International Legal Research Group on ONLINE HATE SPEECH

In cooperation between:

The Council of Europe and The European Law Students' Association

FINAL REPORT

COUNCIL OF EUROPE
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Foreword

Dear ELSA members, partners and supporters,

It has been long time when ELSA, together with Council of Europe, introduced the international Legal Research Group on Online Hate Speech and hereby we are proudly presenting our results. A Legal Research Group (LRG) is a group of law students and/or young lawyers carrying out a research on a specified topic of law with the aim to make their conclusions publicly accessible. The following report represents the research made by students from all over the Europe covering the topic of the implementation of the Protocol to the Budapest Convention on Xenophobia and Racism and exploring the concepts regarding online hate speech in different countries.

Being the world's largest independent law students' association, ELSA is aiming to contribute to law development and legal education of the law students and young lawyers and cooperation with Council of Europe on projects of this kind help us to broaden opportunities we are offering.

With this report we want to raise the awareness on the field of online hate speech which gains an always greater presence in our society where media dominated society especially from legal point of view.

ELSA is grateful to the Council of Europe for giving the opportunity to our members to work together to contribute to legal education, to foster mutual understanding and to promote social responsibility.

The International Coordination Committee (ICT)

Cassandra Matilde Fernandes, Marko Dolenec, Tino Boche & Vasco Silva

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Academic Framework

International Legal Research Group on Online Hate Speech

Academic Framework

1. In your national legislation, how is hate speech defined? (e.g.: Is hate speech defined as an act?) (see Delruelle, "incitement to hatred : when to say is to do ", seminar in Brussels, 25 November 2011).

2. What are the key contextual elements to identify a "hate speech"? Does the multiplying and wider effect of online dissemination always mean higher potential impact of online hate speech; why?

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

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

5. The current debate over "online anonymity"and the criminalisation of online hate speech as stated in the "Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems" is under progress; Should networking sites be legally forced to reveal identities of persons at the origin of such online hate speech and is this feasible ? What is the current status in your country ? (see http://frenchweb.fr/debat-propos-racistes-faut-il-contraindre-twitter-a-moderer/96053)

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

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

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

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

10. What about the notions of "intimidation" and "provocation", comparing to the "incitement to hatred"? How are 'incitement to hatred', intimidation and 'provocation' described in your national legislation? How, if at all, do they differ?

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

    Also recommended by Council of Europe as complementary reading:
    http://www.ejtn.net/Documents/About%20EJTN/Independent%20Seminars/TULKENS_Francoise_Presentation_When_to_Say_is_To_Do_Freedom_of_Expression_and_Hate_Speech_in_the_Case_Law_of_the_ECtHR_October_2012.pdf

National Reports

ELSA Austria

National Researchers

Aziza Avizova

Wolfgang Eckbauer

Oliver Neuhauser

Marlene Kager

Christoph Slamanig

Viktoria Müllner

Katja Schager

Magdalena Pauer

Bettina Keimel

Academic Adviser

Prof. Dr. Christina Binder

National Coordinator

Alexandra Avram

1 National definition of Hate Speech

In your national legislation, how is hate speech defined? (e.g.: Is hate speech defined as an act?) (see Delruelle, "incitement to hatred: when to say is to do", seminar in Brussels, 25 November 2011).

"Language is the dress of thought" - Samuel Johnson

Considering this famous statement by Samuel Johnson, it seems that people nowadays have a bad taste in fashion. Thorough research on the topic of hate speech reveals the crude fact that many people have little inhibitions to offend or harm other people with their words. And the inhibition threshold is even more lessened in online media..

Hate speech refers to the incitement and encouragement of hatred, discrimination or hostility towards an individual that is motivated by prejudice against that person because of a particular characteristic, for example, their sexual orientation or gender identity. The most important legal acts which define hate speech in Austria are: the Austrian Criminal Code, the Austrian Prohibition Statute (Verbotsgesetz) and the introductory statute to the procedural administrative laws (Einführungsgesetz zu den Verwaltungsverfahrensgesetzen).

In Austria, the legislation process of hate speech began at the time of the Holocaust denial. The Laws which proscribed Holocaust denial, constituted, however, also a limitation of the freedom of expression. These statutes make it illegal "to deny that Holocaust took place, to downplay its extent, or to excuse the fact that it happened."[1] In Austria these provision are an integral part of the "Verbotsgesetz"[2], which was adopted in 1947 as constitutional law. To underpin the prohibition, the VerbotsG comprises several penal provisions classifying any act of (re-)engagement in National Socialist activities (Wiederbetätigung) as a punishable offense.

Section 3h of the VerbotsG, which was adopted in 1992, states that

> *"whoever in a printed work, on broadcasting or in any other media, or whoever otherwise publicly in a matter that it makes it accessible to many people, denies, belittles, condones or tries to justify the Nazi genocide or other Nazi crimes against humanity shall be punished with imprisonment for one year up to ten years, in the case of special perilousness of the offender or the engagement up to twenty years".*[3]

In this context, another statutory provision applies, namely the so called "Einführungsgesetz zu den Verwaltungsverfahrensgesetzen (EGVG)[4]", which is the introductory statute to the procedural administrative laws. Article 3 Section 1 states:

> *"Whoever discriminates against another one on the basis of race, colour, national or ethnic origin, religious belief or disability or prevents him from entering places or to use services that are intended for general public use or spreads National Socialist ideas in the sense of the Verbotsgesetz No. 13/1945/´, as amended by the Federal Constitutional Law Gazette No. 25/1947, commits, in the cases of (3) or (4), if the act is not threatened under other administrative penalties with severe punishment, an*

[1] Erik Bleich, "The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies" [2011] PL 4.
[2] Verbotsgesetz", which can be translated as „prohibition- law", will in the following be termed according to its official abbreviation „VerbotsG.
[3] Verbotsgesetz 1947, s 3h.

> *administrative offense, and shall be punished [...] in the case of (3) with a fine up to 1090 Euros and in the case of (4) with a fine up to 2180 Euros [...]."*[5]

The statutory criminal offense of "Verhetzung", which corresponds to incitement, also contains mechanisms against hate speech. The offense of incitement has been redefined by an amendment in fall 2011. The new regulation took effect on the 1st of January 2012. Accordingly section 283 para 1 of the Austrian Criminal Code says that

> *"whoever incites or urges publicly to violence in a manner that is likely to endanger the public order, or in a way perceivable by the general public, against a church or a religious society, or against a group of people defined according to the criteria of race, colour, language, religion or belief, nationality, descent or national or ethnic origin, sex, disability, age or sexual orientation or against the member of such a group explicitly because of its affiliation, shall be punished with an imprisonment up to two years."*

Liable to prosecution is according to para 2, furthermore,

> *"who perceptibly for the general public incites against a group referred to in section 1 or who in a way which infringes on human dignity insults this very group or tries by these means to bring this group in contempt."*[6]

Section 283 para 2 of the Austrian Criminal Code tackles thus the incitement, the urging to violence against and the insult of an overall population group, a national church or religious communities defined pursuant to para 1. This action must be undertaken in a way to harm human dignity. Human dignity is harmed, if the right to humane treatment is refused and if a group is being depicted due to one characteristic mentioned in para 1 as an inferior part of society[7]. Section 283 para 2 is in general more important in tackling online hate speech in Austria. Para 1 also protects individual members of a group defined in accordance with para 1 against the urging to violance.

In order to further understand the specificities of the Austrian definitions of hate, a further look at the elements of rim of these norms. The **aim** of the offender in para 1must be that the addressees decide to adopt a certain behaviour or commit a certain act. It is therefore not enough if the offender has the purpose to generate hostile feelings, he or she must have the purpose to urge the addressees to adopt a certain hostile act. An incitement elicits through emotional means certain feeling in the addressee. Secondly, such a demand or incitement has to be undertake either "in manner that is likely to **endanger the public order**" or be **perceived by the general public**. The **suitability** of endangering public order is given, if the act could threaten the constitutional order of the state. The concept of "general public" is not yet clear to date: it is, however, accepted that more than a handful of people, at least ten, are required to fulfil the definition.[8] Thus, the element of public perceptibility is fulfilled if a hate speech message is being transmitted via a posting in an online forum, a social network or a mass mail.

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[5] Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 2008, s 3 (1) (3), (4)
[6] Strafgesetzbuch, s 283 (1),(2)
[7] *Fabrizy*, StGB[11] [2013], para 283, Rz 1 ff.
[8] ZARA-Zivilcourage und Anti-Rassismus-Arbeit, "Beleidigung, Verhetzung, Verbotsgesetz" <http://www.zara.or.at/index.php/beratung/rechtliches/beleidigung-verhetzung-verbotsgesetz> accessed 12 October 2013

The act of incitement is competitive to the VerbotsG, which renders more tightly defined act, namely national-socialist activities, illegal and is therefore only subsidiary applicable.

National case law demonstrates the application of Section 283 in terms of fighting online hate speech spread on networking sites like Facebook. Not violating the human dignity is the following Facebook entry: "Why aren't there any sperm donors in Turkey? Because all of those jerks are here with us"[9]. This Facebook entry was not qualified as a violation of human dignity. Markus Z*** was, however, convicted after glamorizing the National Socialism on Facebook. He posted sentences like the following: "Best greets from Austria 88" or "Democrates – Ugh! The evil of time 88"[10].

Section 115 of the Austrian Criminal Code contains a further definition of hate speech:

> *"Whoever insults, mocks, abuses (or threatens with physical abuse) publicly or in front of several people, has to be punished with imprisonment up to three months or a fine of up to 180 day´s rate."*[11]

Section 117 (3) also contains a qualified form of libel. If the libel is done because of the affiliation of the victim to "[such] church or religious community, a race, a tribe or a specific group" and is "either abusive or threatening or hurts human dignity" it is called racial libel.

It can thus be concluded that Austria has a full range of hate speech regulations, however, that hate speech is not defined as a single act. It can nevertheless be pointed out, that on the one hand all provisions require a certain degree of publicity or objectively perceptible by the general public. On the other hand, the act of hate speech can be committed against a full range of addressees, beginning with any individual pursuant to Section 111 of the Austrian Criminal Code, to the more narrowly defined group of people of Section 283 of the Austrian Criminal Code. Additionally in Austria, the VerbotsG provides a further very narrow definition of hate speech in the context of national-socialist activities.

2 Contextual elements of Hate Speech

What are the key contextual elements to identify "hate speech"? Does the multiplying and wider effect of online dissemination always mean higher potential impact of online hate speech; why?

In order to properly combat hate speech, racism and discrimination in their online expression with legal means, it is necessary to define the contextual elements of such acts.

Defining the addressee of hate speech

Art 2 Para 1 of the "Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems", establishes a wide definition of online racist and xenophobic acts. This definition has been further detailed within the framework of the "No Hate Speech Movement". Though the definition is already quite extensive, there are some aspects, which would necessitate further clarification.

[9] Bundeskanzleramt - Rechtsinformationssystem RIS, 11Bs110/13, OLG Innsbruck, 30.04.2013.
[10] Bundeskanzleramt - Rechtsinformationssystem RIS, 12Os78/12f, OGH, 10.10.2012.

The Convention's definition has not set any limits in terms of the methods of how online hate speech can be expressed. Consequently, the definition covers the dissemination of racist or xenophobic acts through any written or visual material or any other representations of ideas or theories. What is furthermore important, is that the act incites hatred, discrimination or violence and has to be targeted either at a certain individual who belongs to a certain group, or to the group in its entirety. Lastly, the act of hate speech is completed by a proper definition of discrimination. Thus, according to the Council of Europe's the action has to aim at a discrimination against the ethnic or national origin or against the skin colour or the religion of a certain individual.

The Black´s Law Dictionary[12], on the contrary, defines hate speech as an action, which carries no meaning other than hate. Thus, in this definition the focus is mainly set on the element of hatred. The possible receptor in this case is a group, and not an individual. However, the subject matter is also in this case the discrimination against a certain race or a minority. Furthermore, and comparable to Article 283 Austrian Criminal Code, the focus is set on the **outcome** or **consequence** of the hate action, namely the action of hate speech being aimed at provoking violence. A further approach is taken by "Facebook", which bans in its privacy options any acts of hate speech towards people (plural!) on the grounds of race, ethnical origin, nationality, sex, sexual orientation, disability or disorder, whilst at the same time acknowledging the freedom of opinion.

According to Hannes Tretter[13], there is no official definition which acts the term „hate speech" shall include, but he also makes reference to the suggested definition of the Council of Europe. Thus the term should take account of any forms of expression, which attempt to boost, justify racism, anti-Semitism or intolerance in general. However, Tretter also differentiates between the terms hate speech and hate. He underlines that the difference between these terms lies in the fact that the addressee of hate speech are groups, rather than individuals. Furthermore, he also adds the consequences hate speech has on the society as an important element: according to him acts of hate speech are those which lead to a threat of the basic principles of our democratic society, and are not solely defined by the harm caused to an individual.

Tretter says that further there has to be a differentiation between "hate speech" as it is meant in the present context and "hate" in terms of insult, allegation and prejudice against a certain individual. Furthermore Tretter states, that the abatement of such hate speech expresses respect of the dignity of man, the prohibition of discrimination and the non-discrimination precept in democratic societies, that are characterized by the principles of freedom and equality, pluralism, tolerance, justice and solidarity.[14] Section 283 of the Austrian Criminal Code accommodates this need of Austria as a democratic state and serves as an important legal instrument to protect the legal interests affected by hate speech.

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[12] Garner, Bryan A, and Henry C. Black. Black's Law Dictionary. St. Paul, Minn: West Group, 1999. Print

[13] Hannes Tretter „Der europäiche Rechtsrahmen zur Bekämpfung von Hassrede", in FS Berka (2013), 237

[14] Tretter Hannes, Der europäische Rechtsrahmen zur Bekämpfung von Hassrede, in Festschrift für Walter Berka

In the article of Bhiku Parekh[15], hate speech is subdivided in three essential parts. Firstly, it has to be targeted against a specific group and it should be aimed at inspiring hate based action. However, it is also accepted, that hate speech must not necessary lead to violence, what defines hate speech in the end is the content and the language it expresses. Secondly, hate speech stigmatizes the group and defines characteristics, as being highly undesirable. Thirdly, the target group is placed outside the social community. Hate speech is thus not abstract and the target and reason are obvious for the wider public. Summed up, hate speech, according to Parekh, not abstract and both the target and reason are obvious for the public.

Thus one contextual element which requires from a legal stance further clarification is whether the addressee of hate speech can solely be a group of people, defined on the basis of such characteristics as race, religion or ethnicity, or rather or also an individual member of such a group.

Online Dissemination of Hate Speech

James Banks[16] addressed the problem about hate speech taking place online in his article „Regulating Hate Speech". According to him, the internet provides people with the ability to cross borders and break down real world barriers. Its main advantages constitute also its central dangers: the anonymity, immediacy and global nature of the internet, are the reasons which render it an ideal tool for people to promote hate. As already stated before, there has been an incremental increase in the number of online hate groups the last years. The estimated number of websites inciting hate in the year 2010, was around 8000[17], which probably even increased in the last 3 years. Banks argues that hate speech in the internet is aggravated by several factors: billions of people can be reached, though inexpensive methods, which have the potential of engendering collective identity.

Furthermore, the internet is still a fairly unregulated and almost limitless accessible medium of quick communication. The internet also reduces any inhibitions in criticizing others, as people do not have to disclose their identities. Such dangers emanating from the anonymity of the internet, led for example to the repeatedly demand of a ban of anonymous postings, expressed for instance by Austrian journalists.[18]

In conclusion, due to the delineated nature of the internet, the online dissemination of hate speech has a higher potential impact, than if expressed by means of other media. This is especially true when considering the contextual elements of hate speech in terms of aim of the incriminated act and the impact it has upon democratic principles of modern societies.

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[15] Bhiku Parekh „Hate speech- Is there a case of banning?"

[16] James Banks „ Regulating hate speech online, 3 Nov. 1, International Review of Law, Computers, Technology

[17] According to Simon Wiesenthal Center, qtd in James Banks Banks „ Regulating hate speech online, 3 Nov. 1, International Review of Law, Computers, Technology

[18] "Anonyme Postings abschaffen? Was würde Metternich dazu sagen? Replik auf Julya Rabinowich", DerStandard.at, http://derstandard.at/1373513261015/Feed-the-Troll, accessed on the 10.10.2013

3 Alternative methods of tackling Hate Speech

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

National Legislation

In Austria, Hate Speech is termed "*Verhetzung*" and is regulated in para 283 of the Austrian Criminal Code. This is besides Section 3g or 3h of the already mentioned VerbotsG, the only penal statute that provides legal protection against hate speech in the broadest sense.

According to Tretter, there has to be a differentiation between "hate speech" as it is meant in the context of this legal research and "hate" in terms of insult, allegation and prejudice against a certain individual. Furthermore Tretter states, that the abatement of such hate speech expresses respect of the dignity of man, the prohibition of discrimination and the non-discrimination precept in democratic societies, that are characterized by the principles of freedom and equality, pluralism, tolerance, justice and solidarity.[19] Section para283 accommodates this need of Austria as a democratic state and serves as an important legal instrument to protect the legal interests affected by hate speech.

Austrian Initiatives

Online hate speech in schools is nowadays often combined with mobbing on community channels, such as WhatsApp or Facebook. There are several initiatives, which try to tackle online hate speech in Austria, especially in the school context.

Firstly, since 2007, the Department of Education in Austria tried to deal with these issue though the establishment of the initiative and platform „Weiße Feder" (White Feather) which gathers together many social actors in the common fight against youth violence[20]. Moreover, the amount of school psychologists was increased. General optional subjects were introduced in order to teach the students how to solve conflicts and/or how to prevent them.[21]

A second example to tackle hate speech is internet platform www.saferinternet.at. On this platform one can read articles about security, privacy issues in the internet, get advice from professional and trained expert staff or join events and activities. Also parents are provided with information on cyber mobbing or hate speech.

Last but not least the internet site www.collaboratory.de also deals with the topic of hate speech. This website is an open platform for experts and intervention. Its aim is to monitor the interrelation between the internet and the society. The approach is to analyze controversial topics from the various perspectives of relevant stakeholders by trying to find practical solutions for the society and the internet community. This aim is achieved through the publication or report and recommendations written by working groups, which are subject to a continuous exchange of

[19] Tretter Hannes, Der europäische Rechtsrahmen zur Bekämpfung von Hassrede, in Festschrift für Walter Berka

[20] http://www.gemeinsam-gegen-gewalt.at/

[21] *Weekend Magazin Tirol*, Nr 19, Oktober 2013, Page 25.

ideas. Furthermore, projects and events such as workshops and Wiki-knowledge base offer the possibility of prolonged exchange on seemingly intractable issues. [22]

4 Distinction between blasphemy and Hate Speech based on religion

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

Law prohibiting blasphemy limits the freedom of speech and expression in the context of irreverence towards holy personages, religious artefacts, customs or beliefs. In place of - or sometimes in addition to - such prohibitions against blasphemy, some countries have laws which give redress to those who feel insulted on account of their religion.

Statistically speaking nearly half of the countries in the world (47 %) have laws or policies which suppress blasphemy or defamation. More concretely, according to the Pew Research Center´s Forum on Religion & Public Life, 104 countries have implemented such laws, while 94 of them have at least one blasphemy regulation. There was a trend, especially in Europe (36 of 45 countries, 80 %), of setting up laws against defamation of religion rather than against blasphemy itself[23].

Before discussing regulations concerning blasphemy in Austria, it is interesting to briefly draw the attention towards the example of a country where national laws, by contrast to Austrian law, do not allow criminalization of the defamation of religious beliefs: in the United States laws against religious defamation are deemed unconstitutional. The First Amendment to the United States Constitution states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press [...]".[24] Correspondingly, the US Supreme Court ruled in the case Joseph Burstyn, Inc v. Wilson, in which the appellant, Joseph Burstyn, a film author, tried to rescind a license to exhibit the short film "The Miracle",

> *"that it is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications or motion pictures."*[25]

In Austria there are two main regulations, which relate to blasphemy, namely Section 188 and 189 of the Austrian Criminal Code. Section 188 provides that

> *"anyone who publicly disparages a person or thing that is the object of worship of a domestic church or religious society, or a doctrine, [or other] behavior is likely to attract legitimate offense shall be punished".*[26]

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[22] http://en.collaboratory.de/w/About_us.

[23] http://www.pewforum.org/2012/11/21/laws-penalizing-blasphemy-apostasy-and-defamation-of-religion-are-widespread/, accessed 12 October 2013

[24] First Amendment < http://www.law.cornell.edu/constitution/first_amendment>, accessed 18 October 2013

[25] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=343&page=495>, accessed 17 October 2013.

Section 189 para 1 states that

> *"whoever prevents or disturbs by force or threat of violence the legally permitted holy service or individual acts of worship of a domestic church or religious community, shall be punished with imprisonment of up to two years."*

Furthermore, according to para 1 also whoever commits in a Church or religious place mischief that is likely to attract legitimate offense shall be punished.[27] Section 189 is thus more related to the concept of hate speech rather than blasphemy as such, as it intends to prevent threat of violence, which the Austrian legislation equates with hate speech.

Burkhard Josef Berkmann, dealt with this the dichotomy between blasphemy and hate speech in his article "From Blasphemy to Hate Speech?: The Return of Religious Offences in Religiously plural world"[28], where he elaborates on the Austria legal context. According to him section 188 does not constitute a protection of God or of a religious denomination, as the defence of the religious belief would be too undetermined. The regulation defines rather the "public order" as the subject of protection and explicitly associates is with "religious peace", which is to be understood in this context as a peaceful coexistence of the churches and religious communities, their adherents and any person who does not belong to such institution. More precisely the people, items, doctrinal theologies, rites and traditions are protected by law against vilification and mockery. Through the command of equality, all churches and religious communities are protected in the same way and by the same means. Moreover, the concept of "interreligion" is persistent, as the offender does not necessarily have to belong to the affected or any other church or religious community. Thus the aim of the provision is the general respect of the public towards the above mentioned subjects, regardless of ideologically different affiliations.[29]

Berkman also touches upon Section 283 of the Austrian Criminal Code, which deals with incitement in general. As already mentioned before, according to section 283 of the Austrian Criminal Code "whoever incites or urges publicly to violence in a manner that is likely **to endanger the public order**, or in a way perceivable by the general public, **against a church or a religious society** (...) shall be punished with an imprisonment of up to two years."[30] Thus section 283 of the Austrian Criminal Code defines the contextual elements of acts of hate speech committed against a religion or a religious community along similar lines as section 189, consequently drawing strong parallels between the Austrian hate speech regulations and the applicable provisions against the defamation of religious beliefs.

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[26] Strafgesetzbuch, s 188 (1)
[27] Strafgesetzbuch, s 189 (1), (2)
[28] Translation by the author
[29] Burkhard Josef Berkmann, "Von der Blasphemie zur "hate speech"?: Die Wiederkehr der Religionsdelikte in einer religiös pluralen Welt".
[30] Strafgesetzbuch, s 283 (1),(2)

5 Networking sites and the issue of online anonymity

Approach in legal terms

The current debate about "online anonymity" and the criminalisation of online hate speech as stated in the "Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems" is under progress; Should networking sites be legally forced to reveal identities of persons at the origin of such online hate speech and is this feasible? What is the current status in your country? (see http://frenchweb.fr/debat-propos-racistes-faut-il-contraindre-twitter-a-moderer/96053)

On June 8, 2012 all national newspapers in UK were writing about the victory of Nicola Brookes who was cyber bullied on the social network Facebook. A 45 years old woman from Brighton became a target of "Internet trolls" after having had supporting Facebook posting for the young X Factor contestant Frankie Cocozza. Offenders were not limiting themselves to humiliating commentaries. They created a fake account in Miss Brooke's name with her home address, and sent messages to young children. Thus, Nicola was falsely branded as a drug dealer, a prostitute and a paedophile. After inaction of the Sussex Police officers, the woman from Brighton hired a lawyer and brought the case to the High Court in London. U.K. High Court ruled in Ms. Brookes favour and requested of Facebook to hand over the names, emails and the computers' internet protocol (IP) addresses of the offenders.[31] In April 2012, a family from Georgia, USA filed a libel suit against two students for cyber bullying their daughter on Facebook. Facebook was again order to hand over the names of the offender.[32]

According to Art 10 of the European Convention on Human Rights "[e]veryone has the right to freedom of expression [...] without interference by public authority and regardless of frontiers". This right, however, is limitable in accordance with para 2 of Art 10 ECHR. Over the past two decades national legislation has been implemented and limiting more and more the freedom to express provocatively racist, ethnically or religiously biased thoughts in modern multi-racial, multi-ethnic and multi-faith democracies.[33] These restrictions on discrimination are justified by values which have already been previously outlined, such as community cohesion, public order, human dignity and psychological harm. [34]

However, the implementation of provisions which criminalise hate speech leads to questions of applicability and procedural feasibility in terms of the prosecution of the offenders. Within the

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[31] 'Bringhton woman Nicola Brookes tackles 'trolls' after Facebook abuse' (15 May 2012) BBC News Sussex http://www.bbc.co.uk/news/uk-england-sussex-18078593 accessed 15 September 2013; Josh Halliday 'Facebook forced into revealing identities of cyberbullies' (8 June 2012) the guardian http://www.theguardian.com/technology/2012/jun/08/facebook-revealing-identities-cyberbullies accessed 29 September 2013; http://www.dailymail.co.uk/news/article-2156365/Nicola-Brookes-victim-internet-trolls-wins-High-Court-backing-reveal-identities-targeted-her.html accessed 29 September 2013.

[32] Sara Gates 'U.K. High Court Rules In Nicola Brookes' Favor: Facebook Must Turn Over Cyberbullies' Identities' (6 August 2013) HuffPost Tech http://www.huffingtonpost.com/2012/06/08/nicola-brookes-facebook-cyberbullying_n_1580442.html accessed 30 September 2013

[33] Ibid.

[34] Kymlicka (2007), Skrentny (2002) in Erik Bleich 'The Rise of Hate Speeck and Hate Crime Laws in Liberal Democracies' (July 2011) Journal of Ethnic and Migration Studies pp 917-934 (918).

scope of this research on online hate speech the obvious question arises, whether one could force all internet service providers to disclose the information about cyber offenders.

Technical Feasibility

In order to answer this question it is primarily necessary to visualize the several possibilities, a user has, in terms of registration concerning typical networking sites, from a more technical point of view.

If the user acts completely thoughtless, he could register entering his real-life name and personal data, having everything adjusted to a publicly visible status in his settings; one could easily identify such kinds of hate-speech-perpetrators without any help of the networking site operator. In this case legal support forcing disclosure of the perpetrators identity would bring no additional benefit and would therefore not be feasible.

The complete opposite case is when the user attempts to hide him/herself as well as possible from possible persecution, by entering an alias name for his account, revealing no personal data, and additionally adjusting his settings in order to achieve the best possible privacy for himself. This kind of perpetrator would be very hard to catch, as neither a persecuting executive authority nor the networking site operator could identify the subject. If no helpful related data can be revealed, one option would be that the underlying Internet Service Provider is forced to disclose data which enables to trace back the identity of the subject. However, also this option can be avoided by the use of special anonymity services. The most common way of registration is be a hybrid form of the above stated possibilities, where only part of the personal data has been given provided. In this case a legally fixed disclosing rule of hidden personal data of the perpetrator would enable the ascertainment of his or her identity.

However, besides these technical challenges, the lack of feasibility is spawned by the conceptual nature of networking sites and the underlying internet technology. The server-locations on which the networking sites are hosted are spread all over the world and therefore different laws are applicable. A national legal regulation is geographically limited to the territory of the legislating country. Furthermore, there exists also the problem of verifying the identity of a user on the part of the networking site. At the moment there is no technology implemented by networking sites which could prevent that personal data is stolen and used for registration. To conclude, the feasibility of a law forcing networking sites to disclose the identity of a person at the origin of hate speech does at the moment still face feasibility problems from a technical point of view. But it is cognisable, that in the near future, a technology allowing networking sites the verification of a user's identity, will be developed due to the fact that networking sites themselves are interested in verifying identities for marketing purposes.

Approach in legal terms

After the implementation of Directive 2006/24/EC, it is possible in Austria pursuant to Section 76 of the Code of Criminal Procedure, to hand over the information about the originator and provide access to data to law enforcement authorities. Operators of public communications services are required to transfer to the courts, the prosecutors and the information about the master data. This includes the name, academic degree, address, subscriber number and other

contact information on the nature and content of the contract, provided that this is feasible in technical terms.

Such requests may be made by the police, the prosecution, without the need for judicial approval or consent, or by the court. The requesting authority has to state the concrete suspicion on the committal of a criminal offense by a particular person. There is no restriction on the criminality threshold of the committed offense. The authority must, however, act by more than a suspicion. Basing a request on the need to acquire information in order to prove that a person could be suspected of an offense is therefore insufficient. The accused and the victims (as they relate to the data) have the right to inspect the results of the information. At their request (and also *ex officio*), the data obtained are to be deleted if they cannot be of importance for the procedure or if the evidence shall not be used. A special statutory prohibition on the use of evidence is not provided.

6 Tackling the notions of "violence", "hatred" and "clear presence of danger"

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

In order to answer this question one has firstly to sketch a definition for all of these terms. According to the Oxford English Dictionary "hate" is "an emotion of extreme dislike or aversion; detestation, abhorrence, hatred. "Hate speech" has been determined "[…] a convenient shorthand way of referring to a broad spectrum of extremely negative discourse stretching from hatred and incitement to hatred; to abusive expression and vilification; and arguably also to extreme forms of prejudice and bias".[35]

In chapter I of the add. Protocol both terms are mentioned, "violence" and "hatred":

> *"racist and xenophobic material' means any written material […], which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors",*

This is also the case in Art 3 para 2: "[…] as defined in Article 2, paragraph 1, advocates, promotes or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available". In the case Gunduz v. TURKEY HS both terms "violence" and "hatred" should be alternative given the contextual approach to "hate speech".

Comparative Approach - U.S, Austria and Europe

The national Austrian legislation, Section 283 of the Austrian Penal Code, uses the notions "violence" and "hatred" in an alternative way. Clause 1 of Section 283 treats the request for

[35] James B. Jacobs and Kimberly Potter 'Hate Crimes: Criminal Law and Identity Politics' in Dr. Tarlach McGonagle 'The Council of Europe against online hate speech: Conundrums and challenges'

hatred in terms of direct and physical "violence" against a whole population group, whereas clause 2 treats "only" agitation against a population group in terms of non-physical "hatred".

Due to its extensive jurisdiction in this matter, the U.S. can again serve as an example to draw a comparison to national Austrian law. In the U.S. hate speech is combated by laws that discourage bad behaviour but do not punish bad beliefs. In the U.S., laws are created that do not try to define hate speech in terms of "hatred" or hate crimes in terms of "violence". This approach of treating hate speech can be seen well in two recent cases of the U.S. Supreme Court. The court ruled that acts of violence and hatred, however, not hate speech, may be legally regulated.[36]

The first case[37] is about a 14-year-old who burned a cross of an Afro-American family. This act, which is obviously an expression of hatred, was in the end dealt with by the Supreme Court. The boy was prosecuted under a Minnesota criminal law which forbids, inter alia, the placing of a burning cross on public or private property. The U.S. Supreme Court ruled that the Minnesota criminal law rulings violated the boy's rights concerning free speech. The court did thus not rule on the act itself and the boy was not punished for damaging the cross but instead elaborated on the motivation for the offence and punished the boy for the message of "hatred" and not for his violent act.

The second case[38] is about a boy named Mitchell and several other afro-American youths who viewed a movie where afro-Americans were beaten. After having watched the show Mitchell yelled at a white boy walking by, "There goes a white boy; go get him!" and together with his comrades inflicted violence on the boy. In common the scope of punishment does not depend upon who the victim is. Mitchell's penalty was, however, increased on the grounds of his additional verbal incitement. In this case the Supreme Court ruled that the increased penalty did not violate the rights related to free speech of Mitchell but that it was justified the act itself, as the "violence", was directed at this particular white boy and not because of the thoughts, thus the "hatred", of the accused.

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Finally, the concept of "clear and present danger" posited by Justice Oliver Wendell Holmes, Jr. in Schenck v. United States, states that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." The clear-and-present-danger doctrine is a freedom of speech doctrine, which is applied by federal and state courts in order to decide upon free speech issues. In the pertinent case Schenk was convicted for violating the Espionage Act, which criminalized acts obstructing the recruitment of

[36] Division for public education, Student central, Students in Action, Debating the "Mighty Constitutional Opposites", Debating Hate Speech, http://www.americanbar.org/groups/public_education/initiatives_awards/students_in_action/debate_hate.html>, accessed 29.09.2013.
[37] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)
[38] Wisconsin v. Mitchell, 508 U.S. 476 (1993)

soldiers or attempts to make soldiers disloyal or disobedient. Schenck had mailed numbers of pamphlets which stated that the government had no rights to do so. Justice Holmes emphasized that in ordinary time Schenck would have had the right to do so and his acts would have been protected by constitutional law, however, not at the time, when a nation is at war and the speech has a tendency to incite others to an unlawful purpose.

Compared to the American jurisprudence, the European Court's test of "clear and present danger" gives far less guidance to the Contracting States and their citizens. In fact in the context of Art 10 ECHR, the Court has never adopted a similar test. In Zana v. Turkey, a case resembling the Scheck case, the Court ruled that the sensitive circumstances of the expression of Mr Zana's speech crime supporting the massacres committed by the PKK [Workers Party for Kurdistan], as well as his own authoritative position in society, justified the interference of the authorities with his freedom of expression. The Court seemed in this case to apply an analysis of the contextual setting, which recalls Holmes' doctrine. The ruling of *Zana* was further confirmed by recent judgements of the Court. In sum according to Sottiaux "the final conclusion in this matter depends on the assessment of the contextual setting" and whilst "incitement to violence does not automatically justify an interference with freedom of expression", due to this approach "[t]he national authorities merely enjoy a wider margin of appreciation in cases involving such incitement".[39] As he further points out, "an alternative to this approach could consist of a European test with clear and unambiguous criteria regarding both content and context. Under such a system a certain margin of appreciation could be left to the national authorities to assess whether in a given case these criteria are met." Although the local authorities may be better able to assess the threat posed by an expression in the contextual circumstances, the current European legislature provides the authorities with a too wide margin of appreciation as far as the factual assessment on the threat imposed by an act of incitement is concerned.

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

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

Art 10 para 2:

> *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*[40]

[39] Sottiaux, Stefan " The Clear and Present Danger Test in the Case Law of the European Court of Human Rights" a6RV 63 (2003), 653-679. http://www.zaoerv.de.
[40] European Convention on Human Rights Art 10 para 2

In the case Voskuil v. the Netherlands[41], the applicant, a journalist, filed the case against the Kingdom of the Netherlands which allegedly ordered his detention to force him to disclose the identity of an informant. Thus, the Netherlands Government violated the applicant's freedom of expression (Art 10 European Convention on Human Rights). The Government justified its actions by referring to para 2 of Article 10.[42] The Court stated that regarding "the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest[43]. "Moreover, by using forced measures, the government must have been regarding "requirements of proportionality and subsidiarity"[44], i.e. the Government may only intervene if it is the only way to act effectively. In the case at hand, the Amsterdam Court of Appeal disregarded the requirement of subsidiarity: The Court of Appeal called only three out of the fourteen witnesses (including the applicant) and only after Mr Voskuil had been detained, the Court of Appeal heard other journalists. In conclusion the European Court for Human Rights ruled that the disclosure of the informant did not overweight the interest of the journalist and the freedom of expression.

The court ruled likewise in the case of Times Newspapers Ltd v. The United Kingdom, on the applicant's allegations regarding "the Internet publication rule" being "an unjustifiable and disproportionate restriction on its right to freedom of expression".[45] The Times Newspaper Ltd was publishing defamatory articles about G.L. in the newspaper and online, for which, as the High Court U.K. found, the applicant had no reasonable grounds, and ordered to remove the articles from the website. In this regard, the European Court for Human Rights considered that this action constituted an interference with the applicant's right to freedom of expression within Art 10 para 2 – this action was "prescribed by law "[46] and "necessary in a democratic society".[47] The freedom of expression is "the most universally recognized human right"[48] and one of the crucial basics of a democratic society. Nevertheless, one "[…] must not overstep the boundaries set, inter alia, in the interest of 'the protection of the reputation or rights of others'".[49] Moreover, the freedom of expression is not sacrosanct[50] if "there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature".[51]

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41 Voskuil v. The Netherlands App no 64752/01 (ECHR, 22 November 2007)
42 European Convention on Human Rights Art 10 para 2
43 Voskuil v. The Netherlands App no 64752/01 (ECHR, 22 November 2007) ???
44 Ibid.
45 Times Newspapers Ltd (Nos 1. And 2.) v. The United Kingdom App no 3002/03 and 23676/03 (ECHR, 10 March 2009)
46 European Convention on Human Rights Art 10 para 2
47 Ibid.
48 Mark Janis, Richard Kay, Anthony Bradley 'European Human Rights Law' (first published 1995, Clarendon Press, Oxford) 157.
49 Voskuil v. The Netherlands App no 64752/01 (ECHR, 22 November 2007)
50 Erik Bleich 'The Rise of Hate Speeck and Hate Crime Laws in Liberal Democracies' (July 2011) Journal of Ethnic and Migration Studies pp 917-934 (917).
51 Times Newspapers Ltd (Nos 1. And 2.) v. The United Kingdom App no 3002/03 and 23676/03 (ECHR, 10 March 2009).

A further example for the courts' ruling on the relation of Art 10 and Art 17 provides the case of Lingens v. Austria[52], where the applicant Lingens, an Austrian journalist, was fined for publishing comments about the Austrian Chancellor in a Viennese magazine, alleging him "basest opportunism", "immorality" and an "undignified" behaviour. According to the Austrian Criminal Code the only acceptable defence is a proof of the verity of these statements. Lingens could not prove the truth of these value judgements. Mr. Lingens claimed that the impugned court decisions infringed his freedom of expression to a degree incompatible with the fundamental principles of a democratic society.

In this connection, the Court had to recall that freedom of expression, as ensured in par 1 of Article 10, "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment". Subject to para 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness "without which a "democratic society" could not exist.[53] The European Court of Human Rights stated that a careful distinction needed to be made between facts and value judgments/opinions. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The facts on which Lingens founded his value judgments were not disputed; nor was his good faith. Since it was impossible to prove the truth of value judgments, the requirement of the relevant provisions of the Austrian criminal code was not fulfilled and infringed article 10 of the Convention. [54]

Art 17: Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.[55] Article 17 ECHR is the so-called "abuse clause". This application leads to a categorical exclusion from protection of the right to freedom of expression (Article 10), an approach that contrasts sharply with the Court´s general attitude toward accepting and even creating a broad scope of protection under this right. It also contrasts with the court's usual examination of interferences with the freedom of expression in the light of the case as a whole, all its factual and legally relevant elements being taken into consideration. [56]

In the case of Paskas v. Republic of Lithuania[57], the applicant, a former President of the Republic of Lithuania, granted Lithuanian citizenship "by way of exception" to a Russian businessman, who was honoured with the Medal with the applicant's precursor. The Lithuanian

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[52] Lingens v. Austria, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx{"dmdocnumber":["695400"],"itemid":["001-57523"]}, 8

[53] Handyside judgment, Series A no. 24, p. 23, para. 49

[54] Lingens v. Austria http://hudoc.echr.coe.int/sites/eng/pages/search.aspx{"dmdocnumber":["695400"],"itemid":["001-57523"]}, 34

[55] European Convention on Human Rights Art 17

[56] Cannie/ Voorhoof, The Abuse Clause and Freedom of Expression in the European Human Rights Convention:
An Added Value for Democracy and Human Rights Protection?, 29.

[57] Paksas v. Lithuania App no. 34932/04 (ECHR 6 January 2011)

Parliament requested the Constitutional Court to determine whether the action of the applicant was according to the Constitutional and Citizenship Act. When confronted with the case, the European Court of Human Rights declared in that the "[g]eneral purpose of Article 17 is […] to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated in the Convention […], this Article is applicable only on an exceptional basis and on extreme cases […]." [58] Additionally, the Court stated, that a " 'remark directed against the Convention's underlying values' is removed from the protection of Article 10 by Article 17"[59] and that the "Article prevented the founders of an association whose memorandum of association had anti-Semitic connotations from relying on the right to freedom of association under Article 11 of the Convention to challenge its prohibition, […] seeking to employ that Article as a basis under the Convention for a right to engage in activities contrary to the text and spirit of the Convention".[60] Thus, this is the main distinction of Article 17 from Article 10 para 2.

8 Harmonisation of national legislation

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

"Harmonisation seeks to effect an approximation or co-ordination of different legal provision or systems by eliminating major differences and creating minimum requirements or standards"[61] Given the fact that harmonisation generally foresees cooperation of governments to make laws more uniform and coherent, it is difficult to find measures of common ground all countries are willing to implement into their national legislation to tackle online hate speech. Moreover, as harmonisation requires an executing organ which performs an oversight procedure for harmonisation, it will be difficult to find agreement among willing States. Measures can hence either be adopted voluntarily by States in favour of harmonisation, which are then bound by soft law, or among European Member States in form of EU regulations or directives which allows for a certain control exercised by a European body. By now, on a European level, several steps have been taken advocating the harmonization of jurisdictional rules with respect to prosecuting transnational speech offenses."[62]

However, creation of common standards regarding the freedom of speech and thus hate speech has widely been achieved by the European Convention of Human Rights. Although there is no universally agreed definition of hate speech, Weber argues that definitions of hate speech only differ slightly in most national legislations.[63]

A very prominent approach in regards of measures has been pointed out by Kaltenbach in his speech on combating hate speech. He argued that "in particular, ECRI [European Commission

[58] Ibid. Para 88.
[59] Paksas v. Lithuania App no. 34932/04 (ECHR 6 January 2011) para 88
[60] Ibid.
[61] de Cruz, P., Comparative Law in a Changing World, (London, Cavendish Publishing, 1999)
[62] Decroos, Matthieu J.L., „Criminal Jurisdiction over transnational speech offenses", (2005) 13/3 European Journal of Crime, Criminal Law and Criminal Justice, 365-400
[63] Tretter Hannes, Der europäische Rechtsrahmen zur Bekämpfung von Hassrede, (2013) Festschrift für Walter Berka, 241

against Racism and Intolerance] recommends that authorities promote a more vigorous prosecution and sentencing practice in respect of offences committed through Internet."[64] Delving deeper into the problem and lack of law enforcement concerning hate speech, he stated that "ECRI also encourages member states to undertake sustained efforts for the training of law enforcement authorities in relation to the problem of dissemination of racist, xenophobic and anti-Semitic material via the Internet."[65] In addition to these proposals, States shall also be encouraged by regional or international bodies to support "self-regulatory measures by the Internet industry to combat racism, xenophobia and anti-Semitism on the net, such as anti-racist hotlines, codes of conduct and filtering software."[66] These measures would lead to an adjustment of understanding of the diversity of national legislations on hate speech and cyber crime.

Other measures might include common future legislation on the obligations of Internet providers – an idea that suffered from poor enforcement and lack of political interest in the past years. Moreover, national legislators should be able to discuss legislatory changes with respect to hate speech at national and international level to make sure harmonisation between countries and between countries and international bodies achieves the greatest possible level, e.g. in the way of providing best-practice examples for States which did not meet regional or international standards.

Engle – though focussing on rights of personality in the European Union in his article – predicted that harmonisation of national legislations most likely occurs naturally through general principles of law which enter into national law "via treaties such as the European Convention of Human Rights (ECHR)."[67] This would mean that the stronger this convention is applied and used, the more national rules will automatically be harmonised between countries. For example regarding the Council of Europe Cybercrime Convention it is often recommended by other countries to accede to international conventions to promote harmonisation of national laws[68]. Another suggestion concluded that "harmonization of legislation could be promoted through the development of international model legal provisions at the United Nations level.[69]" Furthermore the study identified some options "to strengthen existing and to propose new national and

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[64] Kaltenbach, Jenö, "Tackling hate speech: Living together online"(2012), http://hub.coe.int/fr/c/document_library/get_file?uuid=21c2558b-756b-4773-aeac-6362c7ff80b3&groupId=10227> accessed 27 August 2013

[65] Kaltenbach, Jenö, "Tackling hate speech: Living together online"(2012), <http://hub.coe.int/fr/c/document_library/get_file?uuid=21c2558b-756b-4773-aeac-6362c7ff80b3&groupId=10227> accessed 27 August 2013

[66] Kaltenbach, Jenö, "Tackling hate speech: Living together online"(2012), <http://hub.coe.int/fr/c/document_library/get_file?uuid=21c2558b-756b-4773-aeac-6362c7ff80b3&groupId=10227> accessed 27 August 2013

[67] Engle, Eric „Harmonisation of Rights of Privacy and Personality in the European Union", (2005) 1,2 London Law Review

[68] United Nations Office on Drugs and Crime, Vienna, *Comprehensive Study on Cybercrime* (Draft, February 2013) <http://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf> accessed 17 August 2013

[69] United Nations Office on Drugs and Crime, Vienna, *Comprehensive Study on Cybercrime* (Draft, February 2013) <http://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf> accessed 17 August 2013

international legal or other responses to Cybercrime (...)"[70] such as "the development of international model provisions on criminalization of core cybercrime acts, with a view to supporting States in eliminating safe havens through the adoption of common offence elements (...)."[71]

One third of the countries that participated in the UNODC's study claimed that their legislation is already "highly, or very highly harmonized with countries viewed as important for the purposes of international cooperation."[72]

Similarly, Kaltenbach in his speech as Chair of the European Commission against Racism and Intolerance, explained that "for some States, the solution is to improve the harmonisation of their national legislation with international agreements, such as the Protocol to the Cybercrime Convention. Others have decided not to treat such cases as criminal offences and look for other measures for controlling hate speech online. Other States are vehemently opposed to any regulation of the Internet. In the name of freedom of expression, they exhort to "fight hate speech with more speech".[73] In these cases States are unwilling to promote harmonisation and will not do so in future to protect their citizen. Any measures to achieve better harmonisation are hence not feasible and will not lead to a better outcome.

Particularly in the Western Hemisphere the use of multilateral instruments clearly produced very similar national legislations. However this phenomenon also points out the low level of harmonisation in other regions. Specifically in these regions, stronger cooperation and guidance by oversight bodies is required. Nevertheless certain divergences among national legislations due to legal and constitutional differences, cultural traditions and legal evolution may never be of feasible nature for harmonisation.

9 Legal implications of "hate speech"

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

As already mentioned before in this report section 283 of Austria's Criminal Code provides a definition of hate speech. Moreover this definition is legally binding.

In the European Union there is no generally recognized definition of hate speech. But the European court of human rights defines in his legal jurisdiction a few basics, which make it

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[70] United Nations Office on Drugs and Crime, Vienna, *Comprehensive Study on Cybercrime* (Draft, February 2013) <http://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf> accessed 17 August 2013

[71] United Nations Office on Drugs and Crime, Vienna, *Comprehensive Study on Cybercrime* (Draft, February 2013) <http://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf> accessed 17 August 2013

[72] United Nations Office on Drugs and Crime, Vienna, *Comprehensive Study on Cybercrime* (Draft, February 2013) <http://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf> accessed 17 August 2013

[73] Kaltenbach, Jenö, "Tackling hate speech: Living together online"(2012), <http://hub.coe.int/fr/c/document_library/get_file?uuid=21c2558b-756b-4773-aeac-6362c7ff80b3&groupId=10227> accessed 27 August 2013

easier to get to know the freedom of assembly and association and freedom of expression and information. Furthermore there is a recommendation of the Committee of Ministers for a definition of hate speech[74]:

"The term "hate speech" shall be understood as covering all forms of expression which sprees, incite, promote or justify racial hatred, xenophobia, anti- Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrant and people of immigrant origin" S. Appendix to Recommendation No.R (97) 20 of the Committee of Ministers on "Hate Speech", Council of Europe.

If one compares US and European Legislation on Hate Speech, the US is more protective of the right to freedom of speech.[75] With this protection the First Amendment affords significant support to those publishing hate from US websites. This is in direct contrast with the handling of hate speech in many other nations.[76] Having a legally binding definition of "hate speech" would definitely be an appropriate measure to avoid regulatory conflict between nation states. Admittedly, the US commitment to free speech seriously undermines such an international collaboration. Although the US justification to "hate speech" has become a minority view, it rules the European efforts to construct a truly international regulatory system out.[77]

Article 4 of the International (ICERD) is the primary international agreement on hate speech. This article says that first of all the parties shall criminalize the propagations of ideas of racial superiority or hatred. After that the parties announce illegal and prohibit organizations and activities that promote and instigate discrimination and shall recognize participation in such organization and/ or activities as an offence punishable by law. Finally public authorities and public institutions are prohibited from promoting on inciting racial discrimination.[78]

The Council of Europe´s Convention on Cybercrime intends to enhance the collaboration on an international basis on the matter of computer based crime. They try to increase the cooperation amongst nations, harmonising national laws and investigatory techniques. The USA is not a member of the Council of Europe but it has observer status. As there is the possibility for Non-European countries to get an invitation to sign and ratify council treaties, the USA did both regarding the Convention on Cybercrime. The Convention on Cybercrime included possession of child pornography, fraud and copyright infringement. At the time the USA signed the Convention, the internet hate speech protocol which has been included in the Convention before was already removed again. Instead the Council of Europe established a separate protocol to address online hate speech. However the USA didn't sign this separated protocol, because of the inconstancy with their constitutional guarantees.[79]

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[74] Szabados, *Hassreden im Internet, Über die Grenzen der juristischen Verfolgung im Internet*
[75] *European Journal of Crime, Criminal Law and Criminal Justice* 367
[76] *International Review of Law, Computers & Technology* 235
[77] Banks, *Regulating hate speech online* 236
[78] Blarcum, *Internet Hate Speech: the European Framework and the Emerging American Haven*
[79] Banks, *Regulating hate speech online* 236

In conclusion, in Europe the first steps have already been taken on the way to a common and legally binding definition of hate speech and there is already increased coordination and cooperation in combating online hate crime.

10 Legal implications and differentiation of related notions

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

The terms "incitement to hatred", "intimidation" and "provocation" are not clearly defined in Austrian law. In Austrian penal code[80] we can however find descriptions for „incitement to hatred" in section 283 of the Austrian Criminal Code as well as in the so-called "Verbotsgesetz", for „intimidation" in section 107 Austrian Criminal Code as well as for „provocation" in section 282 and section 282a. Whereas section 282a can be considered as lex specialis of section 282, some provisions in the VerbotsG can be considered as lex specialis of section 283.

Among these regulations, we can differentiate between two different types: On the one hand, those securing public order, such as sections 282, 282a and 283 and on the other hand, provisions constructed to protect one's personal freedom, such as section 107. The first ones describe publicly committed acts. This means they have to be perceivable for at least 10 persons[81], in addition to be appropriate to disturb public order, or to be perceivable for 150 persons at minimum[82]. In contrast to this, for the question if an offence can be subsumed under section 107, it is irrelevant if it was committed publicly or not.

In the following, there will be a short description of the factual findings of these regulations, followed by a comparison of them in order to finally show up their commonalities and highlight their differences.

First of all, the legal offence of provocation is described in section 282. In para 1 of 282 it is described as the public prompting or, according to para 2, as the approval of any punishable act. However, such an approval can only be subsumed under section 282 if certain additional criteria are fulfilled: The approved act has to have been committed intentionally and in a way appropriate to disturb the general sense of justice or to provoke the commission of such an act. Furthermore, it has to be punishable with one year exceeding custodial sentence. In the context of terroristic actions section 282 is concreted in section 282a. It is structured in the same way as section 282: para 1 determines the public prompting whereas para 2 defines the public approval of a terroristic act as an indictable offence. Nonetheless, the approval is only punishable if it is suitable to procure the risk of the commission of a terroristic crime.

Additionally, some subsume hate crimes of so-called hate preachers publicly prompting for the commission of terroristic acts under para 1 of section 282a[83]. Hence, the barrier between the

[80] The Austrian penal code, which is called „Strafgesetzbuch" will in the following be called like its official abbreviation „StGB"
[81] Bertel/Schweighofer, Österreichisches Strafrecht Besonderer Teil I (12th edition, 2012) 155
[82] Birklbauer/Hilf/Tipold, Österreichisches Strafrecht Besonderer Teil I (2nd edition, 2012) 211
[83] Bertel/Schweighofer, Österreichisches Strafrecht Besonderer Teil II (10th edition, 2012), 246

terms "provocation" and "incitement to hatred" can be fluent since, in this context, both can be subsumed under the same provision.

Nonetheless, a provision against hate crimes in general can be found in section 283, which was particularly constructed to combat hate speech. It only provides legal protection to groups that are typically affected by hate speech: on the one hand, these groups can be an officially registered church or a religious group. Apart from this, section 283 also gives protection to groups of persons defined by criteria like race, skin- colour, language, religion or worldview, nationality, ancestry or national or ethnic origin, sex, disability, age or sexual orientation. Section 283 para 2 generally prohibits any incitement to hatred against one of these groups.

In addition to that, section 283 concretely lists and prohibits several kind of hate attacks, such as the prompting or agitation for violence against one of the groups mentioned in para 1. According to para 2, a verbal attack violating human dignity against one of the groups listed in para 1, as well as the attempt to bring one of these groups as a whole in contempt, can equally be qualified as incitement to hatred. Attacks against individuals can only be subsumed under section 283 if they can be subsumed under para 1. Furthermore, the offence must have been committed expressly because of the individual's affiliation to such a group.

In addition to that, when it comes to incitement to hatred based on national- socialistic ideas, section 283 is derogated by the already described "Verbotsgesetz"[84], concretely by the subsections d, h and g of section 3 VerbotsG. It aims at combating any potential restructuring of Nazism in Austria and therefore provides penal provisions qualifying any revival of national-socialistic activities as a punishable offence. To be more concrete, according to section 3d VerbotsG the public prompting or approval of an act prohibited by VerbotsG itself, respectively according to section 3h VerbotsG the denial, belittlement, condoning or the attempt to justify national- socialistic activities is strictly prohibited[85].

In contrast to this, as already mentioned in the beginning, the factual findings of section 107 of the Austrian Criminal Code, which regulates intimidation, have a completely different nature. Instead of focusing on the possible impact to the outside, the Austrian legislator puts a strong focus on the offender's inner intention. He or she must intend to cause fear and anxiety, more concretely to set the victim in an "agonizing and lasting state of fear"[86]. Beyond that, in opposition to sections 282, 282a or 283 Austrian Criminal Code, the offender must intend the victim to get notice of the threat. This especially has to be proven in case the offender expressed the threat to a third person[87].

Moreover, the custodial sentence can be raised up to three years if the threat causes that the threatened person or other person, against whom the violence or threat is directed, gets in "an agonizing state of fear" for a longer time. The same can be applied if the offender threatens with death, significant mutilation or a striking distortion, kidnapping, fire- raising, endangerment

[84] "Verbotsgesetz", which can be translated as „prohibition- law", will in the following be called like its official abbreviation „VerbotsG"

[85] 7 <http://www.entnazifizierung.at/denazification-in-austria/> accessed 6 october 2013

[86] Bertel/Schweighofer, Österreichisches Strafrecht Besonderer Teil I (12th edition, 2012) 118

[87] cf. 10 Os 233/69, 10Os120/85; 10Os53/86; 12Os17/86; 13Os83/88; 14Os132/05a; 13Os17/10i

through nuclear energy, ionizing radiation or disintegrates or the destruction of their economic existence or social status.

To sum up, in Austrian law there are lots of provisions that come quite close to the subjects of "incitement to hatred", "intimidation" and "provocation". Sometimes they can be subsumed under the same regulation, such as "provocation" and "incitement to hatred" under section 282a of the Austrian Penal Code. With a general provision in section 283 and more concrete ones in its lex specialis, section 3 subsection d, h and g VerbotsG, there can however be found a relatively developed legislation concerning hate speech in Austria. Thus, especially when it comes to incitement to hatred, these regulations could be considered in the process of an EU-wide-legislation.

11 Comparative analysis

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

The Additional Protocol to the Convention on Cybercrime can only have an effect, if the members of the Council of Europe ratified it. The treaty opened to sign on the 28th of January in 2003. Its entry into force was the 1st March 2006. This Protocol wants to cover offences of racist or xenophobic propaganda and, apart from harmonising the substantive law elements of such behaviour, improve the ability of the Parties to make use of the means and avenues of international cooperation set out in the Convention.[88]

By May 2013, 20 States had ratified the Protocol and a further 14 had signed the Protocol but had not yet followed with ratifications. The States, which have already ratified the Protocol are: Albania, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, Finland, France, Germany, Latvia, Lithuania, Montenegro, the Netherlands, Norway, Portugal, Romania, Serbia, Slovenia, the Former Yugoslav Republic of Macedonia and Ukraine.

Austria signed it on the 30th of January 2003, but never ratified it. In fact the additional protocol is not ratified by seventeen countries so far.[89] However, that does not mean that these treaties will not be implemented. It is common that ratification of treaties, and with that their entering into force, take a few years.[90]

Many States, which ratified the Additional Protocol made reservations, declarations and objections to it.[91] For example, Denmark made the declaration that the Protocol will not apply to the Faroe Islands or Greenland (Art 14). Furthermore Denmark declared that in accordance with

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88 <ETS No. 185, http://conventions.coe.int/Treaty/en/Summaries/Html/189.htm> accessed 27 september 2013

89Status as of:

28/8/2013,

<conventions.coe.int/Treaty/Commun/print/CherchеSig.asp?NT=189&CM=4&DF=&CL=ENG> accessed 10 October 2013

90 Van Blarcum, Internet Hate Speech: The European Framework and the Emerging American Haven, 802

91<http://www.minbuza.nl/en/key-topics/treaties/search-the-treaty-database/2003/1/010573.html> accessed 10 October 2013

Art 6 para 2 of the Protocol that it reserves the right to partially refrain from criminalising acts covered by Art 6 para 1.[92]

In May 2006, France declared that in accordance with Art 6 para 1 of the Protocol, it interprets the terms "international court established by relevant international instruments and whose jurisdiction is recognised by that Party" (Art 6 para 1) as being any international criminal jurisdiction explicitly recognised as such by the French authorities and established under its domestic law.

Furthermore, the Kingdom of the Netherlands fully accepted the Protocol in July 2010 for the Kingdom in Europe.[93] The Protocol's legal force requires signatory States to provide necessary privacy protection provisions in their national regulatory frameworks. Legal liability can be imposed on "legal entities for conduct in violation of the Protocol of certain natural persons of authority within the legal entity". Thus, the Convention requires "that the conduct of such figures within an organisation is adequately monitored, also because the Convention states that a legal entity can be held liable for acts of omission in this regard".[94]

The protocol has indirect relevance, which means that the liability and jurisdiction principles of the text indirectly imply an obligation to assess one's risk with regard to the subject matter. One of the affected sectors is the generic one, which means that the provisions can be relevant to any entity involved with information systems and data processing, in view of the topic of the normative text.

A project to implement the Convention on Cybercrime (ETS 185) and its Protocol (ETS 189) was funded by contributors from the government of Estonia, Japan, Monaco and Romania. The objective was to "promote broad implementation of the Convention of Cybercrime and its Protocol and related international standards." The projects achievements were: legislation and policies, international cooperation, law enforcement, financial investigations, training of judges and prosecutors, data protection and privacy and protection of children.[95]

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[92]<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=189&CM=4&DF=&CL=ENG&VL=> accessed 10 October 2013

[93]<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=189&CM=4&DF=&CL=ENG&VL=> accessed 10 October 2013

[94]<http://www.enisa.europa.eu/activities/risk-management/current-risk/laws-regulation/civic-penal-law/additional-protocol-to-the-convention-on-cybercrime> accessed 10 October 2013

[95]<http://www.coe.int/t/DGHL/cooperation/economiccrime/cybercrime/cy%20Project%20global%20phase%202/projectcyber_en.asp> accessed 10 October 2013

ELSA Belgium

National Researchers

Emmanuelle Hardy

Amy Dunne

Debbie Van Waes

Margaux Giansante

Natali Afsar

Academic Adviser

Jogchum Vrielink

National Coordinator

Natali Afsar

"The combination of hatred and technology is the greatest danger threatening mankind."[1]

"In an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process."[2]

1 National definition of Hate Speech

Defining hate speech is a complex task. Belgian Legislation handles this intricate task by subdividing hate speech into different laws according to the criteria they protect, which form a foundation for the criminalization of hate speech. This so called 'foundation' is formed by the Anti-Racism Act[3], Anti-Discrimination Act[4] and the Anti-Negationism Act[5].

Through the Anti-Racism Act and Anti-Discrimination Act a common definition can be deduced, namely we can speak of hate speech when a statement or publication stimulates discrimination, segregation, hate or violence against a person or a group, based on characteristics such as race, ethnicity, sexual orientation, disability, state of health and/or gender. However, we must acknowledge that there is a difference between the Anti-Racism Act and the Anti-Discrimination Act. Both acts prohibit incitement, but the Anti-Racism Act goes even further by prohibiting the dissemination of ideas of racial superiority and hatred. Nonetheless, there are more elements necessary to verify whether there is "hate speech" or not, namely the content, intention and context of a statement[6]. The Anti-Negationism Act treats the denial, minimizing, justifying and approval of the Holocaust, and shares the same constitutive elements as the Anti-Racism Act and the Anti-Discrimination Act.

In accordance with these acts, Article 444 of the Belgian Penal Code, specifies under which circumstances the offensive speech must occur. The most important element that can be derived from this provision is that a certain publicity is necessary for the offence to be punished. Although Article 444 of the Belgian Penal Code refers to "pieces of writing", Belgian jurisprudence declared that weblogs and websites can also be a medium.

Until now the position of the European Court of Human Rights, as stated in the Erbakan v. Turkey case, is that "Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle, it may

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[1] Simon Wiesenthal, "Justice, Not Vengeance", Weidenfeld and Nicolson London, 1989 at page 358
[2] W.Cohen and D.Danelski 1997 :375
[3] Wet van 10 mei 2007 tot wijziging van de wet van 30 juli 1981 tot bestraffing van bepaalde door racisme of xenofobie ingegeven daden, B.S., 30 mei 2007.
[4] Wet 10 mei 2007 tot wijziging van de wet van 25 februari 2003 ter bestrijding van bepaalde vormen van discriminatie, B.S. 30 mei 2007
[5] Wet van 7 mei 1999 tot wijziging van de wet van 23 maart 1995 tot bestraffing van het ontkennen, minimaliseren, rechtvaardigen of goedkeuren van de genocide die tijdens de Tweede Wereldoorlog door het Duitse Nationaal-socialistische regime is gepleegd, B.S. 25 juni 1999
[6] Jogchum Vrielink, 'Uitgever spirituele boeken zet niet aan tot haat', Juristenkrant (2007), Juristenkrant 2007, 148, 16; Jogchum Vrielink, 'Islampohobia and the law: Belgian hate speech legislation speech and the wilful desctruction of the Koran, IJDL 2013, 1-12.

be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance." [7]

Short but to the point it can be said that national and international legislation are inform one another, but nevertheless it cannot be denied that hate speech is paradigmatic, as with the vagarities of human behavior, and it is hard to lay concrete criminalisation according for every possible eventuality. Therefore, it is acknowledged that the discretion employed by the ECtHR, which oftentimes takes judicial notice of contextual elements in affirming protections against hate speech, is necessitated by reason of the lacuna between statutorily prohibited conduct and conduct which may have the same effects as that which is prohibited in statute.

2 Contextual elements of Hate Speech

As stated, a clear definition of hate speech is hard to find. Through national and international jurisprudence contextual elements are advanced in order to qualify hate speech. To specify the contextual elements, a short overview of the constitutive element is necessary. Therefore, a brief view on content, intention and context of a statement which includes the contextual elements such as the medium and speaker is necessitated.[8] It will be further considered whether the multiplying effect of online dissemination will always mean a higher potential of injury to victims of online hate speech.

The first element 'content' treats the subject of the statement, 'what' is said? Content is important, because statements in political or public interest require different opinions and point of views of different people[9]. Even the most extreme ones contribute in the evolution of society. Statements in religious matters, on the other hand, aren't benefited by extreme opinions[10]. The outcome is that jurisprudence, as well as people, are more or less tolerant to hate speech, depending on the content. Thereby jurisprudence takes content in account in order to judge hate speech. The second element 'intention' is the most difficult one to extract, 'why' did someone make a certain statement? Two main intentions can be distinguished, namely the intention to inform people public on a public interest matter or the intention to disseminate hate speech, to incite to violence and hatred[11]. Tracing the purpose of a statement is difficult, as finding out someone's subjective purpose demands a comprehensive investigation. These elements will further be examined under US jurisprudence infra where it is seen that the US advocates a policy of content-neutrality and refrains from an analysis of the subjective state of mind of the publisher. Below, it will be evaluated whether this approach is preferable to the prevalent European approach.

Finally, a consideration of "context" espouses a number of considerations such as- "Who", to "Whom" and "Where"? Context also includes the relationship towards the audience[12] which has been an important consideration in the jurisprudence of the ECtHR which considers the

[7] Erbakan v. Turkey App no 59405/00 (ECHR 6 July 2006)
[8] Jogchum Vrielink, 'Uitgever spirituele boeken zet niet aan tot haat', Juristenkrant (2 mei 2007)
[9] Anne Weber, Manual on hate speech (Council of Europe publishing, september 2009)
[10] Ibid
[11] Ibid
[12] United States Holocaust memorial museum, 'Hate Speech and group targeted violence', http://www.ushmm.org/genocide/spv/pdf/summary.pdf

vulnerability of the recipient of the speech. At the outset, it is seen that the author's status or role in society determinates society's tolerance towards freedom of statements. The tolerance towards politicians in a political debate is remarkably larger than towards public officials such as teacher. Official journalists on the other hand, have to deal with the distinction between "neutrality" and "objectivity".[13] This is well illustrated through the case of Feret v Belgium is illustrative of the view that political expression, once a "prized category" of free speech is currently being reigned in under the Additional Protocol and the position of politicians as public figure is not seen to negate the possible racist content of their speech. In the case of Feret v Belgium, a challenge was brought against the conviction of the President of the "Front National-Nationaal Front", an extreme right-wing party, for inciting the public to acts of discrimination or racial hatred by means of posters and leaflets distributed during an electoral campaign. These leaflets presented non- European immigrant communities as criminally minded and keen to exploit the benefits they derived from living in Belgium whilst also ridiculing members of these communities. The ECtHR found that the applicant's conviction was certainly an "interference" with his right to freedom of expression contained in Article 10, but one which was expressly provided for by the general criminal law prohibiting such forms of on racism and xenophobia. In an important extension of the previous law, the Court held that incitement to hatred was not confined to calls for specific acts of violence or other offences. Insults, ridicule or defamation aimed at specific population groups or incitement to discrimination, as in this case, was sufficient for the authorities to give priority to fighting hate speech when confronted by the "irresponsible use"- more precisely abuse of freedom of expression which undermined people's dignity, or even their safety. This case has formulated a broad view of the scope of incitement to racial or ethnic hatred to cover racist hate speech that does not expressly urge its audience to commit immediate acts of violence. Secondly, the status or role of the victim is important to estimate the impact of a statement. Two findings can be cited here to clarify society's position, viz people are more likely to accept criticism towards politicians than criticism towards private individuals[14] and public officials are expected to bear more criticism than private individuals.

The "where" of a statement has become a more important aspect, courtesy of the advent of the era of digitalisation. Previously only press was in discussion, but nowadays new technologies such as internet and other new media, has widened the discussion. This is compounded by the fact that the internet does not respect national borders. It is often seen that the free speech haven that is the US is a jurisdiction which is home to many "hate speech" websites which propagate their creed from the safety of the US. In this way, hate speech permissible in other jurisdictions may have an extraterritorial effect in Europe. Given that Internet Service Providers are not liable for the content published, beyond a discussion above of the content policy each form of media may stipulate, this content may be free accessible in the European Union without a corporeal person available to apply the stipulations of the Additional Protocol to through domestic laws. The new technologies have created a 'citizen-journalist', which opened the gate for more personal hate speech, as in the traditional press personal hate speech was limited.[15]

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[13] United States Holocaust memorial museum, 'Hate Speech and group targeted violence', http://www.ushmm.org/genocide/spv/pdf/summary.pdf

[14] Anne Weber, Manual on hate speech (Council of Europe publishing, september 2009)

[15] United States Holocaust memorial museum, 'Hate Speech and group targeted violence', http://www.ushmm.org/genocide/spv/pdf/summary.pdf

These new citizen-journalists, operating through websites, blogs, text-messaging, e-mail and so on, have the opportunity to act in anonymity, which makes it even harder to investigate hate speech. This online anonymity creates a 'bubble' where people feel safe and are more likely to express their freedom of speech. In a way this is mostly encouraging, but in another way, it creates an opportunity to express hate speech without consequences[16]. In general it can be said that the digitalisation has enlarged the impact of hate speech. It is further submitted that the application of a contextualised approach to the publication of material on the internet qua the Additional Protocol may give rise to further complexities. One such complexity is noted from Reno v ACLU (1997) in which the US Supreme Court undertook a review of the Communications Decency Act of 1996. This Act restricted the display of sexually oriented material and punished the intentional communication of such material to minors. The Court first distinguished between internet based communications and real-time communications such as radio and television. The Court set aside the idea that the government could ban communications between adults on the grounds that minors might receive messages for which they are unfit. The Court argued that the recipient of a message actively searches for it.[17] Therefore, in European Union parlance, it may be said that a proportionality test and the least restrictive means of upholding the freedoms of expression must be undertaken, even in relation to those who are vulnerable,[18] as there is some element of personal culpability and responsibility to be attributed to the users of the internet who actively seek out that which may cause harm.

3 Alternative methods of tackling Hate Speech

While combating hate speech through regulation is necessary in certain cases, measures outside legislative action should also be considered. It is submitted that "racist speech is a mere symptom of racism"[19]and therefore it is preferable to dissuade hate speech through information, education and discussion. In this way, it is important to address the core of the issue, rather than just the symptoms. A right balance must be struck between the protection of freedom of speech and the necessity to tackle hate speech. This is recognised by both the Council of Europe and Member States and in this way, a number of "soft power" initiatives have been undertaken to militate against hate speech.

Raising awareness through campaigns

Diverse campaigns have been launched all around Europe to raise awareness among citizens. The "No hate speech" campaign has been one of the driving forces of these initiatives. As pointed out in the Council of Europe's website, "to tackle hate speech, it is vital for people to campaign, to act together to uphold human rights online, to raise awareness, change attitudes and mobilise communities"[20]. In Belgium, many initiatives were undertaken to promote the

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16 Bianca Bosker, 'Facebook's Randi Zuckerberg: anonymity online 'has to go away', Huffington Post, (27/7/2011) http://www.huffingtonpost.com/2011/07/27/randi-zuckerberg-anonymity-online_n_910892.html

17 Opposing Hate Speech Anthony Joseph Paul Cortese at page 36

18 Opposing Hate Speech Anthony Joseph Paul Cortese at page 36

19 William G. Ortner, "Jews, African-Americans and the Crown Heights Riots: Applying Mastuda's Proposal to Restrict Racist Speech" 73 B.U.L Rev 897 (1993) at page 918

20 Council of Europe, 'The campaign' (act4hre.coe.int 2013) <http://act4hre.coe.int/eng/No-hate-speech-movement/The-Campaign> accessed September 2013

campaign. In June, an important event was organised in Brussels by the three Belgian Communities for the campaign's opening[21], during which concerts, flashmobs, and other activities took place. All year long, many other events were organised to promote the campaign: a contest of creative projects, trainings for activists, interactive exhibitions, etc... Debates and a national meeting in partnership with the Council of Europe on online hate speech were organised. Partnerships with diverse Belgian youth movements State were also established to raise awareness among youth[22]. The campaign will soon be extended to the education sector.

Media's role

The media further has a key role to play in the promotion of tolerance and peace. As rightly pointed out by Ljiljana Zurovac, Executive Director of the Press Council in Bosnia and Herzegovina, "if journalists follow ethical guidelines, they will not perpetuate stereotypes and prejudices but rather counter the spread of intolerance and hatred." Online hate speech can unfortunately be present in all the internet platforms: social Medias, blogs, music, video and even games. The social network Twitter states in its terms of use "You may not publish or post direct, specific threats of violence against others". Google also specifically bans hate speech in its User Content and Conduct Policy[23]. The website Youtube recently expressed itself on the issue of hate speech by declaring "we encourage free speech and defend everyone's right to express unpopular points of view. But we do not permit hate speech (speech which attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status and sexual orientation/gender identity)." Even though most of the important online websites state to have a clear politic against hate speech, we can question the effectiveness of the measures undertaken. On that issue, Facebook recently declared "in recent days, it has become clear that our systems to identify and remove hate speech have failed to work as effectively as we would like, particularly around issues of gender-based hate. (...) We need to do better - and we will". [24] Belgium has not yet ratified the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems; the effects of this Additional Protocol this will be discussed infra.

Training for public officials

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[21] Fédération Wallonie-Bruxelles, ' Une campagne contre la haine en ligne' (federation-wallonie-bruxelles.be 2013) <http://www.federation-wallonie-bruxelles.be/index.php?id=portail_hebdo&no_cache=1&tx_ttnews[tt_news]=1123&cHash=5557849d91> accessed September 2013

[22] Bureau International Jeunesse, 'Vivre, apprendre et agir pour les Droits de l'Homme ' (lebij.be 2013) <http://www.lebij.be/index.php/no-hate/> accessed October 2013

[23] "*Do not distribute content that promotes hatred or violence towards groups of people based on their race or ethnic origin, religion, disability, gender, age, veteran status, or sexual orientation/gender identity*" Google, 'User Content and Conduct Policy' (Google.com) <http://www.google.com/intl/en-US/+/policy/content.html> accessed October 2013

[24] Brian Womack, 'Facebook to tackle hate speech' (newsstore.fairfax.com.au 2013) <http://newsstore.fairfax.com.au/apps/viewDocument.ac;jsessionid=ED160A455D846FA54AF9049703561EF6?sy=afr&pb=all_ffx&dt=selectRange&dr=1month&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=brs&cls=22020&clsPage=1&docID=AGE130530CD5RM2VDTM1> accessed September 2013

Training should be provided to public officials and other public figures on the issue of hate speech and especially to professional involved in the educational system. These trainings could also include the judiciary, the executive or even political associations as well as religious institutions. Influential people such as politicians should be informed and warned against statements that might promote discrimination and be encouraged to take advantage of their positions to promote tolerance.

Promote collaboration and alliance between influential institutions and organisations

Tackling intolerance and hate speech also requires dialogue and collaboration between key actors: government, policymakers, non-government organisations and international organisations. The "Living History Forum" in Sweden is a great example of that positive collaboration. This organisation initiated alliances between employer associations, trade unions, LGBT organisations, and municipalities, as well as the creation of ombudsman against sexual orientation discrimination.

The prohibition of incitement to hatred should not be limited to criminal sanctions

The complexity of criminalising an incitement to hatred will be considered infra in question 9, however at this juncture, it is submitted that sanctions for incitement to hatred should not be limited to criminal law penalties. Criminal penalties should only be considered for the most serious forms of incitement and used "as a last resort measures to be applied in strictly justifiable situations, when no other means appears capable of achieving the desired protection of individual rights in the public interest"[25]. Further, the States should give a central place to the victims and ensure they are rightly redressed. As well as the possible introduction of fines, other non-legal mechanisms such as mediation and alternative dispute resolution, or even civil and administrative measures should also be considered. In Belgium, the Centre for Equal Opportunities and Opposition to Racism offers an alternative to litigation. Victims of discrimination have the choice between going to court for redress, or take contact with the Centre which offers the possibility to act through conciliation and negotiation. The Centre states in its September 2012 report that it "has the objective of developing alternative measures in the fight against discrimination and hate crimes by providing specific tools adapted to discriminatory nature of the act. In daily practice, the Centre seeks primarily to extrajudicial solutions to reports and records". The Centre further explains that they are offering the authors of offences the "non-stigmatising possibility to explain, understand the significance of his actions and recognize the otherness of others"[26].

4 Distinction between blasphemy and Hate Speech based on religion

The offence of blasphemy is not criminalised by the Belgian law. However, the Belgian Penal Code provides in its Article 144 that « words, gesture or threat offending the object of a cult, in

➔ [25] Council of Europe, Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society (1st, Council of Europe, 2010) 25

[26] Centre pour l'égalité des chances et la lutte contre le racisme, 'Vers des mesures alternatives dans la lutte contre les discriminations et les délits de haine ' (diversite.be 2012) <http://www.diversite.be/sites/default/files/legacy_files/studies/2012/rapport%20Mediation_FR_DEF.pdf> accessed October 2013

the place used for its exercise, or during the public ceremony of this cult, shall be punished [...] ». This provision only concerns the objects of cults, and does not concern blasphemy, which is a speech. Importantly, this offense requires the violation of these objects either in places of worship (churches; synagogues etc.), or during a public ceremony. It is, to a large extent, a so-called "time-place-and-manner" restriction, rather than a purely content-based one. The Strasbourg Court leaves a very wide margin of appreciation to the States for cases of attacks on religious beliefs. In its Resolution 1805 of the 29th of June 2007, the Parliamentary Assembly of the Council of Europe stated that

"In this connection, the Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. A distinction should be made between matters relating to moral conscience and those relating to what is lawful, matters which belong to the public domain, and those which belong to the private sphere. Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world."[27]

It is interesting to take a look at the reasoning of the European Court of the human's on this topic[28] through the prism of the cases of Otto Preminger Institut v Austria of 1994 and the case Handyside v United Kingdom of 1976. Through these judgements, the Court introduced a test of proportionality. In Handyside, the Court declared that:

«Freedom of expression constitutes one of the essential foundations of such a society… Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population…This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued »29.

However, offensive speech against religion which does not contribute to a democratic debate are not protected:

"(...) However, as is borne out by the wording itself of Article 10 para. 2 (art. 10-2), whoever exercises the rights and freedoms enshrined in the first paragraph of that Article (art. 10-1) undertakes "duties and responsibilities". Amongst them - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."[30].

The positions on blasphemy varies from one Member State to another. Amongst members of the Council of Europe, only Germany, Denmark, Italy, Ireland and Greece have a disposition against blasphemy in their legal orders. However, these legislations are usually not enforced, except the orthodox Greek prohibition. As explained supra, the Belgian law only punishes

[27] Parliamentary Assembly of the Council of Europe Resolution N°1805 of 29 June 2007 <http://www.assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=17569&Language=EN>
[28] Guy Haarscher, 'Liberté d'expression, blasphème, racisme : essai d'analyse philosophique et comparée' [2007] Working Papers du Centre Perelman de philosophie du droit
[29] Handyside v UK ECHR (5493/72) [1976]
[30] Otto-Preminger-Institut v. Austria, ECHR (13470/87) [1994] 26, §49.

offences against the object of a cult. There is some sort of "right to blasphemy". However, this "right" has its limits, imposed by the Penal Code. Other incriminations could apply, such as calumny or defamation, criminalised by Article 443 of the Belgian Penal Code. Further, incitement to hatred based on religion is criminalised under the Anti-Discrimination Law of 10 May 2007[31]. The Article 38 of the Law also modified Article 453bis of the Penal Code for destruction of gravestones and the sepulchres, and provides that the sentence shall be doubled if one of the motives of the offense is hate, scorn or hostility against this person for reason of their religious belief. This is more in line with a causal link between the offending action and the injury to victim, the punishment of which is amplified due to the presence of hatred or hostility. These laws are seen by some as a threat against freedom of expression. More specifically, in Belgium, it is interesting to mention the recent judgement of the Bruges's Criminal Court. This judgement convicted a man for incitement to racial hatred and discrimination because he publicly tore up a Koran, before the eyes of a small group of Muslims. Despite the defendant's position arguing that no infraction of the anti-racism legislation had occurred, the Criminal Court convicted him to an effective prison sentence of four months and a fine of 600 Euros. In another case, an individual was convicted of incitement to racial hatred for having shouted "terrorist!" and "return to your own country!" to a sun-tanned snack bar owner who turned out not to be of foreign origin[32]. Several people have been convicted in Belgium for similar statements. These convictions can be seen as an answer to the recent phenomenon of "islamophobia". However, Muslims constitute a religious community, not a race or an ethnicity. Incitement to religious hatred, discrimination and violence are criminalised by the Anti-discrimination Act of 30 May 2007. The problem here is that the legislation concerning racial hate speech, the Anti-racism Act, is applied although the facts of the case clearly indicate that this concerns "religion" rather than "race". This development is an important shortcoming of the Belgian jurisprudence. Speech concerning religion traditionally enjoys a higher degree of protection that racist speech. Treating speech against a religion as racist speech under hate speech legislation constitutes a threat against free speech and leads to discourage public debate around religion, necessary in a free democratic society[33].

5 Networking sites and the issue of online anonymity

Presently, Belgium manages online anonymity indirectly and has no legal policy on forcing networking sites to reveal identities of persons. However, there are several other initiatives to combat online hate speech which have been taken by policy and other institutions[34]. Worth mentioning are following initiatives:

[31] Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination Article 3

[32] Jogchum Vrielink, 'Islamophobia' and the law: Belgian hate speech legislation speech and the wilful destruction of the Koran' [2013] IJDL, 2

[33] Jogchum Vrielink, 'Islamophobia' and the law: Belgian hate speech legislation speech and the wilful destruction of the Koran' [2013] IJDL, 4

[34] Ann Braeckman, "hate speech on the internet. Case study of Belgium and the Netherlands", Ghent University.

- ISPA: a Belgian co-operation of Internet Service Providers that took their responsibility and joined the combat against inappropriate conduct on the internet by working out a 'code of conduct' for people using the internet[35].
- CYBERHATE: a Belgian co-operation of different organizations and institutions trying to 'delete cyber hate' by creating a point of complaints that should make internet surfers able to report more easily and more effectively. The point of complaints is linked to the next organization, namely the CGKR[36].
- Centre for Equal Opportunities and fights against Racism/Centrum voor Gelijke Kansen en Racismebestrijding (CGKR): is a general organization in the combat pro equal opportunities and against racism, involving these subject matters online. As mentioned the point of complaints, www.cyberhate.be, is linked with this organization. Main goal of the CGKR is deal with complaints by mediating with the website-author or the moderator of a forum[37].
- Ecops: initiative of the Federal police, more specific the Federal Computer Crime Unit of Belgium, which also creates a point of complaints.
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- Starting with the CYBERHATE, these organizations aim to develop one common integrated point of complaint, instead of several[38]. Obviously these initiatives are a good start to combat online hate speech but do not evaluate online anonymity in a centralised way. Valuing online anonymity depends on where to we draw the line between privacy and protecting people against online hate speech? The most important arguments pro online anonymity are based on the main purpose of internet, the impracticability of exposing identities and drawing the line with privacy. First of all the main purpose of internet is being a 'free world wide web' with respect for people's privacy, so being freedom of speech was made easier, which opened many debates that lead to solution that would not have been as easy without internet[39]. Consequently exposing identities would undermine freedom of speech, and thereby would undermine the European Convention of Human Rights, which defends the freedom as speech as one of the most important human right. Secondly exposing identities might lead back to more intolerance and more censure, which is completely opposite to the democracy necessary under the European Convention of Human Rights. Next to the threats faced by the freedom of speech and democracy, there are more subjective issues too, which makes it impracticable to expose identities[40].
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- Relevant questions are:
- * Who decides on where to draw the line between hate speech and a lawful statement?
- * Which hate speech are you going to pursue? Each statement, only the extreme crude?

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[35] http://www.ispa.be/ accessed 1 september 2013; Ann Braeckman, "hate speech on the internet. Case study of Belgium and the Netherlands", Ghent University.
[36] http://www.cyberhate.be accessed 1 september 2013
[37] http://www.diversiteit.be/?action=onderdeel&onderdeel=221&titel=Internet accessed 1 september 2013
[38] Http://www.cyberhate.be accessed 1 september 2013
[39] http://en.wikipedia.org/wiki/World_Wide_Web accessed 1 september 2013
[40] Frenchweb, interview with Jérémie Mani, president of Netino and Tristan Rouquier, president of SOS Racisme, http://frenchweb.fr/debat-propos-racistes-faut-il-contraindre-twitter-a-moderer/96053

- * Who are you going to hold liable for the hate speech? Internet servers, social networking sites?
- * How are you going to find that person?
-
- The Additional Protocol at present confirms that there is no liability for Internet Service Providers. In this way, the Protocol accepts the impracticality of online policing by the service providers. A parallel example of this is the Chinese jurisdiction in which ISP are personally liable for contraband content on their social platforms. The People's Republic of China is said to operate the most sophisticated and extensive effort to selectively censor human expression ever implemented.[41] The PRC is well known as a jurisdiction which does not respect the exigencies of freedom of speech and therefore it is submitted that holding ISPs civilly liable, beyond operating a controlled content policy, is overly burdensome and likely to have a chilling effect on free speech on the internet. At present, it is seen that ISPs often vigilantly guard the anonymity of their patrons and refuse to release personal information of publishers without a court order. A study undertaken by the Leuven Institute for Human Rights and Critical Studies in 2013 for the Media Legal Defence Initiative, overwhelmingly concluded that throughout 15 jurisdictions, European and non European, that the transparency reports of Google and other such social media removed content only at the insistence of a court order or if it was mandated by the police in the interests of national security. In seeking to preserve anonymity for its users, it is seen that ISPs do not want to be associated with the infringements of its patron. As apart from hate speech deterrence, doing so would render the ISPs liable for copyright, defamation and other such torts which could have far reaching consequences.
- The opponents on the other hand are convinced that online anonymity stimulates hate speech, because hateful statements are easier made when people know they can hide behind there right on privacy.[42] Her statement perfectly summarizes the opponents point of view. Anonymity gives the publisher a sense of impunity for their conduct, and in this way creates a moral hazard problem. Even though the publisher's comments may be subject to peer review on the internet, the conduct of the publisher is without any real consequences and therefore, the impetus for self-regulation is diminished. Despite pro and contra anonymity both having far reaching consequences, striking a golden mean is possible where a focused consideration of all stakeholders is taken into account. At present, it almost seems that by reason of the internet and ISP creating an intangible barrier between the publisher and his statements, it is seen that the law cannot penetrate the internet. The Convention on Cybercrime is therefore ambitious in that it intends to challenge this formula. However, it is submitted that this is primarily a "structure-orientated" problem and not a "conduct-orientated" problem. In rearranging the position of publishers in respect of the law, and removing their impunity, conduct may change.
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[41] Gary King, Jennifer Pan, Margarete E. Roberts, « How Censorship in China Allows Government Criticism but Silences Collective Expression » American Political Science Review May 2013 at Page 1

[42] Bianca Bosker, Facebook's Randi Zuckerberg: anonymity online 'has to go away', Huffington Post, (27/7/2011) http://www.huffingtonpost.com/2011/07/27/randi-zuckerberg-anonymity-online_n_910892.html

- The main problem by abolishing online anonymity in concrete cases is who is qualified and authorized to decided whether a statement can be seen as hate speech or not? The social networks? Or national authorities, such as national police? If were choosing the option of the social networks, there's the fact that social networks operate in so many countries and no universal laws indicate what should be seen as hate speech. Moreover, they are confronted with different languages and the fact that it's mostly impossible to discover the real person behind an online identity, which would mean that if social network sites should operate against online hate speech, they would need a research team with people of around the world, to look for needle in a haystack[43]. As if today there's a 'report tool' on most social networks, where you can report online hate speech. But what if they find a hate speech statement, what can they do with it? Deleting it is probably the first and only thing networks are able to do. The Leuven Institute has noted in its study that liability for the ISP can accumulate where in a case of prima facie contravention of criminal statute, and upon notification to the ISP of the content, the ISP has not removed the content within a reasonable time. In this way, perhaps liability can be seen as a matter of degree.
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- National authorities on the other hand, can deal with hate speech by pursuing the authors of hate speech, but anyhow they are also confronted with the problem of where to draw the line and the fact that mostly it is impossible to discover who is really behind the hate speech statements[44]. Above all they are completely dependent on complaints by people, but mostly complaints are always late. Given these elements and problems, we can put out that even a well-organized co-operation between national authorities and social networks isn't capable to cope with hate speech.
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- As long as there is no universal legal instrument defining online hate speech, or at least defining universal constituents to qualify online hate speech, we must face with the fact that the 'report tool' on social networks and they possibility to report by national authorities are the most effective way to combat online hate speech. This is advantageous as it encourages self-regulation and attunes those active on the internet to maintain independent reactions to content published. Abolishing online anonymity would damage the right of freedom of speech in a disproportional way, whereby general abolishment cannot even be considered.

6 Tackling the notions of "violence", "hatred" and "clear presence of danger"

It is seen that the Internet is now the most accessible and widespread public forum in which to disseminate and exchange ideas, veritably the new "market place for ideas."

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[43] Frenchweb, interview with Jérémie Mani, president of Netino and Tristan Rouquier, president of SOS Racisme, http://frenchweb.fr/debat-propos-racistes-faut-il-contraindre-twitter-a-moderer/96053

[44] Frenchweb, interview with Jérémie Mani, president of Netino and Tristan Rouquier, president of SOS Racisme, http://frenchweb.fr/debat-propos-racistes-faut-il-contraindre-twitter-a-moderer/96053 Further, One of the most striking opponent is Facebook's marketing director and sister of co-founder, Randi Zuckerberg, who claimed that "Anonymity on the Internet has to go away" because "People behave a lot better when they have their real names down. … I think people hide behind anonymity and they feel like they can say whatever they want behind closed doors."

This submission will argue that in fact, the combination of hatred and technology is benign without direct action or ascertainable intention to commit a racially motivated and xenophobic crime, or as in US legalise, in the absence of a "true threat". It is submitted that while the fertilisation of hateful ideas is undesirable in a democratic pluralistic society, the direct consequences of such fertilisation, promotion or incitement is too vague to ascertain. Without a causal link between the publisher of the hate speech and the discernible effect, it is submitted that the balancing of Convention rights are incorrectly weighted in opposition to free speech. However, under a cumulative assessment which takes the notion of hatred in conjunction with incitement to violence, the vague causal link is mitigated and hate speech which is endemic to serious breaches of law may be prosecuted in a focused way rather than the application of a chilling effect over various forms of unfavourable speech, without a corollary examination of the effects on victims. In this regard, this submission advocates the cumulative and not alternative assessment of the alleged hate speech in conjunction with the tortuous liability theory which proscribes the need for demonstrable effects to an individual or individuals.

A cumulative standard for assessment however is tacitly proffered within the confines of the immediate research question. Given an open textured research questions, it would be preferred that the notions of hatred and violence would not be treated alternatively or cumulative, but individually with respect to the particulars which relate to these very distinct standards of personal liability. In blurring the distinction between these two standards, the Council of Europe is treating that which is dissimilar in the same manner, and risks that this treatment may filter down in application to the victims of transgressions of the Convention on Cybercrime.

Statutory Scheme of the Additional Protocol

The terms of the Additional Protocol, which entered into force on the 1st March 2006, are couched in terms of hatred and violence. The provisions of the Additional Protocol can be divided into five types of conduct that parties to the Protocol are required to criminalise. First, it requires each party to criminalise "distributing, or otherwise making available, racist and xenophobic material to the public through a computer system." Secondly, the Additional Protocol requires each country to criminalize the act of directing a threat to a person through the internet purely because of race, national origin, or religion. Thirdly, the Protocol requires each country to criminalise the act of publicly insulting a person through a computer system because of the person's race, national origin or religion. Fourthly, each party to the Protocol must pass legislation making it a crime to distribute or make available through the Internet "material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity." Finally, "aiding or abetting" the commission of any of the offenses established by the Protocol is criminalised. With respect to each of these crimes, it is optional for the state party to refrain from prosecution where the behaviour falls below the standard of incitement to hatred or violence or is committed without the intent to "incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion." It is seen through an examination of the Additional Protocol and the case law of the ECtHR, that the terms hatred or violence (oft expressed in domestic provisions as hatred or hostility) are employed disjunctively and alternatively or cumulatively to the same end

and that no substantial differentiation is made between these differing standards of liability within the Protocol itself.

The Explanatory Report provides that "[t]he term "violence" refers to the unlawful use of force, while the term "hatred" refers to intense dislike or enmity"[45]. As above, in giving these definitions within the same breath, it is elucidated that the distinct conception of harm which corresponds to each term is lost in the lack of subtlety of definition. The difference in conception of harm is although implicitly recognised and, as well as may be assumed as a natural consequence, the effects which these terms are projected to have may also be cognised. However, that the peculiarities of hatred and violence are not attuned to in the Additional Protocol indicates that the balancing of the Convention rights within the Protocol are carried out in error. That which is most objective is that the pernicious effects of violence are in the Protocol being equally weighted with respect to the variant but no less reprehensible effects of hatred in balance with other Convention rights, but most particularly for this research, the freedom of expression. For conduct to transgress the provisions of the Additional Protocol, it is required that the published material advocates, promotes or incites hatred or violence- this is an 'either or' test. As per the wording of para 14 of the Explanatory Report,[46] "[t]he definition requires that such material advocates, promotes, incites hatred, discrimination or violence. "Advocates" refers to a plea in favour of hatred, discrimination or violence, "promotes" refers to an encouragement to or advancing hatred, discrimination or violence and "incites" refers to urging others to hatred, discrimination or violence."[47] The means antecedent to the ends of hatred or violence are considered separately, yet the differing levels of mens rea required in order to incur liability for hatred or violence are not reflected in these definitional parameters. It is submitted that inchoate offences, such as an incitement to commit, should relate to the culpability of the crime proposed to be incited, rather than in abstract with an adorned thresholds muddled through a blurring of the standards required for hatred or violence.

By the nature of a crime of incitement, the offences under the Additional Protocol require that the perpetrator subjectively intends to incite violence or hatred for racist motives. Possibly to avoid the accusation of being 'thought crime' legislation, the Additional Protocol's definition avoids any focus upon subjective feelings, beliefs and offence, and concentrates instead upon the possible external impact of the materials upon the conduct of others.

Primordially violence is prohibited in civil societies as of necessity. However, incitement to hatred does not follow the same formula. Hatred is "allowable", or more properly, even a natural consequence of experiences and events in civil society. Hatred however depends necessarily on whether it is directed with intent, whether a person or group is targeted in such a way that violence or other negative effects limiting the rights of others are a likely incidental consequence. Likelihood of violence may be established on a balance of probabilities or beyond reasonable doubt in a case-by-case basis but incitement to hatred, pervades a subjective analysis in which the

[45] Ibid., at para 15

[46] Explanatory Report to the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, ETS No. 189 available from «http://conventions.coe.int/Treaty/EN/Reports/Html/189.htm» viewed on the 1st September 2013

[47] Ibid., at para 14

causal effects are difficult if not impossible to discern whether there has not been a direct victim. In this way, it is doubted that the mere distribution of racist and xenophobic material on the Internet would cause an "immediate breach of the peace" or otherwise result in a "hate crime". Timofeeva comments "Indeed, it does not seem highly probably that impersonal, or even personal messages on the computer screen would directly cause someone to get involved in violence or disorder."[48]

A Clear and Present Danger to Clear Judicial Construction:

Incitement to Hatred and Violence under the Additional Protocol

It is notable that although the US ratified the Convention on Cybercrime in 2006, it is unlikely that this Additional Protocol will be signed in the near future as it in inconsistent with the US constitutional right to free speech in its current capacity.[49] In its current form, the Additional Protocol does not operate on the same thresholds as the US system for encroaching on freedom of expression. Van Blarcum[50] astutely acknowledges that Article 3 of the Additional Protocol does not distinguish between purely political speech and speech intended to intimidate, and therefore that this is the reason that the Protocol may not meet the required threshold of a "true threat" as advocated within the American system. While the ECtHR through precedent have reaffirmed the additional protections available for speech made in the public interest, the Additional Protocol makes chilling inroads into the conception of speech made as part of a public interest exchange of ideas or as part of the particularly prized speech genus, political speech, in failing to delineate that type of speech which evokes an elicit reaction by causation and that which has a "bad tendency" to cause malign results. In phrasing the objection to the Additional Protocol in this manner, it is to be stated more clearly that current European jurisprudence is a proponent of a species of the abandoned US "bad tendency" supervision of hate speech. While due to constitutional and elementary differences of approach to the freedom of expression in Europe, it is submitted that an ECtHR flavouring of the "clear and present danger" test in the interpretation of the provisions of the Additional Protocol would adequately partisan the different mens rea standards required under hatred and violence. Such a European conception of "clear and present danger" would lend to the concept of hatred an immediacy which would resolve the causal concerns in advocating liability under this masthead. With respect to violence, only the more serious infractions likely to cause a verifiable ill would be sanctioned, and in this way, the chill on the freedom of expression would be lessened.

The causational difficulties, and the resulting defects of the Additional Protocol, are best set out by Van Blarcum as:

"This statute is analogous to the statute rules unconstitutional in Black: Like Virginia placed a blanked prohibition on cross burning, the Council of Europe is placing a blanket prohibition on distribution of racist and xenophobic materials. The Virginia statute failed to distinguish between

[48] Yulia A. Timofeeva, "Hate Speech Online: Restricted or Protected? Comparison of Regulations in the Unites States and Germany", Journal of Transnational Law & policy Vol. 12:2, available at «http://www.law.fsu.edu/journals/transnational/vol12_2/timofeeva.pdf» at page 272

[49] David Wall, "Cybercrime: The Transformation of Crime in the Information Age" at page 117

[50] Christopher D. Van Blarcum, "Internet Hate Speech: The European Framework and the Emerging American Haven", 62 Wash. & Lee L. Rev. 781 (2005) at page 815

cross burnings at a political rally for the benefit of like-minded individuals and a cross burning on a neighbour's lawn. The Council of Europe has failed to distinguish between racist and xenophobic materials directed to other racists and xenophobes and material intended to intimidate. As a result, this Article will not meet the "true threat" test."[51]

The analogy between the failures of the Virginia statute and the Additional Protocol largely coincides with a failure to distinguish between hatred and violence in a substantive way, and respectively, a failure to distinguish between the immediate and imminent effects of this conduct as opposed to intangible effects.

US Freedom of Expression Tradition

The European freedom of expression provisions allow for balancing to occur between competing the protections of the Convention in contrast to the US Constitution protects all forms of speech indiscriminately, even that which is unfavourable. From this deduction, it is seen that the pool of speech which is allowable in the US is much larger than that permissible in the European tradition, and therefore this is why the American is often considered a haven for free speech. For example, the European tradition does not give protection to negationism in order to both protect the ideals of democracy under Article 17 and to protect the rights of others, whereas the US tradition provides protection for all speech depending upon its propensity to have a tangible effect on the rights of others. Given this assertion, it is seen that there is a possibility that many variant types of speech which impinge on the rights of others, or on democratic ideals, may be submitted to a balancing act with the general rights of others under the Constitution, who may not as a matter of concern feel the effects of infractions on their rights. This over paternalistic approach casts a wide net over the types of speech which may be subject to restriction or exclusion under the Convention. Therefore, it is submitted that an emphasis on direct effects or intention to incite to direct action should be imported into the construction of the Additional Protocol in relation to the hatred and violence. Either by legislative amendment, or instruction from the Contracting Parties from whom there is evidence in some jurisdictions of tuition in the American tradition, a textured balancing of the Convention rights needs to be instituted with emphasis on direct or probably indirect effects.

The Threat Theory

The "clear and present danger" doctrine was originally conceived of by Supreme Court Justice Oliver Wendell Holmes Junior and was presented at the time as an innovation in hate speech legal tradition but is more correctly now rebranded as a narrow exception in US legal tradition which is used to justify the regulation of hate speech. In the seminal case of Schenck v United States,[52] the clear and present danger doctrine encapsulated a situation where speech made compels a rational person to behaviour as a result of fear for their safety, or other words as a natural convulsion. A situation which meets the threshold of a clear and present danger is an exceptional one. The actions of other third parties in such situations will be at their own liability

[51] Ibid.
[52] 3 March 1919

owing to the ability of the third party to process and assess the speech, and therefore where there has been cognitive processing, it is indicated that there has been the breakage of the causal nexus between the publisher and the resulting consequences. The discussion will now proceed to a consideration of the situations in which speech which may be restrained under the American system. The US "clear and present danger" test may only allow a restriction when justified as necessary to avert imminent harm to an interest of compelling importance.[53] To be restricted under this principle, the speech must clearly pose an imminent and substantial danger. Allowing speech to be curtailed on the speculative basis that it might indirectly lead to some possible harm sometime in the future would inevitably unravel free speech protection. In the 1960s, the United States moved away from this stringent approach to apply a more relaxed "bad tendency" approach to free speech which allowed greater regulation of hate speech. Despite dissents from Holmes and Brandeis and other members of the judiciary, the Court allowed the government to suppress any speech which may have a tendency to lead to some future harm. In recent times, the Supreme Court has repudiated this bad tendency rationale for supressing controversial speech and has recognised the crucial distinction between advocacy of violent or unlawful conduct, which is protected, and intentional incitement of such conduct which is not. This principle is enshrined in the landmark case of Brandenburg v Ohio. Despite a Ku Klux Klan leader addressing a rally of supporters brandishing firearms and advocating violence, the Court held that this generalised advocacy was neither intended nor likely to cause immediate violent or unlawful conduct and therefore could not be punished. The critical distinction of Brandenburg is one which distinguishes advocacy and unprotected incendiary incitement. By applying an alternative standard of "incitement to violence or hatred", and weighting both infractions equally with other rights, the distinction between advocacy and incendiary incitement is blurred in the European tradition to the detriment of freedom of expression. As discussed above, the means, consequences and standards of intents requisite for both hatred and violence under the present European system are analogous to each other and do not take account of the significant differences between incitement to hatred and violence. In turn, these definitional fiats further do not take account of that which capacity to cause direct effects and that which is benign. In returning to the original clear and present danger test, the American tradition reaffirmed its protection of all types of speech under the Constitution, restricting only that which in a contextual setting has the capacity to cause tangible detriment. For ease of reference this will be referred to as the "contextual requirement". In an effort to draw distinctions, a consideration of exactly the character of speech which falls foul of protection in the US is well illustrated in the 1942 case of Chaplinksy v State of New Hampshire. In this case the Supreme Court created the unprotected category of speech known as "fighting words" and defined them as those words that by their very expression would arouse a violent response from the receiver of the message. Although, theoretically, extremely offensive speech could be banned as fighting words, the Supreme Court has failed to identify any fighting words fit for governmental prohibition for over five decades and has consistently held that mere offensiveness of speech is not a basis for restricting it. Therefore, it is seen that a far wider category of speech is protected in the US than in comparison with Europe.

[53] Nadine Strossen, "Incitement to Hatred: Should There Be A Limit", Southern Illinois University law Journal Vol. 25 at page 250

A second facet of US free speech theory is that of "content neutrality" which holds that a government may never limit speech just because any listener or even indeed that the majority of the community disagrees with or is offended by its content or the viewpoint which it conveys. That types of speech are permissible in the US is enunciated as the "bedrock principle" of the US freedom of expression regime.[54] This may be compared to the foundations of free speech theory in Europe which is proclaimed to be rooted in the promotion of democracy in a pluralistic society. The viewpoint-neutrality principle reflects the philosophy first stated in the ground breaking opinions of former United States Supreme Court Justice Oliver Wendell Holmes and Louis Brandeis, that the appropriate response to speech with which one disagrees in a free society is not censorship but counter-speech or rather, more speech, not less. The "content neutrality" doctrine of the US is the primary distinction between that system and the system of the EU. The case law of the ECtHR demonstrates that there are certain types of speech for which protection is categorically denied such as negationism.

Contextual Requirements and Content-Neutrality

A comparison of the US approach with the current European approach

Most objectionable in relation to the conception of hatred and violence within in the Additional Protocol is the conflation of the conceptions of speech with action.[55] Whether hate speech is manifested in speech only or in speech and action is a facet of a contextual evaluation of hate speech undertaken on a case-by-case basis. In other words, the suppression of ideas through hate speech legislation may not be equated with the suppression of racial or xenophobic actions. Much in line with the American "market for ideas",[56] severance between hatred and violence is necessary to encourage a fruitful exchange of ideas and healthy debate in which the invisible hand of public opinion will correct the abhorrent. However, as seen in the case of Jersild, context is pivotal to a determination of the case. In Jersild it was seen that the documentary of Jens Olaf Jersild included derisory comments concerning immigrants and ethnic groups in Denmark made by youths under the guise of the so-called "Greenjackets" movement. On a whole the content of the program was balanced but nevertheless, it was seen that the documentary was concerned with the presentation of a social message to the public and accordingly, the ECtHR found that there was an infringement of Article 10. This case demonstrates that a consideration of the contextual factors of the case should lead to a consideration of the cognitive element present in the broadcast of a message. The presence of such a cognitive element should reckon and negate the representation of hatred and violence with respect to race, national origin or religion as an evidential truth, such an evidential truth is then submitted to review within the market place for ideas. Otherwise, hate speech represents a means of rebranding ideas as illegitimate and immoral without challenge these ideas politically. This recognition of a cognitive filter would accord satisfactorily with the causation concerns in regulating hate speech, as like the Schenck v United States which accorded liability to actors who had the possibility to process an evidential truth, the presence of a cognitive filter would mean that the balancing of Convention rights would not be overbroad. In this respect, the Convention

[54] Texas v Johnson, 491 US 397, 414 (1989)
[55] Sandy Starr, "Hate Speech on the Internet: Distinguishing Speech from Action" at page 128
[56] Justice Holmes, Abrams v United States

would take account of those whose rights were specifically effected, rather than considering a balance of all the rights of those exposed to a pernicious message. This would mean that the freedom of expression would be balanced in a more rapt and focused means with the other Convention rights. In respect to the contextual requirement, the Jersild case fails to appreciate the contextual factors of the case in a targeted way, such as the filtering of a balanced program through the public, and is one of the clearest examples of a "naked" prohibition on speech owing to its content.

Member States which apply a Clear and Present Danger Test

It is seen that there is an emerging divergence between the approaches of the Member States at grassroots level and the approach of the ECtHR which is seen to advocate a stricter bad tendency test. Apart from general protections for equality before the law, few states have constitutional protection against hatred, although there are notable exceptions. Austria has enshrined in its constitution prohibition of Holocaust denial and Italy's constitution protects religious equality. Luxembourg's constitution provides against general discrimination of all foreigners. Most significantly, a 2004 Hungarian decision[57] invoked a genus of the the American 'clear and present danger' test in finding unconstitutional a law that punished speech provoking racial hate. Given that national jurisdictions are seen to favour clear causal connections, the ECtHR may take leave to interpret the test more stringently in an effort to promote foreseeability of application.

Conclusions

When the norms protected by hate speech legislation are violated, the violation is tended to be conceptualised as "mainly conduct and little speech."[58] We are easily convinced to claim that the lewd and profane are such to incite an immediate breach of the peace.[59] The co-authors of "State of the Union Report: A Road Map to Addressing Reform Possibilities Based Upon A Comparative Analysis of the Legal Regulation of Hate Speech and Hate Crime"[60] aver that there are real technical issues concerning the difficulties with both identifying and enhancing the punishment of hate crime offenders by reference to an after-the-fact interpretation of the nature of their discriminatory "motivation" located within the elusive inner recesses of their subjectivity, as opposed to demonstrable or assumed harm identifiable from a "third person perspective." Given that there is broad discretion as to what constitutes hate speech, that assessment can be subjective in the ECtHR. Arguably, threats and other online crimes are substantively different because of the ubiquitous nature of the Internet.[61] A threat divulging private information

[57] Hungarian Constitutional Court, Decision 18/2004 Hungarian Constitutional Court, Decision 18/2004 (v.25) AB, available at: http://www.mkab.hu/content/en/en3/09360304.htm (visited 23 Sept 2007

[58] Extreme Speech and Democracy, Ivan Hare and James Weinstein at page 135

[59] Ibid at page 135

[60] Dr. Kim McGuire, Dr. Bogusia Puchalska, Prof. Michael Salter at page 3 http://www.uclan.ac.uk/research/environment/projects/assets/stateofunion10.pdf

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broadcast over the Internet, for example, not only can intimidate its target but can also be a criminal solicitation to others unknown, complete with valuable information that aids in the proposed crime's commission. This submission does not seek to diminish the capacity of threats disseminated on the internet to constitute a clear and present danger, however, it is submitted that the Additional Protocol should take account of a more clear causal nexus between the speech and the resultant damage. As per Justice Holmes, the theory of free speech "is an experiment as all life is an experiment" and is a "wager based on imperfect knowledge". Given lack of adequate evidence for any certainty about the guess whether suppression or freedom provides the best security, the Daphne Report submits that wisdom requires that choice favour liberty. In this way, it is proposed that the threshold for conviction should remain stringent and the choice should favour freedom of expression. Interpreting the Additional Protocol's prohibitions against incitement to hatred and violence under the same threshold is unfavourable because if an 'alternating' threshold is not used relative to the speech, much like the Black case op cited, there is a confusion between speech which has a possible discernible effect such in the case of "violent" response and that which creates a subjective reprehensible repercussion as would be in the case of that which incites "hatred".

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

The Council of Europe has begun from the departure point that hate speech is ab initio illegal- announcing that it "considers racism not as an opinion but as a crime."[62] Amongst the forms of expression which are considered to be offensive and contrary to the Convention are racism, xenophobia, anti-Semitism, aggressive nationalism and discrimination against minorities and immigrants. These represent what would be known in American legal parlance as "unprotected" forms of speech. However, unlike America, the European conception of unprotected forms of speech is far wider. This is partially as a result of the maxim that, as the ECtHR submits, that there is no universally accepted definition of the expression "hate speech".[63] The categorisation of speech as hate speech in the European Union has a special nexus with democratic ideals. Whereas the American Supreme Court charges itself with extending the protections of the free speech Amendment as gatekeepers of freedom of expression, the case law of the ECtHR sees that the Court is taken with establishing parameters within which it is possible to characterise speech as "hate speech" in order to exclude it from the protections afforded to freedom of expression under Article 10.[64] The Court takes both an exclusionary and a restrictive approach to unfavourable speech as opposed to a speech-protective approach.

These systems of exclusion and restriction are set out in the Convention, as follows:

(a) by applying Article 17 (prohibition of abuse of rights) of the Convention where the comments in question amount to hate speech and negate the fundamental values of the Convention, or

[62] Yulia A. Timofeeva, "Hate Speech Online: Restricted or Protected- Comparison of Regulations in the United States and Germany" at page 265

[63] ECHR, "Factsheet- Hate Speech", July 2013 available from http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf

[64] http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf

(b) by applying the limitations provided for in the second paragraph of Article 10 of the Convention. This approach is adopted where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention.

Due to the fact the members states of the Council of Europe are democracies, as per Lingens v Austria, the ECtHR holds debate on matters of public interest in high regard. Expression which related to such matters as opposed to private morality is therefore deemed more worthy of expression. The types of expression which fall within the scope of Article 10(1) have been drawn widely in the ECtHR case law. "In adopting a broad and purposive definition of protected speech, the Strasbourg court has held that speech through almost every known expressive medium … falls within the scope of Article 10."[65] Article 10 protects not only the form of expression, but its content. Article 10 further covers both facts and opinions and includes a right to receive information, not merely to impart it. The provisions of Article 10(1) are therefore expansive, but access to these protections requires that the speech first be filtered successfully past Article 17 or satisfy the balancing test of Article 10(2).

Justifying elements

In delineating that which amounts to hate speech, "the strength of the protection offered will depend on the extent to which the expression can be linked to the direct functioning of a democratic society." Article 10 and 17 of the Convention approach the consideration of that which can be linked to the direct functioning of a democratic society differently. In Glimmerveen, the Commission noted: "The general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention." Article 17 prevents the misappropriation of ECHR rights by those with totalitarian aims. Article 30 of the UDHR was the direct inspiration for the insertion of Article 17 into the ECHR. The abuse clause was a vehicle constructed in order to ensure that a democratic community would be able to defend itself. It's primary reason for existence is thus to give democracy the legal weapons necessary to prevent the repeat of history, in particular the atrocities committed in the past by totalitarian regimes which enjoyed legality at the time. The abuse clause may not be invoked independently and must always be linked to a Convention right which is deemed to be abused. The scope of application has been widened subject to any given interpretation of what is detrimental to the exigencies of democracy, less according to that which has essences of totalitarianism. This may be exemplified in the dicta of Judge Jambrek in Lehideux v France in which it is said that:

"In order that article 17 may be applied, the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others …" Keane explains that "Article 17 has a significant effect on the regulation of hate or xenophobic speech- it serves to remove that speech from the protection of article 10(1), purely on the basis of content. It eliminates the need for a "balancing process" that characterises the court's approach

[65] A Lester, D Pannick and J Herberg, Human Rights Law and Practice 3rd ed 2009

under 10(2)"[66] The difficulty lies in the determination of whether the content of any category of speech is so pernicious to Convention values, that it is not to be subject to weighing against the rights of others but immediately ousted from Article 10(1) protection. In this sense, is the speech of a nature which de facto and inherently damages the Convention values.

Article 17 has a significant effect on the regulation of hate or xenophobic speech – it serves to remove that speech from the protection of Article 10(1), purely on the basis of content. It eliminates the need for a 'balancing process' that characterises the Court's approach under Article 10.

Dual Application of Article 17

ECtHR have developed dual system of filtering the freedom of expression guarantees of the Convention. It has been noted from the jurisprudence of the Strasbourg court that the application of Article 10 and 17 can be inconsistent, some speech characterised as hate speech is subject to Article 17 which excludes Article 10, others are not as such restrained from the scope of Article 10.[67]

There are two means in which the abuse clause of Article 17 has been applied. The first shows that it has been applied in a direct way, wholly excluding certain expressions from the protection of Article 10, known as the "guillotine effect". In such cases, the applicants' statements are simply not considered under the protective scope of Article 10. Such decisions are mostly taken prima facie and are strongly content based, with little or no attention paid to contextual factors. On the other hand, the abuse clause has regularly been applied indirectly, as an interpretative aid when assessing the necessity of State interference under Article 10(2). The application of Article 17 through Article 10(2) is less fraught with concern because as noted by Frowein, "it would seem that the use of Article 17 within the restrictive clause of Article 10(2) is a proper method to avoid some of the dangers which Article 17 could otherwise raise." However, it is noted by Cannie and Voorhoof that even if Article 17 seems to be applied indirectly, its effects can often be the same. However, it is proposed that its application in conjunction with Article 10(2) indirectly assures that a false positive conclusion is not arrived at through the guillotine effect. It is further submitted that, as Article 17 must always be construed in conjunction with another right adorned in the Convention, that its construction by way of the guillotine effect is fundamentally mistaken as it fails to take account of the contextual factors which are imported by considering other rights of the Convention.

It has been proposed that the abuse clause has been somewhat detached from its original purpose, which strictly confined the abuse clause to situations threatening the democratic system of the State itself. The organs of the Convention have stretched its material scope to any act that is incompatible with the Convention's underlying values or contrary to the text and spirit of the Convention. In this regard, the Court has explicitly associated the fight against racism as such

[66] D Keane "Attacking Hate Speech under Article 17 of the European Convention on Human Rights: 2007 25 Netherlands Quarterly on HR 641, 644

[67] Hannes Cannie and Dirk Voorhoof, "The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?" Netherlands Quarterly of Human Rights, Vol. 29/1 (2011) 83 at page 54 http://www.corteidh.or.cr/tablas/r25909.pdf

with the fundamental values protected by the Convention. The widening of the abuse clause's scope of application to the broad sphere of racial and religious discrimination is far removed from the original rational and general purpose of the abuse clause. However, in favour of a wide interpretation of the abuse clause it may be noted that racist doctrines are at the heart of totalitarian groups or regimes, the development of which the abuse clause aims to oppose. Secondly, it is proposed that despite the Courts obiter dicta, the Court has made effective use of the abuse clause only to respond to activities or statements related to National Socialism or inspired by this ideology. Finally, if the abuse clause were not so widened to be a credible means of opposing totalitarianism which may not manifest overtly, but may be tacitly implied in the public interest speech, Article 17 would become redundant and unable to challenge the changing faces of totalitarian doctrine. The instant research question is best reformulated in the words of Cannie and Voorhoof: "The key question is whether this application exerts a desirable impact on democracy. Are there reasons to believe that the application of Article 17 in the field of freedom of expression generates an added value with a view to defending and maintaining the organisation democratic structure, and/or for protecting and promoting respect for the core democratic values of human dignity and equality?" It is submitted that the value with respect to the freedom of expression, as far as a confirmation of the steadfastness of the Convention members to resist totalitarian regimes, is limited. It is submitted that the application of Article 17 has a negative effect on democracy in freedom of expression jurisprudence. The article exudes a chilling effect on speech which does not accord with the fundamental principles of free and frank open discussion in a pluralistic and democratic society. This free and frank discussion is accommodated in Article 10(1), but carefully, within the limits of Article 10(2). An example of the application of Article 17 occurs in the case of Kuhnen[68] in which the applicant was convicted due to his attempt to reinstitute the National Socialist Party, and for which the Commission found his conviction justified.

Article 10

While the Article 17 is primordially aimed at protecting the democratic structure, Article 10 has been acknowledged for the important role of freedom of expression in a democratic society. "Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man."

In comparison to Article 17 which is applied at the courts behest, Article 10(2) may only restrict the freedom of expression when three cumulative conditions are met:

- that the restriction is prescribed by law,
- pursues a legitimate aim, and finally and most decisively,
- is necessary in a democratic society. In relation to necessity, the ECHR has required the both the content and context of the remarks to be examined.

Overtly in Gunduz v Turkey, the Court, in favour of the exclusion of Article 10 protections, considered that "there can be no doubt that concrete expressions constituting hate speech,

[68] Kuhnen v Federal Republic of Germany, 56 European Commission on Human Rights Decisions and Reports 205 (1988)

which may be insulting to particular individuals or groups are not protected by Article 10 of the Convention."[69] However, it is submitted that this should not mean that the restrictions are exempt from application of the conditions of Article 10(2) which provides legal certainty to the persons publishing such speech. Article 19 of the International Covenant on Civil and Political Rights [hereinafter 'ICCPR'] provides a similar speech-protective framework as Article 10 ECHR, likewise relying on a similar threefold necessity test. Moreover, also the ICCPR in its Article 5(1) contains an abuse clause which is identical to the European one, and is also inspired by the same fear of democracy being overthrown by totalitarian movements. Contrary to the Strasbourg organs, the UN Human Rights Committee (HRC, which supervises the compliance of the Treaty States' actions with the Covenant) only applied this clause once and it shows a marked reluctant attitude in using it. However, in contrast to Article 17 ECHR, Article 5(1) ICCPR has not been interpreted as being applicable to activities or statements that are deemed to run counter to the Covenant's purposes and general spirit. This is very well illustrated by the Human Rights Committee's decision in Faurisson vs France, a well-known case of Holocaust denial (the kind of speech that is most vigorously attacked by the European abuse clause). Notwithstanding the clear revisionist content of Faurisson's written statements the Committee refused to apply the abuse clause in the admissibility stage. Instead, it decided the case under Article 19(3) ICCPR, eventually approving of Faurisson's conviction after having examined the complaint on its merits. This suggests that this type of speech can be safely dealt with within the confines of the speech-protective framework.

Interaction of Article 17 and 10(2)

Under a direct application of the abuse clause, there is absent any balancing procedure and as a result the applicant is categorically refused any protection under his or her right to freedom of expression. The radicalism of this approach provokes most authors to embrace the indirect variant of the abuse clause's application, to which is ascribed the benefit of avoiding some dangers Article 17 could otherwise bring into being. The analysis of Cannie and Voorhoof demonstrates that even through indirect application, once the speech is considered at the domestic level to be related to National Socialism or other racist undertones, the protection of Article 10 is categorically denied without a consideration of the case as a whole. In other words, these forms of hate speech are in these circumstances only formally considered under the scope of Article 10, the strict requirements of proof under Article 10(2) being made redundant by way of the abuse clause's (indirect) application.

Against the Guillotine Effect

There have been identified a number of undesirable reasons against the application of the abuse clause in free speech disputes. Amongst these:

(i) That there is no or only superficial context examination. This is best exemplified by the Jersild case in which a journalist did not make objectionable statements but assisted in their dissemination in his capacity as a television journalist. In relation to whether Article 17 or Article 10 is to be applied, Keane notes that the 'balancing process' would have been removed if Article

[69] Gunduz v Turkey, at para 41

17 had been applied as on the basis of the content alone, the comments would have passed the admissibility stage and the prosecution of the journalist would have been justified.

(ii) Secondly, it is submitted that there is a tendency to disregard proportionality if the necessity test is not applied.

(iii) Thirdly, there are structural dangers. As per Sottiaux and Van der Schyff, "a decision that categorically denies free speech protection to the denial of certain historical facts would then hinder the preservation and further development of distinct constitutional identities."

In this regard, the idea behind the margin of appreciation doctrine is that domestic decision-makers are better placed to interpret the Convention so as to adapt its reading to the specifications of their own countries. Although, according to standing jurisprudence of the Court, the member States enjoy a broad margin of appreciation in assessing whether and to what extent an interference is necessary in cases of hate speech, this margin in never unlimited and is always accompanied by European supervision. However, the application of the abuse clause removes the need for member States to pertinently and sufficiently justify interferences and drastically reduces the Court's role in ensuring that limitations are narrowly construed and convincingly established.

Margin of Appreciation and Subsidiarity

The Margin of Appreciation doctrine refers to the power of a contracting state to assess the factual circumstances in which the rights of the Convention operate. The margin of appreciation is based on the notion that each society is entitled to a certain latitude in balancing individual rights and national interests, as well as in resolving conflicts that emerge as a result of diverse moral convictions.[70] The oft cited case of Handyside[71] demonstrates the role of the margin of appreciation in relation Article 10. In this case, the publication of a book saw the applicant convicted on obscenity charges. The Court in this judgement did not find that the UK had violated Article 10 on the grounds that the state had a legitimate aim to protect morals. The Court appreciated in this case that it was not possible to fund a common denominator among different societies which wold establish a uniform conception of morals. In the Jersild case, it was accepted that this was the first time that the Court was dealing with a case of the dissemination of racist remarks that denied to a group of persons the quality of human beings. In the dissenting opinion by Judges Ryssdal, Bernhardt, Spielman ad Loizou, it was felt that while it was clear that those who had made the objectionable statements were not entitled to the protection of Article 10, that "the same must be true of journalists who disseminate such remarks." They disagreed with the majority because "the majority attributes much more weight to the freedom of the journalist than to the protection of those who have to suffer from racist hatred." However, in their opinions, they remarked that it was this balancing should be remised to the national authorities. These dissenting judges, in line with the requirements of the margin of appreciation, found that it is not the duty of the Court to perform the exercise of balancing conflicting interests, but rather that should have been left to the Danish Court who enjoys a

[70] Onder Bakircioglu, "The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases" at page 1
[71] Handyside v United Kingdom Application No. 5493/72 1976

margin of appreciation in the sensitive area.[72] It is submitted that the application of Article 17 is undesirable as it eliminates substantial guarantees for applicants seeking to safeguard their rights to freedom of expression at the Strasbourg level, leaving too broad a discretionary margin for member states and removing the applicant's particular protections against disproportionate interferences. It is preferable, not only from a democratic standpoint, but also from a human rights perspective, to treat all alleged hate speech equally under the speech protective framework provided by Article 10 ECHR with an emphasis on the necessity test of Article 10(2), without conferring any decisive impact on the abuse clause. If States can restrict speech under Article 17 because of its content, the burden of proof required to justify intervention is shifted away from that state, (also as the abuse clause may be uniquely invoked by the state against an individual) and the onus is shifted to the publisher. The result is a loss of any degree of proportionality; interference is justified because of content and not because of any balancing act with a conflicting right. An absence of a detailed and systematic justification for the usage of the doctrine may mean that there is loss of foresight in the application of the doctrine in order to create a harmonious society in Strasbourg.

The primary duty to protect the rights and freedoms enshrined in the European Convention rests with the member states. Therefore, since the main responsibility of ensuring the rights provided in the European Convention rests with the Contracting States, and the role of the Strasbourg organs is limited to ensuring whether the relevant authorities have remained within their limits, the margin of appreciation fits into this subsidiary role. It has been said that the rationale behind the principle of subsidiarity is that "it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context." Linking the principles of subsidiarity and margin of appreciation is the role of the ECtHR which provides European supervision.

The submissions of Sottiaux are most agreeable and it is submitted that a more attractive alternative would consist of a European test with clear and unambiguous criteria regarding both content and context. Under such a system, a certain margin of appreciation could be left to the national authorities to assess whether in a given case these criteria are met. The local authorities may indeed be in a better position to make the initial factual assessment of the threat posed by the expressions involved. Today, however, the situation seems to be the other way around: when an expression satisfies the standards of a vague test, the national authorities enjoy a wide margin of appreciation to moderate it.[73]

8 Harmonisation of national legislation

Harmonisation of criminal law is a utterly sensitive topic. However, cybercrime is one of the most globalized offences of the present and this requires awareness of the convergence and divergence among international and regional systems. International cooperation and a certain level of coordination are necessary to tackle online hate speech.

[72] David Keane, "Attacking Hate Speech under Article 17 of the ECHR", Netherlands Quarterly of Human Rights, Vol 25/4 (2007) at page 655

[73] http://www.zaoerv.de/63_2003/63_2003_3_a_653_680.pdf

For successful harmonization, it is of considerable importance that the area in question shares common value, especially in the field human rights. Further, the existence of specific instruments such as European directives or framework decisions contributes greatly to ease the unification of criminal law. Also significant, the influence of the various international institutions and organizations, politically powerful States and experts concerned. Along with efforts in legal harmonisation, the contributions of networks such as the International Criminal Police Organization (Interpol), through its system of cooperation in gathering and sharing information are worth mentioning.

The Convention on Cybercrime, the first international treaty seeking to address Internet and computer crime by harmonizing national laws, is a landmark in the sphere of the international harmonization of cybercrime law. The First protocol to the Convention, the Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, provides for a harmonised approach with regard the criminalisation of such harmful conduct and makes the investigative powers of the Cyber Crime Convention applicable to the investigation of racist and xenophobic crimes in electronic environments[74]. These measures provide for effective means of investigation and are considerable support efforts to combat discrimination.

A certain level of harmonisation regarding hate crime has already been reached in the European Union. At substantive level, the Council adopted on the 28th of November 2008 the Framework decision on combating certain forms and expressions of racism and xenophobia by means of criminal law. This Framework Decision answered the need to develop a common approach across the European Union toward racist and xenophobic offences. According to Article 1(a) of the Framework Decision, Member States shall make punishable the intentional conduct of publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin. Also worth mentioning, the Audiovisual Media Services Directive banning incitement to hatred in audiovisual media services and the promotion of discrimination in audiovisual commercial communications.

At procedural level, the EU Framework Decision on the European arrest warrant includes racism and xenophobia and computer-related crimes in the list of offences that does not require double criminality. In the Advocaten van de Wereld case of the Court of Justice of the European Union[75], claimants argued that the legal instrument used was inappropriate and infringed the principles of legality and non-discrimination. The Court however found that the Framework decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract, but simply to determine the scope of a procedural rule and in particular the condition for surrendering the persons sought76.

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[74] Henrik W.K.Kaspersen, 'Cyber Racism and the Council of Europe's reply' (humanrights.gov.au 2003) <https://www.humanrights.gov.au/publications/cyber-racism-and-council-europes-reply> accessed October 2013

[75] Judgment of 3 May 2007, Case C-303/05, *Advocaten voor de Wereld VZW* v. *Leden van de Ministerraad,* http://ec.europa.eu/dgs/legal_service/arrets/05c303_en.pdf

[76] Judgment of 3 May 2007, Case C-303/05, *Advocaten voor de Wereld VZW* v. *Leden van de Ministerraad,* http://ec.europa.eu/dgs/legal_service/arrets/05c303_en.pdf

Consequently, the Court of Justice rejected these claims and confirmed the validity of the Framework Decision.

The Framework decision on combating racism and xenophobia specifies in its Article 1 §2 that Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting. The Framework decision therefore sets a threshold which national legislation must meet and leaves the choice to the Member States to exceed the terms of the legislation. This framework Decision serves as a minimum harmonisation of what is understood as racist and xenophobic offences across the EU.

In the Preamble of the Framework decision on combating racism and xenophobia, it is acknowledged that full harmonisation of criminal laws is currently not possible, particularly in this field, because of the differences in cultural and legal traditions among Member States[77].

This statement is accurate and realistic. Progress in achieving harmonisation must work with the diversity of Europe. However, two points must be considered. First of all, LGBT are not protected by the Framework Decision. Morten Kjaerum, the European Union Agency for Fundamental Rights Director, stated during the conference "The hate factor in political speech - Where do responsibilities lie?" that there is a need to move from the Council of Europe Committee of Ministers Recommendation (97) 20 on hate speech mainly focusing on race and ethnicity to include, for example, LGBT at least[78]. We believe this should also be the case at EU level concerning the Framework decision on combating racism and xenophobia. The FRA online survey covering discrimination and hate speech against LGBT people shows that discrimination on grounds of sexual orientation or gender identity is very widespread across the EU79. Measures should be taken to combat this issue. Secondly, it must be ensured that this "acquis" is correctly implemented. EU Member States had to transpose the Framework Decision in domestic laws by 28 November 2010. The Commission should publish an implementation report this year[80].

9 Legal implications of "hate speech"

No widespread consensus regarding the definition of the term "hate speech" exists at international level. Although most States have adopted legislation banning expressions tantamount to "hate speech", definitions given to this notion differ. It is however increasingly

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[77] Yaman Akdeniz, *Racism on the Internet* (Strasbourg, Council of Europe Publishing, 2009) 88

[78] Morten Kjaerum, "European legal standards on hate speech - is there an *acquis*?" (The hate factor in political speech - Where do responsibilities lie?, Warsaw, September 2013)

[79] 93 000 individuals completed the survey, and about a half of all respondents stated that they had personally felt discriminated against or harassed on the grounds of sexual orientation in the year before the survey. - European Union Agency for Fundamental Rights , 'EU LGBT survey - European Union lesbian, gay, bisexual and transgender survey - Results at a glance' (fra.europa.eu 2013) <http://fra.europa.eu/en/publication/2013/eu-lgbt-survey-european-union-lesbian-gay-bisexual-and-transgender-survey-results> accessed October 2013

[80] http://ec.europa.eu/justice/fundamental-rights/racism-xenophobia/framework-decision/index_en.htm

important to be aware of the truly global dimension of the problem. Online hate speech does not respect political boarders, and this requires awareness of the convergence and divergence among international and regional definition of hate speech[81].

As we know, Strasbourg Court usually does not resort to very precise definitions of the notions contained in the Convention[82]. This is also the case for "hate speech", despite the fact that a consensus on a definition had been reached among the Council of Europe's Member States. Indeed, the Council of Europe Committee of Ministers Recommendation 97(20) on hate speech[83] defined "hate speech" as follows, as per Gunduz v Turkey[84]:

"the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."

However, this does not call into question the preference of the Court for a case-by-case and context specific approach. The Court prefers to avoid limiting its reasoning and its jurisprudence by adopting definitions that would restrain its action on future cases[85].

At UN level, The International Convention on the Elimination of all forms of Racial Discrimination (ICERD) is traditionally seen as more far reaching in terms of its restriction on freedom of expression than other international instruments, such as the ECHR. Article 4(a) of the ICERD states that signatories "shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred." The Committee on the Elimination of Racial Discrimination (CERD) focuses on the (racist) content of speech.

International organisations also provide for a definition of "hate speech". Human Rights Watch defines hate speech as "any form of expression regarded as offensive to racial, ethnic and religious groups and other discrete minorities, and to women". While the ICERD places an emphasises on speech with racist content, Human Rights Watch provides a broader definition, centralised on the victims and not limited to racial and ethnic groups but also includes religious groups and women.

Definition given to hate speech also greatly varies among States. Britain bans abusive, insulting and threatening speech. Denmark bans speech that is insulting and degrading. In Holland, it is a criminal offense to insult a particular group. Germany bans speech that violates the dignity or defames a group. While States as France, Germany, Austria and Belgium criminalise the denial of the Jewish Holocaust, other European States such as the United Kingdom, Ireland, and Italy do

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[81] Françoise Tulkens, "European legal standards on hate speech - is there an *acquis*?" (The hate factor in political speech - Where do responsibilities lie?, Warsaw, September 2013)

[82] Mario Oetheimer, *La Cour Européenne des droits de l'Homme face au discours de haine* (Rev. trim. dr. h. (69/2007)) 64

[83] Council of Europe Committee of Ministers Recommendation (EC) 97(20) on Hate Speech [1997]

[84] *Gunduz v. Turkey*, Application No. 35071/97 (CEHR, 4 December 2003) §22

[85] Mario Oetheimer, *La Cour Européenne des droits de l'Homme face au discours de haine* (Rev. trim. dr. h. (69/2007)) 64

not have similar provisions[86]. And so on. Disagreements and variations exist and depend upon the cultural, political, moral and religious context.

There is no consistency on what constitutes hate speech. States, international institutions and international organisations provide varying definitions. The problem arising from the absence of a legally binding definition is that we are unsure of the scope of a notion that has serious regulatory consequences. So, do we need a legally binding definition at international level? Not quite exactly. There is a diversity to respect, but at the same time clear "red lines" should be drawn[87]. For instance, the EU framework decision on combating racism and xenophobia respect that diversity. The framework decision only obliges Member States to criminalize if the conduct reaches a level of public incitement to violence or hatred[88]. What is necessary today at international level is a clearer definition of hate speech. A better definition would require courts to be more rigorous in their analysis in such cases, which would lead to more careful reasoning and better protection for freedom of speech[89]. It would also help to guard against the inflation and unwarranted expansion of the term[90].

Dr. Tarlach McGonagle has put forward the idea of "unpacking" the notion of hate speech[91]. As described by McGonagle, hate speech is a shorthand expression that describes a great range of objectionable types of expression within which very clear distinctions can be made. At one end of the spectrum, we have statements that are morally objectionable, but which would not trigger existing international legal standards. At the other end of the spectrum, we have incitement to hatred on various grounds that would typically be considered prohibited types of expression under existing European and international legal frameworks.

This same idea was recently expressed by the Committee on the Elimination of Racial Discrimination. In its General recommendation No. 35 on combating racist hate speech[92], the Committee seems to move away from the traditional criminalization of expression amounting to hate speech and offers a more explicit recognition of the differentiation within hate speech. Some types of speech, while morally reprehensible, are not quite as serious and harmful as a real incitement to hatred or violence. That differentiation should lead to a differentiation in responses. The recommendation also stresses on the complementarities between criminalization

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[86] Yaman Akdeniz, *Racism on the Internet* (Strasbourg, Council of Europe Publishing, 2009) 8

[87] Morten Kjaerum, "European legal standards on hate speech - is there an *acquis*?" (The hate factor in political speech - Where do responsibilities lie?, Warsaw, September 2013)

[88] directed against a group of persons or a member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin

[89] Michael Herz and Peter Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, 2012) 428

[90] Tarlach McGonagle, *The Council of Europe against online hate speech: Conundrums and challenges*, 11 http://hub.coe.int/c/document_library/get_file?uuid=62fab806-724e-435a-b7a5-153ce2b57c18&groupId=10227

[91] Interview of Tarlach McGonagle on the blog http://hatespin.weebly.com/mcgonagle.html

[92] General recommendation No.35 of the Committee on the Elimination of Racial Discrimination (EC) CERD/C/GC/35 on combatting racist hate speech [2013]

for serious form of hate speech, and the potential of education and informative strategies for countering the other types of harmful speech[93].

"12. The Committee recommends that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity."[94]

The Recommendation then indicates the contextual factors that should be taken into account for qualifying dissemination and incitement as offences punishable by law. These contextual elements are the content and form of speech, the economic, social and political climate prevalent at the time the speech was made and disseminated, the position or status of the speaker, the reach of the speech and its objectives.

At national level, the same approach should be considered. It is not necessary to resort to a binding definition. Hate speech is a constantly evolving concept. However, restrictions on speech should be formulated with sufficient precision. The CERD expressed its concern on the use of broad or vague restrictions on freedom of speech by States, and stressed that "measures to monitor and combat racist speech should not be used as a pretext to curtail expressions of protest at injustice, social discontent or opposition"[95].

On the other hand, an expansion of the definition is needed in some countries. As suggested by Director of the FRA Morten Kjaerum during the conference "The hate factor in political speech - Where do responsibilities lie?" held in Warsaw, there is a need to move from the Committee of Ministers Recommendation (97) 20 on hate speech mainly focusing on race and ethnicity to include, for example, LGBT at least[96]. Recent surveys, such as the FRA online survey covering discrimination and hate speech against LGBT people, shows how widespread discrimination on grounds of sexual orientation or gender identity is[97].

All in all, hate speech should be defined with sufficient precision. At international level, the challenge lies in the identification of common, universally accepted standards that are typically prohibited under existing international legal standards and build from these elements a better definition. Essentially, differentiation should be made between the types of legal responses to

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[93] Tarlach McGonagle, "European legal standards on hate speech - is there an *acquis*?" (The hate factor in political speech - Where do responsibilities lie?, Warsaw, September 2013)

[94] General recommendation No.35 of the Committee on the Elimination of Racial Discrimination (EC) CERD/C/GC/35 on combatting racist hate speech [2013]

[95] Ibid

[96] Morten Kjaerum, "European legal standards on hate speech - is there an *acquis*?" (The hate factor in political speech - Where do responsibilities lie?, Warsaw, September 2013)

[97] 93 000 individuals completed the survey, and about a half of all respondents stated that they had personally felt discriminated against or harassed on the grounds of sexual orientation in the year before the survey. - European Union Agency for Fundamental Rights , 'EU LGBT survey - European Union lesbian, gay, bisexual and transgender survey - Results at a glance' (fra.europa.eu 2013) <http://fra.europa.eu/en/publication/2013/eu-lgbt-survey-european-union-lesbian-gay-bisexual-and-transgender-survey-results> accessed October 2013

hate speech by placing greater emphasis on the act of incitement to hatred[98] in conjunction with violence[99]. Only the most harmful speech should be criminalized. Verbal abuses cannot be criminalized in a democracy and alternative strategies to counter hate speech are of utter importance. The challenge of defining hate speech should not make us forget that it is essential to combat hate speech first through education and informative strategies rather than criminal sanction.

10 Legal implications and differentiation of related notions

In Belgium, "incitement to hatred" is a term we find in three different laws: the Anti-racism Act, the Anti-discrimination Act, and the Act against Discrimination between Women and Men. The scopes of protection of these laws are delineated according to the criteria they protect.

The Law of 30 July 1981 on the punishment of certain acts inspired by racism or xenophobia[100] is a law against discrimination and hate speech passed by the Federal Parliament of Belgium in 1981. This law - commonly known in Belgium as the "Moureaux Law"[101] - criminalises incitement to discrimination, hatred or violence against a person or against a group or community, on account of race, colour, origin or national or ethnic descent[102]. A second law adopted more recently, the Law of 10 May 2007 against certain acts of discrimination[103], criminalises incitement to discrimination, hatred or violence against a person or against a group or community, on account of age, sexual orientation, civil status, birth, wealth, religious or philosophical beliefs, political conviction, trade union conviction, language, current or future state of health, disability, physical or genetic characteristic or social origin. Finally, incitement to hatred based on sex can also lead to criminal liability according to the Law of 10 May 2007 against discrimination between women and men[104].

According to the above laws, incitement to hatred can lead to criminal liability (only) if carried out under the circumstances specified in Article 444 of the Belgian Penal Code, which are the following: either in public meetings or places; or in the presence of several people, in a place that is not public but accessible to a number of people who are entitled to meet or visit there; or in any place in the presence of the offended person and in front of witnesses; or through documents, printed or otherwise, illustrations or symbols that have been displayed, distributed, sold, offered for sale, or publicly exhibited; or by documents that have not been made public but which have been sent or communicated to several people.

The question of the mens rea required for a conviction of "incitement to hatred" was considered by the two Supreme Courts of Belgium, The Court of Cassation and the Constitutional Court.

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[98] Tarlach McGonagle, "*The Council of Europe against online hate speech: Conundrums and challenges*" (Expert paper, University of Amsterdam) <http://hub.coe.int/c/document_library/get_file?uuid=62fab806-724e-435a-b7a5-153ce2b57c18&groupId=10227> accessed September 2013

[99] See question 6

[100] Loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie

[101] Named after Philippe Moureaux, the Minister of Justice of the time

[102] Both the Antiracism Act and Antidiscrimination Act prohibit incitement to hatred, however the Antiracism Act also prohibits the dissemination of ideas of racial superiority/hatred – see question 1

[103] Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination

[104] Loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes

The first judgment to address this issue was a judgment of the Belgian Court of Cassation of 1993. In this case, the Court of Cassation held that no special intent is required for incitement to hatred, and that the opposite would amount to the addition of a condition not required by the law[105] (which would be contrary to the strict interpretation of criminal law[106]). However, a decade later, in 2004, the opposite conclusion was reached by the Belgian Constitutional Court in the context of a request for annulment of the Belgian anti-racism law of the time.

In its judgment 157/2004, the Belgian Constitutional Court held that a dolus specialis is required for being convicted of "incitement to hatred" [107]. The Court declared that it appears from the preparatory work of the Belgian Senate that "incitement to hatred" requires a special intent. According to the Court, because of the scope given to the terms incitement, discrimination, hatred and violence, the offence cannot be presumed solely on ground of the existence of the actus reus. It requires specific mental element implied by the terms used by the law. The Court also specified that jokes, cartoons, opinions and pamphlets lack this special intent. In this important judgment, the Belgian Constitutional Court also provided an interpretation of the term "incitement" and "hatred". The Court stated that the term "incitement"

"indicates by itself that the criminal acts go beyond what is information, idea or criticism. The word "incitement" in its common sense, means "to push someone to do something". There can be incitement only if the words or writings disseminated under the conditions described in Article 444 of the Penal Code include encouragement, exhortation or incitement to discrimination. The incitement to treat them differently shall be punishable only if the difference in treatment lacks any objective and reasonable justification".

"Discrimination", "hatred" and "violence" are, according to the Constitutional Court, three different degree of a same conduct. The Constitutional Court reiterated this interpretation a few years later in a judgment ruling on a request for annulment against the law 10 May 2007 against certain acts of discrimination[108].

Regarding the notion of "intimidation", Belgium implemented in its domestic law the EU discrimination law and protection against harassment and extended it to the entire scope of the Anti-discrimination and Anti-racism Acts. The provisions against harassment require the violation of the dignity of one or more concrete persons, and not of an abstract group such as women or men in general, which is in line with the texts of the various EU Directives indicating clearly that it is not intended to cover impersonal types of defamation[109].

However, in 2007, the Brussels' Court of Commerce banned a sexist commercial for violating the Antidiscrimination Act and qualified the commercial expression as harassment on the ground of sex, as well as public incitement to hatred, discrimination and violence. In this case, there was no violation of the dignity of concrete persons. The Court of Commerce clearly misapplied the

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105 Cass 19 May 1993, *J.T.*, 1993, 573-577

106 Franklin Kuty, *Principes généraux du droit pénal belge, I. La loi pénale* (Larcier, 2007) 171

107 Constitutional Court 6 October 2004, n° 157/2004, B.51 (Request for annulment of the law of 25 February 2003 on the fight against discrimination - This law was amended by the law of 30 May 2007)

108 Constitutional Court 12 February 2009, n° 17/2009

109 Jogchum Vrielink and Stefan Sottiaux, "Banning Sexism: How Harassment Law may Threaten Freedom of Expression and Undermines Antidiscrimination Policies" [2008] IJDL 263

harassment provision by extending it to violation of the dignity of an abstract group, and not limiting the application of the provision to cases of violation of one or more concrete persons, as required by the law[110]. Moreover, the Court's approach for the application of the incitement provision is also problematic. As explained above, the Belgian Constitutional Court expressly determined in its 2004 ruling that "incitement" requires a special intent and excludes mere negative attitudes or feelings from the realm of the hate speech provisions. None of these requirements was shown by the Court of Commerce.

Despite the very clear interpretation developed by the Belgian Constitutional Court, the Court of Commerce and more recently the Criminal Court of Bruges[111] did not follow the restrictive interpretation given to "incitement to hatred" by the Constitutional Court[112]. This demonstrates that Belgian courts are currently not consistent in their application of the Belgian antidiscrimination legislation. Although there is no system of binding precedent in Belgium, this inconsistency and extremely broad application of the Belgian antidiscrimination legislation is an important flaw of the Belgian jurisprudence, and may result in potential unnecessary convictions.

11 Comparative analysis

Question 11: Comparative analysis: How has the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS 189) been transposed into the domestic law of Council of Europe member States? (by Emmanuelle)

For once, Belgium does not honor its title of good pupil. Although usually highly active in the field of human rights, Belgium has not yet ratified the Additional Protocol concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems.

In August, the Collège des procureurs généraux[113], an organ of the judiciary responsible for the development and coordination of criminal policy, issued a circular on research policy and prosecution of cases of discrimination and hate crimes and stated that the fight against cyber-hate is now a priority for justice[114].

In Belgium, the term "Cyberhate" relates to "expressions of hatred (bullying, insulting, discriminatory remarks) on the Internet against people because of their skin color, their alleged race, origin, gender, sexual orientation, religious or philosophical beliefs, disability, illness, age ."

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110 Jogchum Vrielink and Stefan Sottiaux, "Banning Sexism: How Harassment Law may Threaten Freedom of Expression and Undermines Antidiscrimination Policies" [2008] IJDL 263, 265

111 Criminal Court of Bruges 11 April 2013

112 Jogchum Vrielink, 'Islamophobia' and the law: Belgian hate speech legislation speech and the wilful destruction of the Koran' [2013] IJDL

113 The College of Attorneys General is responsible for the development and coordination of criminal policy.

114 CIRCULAIRE COMMUNE N° COL 13/2013 DU MINISTRE DE LA JUSTICE, DU MINISTRE DE L'INTÉRIEUR, ET DU COLLÈGE DES PROCUREURS GÉNÉRAUX PRÈS LES COURS D'APPEL 2013 s III(8))(d)), http://www.om-mp.be/extern/getfile.php?p_name=4499864.PDF

It may also include anti-Semitism and Holocaust denial.115 Once again, only speech that incites others to hatred, violence or discrimination based on legally protected criteria constitute a punishable offence.

Although a "bad pupil" regarding the ratification and correct implementation of the additional protocol, Belgium provides a great range of means to report acts of racism and xenophobia committed through computer systems.[116]

Both the Internet Crime division of the Federal Police (Federal Computer Crime Unit) and the Centre for Equal Opportunities and the Fight against Racism created hotlines through which any victim or witness of a racist or anti-Semitic crime can report the offense[117]. This also applies to offences committed through computer system.

During the infamous Dutroux case[118], the police set up an antenna from which both Internet service providers and people can communicate illegal content. Although this antenna was initially created to the fight against child pornography, his scope has been extended to all possible forms of illicit activities, therefore also including racism and discrimination.

The service of fight against computer crime of the federal police, the Federal Computer Crime Unit[119] will conduct an investigation and support report the problem to the judicial authorities if necessary.

The Belgian constitutional system/law[120] has established a system known as "cascading responsibilities" for press offenses committed through the internet. Internet service providers can only be held responsible for racist content on their servers when the authors are unidentified, or if they are located outside Belgium. The Act of 11 March 2003 on certain legal aspects of information society defines responsibility and hosting providers. As a result of this "cascading responsibility", there is always a responsible for press offenses. The first responsible is the author of the offence, provided that he is identified and resides in Belgium, second to liability is the editor and printer, and finally the disseminator. This indirect responsibility has lead

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115 Centre pour l'égalité des chances et la lutte contre le racisme, 'racisme et discrimination sur internet. De quoi s'agit-il? Comment réagir? Informations et conseils pratiques.' [Octobre 2009] DELETE CYBERHATE, 9, http://www.diversite.be/diversiteit/files/File//brochures/CGKR_cyberhate_FR.pdf

116 Centre pour l'égalité des chances et la lutte contre le racisme, 'La lutte contre le discours de la haine sur internet.' [2004] La lutte contre la propagande raciste, xénophobe et antisémite sur internet. 4, 6. http://www.saferinternet.be/games/matmonblog/fr/telechargement/Egalite_dossier_pedag.pdf

117 See on that matter question 5

118 Marc Dutroux is a Belgian serial killer and child molester, convicted of having kidnapped, tortured andsexually abused six girls during 1995 to 1996, ranging in age from 8 to 19, four of whom he murdered.

119 (FCCU - www.ecops.be)

120 Constitution Article 25: " The press is free; censorship shall never be established, no bond shall be required from authors, publishers or printers. When the author is identified and reside in Belgium, publisher, printer or distributor shall not be prosecuted. "

ISPs to take several measures to protect themselves from this potential responsibility. This fear of being prosecuted might be threatening for freedom of speech on the internet.

The Centre for Equal Opportunities and the Fight against Racism is also member of the international network INACH (www.inach.net), a network of organizations from different countries (Netherlands, Germany, France. etc..) fighting hate speech on the internet by means of legal measures, training and monitoring.

The Centre has also the possibility to bring proceedings before the criminal court of 1st instance in order to further investigate the case. In cases of racist and xenophobic content, the Centre may also engage in civil proceedings. In cases where the required evidence are available and no further investigation is necessary, it is possible to directly issue a summons to the accused persons. Such proceeding is useful in cases where the Centre would like to delete quickly illegal content on internet. In two recent judgments, the Court of Cassation has gone for an evolutive interpretation of "press offence" of the Article 150 of the Belgian Constitution, and has therefore widened the competence of the Belgian Cour d'Assises (highest court for criminal cases) to internet content.

Consequently, the Centre is deprived of its competence in cases of hate speech in the internet. However, there is an important exception to the scope of Article 150, namely racist and xenophobic content of speech, which can both still be subject to proceedings by the Center for Equal Opportunities and the Fight against Racism.

In conclusion, if you have been confronted to cyber hate, on a website, a blog, a forum or on a chain e-mail, you can report it to the Federal Computer Crime Unit of the Federal Police (www.ecops.be) or to the Centre for Equal Opportunities and Opposition to Racism (www.cyberhate.be) who will establish contact with the host or, ultimately, investigate on the ISP. The Centre always refers to the relevant terms of use and/or legislation, and put an emphasis on dialogue and mediation in its action.

It should also be noted that the ISPA, the Belgian association of the Internet Service Providers, has developed a memorandum of cooperation with the Ministry of Communications[121] and the Ministry of Justice. In this memorandum, SPA recognizes the central role played by the ISPs in the fight against illegal content and reaffirms its commitment to cooperate with the judicial authorities in investigations of cyber crimes.

[121] Political Intelligence SPRL., 'Belgian Internet Service Providers Association, Home » What we do » Memorandum pour le gouvernement fédéral.' (ISPA) <http://www.ispa.be/> accessed 18.10.2013

ELSA Bulgaria

National Researchers

Veronika Andreeva

Desislava Ivanova

Nayden Trifonov

Zornitsa Dimitrova

Irena Tcholakova

Academic Adviser

Ivan Stoynev

National Coordinator

Irena Tcholakova

1. National definition of Hate Speech

International law and regulation has not yet accepted an outright definition of "Hate speech" although this term is used often in the Anti-discrimination law. Recommendation 97(20) of the Council of Europe's Committee of Ministers includes a number of principles concerning hate speech spread through the media, as well as a working definition:

Hate speech should be understood as covering all forms of expression which spread, incite, promote or justify racial hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.

Bulgaria has been a Member State of the Council of Europe since 7th May 1992 ratifing the European Convention on Human Rights (hereinafter the Convention or ECHR) on 7th September 1992. Apart from that, the state has signed a number of international treaties and conventions, including The International Covenant on Civil and Political Rights, The International Covenant on Economic, The Social and Cultural Rights, The International Convention on the Elimination of All Forms of Racial Discrimination, as well as The Convention on Cybercrime. The Constitution of the Republic of Bulgaria in Article 5 reads:

> International treaties which have been ratified in accordance with the constitutional procedure, promulgated and having come into force with respect to the Republic of Bulgaria, shall be part of the legislation of the State. They shall have primacy over any conflicting provision of the domestic legislation.

Thus, national provisions on human rights seek to ensure compliance with the legal framework, established in the international acts/deeds, treaties/ signed by the Bulgarian government.

The Bulgarian Constitution observes/presents, reviews/ human rights emphasizing that all persons are born free and equal in dignity and rights (Article 6). The national Act on the Religious Confessions promotes the right of freedom of religion, as well as tolerance and respect between believers from different religions and between believers and non-believers. The statue proscribes any discrimination based on religion.

The Bulgarian Protection Against Discrimination Act entered into force on 1th January 2004. The Act regulates the protection against all forms of discrimination against individuals and legal entities (regarding their members or employees) based on sex, race, nationality, ethnic origin, citizenship, origin, religion or belief, education, opinions, political affiliation, personal or public status, disability, age, sexual orientation, marital status, property status, etc.[1] and contributes to its prevention. In accordance with the law a pioneering independent specialized state body for prevention of discrimination was established. The Commission for protection against discrimination seeks to combat and prevent any discriminatory practices, and to impose

[1] Protection Against Discrimination Act Art.4 para 1

sanctions and enforce administrative compulsory measures. The act in Article 9 prescribes that 'after a party, claiming to be a victim of discrimination, proves facts, sustaining the assumption of occurred discrimination, the defendant party must prove that the right to equal treatment has not been infringed' meaning that the burden of proof in the proceedings for protection against discrimination is carried by both parties in a trial.

Further, the Act prohibits instigation to discrimination and racial segregation considering them types of discrimination. Legal definitions of both terms are provided in the Additional provisions of this act. Instigation to discrimination shall be understood as 'direct and purposeful encouragement, instruction, exertion of pressure or prevailing upon someone to discriminate when the instigator is in a position to influence the instigated'[2]. Whereas racial segregation is 'issuing of an act, the performing of an actionor omission, which leads to compulsory separation, differentiation or dissociation of persons based on their race, ethnicity or skin colour'[3]. Thus, we can draw the conclusion that the Bulgarian national legislation accepts the aforementioned forms of discrimination as acts.

According to the Bulgarian law hate speech is a form of direct discriminatory behaviour.[4] Direct discrimination is any less favourable treatment of a person than another person would be treated under comparable circumstances. This unfavourable treatment could be any 'act, action or inaction, which directly or indirectly infringes human rights or legal interests.'[5]

In accordance with The European Commission against Racism and Intolerance (ECRI) Bulgarian Criminal Code in its Chapter Three entitled „*Crimes against the rights of the citizens*" regulates crimes against national and racial equality (Article 162; 163) [6] and crimes against religious denominations (Article 164,165,166)[7]. The law constrains any dissemination of racial and religious hatred, discrimination or violence by the means of speech, mass media and electronic information systems. The Criminal Code recognizes two forms of spreading discriminatory ideas and sets forth provisions, procedures and penal sanctions, which seek to ensure that no expression should propagate or instigate (abet) to discrimination, violence or hatred.

Propagating discrimination 'is a public act of convincing indeterminate circle of third parties in a notion'[8]. Hate speech act is committed with its expression regardless of the effect on

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[2] Protection Against Discrimination Act Additional provision Art. 1 para 5

[3] Protection Against Discrimination Act Additional provision, Art. 1 para 6

[4],Iva Pushkarova "Instigation to discrimination and hate speech" in *Antidiscrimination law. Civil law aspects* p.173

[5] Protection against discrimination Act Additional provisions Art. 1 para7

[6] Bulgarian Criminal Code Art.162 para 1 "An individual who through speech, press, mass media, electronic information systems or through the use of another means propagates or abets to discrimination, violence or hatred on the grounds of race, nationality or ethnic origin is subjected to a penalty of imprisonment for a term up to four years, a fine from five to ten thousand BGN and public execration."

[7] Bulgarian Criminal Code Art.164 para 1 "An individual who propagates hatred on religious basis through speech, the press or other mass media devices, through electronic information systems or by the use of another means, is subjected to a penalty of imprisonment for a term of up to four years or probation and a fine from five to ten thousand BGN."

[8] Iva Pushkarova , „Hate speech"in *Antidiscrimination law. Criminal law aspects* p. 103)

third parties. The author is acting with malice aforethought due to the fact that he intends to 'spread, incite, promote or justify hatred based on intolerance'[9].

The Criminal Code criminalizes any act of a perpetrator, who abets to discrimination, hatred and violence. The author of hate expressions in this case aims not only to incite religious and racial hatred but to encourage criminal offence on discriminatory grounds. Hate speech as an act of violation of human rights leads to formation of racial, sexual or cultural stereotypes, which on the other hand, is a premise for performance of ‚a wrongful act done intentionally without just cause and excuse'[10].

The Bulgarian Criminal Code identifies three new forms of hate speech: justification, denial and negationism of committed crimes against peace and humanity (Article 419a).

In conclusion, hate speech is an act of expressing ideas, which 'spread, incite, promote or justify' racial and religious hatred. Although certain parameters of this term have been set by The European Court of Human Rights, there is no agreed definition. The provisions of the Bulgarian law stand up for the idea that hate speech is an act and not only an opinion.

2. Contextual elements of Hate Speech

Hate speech can be hard to distinguish at first sight. It can be well-covered under sound and reasonable points, but having a meaning that excludes it from the protection of the right to freedom of expression. One of the greatest challenges the Court meets is the constant reconciliation between the conflicting rights to freedom of expression under the provision of Article 10 of the ECHR and the prohibition of abuse of rights guaranteed by Article 17 of the Convention.

The right to freedom of expression is a core value in every democratic and pluralistic society. It includes the right to 'express an opinion or to publicize it through words, written or oral, sound or image, or in any other way'[11] as well as the right to 'seek, obtain and disseminate information'[12]. The right to freedom of speech is not an absolute right in any country and often is a subject of limitations[13]. Hate speech bans define certain boundaries which should not be overstepped in order to ensure the social well-being. At the same time, hate speech bans are highly controversial due to the fact that every state has its own national peculiarities and no universal remedy for hate speech exists.

The European Court of Human Rights in its case-law has set out criteria by which hate speech can be differentiated from any kind of expression, which intends to 'offend, shock and disturb'[14]. Among them as most important for the Court are the aim (intention); content of the expression; status of the applicant and the target group of the speech, as well as the potential impact of the expression.

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[9] Gündüz v. Turkey No. 35071/97 (ECHR 2003-XI) para 40
[10] Bromage v Prosser (1825) 4B&C 247, 107 ER 1051
[11] The Constitution of Republic of Bulgaria (1991) Art. 39 para 1
[12] The Constitution of Republic of Bulgaria (1991) Art. 41 para 1
[13] Simona Veleva , *Freedom of speech in Europe and the United States. A comparative analysis of legislation protecting freedom of speech and media* (Sofia University „St. Kliment Ohridski", 2012)
[14] Handyside v. the United Kingdom App no 5493/72 (ECtHR 7/12/1976)

Firstly, the aim persued by the perpetrator is one of the key contectual elements of hate speech. Anna Weber points out:

> The fundamental question the Court asks is whether the applicant intended to disseminate racist ideas and opinions through the use of "hate speech" or whether he was trying to inform the public on a public interest matter. The answer to this question should enable to distinguish between forms of expressions, which, although shocking or offensive,are under the protection by Article 10, and expressions, which cannot not be tolerated in a democratic society[15].

Any form of expression which intends to disseminate widely religious intolerance, racial or sexual orientation, fanatism, of violence or negationism is not compatible with the principles of a democratic society and should be condemned as hate speech. The animus (intention) of a perpetrator is usually hard to identify due to its link to the individual value judgement which includes different preceptions and opinions, as well as the cultural conditions in every country.

Another criterion The Court bases its decisions on is the status of the applicant. The impact of any statement or act of a public (political, social or cultural) figure, inciting hate speech is usually greater than of a private individual and could lead to a wave of violence and intolerance. The Court states that politicains should avoid expressions which are likely to foster intolerance[16].

Online communication engages immense number of people with different backgrounds in a battle of ideas. This competition of viewpoints represents the high aspirations that stand behind the meaning of article 10 of ECHR. But if the focus of an online conversation shifts, free expression no longer stays constructive, but seeks to deliberately harm a group of people on discriminatory grounds.

Online identification of hate speech is even more complicated to identify. One of the front questions is how to identify an individual who is using an Internet persona in websites and social networks. Usually, the author of ideas disseminating hatred and violence stays anonymous or hides their identity under a pseudonym. Considering this, and the fact that the Internet provides people with a wide range of opportunities to express freely their beliefs increases the potential impact of hate speech. Another great question, which later on should be discussed, is where hate speech is committed (in the place of performance of the offence; where hate speech message was recieved or where the server is found). This gives rise of the next question by which national provisions hate speech should be sanctioned.

The Internet is a boarderless battlefield of beliefs where everyone could become addressee to openly hostile messages on sensitive racial and religious topics. The form and context of online hate speech are cruical for understaning its potential impact. Members of hate groups from all over the world participate in Internet conversations encouraging discrimination and suppression. The potential impact that online hate speech has is greater due to the fact that communication is live, happening in real time. Struggles identifing the perpetrator increases the

[15] Weber Anna, *Manual on hate speech* (Council of Europe Publishing, September 2009) p. 33
[16] Erbakan v. Turkey App no 59405/00 (ECHR 06 July 2006) para 64

roughness of the speech and so begins the vicious circle of no-face conversation which can trigger hate crimes.

3. Alternative methods of tackling Hate Speech

Article 10 of the European Convention of Human Rights proclaims the Freedom of Expression and it grants the right to freedom of expression to everyone. Many could argue that they are entitled to hate speech due to the fact that it is their right to freely express all different kinds of believes, ideas and concepts to unlimited number of people. Yet, still in the second paragraph of the Article 10, this freedom is limited when it contradicts with the postulates of democratic society, the national security of a country, its public safety and the protection of health and moral, rights and reputation of others.

Where are the boundaries of freedom of expression and to what extend it can be used as a justification of hate speech is a question that bothers also the Bulgarian jurisprudence. The freedom of expression is proclaimed in the Bulgarian Constitution under Article 39. It is, however, put in certain boundaries with the second paragraph of Article 39, according to which the freedom of expression shall not be exercised for violation of the rights and good reputation of other members of society, neither can be exercised in order to agitate towards change of the constitutional order or towards performance of crimes and initiation of conflict or violence. Even though Article 39 was often used as a justification for hate speech. To avoid any further disputes on the topic and to minimize the speculations around it, the Constitutional Court issued a Decision, where the boundaries of freedom of expression are outlined clearly and in relation to the European Convention on Human Rights and to the International Pact on Human and Political Rights. The Constitutional Court states that the freedom of expression is one of the fundamental principles of a democratic society. The freedom of expression shall be considered not only when it comes to information and ideas with positive outcome, but also when it comes to those ideas that are considered to be insulting or shocking[17]. Yet, the boundaries of freedom of expression are put in relation to other fundamental human rights, which without any doubt shall not be violated. These are the rights of a free choice of religion, faith or atheistic visions, freedom of conscious and thought. The equality principle according to the Constitutional Court shall also be observed. That is why, 'initiation of conflict and violence shall be interpreted as any kind of expression (speech) that is negatively directed towards the interest of specific social groups. Such expression comes in contradiction with the principle of tolerance, which has priority over the freedom of expression[18]. With this Decision, the court practice and jurisprudence clarified the boundaries of freedom of expression, leaving no space for arguing that the right to free expression in violated if hate speech is sanctioned.

However, there are still some isolated cases where decisions of the Commission for Protection Against Discrimination and of the Bulgarian courts, where hate speech is not sanctioned due to fragmentary interpretation and misinterpretation of phrases and speeches, which taken out of the context cannot be understand correctly. Such misinterpretation, made on

[17] 7/1996 of the Constitutional Court of Republic of Bulgarian on case 1/1996

[18] Iva Pushkarova "Hate Speech" in Antidiscrimination law. Criminal law aspects p. 100

purpose by the decision body that leads to wrong conclusion of the decision body is considered to be an act in favor of hate speech which is totally unacceptable[19].

4. Distinction between blasphemy and Hate Speech based on religion

Blasphemy is an act of great disrespect or insult to God or holy personages, religious relics etc. In most European countries (including Bulgaria) blasphemy is not incriminated, except Austria, Denmark, Italy, Greece, Poland and the Netherlands where blasphemy laws exist but are largely inapplicable. Owing to the principle of separation between the government and religious institutions (also known as secularism) European democracies rarely penalize blasphemy. Even if such provisions are included, they stay to a great extent dead letter in the national legislation. To the contarary, countries where the government and religious institutions are close (most countries which belong to the Sharia legal system) prohibit blasphemy due to the understanding that any irreverence for religion is defamation of the country.

In its Recommendation on Blasphemy, religious insults and hate speech against persons on grounds of their religion, the Parliamentary Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. A distinction should be made between matters relating to moral conscience and those relating to what is lawful, matters which belong to the public domain, and those which belong to the private sphere.

Later, the text of the Recommendation reads as follows: 'hate speech against persons, whether on religious grounds or otherwise, should be penalised by law'[20].

What is the difference between blasphemy and hate speech based on religious matters? Blasphemy aims to ridicule a religion and its holy personages. In most European countries blasphemy is not incriminated by law. This does not exclude the possibility of religious societies to 'penalize in a religious sense any religious offences' but they should not 'threaten the life, physical integrity, liberty or property of an individual, or women's civil and fundamental rights'[21].

On the other hand, religious hate speech targets a person or group of people who belong to the same religious community. Article 9 of the European Convention on Human Rights (ECHR) stipulates that everyone has the right to freedom of thought, conscience and religion. 'While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares'[22]. European democracies considering the freedom to religion as one of the fundamental human rights have adopted legislation which seeks to constrain from any infringement of this freedom.

The major difference between blasphemy and hate speech could be found in their subject. Hate speech aims to denigrate an individual or group of people who have the same cultural, religious or ethnic background while blasphemy intends to vilify a religion and its deities. Racial and religious matters are usually subjective and sensitive topic especially in

[19] Iva Pushkarova "Instigation to Discrimination and hate speech " in *Antidiscrimination law. Civil law aspects* p.190

[20] Parliamentary Assembly, Recommendation 1805 (2007) Blasphemy, religious insults and hate speech against persons on grounds of their religion , para 12

[21] Parliamentary Assembly, Recommendation 1805 (2007) Blasphemy, religious insults and hate speech against persons on grounds of their religion

[22] Hasan and Chaush v. Bulgaria App no 30985/96 (ECtHR, 26 October 2000) para 60

multicultural societies. Thus, even if statements or acts are offensive to members of a religious group but they do not incite intolerance or hatred (based on characteristics of that group), they are not considered hate speech.

In Bulgaria, as previously mentioned, blasphemy is not punishable by law. The Constitution of the Republic of Bulgaria states that denominations are free and religious institutions are separate from the State.[23] The Act on religious confessions regulates the right to religion and its protection as well as the legal status of the religious communities and institutions and their relations with the state.[24] The statute specifies that the state religion is the Eastern Orthodox and bans any use of religious communities, institutions and beliefs for political purposes.

In conclusion, blasphemy and hate speech differ from each other in their subject. A few European countries include blasphemy in their penal codes. The Parliamentary Assembly recommends that national provisions 'are reviewed in order to decriminalise blasphemy as an insult to a religion'[25]. At the same time, states should 'penalise statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on grounds of their religion as on any other grounds'[26].

5. Networking sites and the issue of online anonymity

Internet has been part of our lives for over 20 years. It all started in 1989. The World Wide Web was invented. People all over the globe received an opportunity to communicate with each other beyond any borders, sharing information and ideas very easily. But not everything that is being shared on the internet is beneficial for mankind. Some of the proclaimed ideas are not only mean, but full of hatred and could even lead to crimes committed through the internet. Online anonymity is a factor that often contributes to people escaping penalty they deserve. Dynamic technologies that we all consider to be the biggest priority of the 21st century, make it even harder, if not impossible to reveal someone's real identity. Meanwhile, hate speech is spread and promoted easily around the globe by means of numerous websites.

To the question 'Should networking sites be legally forced to reveal identities of persons…' most people would answer undoubtedly with 'Yes'. But would that be enough to punish the perpetrator, if there is no law violated in the country and how do we know which is the country?

We could illustrate the problem of criminalization of online hate speech and online anonymity in addition with just a simple example - a person who incites racial hatred and discrimination lives in Europe, the internet service provider is registered in the United States and the victim lives somewhere in Asia. And here is the same question again - Is it possible for the victim to protect their rights, if their country of living has not adopted law or regulations which allow this. Moreover, where is the crime committed – in the country where the message is being sent or on the territory where it has been received?

[23] The Constitution of Republic of Bulgaria (1991) Art. 13
[24] Act on Denominations Art. 1
[25] Parliamentary Assembly, Recommendation 1805 (2007) Blasphemy, religious insults and hate speech against persons on grounds of their religion para 17.2.4.
[26] Parliamentary Assembly, Recommendation 1805 (2007) Blasphemy, religious insults and hate speech against persons on grounds of their religion para 17.2.2.

According to principle 6 of Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate speech" an author is responsible for expressions of hate speech, but media, on the other hand, is responsible for distributing any information and ideas that could be treated as hate speech and both should be distinguished clearly by every Member State in their national law:

> To this end, national law and practice should distinguish clearly between the responsibility of the author of expressions of hate speech, on the one hand, and any responsibility of the media and media professionals contributing to their dissemination as part of their mission to communicate information and ideas on matters of public interest on the other hand.

Principle 2 of the Recommendation states that the governments of the Member States shall adopt acts of law or establish a framework consisting of civil, criminal and administrative law provisions on hate speech that give the administrative and judicial authorities the power and criteria to harmonize freedom of expression adopted by the Convention on Human Rights and Fundamental Freedoms and protection of rights of others in each case. However, acts of hate speech are not punishable under the criminal law of every member of the EU and this creates certain practical difficulties.

Some European countries have adopted Codes banning hate speech and which is more important – they have established associations that have the authority to enforce these codes. For instance, the Code of Practice of ISPA of the United Kingdom states that British ISPs 'shall use their reasonable endeavors to ensure… service and promotional material do not contain material inciting violence, sadism, cruelty or racial hatred.'[27]

On the contrary, in the United States, it is in the power of every ISP to make its own decision as to whether or not to host and support sites of this type. Some internet providers ban speech that is unprotected by the First Amendment of the Constitution, but they do this on their own discretion, legally they can not be forced to do such thing. Moreover, concerning screening of offensive material the CDA states that 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'[28], i.e. providers can not be held criminally liable for the speech of their users.

In general, the decision weather or not to oblige websites to reveal someone's identity as well as the responsibility of prosecuting and punishing the author of the speech remains with governments of each country and laws/regulations they vote on.

According to Article 250 of the Bulgarian Electronic Communications Act determines that providers of electronic communication networks can collect, process and use personal data. They can only store this information for 12 months and in case it is needed for 'tracking and identifying the source of the link…or identifying the electronic communication device of the user'.[29] This information can be submitted upon request of another country provided that there is an agreement between the two countries. Article 261 of ECA determines a supervising authority – a body responsible for controlling the process of collecting and storing personal data

[27] Code of Practice of the Internet Service Providers Association 1999, Art. 2.3
[28] Communications Decency Act 1996, s.230
[29] Electronic Communications Act 2007 Art.250a, para1

information – the Commission for Personal Data Protection. Article 331 of ECA determines a penalty fine for not submitting the information described in Article 250a upon request.

According to PDPA adopted by Bulgarian government personal data may be processed only in cases when at least one of the following conditions is met, namely:

> 1. processing is necessary for the execution of an obligation of the personal data controller, stipulated by law…
>
> 2. the individual to whom such data refer has given his/her explicit consent;…4. processing is necessary in order to protect the life and health of the individual to whom such data refer;… 7. processing is necessary for the execution of the legitimate interests of the personal data controller or a third party to whom the data are disclosed, except where such interests have priority over the interests of the individual to whom such data refer.[30]

When personal data have not been collected from the individual to whom they refer, the data controller or its representative shall provide them with an explanation of the purposes for which the data are being processed except when disclosure of data is explicitly provided by law. Article 36d of PDPA allows personal data received under Art.1, para 6 in accordance with the requirements of Art.2, para 3 to be further processed 'only for the purposes of prevention or detection of crimes, conduct of penal proceedings or execution of criminal penalties…'. Article 36f, para 1 states that:

> Any controller receiving data under Art.1, para 6 may provide them to a third country competent authority or an international body, only if … it is necessary for the prevention or the detection of a crime, the conduct of penal proceedings or the execution of criminal penalties;…

Most important-this Act provides preventive functions: Article 36h establishes the obligation of a controller to reveal someone's identity by providing their personal data received under Art. 1, para to third individual or legal person if:

> the provision is essential for…the prevention or detection of crimes, conduct of penal proceedings or the execution of criminal penalties, the prevention of an immediate and serious threat to the public order; or the prevention of serious harm to the individual's constitutional rights.

Bulgarian CPC[31] states in Section 5 – "Searches and seizures" Art.159 that:

> Obligation to hand over objects, papers, computerized data, data about subscribers to computer information service and traffic data. Upon request of the court or the bodies of pre-trial proceedings, all institutions, legal persons, officials and citizens shall be obligated to preserve and hand over all objects, papers, computerized data, including traffic data, that may be of significance to the case.

On other side Article 160, para 1 states that:

[30] Personal Data Protection Act 2002

[31] Bulgarian Criminal Procedure Code 2006

> There should be sufficient reasons to assume that in certain premises or on certain reasons objects, papers, computerized information systems containing computerized data may be found, which may be of significance to the ease, searches shall be conducted for their discovery and seizure.

Article 161 determines bodies that can make the decision on searches and seizures – that could be done only by a 'judge from the respective first instance court or a judge from the first-instance court in the area of which the action is taken, upon request of the prosecutor.'

Article 172 para 3 establishes the obligations of Computer information service providers to give assistance 'to the court and pre-trial authorities in the collection and recording of computerized data through the use of special technical devices only where this is required for the purposes of detecting crimes under paragraph 2'. The act of 'propagating or abetting to racial or national hostility or hatred or to racial discrimination…' as stated in Article 162, para 1 of Bulgarian Criminal Code is not included in the scope of Art. 172, para 3 of the above mentioned CPC since it is not among the crimes established in para 2 of the above mentioned Article of the same Code.

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

European convention on Human rights gives us a framework of fundamental rights and freedoms - for example "Freedom of thought, conscience and religion" (Art. 9), "Freedom of expression"(Art. 10) – both crucial for defining hate speech and results of using it as a crime. The ECHR has identified different forms of expression, inciting and promoting racial hatred, xenophobia, intolerance, discrimination and hostility against minorities and immigrants as offensive. All of them shall be treated as "hate speech". However there is no universally accepted definition of "hate speech". The Additional Protocol to the Convention on Cyber Crime and the ECHR's case-law give us certain elements which makes it possible to characterize "hate speech" and make an exclusion from freedom of expression (Art. 10) as well as from other fundamental rights established in the Convention.

The notion 'hatred' as one of two main elements means an extremely strong feeling of dislike. As for 'violence' – it consists of an action/actions and/or words that are meant to hurt the victim. In the context of hate speech violence is to be considered mainly as psychological. Simple meaning of these two words could lead us to the idea that hatred is an emotional state and is very likely to exist on its own, but it could also lead to an act of violence. However, the Additional Protocol in several of its articles gives these elements alternatively:

> racist and xenophobic material" means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence,…[32]

> …advocates, promotes or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available…[33]

[32] Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems 2003, c 1, Art. 2

[33] Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems 2003 . Art. 3

> require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin,…[34]

In the case of Feret v. Belgium[35], the applicant – a chairman of the political party 'Front National-National Front' was held responsible for the distribution of leaflets and posters his party made during the election's campaign. He was sentenced to community service. In connection with his application the ECHR observes that the leaflets were 'criminally-minded'[36] and 'also sought to make fun of the immigrants concerned, with the inevitable risk of arousing… feelings of distrust, rejection or even hatred towards foreigners.'[37] The word violence, however is not mentioned anywhere in the court's decision which means that at least one and not necessary both of the notions should be present in the case.

Another example of the use of only one of both terms can be found in the case of Pavel Ivanov v. Russia.[38] An owner of a newspaper was convicted of promoting 'ethnic, racial and religious hatred through the use of mass-media'[39]. The ECHR agrees with the domestic court, confirming that the applicant has managed to incite 'hatred towards Jewish people'[40] through his publications. Thus the court finds the application ill-founded under Article 10.

In the case of Garaudy v. France[41] the applicant - Mr. Garaudy was found guilty of '…incitement to discrimination and racial hatred.'[42] (against Jewish community) by the Paris court of Appeal. The ECHR states that the applicant could not rely on Article 10, because of his acts, violating fundamental rights established by the Convention.

The US Supreme court has adopted the doctrine 'clear and present danger'. It is used as a measure in cases concerning hate speech and not only. In the case of Brandenburg v. Ohio[43] (concerning the issue of violation of the right to freedom speech) the court states that exercising free speech should not incite 'imminent lawless action'[44] as well as not to be 'likely to incite or produce such action'[45]. If the speech does fall into the scope of this doctrine it could not be protected under the First Amendment of US Constitution. Another example of applying the "clear and present danger" can be found in the case of Craig v. Harney[46] (concerning the publication in a newspaper of news articles, which reported events in a case pending in a state court), in which the court states that, the article did not 'constitute a clear and present danger to

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[34] Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems 2003 Art. 6
[35] App no 15615/07 (ECtHR, 16 July 2009)
[36] Feret v Belgium App no 15615/07 (ECHR, 16 July 2009)
[37] Feret v Belgium App no 15615/07 (ECHR, 16 July 2009)
[38] App no 35222/04 (ECtHR, 20 Feb 2007)
[39] Pavel Ivanov v Russia App no 35222/04 (ECHR, 20 Feb 2007)
[40] Pavel Ivanov v Russia App no 35222/04 (ECHR, 20 Feb 2007)
[41] App no 65831/01 (ECtHR, 07 July 2003)
[42] Garaudy v France App no 65831/01 (ECHR, 07 July 2003)
[43] 395 US 444 (1969)
[44] 395 US 444 (1969)
[45] 395 US 444 (1969)
[46] 331 US 367 (1947)

the administration of justice, and the conviction of the newspapermen for contempt violated the freedom of the press guaranteed'.[47]

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

There is a difference between the interpretation of freedom of expression under Article 10 of the European Convention on human rights and violations of individual rights by using abusive language. In most cases, the Court gives prominence to Article 17 of the European Convention on Human Rights, which prohibits a person or group of people to engage in acts violating the rights listed in the Convention. It is the prohition of the expression that can lead to agrgressive behaviour and endangering the lives and rights of another human being

In the case of Glimmerveen and Hagenbeek v the Netherlands[48] the Court relies on Article 17 to exclude the application of Article 10 in its entirety. The Court noted:

> The applicants essentially want to use Article 10 as under the Convention on the right to engage in these activities, which, as shown above, contrary to the letter and spirit of the Convention, which right, if given, would contribute to violation of the rights and freedoms mentioned above. Therefore The Commission finds that the applicants cannot, under provisions of Article 17, to rely on Article 10.

In this case, the applicants were convicted of possession and distribution of materials calling all people in the Netherlands who are not white to be expelled. The side taken by the Commission precludes speech proclaimed anti-Semitic sentiment to be protected by Art. 10 of the Convention.

From another perspective, a State can adopt a different approach in which Article 17 is most efficiently applied to Article 10 (2). The logic is that in this way you can determine when intervention is necessary in a society that rests on the foundations of democratic governance. Using this approach, the Court does not affect the interpretation of Article 10 (1) which states that everyone has the right of free expression as long as it does not cause offense or threat other's personal security.

In the case of Lehideux and Isorni v France[49] European Court of Justice determined that the conviction the applicants caused by the public defense of the war-criminals, induced protection under Article 10. This is due to the fact that the applicants do not deny the fact of the existence of the Holocaust. They cast doubt on the participation of one person in it.

Thus, there is a problem - how to determine whether the final speech or hate speech should be excluded from Article 10 through Article 17. The decision of the Court is in each and every case to focus on the context in which the ideas of the people involved in the process had been expressed.

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[47] 331 US 367 (1947)
[48] App no 8348/78 (ECtHR, 11 Oct 1979)
[49] App no 24662/94 (ECtHR, 23 Sep 1998)

However, another problem arises - precisely, the distinction between hate speech and speech that incites racial or religious hatred and violence. Hate speech and speeches that incite violence are not included in the protection under Article 10 (1). Reporting of such views and the possible effects they may have on others the Court decides to assess whether an intervention carried out by the state is justified and does not violate the rights under Article 10 (2), and not to limit the rights under Article 10 (1).

In the case of Gunduz v Turkey[50] (2003), the Court noted that:

> Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. Given by the principal considerations may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression Posts which spread, incite , express or justify hatred based on intolerance (including religious intolerance) , provided that any imposed"formalities ", 'conditions', 'restrictions' or 'penalties' are proportionate to the legitimate aim pursued. Along with this ... there can be no doubt that the specific statements representing hate speech that may be offensive to some individuals or groups, fall under the protection of Article 10 of the Convention.

The context in which individuals express their views needs to be monitored about the border between someone who spreads hostile ideas and did not make use of the protection of Article 10 (1) and the mass media, that by the coverage of this event can become a public defender . It is possible that a statement cannot be regarded as incitement to racial tension, if reflected in the mass media (radio, TV, print), known for his work on topics which are based on controversial opinions and viewpoints.

It could be argued that the rights, obligations and responsibilities under art. 10 (2) must be viewed with a certain cautiousness.The institutions which are responsible for the morale, the prevention of disorder, preservation of the territorial integrity should make a distinction between those who teach them and those who report them. However, the primary obligation of States under Article 10 is to refrain from unlawful interference in the execution of the right of citizens of freedom of expression. As long as it does not endanger national security, or not affect others. To keep the fine line between the proclamation of free expression and direct government intervention in the media and personal correspondence of citizens, Article 10 has a horizontal effect and applies to the actions of non-state structures and individuals. European Court of Justice requires action by the State, when the rights of a person are threatened by non-state structures, but if that does not happen, at least this to raise acts on interference on the ground of Article 10.

8. **Harmonisation of national legislation**

Proportionality is a leading principle laying down the methods according to which each legislative body shall execute its jurisdiction. When it comes to taking a decision about what the actions shall be, there must be an answer to the following question – Under what form and

[50] App no 35071/97 (ECtHR, 04 Dec 2003)

nature shall the actions of the respective body be? For instance for the EU in art.5 from Treaty on European Union the content and the form of each and every action has been stipulated accordingly to the needed actions, so that they shall not go beyond what is necessary in order to achieve the aims of the Treaties. Under any decision it shall be preferred the less restricted variant.

Whereas a proportional norm will be each one capable of complying with the requirements of: adequacy to the end, the least restrictive of the human rights among all the adequate ones that could be applied and finally proportional strict that is, it must keep the balance between the costs and the benefits that it causes.[51]

Taking into account the fact that the regulation and the control of the matter of freedom of speech on Internet is not part of either of the competences of the European Union, but in order to defend the core rights and freedoms of the citizens and the common principle of non-discrimination incorporated in each and every international deed, this freedom should be referred to the so called soft law, that should allow through "codes of conduct", "guidelines", "communications" etc. to arrange this subject to a certain extend. And later on the basis of this soft law practice and guidance EU should have the legal basis needed for determination and outlining of the issue of online hate speech and subsequently through stronger measures to initiate a gradually harmonization of the laws, for example through Directives in a field where a Common law legislation is compelling.

The harmonization of the national laws can be achieved by the means of additional recommendations and acts of the Council of Europe as well. In the written and later on adopted from the EU Convention on Cybercrime along with the Additional Protocol in which are incriminated the deeds with racialist and xenophobic character there can be found the basics of a future broadening the scope of its texts. Being a base this Convention should be a foundation of an additional Act that can guarantee the appropriate equilibrium between the interests of the enforcement actions and the esteem of the core human rights on Internet while executing them. Precisely because of this contradiction between executing one of the fundamental human rights – the freedom of expression and the protection of another one – non-impairment of the human dignity, in the broadest sense, it has to rely on practices proving the need of their objectifying existence that appears to be this Convention. The incorporated Art. 18 in the Convention that refers to the national legislations who should adopt such legislative and other measures as may be necessary to empower its competent authorities to order a person in its territory to submit specified computer data in that person's possession or control when a violation of a restrictions or defense of the human rights objectified in the Convention, shows the realized by the authorities indispensability of sanctions when a violation of a core human rights on the Internet, a fact that is correlative to the issue of online hate speech.

One of the main approach that soft law can offer is the technical standards that strenghten the Net. Such standards are set out in the requests for comments run by the Internet Engineering Task Force (IETF), that were emerged informally through discussions between various parties, but never turned into hard law by statutory definition. This unregulated situation

[51] From the selected works of Juan Cianciardo, October 2009, The principle of proportionality: its dimensions and limits.

is quite a peculiar taking into account the fact that nearly every other product or technology is presently defined in the law by formal regulation.

Soft law along with the adaptive governance is alternative ways of setting out a legal structure for the Internet and hate speech.

> "These include: systems of informal rules which may not be binding but have effect through a shared understanding of their benefits; adaptable law that is flexible and open to change with the development of knowledge; agreements that include both states and non-state actors, and involve both the citizen and business. Finally, soft law offers lessons on continuous learning in a changing environment, resulting in an evolving system of laws."[52]

The method of decentralization of law-making and permitting a new framework of laws to emerge, give a chance to the online service providers to take part in the whole process and also to develop their own systems of governance and standards of behavior. Having this as a practice will ensure that the legislation is in conformity with the needs of the online services as well with the needs of the already existing legislation. In this case law may develop from the bottom up, as users select the services, products and environment that match their own ethical and behavioral standards.

There is also an interesting approach of developing a mix of private and State rules and remedies which are independent and complementary. In terms of the law as experienced by the users of the Internet community, rules and remedies are often adopted on the basis of their suitability. The regulation executed by the State may be appropriate for the control of certain activities, the technical standards in other situations, and the private regulation where access to national courts or processes is impossible. The effectiveness of the private regulation will only come if it does not require enforcement through the national courts. Technical or architectural enforcement would be more effective. Technical control may be exercised by the state, but is often in the hands of the commercial organisations that design and develop the technologies we use. Software engineers will determine certain aspects of what can and cannot be done, or even what may be considered right or wrong. They will find ways to prevent file sharing, or illegal downloading, or other aspects of the online activities. The fact that blocking or filtering software has largely removed the need for States to struggle, as they did in the late 1990s, with issues of censorship, is an evidence of the needed cooperation with the business and users of the Internet. If individuals can control the flow of information to their computer it is less imperative that the state should eliminate it from the web. The challenge for these "technical governors" of behaviour is to recognise the full potential of their role.

The private regulations that are in the codes of behaviour agreed amongst groups of users or laid down by commercial organisations that provide a service or social networking environment are the other way of having a harmonization of laws. One method of establishing standards of behaviour is through online dispute resolution. A mix of state and private regulation

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[52] A Power and O Tobin, "Soft Law for the Internet, Lessons from International Law", (2011) 8:1 SCRIPTed page, http://www.law.ed.ac.uk/ahrc/script-ed/vol8-1/power.asp

is both inevitable and necessary to provide solutions that are needed now to millions of online customers and consumers. This should lead to greater collaboration between private groups and states in the development and administration of rules.

At an international level, hard law can be used to frame the standards of behavior, together with reputational and coercive consequences for any violation. Another option is a system of centralised enforcement. Hard law can also apply in situations where international commitments are incorporated into domestic law. When international laws are incorporated into domestic law they are generally no longer seen as international law, but just another form of domestic law, but with an international source. That is when States may choose the hard law when:

> "a) the benefits of cooperation are high and the cost of breach also high; b) when noncompliance may be difficult to detect; c) when states wish to form alliances such as the EU or NATO; d) when domestic agencies are given power to make agreements, with little control from the executive; and e) when a state is seeking to enhance its international credibility.Hard law does however entail significant costs and can restrict the behaviour and sovereignty of nation states." [53]

Yet another way of harmonization is the Common law as well as the case-law. As the last one should guarantee the future enactment of a law in the sphere of the online hate speech. The mentioned above case-law about online hate speech prove the imperativeness of objectifying of the issue because of some contradictions that leads to difficulties when defending violated human rights.

All of the above mentioned manners for harmonization of national legislations should recognize as a factor, when formulating the texts, the following substantial elements so the final content should not be vague. It is important to note the questions about what should be the ways to prove that a specific remark belongs to the online hate speech group, that is to say it should be determined the situations when the animus bears in itself the threat of the hate speech with a distinct characteristics of violation of human rights as a common law principles. Another important item is also the determination how and in which cases the identification of the respective people proclaiming hate speech on Internet should be disclosed, who should be the organs requiring this information and how the personal data protection should be guaranteed of the victims their selves. Yet another principal aspect that should be concerned is by what means the place of "crime" should be set – the place of the addressee, of the sender or the place of the IP address itself. Considering these important elements and determining their essential parameters, the authorities responsible for preserving of human rights should be able to guarantee relatively safeness of the "users" of Internet.

It is important to be noticed that the problem with discrimination and non-tolerance is a leading subject to almost all of the legislative measures undertaken by the state and supranational institutions but the new element of the theme in this paper is the place where the respective violations of these postulates are done - that is the Internet space. It is the specific character of

[53] A Power and O Tobin, "Soft Law for the Internet, Lessons from International Law", (2011) 8:1 *SCRIPTed* page, http://www.law.ed.ac.uk/ahrc/script-ed/vol8-1/power.asp

this space that imposes specifications of the regulation of the legal matter itself, including the importance of the protection of the personal data of the "users" of Internet. It is important to be taken into consideration the answer to the question – in the defense of which value an Internet "user" should refuse his anonymous in the Cyberspace so to guarantee the incorporated in the relevant legal acts rules regarding the fundamental human rights. Or should one right – of freedom of speech to be restricted because of another one – the right of non-discrimination – and if yes isn't this a principle contradiction between basic postulates and in this case should not been necessary a fully reconsideration of the legal regulations for protection of human rights but not only in this specific case? The purpose of regulating hate speech on Internet and in general is to prevent interference with other rights and to prevent the occasioning of certain harms. All in all, the range of harms to be prevented or minimised is varied and complex. But because of the complexity of the question the measures needed for its solving are on the ground of one of the most delicate themes. Nevertheless the fast development of the Internet technologies, all the instruments for communication demand the debate and adoption of measures for defense of human rights on Internet to be perceived as crucial, and on which finding a solution should contribute for the harmonization of the national legislations through the proportionality principle based on the equitable restraint of the not so far good controlled Cyberspace.

9. Legal implications of "hate speech"

When we talk about and debate over hate speech, in general, we speak of vicious speech that is aimed to victimize and dehumanize its target. Hate speech is more unclear than incitement. Although the term, hate speech, is widely used in legal, political and academic circles, there is often disagreement about its scope.

Determination of a specific concept with the purpose to incorporate it in legislation or some other type of legal deed, with an international or national significance, is binded with a responsibility that, in today's cross-border relations between the countries, should have been put in first place. Taking into consideration the fact that online hate speech is a phenomenon of the "new world" and the newest technologies the determination and outlining of the issue should be conformed to entirely new for the traditional law elements and more precisely the entirely new sphere in which the hate speech itself is being executed the Cyberspace including the way of transportation of information, the defense mechanisms that are usually used for keeping the anonymity of the "users" etc. Because of these elements of the cyber space the necessary formation of legal definitions of every aspect of the issue should be time consuming but in respect to the increasing usage of Internet the procedures should take less time. In this regard the meeting held by Anti-Defamation League, at the beginning of October 2013, the monitoring papers and requirements from European Commission against Racism and Intolerance (ECRI) as well as the discussions on national level organize and set common aims and the beginning of new politics for finding an appropriate solution to the issue.

The needed definitions should be made to clarify and support policies objectives agreed at the international forums and meetings. An open question revolves on whether national authorities should wait for a potential set of international definitions of hate speech; violators etc. in the context of the meetings and reports or if it would be advisable to legislate such definitions in short term in order to participate more effectively in the wave complaints and the increasing number of legal proceedings.

Legally, concepts for the issue must be defined. In spite of the firm position, for example of the libertarians, according to whom the state-based governance and actually a governance at all in Internet can not and should not be done but a self-regulating regimes would be appropriate way to bring under control the issues that may occur. In sharp contrast with that point of view, those who may be called traditionalists affirm that the political and legal institution known as State is the proper regulatory organization to carry out the task of regulating Internet. But as another opinion on the topic the international lawyers have always reminded that International Law and harmonization could be, and indeed are, the natural solution for global problems. Regarding the Internet, however, International Law alone is not always recommended. And as a result of all of the above mentioned in this paragraph the best decision should be sort of mixed governance – for example the one that was evolved with the Internet Corporation for Assigned Names and Numbers (ICANN).[54]

Regulatory conflicts in cyberspace are now frequently linked to the interplay between the worldwide availability on the web of data, perceived to be harmful or offensive to fundamental values in the regulating State, and the constitutional protections for freedom of speech of expression existing in the State in which data is made accessible. i.e. in the US where many of the content providers are located.

In regard of some examples of international cases that concern a regulatory conflicts it can be made a conclusion that extraterritorial regulation in the Internet field is feasible. The examples shown hereinafter point out that International law as well as doctrines like perspective jurisdiction, some technical solutions like filtering and zoning are in help when solving transnational disputes in a fair way until there is a solution based on international harmonization.

One of the very important cases in this field of regulation is CompuServe[55]. The asserted offence to German Criminal Code consisted of the provision by CompuServe Deutchland (a 100 per cent subsidiary of CompuServe US) of a public access to violence, child pornography and bestiality. Even the fact that the access was blocked worldwide to that content, CompuServe made available parental control software to its subscribers and unblocked the newsgroups. Nevertheless, there was an imposed sentence to one of the managing directors of CompuServe Deutchland from the Munich court. After an overturn of the case from the German higher court the imposed sentence attracted much attention and criticism especially in the US.

Quite the same in a point of view about the received criticism was the condemnation received by Yahoo case in the US[56]. The parties were two French public interest groups against Yahoo! Inc.,a Delaware corporation located in California, US. It was about the offering for sale of Nazi memorabilia by Yahoo! auction website accessible in France, which was in fact deemed illegal under French law. Indeed, French legislation along with many other nation's laws, may be considered to be in accordance with the Convention on the Elimination of All Forms of Racial Discrimination (CERD)[57]. The plaintiffs sought an order prohibiting Yahoo! from displaying the

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[54] < http://www.icann.org/en/resources/policy> accessed 22 October 2013

[55] Amtsgericht Munchen (Munich Court of First Instance) NJW 51 (1998), 2836

[56] Yahoo Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, Supp. 2D 1168, Case No C-00-21275JF (N.D. Ca., September 24, 2001)

[57] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, UNTS Vol.660 No 9464

memorabilia in France. Because of the fact that the harm was caused in France the French court found it had personal jurisdiction, sought an expert opinion on the possibility for Yahoo! to block access to French users, instead of completely eliminating the website content worldwide. The Court ordered that Yahoo! should take all measures to dissuade and render impossible all visitation on Yahoo.com to participate in the auction service of Nazi objects. It was a response of Yahoo! to sought a declaratory judgment that the French decision could not be recognized in the US. Besides finding it had jurisdiction the US District Court granted summary judgement on the merits in favor of Yahoo!. Nevertheless the US Court of Appeals has recently reversed that decision and held that the California Court had no personal jurisdiction over the French parties and that France had right to hold Yahoo! accountable in France. Because of this last case there should be made some conclusions in the future regulation on this issue. The Yahoo! case has shown that traditional conflict of laws instruments may apply to cyberspace - because of the fact that the harmful effects had occurred in France the country was in power to apply its national law. Another important conclusion can be made out of this case – the fact that in trans-boundary disputes in which issues of freedom of speech arise, it is not the place of the country of the information provider but the place of the country of the recipient that governs the situation. Another case called Gutnick[58], decided by the Australian Supreme Court has recently come to corroborate this approach and therefore reflects the majority opinion. Basically from the cases shown before it can be made a general conclusion that German, French and Australian democracies have chosen rules for free expression that are consistent with the international human rights but that do not mirror the protection afforded by the First Amendment to the US Constitution. When considering regulatory conflicts in the international arena and in this case in the area of cyberspace coming from a technology being purely manmade, there should the clear mind that this technology should not dictate the way in which law manages the arising conflicting interests.

In reference to the question if it would be advisable for the national authorities to legislate definitions on hate speech in short term so to be able to participate more effectively in the wave of complaints and the increasing number of legal proceedings, taking into consideration all of the above mentioned examples as well as stated opinions of different groups it is the best decision to be made an international Act in which all of the aspects should be concerned, when dealing with international subject which is Internet. The fact that the freedom of speech in general is constituted in a lot of international acts shows that its violation and its opposite – hate speech, should be incorporated in the same law sources since freedom of speech is one of the fundamental human rights. In respect to the whole paper of 'Online hate speech' because Internet is one the most used "international devise" its regulation must be at an international level too, so when there is online hate speech the defense and the proceedings to be clear and in respect to the human rights.

10. Legal implications and differentiation of related notions

In the Bulgarian legislation key texts in explaining the notions of 'provocation' and 'incitement of hatred' are the provisions of the Bulgarian Criminal Code (BCC). According to Art. 162 of BCC whoever provokes or strives incitement to discrimination, violence or hatred on the grounds of race, national or ethnical identity, using the means of speech, press or other

[58] Dow Jones & Company Inc.v.Gutnick (2002) HCA 56, 10 December 2002

means for mass communication is to be sanctioned with imprisonment for a period of one to four years and with penalty between 5 000 to 10 000 BGN. This redaction of the Article came into force in the year 2011. Shall we analyze and compare it to the previous redaction it is to be pointed out that the legislative body has increased the sanction of the imprisonment by providing a minimum imprisonment period of one year[59]. Taking in consideration the contemporary vision of decriminalization of some deeds, explicitly stated by the jurisprudence in Bulgaria, a conclusion can be drawn that provocation and incitement of hatred are considered to be deeds against human rights with high social risk and therefore shall be sanctioned strictly.

Incitement of hatred and provocation are considered to be the two most common forms of hate speech. Although with very close meanings provocation and incitement of hatred shall be compared and precisely distinguished one from the other.

Incitement of hatred is always an action that is directed towards indefinite number of third persons[60]. Incitement of hatred aims to express certain idea, which implies an element of discrimination and proclaims further actions. In its essence it is a written or oral distribution of ideas and studies irrelevant of the means through which it is proclaimed. Proclaiming of incitement of hatred can be accomplished either through the means of mass communications, or it could be also incident expression though street art, posters, etc. The aim is to influence the conscious of third persons in a way that they will change their point of view. Yet, in order to classify incitement of hatred as a crime it is irrelevant whether the aim was successful. According to the jurisprudence and the court practice it is a formal crime, i.e. the deed itself is a crime, the end result is for the legal qualification irrelevant[61].

Provocation on the other hand is a deed that is more or less directed toward one or several persons, where the wanted end result is these persons to be influenced in such a way that they will form an inner perception of hatred with a discrimination element towards one person or group of people united under common national, race, religious or political traits. It also can be achieved trough the means of mass communication[62] and just as incitement of hatred it is a formal crime, i.e. the pure act of provocation is classified as a crime.

When it comes to the notion of intimidation under the Bulgarian legislation it is not considered as an independent crime. The jurisprudence defines intimidation as a psychological impact over a person. Through intimidation the intimidated person is threaten with a direct action that puts the person or its relatives in danger for their health, life, dignity or possessions[63]. Intimidation is used in the Bulgarian legislation as an element of many crimes. It is an action that aims to force the intimidated person to certain behavior against his free will. Crime that implies the notions of hatred and discrimination and has intimidation as one of its elements is the crime under Art. 165, para 1 of BCC, according to which whoever uses force or intimidation in order to prevent citizens to freely express their believes or to freely perform their religious duties, through which no national law or good moral is violated is to be sanctioned with imprisonment

[59] Bulgarian Criminal Code (1968) Art.162, para 1
[60] Iva Pushkarova, "Hate Speech" in Antidiscrimination law. Criminal law aspects p.103)
[61] Aleksander Stoinov, Human Rights Crimes. Criminal Law. (Sofia, 2006 p. 248)
[62] Iva Pushkarova "Organization/Group against national equality and religious and political tolerance under Art. 162 of the Bulgarian Criminal Code". , Contemporary Law Magazine. Issue 6/2007.)
[63] Anton Girginov, *Bulgarian Criminal Law*. (Sofia, 2005 p.124)

for up to one year. Intimidation can be in general described as a mean for achieving an end goal that is against the law and against the intimidated person's free will.

11. Comparative analysis

The Convention on Cybercrime along with the Additional Protocol is one of the most effective instruments of the International Law through which the safe and controlled Cyberspace is no longer such a hard thing to achieve. Because of the technological, commercial and economic developments people from all over the world are being brought closer, but still racial discrimination, xenophobia and other forms of intolerance continue to exist in our societies. Globalisation carries risks that can lead to exclusion and increased inequality, very often along racial and ethnic lines.

The protocol determines which racist and xenophobic acts have to be criminalised by the State Party involved. Thereto it defines a number of offences that will be discussed below. The protocol also - and that is a key function - makes the procedural investigative measures as well as the instruments for international co-operation available to the investigation of the racist and xenophobic offences as defined in the protocol. By harmonising the criminalisation of racist and xenophobic acts the condition of dual criminality - still the usual condition for mutual assistance - is fulfilled.

Because of the differences between the countries in Europe based on religion, ethnicity, political systems etc., the comparative analysis should be in respect to those specific features. The end of World War II was a beginning to a proliferation to many European countries of the hate speech legislation designed to curb incitement to racial and religious hatred. Though originally intended to guard against the kind of xenophobic and anti-Semitic propaganda that gave rise to the Holocaust, today, national hate speech laws have increasingly been invoked to criminalize speech that is merely deemed insulting to one's race, ethnicity, religion, or nationality. Raising the question about Holocaust that Europe faced in its history is one of the reasons for most of the acts that refer to human rights in this case the Additional Protocol to the Cybercrime Convention. The facts around the Nazi idea and all of the decisions and deeds that were taken, alarmed the European nations that a strict acts should be applied so that every human being to be protected and his dignity to be saved. Germany is one of the countries that has signed but not yet ratified the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems. This is because of the fact that the authorities have indicated, however, that they consider that German law complies with its provisions and that they intend to ratify the Protocol at the same time as they implement the EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law[64]. According to the Framework Decision itself it is said that by the 28 November 2013 the Council should be able on the basis of reports to assess the extent to which each Member State had managed to comply with the provisions of this decision. Taking into consideration the fact of the rising issues with the violence and hate speech on Internet the Member States and in this case Germany should be strict, as usual when executing the secondary legislation of the EU.

[64] COUNCIL FRAMEWORK DECISION 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

In other countries form central Europe, for example in France there is a strong problem when it comes to the minorities, immigrants or persons from immigrant origin in particular Muslims, people from North Africa, Black persons or Jews. Because of the high concentration of this immigrants in different part of the country and for number of social reasons this provokes this kind of tension in the society that turns into a hate speech and in nowadays even into online hate speech. The ECRI (European Commission against Racism and Intolerance) report on France[65], reports that even of the existence of legal apparatus to combat Internet content inciting racial hatred, including with the Central Office if Combat Offences linked to Information and Communication Technologies, that is monitoring questions about reported sites that are against the legislation, plus the launched, government site for reporting unlawful internet content the whole issue still stays vague. There is a need of stronger measures, so the ECRI recommends French authorities to reinforce their efforts to combat forms of racist expression on Internet including some information campaigns should be held. It is in the power of the Government and all institutions the rise the awareness of the society to this issue so all of the authorities and state organs to fulfill their responsibilities as regulatory organs. Having the legislation basis the execution of the decisions and acts are in the hands of the people and the democratic society.

In the countries in Eastern Europe the problem is even stronger. The long-time problems with ethnic tensions and civil wars left really serious heritage of hate speech. Now when the Internet is part of the modern life there are actually no boundaries this hate speech as mentioned to be bear there and to become of the hardest things to be controlled. For example, since its independence in June 2006 Montenegro has ratified a vast majority of relevant international instruments of concern to ECRI[66] including the Additional Protocol to the Cybercryme Convention. In this connection the country has made a huge progress when it comes to the authorities appointed to be responsible for the issue as well as on the legislation in this sphere. The adopted Act on Prohibition of Discrimination proves the good practice that they had started. In it the authorities has established The Protector of Human rights and Freedom (Ombudsman) as the anti-discrimination body with competence in both private and state sphere. In the actions that were taken are also the Strategy that was adopted in 2007 that is about to deal with the problem of the socio-economic situation of Roma, Ashkali and Egyptian. Another good practice is the Council for Civil Control of the Police Work aim to act as an independent oversight mechanism to investigate complaints against the police. All of this along with the new Constitution that was adopted in 2007 Montenegro had made a lot of changes in a democratic way. But still the ECRI report launched 21 February 2012 gave some suggestion for stronger measures. The recommendations are mainly about the need of ratification of some important international acts like the International Convention on the Protection of the Rights of the All Migrant Workers and Members of Their Families as well as the Convention of the Participation of Foreigners in Public Life at Local Level; other recommendations are connected to the already existing authorities where there is a need to be strengthen the initial and in-service training provided to the lawyers, prosecutors, police and judges on issue connected to the

[65] ECRI, Report 'Report on France (the forth monitoring cycle) adopted on 29 April 2009 and Published on 15 June 2010

[66] ECRI, Report 'Report on Montenegro (the forth monitoring cycle) adopted on 8 December 2011 and Published on 21 February 2012

discrimination; some others are connected to the conditions at schools, working place about the people from different ethnic groups. About the hate speech imposing on Internet the legislation and practice is vague, even the ratification of the Additional Protocol to the Convention of Cybercrime. Still there are not pointed any practices in the report of ECRI. But the progress in general to a democratic society that does protect human right is significance and taking into consideration the fact that this is the only monitoring report to Montenegro form ECRI and there is such a change in the society and legislation system is a satisfactory fact that lay the basis of the future development. Being part form Council of Europe the country will gradually execute all of the conditions not only about the other pointed issues but also the conditions about the online hate speech and the anti-racist and anti-xenophobic speech and content.

From the mentioned countries as examples is clear that depending on a lot of factors like history, economics, level of democratization of the State as well as all of the contemporary issues depends the legislation and the means that are used against hate speech. Countries around Europe but not only are forced to find a solution to an issue that is quite hard to be put into legal framework so to be easily controlled. All of the new technologies challenge existing legal concepts. Information and communications flow more easily around the world limited from no borders. But along with them the so called hate speech on Internet is the issue of the modern society that brings the legal system before some of the hardest questions that need to be answered. Thus solutions to the problems must be addressed by international law, necessitating the adoption of adequate international legal instruments. The Convention on Cybercrime and its Additional Protocol aim to meet this challenge, with due respect to human rights in the new Information Society.

ELSA Croatia

National Researchers

Ana Pendeš

Martino Pekas

Anja Juršetić

Tihana Krajnović

Gordana Jagnić Nenadić

Ida Dojčinović

Dragana Nikšić

Academic Adviser

Marina Gutschy

Aleksandar Maršavelski

National Coordinator

Ida Dojčinović

Language Advisor

Dragana Nikšić

1 National definition of Hate Speech

In your national legislation, how is hate speech defined? (e.g.: Is hate speech defined as an act?) (see Delruelle, "incitement to hatred: when to say is to do", seminar in Brussels, 25 November 2011).

> *"Freedom, equal rights, national equality and equality of genders, pacifism, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution."*

Equality, which is mentioned in Article 3 of the Constitution of the Republic of Croatia[1] as the first of all the values in the Croatian constitutional order, is a standard which represents the fundamental value for pursuing human dignity and providing opportunities for all people. Hate speech and criminal offences motivated by hatred destroy the ideal of equality among the members of a society[2]. Hate speech generally includes all forms of expression (speech, gesture or conduct) which spread, incite, promote and justify racial, ethnic, gender, religious, political, language or other types of hatred. Its intention is to degrade, intimidate or incite violence or prejudices against a person or group on various grounds.[3]

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

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

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

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[1] Constitution of the Republic of Croatia, Official Gazette 85/10

[2] Organization for Security and Co-operation in Europe, *Hate Crimes Law: A practical guide*, OSCE, 2009 http://www.osce.org/bs/odihr/36429> accessed 5 October 2013

[3] Erceg, Tena; *Rasna netrpeljivost i govor mržnje, međunarodni i hrvatski standardi i praksa*, Center for Human Rights, Zagreb, 2004, <http://www.ombudsman.hr/dodaci/036_izvjestajgovormrznje.pdf> accessed 3 October 2013

In addition to the Croatian Constitution and Criminal Code[4], there are several other statutes which prohibit hate speech. Article 3 of the Media Act[5] prescribes:

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

The Gender Equality Act[6] and Homosexual Partnerships Act[7] prohibit "discrimination, direct or indirect, on the grounds of gender, marital or family status and sexual orientation". According to the Report of Ombudsman for 2011, "Victims of hate speech in Croatia are most often members of national minorities, especially the Roma and LGBT persons"[8].

There have been examples of hate speech in Croatia among the members of the authority as well. A few years ago, the county prefect of the Međimurje County made remarks and actions regarding a long-term crisis caused by the segregation of the Roma. In most schools in that county, Roma children were segregated in such a way that they were forced to enter the school through a separate entrance and obliged to take a shower before entering a class.[9] There is a protection from segregation and discrimination on the basis of national origin provided by Anti-discrimination Act[10] in Croatia within its Article 1.

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

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[4] Criminal Code, Official Gazette 125/11, 144/12
[5] Media Act, Official Gazette 59/04, 84/11, 81/13
[6] The Gender Equality Act, Official Gazette 82/08
[7] Homosexual Partnerships Act, Official Gazette 116/03
[8] Ombudsmans *The 2011 Annual Report on discrimination* (June 2012), <http://www.ombudsman.hr/dodaci/Izvje%C5%A1%C4%87e%20o%20pojavama%20diskriminacije%20za%202011.pdf> accessed 5 October 2013
[9] Erceg, Tena, op. cit (no 3).
[10] Anti-discrimination Act, Official Gazette 85/08
[11] 'Skinsi Molotovljevim koktelima u Zagrebu napali Rome', Index.hr (Zagreb, 26 June 2009) <http://www.index.hr/vijesti/clanak/skinsi-molotovljevim-koktelima-u-zagrebu-napali-rome/439349.aspx> accessed 8 October 2013

Another example of hate speech occurred when a well known Croatian sports club manager incited to national hatred by stating the following about a Croatian minister on a radio channel[12]:

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

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

2 Contextual elements of Hate Speech

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

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

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

According to the European Court of Human Rights[15] well-established case-law, freedom of expression constitutes one of the essential foundations of the democratic society and one of the

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[12] 'Mamiću prijeti zatvor: Tužitelj traži godinu dana zbog 'Jovanovića hrvatomrsca krvavih očnjaka', Index.hr (Zagreb, 25 September 2013) <http://www.index.hr/sport/clanak/mamicu-prijeti-zatvor-tuzitelj-trazi-godinu-dana-zbog-jovanovica-hrvatomrsca-krvavih-ocnjaka/702500.aspx> accessed 20 October 2013

[13] 'Ubila se zbog nasilja preko Interneta?', Jutarnji list (Zagreb, 30 May 2013) (<http://www.jutarnji.hr/petnaestogodisnjakinja-se-u-loboru-ubila-zbog-nasilja-preko-interneta-/1105702/> accessed 8 October 2013

[14] Titley, Gavan Hate speech online: considerations for the proposed campaign, Council of Europe, 2012.

[15] the European Court of Human Rights, ECHR hereafter

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

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

In assessing the pressing social need, the Court's case law has established certain parameters - identification criteria - which make it possible to characterize "hate speech" in order to exclude it, or not, from the protection afforded to freedom of expression. The context (concerning the public and political debate in the country[17]) and the intention[18] are the two main elements, the combination of which produces the pragmatic force of speech (its ability to convince, to direct the audience, to incite it to commit or not to commit a specific act.) The status of the perpetrator and the form and the impact of the speech are further elements that the Court also takes into account.[19]

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

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

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[16] Balsyte-Lideikiene v. Lithuania, app no 26682/95, 4 November 2008
[17] Ibid.
[18] Gunduz v. Turkey, app no 35071/97, 4 December 2003
[19] Tulkens, Françoise; *When to say is to do Freedom of expression and hate speech in the case-law of the European Court of Human Rights*, Seminar on Human Rights for European Judicial Trainers, European Court of Human Rights - European Judicial Training Network, 2012, p. 8.
[20] ESurek v Turkey (No. 1), app no. 26682/95, 8 July 1999, §62.
[21] Tulkens op. cit. (n 19), p. 12.

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

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

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

3 Alternative methods of tackling Hate Speech

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

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

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

Anonymity makes it hard for local prosecutors and victims to discover the identity of the party responsible for illegal conduct.[22]

However, even if the party can be identified, multijurisdictionality means that the prosecutor or victim may face great obstacles in bringing suit against the offending party.[23] The risk in this is the mere fact that the propagator can opt for a favourable jurisdiction where there are no such restrictions. Consequently, the propagator is given open floor to evade criminal liability.[24]A successful solution for combating online hate speech requires transnational normative orders.[25]

[22] Krasovec, Jay; Cyberspace: *The Final Frontier, For Regulation?*, Akron Law Review, Vol 31. No. 1 (1997), p. 101.
[23] Goldsmith, Jack L.; *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998), p.1216.
[24] McGonagle, Tarlach; *Minorities and Online "Hate Speech": A Parsing of Selected Complexities*, 9 European Yearbook of Minority Issues (2010), p.421.
[25] Ethem Coban, 'Internet hate speech: A threat to order public? Identifying the obstacles of regulation' (2013.), 10.

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

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

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

4 Distinction between blasphemy and Hate Speech based on religion

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

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

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

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

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

5 Networking sites and the issue of online anonymity

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

(see http://frenchweb.fr/debat-propos-racistes-faut-il-contraindre-twitter-a-moderer/96053)

Croatian criminal legislation is aligned with the Convention of Cybercrime of the Council of Europe[26], which entered into force in Croatia on 1 July 2004. Its major goal is to prosecute offences against confidentiality, integrity, and availability of computer data, offenses related to computer, offenses related to the content and offenses related to infringements of copyright and other rights. [27] This Protocol was opened for signature in Strasbourg, on 28 January 2003, on the occasion of the First Part or the 2003 Session of the Parliamentary Assembly[28]. Croatia signed it on 26 March 2003, so it is signed but not yet ratified, together with nine other treaties[29].Additional Protocol signatory countries want to be stronger in fight against racism and xenophobia, as well as in combating their spread through the Internet which is why the amendments to the original convention are needed.

New Criminal Code entered into force on 1 January 2013 and it has tried to complement national criminal legislation because such behaviour, contained in the Articles 2, 3, 4 of the Convention is not criminalized in Croatian regulations. Chapter thirty (XXX) is particularly interesting: Crimes against public order and Article 325: ˝Public incitement to violence and hatred˝. It contains concrete measures against perpetrators who

> ˝... through the print, radio, television, computer system or network, at a public rally or in some other way publicly incites or publicly make available to the public tracts, pictures or other material instigating violence or hatred directed against a group of persons or member of such a group on account of their race, religion, national or ethnic origin, descent, color, sex, sexual orientation, gender identity, disability or any other characteristic, shall be sentenced to imprisonment for a term of up to three years˝

[26] Act on confirmation of the Convention of Cybercrime, Official Gazette - International Agreements 9/2002

[27] Bagović, Kate; *Sankcioniranje cyber nasilja prema novom Kaznenom zakonu*, Ius Info Portal, published on 27/6/2012, http://www.iusinfo.hr/dailycontent/Topical.aspx?id=13063 visited on 9/10/2013

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

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

Imprisonment as a legal sanction is not envisaged in the Croatian Criminal Code for the commitment of criminal offenses against honour and reputation on the Internet. The basis of criminal prosecution is a private lawsuit and perpetrators shall be punished by a fine of up to three hundred and sixty daily units. Such punishment is a restriction of the freedom of speech. However, there are problems with determining the identity of perpetrators, lack of jurisprudence and publishing corrections inaccurate, libellous allegations. Online anonymity is generally not regulated, but some aspects are regulated by the Act on Electronic Communications.[30]

Since the new Criminal Code entered into force, there have been examples of judgment against people promoting hate speech over the Internet, and perpetrators have been fined.[31] There are also various examples of hate speech on blogs, closed groups of social networks etc where it is difficult to determine the identity of the perpetrator.[32] Most often such acts target minorities and gay population. In most countries (including Croatia), a court order is required in order to get legal access to the data and this can be requested only on grounds of valid evidence when prescribed by law.

Croatia has made significant strides in the fight against these forms of crime, which can be seen in the Progress Report of the Council of Europe 2011. There is visible progress in the changes and harmonization of the national legislation with the EU acquis and international conventions. It is particularly important that the Department of high-tech crime be established at police directorate and that this issue be dealt with by specialized police officers. There has also been a successful co-operation with other competent national authorities, for example a continuous cooperation with the Croatian Academic and Research Network and the Institute for Information System. Other important influences arise from CyberCrime @ IPA project that aims to ensure the implementation of the Convention and the Additional Protocol in Southeast European states (Albania, Bosnia and Herzegovina, Croatia, Montenegro, Serbia, Macedonia and Turkey.)[33]

6 Tackling the notions of "violence", "hatred" and "clear presence of danger"

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

There is no clear definition of hate speech, so the notions of "violence" and "hatred" are to be seen as parts of the concept of "hate speech", as elements which constitute identification criteria

[30] Act on Electronic Communications, Official Gazette 73/08, 90/11, 133/12, 80/13

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

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

[33] *Dubrovnik: Počela konferencija o suzbijanju kompjutorskog kriminaliteta*, Ministery of Intern Affairs, published on 13/2/2013, http://www.mup.hr/149853/1.aspx, visited on 9/10/2013

in every case. These notions are merely elements which make a distinction between the expressions falling under the scope of protection granted by the Article 10 and those ones which should be excluded from this protection.

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

The ECHR has also never given a precise definition of "hate speech". In the case of *Gunduz v. Turkey* the Court refers to hate speech as "all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)."[34] It is important to note that this is an «autonomous» concept, insofar as the Court is not bound by the domestic courts' classification.[35] Thus, it is a set of circumstances, a variable of elements (such as violence and hatred), which help to divide what is allowed from what is not.

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

The concept of "*the clear and present danger*" in a similar way states that the limitations upon freedom of speech, press or assembly could be set depending on whether the words in a certain case are used in such circumstances or whether they are of such nature as to create a clear and present danger[36]. Some notions may not seem dangerous on their own, but when combined with circumstances, they create danger. The concept itself is a certain test for the circumstances of the cases in which the authorisation for the limitations on freedom of speech is questionable and as such serves as a tool to confirm whether they are justified or not.

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

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

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[34] Gunduz v. Turkey, op. cit. (no 18), §41.
[35] Weber, Anne; *Manual on hate speech*, Council of Europe Publishing 2009, p.3
[36] Definition provided by USLegal, http://definitions.uslegal.com/c/clear-and-present-danger/

When deciding on the possible violation of Art. 10 of the Convention[37], the Strasbourg Court practices two different approaches mentioned in the Convention. Firstly, the Court can exclude guaranteed protection by applying Article 17 - prohibition of abuse of rights.

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

Article 17, also known as an "abuse clause" has a rather general scope. It will ensure that an individual or group cannot use rights granted by the Convention to undermine other rights or democracy[38]. Such protection exclusion in regard to freedom of expression "is used but in moderation"[39], as observed by Françoise Tulkens.

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

> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

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

1) Is the interference prescribed by law?

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

2) Does it pursue a legitimate aim?

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

3) Is it "necessary in a democratic society"?

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

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

[39] Tulkens, Françoise; *When to say is to do Freedom of expression and hate speech in the case-law of the European Court of Human Rights*, Seminar on Human Rights for European Judicial Trainers, European Court of Human Rights - European Judicial Training Network, 2012

The Court examines whether reasons adduced by the State are "relevant and sufficient". *Onus probandi* is upon the State. When analyzing the case, the Court has to consider all factual circumstances "in the light of the case as a whole"[40].

However, the Court developed the doctrine of margin of appreciation already in 1976 in the case Handyside v. The United Kingdom[41]. " This variable discretion is granted to national authorities by the Court when it examines whether a State has violated an applicant's Convention[42] " in meeting their obligations arising from the Convention, but this flexibility does go "hand in hand with European supervision"[43].

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

8 Harmonisation of national legislation

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

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

It is important to stress how in the Strasbourg Case Law "whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his situation and the technical means he uses"[44]. When compared to other media (radio, television, newspapers), the Internet has become one of the most prominent and powerful communication tools due to the recent technological developments. Some possible measures regarding hate speech communicated via the Internet can be the same as the measures for other media; such as

[40] Zana v Turkey, app no 18954/91, 25 November 1997
[41] Handyside v The United Kingdom, app no 5493/72, 7 December 1976
[42] Mowbray, Alastair; *Cases, Materials, and Commentary on the European Convention on human rights*, Oxford University Press 2012), p 633.
[43] Handyside v The United Kingdom, op. cit. (n 41).
[44] Ibid.

criminal penalties, disciplinary penalties, damages in respect of civil proceedings[45], public apologies or retractions. Other possible measures are quite different due to the characteristics of the Internet and its influence, e.g. injunctions preventing publication, posting or streaming, content removal, website blocking, etc.

9 Legal implications of "hate speech"

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

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

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

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

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

The obstacle to the international definition of hate speech is the unevenness of social awareness. For example, in 2002, Sweden has expanded the definition of hate speech to include threat and

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

the expression of contempt on the basis of sexual orientation, while in some countries this will not happen for years to come. In addition, the barrier could be the content and orientation of definition. In Germany, for example, this would involve a definition which would prevent justifying Nazism, while in Croatia this would be the case with the propaganda of the Ustashe spirit.

"Hate speech is a malignant type of speech the main aim of which is not to mediate ideas, but to hurt, humiliate, offend, intimidate or stimulate violence[46]." Since the harmful effects of hate speech are scientifically proven (emotional stress, loss of dignity, hate speech internalization - the victim starts to believe that the discrimination was valid, which can then easily change from speech to physical violence) requires that each state takes action on a national level, but there should also be mutual cooperation on an international level.

10 Legal implications and differentiation of related notions

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

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

[46] More in: Alaburić, Vesna; *Ograničavanje govora mržnje u demokratskom društvu – teorijski, zakonodavni i praktički aspekti*, Hrvatska pravna revija, January 2003

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

11 Comparative analysis

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

The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS 189) requires criminalization of racist and xenophobic propaganda through computer systems, racist and xenophobic motivated threats and insults including denial, gross minimization, approval of genocide or crimes against humanity (especially those happened during the period of 1940-45).

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

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

The state had the obligation to adjust its material law in accordance with the Additional protocol. The implementation can be seen in Article 325 of the Criminal Code[47].

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

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[47] See in *supra ad. 1*

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ELSA Cyprus

National Researchers

Alexandra Patsalidou

Ioanna Athinodorou

Christoforos Tsekouras

Academic Adviser

Alexia Solomou

National Coordinator

Fiona Sfountouri

Language Advisor

Dragana Nikšić

I. Introduction

The Republic of Cyprus became an independent sovereign state in 1960.[1] Pursuant to Article 5 of the Treaty concerning the Establishment of the Republic of Cyprus, the latter 'shall secure to everyone within its jurisdiction human rights and fundamental freedoms comparable to those set out in Section I of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on the 4th of November, 1950, and the Protocol to that Convention signed at Paris on the 20th of March, 1952'. [2]

The Constitution of Cyprus came into force on 16 August 1960. The Cypriot Constitution ensures the protection of fundamental rights and freedoms which correspond to the rights and freedoms set out in the European Convention.[3] Furthermore, Cyprus is a party to a series of international human rights treaties covering a wide range of rights, from first to second and third generation rights.[4] In guaranteeing the protection of these rights, the Constitution does not distinguish between citizens and non-citizens and does not discriminate between members of the

[1] Treaty of Establishment, No. 5476. United Kingdom of Great Britain and Northern Ireland, Greece, Turkey and Cyprus, available at: http://www.mfa.gr/images/docs/kypriako/treaty_of_establishment.pdf.

[2] Ibid.

[3] Constitution of the Republic of Cyprus, 1960, Part II, Fundamental Rights and Freedoms, Articles 6-35, available at: http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/$file/CY_Constitution.pdf.

[4] International Covenant on Civil and Political Rights, New York, 16 December 1966, Cyprus ratification: 2 April 1969 Law No. 14/1969; International Covenant on Economic, Social and Cultural Rights New York, 16 December 1966, Cyprus ratification: 2 April 1969, Law No. 14/1969; Optional Protocol to the International Covenant on Civil and Political Rights New York, 16 December 1966 Cyprus ratification: 15 April 1992, Law No. 17(III)/1992; International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966, Cyprus ratification: 21 April 1967, Law No. 12/1967, No. 11/1992 and No. 28(III)/1999; Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, New York 15 January 1992, Cyprus acceptance: 28 September 1998, Law No 6(III)/1995; Convention (No. 111) concerning the Discrimination in Employment and Occupation Geneva, 25 June 1958, Cyprus ratification: 2 February 1968, Law No. 3/1968; Convention against Discrimination in Education, Paris, 15 December 1960, Cyprus acceptance: 9 June 1970 Law No. 18/1970; Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, Geneva, 29 June 1951 Cyprus ratification: 19 November 1987, Law No. 213/1987; Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, Cyprus accession: 23 July 1985, Law No. 78/1985; Amendment to article 20, paragraph 1 of the Convention of the Elimination of All Forms of Discrimination against Women New York, 22 December 1995 Cyprus acceptance: 30 July 2002 (Not yet in force); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women New York, 6 October 1999, Cyprus ratification: 26 April 2002, Law No. 1(III)/2002; Convention on the Political Rights of Women, New York, 31 March 1953.

Greek-Cypriot and Turkish-Cypriot communities.[5] The protection afforded by these legal instruments is further enhanced by the provision of a constitutional protection on the freedom of expression.[6]

Cyprus is also a member of the Council of Europe and it has ratified the European Convention on Human Rights by Law 39/62. Pursuant to Article 169 of the Constitution of Cyprus, the European Convention has increased power over any other law of the Republic.[7] Accordingly, the Convention became part of national law and in case of conflict it shall take precedence over other national laws.

Cyprus became a full and equal member of the European Union on 1 May 2004 and as such, is subject to EU laws and regulations.[8] The case-law of the EU has long established that Community law shall take precedence, shall be binding and directly applicable to all member states.[9] Member states are under the obligation to harmonise their laws in accordance with the EU *acquis communautaire.*[10] In order to meet these requirements, Cyprus amended its Constitution

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[5] Constitution of the Republic of Cyprus, Articles 4-35: The rights are granted to "every person" or "to all persons" or to "every person"; Legal measures to combat racism and intolerance : Cyprus (situation as of 1 December 2004), ECRI, Strasbourg : COE, 2004, p.5

[6] Article 19, Constitution of the Republic of Cyprus, 1960, Part II, Fundamental Rights and Freedoms.

[7] Article 169, Constitution of the Republic of Cyprus, Part XII, Miscellaneous Provisions: Subject to the provisions of Article 50 and paragraph 3 of Article 57- (1) every international agreement with a foreign State or any International Organisation relating to commercial matters, economic co-operation (including payments and credit) and modus vivendi shall be concluded under a decision of the Council of Ministers; (2) any other treaty, convention or international agreement shall be negotiated and signed under a decision of the Council of Ministers and shall only be operative and binding on the Republic when approved by a law made by the House of Representatives whereupon it shall be concluded; (3) treaties, conventions and agreements concluded in accordance with the foregoing provisions of this Article shall have, as from their publication in the official Gazette of the Republic, superior force to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto.

[8] In light of the Cyprus Problem, Article 1 of Protocol 10 to the Accession Treaty 2003 recognises the fact that the government of Cyprus is not able to exercise effective control over the North of Cyprus, and as such states that: "The application of the acquis shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control". For the complete Accession Treaty, see: http://ec.europa.eu/enlargement/archives/enlargement_process/future_prospects/negotiations/eu10_bulgaria_romania/treaty_2003/content/index_en.htm.

[9] See C- 6/64 *Flaminio Costa v ENEL* (1964) ECR 585.

[10] The acquis communautaire is commonly described as including "all the EU's treaties and laws, declarations and resolutions, international agreements on EU affairs and the judgments given by the Court of Justice. It also includes action that EU governments take together in the area of 'justice and home affairs' and on the Common Foreign and Security Policy. 'Accepting the acquis' therefore means taking the EU as you find it. Candidate countries have to accept the 'acquis' before they can join the EU, and make EU law part of their own national legislation." – see http://europa.eu/abc/eurojargon/.

in 2006 to secure the supremacy of the EU *acquis* in the Cypriot domestic legal order. [11] The addition of a new Article 1A reads as follows:

> *'Nothing in the Constitution shall be deemed to invalidate laws enacted, acts carried out or measures adopted by the Republic which were necessitated by the obligations as a Member State of the European Union nor prevent regulations, directives or other instruments or binding legislative measures adopted by the European Union or the European Communities or by their institutions or the competent bodies based on the Treaties establishing the European Communities or the European Union from having legal force in the Republic.'*

The EU *acquis,* insofar as it originates from primary and secondary laws of the EU, serves as a source of law which is supreme to Cypriot constitutional and national law.[12] As a result, Cyprus has introduced an array of legislative instruments in order to transpose EU law into its national legal order. For example, Cyprus has transposed the EU Framework Decision pertaining to the combating of different forms and expressions of racism and xenophobia.[13]

A repercussion of the financial crisis and the economic instability in Cyprus over the past few years is a growing amount of hate speech on the internet, as evidenced in various blogs and general social media, such as Twitter and Facebook.[14] The racist discourse and behaviour, in both the media and in Cypriot society at large, particularly targets migrants and ethnic communities, who are predominantly used as scapegoats for the economic suffering and growing unemployment.[15] The aim of the present report is to examine how the Cypriot legal system regulates online hate speech.

II. National Definition of Hate Speech

[11] Fifth Amendment, Law No. 127(I)/2006. Relevant articles of the Constitution which have been amended are Articles 11, 140, 169 and 179.
[12] Article 1A, Constitution of the Republic of Cyprus, 1960, Part I, General Provisions.
[13]Framework Decision 2008/913/JHA on combating forms of racism and xenophobia through criminal law (2008), OJ L 328 (transposed as N 134(I)/2011)
[14] L.Savvides, F.Osum, F.Deniz Pasha, with the support of KISA – Action for Equality, Support, Antiracism, *Racism and related discriminatory practices in Cyprus*, ENAR publication, found at http://cms.horus.be/files/99935/MediaArchive/publications/shadow%20report%202011-12/Cyprus%20-%20unedited.pdf
[15] S. Chowdhury and C. Kassimeris, with the support of KISA – Action for Equality, Support, Antiracism, *Racist Violence in Cyprus*, ENAR publication, found at: http://cms.horus.be/files/99935/MediaArchive/Racist%20Violence%20Cyprus%20-%20online.pdf

A. European Union Law Provisions

In the EU's fight against discrimination and rising racism, and following the European Parliament's Resolution on the right to freedom of expression and respect for religious beliefs,[16] the European Council adopted the Framework Decision on combating racism and xenophobia. The Framework Decision has as its legal base Article 34(2)(b) of the Treaty on the European Union, as amended by the Treaty of Nice, which provided for the use of framework decisions in the field of police and judicial cooperation in criminal justice. This Decision has been transposed into domestic Cypriot law by Law 134(I)/2011.

The Decision provides for the use of criminal law, through effective, proportionate and dissuasive criminal penalties, to combat expressions of racism and xenophobia.[17] Regarding intentional conduct, it makes provision for the punishment of 'publicly inciting violence or hatred'[18] and the commission of a racist act by public dissemination or distribution of tracts, pictures or other material.[19] This therefore ensures the criminalisation of hate crime which may be expressed through various materials online.[20]

Since the Treaty of Lisbon however, Framework Decisions are no longer used as legislative instruments due to the various difficulties emanating from their application.[21] The Court only has jurisdiction to issue preliminary rulings on the interpretation of Framework Decisions after a member state makes a declaration to this effect. Furthermore, the European Commission was not in a position to bring any enforcement proceedings against member states if they failed to implement the Decision. As is the case with a variety of Framework Decisions, pre-Lisbon Treaty, in the field of judicial cooperation, proposals by the European Commission have been

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[16] European Parliament Resolution, 29th November 2006, C290 E/399: "2. Calls on all those who enjoy freedom of expression to commit themselves to supporting the fundamental values of the EU, democracy, pluralism and tolerance and not to abuse that freedom by incitement to religious hatred or the dissemination of xenophobic or racist attitudes aimed at excluding any persons, whatever their origin or religious beliefs."

[17] Article 3(1), Framework Decision 2008/913/JHA on combating forms of racism and xenophobia through criminal law (2008), OJ L 328 (transposed as N 134(I)/2011).

[18] Article 1(1)(a) , supra at n.17.

[19] Article 1(1)(b) supra at n.17.

[20] Hatred is defined by Recital 9 as: 'understood as referring to hatred based on race, colour, religion, descent or national or ethnic origin'.

[21] European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, available at: http://www.refworld.org/docid/476258d32.html [accessed 9 October 2013].

made to replace Framework Decisions with Directives.[22] This may be the case with the Framework Decision 2008/913. The European Commission will issue the first progress report since the adoption of the Decision at the end of 2013.

B. Legislative Provisions

In 2011, the Fight against some Forms and Manifestations of Racism and Xenophobia through the Penal Code Act was enacted in Cyprus, implementing the Council Framework Decision 2008/913.[23] Any reference to hate in the aforementioned Act is to 'hate that is based on race, colour, religion, genealogical origin or ethnic origin'.[24] Article 3(1) of this Act stipulates that:

> '*Any person who deliberately transmits in public and publicly incites, in any way, violence or hatred against a group of people or a member of a group, which is determined on the basis of race, colour, religion, genealogical origin, national or ethnic origin, in such a way to cause public disorder, or that has a threatening, abusive, or offensive character, is liable of up to five (5) years of imprisonment, or a fine up to ten thousand euros (10,000), or both in case of conviction.*'[25]

Furthermore, Cyprus has ratified the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, which provides that 'the State Parties are required to criminalise distribution or otherwise make available racist and xenophobic material to the public through a computer system'.[26] Article 4 of Law 26(III)/2004, ratifying this Protocol, stipulates:

> '*that if a person deliberately without a right distributes or with any other way through computer systems makes available xenophobic or racist material which incites or promotes prejudice based on racial*

[22] An example is the Victims Directive 2012/29/EU replacing Framework Decision 2001/220/JHA

[23] Law 134(I)/2011 on combating certain forms and expressions of racism and xenophobia by means of criminal law (2011)

[24] Ibid. Article 2: *"«μίσος» σημαίνει το μίσος που βασίζεται στη φυλή, το χρώμα, τη θρησκεία, τις γενεαλογικές καταβολές ή την εθνική ή εθνοτική καταγωγή"*.

[25] Ibid. Article 3(1): "*Πρόσωπο το οποίο εκ προθέσεως δημόσια διαδίδει και δημόσια υποκινεί με οποιοδήποτε τρόπο βία ή μίσος που στρέφεται κατά ομάδας προσώπων ή μέλους ομάδας προσώπων που προσδιορίζεται βάσει της φυλής, του χρώματος, της θρησκείας, των γενεαλογικών καταβολών ή της εθνικής ή εθνοτικής καταγωγής, κατά τρόπο που διαταράσσει τη δημόσια τάξη ή που έχει απειλητικό, υβριστικό ή προσβλητικό χαρακτήρα, είναι ένοχο αδικήματος και, σε περίπτωση καταδίκης, υπόκειται σε ποινή φυλάκισης που δεν υπερβαίνει τα πέντε (5) χρόνια ή σε χρηματική ποινή που δεν υπερβαίνει τις δέκα χιλιάδες ευρώ (€10 000) ή και στις δυο αυτές ποινές.*"

[26] Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189), Explanatory Report, Article 3.

differences either hatred either violence, could be convicted with 5 years imprisonment or a fine up to 35,000 Euros or both.'

Online hate speech could conceivably fall within the scope of Article 3(1) Law 134(I)/2011, even if it is not explicitly provided for, especially if conjunctively read with Article 4 of Law 26(III)/2004. The phrase 'in any way' could potentially include the online means of communicating hate speech. To successfully prosecute the crime of hate speech, a series of elements need to be fulfilled. Firstly, there has to be a public transmission of the hate speech which, by definition, will occur when such speech is disseminated on the internet. Secondly, online speech has to spread hate against a group of people, or a member of that group, which is formed on the basis of the protected grounds, for example race or religion. Thirdly, online hate speech has to cause a public disorder or have a threatening, abusive or offensive character. Fourthly, the *mens rea* of this crime is that it has to be committed 'deliberately'. This means that the offender must have had the specific intent to commit the offence in question. *Prima facie*, recklessness would not qualify as the required *mens rea* for the substantiation of this offence. This requirement is particularly difficult to satisfy using existing evidence law principles as it places the bar on proving the subjective intention high.

Cypriot criminal law also tackles specific crimes relating to religion.[27] With reference to the protection of religious groups which are recognised by the Constitution,[28] the Penal Code criminalises persons who have intentionally offended religious groups either by oral statements, actions or publications, which have a religiously offensive character.[29] The penalty for such crimes does not exceed one year imprisonment. These criminal law provisions cover religiously motivated hate crime (encompassing hate speech in their scope). It has to be noted that these provisions initially aimed to resolve inter-communal tensions between Greek and Turkish Cypriots in the early 1960s. As a consequence, they are not directly aimed at combating hate speech, racial discourse or racially motivated crime.

C. Constitution of the Republic of Cyprus

[27] The Penal Code Law, Cap.154, Articles 138 – 142.

[28] Article 3 of the Constitution affords a legally recognised status to religious groups whose members are ordinarily resident in Cyprus and exceed 1000 members on the day of the signing of the Constitution. At that time, the only groups which were recognised as a result were the Maronites, Armenians and Latins. Ethnic groups, such as the Roma, were considered to be Turkish Cypriot and no efforts were made to recognise their independent existence.

[29] The Penal Code Law, Cap.154, Articles 47(1)(b), 141 and 142.

The Constitution of the Republic does not make an explicit reference to hate speech. Nevertheless, combined readings of Article 19 on freedom of speech and expression and Article 28 on equality before the law of the Constitution, in conjunction with legislation set out above, give an indication of the legal parameters that could potentially regulate the use of online hate speech. Article 19 of the Cypriot Constitution, which is akin to Article 10 of the European Convention on Human Rights,[30] provides as follows:

'1. Every person has the right to freedom of speech and expression in any form.
2. This right includes freedom to hold opinions and receive and impart information and ideas without interference by any public authority and regardless of frontiers.
3. The exercise of the rights provided in paragraphs 1 and 2 of this Article may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.'[31]

As is evident from Article 19(3), freedom of expression in Cyprus is a qualified, not an absolute, right. Accordingly, Article 3(1) of Law 134(I)/2011 restricts the right of freedom of speech and expression. The restriction therein, is not unconstitutional; it is justified, as it is prescribed by law and necessary in a democratic society in order to protect other members of the society from being discriminated against,[32] as well as protecting the right to privacy[33] and the right of peaceful assembly.[34]

D. Case-law

a. Cypriot case-law

[30] Article 10(1) of the European Convention on Human Rights provides: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.'
[31] Article 19, Constitution of the Republic of Cyprus, 1960, Part II, Fundamental Rights and Freedoms.
[32] Article 28, Constitution of the Republic of Cyprus, 1960, Part II, Fundamental Rights and Freedoms.
[33] Article 15, Constitution of the Republic of Cyprus, 1960, Part II, Fundamental Rights and Freedoms.
[34] Article 21, Constitution of the Republic of Cyprus, 1960, Part II, Fundamental Rights and Freedoms.

Cypriot courts have developed the freedom of expression through their case law mainly to protect the freedom of the media and their right to broadcast.[35] This has been done by developing the various legal provisions on libel, defamation[36] and slander.[37] This is evident in cases where the Courts take the approach that restricting the right of expression can only be done 'in a manner [that is] as favourable as possible to the freedom of the press'.[38] Whilst this has generally been the approach of the courts regarding racism and related discrimination in the media, the ECtHR recently rejected as inadmissible and manifestly ill-founded a claim by a TV station in Cyprus complaining that its freedom of expression had been violated by the Cyprus Radio and Television Authority (*CRTA*).[39] The speech[40] expressed in the entertainment series justified, in the Court's opinion,[41] a curtailment of the station's freedom of expression (Article 10 of the European Convention) due to its racist and discriminatory nature, and the Court's commitment to combating racial and gender discrimination in all its forms and manifestations.[42]

Cypriot case law on hate speech and, more generally, racism and related discrimination in the media, is under-developed, particularly in light of the fact that only two years have passed since the enactment of Law 134(I)/2011. This situation is primarily the result of lack of effective national reporting mechanisms and the apparent unwillingness by the Attorney-General to prosecute offenders.[43] The Attorney-General, as per Article 142(2) of the Penal Code, has the

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[35] "It is clear that since the Constitution gives the authority to sublicense, this authority may include the right to enact legislation that regulates and controls the operation of broadcasting stations. Such legislation is not contrary to Article 19 of the Constitution. It follows therefore that the law in question does not violate Article 19 of the Constitution" in Sigma Radio T.V. Ltd v Αρχής Τηλεόρασης Κύπρου, Υπόθεση Αρ. 1096/2001, (2003) 4 ΑΑΔ 1.

[36] *Alitheia Ekdotiki Etaireia Ltd v Charalambou Leon*ida (1997) 1 Α.Α.Δ. 55.0

[37] Law of Torts, Cap.148, Section 3, Articles 17 and 25. On 'slander', see*: Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581.

[38] *Cosmos Ltd v Republic of Cyprus* (1971) 3 C.L.R. 387.

[39] *Sigma Radio Television Ltd v Cypru*s, Application No: 32181/04 and 35122/05, Final Decision 21/10/2011.

[40] One episode from the station's entertainment series had characters saying that "in the old times, in Limassol, it was all Arabs, Phoenicians, houllou, ya habbibi, all of them. Most of them darker than chocolate…"

[41] Ibid at n.39 § 208: "Even though it appears that the remarks in question were made in the context of a fictional entertainment series, the Court considers, in view of their content, and in the absence of sufficiently detailed information about the programme and specific observations on the part of the applicant, that the CRTA could not be said in the circumstances to have overstepped its margin of appreciation in view of the profound analysis at the national level.

[42] For further reference, see: *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-VII

[43] M.Kyprianou, R.Veziroglu with the support of KISA, "*Action for Equality, Support, Antiracism, Racisms and Related Discriminatory Practices in Cyprus",* found at http://cms.horus.be/files/99935/MediaArchive/publications/shadow%20report%202010-11/4.%20Cyprus.pdf

exclusive right to prosecute or approve the prosecution of a person who intentionally publishes a book, newsletter, article or letter in a newspaper or magazine which publically offends one's religious affiliation or belief.

It has thus been argued that "the discretion of the Attorney-General to prosecute or not remains an obstacle" to the effective implementation of the legal framework on combating hate speech and racial violence.[44] Examples of a failure to act have been highlighted by Nikos Trimikliniotis, who cites the example of the well-known Cypriot journalist, Makarios Droussiotis.[45] The journalist interviewed the Turkish Prime Minister in 2010 and was subjected as a result to death threats by nationalist and right-wing fanatics in an anti-government blog. The journalist requested that measures be taken against the administrator of the blog, but the Attorney General 'expressed the opinion that the evidence was not adequate' and the charges were dropped.[46] The Head of the Police Bureau for Combating Discrimination expressed that even though incidents are recorded by the Police as 'racist', perpetrators of racially motivated crimes are not prosecuted because of an evident reluctance by the Attorney-General.[47]

Another reason for the lack of reported crime is due to the lack of an efficient recording system which would clearly stipulate and classify types of racist crime. The Attorney-General's Office does not maintain such records and it is virtually impossible to search the Court Registrar's archives unless one is aware of the specific name of the case and its corresponding file number.[48] This difficult state of affairs has been noted by the ODIHR in its Hate Crime Report,[49] which supports that the current mechanism for recording incidents of a racist nature in the police database does not comply with the recommendation made by the Ombudsman that there should be a specific record of an incident which can be described as racist.[50] It is therefore difficult to evaluate the extent of online hate speech in Cyprus.

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[44] N. Trimikliniotis & C. Demetriou, *Racist and related hate crimes, Cyprus*, September 2010, http://works.bepress.com/nicos_trimikliniotis/28, accessed on 9th October 2013

[45] Ibid at paragraph 26

[46] Ibid

[47] This opinion was given to Trimikliniotis during an interview in 2010, supra at n. 44.

[48] These difficulties were expressed by Trimikliniotis when conducting his research on this issue, as per footnote 44, paragraph 29. He further comments that "a keyword search at the [private database operating on the basis of subscriptions] regarding racist or other related hate crime has rendered nil results."

[49] Hate Crimes in the OSCE Regions, Incidents and Responses, Annual Report for 2007, Warsaw, October 2008, found at: http://www.osce.org/odihr/33989.

[50] Cyprus Ombudsman File No. A.K.P. 37/2005, *Improving Recording of Racist Crimes*, Cyprus, Agency for Fundamental Rights.

b. European Court of Human Rights case-law

The European Court of Human Rights has established that some forms of expression could come into conflict with rights protected by the ECHR. In the case of *Handyside v. United Kingdom*, the Court held that 'freedom of expression [...] is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population'.[51] In addition, the Court stated that 'tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance'.[52] The case-law of the ECtHR is further discussed below in the discussion of the potential ways of tackling hate speech through Article 10(2) and 17 of the European Convention.

c. Court of Justice of the European Union case-law

The case of *Feryn*,[53] which appeared to deal exclusively with non-discrimination, upon deeper analysis, is perhaps the first EU hate speech case which can be attributed to the Court.[54] The case involved a number of public statements made by the Director of Feryn, which had the effect of advertising that his company was looking to recruit fitters but did not want to employ 'immigrants' because the company's customers were reluctant and afraid to grant them access to their homes. The Court found that these statements, which were of a racist nature, constituted direct discrimination as they hindered equal access to the labour market. Effectively, it was recognised by Attorney-General Maduro that 'contrary to conventional wisdom, words can hurt'[55] and it was found that the 'announcement that persons of a certain racial or ethnic origin are unwelcome as applicants for a job is thus itself a form of discrimination'.[56]

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[51] *Handyside v. United Kingdom*, Application no. 5493/72 (ECtHR, 7 December 1976) §49.
[52] *Erbakan v. Turkey*, Application no. 59405/00(ECtHR, 6 July 2006) §56.
[53] Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestnijding v. Firma Feryn NV* (2008) ECR I 5187.
[54] For a deeper analysis of Feryn, see: Belavusau. U, *Fighting Hate Speech Through EU Law* in E. Ellis & K. Benediktsdottir (eds), 'Equality into Reality: Action for Diversity and Non-Discrimination', Iceland University Press, 2011.
[55] Opinion of Advocate General Poiares Maduro, delivered on 12 March 2008 on Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestnijding v. Firma Feryn NV* (2008),), §1.
[56] Ibid at §16.

The Race Equality[57] and Equal Treatment[58] Directives provide for protection within the field of employment. In light of the Feryn case therefore, which invoked the Race Equality Directive in relation to hate speech, it could be said that if it can be proven that speech which discriminates against identifiable groups, based on the grounds covered by the aforementioned Directives,[59] and that has been said within the employment, access to goods and services context, then it will be possible to claim that there was discrimination and a contravention of EU law. As the Race Directive does not explicitly refer to racist 'hate speech' in its ambit, this would not preclude its effectiveness in being invoked in protecting victims in hate speech cases, pursuant to the case of *Feryn*.

III. Contextual Elements of Hate Speech

According to the Council of Europe, the term hate speech is understood as: '*covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin*'.[60]

Context and intention are therefore very important in assessing whether hate speech actually took place.[61] The potential repercussions of online hate speech are much higher because online dissemination of information can reach a potentially very high number of people, especially when published on social networking sites. Online hate speech can rapidly spread anywhere in the world and become easily accessible to anyone, at any point in time. It is usually in writing, but can also be in photographic or audiovisual form.

The European Commission against Racism and Intolerance (ECRI), in its fourth report on Cyprus, found that '*there is a rise in prominence of extremist anti-immigration groups. Certain extreme*

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[57] See the Fundamental Rights Agency's Report on the efficacy of the RED: http://fra.europa.eu/sites/default/files/fra_uploads/1916-FRA-RED-synthesis-report_EN.pdf

[58] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2002], *OJ L 303*.

[59] Race Directive covers racial and ethnic origin, as per Article 2. Equal Treatment Directive covers religion or belief, disability, age or sexual orientation, as per Article 2.

[60] 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 at the 607th meeting of the Ministers' Deputies).

[61] *Gündüz v. Turkey,* Application no. 35071/97, (ECtHR, 13 November 2003).

nationalist websites disseminate hate speech'.[62] It is apparent that the recent upsurge of nationalism and xenophobia in Greece has had a direct impact on Cyprus. Political groups incite racial violence by targeting groups and posting online texts, as well as audio-visual material, thereby causing verbal and mental abuse.[63] The particular characteristics of online hate speech and the context in which they are made must be taken into account in the Courts' deliberations.

IV. Alternative Methods of Tackling Hate Speech

Framework Decision 2008/913 predominantly provides for the use of criminal law to tackle hate crime. However, Article 6 provides examples of other penalties which member states may wish to apply, such as:

a) exclusion from entitlement to public benefits or aid;

b) temporary or permanent disqualification from the practice of commercial activities;

c) placing under judicial supervision;

d) a judicial winding-up order.

Applying this provision to cases of hate speech therefore, depending on the nature of the broadcaster or publisher of the hate speech (i.e. whether it is on a registered company website which is engaging in hate speech whilst carrying out its commercial activities), it would be possible to place the website under judicial supervision to ensure that such discriminatory speech is never published, or alternatively, if one interprets Article 6(b) expansively, to temporarily or permanently close down the website.

As is evident from the above discussion, the legislative framework is in place in Cyprus to combat incidents of online hate speech. What is therefore necessary in Cyprus is effective enforcement of the relevant legislative provisions by the office of the Attorney-General responsible for prosecuting such crimes, as well as effective investigation by the police authorities. ECRI has for example urged that the authorities in Cyprus take all appropriate steps

[62] ECRI Report on Cyprus (fourth monitoring cycle), Adopted on 23 March 2011 , Published on 31 May 2011, p.7, found at: http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/cyprus/CYP-CbC-IV-2011-020-ENG.pdf

[63] For instance, an article condemning Turkish-Cypriot buses which take tourists to the international airport of Larnaca was subsequently erased from this website: http://www.cyprusnewsreport.com/?q=node/4048

"to prevent the Internet from being used to disseminate racist and xenophobic comments and material and to prosecute the perpetrators of such acts".[64]

Tackling certain types of hate speech might potentially engage Article 17 of the European Convention; the so-called abuse clause.[65] The use of this Article deprives the protection afforded by the Convention to the freedom of expression. This specific Article does not have an obligatory nature, i.e. it does not impose any obligation on the contracting parties to take measures against acts contrary to the ECHR, instead it only enables them to do so.[66] A more detailed discussion on Article 17 is set out below.

Another important way to tackle hate speech would be to focus on education. Tolerance and acceptance of diversity can be taught at school and in the family of a child at a young age. Moreover, according to the European Commission for Democracy Through Law, 'information and communication leads to a better understanding of the convictions of others and to tolerance'.[67] Combating hate speech should be achieved through the criminal justice system, by the imposition of penalties, and the education system of Cyprus.

V. Distinction between Blasphemy and Hate Speech based on religion

EU law does not make any provision on blasphemy. Framework Decision 2008/913 defines religion to be understood as 'broadly referring to persons defined by reference to their religious convictions or beliefs'.[68] Further, the EU Charter on Fundamental Rights, as per Article 10 on freedom of thought, conscience and religion, broadly provides for the protection of everyone to have the freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. Regarding the interpretation of this right in a more specific context, the case-law of the European Court of Human Rights provides further guidance (see below).

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[64] Ibid Supra at n. 62, p.27, § 125.

[65] 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

[66] See below the discussion on Article 17 of the European Convention.

[67] European Commission for Democracy Through Law, Report on the relationship between freedom of expression and freedom of religion: The issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, Adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008).

[68] Ibid at n.13, Recital 8.

Blasphemy is non-existent as a legal notion in Cypriot domestic law. The Constitution protects freedom of religion by explicitly stating in Article 18 that 'every person has the right to freedom of thought, conscience and religion'; and that 'all religions are equal before the law'.[69] In addition, Article 28 guarantees that 'all persons are equal before the law' and that "every person shall enjoy all the rights and liberties provided for in the Constitution without any direct or indirect discrimination against any person on the ground of his community, race, religion, language, sex, political or other convictions, national or social descent, birth, colour, wealth, social class, or on any ground whatsoever".[70]

Nevertheless, 'religious insult' is considered a criminal offense under the Penal Code Law.[71] Under Article 141, '*Whoever speaks or creates a sound that might be understood to any person or makes a hand gesture before him or places any object before him, with deliberate intention to offend the religious sentiments of such person, is guilty of a misdemeanour and is liable to imprisonment for one year*'. This is the only criminal offence under Cypriot law that bears resemblance with a ban on blasphemy. Nevertheless, the evidence of the prosecution and sanctioning of this crime in Cyprus is scant.

Article 138 of the Penal Code protects places of worship and religious objects.[72] This Article was interpreted as aiming to prevent unnecessary and unjustified attacks on religious beliefs to the public, where deterrence is deemed necessary in a democratic and well-governed state whose population consists of people who profess and follow different religious beliefs and rituals.[73] Given the absence of case law under Articles 141 and 142 of the Penal Code, the manner in which the Court would deal with a case before it involving an alleged breach of the aforementioned Articles could only be hypothesised by analogy. A clear connection between the attack itself and religion needs to be established. In a hypothetical religious hate speech case, it

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[69] This resonates Article 19 of the European Convention on Human Rights, which ensures that *"everyone has the right to freedom of thought, conscience and religion"*.

[70] This resonates Article 14 of the European Convention on Human Rights, which stipulates that *"the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"*.

[71] The Penal Code Law, Cap.154, Article 141: "*Όποιος ξεστομίζει λέξη ή δημιουργεί ήχο ώστε να ακούγεται σε οποιοδήποτε πρόσωπο ή προβαίνει σε χειρονομία ενώπιον του ή τοποθετεί οποιοδήποτε αντικείμενο ενώπιον του, με την εσκεμμένη πρόθεση να θίξει τα θρησκευτικά αισθήματα τέτοιου προσώπου, είναι ένοχος πλημμελήματος και υπόκειται σε φυλάκιση ενός χρόνου*".

[72] "Whoever destroys, damages or desecrates a place of worship or object that is considered sacred by any class of persons, with the intention of insulting the religion of any class of persons or with knowledge that such acts might be considered a certain class of persons as an insult to their religion is guilty of a misdemeanor."

[73] *Republic v 1. Sarbjit Singh, 2. Mamas Prokopiou Kitas, 3. Antonis Prokopiou Kitas*, [2010] Case No. 8000/10

would be necessary for the victim to provide evidence to show that the publication was made in order to purposefully insult the religion, in a humiliating fashion or insult the followers of the religion itself.

Whenever there is a gap in the Cypriot common law, reference to the English common law is customarily made by Cypriot courts.[74] A recent case in the UK involving the dissemination of racist hate speech on Twitter by a 21 year old male, which caused a public uproar, was seen as a racially aggravated offence and a crime of specific intent.[75] Due to the expressed racial content of the words used, the extremely offensive nature of those words, and the intention of the defendant to cause racial offense, the Court convicted him to a sentence of immediate imprisonment.

VI. Networking Sites and the Issue of Online Anonymity

The issue of online anonymity is a crucial one when the prosecution is collecting evidence to put forward their case for online hate speech before the court. There is no ongoing current debate in the House of Representatives of Cyprus regarding whether networking sites should be legally forced to reveal the identities of persons in cases involving online hate speech. Furthermore, no public body based in Cyprus has the competence to regulate or monitor internet forms of expression. Specifically, both the Cyprus Radio Television Authority and the Press and Information Office, clarified that they have no jurisdiction over the internet.[76]

Revealing the identities of persons at the origin of an online hate speech might prove difficult since the revelation of the identity of a person is likely to conflict with fundamental freedom articles of the Constitution of the Republic, such as Article 17, which guarantees the right to respect of one person's correspondence and any other communication.[77] Additionally, Article 17

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[74] Article 29 of the Courts Law of 1960 (Law no.14/1960)

[75] R *v Liam Stacey*, Swansea Crown Court [2012]

[76] Sylvie Mantis, Interview with representatives of the Cyprus Radio-Television Authority, Nicosia, 27th March 2012.

[77] Article 17, of the Constitution reads: *"1. Έκαστος έχει το δικαίωμα σεβασμού και διασφαλίσεως του απορρήτου της αλληλογραφίας ως και πάσης άλλης επικοινωνίας αυτού, εφ' όσον η τοιαύτη επικοινωνία διεξάγεται διά μέσων μη απαγορευομένων υπό του νόμου. 2. Δε χωρεί επέμβαση κατά την άσκηση του δικαιώματος τούτου, εκτός αν η επέμβαση αυτή επιτρέπεται σύμφωνα με το νόμο, στις ακόλουθες περιπτώσεις:Α. Προσώπων που τελούν υπό φυλάκιση ή προφυλάκιση. Β. Κατόπιν δικαστικού διατάγματος που εκδόθηκε σύμφωνα με τις διατάξεις του νόμου, μετά από αίτηση του Γενικού Εισαγγελέα της Δημοκρατίας, και η επέμβαση αποτελεί μέτρο το οποίο σε μια δημοκρατική κοινωνία είναι αναγκαίο μόνο προς το συμφέρον της ασφάλειας της Δημοκρατίας ή την αποτροπή, διερεύνηση ή δίωξη των ακόλουθων σοβαρών ποινικών αδικημάτων:(α) Φόνος εκ προμελέτης ή ανθρωποκτονία, (β) εμπορία ενηλίκων ή ανηλίκων προσώπων*

provides that there shall be no interference with the exercise of this right except in accordance with the law. However, these cases should be resolved on a case-by-case basis. It seems that in Cyprus, at present, internet regulation is at an embryonic stage.

VII. Tackling the Notions of "Violence", "Hatred" and "Clear Presence of Danger"

Both the notions of "hate speech" and "violence" are included in the Law on combating of certain forms and expressions of racism and xenophobia by means of criminal law.[78] Particularly, Article 3(1) of that Law reads:

> *'Any person who deliberately transmits in public and publicly incites, in any way, violence or hatred against a group of people or a member of a group, which is determined on the basis of race, colour, religion, genealogical origin, national or ethnic origin, in such a way to cause public disorder, or that has a threatening, abusive, or offensive character, is liable of up to five (5) years of imprisonment, or a fine up to ten thousand Euros (10,000), or both in case of conviction'.*[79]

Given the current debate with regard to the alternative or cumulative approach of the two notions, it is not surprising that the aforementioned Law uses the two notions alternatively, under Article 3; admittedly, in this way, they would cover a wider range of cases, since the need for the two notions to co-exist would not be present.

More than a decade ago, the ECtHR stated that "although certain phrases seem aggressive in tone […] when taken as a whole they do not glorify violence. Nor do they incite people to hatred, revenge, recrimination or armed resistance".[80] However, in more recent cases, the Court took a different approach. For instance, in *Feret v. Belgium,* a case regarding public incitement to discrimination and racial hatred though publication and dissemination of leaflets, the applicant was convicted of incitement of hatred to racial discrimination.[81] The Court found no violation of

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και αδικήματα που σχετίζονται με την παιδική πορνογραφία, (γ) εμπορία, προμήθεια, καλλιέργεια ή παραγωγή ναρκωτικών φαρμάκων, ψυχοτρόπων ουσιών ή επικίνδυνων φαρμάκων, (δ) αδικήματα που σχετίζονται με το νόμισμα ή το χαρτονόμισμα της Δημοκρατίας και (ε) αδικήματα διαφθοράς για τα οποία προβλέπεται, σε περίπτωση καταδίκης, ποινή φυλάκισης πέντε ετών και άνω. Γ. Κατόπιν δικαστικού διατάγματος, που εκδόθηκε σύμφωνα με τις διατάξεις του νόμου, για τη διερεύνηση ή δίωξη σοβαρού ποινικού αδικήματος για το οποίο προβλέπεται, σε περίπτωση καταδίκης, ποινή φυλάκισης πέντε ετών και άνω και η επέμβαση αφορά πρόσβαση στα σχετικά με ηλεκτρονική επικοινωνία δεδομένα κίνησης και θέσης και στα συναφή δεδομένα που είναι αναγκαία για την αναγνώριση του συνδρομητή ή και του χρήστη."

[78] Ibid at n.23.

[79] Ibid at n.25.

[80] Sener v. Turkey, Application no. 26680/95(ECtHR 18 July 2000) §45.

[81] Feret v. Belgium, Application no.15615/07 (ECtHR, 16 July 2009).

Article 10 of the ECHR.[82] In *Vejdeland and Others v. Sweden*, a case concerning the conviction of the applicants for the distribution of leaflets which were offensive for homosexuals, the Court stated that discrimination based on sexual orientation was as serious as discrimination based on "race, origin or colour"; and found no violation of Article 10.[83] Particularly, the Court adopts the approach that hate speech is sometimes used as the means to promote violence or hostility; it constitutes the act by which hatred is incited. Freedom of expression is indeed limited, but only on the basis of an act. This is why the Court does not tolerate 'incitement to hatred, revenge, recrimination or armed resistance'[84] or statements which promote the use of 'knives or bayonets to get rid of political adversaries'.[85]

'Clear and present danger' is a term used in the United States as a test for whether a Law can be deemed unconstitutional. Cyprus has not adopted this notion. However, a law can only be deemed unconstitutional if it is contrary to specific provisions of the Constitution. There is always a presumption that laws are constitutional, unless established otherwise.[86] The party who claims that a law is unconstitutional must prove the unconstitutionality beyond any reasonable doubt. The declaration of an unconstitutional law falls under the sole jurisdiction of the Supreme Court.[87]

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

Cyprus based Part II of its Constitution on the European Convention. Article 19(3) of the Constitution resembles Article 10(2) of the ECHR. Both Articles, in their first part, safeguard the freedom of expression and in the second part provide restrictions by presenting the criteria on which the restriction needs to be based. The criteria are the following: the restriction, formality, condition or penalty should be prescribed by law, and they should be necessary in a democratic society in the interest of national security, territorial integrity or public safety, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the

[82] Ibid, at §82.
[83] Vejdeland and Others v. Sweden, Application no. 1813/07 (ECtHR, 9 February 2012) at §60
[84] ECtHR, Sener v. Turkey, Judgment of 18 July 2000.
[85] ECtHR,Gunduz v. Turkey, Judgment of 13 November 2003.
[86] For Instance, in *Andreas Nikolaou v. Nafsika A. Nikolaou (1992) 1 A.A.Δ. 1 CLR 1338*, the Court deemed the Law in question to be constitutional because the presumption of constitutionality was not overturned.
[87] Article 144 Constitution of the Republic of Cyprus, 1960, Part IX ,The Supreme Constitutional Court.

disclosure of information received in confidence, or to maintain the authority and impartiality of the judiciary.[88]

Combating hate speech can be achieved by the application of Article 17 of the European Convention. Article 17 is addressed to contracting parties, but also to groups of persons; and its purpose is to maintain the fundamental rights and freedoms established in the ECHR and prevent a possible breach. By applying this Article, the Court prevents any deviation from the true meaning of the rights contained in the ECHR, by excluding the expression in question from the protection offered. The purpose of this Article was set out by the Court for the first time in the case of *Lawless v. United Kingdom,* according to which:

> '*the purpose of Article 17, insofar as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; ...therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms*'.[89]

Another way to combat hate speech is by the application of Article 10(2) of the European Convention, which refers to the restriction of the freedom of expression. The Court follows a four-step test in determining whether a limitation of Article 10(1) is justified. Accordingly, the Court has to verify the existence of the interference, whether it is prescribed by law, pursues a legitimate aim and necessary in a democratic society. Additionally, the Court takes into account the objective of the person whose freedom of speech was restricted, the content of the expression, the context, the profile of the people who are targets of opinions and expressions, the publicity and potential impact of the expression and the nature and gravity of the restriction.[90] In the case of *Soulas*, regarding the social integration of migrants, the ECtHR, applied the four-prong test and carried out a proportionality test on the relation between the two perspectives of Article 10.[91] The Court, *inter alia*, stated that the delicate issue of the social integration of migrants should be provided with a wide margin of appreciation, done in such way that the outcome of a speech would depend on the demographic, historic and cultural context.[92]

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[88] Article 10 (2) of the ECHR provides for an additional criterion which is not included in Article 19 (3) of the Constitution of the Republic of Cyprus: the prevention of disorder or crime

[89] ECtHR, Lawless (no.3) v. Ireland, Judgment of 1July 1961 §7

[90] Council of Europe Factsheet on Hate Speech, updated November 2008, p.3.

[91] Soulas and others v. France, Application No: 15948/03, Judgment of 10th July 2008

[92] See further: Judge Francoise Tulkens, *When to say is to do, Freedom of expression and hate speech in the case law of the ECHR,*,Strasbourg, Human Rights Building, Tuesday 9 October 2012.

IX. Harmonization of National Legislations

A fundamental tenet of the EU is the respect of the different legal systems and traditions of member states. Article 67(3) on the Treaty for the Functioning of the European Union (TFEU)[93] directly encourages the approximation of criminal laws for the prevention and combating of racism and xenophobia, whilst respecting the principle of subsidiarity and proportionality, as per Article 69 TFEU.[94] If the EU chose to create a stronger legislative protection for racially motivated crime, including hate speech, it could introduce it under Article 84 TFEU, which provides that the European Parliament and the Council can establish measures to promote and support Member States in the field of crime prevention. These measures however cannot harmonise the laws and regulations of member states.

The criminal ban on certain discourses is more pertinent to certain constitutional traditions and this depends on historical events and society's perception of the role of government in limiting freedom of expression in particular situations.[95] The Constitution of Cyprus strongly values freedom of expression and there are very few examples in the case law where it has been curtailed by the courts.[96]

This point is explicitly recognised in the Framework Decision, Recital 6, which states that:

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[93] Article 67 of the Treaty for the Functioning of the European Union: 1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. 2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons
shall be treated as third-country nationals. 3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws. 4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

[94] Article 69 of the Treaty for the Functioning of the European Union: National Parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality.

[95] For example, Austria, Belgium, the Czech Republic, Germany, Hungary, Israel, Luxembourg, Poland and Romania all criminalise the express denial of the Holocaust and various penalties could be enforced for this criminal act.

[96] Ibid 39

> *"This Framework Decision is limited to combating particularly serious forms of racism and xenophobia by means of criminal law. Since the Member States' cultural and legal traditions are, to some extent, different, particularly in this field, full harmonisation of criminal laws is currently not possible".*

Its goal therefore is not the harmonisation of national legislation for such crimes, but instead to ensure that "effective, proportionate and dissuasive penalties are provided for natural and legal persons having committed or being liable for such offences".[97] It would therefore not be respectful of the principle of proportionality to impose one unitary criminal law system in the tackling of racist and xenophobic crime.

Achieving harmonization of domestic criminal law is not an easy task. Pursuing this, the Council of Europe made recommendations to the contracting parties on the harmonization of national measures regarding hate speech.[98] Even though a recommendation is not legally binding, the contracting parties committed themselves to take action in a specific field, keeping in mind the fundamental rights and freedoms provided for by the ECHR. Furthermore, over the years, the ECtHR adopted certain identification criteria for distinguishing hate speech in order to discern whether or not to exclude it from the protection offered by the ECHR on freedom of expression; although it has never given a precise definition of it. Accordingly, the reference given to hate speech relates to '*all forms of expression which incite, promote or justify hatred based on intolerance. Pursuant to the Council of Europe, it is important to note that this concept given by the Court is autonomous, since the Court does not consider itself bound by the domestic courts classification*'.[99]

X. Legal implications of "hate speech"

Whilst there is no explicit definition of hate speech in EU law, the Recitals in the Framework Decision provide a guideline as to the interpretation that Member States should afford to pertinent terms, such as 'hatred' and 'religion'. In concrete, Recital 8 states that *'Religion' should be understood as broadly referring to persons defined by reference to their religious convictions or beliefs";* and Recital 9 mentions that *'hatred' should be understood as referring to hatred based on race, colour, religion, descent or national or ethnic origin".* Anything more explicit and binding would not be appropriate for a

[97] Ibid at n.13, Recital 5.
[98] For example, Council of Europe Recommendation 1805 (2007) on *Blasphemy, religious insults and hate speech against persons on grounds of their religion*, Assembly on 29 June 2007 (27th Sitting)
[99] Manual on hate speech, Anne Weber, Council of Europe Publishing, September 2009, at p.3.

legislative instrument under EU law as it would disregard the constitutional traditions of member states.

There is currently no universally accepted definition of hate speech. Although with some common grounds, each state has its own definition of hate speech. In light that it attracts criminal sanctions, this is an area best dealt with by domestic legal systems. At the international level, it would be desirable to have a common understanding of this notion. Nevertheless, it would be difficult to impose a legally binding term to all the member states. The Council of Europe gave its own definition of hate speech, which is set out above.[100] Nevertheless, this definition is not legally binding. It could however constitute a starting point, should a multilateral treaty come into place.

XI. Legal implications and differentiation of related notions

The definition of 'provocation' used under Cyprus law, in accordance with its own developed case law and the influence of UK law, is an '*act, or series of acts, done by the victim to the accused which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind*'.[101] Whether there is provocation is dependent on whether it is 'real' and 'specific' to the legal nature and particular nature of the case.[102] Provocation can potentially limit the freedom of expression. However, this should be in compliance with Article 10(2) of the ECHR, according to which the limitation must be justified only to the extent that it is clearly prescribed by law, pursues a legitimate aim, and is necessary in a democratic society and proportionate to the aim pursued.

'Intimidation' (απειλή), as per Article 91A of the Penal Code, comes into play when '*any person who causes another fright or anxiety by threatening with violence or other wrongful act or omission, commits an offence and on conviction is subject to imprisonment not exceeding three years*'. Cypriot courts have held that intimidation and harassment are intrinsically linked with the victim's feelings and thus must be

[100] 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 at the 607th meeting of the Ministers' Deputies)

[101] *Γ.Ε της Δημοκρατίας ν Ανδρέα Αεροπόρου* (1997) 2 Α.Α.Δ. 17; *Duffy* (1949) 1 All E.R. 932

[102] Ibid at n. 74.

proved that the victim was actually intimidated or harassed by the threat.[103] Intimidation refers to a *"statement communicating a serious intention to commit an act of unlawful violence; and which of its nature is deprived of protection so long as the statement establishes intimidating speec*h".[104]

According to the Committee of Ministers, hate speech refers to '*all forms of expression, which spread, incite, promote or justify hatred based on intolerance*.'[105] 'Incitement of hatred' is found in the case law of the ECtHR. *Onal v. Turkey*[106] and *Soulas and others v. France.*[107] The former case concerned criminal proceedings for publishing works which promoted hatred and hostility. Specifically, the biography of a Kurdish businessman was published in which he was accused, inter alia, of drug trafficking.[108] The applicant complained that his work did not contain incitement to hatred and that his right of freedom of expression was violated. The Court found a violation of Article 10. The latter case concerned the publication of a book in which the authors were found guilty of propaganda at national level. Additionally, the case of *Le Pen v. France*, regarded a publication where the applicant was found guilty for incitement to discrimination, hatred and violence towards a group of people because of their origin.[109]

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[103] *Αστυνομικός Διευθυντής Λευκωσίας v Άννα Ιωάννου* (2007), Case No: 34785/07.
[104] Roger Kiska, "Hate Speech: A comparison between the European Court of Human Rights and the United States Supreme Court Jurisprudence", p.143.
[105] *Gündüz v. Turkey,* Application no. 35071/97, (ECtHR, 13 November 2003).
[106] *Onal v. Turkey,* Application no. 41445/04 (ECtHR, 2 October 2012).
[107] *Soulas and others v. France,* Application no.15948/03 (ECtHR ,10 July 2008).
[108] Ibid at n.108.
[109] Le Pen v France, Application no. 18788/09, Judgment of 20th April 2010

ELSA Czech Republic

National Researchers

Kateřina Kapková

Mgr. Luboš Mazanec

Lenka Pekařová

Mgr. Iva Šimková

Mgr. František Vinopal

Academic Adviser

JUDr. Štěpán Výborný

National Coordinator

Helena Morozová

1 National definition of Hate Speech

In your national legislation, how is hate speech defined? (e.g.: Is hate speech defined as an act?) (see Delruelle, "incitement to hatred: when to say is to do", seminar in Brussels, 25 November 2011).

The Czech Republic, as well as other European countries, is bound, either legally or politically, to protect fundamental human rights on the international level. These legal documents coming from the most important international organizations protecting human rights such as the United Nations – Universal Declaration of Human Rights, the Council of Europe – European Convention on Human Rights and the European Union – Charter of Fundamental Rights of the European Union, these all contain fundamental human rights and freedoms, which can be in conflict, when it comes to hate speech. There is always a question of freedom of speech versus the hatred, no matter where is it targeted, but mostly injuress the hatred some other fundamental right or freedom like freedom of thought, conscience and religion or prohibition of discrimination.

The Czech legal system is based on the European model of defending democracy (developed mainly because of the experience of the Second World War), where are foreseen necessary measures to be taken, if the freedom of speech interferes too far into any other fundamental right and has actually the power to threaten democracy.

On the national level this principal is expressed in the Czech Constitution and in the jurisprudence of the Czech Constitutional Court. Protection of fundamental rights repeats the constitutional Act of fundamental human rights and freedoms, adopted straight with the establishment of the Czech Republic. Right behind the first section dealing with the most general fundamental rights and freedoms, there is for example also a section dealing especially with the rights of national and ethnical minorities.

However in the Czech legal order there is no such specific notion as hate speech. In the Criminal Code of the Czech Republic we can find a Chapter called "Crimes against coexistence of humans". There are defined crimes such as "Violence against group of inhabitants or against individual" (section 352), "Defamation of nation, race, ethnical or other group of people" (section 355) and "Incitement to hatred against group of people or to restriction of their rights and freedoms" (section 356). In other section called "Crimes against humanity" there are described crimes like "Foundation, support and promotion of movement aiming suppression of rights and freedoms of humans" in section 403, "Expression of sympathy to such movement" in section 404 or "Denying, questioning, approval and justifying of genocide" in section 405. These all crimes are based on hatred as meant in this topic.

The section 356 defines directly the term "incitement to hatred". The general rule says that whoever publicly incites to hatred to any nation, race, ethnical, religious or class group, or to restriction of their rights and freedoms, will be punished with imprisonment of two years.[1]

[1] Act No.40/2009 Coll.., Criminal Code, as amended further.

In all these three crimes after defining of the general rule in the first paragraph, in the next paragraphs the general rule is specified more deeply. For all these crimes there is specified higher punishment for a person, who commits the crime defined above, when he or she does it through printed media, film, TV, publicly accessible PC network or other tools of the same effect.

That means according to the Czech Criminal Code, there is no such crime defined especially as hate speech crime. However, using online tools to commit a hate crime is to be considered as an aggravating circumstance.

The incitement to hatred is also mentioned in other acts such as an Act about television and radio broadcasting, where the company can lose their license, when they broadcast anything, what could mean the incitement to hatred. Further a new Act about criminal liability of legal entities also prohibits them to commit all crimes mentioned above. Last, but not least, the hate incitement is also mentioned in acts about petitions, associations and organizations. They all prohibit any activity base on hatred.

From the institutional point of view, the Act of churches and religious associations contains in its section 5 paragraph b) a strict prohibition to found any church or religious association, when their activities are against the law order and their belief or activities threaten rights, freedoms and equality of individuals and their associations including other churches and religious associations, threaten democratic fundaments of the state and its sovereignty, independence and territorial integrity, which would deny or restrict personal, political or other rights of individuals because of their nationality, gender, race, origin, political or other thinking, religion or social status, incite hatred and intolerance from these reason, supports violence or breaking the laws.[2]

Summarizing the Czech legal order knows nothing like hate speech as a special act. There are hate crimes affected by the Criminal Code and other acts as mentioned above. The closest institute to hate speech is most probably the crime "incitement to hatred" in the section 356 of the Criminal Code. Hate speech is according to our legal system actually one of more possible ways of committing each one of these crimes. And moreover hate speech spreading online is considered even as an aggravating circumstance.

2 Contextual elements of Hate Speech

What are the key contextual elements to identify a "hate speech"? Does the multiplying and wider effect of online dissemination always mean higher potential impact of online hate speech; why?

[2] § 5 sub. b) Act. No.. 3/2002 Coll., The Church and Religious Organisations Act, as amended further.

The term hate speech can be understood as a part of a broader concept of hate crime, where there can be found also hate violence next to the hate speech.[3] At the end of twenties and early thirties of the twentieth century corresponded the term race hate to today's term hate speech. At the beginning of the forties corresponded the libel group. Can we say that the protection of the individual against insults may also apply to the whole group? In later times the most widely used concept of hate speech asserted itself.[4]

Distinction between violence and threats of violence is not the best because of violence and threats of violence may overlap. Although violence in its most common form, in the form of physical assault, cannot be carried out in cyberspace, some symptoms, such as challenges to physical attacks against enemies or consent with the criminal acts carry a clear element of violence.

Hate speech may be viewed in a separate meaning or as a part of an expression hate crime.[5] Hate crime can be defined as the unlawful conduct that meets the definition of the criminal offense and its motive is the offender's hatred under the jurisdiction of the victims of the attack to a certain race, nationality, ethnic group, religion or other social group.[6] These findings can be used to detect hate speech, although some also depend on the peculiarities of the virtual world.[7]

Hate speech is utterance intended to insult, humiliate or provoke discrimination, hatred or violence against an individual or group of persons just on the basis of their personal characteristics, typically gender, race, color, language, religion or belief, political or other opinion, national or social origin, association with a national or ethnic minority, etc.[8]

In Czech professional literature hate speech is not sufficiently defined yet. Definition you have read in the last paragraph cannot be considered sufficient because it lists only one category of qualified facts, so we will follow foreign approaches to this concept. For a more apt definition see the Council of Europe, first in the Recommendations of the Committee of Ministers of the hate speech from 1997.[9] Here hateful expression shall include forms of expression which spread, incite, promote or justify race hate, xenophobia, anti-semitism or other forms of hates based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.[10] Individual definition of hate speech may be different, but not in essence. Differences arise from different backgrounds and subjective view of the evaluator.

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[3] M. Mareš. *The issue of Hate Crime: International experience and capabilities of this approach in the Czech Republic with an emphasis on hate crimes against foreigners* (Ministerstvo vnitra, 2011) 5.
[4] S. Walker. *Hate Speech: the history of an American controversy* (University of Nebraska, 1994) 8.
[5] Š. Výborný. *Hateful internet and law* (Wolters Kluwer, 2013) 17-18.
[6] J. Herzeg. *Crimes of hate* (ASPI, 2008) 11.
[7] Š. Výborný. *Hateful internet and law* (Wolters Kluwer, 2013) 18.
[8] P. Jäger, P. Molek. *Freedom of expression - democracy, equality and freedom of expression* (Auditorium, 2007) 22-25.
[9] Š. Výborný. *Hateful internet and law* (Wolters Kluwer, 2013) 19.
[10] Recommendations of the Committee of Ministers of the Council of Europe 90 (20) on hate speech http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dhlgbt_docs/CM_Rec%2897%2920_en.pdf accessed 30.10.1997.

According to Štěpán Výborný it would be more appropriate, especially in the case of crimes, to work with the term bias or the Czech equivalent of prejudice or preoccupation with which it is operated in the international literature as a synonym for the term hate. Nearly all crimes are in fact motivated by a kind of hate, and therefore the term hate crime in principle does not affect the group members dealt with in the definition. Even in this case some difficulties arise. For example, how to understand the concept of bias crime (speech) according to the concept of prejudice and preoccupation.[11]

Dictionary of literary Czech language by Czech Language Institute defines prejudice as "pre-made or handed down but probably inadequate conclusion or opinion, usually emotionally colored" and preoccupation as "pre-biased, especially unfairly, having prejudices."[12] Both terms are by definition very close to the term hate crime or bias crime. For the hate speech, the relationship between hate and bias is very close and the best is to talk about hate based on prejudice or preoccupation or hateful prejudices.[13]

After defining terminological point of view we can dedicate time to particular hate speech on Czech internet, i.e. hate speech online. The web contains different forms of hates every day. It is unable to escape them and they get to the people who would on principle refuse to meet them.[14] How the possibilities of expression in the virtual world has been changing the understanding of freedom of speech and also affect access to hate speech?

Freedom of speech has undergone considerable change with the advent of cheap and anonymous international internet. Anyone can join in public debates and participate in discussions on various social issues. Some people are abusing access to information and spreading ideas that disrupt the debate. But there is a need to highlight the positive aspects of the internet, mainly because it contributes to the dissemination of information.[15]

Dissemination of information through the internet is a global dimension. The idea manifested abroad and in foreign language can be quickly disseminated in the Czech Republic without extensive computer knowledge. Cheapness is reflected as a connection without great expense as well as the cheapness of production and dissemination of materials. Internet security can be understood as security against opponents in the real world and anonymity as an easy escape of spokesman of hate speech.[16]

In the Czech Republic, the increase of internet in Czech households logically leads to increase of online hate speeches. Internet connection has been established on 13th February 1992. In 1996

[11] Š. Výborný *Hateful internet and law*(Wolters Kluwer, 2013) 20-21.
[12] Institute for language academy of sciences of the Czech Republic. "Dictionary of literary Czech language by Language Institute of the Czech Academy of Sciences" <http://ssjc.ujc.cas.cz/ http:// > accessed 2011.
[13] Š. Výborný. *Hateful internet and law* (Wolters Kluwer, 2013) 21.
[14] Ibid 23.
[15] Ibid 75.
[16] Š. Výborný. *Hateful internet and law* (Wolters Kluwer, 2013) 64-65.

6% of the population consisted the connnection to internet, in 2012 it was 6,290,000 inhabitants[17] out of approximate 10,500,000 inhabitants in the Czech Republic.[18]

Czech legislation finds delivery a cyber hate speech on the internet as a crime (see Alternative methods of Tackling Hate Speech). It is incorporated under qualified facts and are therefore punished more severely. This sharpening approach stems primarily from the possibility to reach through the internet a wide range of listeners on one side and cause appreciable harm victims on the other side.[19]

3 Alternative methods of tackling Hate Speech

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

Hate speeches are not governed in the European concept of human rights and fundamental freedoms in principle. This fact is based on experience with undemocratic forms of government that changed the understanding of democracy in the European environment. In the Czech Republic it was mainly the Nazi ideology of Adolf Hitler which was replaced by the socialist ideology of the Communist Party. Democracy must fight just as strong as the people who are trying to destroy it - this so-called "defending democracy" that became the theoretical basis for the prosecution of persons who do not respect the basic principles of democracy. In the case of hate speech the protection of human dignity over freedom of speech is prioritized by the opportunity to penalize speakers who uttered hateful words.[20]

The European Court of Human Rights already pursued to hate speech in its judicial practice several times, as evidenced by the case law that has a significant impact on the Czech Republic. Common to them is that there has been a resolute refusal to grant protection to any hate speech based on incompatibility with principles of European democracies and principles. This theme was processed for example by Bohumil Repík in his book Freedom of speech versus racism in the Strasbourg jurisprudence.[21]

Examples of judgments of the ECHR, which have an impact on access to hate speech in the Czech Republic are Sejdic and Finci v.Bosnia and Herzegovina or Timishev v. Russia, Féret v. Belgium, Vejdeland v. Sweden, Soulas v. France, Ivanov v. Russia or Norwood v. the United Kingdom.[22] **The ECHR** leaves in these examples of hate speech Parties to the Convention

[17] J. Soukup, "*Number of active users in the Czech Republic for the last four years increased by 1.4 million*" <http://www.kurzy.cz/tema/detail/pocet-aktivnich-uzivatelu-internetu-v-cr-za-posledni-ctyri-988143.html> accessed 13.6.2012

[18] Czech Statistical Office. "Population change <http://www.czso.cz/csu/csu.nsf/informace/coby091113.doc> accessed 1.9.2013

[19] Š. Výborný. *Hateful internet and law* (Wolters Kluwer, 2013) 82.

[20] Ibid 36-39.

[21] Š. Výborný. *Hateful internet and law* (Wolters Kluwer, 2013) 49.

[22] Ibid 59-60.

fairly significant freedom (this approach is known as the doctrine of margin of appreciation) and does not interfere with their action directed against hate speech. [23]

But on the other hand we can find very few cases factually related to the preaching of hate speech on the internet. The reason is probably the difficult law enforcement against the disseminators of hates in the virtual world and therefore their limited recourse. An example might be the case Féret, when there were leaflets spread over the internet.[24]

In the jurisprudence of the Constitutional Court of the Czech Republic we found only a limited number of such cases. The most important question is whether the Czech protector of constitutionality distinguishes between freedom of expression in the real and virtual world. Yes, it distinguishes. The Court even talks about the prevalence and ease of use of the internet.[25] The Court stated that "in the virtual bay of information technology and electronic communication (in cyber space), every minute there are - in particular through the development of internet and mobile communications - recorded, collected and made available to virtually thousands, if not millions of people - data and information that intervene in the private sphere of the individual, although he did not deliberately let anyone to obtain and secure his data."[26] From this we can conclude that in the Czech Republic generally applicable principles for democracy are valid for the internet as it is clear from the jurisprudence of the ECHR. In its jurisprudence, the Constitutional Court does not address deeper issues of freedom of expression on the internet. I infer from this that the Constitutional Court as ECHR does not distinguish between virtual a real environment.[27]

Czech criminal law affects speech that attacks certain groups of the population. There can be considered for instance these crimes: violence against a group of inhabitants and the individual (§ 352 of the Criminal Code[28]), defamation of nation, race, ethnic or other groups of persons (§ 355), denial, questioning, approval and justification of genocide (§ 405) and other.

The offenses were contained in the Criminal Code before the advent of the internet. Czech legislation responded by an amendment in 2002, when the criminal offense of incitement to hate added qualified facts - committing this act through publicly accessible computer network. Until the adoption of the new Criminal Code in 2010, other facts that affect hate speech or other crime committed on the internet were not governed by the law. This absence was filled by judicature practice. The new Criminal Code from 2010 included hate speech committed by publicly accessible computer network in the category of qualified acts which require the imposition of a higher sentence.

Problems and important issue is the identification of the speaker. Defendants often argue that they did not write a speech and someone abused their computer or user account on the internet.

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[23] U. Belavasau. "*A Dernier Cri from Strasbourg: An Ever Formidable Chalenge of Hate Speech*." (2010) European Public Law. No. 3, 373-389.
[24] Š. Výborný. *Hateful internet and law* (Wolters Kluwer, 2013) 69-70.
[25] Ibid 73.
[26] The Award of the Constitutional Court of the Czech Republic, No. 2011/10 from 28th November, 2011
[27] Š. Výborný. *Hateful internet and law* (Wolters Kluwer, 2013) 74-75.
[28] 40/2009 Sb., Criminal Code

This is expressed by the Supreme Court of the Czech Republic, which said that "the evidence necessary to determine the facts and the offender will be usually delivered by expert opinion in the field of computer technology that identifies a person who has set up a website and placed the text".[29] However, in some cases the Court agreed with the defense that the actual IP address data is not sufficient to detect the offender, despite the fact that the defendant was a sympathizer of extreme political torrent.

Out of the other Czech legislation it is necessary to mention in particular the Act on Certain Information Society Services.[30] You cannot expect the service providers themselves (as a person who creates a website) to insert directly hateful content. § 5 of the Act defines when the service provider is responsible for the content of information and when to exclude its liability. Many providers are ensuring safety content ahead in the terms and conditions of contract. The practical utility of this Act is not too high, and furthermore, the majority of extremist groups does not use the services of Czech entities, but entities abroad. These foreign service providers could possibly be affected by spacer offenses, but enforcement of decisions in such cases would be very difficult.

Under the Act on offences[31], §49 letter e) A person commits an offense against civil coexistence of person who causes another person injury to his/her membership of a national minority or ethnic origin, race, color, sex, sexual orientation, language, religion and more. Proving is as difficult as in ordinary criminal proceedings.

Recently the voices in calling for greater protection of members of the LGBT community (Lesbian - Gay - Bisexuals - Transgendered) can be observed. Sexual minorities are not specifically and expressly protected by Czech criminal law yet.[32]

In the Czech Republic it is possible to fight back against hate speech online at several levels. At the level of the user (where it is also possible to defend himself/herself with personal action) and at the level of domain provider. The problem is the application of law and evidence.[33]

[29] The Judgment of the Supreme Court of the Czech Republic, No. 4 TZ 265/200 from 16th January, 2001

[30] 480/2004 Sb. Act on Certain Information Society Services

[31] 200/1990 Sb. Act on offences

[32] Š. Výborný. *Hateful internet and law* (Wolters Kluwer, 2013) 20-21.

[33] Š. Výborný. *Hateful internet and law* (Wolters Kluwer, 2013) 76-87.

4 Distinction between blasphemy and Hate Speech based on religion

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

To the question of defamation of religious beliefs, in the Czech legal environment there is no such notion as blasphemy. The notion defamation of religious beliefs exists in the Criminal Code, as mentioned above in answer to question one. In the section 355 there is special crime called "Defamation of nation, race, ethnical or other group of people". The religious aspect is not obvious from the name of the section; nevertheless the second paragraph of this section specifies this "other group of people". The second paragraph says: "Who publicly defames group of people for their real or assumed race, ethnicity, nationality, political opinion, belief or for the fact that they are really or assuming without belief, will be punished with imprisonment of two years." Also in this case there are aggravating circumstances such as committing this crime in a group (at least two persons) or via printed media, film, TV, publicly accessible PC network or other tools of the same effect.

The religious aspect as a reason for committing crime of defamation is not the only one in the definition of this crime. In the context of Czech history there are no such cases about crimes of defamation committed from religious reasons. The only jurisprudence that can be found to this topic, is dealing with defamations from political reasons. Especially the word defamation was in the past repeatedly abused by the communist regime. Any expression suggesting lack of respect to the communist party and the regime meant in years 1948 – 1989 committing crime of defamation. Nowadays the jurisprudence connected to this section is very rare.

When it comes to hate speech based on religion and its place in the Czech legal system, the Criminal Code comes again. Because the notion is very wide in its meaning and as such is not represented there, it could be subordinated to several different crimes described in answer to question one.

For example the crime "Violence against group of inhabitants or against individual" described in the section 352 is committed also in case that the committer only threatens to the group with killing or bodily harm, he does not really need to harm them. This threat can be without any doubt committed through hate speech. And the aspect of religious base is even an aggravating circumstance when punishing the committer.

As mentioned in the previous paragraph, the Czech Republic has actually no experience with hate speech based on religion. The current cases are dealing with hatred against the Gipsy ethnicity, especially in the online form, because the committers enjoy the anonymity of internet, where they are not exposed to judgment of the society for this opinion, so they are not afraid to express it.

Other type of cases is based on radical political parties and movements, which are either from the ultra – right or from the ultra – left part of the political spectrum. This aspect does not really matter from the hate speech point of view; both these streams have any fundaments in our history, so their position is very similar and the degree of aggression in their activities on internet as well.

5 Networking sites and the issue of online anonymity

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

(see http://frenchweb.fr/debat-propos-racistes-faut-il-contraindre-twitter-a-moderer/96053)

Firstly, it is very important to stress that the Additional Protocol, though signed, was never ratified in the Czech Republic and therefore is not applicable there. That's quite surprising because the rules of Additional Protocol are in accordance with Czech law. It was claimed that the reason for such a hesitation is the fact that there was ongoing reform of Czech criminal code. However, the reform was finished about 4 or 5 years ago and the Additional Protocol is still not ratified.[34] Unfortunately, during my research I couldn't find an answer to what is the motivation of our Parliament not to ratify the protocol

I consider Online Hate Speech as wrongful doing which can be even a crime (at certain circumstances). It is a general rule that citizens should report crimes and should be helpful towards police officers (or any other officers with similar position). In my opinion, the same duty applies also to networking sites, or to be precise to the owners of networking sites. Therefore, networking sites should be legally forced to reveal identities of persons committing hate speech as it is obligatory with any other crime.

Another question is, though, how to make it work? Internet is one of the most international environments and finding jurisdiction is not an easy task. Which jurisdiction and therefore whose law should apply? The law of country where the hate speech text was written; the law of country where the server is located; the law of country where this text was possible to read; the law of country where it can cause harm? It's not easy to decide and therefore I recognize the solution in unification and harmonization of the law. Therefore, I believe the solution is the internationalization of the laws on hate speech of as much countries as possible. And that's reason why not ratifying of Additional Protocol in the Czech Republic is disappointing for me.

[34] Š.Výborný, "*The freedom of speech and hate speech on the internet*" <https://is.muni.cz/auth/th/210805/pravf_r/Svoboda_slova_versus_nenavistne_projevy_na_internetu.pdf> accessed 5th October 2009

Current status in the Czech Republic

Act No. 127/2005 Coll., on electronic communication, regulates obligation of some subjects to retain traffic and location data of their users and reveal these data upon request to eligible institutions, e.g. police. However, this Act is bounded for providers of internet connection, meaning for example some telecommunication companies, and not operators of the networking sites. Therefore, in case of investigating of hate speech, police can ask those telecommunication companies to reveal these data (e.g. IP address) to them.

It is important to emphasize that providers of internet connection have duty to retain traffic and location data only for period of 6 months. Therefore, in case that investigation will take place more than 6 months after the hate speech was done, the chance to find the offender is very low.

To conclude, networking sites are not according to Czech law obliged to reveal identity of a person committing hate speech. However, that doesn't mean that they have no responsibility regarding online hate speech committed on their sites.

Networking sites, or to be more specific operators of networking sites, are considered as providers of information society services. It means that they are bounded by the Act. 480/2004 Coll., on some information society services.

Section 5 of this Act states that provider of information society service, in our case operator of the networking sites, is responsible for the content of information stored if:

- due to the scope of its activities and the nature and circumstances of the case the provider should have known that the content of information stored or user behavior are unlawful

- or if it has been demonstrated to the operator that the nature of the content of stored information is irregular and illegal

In such situation the operator has duty to promptly do all the steps that may be required to remove or disallow such information. When the operator fails to do so, it could be found responsible for harm caused by the hate speech committed in such way.

Summary

The current status in Czech Republic supports more the concept of online anonymity. Firstly, only few subject have duty to retain data and reveal when necessary to police, and secondly they are obliged to do so only for 6 months.

6 Tackling the notions of "violence", "hatred" and "clear presence of danger"

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

Without any doubts, the notions "violence" and "hatred" seems to be essential for a clear and understandable definition on the international but as well on the national level. When analyzing the content of the "Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems" (hereinafter "the Protocol"), we can find them in several sections. The crucial one is the Section 2 (1) where the definition of racist and xenophobic material is contained, essential for the further interpretation of all other sections. Specifically, there is stated: "…material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence…" [35]. Following the further explanation contained in the Explanatory Report to the Protocol, the particular definition of both notions mention above can be find, when the term violence refers to "…the unlawful use of force…" and the term hatred refers to "…intense dislike or enmity…" [36]. The difference is clear. Violence is connected with an unlawful exertion of physical force, usually with the intention to cause a damage or injury [37]. The result of violence can be usually easily seen and identified and it is also much easier for police and prosecutors to prove and prosecute such a conduct. In the case of the notion hatred, the situation is much more complicated. As it can be seen from its definition as a deep and emotional dislike [38], this term is practically connected with an inner psychological state of mind or alternatively to a feeling of a human being. Hatred is an act with lower intensity, very often nobody even knows about it. Hatred can subsequently but not necessarily result in unlawful acts of violence, often called hate crimes. This means that quite often, but not always, the hatred is an assumption of violence.

Attention can be now moved to the question whether the notions of violence and hatred should be in alternative or cumulative relation with respect to the content of the Protocol and also with the respect to relevant case-law. The interpretation of language is pretty clear, because in the Protocol is used the conjunction "or" and therefore the interpretation shall tend to the alternative use of both words. Specifically, the conclusion is that the legislature in this case probably tended to the approach according to which the hate speech is a conduct that results not only in both hatred (which is state of mind) and violence (includes physical acts) together, but also only one of them might be the result. Otherwise the legislature would use the conjunction "and".

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[35] Section 2 (1), Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, Council of Europe 2003.

[36] Point 15, Explanatory Report to the Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, Council of Europe 2003.

[37] J.M.Hawkins, R. Allen. *The Oxford Encyclopedic English Dictionary*, (Oxford: Clarendon Press, 1991).

[38] J.M.Hawkins, R. Allen. *The Oxford Encyclopedic English Dictionary*, (Oxford: Clarendon Press, 1991).

The analysis of relevant case law of the European Court of Human Rights (hereinafter "ECHR") shows that the situation is definitely not that easy and clear. Firstly, there is really strong line of decisions based on from which results that an unlawful act resulting in a hostility or causing a hostility towards a racial, ethnic, religious, sexual or similarly defined group of people shall be prosecuted as act of hate speech – it means as a crime [39] - and such an act allows to limit the freedom of speech and expression. Even if their circumstances are rather different, in all these cases the Court concluded that states are entitled to prosecute (of course the punishment shall be adequate and proportional) conduct that results or might result in hostility or hatred of high toward a group of people. In other words, the Court stated that such a conduct does not fall under the protection provided by the Section 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms [40].

In contrary, in past years ECHR slowly changed its attitude and doctrine towards the conduct that shall be criminalized. And it is possible to say that the Court have slightly turned to the concept called "the clear and present danger doctrine" created by the US Supreme Court. What does it mean? In a few words, this doctrine says that restrictions on the freedom of speech and press shall be upheld only in the case that an immediate and grave danger threats to interest protected by law. This doctrine has developed since yearly 20th century, but practically says that when a conduct shall prosecuted as a crime, it is not enough that it might result in an act of violence with a certain level of probability but this physical violent part is a precondition for government to have a right to prosecute such a conduct and limit the freedom of expression essential for every individual in a democratic society [41]. Even if ECHR does not refer to cases from the United States or specifically to the abovementioned doctrine, this tendency seems to be more and more evident and approach somehow similar in cases from last six or seven years [42]. In fact it means that ECHR has slowly but gradually begun to put the freedom of speech and expression ahead of principle of tolerance and necessity to protect the public order. Or in other words, it is also possible to conclude that ECHR requires higher dangerousness of conduct. It is not enough that conduct results in hostility or hatred, but with regard to wider circumstances (ECHR for example analyse a social status of person committing an act, social and political situation in a country, means of communication etc.) it shall result in real acts of violence. Of course, this statement is really basic conclusion from the ECHR decision from last years.

Similar conclusion is present also in the relevant case law from the Czech Republic. In one of most significant and influencing decisions [43] on the issue of "hate speech", there is specifically

[39] See e.g. Garaudy v. France, application No. 65831/01 (ECHR, 25th June 2003), Norwood v. the United Kingdom, application No. 23131/03 (ECHR, 16th November 2004), Zana v. Turkey, application No. 18954/91 (ECHR 28th May 1996), Sürek (No.1) v. Turkey, application No. 26682/95 (ECHR, 8th July 1999)

[40] This section concerns about the freedom of expression.

[41] Sottiaux, Stefan, The „Clear and Present Danger" Test in the Case Law of the European Court of Human Rights, ZaöRV No. 63 (2003)

[42] See e.g. Leroy v. France, application No. 36109/03 (ECHR, 2rd October 2008) or Özturk v. Turkey, application No. 22479/93 (28th September 1999)

[43] The Award of the Constitutional Court of the Czech Republic, No. 2011/10 from 28th November, 2011.

said: "…these moderating conclusions [44] do not apply to the case of extreme and hate expressions (so called hate speech). Limitation or prosecution of these expressions is necessary in every democratic society when these expressions contain incitement to violence or denying, questioning, approval or justifying of crimes against humanity…or support and propagation of movements which tend to the suppression of fundamental human rights and freedoms…In the case of hate expressions it is necessary to examine and investigates their whole context in detail.". In fact the Constitutional Court of the Czech Republic (the court that is entitled to protect and interpret the constitution) stated in this award, but also in several other awards[45], that the freedom of speech of every individual shall be limited only under extreme circumstances when evident danger threats. It means the similar approach as applied by ECHR.

When the attention is paid to the phenomenon of hate speech in the cyberspace, the controversy of this problem is even more evident. When a webpage or social network is used, an impact of expression is usually really wide but on the other hand it is almost impossible to measure how many people have been reached by this expression and what is the result of it. Even in the incitement to hatred is present and incitement to violence is missing, still the interest protected by law can be seriously harmed and violence can be an indirect result of this expression. This results in a situation that to prove a hate speech act in the cyberspace requires really deep effort and high level professionalism from competent authorities to effectively prosecute such a conduct. And when compared to the financial, material and technical possibilities of these authorities, this requirement makes the prosecution of hate speech in cyberspace very difficult.

In conclusion and in the author's opinion, the notions of hatred and violence in the Protocol shall be rather interpreted as alternative categories, but the doctrine in last cases of ECHR tends to a slightly different direction. According to it, the both notions shall be present cumulatively or better to say, when an act incites or results only in hatred, there is usually really narrow space for a state intervention (possible only if the extreme and enormous hatred threats) and such acts shall mostly fall under the protection of freedom of expression. On the other hand, all relevant ECHR cases say that it is necessary to carefully investigate and examine the circumstances of every case and conduct. It means that similar kind of conduct in different conditions can be assessed differently and in one case prosecuted and in other case seen as a conduct falling under the protection of freedom of speech.

7 Justifying the distinction between the sections 10 paragraph 2 and section 17 of the European Convention on Human Rights

What are the justifying elements for the difference between the two approaches (exclusion in conformity with the section 17 of the Convention and restriction in conformity within the

[44] By this the Constitutional Court means the conclusions which prefer the freedom of speech before the necessity to protect public order.
[45] The Award of the Constitutional Court of the Czech Republic, No. 3108/08 from 26th March, 2009 or the Award of the Constitutional Court of the Czech Republic, No. 2843/08 from 5th August, 2009.

section 10 paragraph 2 of the Convention) made by the ECHR on hate speech? Can these elements be objectively grounded? What about subsidiarity and margin of appreciation?

The plain fact is that there is still no exhaustive and widely accepted definition of the "hate speech". Despite this "imperfectness" European Court of Human Rights has stated several parameters by which we should be able to distinguish "hate speech acts" and exclude them from the protection under freedom of expression guaranteed by European Conventions on Human Rights.

The Court excludes hate speech from such protection by applying the section 17 (exclusion in conformity) of the Convention and/or by applying the limitations under the section 10 § 2 (restriction in conformity). Historically, section 17, the so-called "abusive clause[46]", was incorporated due to eliminate applicants' claims from the protection provided by section 10 Convention (the right to freedom of expression) in order to prevent the misappropriation of ECHR rights by those with totalitarian aims[47]. The interpretation of section 17 has become broader over the years. "In order that section 17 may be applied, the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others …".[48] These elements can therefore be used to justify interference by the state with freedom of expression where that expression seeks to destroy the fundamental values of the Convention[49] in contrast to the freedoms which under the necessity test "may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary" and do not destroy such fundamental values[50]. Unfortunately the relationship between the elements of section 10 (2) and section 17, respectively application of such sections, is not clear. On the one hand, the section 17 is used during[51] the necessity test under the section 10 (2) as a „interpretation aid"[52], on the other hand sometimes the application of the section 17 is considered after[53] or

[46] H.Cannie,D. Voorhoof. "*The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?*" (2011) 29(1) *Netherlands Quarterly of Human Rights* 54, p. 56 and following.

[47] Law Commission Consultation Paper No 213, HATE CRIME: THE CASE FOR EXTENDING THE EXISTING OFFENCES, Appendix A: Hate Crime and Freedom of Expression under the European Convention on Human Rights, p.8.

[48] Lehideux v France, application No. 24662/94 (EHRR, 2000)

[49] Law Commission Consultation Paper No 213, HATE CRIME: THE CASE FOR EXTENDING THE EXISTING OFFENCES, Appendix A: Hate Crime and Freedom of Expression under the European Convention on Human Rights, p.8.

[50] Section 10 § 2 of the European Convention on Human Rights.

[51] D.Kretzmer, F.K..Hazan(,eds), F*reedom of Speech and Incitement against Democracy, Kluwer Law International*, The Hague, 2000, pp. 33–40, at p. 36 and following.

[52] H.Cannie, D.Voorhoof. "*The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?*" (2011) 29(1) *Netherlands Quarterly of Human Rights* 54, p. 58 and following.

before[54] justifications under the section 10 (2)[55]. This lack of clarity could be leading to categorical exclusion from protection of the right to freedom of expression. It contrasts to the „Court's general attitude toward accepting and even creating a broad scope of protection under this right"[56], despite the fact that the section 10 (2) „can be used to justify interference with many (if not all) instances of hate speech, resort to section 17 is unnecessary in most cases".[57] The issue is, especially under circumstances of "technical" impossibility to reach objective elements, definition, whether "the expression in question is so hateful that the section 17 applies because the expression has a potentional to destroy the rights of others"[58] There is no exhaustive list of elements. It appears that elements can be grounded case-by case with respect to the social, cultural, historical and legal background of each state.

Relating to this issue, margin of appreciation allows to domestic decision-makers executing their obligations under the Convention. It has to be emphasized that states are usually in better position to interpret "the Convention so as to adapt its reading to the specificities (cultural, historical, and so on) of their own countries"[59] and "a standard of judicial review to be used when enforcing human rights protection; with the margin of appreciation entailing the idea that national authorities are generally in a better position than a supervisory court to strike the right balance between the competing interests of the community and the protection of the fundamental rights of the individual".[60] In a conservative point of view, the relationship between the discretion of state and process of the integration under the Convention has been based on the principle of subsidiarity. This principle is crucial and represents one of the fundamental elements of the European Human Rights.[61] In contrast, progressive approach arrogates the great importance to the independent role of the court by effectively providing protection of fundamental human rights[62]. By this view, the Convention has to primarily assess as an instrument of unification in the area of human rights. In spite of this instrument is inspired by

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[53] See e.g. *United Communist Party of Turkey and Others v Turkey, application No. 19392/92 (EHRR 1998)* (Grand Chamber decision)

[54] *See e.g. Pavel Ivanov v Russia, application No. 35222/04 (ECHR 2004)*

[55] Law Commission Consultation Paper No 213, HATE CRIME: THE CASE FOR EXTENDING THE EXISTING OFFENCES, Appendix A: Hate Crime and Freedom of Expression under the European Convention on Human Rights, p.9.

[56] H.Cannie, D.Voorhoof. "*The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection*?" (2011) 29(1) *Netherlands Quarterly of Human Rights* 54, p. 54 and following.

[57] Law Commission Consultation Paper No 213, HATE CRIME: THE CASE FOR EXTENDING THE EXISTING OFFENCES, Appendix A: Hate Crime and Freedom of Expression under the European Convention on Human Rights, p.9.

[58] Ibid.

[59] H.Cannie, D.Voorhoof. "*The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?"* (2011) 29(1) *Netherlands Quarterly of Human Rights* 54, p. 71.

[60] R.Clayton, H.Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 6.45.

[61] R. Ryssdall. *Opinion: The Coming of Age of the European Convention on Human Rights*. European Human Rights Law Review, 1996, Issue 1, p. 24.

[62] R. Barinka. *The European Convention on Human Rights and the margin of appreciation doctrine*, Dissertation Paper, Brno, 2006. p. 20 and following.

national legal orders, it constitutes to a certain extent autonomous legal order (a new legal order).[63]

8 Harmonisation of national legislation

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

Internet is very international environment in which conflicts of different jurisdiction occur on a daily basis and therefore harmonisation (or even unification) of national legislation is very important when it comes to online hate speech. On the other hand, countries are sovereign subjects and without their consent they cannot be bounded.

Therefore, first area to focus on is, in my opinion, creating will of countries to solve this issue. In other words, in order to achieve harmonisation of legislation it is important to firstly work at non-legislation sphere, meaning:

Council of Europe campaign - already going on

Citizen´s iniatives

Education in the area by non-governmental organization (e.g. ELSA)

"Lobbing" - pressure on governments

Etc.

After the will of countries to work on solution of the problem is created, then it is important to find a way. I really appreciate that Council of Europe discuss this topic and creates legal instruments such as Convention on Cybercrime and its Additional Protocol. This is definitely a good way to go.

I believe that the European Union's impact would be also very significant. EU has jurisdiction in security cooperation and this topic is falling into scope of this competence. It would be really helpful if EU started to concentrate on this issue.

However, internet is worldwide phenomenon without borders and Council of Europe and EU works only in Europe. Therefore, thought impact of those two is or could be huge; it is not enough and doesn't include non-european countries. Altough one worldwide organization comes on my mind automatically – United Nations. Human Rights Council could be appropriate phorum for a such discussion and creation of a worldwide working instrument.

It is not easy to make such instrument working, it must be ratified by government which brings us back to the beginning of this answer – the will of the country which can be created by pressure of the citizens. I hope that Legal Research Group and other ELSA activities area are one step closer to this goal.

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[63] Lord Lester of Herne Hill. *Universality versus Subsidiarity: A Reply*. European Human Rights Law Review, 1998,
Issue 1, p. 75.

9 Legal implications of "hate speech"

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

The term "hate speech" is in fact really flexible, various and it covers wide range of actions or activities. After detailed examination, many of them cannot be seen as a crime or illegal activity. Moreover, the term "hate speech" and its use differ in relation to a field of use and in relation to a person using it. Its translation from English to other languages is also sometimes complicated and might be confusing. As a result, it is not possible to find any universally accepted definition of the term "hate speech". The best available definition can be found in the Council of Europe's Committee of Ministers Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech". There is stated that: "the term hate speech shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin." [64]. Nevertheless, this definition is neither legally binding on international level nor transferred to the majority of European national legislation. In fact, it is more than clear that such a provision could not be used as a part of a national criminal since it is too general and "elastic". Every developed and democratic country in the world has its own legal culture with specific institutes of the criminal law, but of course also a culture of other fields of law. This means that it is usually quite hard to implement some doctrine from "the top" – in this case from the international level. Additionally, in many countries the conduct defined above already falls under existing and prescribed crimes. It is just up to national courts to assign this to existing merits of crimes or sometimes just "extend" an application scope of particular merits.

The Czech Republic is a good example of the country where the detailed definition of the term "hate speech" is missing. Specifically, more merits of crimes can fall under conduct defined as a "hate speech", the most significant are the following three: a) Defamation of nation, race, ethnic or other group of people [65]; b) Incitement to hatred against a group of people or to the restriction on their rights and freedoms [66]; c) Denying, questioning, approval or justifying of genocide [67]. The examples mentioned above are the most evident one but in specific cases could the conduct defined as a hate speech also fulfil the definition of some other merits. Anyway, this is not the crucial fact. Important is that neither in the Czech criminal law nor in other provisions of the public law (except a few court decisions and then of course academic literature [68]) cannot be explicitly found the term by which is the notion "hate speech" usually translated to the Czech language. But still, the Czech Republic complies with the requirements laid down in the

[64] Provision „Scope" in Appendix to Recommendation No. R. (97) 20 of the Committee of Ministers to Member States on "Hate Speech", Council of Europe 1997
[65] Section 355 of the Act 40/2009 Coll., Criminal Code, Czech Republic 2009
[66] Section 356 of the Act 40/2009 Coll., Criminal Code, Czech Republic 2009
[67] Section 405 of the Act 40/2009 Coll., Criminal Code, Czech Republic 2009
[68] See for example Š. Výborný *Hateful internet and law* (Prague: Wolters Kluwer, 2013), p. 17-20,

international law and public institutions are able to prosecute and punish such a criminal acts. If this works in the Czech Republic, which represents the continental legal culture with quite rigorous attitude to the rule of law with requirements on detailed and precise definitions in written law rather than on use of analogy and case law, the author cannot see any reason why to push all national states to implement the concept of hate speech in a form of its precise and legally binding definition into their national laws. Moreover, this step could in some way harm a consistency of national laws. The reason why national states would implement such a definition into their legislation is because at the international level is the issue of "hate speech" seen as actual and important. As a result, other "less actual and important" issues would be so precisely defined in national legislation. But the simple fact is that not only all citizens shall be treated as equal, but also crimes should be treated not only with regard to the point of view of international organizations and community. A democratic state, where the principles of democracy and rule of law have deep roots and has institutions that are able with certain flexibility deal such a rapidly developing issue as the "hate speech".This state does not need precise and legally binding definition in its criminal law. On the other hand, a state without such roots is often not capable to manage this problem even if a detailed definition is adopted into its law.

When the relevant Czech case law is analysed, the strong and positive conclusion is that competent courts are able to deal with this issue by using current legislation. The highest judicial institution in the Czech Republic (the Supreme Court and the Constitutional Court, both acting within their powers) have even used directly or indirectly the term "hate speech" in several of their decisions [69]. Even if the Czech Republic and its law are not based on the case law principle, still the other courts are strongly influenced by the decision of the two abovementioned courts (and usually are bound by them) and also other institutions are able to use these decisions to further interpret some issue. In fact the public institutions are effectively able to deal with the issue of hate speech even if the detailed and legally binding definition is missing. Of course, in this situation the legal certainty of ordinary citizens is in some way reduced, since they are used to not read and analyse the case law. But this is the task also for other institutions and possibly also for the civil society to keep public informed. Moreover, there is a probability that even a precise definition in a law would keep them much more informed.

To conclude, the author's opinion is that there is no necessity to strive for the adoption of legally binding definition of "hate speech" in as many national legislations as possible and as quickly as possible. Of course, this opinion is not based on detailed analyse on problems with application with dozens of national jurisdictions. So even if it is almost sure that in several states it could help to improve the legal certainty of their citizens, still this effort could arouse a resistance in some other countries. This is the reason why the author thinks that this effort, when would be invested in some other areas of the problem of hate speech, could somewhere else bring much higher gains with lower costs.

[69] See for example the Award of the Constitutional Court of the Czech Republic, No. 2011/10 from 28th November, 2011.

10 Legal implications and differentiation of related notions

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

Intimidation expressly arrises in the Czech legal order from several sources. These can be divided into criminal and labor law origin

In the criminal origin the notion of intimidation is mentioned in the Czech Code of Criminal Procedure in the context of witness protection. Section 211 paragraph 3 says when the witness was attacked, intimidated, bribed or …, there is no need for him to come to the court and make his statement personally, the reading of the protocol with his statement is in this case sufficient.

The labor origin is presented mainly by the Anti-Discrimination Act, which was adopted in 2009 in accordance to the harmonization of European Law. Its section 4 says that "bothering" in context of direct discrimination means among others such unrequested behavior, whose purpose or consequence is creation of hostile, intimidating, insulting or humiliating environment. This origin is however not really connected to hate speech.

The notion of provocation does not appear in the Czech legal regulations directly. The jurisprudence works with this notion, mostly in the criminal cases, for example in context of permissibility of provocation from the police man as a secret agent. The notion is there actually "the police provocation", but again there is no closer connection to the hate speech.

The notion "incitement to hatred" is however in the Czech legal order and the jurisprudence quite often, when it comes to hate speech. The definition of this crime is described in the answer to question one of this document. The jurisprudence pursues then to the interpretation of this term.

Actually the other two notions, intimidation and provocation could be definitely subordinated under the crime or action of incitement to hatred. Although they were not expressly described in the Czech jurisprudence yet, the interpretation of incitement to hatred says that it is any behavior (in any form) aiming to arose hatred by other people against any nation, race, religion, class or other group of people, or to cause any acts by other people leading to restriction of rights and freedoms of members of these groups. The any form means, there is no difference, if it is oral, written or other expression, moreover it is described as any behavior expressed directly, indirectly or hidden (targeted irony), which can be addressed to uncertain group or amount of people, but also to an individual. Without any doubts the intimidation or provocation can be definitely qualified as an incitement to hatred, when the other conditions of the crime definition are fulfilled (for example the general rule that the extent of the criminal action is enough harmful and dangerous for the society).

Interesting fact to mention is that the incitement to hatred is not only criminally persecuted by the Czech Criminal Code in the Czech territory. It is accounted also in the asylum law, where the applicants can be rejected, if there are serious reasons for considering that they committed crimes, which are in contradiction to the principals and aims of the United Nations (according to

the section one and two of the Universal Declaration of Human Rights). This measure targets in the first place the persecution of terrorism and genocide, which are however definitely forms of hate speech

11 Comparative analysis

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

The relationship between international law and municipal law can be understood as:

> Monist System- international law and national law constitute a single legal system (e.g. Netherland, Switzerland).
>
> Dualist System - international law and national law are two separate legal systems existing indepedently of each other (e.g. United Kingdom).
>
> Mixed System - most common, a combination of monism and dualism, dualist system modified monistic elements (e.g. Czech Republic).

States are required to fulfil their international obligations, but they are free to decide on the method of fulfilling within their domestic legal systems. There is a general duty for states to adapt national law to obligations under international law.[70] But international law leaves the method of achieving this result (concepts of 'incorporation', 'adoption', 'transformation' or 'reception') to the domestic jurisdiction of states.[71]

Thus, the Additional Protocol to the Convention on Cybercrime is an international legal document which has been transposed into domestic legal system through following methods.

Transformation stipulates, that norms of international law do not become part of domestic legal order until they have been expressly adopted by the state.[72] Incorporation means that rule of international law is enforceable in domestic jurisdiction as long as it is not discordant with the norms of national law. This doctrine rules that international law is automatically form part of municipal law.[73] It can be performed under the norm of reception. Adoption is based on the reception of legal content from international to municipal form of law. Adaptation corresponds to the content of the harmonization agreements to harmonize the relevant areas of national law.

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[70] P. Malanczuk. *Akehurst's Modern Introduction to International Law*, 7th ed, Routledge, 1997. p. 64.
[71] Ibid.
[72] A.Agrawal.B.: *ENFORCEMENT OF INTERNATIONAL LEGAL OBLIGATIONS IN A NATIONAL JURISDICTION*, http://brahmavtar.com/enforcement-of-international-legal-obligations-in-a-national-jurisdiction.doc, p. 6.
[73] See http://oxfordindex.oup.com.

States	Signature	Ratification	Entry into force
Albania	26/5/2003	26/11/2004	1/3/2006
Andorra	23/4/2013		
Armenia	28/1/2003	12/10/2006	1/2/2007
Austria	30/1/2003		
Azerbaijan			
Belgium	28/1/2003		
Bosnia and Herzegovina	9/2/2005	19/5/2006	1/9/2006
Bulgaria			
Croatia	26/3/2003	4/7/2008	1/11/2008
Cyprus	19/1/2005	23/6/2005	1/3/2006
Czech Republic	17/5/2013		
Denmark	11/2/2004	21/6/2005	1/3/2006
Estonia	28/1/2003		
Finland	28/1/2003	20/5/2011	1/9/2011
France	28/1/2003	10/1/2006	1/5/2006
Georgia			
Germany	28/1/2003	10/6/2011	1/10/2011
Greece	28/1/2003		
Hungary			
Iceland	9/10/2003		

Ireland			
Italy	9/11/2011		
Latvia	5/5/2004	14/2/2007	1/6/2007
Liechtenstein	17/11/2008		
Lithuania	7/4/2005	12/10/2006	1/2/2007
Luxembourg	28/1/2003		
Malta	28/1/2003		
Moldova	25/4/2003		
Monaco			
Montenegro	7/4/2005	3/3/2010	1/7/2010
Netherlands	28/1/2003	22/7/2010	1/11/2010
Norway	29/4/2008	29/4/2008	1/8/2008
Poland	21/7/2003		
Portugal	17/3/2003	24/3/2010	1/7/2010
Romania	9/10/2003	16/7/2009	1/11/2009
Russia			
San Marino			
Serbia	7/4/2005	14/4/2009	1/8/2009
Slovakia			
Slovenia	26/2/2004	8/9/2004	1/3/2006
Spain			

Sweden	28/1/2003		
Switzerland	9/10/2003		
The former Yugoslav Republic of Macedonia	14/11/2005	14/11/2005	1/3/2006
Turkey			
Ukraine	8/4/2005	21/12/2006	1/4/2007
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141/1961 Sb. Criminal Order (Procedure)

143/1988 Sb. Governmental Act to Convention against torture and other cruel, inhuman or humiliating punishment

83/1990 Sb. Act of associations

200/1990 Sb. Act on offences

2/1993 Sb. Act of fundamental Human Rights and Freedoms

231/2001 Sb. Act of broadcasting

3/2002 Sb. Act of churches and relugous associations

480/2004 Sb. Act on Certain Information Society Services

40/2009 Sb. Criminal Code

198/2009 Sb. Anti-discrimination Act

418/2011 Sb. Act of criminal liability of lega entities

The European Convention on Human Rights

Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, Council of Europe 2003

The Award of the Constitutional Court of the Czech Republic, No. 6/02 from 27th November, 2002

The Award of the Constitutional Court of the Czech Republic, No. 3108/08 from 26th March, 2009

The Award of the Constitutional Court of the Czech Republic, No. 2843/08 from 5th August, 2009

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ELSA Estonia

National Researchers

Silver Sass

Tea Kookmaa

Sven Kõllamets

Andres Illak

Kati Kruut

Academic Adviser

Aleksandr Popov

National Coordinator

Andrei Krassilnikov

1 National definition of Hate Speech

There is no specific term as hate speech defined in Estonian legal acts. Estonian Penal Code clause 151 provides punishments for activities which publicly incite to hatred, violence or discrimination on the basis of nationality, race, colour, sex, language, origin, religion, sexual orientation, political opinion or financial or social status if this results in danger to the life, health or property of a person. Same clause sets the punishments for a legal person.

The Constitution of the Republic of Estonia clause 45 says that everyone has the right to freely disseminate ideas, opinions, beliefs and other information /.../. The commentaries of the aforementioned constitution clause 45 adds that freedom of speech is not an absolute freedom with no boundaries and clause 17 says that no one's honour or good name shall be defamed.

According to the explanatory draft of amendments for the Penal Code say that a person who knowingly indices hatred or violence can be liable for his/her actions.

2 Contextual elements of Hate Speech

A hate speech in general is a very broad term describing a speech that incites people to hatred. It is a matter of great dispute and argumentation globally. The right to freedom of expression is a fundamental human right which finds protection in all major human rights systems, as well as in national constitutions. At the same time, it is not an absolute right, and it may be limited to protect overriding public and private interests, including equality and public order.[1]

What exactly makes speech a hate speech is thus very difficult to identify. However, international law, and specifically the right to freedom of expression, imposes constraints on what may be banned as hate speech. The key aspects of hate speech are intent, incitement and proscribed results.[2]

2.1 Intent

The best way to describe this element is that only the statements made with the intent of inciting hatred are to be identified as hate speech. For example, a news story covering racism is not a hate speech, since the intent of the story is not to incite hatred, but to inform the viewer about the topic. But take an online comment about some news story which promotes hatred towards another race, and this is clearly a hate speech, since the author's intent was to incite hatred.[3]

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[1] Toby Mendel, "Hate Speech Rules Under International Law" (2010) The Centre for Law and Democracy <http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf> accessed 26 July 2013

[2] ibid

[3] ibid

2.2 Incitement

This element consists of causation and context. It is clear that inciting an act and causing it are two very different things. At the same time, international courts often look for causation-related factors when assessing whether speech incites hatred. The courts consider what the likely impact of a speech might be. Many of the hate speech cases refer to contextual factors, because the context is very important when trying to assess whether a particular statement is likely to incite to hatred.[4]

2.3 Proscribed results

The proscribed results of a hate speech may include violence, discrimination and hatred. While the first two - violence and discrimination - are normally prohibited by law, hatred without any actions is understood by both the HRC and the CERD Committee as a state of mind rather than a specific act. Furthermore, hatred, as such, can simply be seen as an opinion and is thus absolutely protected by international law. Despite this, hatred is still mostly considered to be one part of proscribed results. This may be due to the fact that there is a certain risk, that hatred may find some form of manifestation and thus, groups should not have to wait until concrete acts are perpetrated on them before being able to claim some protection.[5]

The Council of Europe Recommendation 97(20) on Hate Speech defines "hate" implicitly, as follows:

"[T]he term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."[6]

Although this definition is largely circular, it does provide a few notions that provide insight into the meaning of the term hate, namely xenophobia, antisemitism, intolerance, aggressive nationalism, ethnocentrism and discrimination.[7]

There have also been numerous academic attempts to distinguish hate speech from offensive speech. One line of reasoning, which may be helpful, is to distinguish between offensive expressions targeting ideas, which is protected, and abusive expression which targets human beings, which may not be protected.[8]

Information-communication technology has created possibilities to disseminate of any information very fast and wide. There is a possibility of simultaneous viewing, copying, sharing and linking by many people in many geographical locations. The traditional barriers do not exist in ICT, the original sources may become unclear, the original wording, intentions and context

[4] ibid
[5] ibid
[6] ibid
[7] ibid
[8] ibid

may change (see Jyllands-Posten Muhammad cartoons controversy). Therefore the multiplying and wider effect of online dissemination mean higher potential impact of online hate speech.

3 Alternative methods of tackling Hate Speech

Denial and the lessening of legal protection under article 10 of the European Convention on Human Rights mean that although every person has the right to freedom of expression, there are still some limitations to the ability to execute this right. It is due to the fact, that freedom of speech carries with it certain duties and responsibilities and thus should be regulated by law. The restrictions on executing the freedom of speech apply to information concerning national security, territorial integrity or public safety and are used to prevent any disorder or crime, to protect health, morals, reputations and rights of other people.

According to national legislation, acts of threatening, giving false testimonies, calls for crime or social hatred and public defamation are not protected by freedom of speech.[9]

Furthermore, according to The Constitution of the Republic of Estonia clause 12, incitement to ethnic, racial, religious or political hatred, violence or discrimination is prohibited and punishable by law, as well as incitement to hatred and violence between social classes or to discrimination against a social class.

Alongside denial and the lessening of legal protection, the national legislation can be modified to include punishments for certain expressions or acts which incite to hatred based on ethnicity, sex, race, sexual orientation, religion, political opinion, financial or social status. These modifications have already been implemented in Estonia's national legislation, in the clause 151 of the Penal Code, as mentioned above.

4 Distinction between blasphemy and Hate Speech based on religion

Blasphemy is not regulated in Estonia's national legislation. However, inciting hatred based on religious beliefs is prohibited by clause 12 of The Constitution of the Republic of Estonia. Therefore it is plausible to say that the national legislation does not make a difference between blasphemy and hate speech based on religion.

5 Networking sites and the issue of online anonymity

In order to answer this question, it is first necessary to understand the possibilities and limitations of revealing the identities of persons who wrote hateful articles or comments. The majority of web pages have no means of identifying the person sitting behind the desk. The only exceptions are for example online banks, where the account owner must log in with correct

[9] The Estonian Ministry of Justice, <http://www.just.ee/57743> accessed 27 July 2013

credentials in order to be able to complete certain actions on the page. For example, if a person wants to make a bank transaction, he must log in to his bank account either via bank's code card, PIN calculator, ID card or Mobile ID. In any case, the account a person is managing is being linked to a particular person, so the web page knows, which particular person is managing his account at the moment.

On most sites, however, a person is either not required to log in at all or at the most, required to log in via e-mail or social networking profile. Although the last two methods are mostly used by honest people, one cannot deny, that someone can just create a fake email account and register on a web page, so networking sites cannot rely on this kind of identification.

A web page can, however, see the IP address of the computer, from which a post was made, but that can only help link individual posts to a certain IP address or help identify the owner of the computer, which only applies when a computer is connected to the internet via a static IP address. Thus, a person, who wants to post hateful comments on a web page can for example use his friend's computer, a public computer (such as computers in libraries or internet cafes), find an open WiFi network or just buy a SIM card and connect to the internet via a cellular network, in which case the computer is given a random IP address every session. And these are only some of the most well-known and obvious things one can do. Because of that, finding out the identity of someone online may be quite difficult.

Most news pages in Estonia have a common policy that they may reveal if a comment has been already posted from the same IP address, even if it was done by different people (for example a family computer, which is being used by several family members to comment on the same news story). They do not, however reveal information about IP addresses to the public. Instead, they follow the rules of online comments made by Estonian Newspaper Association (Eesti Ajalehtede Liit - EALL), which state that hateful comments or comments that incite hatred are to be deleted and in case the court or the police demand, they will reveal all known information to the authorities. These rules also state that they may impose prevention methods such as using word filters and blocking of offender IP addresses and that current legislation does not require that all persons wanting to comment must identify themselves via a reliable method (such as an ID card for example). Nor does it require that any of this information should be made public.[10]

Our research group concluded, that it may be good to keep a public database of IP addresses from which hateful comments have been made, however, due to the limitations described above, doing so might not be very feasible, since if a person really wants to stay anonymous, he could use several methods to stay anonymous and revealing an IP address, which the offender may not use ever again, would not be useful.

[10] Estonian Newspaper Association, "Best practice agreement on online commenting" (2008) <http://www.eall.ee/lepped/online.html> accessed 3 August 2013

6 Tackling the notions of "violence", "hatred" and "clear presence of danger"

In the provisions of the additional Protocol, "violence" and "hatred" are considered to be alternative elements of an offence. In fact, article 2 in the Protocol gives the following definition to racist and xenophobic material:

"racist and xenophobic material means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors." (Article 2)

In the case-law of EctHR, "hate speech" translates to a violation of article 10 of the ECHR which grants every person a freedom of expression. As far as hate speech is concerned, there exists no universally accepted definition for that phenomenon.

The EctHR, in its case-law, has used the terms when referring to hate speech:

"had an intimidating effect on them", "physical presence of threatening group", (Vona v. Hungary), "capable of stirring up violence", "having a demonstrable impact on public order" (Leroy v. France), "incite others to the use of violence, armed resistance or uprising and had not amounted to hate speech" (Faruk Temel v. Turkey). It becomes evident, when analysing EctHR case-law, that the capability of "stirring up violence" must be clearly visible. For example, the case of Gündüz v. Turkey, the applicant was a member of an Islamist sect. The applicant fiercely criticized secular democracies in television and called for an introduction of Sharia law. The applicant later alleged a violation of his freedom of expression – Art 10 of the ECHR. And the ECtHR did find a violation of Art 10. In its judgement, the Court explained that „the topic /secular democracies/ had been the subject of widespread debate in the Turkish media and concerned a problem of general interest. The Court considered that the applicant's remarks could not be regarded as a call to violence or „hate speech" based on religious intolerance.

As a result of the analysis delivered above, it can be concluded that the notions of „violence" and „hatred" should be cumulative as comprising the substance of „hate speech". This conclusion is supported by the case-law of the ECtHR, where the Court has defined „hate speech" by these two elements: hatred and violence, the latter not necessarily having to be exercised, but rather on the verge of happening, or, as the ECtHR has phrased it itself, about to be „stirred up".

In the context of the US law, the notion of „clear and present danger", has a historical background to it. In 1798, the Congress passed a law restricting freedom of speech – the Sedition Act. War seemed likely between the United States and its former ally France.[11] Members of Congress were convinced that people sympathetic to France would try to stir up trouble for the new nation.[12] The Act expired in 1801. The case of Schenck v. United States, 249 U.S. 47 (1919), was the Supreme Court's first important decision in the area of free speech. In that case, it was decided that freedom of speech was not an absolute right. It was stated that the

[11] Constitutional Rights Foundation, "A Clear and Present Danger" <http://www.crf-usa.org/america-responds-to-terrorism/a-clear-and-present-danger.html> accessed 6 August 2013
[12] ibid

government was allowed to restrict freedom of speech when „the words...are used in such circumstances as to create a clear and present danger".[13] It is important to note that at the time of this decision the US was at war again, and it has been said that this was one of the driving motives behind this conclusion. In 1949, the Supreme Court revised its stance on hate speech, saying that "freedom of speech, though not absolute, is protected against censorship or punishment unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest."[14] Despite the attempt to clarify the notion „clear and present danger", it still remains a matter of interpretation.

In UK law, hate speech laws are found in various statutes. The following ones help to set the parameters for defining hate speech most clearly:

Public Order Act 1986, Section 18:

A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

Offences under Part 3 carry a maximum sentence of seven years imprisonment or a fine or both.

Public Order Act 1986, Part 3A:

"A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred."

Section 29J, in the same Act, intends to protect freedom of speech by specifying the following:

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

Hence, it can be deducted from the latter that, similarly to the practice of the EctHR and the US Supreme court in defining the notion of „hate speech", the law in the UK seeks to define „hate speech" by referring to it as a hateful (threatening/abusive/insulting) use of communication, intended to stir up hatred.

[13] Schenck v United States, [1919] 249 U.S. 47.
[14] Terminiello v. Chicago, [1949] 337 U.S. 1

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

Exclusion in conformity with article 17 of the Convention means that everyone has the right to execute their freedoms except when doing so will prevent others from executing their freedoms, whether it be a State, a group or an individual.

Restriction in conformity with article 10 p 2 of the Convention means that the right to freedom of expression should be restricted in an extent necessary to prevent disorder, crime, to protect health and morals, to protect the reputation or rights of others and to prevent the disclosure of information received in confidence, or to maintain the authority and impartiality of the judiciary.

The difference between these approaches is that the method of exclusion clearly denies any interpretations, while the method of restriction allowes the Member States to restrict the freedom of speech more specifically than the Convention does.

8 Harmonisation of national legislation

One measure to achieve the harmonisation of national legislations is to translate the original document to the national language of the Member State and make it available to the public, thus giving all the citizens the opportunity to see and understand the concept of the original framework document.

Another measure that the State can take is to analyze court practice and existing legal framework. Doing so will allow the State to effectively determine whether any further harmonisation is needed or it has already been implemented to the necessary extent in the legislation.

9 Legal implications of "hate speech"

A legally binding definition of "hate speech" on a national level is most likely possible. One reason for this is that all citizens of a country are considered equal in front of the law. This sets a prerequisite that there should be a legally binding definition of "hate speech" present in the national legislation.

However, this may not be the case at international level because of the sheer amount of different cultures and languages. As has been stated before, this can lead to situations where the original phrasing and the intent is either lost or changed dramatically.

As a legally defined term, "hate speech" can only be defined very broadly and generally because of the aforementioned cultural diversity.

10 Legal implications and differentiation of related notions

Estonia's national legislation describes incitement to hatred in clause 12 of the Constitution of the Republic of Estonia and clause 151 of the Penal Code. They prohibit incitement to ethnic, racial, religious or political hatred, violence or discrimination. There is no separate notion of "intimidation" or "provocation" present in the national legislation.

The national legislation describes "incitement to hatred" as any public act that promotes hatred based on ethnicity, race, colour, sex, language, origin, religion, political or other views, property or social status.

11 Comparative analysis

The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer system has not yet been transposed into the national legislation of Estonia.

There is a draft of amendments for the Penal Code, although these kinds of crimes that have been committed through computer systems, are yet to be mentioned. However, clause 3 of the Constitution of the Republic of Estonia states that "generally recognised principles and rules of international law are an inseparable part of the Estonian legal system". Therefore such aforementioned activities can be punished and persons who commit such acts can be held responsible.

ELSA Finland

National Researchers

Sini Henttonen

Tero Kivinen

Tapio Rasila

Johanna Sammalmaa

Jonna Vihavainen

Academic Adviser

Riku Neuvonen

National Coordinator

Miika Honkanen

List of abbreviations

CFREU	Charter of Fundamental Rights of the European Union
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
HE	Government bill (*hallituksen esitys*)
HeHO	Court of Appeal of Helsinki (*Helsingin hovioikeus*)
ICCPR	International Covenant on Civil and Political Rights
JSN	Council for Mass Media in Finland (*Julkisen sanan neuvosto*)
KKO	Supreme Court of Finland (*korkein oikeus*)
KouHO	Court of Appeal of Kouvola (*Kouvolan hovioikeus*)
KSL	Consumer Protection Act (*kuluttajansuojalaki*)
KuvaohjelmaL	Act on Audiovisual Programmes (*kuvaohjelmalaki*)
MEKU	Finnish Centre for Media Education and Audiovisual Media (*Mediakasvatus- ja kuvaohjelmakeskus*)
MEN	Council of Ethics in Advertising (*Mainonnan eettinen neuvosto*)
PL	Constitution of Finland (*Suomen perustuslaki*)
RL	Criminal Code of Finland (*rikoslaki*)
SananvapausL	Act on the Exercise of Freedom of Expression in Mass Media (*laki sananvapauden käyttämisestä joukkoviestinnässä*)
TekijänoikeusL	Copyright Act (*tekijänoikeuslaki*)
VahL	Tort Liability Act (*vahingonkorvauslaki*)

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Lakivaliokunnan mietintö n:o22 hallituksen esityksestä rikoslainsäädännön kokonaisuudistuksen toisen vaiheen käsittäviksi rikoslain ja eräiden muiden lakien muutoksiksi (LaVM 22/1994)

Parliament of Finland

Hallituksen esitys Euroopan neuvoston tietoverkkorikollisuutta koskevan yleissopimuksen lisäpöytäkirjan, joka koskee tietojärjestelmien välityksellä tehtyjen luonteeltaan rasististen ja muukalaisvihamielisten tekojen kriminalisointia, hyväksymisestä ja laiksi sen lainsäädännön alaan kuuluvien määräysten voimaansaattamisesta sekä laeiksi rikoslain ja tietoyhteiskunnan palvelujen tarjoamisesta annetun lain 15 §:n muuttamisesta (Eduskunnan vastaus 332/2010 vp)

1 National definition of Hate Speech

For the purposes of this report, we adopt the definition of hate speech stated in the Council of Europe Committee of Ministers' Recommendation No. R (97) 20 according to which

> *"-- the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."*[1]

The Finnish legislation does not include a concept of hate speech as such nor is hate speech defined as an act. Action that can be considered to constitute hate speech is covered by several criminalisations stated in the Criminal Code of Finland (Rikoslaki (39/1889)). The focal criminalisations regarding hate speech are ethnic agitation (RL 11:10)[2], aggravated ethnic agitation (RL 11:10a) and breach of the sanctity of religion (RL 17:10). Acts of hate speech can also constitute other crimes such as public incitement to an offence (RL 17:1), distribution of a sexually offensive picture (RL 17:18), dissemination of information violating personal privacy (RL 24:8) and defamation (RL 24:9–10). In this report we mainly focus on the criminalisations of ethnic agitation and breach of the sanctity of religion. In addition, the report covers the grounds for increasing punishment. According to Finnish legislation, a racist motive for committing a crime constitutes a reason for increasing the perpetrator's punishment (RL 6:5).

The provision on ethnic agitation (RL 11:10) reads as follows:

> *"A person who makes available to the public or otherwise spreads among the public or keeps available for the public information, an expression of opinion or another message where a certain group is threatened, defamed or insulted on the basis of its race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or a comparable basis, shall be sentenced for ethnic agitation to a fine or to imprisonment for at most two years."*[3]

The act of making available includes, among other things, posting material online for the public. This contains for example posting material to an internet chat room or other website, and also

[1] 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, at the 607th meeting of the Minister's Deputies) <http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf> accessed 1 July 2013.

[2] The title of the section, 'ethnic agitation' can be considered somewhat misleading, since it is narrower than the acts described in the section, which include agitation on several other grounds than ethnicity. Yet due to lack of a better translation, the term 'ethnic agitation' shall be used throughout this report.

[3] Unofficial English translation, available at <http://finlex.fi/fi/laki/kaannokset/1889/en18890039.pdf> (accessed 16 August 2013).

posting and compiling links making them more accessible to others.[4] In order to constitute a crime, ethnic agitation needs to be intentional.[5] For more on intention, see question 2.

Even though religious hatred is included in the section concerning ethnic agitation, the Criminal Code of Finland also includes a separate criminal act of breach of the sanctity of religion (RL 17:10), which states that

> *"A person who*
>
> *(1) publicly blasphemes against God or, for the purpose of offending, publicly defames or desecrates what is otherwise held to be sacred by a church or religious community -- or*
>
> *(2) by making noise, acting threateningly or otherwise, disturbs worship, ecclesiastical proceedings, other similar religious proceedings or a funeral,*
>
> *shall be sentenced for a breach of the sanctity of religion to a fine or to imprisonment for at most six months."*[6]

In this context, a church or religious community refers to the Evangelical-Lutheran church, the Byzantine Church and certain registered religious communities[7].

As far as legal praxis is concerned, the term 'hate speech' has been referred to in two Finnish Supreme Court decisions (KKO 2013:50 and KKO 2012:58), but mainly only when citing judgments of the European Court of Human Rights. In the case KKO 2012:58, a Finnish politician was accused of ethnic agitation and breach of sanctity of religion for posting on his website a writing that included statements offending Islam and the Somali. The Supreme Court stated that the slanderous and libellous comments were apt for causing intolerance, contempt and even hatred and were as such to be understood as statements similar to hate speech, which do not fall under the protection of freedom of speech.[8]

2 Contextual elements of Hate Speech

2.1 Ethnic agitation

The starting point for evaluating if a threatening, defaming or insulting statement is punishable according to Finnish law is the provision on ethnic agitation.[9] The term 'information, an

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[4] Hallituksen esitys eduskunnalle Euroopan neuvoston tietoverkkorikollisuutta koskevan yleissopimuksen lisäpöytäkirjan, joka koskee tietojärjestelmien välityksellä tehtyjen luonteeltaan rasististen ja muukalaisvihamielisten tekojen kriminalisointia, hyväksymisestä ja laiksi sen lainsäädännön alaan kuuluvien määräysten voimaansaattamisesta sekä laeiksi rikoslain ja tietoyhteiskunnan palvelujen tarjoamisesta annetun lain 15 §:n muuttamisesta (HE 317/2010 vp) 39.
[5] HE 317/2010 vp (n 4) 40.
[6] Unofficial English translation, available at <http://finlex.fi/fi/laki/kaannokset/1889/en18890039.pdf> (accessed 16 August 2013).
[7] According to 2 § of the Act on Freedom of Religion (Uskonnonvapauslaki (453/2003)).
[8] KKO 2012:58, para 39.
[9] Valtakunnansyyttäjänvirasto, 'Rangaistavan vihapuheen levittäminen Internetissä. Rangaistavan vihapuheen määrittäminen ja rikosoikeudellisen vastuun kohdentuminen erilaisiin Internetissä toimiviin toimijoihin. Työryhmän raportti 21.12.2012' (Dnro 17/34/11) 5.

expression of opinion or another message' of the provision on ethnic agitation covers any type of expression such as writings, pictures, photos, drawings, symbols, movies, music videos or speech.[10]

The essential elements of ethnic agitation include 1) the act of threatening, defaming or insulting, 2) the object being a certain group of people and 3) the offender possessing information of the circumstances stated in the provision on ethnic agitation at the time of committing the offence, hence the intentional behaviour of the perpetrator.[11]

Typically punishable is disseminating information, opinions or other messages where violence or discrimination against a group is presented as acceptable or desirable, where people are compared to animals, parasites etc. or where they are generalized and alleged to be criminals or inferior to others.[12] Only groups that are identifiable by the characteristics, such as race or colour, stated in the provision on ethnic agitation are protected by the provision.[13] The provision protects first and foremost minority groups that are generally in a socially inferior position in the society and therefore in need of special protection.[14]

Ethnic agitation has to be intentional. In order for an act to be considered criminal, it has to be intentional in relation to the circumstances of the crime committed.[15] The Finnish legislation does not define the degree of intention required for ethnic agitation – instead, this definition shall be derived from legal praxis. Based on this praxis, it has been stated in legal literature that for the crime of ethnic agitation to be committed intentionally the perpetrator needs to have understood or considered probable that he/she 1) is making available or in another manner disseminating or keeping available to the public certain information etc., 2) this information, opinion or message is threatening, defaming or insulting towards a group of people according to objective standards and 3) the group of people is one of the groups referred to in RL 17:10.[16]

In addition, when assessing the intentionality, the perpetrator's intention can sometimes be taken into account. The perpetrator might for instance wish to inform the public of socially important matters, or he might be taking part in a public debate concerning such matters. Provocation and exaggerated statements are often used as a defence for making an offending statement. In such cases the courts need to assess the situation as a whole, not merely based on the criteria of intentionality described above.[17]

2.2 Breach of the sanctity of religion

The situations where freedom of speech and freedom of religion come into conflict concern mainly the first part of the RL 17:10, namely blasphemy against god or defaming or desecrating

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[10] HE 317/2010 vp (n 4) 42.
[11] Valtakunnansyyttäjänvirasto (n 9) 11, 22.
[12] HE 317/2010 vp (n 4) 42.
[13] Valtakunnansyyttäjänvirasto (n 9) 17.
[14] HE 317/2010 vp (n 4) 42.
[15] ibid
[16] Valtakunnansyyttäjänvirasto (n 9) 23. Refers to Mika Illman, *Hets mot folkgrupp* (Suomalainen lakimiesyhdistys 2005) 284.
[17] Valtakunnansyyttäjänvirasto (n 9) 23–25.

what a religious community holds sacred.[18] Due to this, only the first part of RL 17:10 is dealt with here. Within these limits, the essential elements of the breach of the sanctity of religion include 1) the acts of public blasphemy, defaming or desecrating, 2) the object being something sacred and 3) the perpetrator's intention to offend.

The element of publicity means the statement becoming known by an indefinite group of people.[19] The act of blasphemy can be defined as ridiculing or degrading another's value.[20] The acts of defaming and desecrating are defined as uttering a statement about something held sacred, which is apt for degrading the object's value in another person's eyes.[21]

The object of protection in RL 17:10 is the religious convictions and feelings of citizens as well as freedom of worship in the society, not religion itself.[22] The term 'sacred' is understood as meaning something that the members of the religious community greatly respect. The content of sacred can vary between different religious communities.[23]

The act of defaming or desecrating has to be committed with the intention of offending. This requirement is fulfilled when the offensiveness of the act in question is also understood by people who personally do not consider the object of defaming or desecrating sacred but who do, however, value the convictions of others.[24] As compared to the act of defaming or desecrating, a higher level of intention is required from blasphemy. For the perpetrator to be punished for blasphemy, it is required that the perpetrator understands that the act more likely than not is offensive.[25]

Not every negative statement about a religion constitutes a crime. The religious community can be criticised matter-of-factly without the conduct constituting the essential elements of breach of the sanctity of religion. Also criticism conducted in an ironic tone, which includes matter-of-fact grounds is allowed.[26]

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[18] Kaj-Erik Tulkki, 'Uskonnonvapauden ja sananvapauden keskinäisestä suhteesta rikosoikeuden kannalta arvioiden' (2010) Edilex 2010/28.
[19] Hallituksen esitys eduskunnalle oikeudenkäyttöä, viranomaisia ja yleistä järjestystä vastaan kohdistuvia rikoksia sekä seksuaalirikoksia koskevien säännösten uudistamiseksi (HE 6/1997 vp) 129.
[20] Kaj-Erik Tulkki, *Uskonnonvapauden rikosoikeudellinen suoja* (University of Turku, Faculty of Law 2008) 92.
[21] HE 6/1997 (n 19) 128.
[22] ibid, 127.
[23] ibid, 128.
[24] ibid
[25] Tulkki, *Uskonnonvapauden rikosoikeudellinen suoja* (n 20) 95. The required probability corresponds to the degree of intention knows as dolus eventualis, which is the lowest form of intention regulated by RL 3:6. In this relation, the perpetrator needs to have understood that the consequence will be caused quite probably, ie. more probably than not. Also, according to KKO 2012:98 the probability demand is assessed from a subjective perspective and it is not based on statistics or an objective standpoint.
[26] HE 6/1997 vp (n 19) 128.

2.3 Grounds for increasing punishment

According to RL 6:5, one of the grounds for increasing the punishment is "commission of the offence for a motive based on race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or another corresponding grounds".[27]

A racist or comparable motive shall constitute grounds for increasing the punishment regardless of against whom or what the crime is committed. Hence, the subject of the committed crime can be a person, but it can also be property. However, if the racist or other motive has already been included in the essential elements of the offence in question and thus forms an integral part of it, the punishment cannot be increased on these grounds.[28]

2.4 Potential higher impact of online hate speech

In terms of the Finnish legal system and the offence of ethnic agitation, both the legislation and legal praxis concerning hate speech confirm that using the web as a venue for disseminating materials – if they otherwise fulfil the criteria of ethnic agitation – usually means that the distribution part of the essential elements has been constituted. Even before the latest amendment of the Criminal Code, which added the option of "making available to the public" to the essential elements of the offence, posting online materials which otherwise fit the criteria of ethnic agitation meant they were "distributed" to the public. For example, in the case KKO 2012:58 the Supreme Court confirmed the stance of the District Court that it was evident that posting materials on a blog, which was accessible for all, constituted distributing materials to the public.[29]

Furthermore, the preparatory works of the amendment to the Criminal Code that set into force the Additional Protocol to the Convention on Cybercrime and added "making available to the public" to the essential elements of the ethnic agitation offence, further elaborate the legal significance of using the internet to disseminate hate speech. According to these preparatory works, the expression "making available to the public" can mean – among other things – that the materials are made available to the public online. This also includes, in addition to posting materials on webpages, blogs or discussion forums, setting-up and assembling links to these materials, so that the materials are made more readily accessible to the public.[30]

In contrast, it is clear that private communications, which take place online among few people who already know each other or willingly take part in such communications and which are not accessible or available to the public, do not constitute distributing materials or making them available. This does not, however, mean that the materials have to be accessible to all; for example, making materials accessible to a large number of people – eg the members of a sizable organization –, while restricting availability to others, would constitute distribution. In terms of defining the size of this assumed group, a working group set-up by the Finnish Prosecution

[27] Unofficial English translation, available at <http://finlex.fi/fi/laki/kaannokset/1889/en18890039.pdf> (accessed 16 August 2013).
[28] HE 317/2010 vp (n 4) 38.
[29] KKO 2012:58 (n 8), see also KouHO 2012:9.
[30] HE 317/2010 vp (n 4) 39–40.

Service stated that materials distributed among a group consisting of less than 20 people would not constitute distributing materials to, or making them available for, the public.[31] This, however, is only an opinion expressed by legal experts, and no specific Finnish legislation or case law exists on this topic.

Thus, the short answer would be: yes, from a legal perspective online dissemination nearly always means higher potential impact of hate speech. Furthermore, in Finland nearly all recent prosecutions from the offence of ethnic agitation have resulted from online dissemination of materials.[32] There is a caveat, however; if access to the materials is restricted from the larger audience, then they are not distributed or made available to the public even if the dissemination of these materials occurs online.

3 Alternative methods of tackling Hate Speech

3.1 Introduction

The Finnish legal system is submitted as an example for alternative methods for tackling hate speech. The system, firstly, permits restrictions to fundamental rights, which may subsequently entail criminal or civil liability for acts definable as hate speech., While undoubtedly bearing a striking resemblance to the art 10(2) ECHR mechanism, the doctrine regarding restrictions to fundamental rights features certain characteristics and emphases that may inspire future measures and standards for the purposes of combating abusive use of freedom of expression.

Secondly, freedom of expression is in Finland subject to special regulation in certain contexts, e.g. audiovisual programmes, mass media and advertising, these forms of regulation capable of being utilized to further combat hate speech. This regulatory framework is submitted as inspiration for mechanisms that make it more desirable for e.g. broadcasters and media professionals to take measures to abridge abusive use of freedom of expression in their respective spheres of influence.

3.2 Freedom of expression under the Finnish Constitution

The right to freedom of expression is provided for by the Constitution of Finland (Suomen perustuslaki (11.6.1999/731)). Pursuant to its 12.1 §:

> *"[e]veryone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone. More detailed provisions on the exercise of the freedom of expression are laid down by an Act. Provisions on restrictions relating to pictorial programmes that are necessary for the protection of children may be laid down by an Act."*[33]

[31] Valtakunnansyyttäjänvirasto (n 9) 25.

[32] Statement of State Prosecutor Mika Illman, private lecture held for the research group at the University of Helsinki on 28 August 2013.

[33] Unofficial English translation, available at <http://www.finlex.fi/en/laki/kaannokset/1999/en19990731> (accessed 18 July 2013). For further reading, see Riitta Ollila, 'Sananvapaus ja sopimattoman markkinoinnin sääntely' (2009) 2/2009 Defensor

Freedom of expression under the Finnish fundamental rights system is characterized by its open-endedness and neutrality vis-à-vis form and content of speech[34]. In principle, all forms and content of speech fall within the ambit of protection – the question, therefore, is not whether a certain type of speech enjoys protection, but to what extent[35]. Unlike its regional counterpart – art 10 ECHR – PL 12.1 § does not expressly describe the kinds of pressing social needs on grounds of which restrictions may be imposed[36]. Under the Finnish regime, the freedoms of science, arts and higher education are provided for separately (PL 16.3 §)[37].

3.3 Restricting fundamental rights

Under the Finnish system, fundamental rights are not deemed absolute; restrictions may be imposed upon them, even in the absence of express reservations[38]. As the Constitution does not contain a general provision on the matter, guidelines have been formulated through legislative practice and jurisprudence, namely the test adopted by the Constitutional Law Committee in its work during the drafting of the Constitution[39]. In order for a restriction to be considered constitutional, it must simultaneously satisfy all of the following seven conditions[40]:

Legis 276, 276–8; Pekka Hallberg, '*Perusoikeusjärjestelmä*' in Pekka Hallberg, Heikki Karapuu, Tuomas Ojanen, Martin Scheinin, Kaarlo Tuori and Veli-Pekka Viljanen, *Perusoikeudet* (2nd edn, WSOYpro 2011) 47–8; Sami Manninen, 'Sananvapaus ja julkisuus (PL 12 §)' in Pekka Hallberg, Heikki Karapuu, Tuomas Ojanen, Martin Scheinin, Kaarlo Tuori and Veli-Pekka Viljanen, *Perusoikeudet* (2nd edn, WSOYpro 2011) 459–91; Riku Neuvonen, *Sananvapauden sääntely Suomessa* (CC Lakimiesliiton kustannus 2012) 51–3, 116–75. cf art 10 ECHR; arts 19(2), (3) ICCPR; art 11(1) CFREU.

[34] Manninen (n 33) 462–3; Neuvonen, *Sananvapauden sääntely Suomessa* (n 33) 52, 117. See Hallberg (n 33) 47. See also, however, Riku Neuvonen 'Suomalainen sananvapaus' (2012) 4/2012 Oikeus 597, 600.

[35] Manninen (n 33) 463. cf, vis-à-vis the theories of internal and external boundaries of freedom of expression, Mikko Hoikka, *Sananvapaus Euroopan unionin oikeudessa* (Suomalainen Lakimiesyhdistys 2009) 60–5; Stiina Löytömäki and Riku Neuvonen, 'Viharikokset ja sananvapaus' in Kaarle Nordenstreng (ed) *Kansainvälinen oikeus ja etiikka journalismissa* (2012) 127; Neuvonen, *Sananvapauden sääntely Suomessa* (n 33) 118, 515.

[36] The Constitutional Law Committee and legal scholars, however, have held that only grounds listed in international human rights instruments binding upon Finland should be considered acceptable, see Perustuslakivaliokunnan mietintö n:o 25 hallituksen esityksestä perustuslakien perusoikeussäännösten muuttamisesta (PeVM 25/1994 vp) 5; Veli-Pekka Viljanen, *Perusoikeuksien rajoitusedellytykset* (WSLT 2001) 125, however see also 190–4; Manninen (n 33) 477–8. Further on acceptable social needs, refer to the literature listed at the end of n 39.

[37] See Manninen (n 33) 464–5; Kaarlo Tuori, 'Sivistykselliset oikeudet (PL 16 ja 123 §)' in Pekka Hallberg, Heikki Karapuu, Tuomas Ojanen, Martin Scheinin, Kaarlo Tuori and Veli-Pekka Viljanen, *Perusoikeudet* (2nd edn, WSOYpro 2011) 624–5 and, mutatis mutandis, 622–4. cf art 13 CFREU. Despite being guaranteed in a separate provision, it is debatable whether the Finnish system affords the freedom of artistic expression any stronger protection than its international counterparts, which subsume artistic expression under the freedom of expression. cf art 19(2) ICCPR; *Case of Müller and others v Switzerland* (1988) Series A no 133, para 27; *Case of Ulusoy and others v Turkey* App 34797/03 (ECtHR, 3 May 2007), para 42.

[38] Viljanen, *Perusoikeuksien rajoitusedellytykset* (n 36) 12; Veli-Pekka Viljanen, 'Perusoikeuksien rajoittaminen' in Pekka Hallberg, Heikki Karapuu, Tuomas Ojanen, Martin Scheinin, Kaarlo Tuori and Veli-Pekka Viljanen, *Perusoikeudet* (2nd edn, WSOYpro 2011) 139. See Hallberg (n 33) 56; HE 309/1993 vp 29. In the context of freedom of expression and vis-à-vis criminal and civil liability, see Manninen (n 33) 473–4.

[39] PeVM 25/1994 vp (n 36) 4–5. See Viljanen, *Perusoikeuksien rajoitusedellytykset* (n 36) 18–9, 37–9; Riku Neuvonen, 'Kuvaohjelmien sääntely Suomessa – nykytila ja haasteet' (2010) 1/2010 Lakimies 40, 57; Viljanen, 'Perusoikeuksien rajoittaminen' (n 38) 144–7; Neuvonen, Sananvapauden sääntely Suomessa (n

1. The restriction must be based on a parliamentary legislative act[41].
2. The restriction must be precise and defined in sufficient detail.
3. The grounds for the restriction must be legitimate in the context of the system of fundamental rights, and it must be necessary for the realization of an important social interest[42].
4. A restriction affecting the core of a fundamental right cannot be laid down by a regular legislative act.
5. The restriction must adhere to the principle of proportionality.
6. Due protection under law must be arranged when a fundamental right is being restricted[43].
7. The restriction must be in conformity with international human rights obligations binding upon Finland.

3.4 Criminal and civil liability

For the purposes of combating hate speech, the most important regulation of freedom of expression in Finland occurs by way of imposing criminal or civil liability for certain acts in accordance with the test described above. The key national legislative acts are the Criminal Code of Finland and the Tort Liability Act (Vahingonkorvauslaki (31.5.1974/412)). Content of speech deemed hateful may be punishable as e.g. ethnic agitation (RL 11:10), breach of the sanctity of religion (RL 17:10) or public incitement to an offense (RL 17:1), or it can incur civil liability (VahL 5:6)[44].[45]

3.5 Other forms of regulation

Beyond criminal and civil liability resulting directly from an act definable as hate speech, other forms of regulation vis-à-vis freedom of expression exist in the Finnish legal system. Legislative regulation as well as self-regulation offer for instance mechanisms of responsibility and restrictions that may be utilized to offer incentives to combat hate speech or limit access to hateful content.

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33) 56–7. cf Ollila (n 33) 278. Vis-à-vis criminal legislation, see Perustuslakivaliokunnan lausunto n:o 23 hallituksen esityksestä oikeudenkäyttöä, viranomaisia ja yleistä järjestystä vastaan kohdistuvia rikoksia sekä seksuaalirikoksia koskevien säännösten uudistamiseksi (PeVL 23/1997 vp). For further reading on the use of the test in the work of the Committee, see Viljanen, *Perusoikeuksien rajoitusedellytykset* (n 36) 47–53. For a comprehensive overview on all the criteria, see Viljanen, *Perusoikeuksien rajoitusedellytykset* (n 36) 65–304; Manninen (n 33) 474–82, 485; Viljanen, 'Perusoikeuksien rajoittaminen' (n 38) 147–64.

[40] Viljanen, *Perusoikeuksien rajoitusedellytykset* (n 36) 61; Viljanen, 'Perusoikeuksien rajoittaminen' (n 38) 146.

[41] cf PL 12.1 §. In this aspect the Finnish restrictions test is stricter than its European counterpart. cf *Case of the Sunday Times v the United Kingdom* (no 1) (1979) Series A no 30, para 47; *Case of Barthold v Germany* (1985) Series A no 90, para 46; *Case of Casado Coca v Spain* (1994) Series A no 285-A, paras 42-3; Yutaka Arai, 'Article 10: Freedom of expression' in David J Harris, Michael O'Boyle, Ed P Bates and Carla M Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009) 471-2.

[42] cf art 10(2) ECHR; arts 19(3), 20 ICCPR.

[43] cf PL 21 §; art 13 ECHR.

[44] This provision was introduced in 2004 by Act 16.6.2004/509, and consequently does not appear in the unofficial translation dated 15 March 2001.

[45] For further reading, see Manninen (n 33) 483–7; Löytömäki and Neuvonen (n 35) 128–32. Further on freedom of expression vis-à-vis criminal liability, see Valtakunnansyyttäjänvirasto (n 9) 7–11.

Audiovisual programmes[46] are regulated through ratings and other measures in accordance with the Act on Audiovisual Programmes (Kuvaohjelmalaki (17.6.2011/710))[47]. Programmes that inter alia contain violent themes (15 §)[48] must be classified and rated with an age limit of 7, 12, 16 or 18 years (16.1 §)[49]. Programmes rated 18 may not be distributed to underage audiences (6.1 §), and distributors must take measures to ensure programmes rated 7, 12 or 16 are not distributed to audiences younger than the rating (6.3 §). Failure to comply with the Act may entail a penalty payment (25 §) or criminal liability (36 §)[50]. The 2011 Act saw the creation of the Finnish Centre for Media Education and Audiovisual Media (Mediakasvatus- ja kuvaohjelmakeskus), which inter alia supervises compliance with the Act and handles the training and approval of audiovisual programme classifiers[51].

Televised audiovisual programmes are additionally subject to self-regulation; as of 1999, major television broadcasters in Finland have contractually consented to broadcast programmes harmful to children only after certain hours depending on the rating of a programme[52]. The

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[46] Films, televised programmes, video games and other moving picture programmes intended to be viewed by utilizing technical equipment (KuvaohjelmaL 3 §).

[47] For further reading, see Neuvonen, *Sananvapauden sääntely Suomessa* (n 33), 332–66. cf PL 12.1 § which permits restrictions to pictorial (ie audiovisual) programmes for the protection of children.

[48] Psychological abuse, suicides, racism and discrimination have been considered violent content for the purposes of KuvaohjelmaL 15 §. See Hallituksen esitys eduskunnalle kuvaohjelmalainsäädännön uudistamiseksi (HE 190/2010 vp) 35.

[49] One of the major reforms of the 2011 Act was the movement to age limits corresponding to those used in the PEGI (Pan European Game Information) system. See HE 190/2010 vp (n 48) 5–6, 16, 37–8. PEGI has a distinct symbol for content containing depictions of or encouraging discrimination, see <http://www.pegi.info/en/index/id/33/>. Somewhat surpisingly, while the 2011 Act has been inspired by PEGI and considers racism and discrimination as part of the definition of violent content, none of the symbols used by the MEKU denote racist or discriminatory content, see <http://www.meku.fi/index.php?option=com_content&view=article&id=200&Itemid=430&lang=en>.

[50] cf illegal exhibition or distribution of video programmes to a minor (RL 17:18b).

[51] Classification is first and foremost carried out by authorized classifiers, not the MEKU itself, see KuvaohjelmaL 12 §. Despite 12 § mentioning civil servants working under the MEKU, the intention of the legislative reform was to externalize classification to be carried out by audiovisual media professionals, see e.g. HE 190/2010 vp (n 48) 1, 17-8, 34. For further reading, see <http://www.meku.fi/index.php?lang=en>. As of 2014, the Centre will be superseded by the National Audiovisual Institute (Kansallinen audiovisuaalinen instituutti), see <http://www.meku.fi/index.php?option=com_content&view=article&id=231:laki-kansallisesta-audiovisuaalisesta-instituutista-hyvaksyttiin&catid=53&Itemid=393&lang=fi> accessed 4 October 2013; <http://www.meku.fi/index.php?option=com_content&view=article&id=180:meku-ja-kava-yhdistyvat&catid=53&Itemid=393&lang=fi> accessed 4 October 2013.

[52] 5 p.m. for programmes rated 7, 7 p.m. for programmes rated 13, 9 p.m. for programmes rated 15, 11 p.m. for programmes rated 18. The contract was last renewed in 2004. See HE 190/2010 vp (n 48) 6–7; Neuvonen, 'Kuvaohjelmien sääntely Suomessa – nykytila ja haasteet' (n 39) 52–4. On the impact and effectiveness of this self-regulation, see Viestintävirasto, 'Televisio- ja radiotoiminnasta annetun lain lastensuojelunormiston toteutumista koskeva selvitys' 16.2.2004 (Viestintäviraston julkaisu 3/2004) 24–5. For the EU law context of these contracts, cf Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 95/1, art 27.

MEKU facilitates the conclusion of these codes of conduct, and has the competence to supervise their compliance with the Act of Audiovisual Programmes[53].

Freedom of expression in mass media is regulated by the Act on the Exercise of Freedom of Expression in Mass Media (Laki sananvapauden käyttämisestä joukkoviestinnässä (13.6.2003/460))[54]. Periodicals, network publications and programme broadcasts[55] must be designated a responsible editor (4 §). While liability for distribution of criminal content is regulated by the Criminal Code[56], responsible editors may additionally be held accountable for editorial misconduct (13 §)[57]. Cease orders (18 §)[58], seizure (20 §), liability for media violation (21 §) and forfeiture (22 §)[59] have also been provided for.

Journalism is additionally self-regulated through the Guidelines for Journalists[60] issued by the Union of Journalists in Finland[61] (Suomen Journalistiliitto) and the work of the Council for Mass Media in Finland[62] (Julkisen sanan neuvosto). The guidelines are legally non-binding and attempt to promote good journalistic behaviour. The JSN supervises members'[63] conformity with the Guidelines and, where a member is found to have violated the Guidelines, has the competence to issue a notice the violating member must subsequently publish – the sanction for violations, therefore, is publicity[64].[65]

Marketing contrary to good practice is forbidden under the Consumer Protection Act (Kuluttajansuojalaki (20.1.1978/38))[66]. Failure to comply with the Act may entail injunction orders intensified by penalty payments (2:16). Marketing in Finland is also self-regulated through the Council of Ethics in Advertising[67] (Mainonnan eettinen neuvosto). The MEN does not have the competence to order injunctions, but its statements on advertisements have been considered

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53 HE 190/2010 vp (n 48) 20, 29–30, 39; KuvaohjelmaL 8 §, see also 25 §; <http://www.meku.fi/index.php?option=com_content&view=article&id=24&Itemid=283&lang=fi>.
54 For further reading, see Neuvonen, *Sananvapauden sääntely Suomessa* (n 33) 233–57.
55 For definitions, see SananvapausL 2 §.
56 viz that of perpetrators and accomplices.
57 For further reading, see Valtakunnansyyttäjänvirasto (n 9) 47–9.
58 See Valtakunnansyyttäjänvirasto (n 9) 54–5.
59 ibid 55.
60 <http://www.journalistiliitto.fi/en/the_game_rules/ethics/>.
61 For further reading, see <http://www.journalistiliitto.fi/en/>.
62 For further reading, see Neuvonen, *Sananvapauden sääntely Suomessa* (n 33) 265–8; <http://www.jsn.fi/en/>.
63 The currently effective (as of 1 January 2013) basic agreement of the JSN was adopted by the Finnish Association of Magazines and Periodicals, the Finnish Association of Local Periodicals, the Finnish Newspapers Association, the Union of Journalists in Finland (Finnish Association of Radio and Television Journalists), RadioMedia, MTV3, Sanoma Entertainment, FOX Finland and the Finnish Broadcasting Company (Yle). See <http://www.jsn.fi/en/Council_for_Mass_Media/basic-agreement/>.
64 See Neuvonen, *Sananvapauden sääntely Suomessa* (n 33) 266.
65 On the use of the Guidelines in the judiciary, see Ollila (n 33) 283–4.
66 KSL 2:1. 2:2 defines "contrary to good practice" as "clearly in conflict with generally accepted social values". Special emphasis is placed on affronts to human dignity and religious or political conviction, and discrimination on grounds of inter alia ethnicity, nationality or sexual orientation. Contrary to good practice is also advertising that takes advantage of the credulity of underaged children or is capable of having adverse effects on their development. See Ollila (n 33) 279, 291; Neuvonen, *Sananvapauden sääntely Suomessa* (n 33) 315–6.
67 <http://kauppakamari.fi/en/boards/council-of-ethics-in-advertising/>.

to carry significant weight[68]. The MEN's policy is based on the Consolidated ICC Code of Advertising and Marketing Communication Practice, under which marketing communications should inter alia respect human dignity and not incite or condone any form of discrimination[69].

Finally, voluntary filtering of websites has been attempted in the context of child pornography pursuant to the Act on Measures to Prevent Distribution of Child Pornography (Laki lapsipornografian levittämisen estotoimista (1.12.2006/1068))[70]. Filtering of copyright-infringing websites has also been ordered by district courts, but the filtering of child pornography websites remains the only filtering measure enacted through legislative means[71].

4 Distinction between blasphemy and Hate Speech based on religion

4.1 Introduction

In the Finnish legislation, blasphemy is criminalised by the provision RL 17:10 on breach of the sanctity of religion. Also, hate speech based on religion is criminalised by RL 11:10. These provisions and their essential elements have already been examined above with respect to questions 1 and 2.

The provision on breach of the sanctity of religion in RL 17:10 contains two paragraphs with distinct contents considering the punishable acts: the first concerns both blasphemy and defaming or desecrating what is held to be sacred, and the second concerns offending the sanctity of religion by disturbing religious proceedings or a funeral by making noise, acting threateningly or otherwise. The penalty is the same for all the acts described in the provision. In the context of online hate speech, and especially regarding situations where freedom of speech and freedom of religion are in conflict, we concentrate on the first paragraph of RL 17:10.

The two acts about "blasphemy" and "defaming and desecrating" in the paragraph are examined separately, as they have different legal definitions. These definitions are examined from the national point of view of Finnish legislator and legal literature.

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[68] See Neuvonen, *Sananvapauden sääntely Suomessa* (n 33) 323–4. See also Ollila (n 33) 287–8.

[69] art 4 Consolidated ICC Code of Advertising and Marketing Communication Practice. See Neuvonen, *Sananvapauden sääntely Suomessa* (n 33) 324.

[70] The Act essentially recognizes internet service providers' right to restrict customers' access to child pornography websites (3 §). Cease orders (SananvapausL 18 §) may also be utilized vis-á-vis child pornography websites. A voluntary filtering mechanism was preferred due to to unconstitutionality of prior prevention measures, cf PL 12.1 §. See Liikenne- ja viestintäministeriö, 'Ulkomailla oleville lapsipornosivustoille pääsyn estäminen' 26.8.2005 (Liikenne- ja viestintäministeriön selvitys 1209/30/2005) 12; Neuvonen, *Sananvapauden sääntely Suomessa* (n 33) 297. The mechanism has been criticized for inter alia lack of precision, see Päätös lapsipornografian estotoimista annetusta laista ja sen soveltamisesta tehtyihin kanteluihin 29.5.2009 (EOAK 1186/2/09) 4–12; Liikenne- ja viestintäministeriö, 'Laki lapsipornografian levittämisen estotoimista (1.12.2006/1068). Lain vaikutusarviointi' 1.4.2010 (Liikenne- ja viestintäministeriön julkaisuja 18/2010) 38–43; Neuvonen, *Sananvapauden sääntely Suomessa* (n 33) 298–9.

[71] Neuvonen, *Sananvapauden sääntely Suomessa* (n 33) 296. For filtering of websites disseminating copyrighted material, cf TekijänoikeusL 60 c §.

4.2 The determination of a church and religious community

According to RL 17:10.1, punishable is, for the purpose of offending, to publicly defame or desecrate what is otherwise held to be sacred by a church or religious community. In this context, according to 2 § of the Act on Freedom of Religion, a church or religious community refers to the Evangelical-Lutheran church, the Byzantine Church and certain registered religious communities. The conditions required in order to register such community are specified in Section 7 of the Act. According to the provision, the purpose of a religious community is to organise and support the individual, community and public activity relating to the professing and practising of religion which is based on confession of faith, scriptures regarded as holy[72] or other specified and established grounds of activity regarded as sacred. The community shall realise its purpose respecting fundamental and human rights. The purpose of the community is not to seek economic profit or otherwise organise mainly economic activity. The community may not organise activity for which an association within the meaning of the Associations Act (Yhdistyslaki (503/1989)) may not be founded or for which an association may only be founded subject to permission. According to Section 8, a minimum of 20 persons are required for founding a religious community.[73]

4.3 Objects of legal protection

Before the enactment of the Criminal Code of 1889, it was disputable which the objects of legal protection of religious crimes actually were, or if they were something else than God or religion. According to the preparatory works of the Code, the law was based on the idea of seeing people's religious feelings and convictions as objects of legal protection.[74]

Along with the latest law reform in 1998 regarding the provision, the breach of the sanctity of religion was placed under the Chapter 17 on "Offences against public order". Religion itself is not currently generally considered to constitute an object of legal protection; instead, protection is awarded for citizens' religious beliefs and feelings and the sanctity of religion.[75] The Constitutional Law Committee stated that the provision is therefore founded on public order

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[72] Not limited to those in the Bible.

[73] For further information about the registration process, see National Board of Patents and Registration of Finland, 'Registration of Religious communities in the Register of Associations' <http://www.prh.fi/en/yhdistysrekisteri/uskonnolliset_yhdyskunnat.html> accessed 17 July 2013. According to Section 23 of the Act on Freedom of Religion, a three-person Expert Board functioning in connection with the Ministry of Education has the task of giving the National Board of Patents and Registration its opinion whether the purpose and forms of activity of a particular religious community are in compliance with the Act. According to Section 16, a religious community must be entered in the Register if it has been established in compliance with the Act, the by-laws and administration of the community observe the provisions of this Act, and the name of the community clearly differs from the names of the communities previously entered in the Register and is not misleading. See the Act on Freedom of Religion <http://www.prh.fi/en/yhdistysrekisteri/uskonnolliset_yhdyskunnat/lyhennysote_uskonnonvapauslaista.html> accessed 17 July 2013.

[74] According to HE 6/1997 vp (n 19), which refers to Rikosvaliokunnan mietintö n:o 1888:1 51–2.

[75] HE 6/1997 vp (n 19). Also the Constitutional Law Committee acknowledged the same objects of legal protection, see PeVL 23/1997 (n 39).

and another fundamental right, the right to Freedom of religion and conscience (PL 9 §).[76] Especially considering the principle of proportionality, the Committee noted that it is essential for the liability of the offense to be based on the objective of protecting a person's right to freedom of religion and conscience.

In addition to the fact that religion itself is not an object of legal protection in practice, the preparatory works of the provision noted that it is generally considered to be disputable whether God can be an object of legal protection.[77]

4.4 Balance between RL 17:10 and RL 11:10

According to the preparatory works of the provision of ethnic agitation, the object of its legal protection is ultimately the inviolability of human dignity by protecting individuals from racist and other violations committed for the reasons specified under PL 6.2 §[78]. The same concerns the new statutory on aggravated ethnic agitation (RL 11:10a), which also protects public order and safety.[79] Originally, criminalisations on incitement against and discrimination of people were amended to the Criminal Code in 1970 in pursuance of the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination. The International Covenant on Civil and Political Rights, accepted in 1966, also included a prohibition of discrimination of people. In 1995, the expression "or a comparable basis" was amended to the provision on ethnic agitation; in consequence, the provision applies also to the type of hate crimes not committed with a racist motive. However, in its current form RL 11:10 still constitutes a central regulation addressing racist motives.

Hate speech based on religion or belief is punishable (RL 11:10). Religion as a ground of discrimination of people was already taken into consideration in the original provision of 1970. The provision does not protect religion or religious practices of people or institutions as such, but the people who have professed a certain religion.[80] The term "belief" was added to the provision by the latest amendment.[81] According to the preparatory works, religion would have an unnecessarily prominent status among other ideologies, if it was not explicitly equated to other convictions or similar ideologies.[82]

The terms religion and belief must be interpreted together. Atheists are also protected by the provision.[83] In this sense, religion and belief differ from some other grounds because people

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[76] PeVL 23/1997 (n 39) 3. According to the Constitutional Law Committee, these grounds for restriction were considered to be in confirmity with the right to Freedom of expression both in the Constitutional Act and the European Convention on Human Rights.
[77] HE 6/1997 vp (n 1921).
[78] PL 6.2 § (Basic rights and liberties): No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.
[79] HE 317/2010 vp (n 4) 49.
[80] Valtakunnansyyttäjänvirasto (n 9) 20.
[81] In practice, other convictions were already equated to religion since the law reform in 1995. See Tulkki, *Uskonnonvapauden rikosoikeudellinen suoja* (n 20) 123.
[82] HE 317/2010 vp (n 4) 41.
[83] Valtakunnansyyttäjänvirasto (n 9) 20–1. In certain cases also a political conviction can be equated to a religious belief. In practice, however, political groups are left outside of the scope of the protection

themselves decide whether they belong to such groups; it is not necessary to officially be a member of a religious community or a religious group. However, the cultural background and other matters independent from one's will have a strong influence on determining whether one belongs to a certain group or not.[84] Also, for the requirement of the provision being precise (the principle of legality) and for the purposes of freedom of expression, it is essential that the group referred to in the provision can be distinguished from other groups.[85]

The purpose of the provision is to give protection to the minority groups that usually have inferior social status and for that reason need special protection.[86] However, the protection provided by the provision is not limited to religious minority groups: for instance the Christians are also protected by the provision.[87] If Christian values are offended, the hate speech also attacks the majority of Finnish people. However, because of the purpose of the provision, the threshold for applying the provision to statements against the majority is relatively high; it is required that the restriction to freedom of expression must be necessary in a democratic society, which is rarely the case when the statements offend the majority of people.[88] Also, the term "belief" should not be interpreted broadly to cover, for example, groups determined by political convictions.[89]

4.5 Developments

With the latest law reform in 1998, the heading of RL 17:10 was changed from "blasphemy" to "breach of the sanctity of religion", at which point the provision also came to include disturbing religious proceedings. The maximum penalty was lowered to six months of imprisonment.[90]

The necessity of criminalisation of the act of blasphemy has been questioned several times since the beginning of 20th century. However, the initiatives to abolish the offense have been either overruled or when accepted, not reinforced. The act of blasphemy has remained an offense. The dispute has mainly revolved around the terms "blasphemy" and "God", which may be open for various interpretations. According to the preparatory works, the reference to blasphemy can easily be misunderstandood.[91] In the end, the terms stayed in the provision; it was argued that

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provided by the provision because of the especially strong right to Freedom of expression concerning political matters. See Neuvonen, *Sananvapauden sääntely Suomessa* (n 33) 416.

[84] Valtakunnansyyttäjänvirasto (n 9) 17.

[85] Riikka Rask, 'Vihapuhe Euroopan ihmisoikeustuomioistuimen oikeuskäytännön valossa' Laura Ervo, Raimo Lahti and Jukka Siro (eds), *Perus- ja ihmisoikeudet rikosprosessissa* (Helsingin hovioikeuden julkaisuja 2012) 271.

[86] HE 317/2010 vp (n 4) vp.

[87] Valtakunnansyyttäjänvirasto (n 9) 20.

[88] ibid 18.

[89] ibid 21. Furthermore, political topics and social debate belong to the core of freedom of expression; for this reason it may be more difficult for political groups to find protection under the provision.

[90] Already the Criminal Code of Finland of 1734 contained references to blasphemy. At that time, blasphemy was considered as one of the so-called "Majesty crimes" punishable by death penalty. With time, the maximum penalty of the provision has been gradually lowered. Along with the Criminal Code of 1889, the maximum penalty was lowered to four years of penal labour, or in cases where a milder penal scale was used, six months of imprisonment. In 1970, the maximum penalty of the provision was again lowered to two years of penal labour, and the possibility of applying the mild penal scale was removed.

[91] HE 6/1997 vp (n 19) 128. Also the terms "sacred" and "registered religious communities" faced criticism, see PeVL 23/1997 (n 39).

they were justified by the Christian tradition and values of the Finnish legislation and the sense of justice of the people.[92]

In addition to the discussion revolving around the law drafting process, arguments have also been presented about whether it is at all necessary to prohibit blasphemy in particular in order to protect certain objects that require legal protection. It has been argued that the religious feelings can be protected by legislation of hate crimes.[93]

As examined above, the current criminalisation of ethnic agitation based on religion aims to protect the same objects of legal protection as the provision concerning the breach of the sanctity of religion, in other words the religious feelings and beliefs of people and the public order. As the commission of the offence for a motive based on religion or belief is now also a ground for increasing the punishment by RL 6:5, the religious feelings and convictions of people can always be taken into account as objects of legal protection. However, Finland continues to stand among the minority of the Council of Europe member states in which blasphemy is still defined as an offence as such.[94]

5 Networking sites and the issue of online anonymity

Both the justifications for online anonymity as well as the justifications for restricting it are well-known and rather self-evident. It is naturally impossible to provide a clear-cut and final answer to the rather heated debate raging around these issues. Anonymity has an important part to play in encouraging freedom of expression and lively discussion concerning even controversial issues, which are central to the proper functioning of any democratic polity. It allows people to express their views regardless of their societal or professional status and without the fear of negative repercussions in their private or professional lives.[95] Moreover, anonymity helps to make the discussion more objective by leaving the person behind the message hidden, thus making the discussion more about substantive arguments and less about personal characteristics or attributes of the participants.[96] It also allows people to discuss and share thoughts about painful and personal issues, which they would otherwise be too embarrassed or shamed to bring up.[97] Finally, it lowers the threshold for so-called whistle-blowers and potential informants of criminal

[92] For further details see Kaj-Erik Tulkki, Uskonnonvapauden rikosoikeudellinen suoja (Licentiate thesis) (Turun yliopisto, Oikeustieteellinen tiedekunta 2008) 79–91.
[93] See for example Kimmo Nuotio, 'Jumalanpilkasta viharikoksiin' (2009) 1 HAASTE (Oikeusministeriö) <http://www.haaste.om.fi/Etusivu/Juttuarkistoaiheittain/Maahanmuuttajat/1247666494525> [2.9.2013].
[94] European Commission for Democracy through Law (Venice Commission), Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, 17–18 October 2008, Doc. No. CDL-AD(2008)026 8.
[95] Jacob Palme and Mikael Berglund, 'Anonymity on the Internet' (2012) <http://people.dsv.su.se/~jpalme/society/anonymity.pdf> accessed 15 August 2013, 3.
[96] ibid, 4.
[97] Adam Joinson, 'Self-disclosure in computer mediated communication: The role of self-awareness and visual anonymity' (2001) European Journal of Social Psychology 177.

activity.[98] The most obvious downside of anonymity is that it allows perpetrators to hide their personalities while either preparing or carrying out a wide variety of crimes.

Finnish legislators have sought to resolve the balancing act between these positives and negatives. Both the Finnish Constitution as well as the more specific Finnish statutes concerning the freedom of speech protect the right of an individual to express his/her opinions while remaining anonymous. This right, however, does not extend to situations where this communication contains elements that are seen as unlawful.[99]

Consequently, in Finland, networking sites can be legally forced to reveal the identity of a person suspected of online hate speech. More specifically, according to the Act on the Exercise of Freedom of Expression in Mass Media 17 §, a court may, based on a demand made by a police of a sufficient rank or a prosecutor, order the administrator of a transmitter, server or a comparable appliance to deliver the information required for identifying the sender of an online message to the public authority that made the demand. This demand is heeded to by the court only if there are probable causes to suspect that the contents of that message is such that making it available for the public has been made subject to a punishment.

According to the preparatory works of the above-mentioned legal provision, this information can include the name of the sender, if this is known to the administrator, as well as the IP address from which the message was sent from.[100] After receiving the IP address, the police has to invoke its right under the Police Act (Poliisilaki (496/1995)) 36 §, which stipulates that the police has the right to receive such information from a telecommunications company or a community subscriber which allows them to identify the telecommunications terminal from where an anonymous message was sent, i.e. identify the sender.

Thus, for example when a message, the contents of which fulfils the criteria of ethnic agitation, posted by an anonym user appears on a discussion forum, the police must first receive a court order addressed to the administrator of that discussion forum to reveal the IP address of the user, after which the telecommunications company which hosts that IP address must be contacted to get the subscriber information of the IP address in question.

Moreover, an amendment of the Coercive Measures Act (Pakkokeinolaki (806/2011) is coming into force from the beginning of the year 2014. In terms of offences taking place in an online environment, the most important amendments concern the so-called "secret forcible measures" and especially telemonitoring. According to the governmental proposal, the concept of telemonitoring also includes acquiring the information necessary for identifying a sender of an online message. The police can use telemonitoring to identify a person, for example, in a situation where a telecommunications terminal has been used to carry out an offence for which the most severe punishment is at least two years of imprisonment.[101] This also includes the offence of ethnic agitation. Pursuant to the amended Forcible Measures Act, permission to use

[98] Palme and Berglund (n 95) 4.
[99] Hallituksen esitys Eduskunnalle laiksi sananvapauden käyttämisestä joukkoviestinnässä ja eräiksi siihen liittyviksi laeiksi (HE 54/2002 vp) 74–5.
[100] HE 54/2002 (n 99) 75.
[101] Hallituksen esitys eduskunnalle esitutkinta- ja pakkokeinolainsäädännön uudistamiseksi (HE 222/2010 vp) 320–1.

telemonitoring is granted by a court based on a demand made by a police officer of a sufficient rank.[102]

With the adaption of so-called "tor networks" and other comparable technologies[103], which are specifically designed to hide the identity of users browsing the Internet, the feasibility of imposing these measures naturally decreases. Given the limited resources of public authorities and the relatively high number of cases where online platforms are used to disseminate hate speech, authorities must naturally engage in a selection process when deciding which cases to investigate further and eventually prosecute. Increased resources demanded for getting around the above-mentioned identity hiding technologies naturally enter into these calculations.[104] It also remains somewhat of a mystery to outside observes whether the Finnish public authorities are capable of revealing the identities of the users of these technologies at all.

6 Tackling the notions of "violence", "hatred" and "clear presence of danger"

According to the Additional Protocol, hate speech refers to an expression that advocates, promotes, or incites towards a certain violent act but also to an expression that "merely" advocates, promotes, or incites towards hatred. In Article 2 of the Protocol, it is stated that "racist and xenophobic material" means any written material, any image … which advocates, promotes or incites hatred, discrimination or violence…" Further, Article 3 paragraph 2 provides that "a party may reserve the right not to attach criminal liability to conduct … where the material … advocates, promotes or incites discrimination that is not associated with hatred or violence. Thus, in the context of hate speech, the terms "violence" and "hatred" are used as alternatives.

According to the ECtHR's jurisprudence, hate speech usually means incitement to violence against persons, authorities or an ethnic group.[105] For example in the case of Gündüz v. Turkey, the Court stated that the applicant's speech did not amount to hate speech, since the mere defending of Sharia without incitement towards violence did not amount to hate speech[106]. Further, in the case of Sürek v Turkey, the letters[107] that the applicant had published were considered to amount to hate speech since they must be seen as capable of inciting to further violence in the region in question[108].

However, ECtHR has also stated that hate speech does not necessarily have to directly incite to a certain violent act towards a certain group. Hate speech can also present itself as some other kind of insulting or hostile expression that is directed towards a group for example on grounds

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[102] ibid, 323.
[103] For further details see e.g. Damon McCoy and others, 'Shining Light in Dark Places: Understanding the Tor Network' (2008) Privacy Enhancing Technologies—Lecture Notes in Computer Science, Vol 5134, 63–76.
[104] Statement of State Prosecutor Mika Illman, private lecture (n 32).
[105] Päivi Hirvelä and Satu Heikkilä, *Ihmisoikeudet - käsikirja EIT:n oikeuskäytäntöön* (Edita Publishing 2013) 578.
[106] *Case of Gunduz v Turkey* ECHR 2003-XI 15 (HUDOC).
[107] The authors had used in the letters labels such as "fascist Turkish army", the TC murder gang" and "the hired killers of imperialism" alongside references to "massacres", "brutalities" and "slaughter".
[108] *Case of Sürek v Turkey* (no 1) ECHR 1999-IV 26 (HUDOC).

of race or sexual orientation.[109] The Court stated in Erbakan v. Turkey that it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance[110]. In the case of Féret v. Belgium, the Court stated that racist discrimination and xenophobia must be resisted in all their forms as far as possible even when the speech does not incite towards violence or other criminal act.[111] Further, in the recent case of Vejdeland v. Sweden, the Court stated that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of speech exercised in an irresponsible manner.[112] Even though the circumstances in cases concerning Belgium and Sweden are not comparable to the circumstances in the case of Erbakan v. Turkey, they illustrate the Court's consistency in its view that direct incitement to violence is not sine qua non for speech to be considered hate speech.

In the United States, speech is protected against censorship or punishment unless shown likely to produce a "clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest"[113]. The "Clear and present danger" test has been developed in the jurisprudence of U.S. Supreme Court[114]. In Schenck v. United States, the Court concluded that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent"[115]. The "clear and present danger" test was later restated in Brandenburg v. Ohio, where the Supreme Court held that an expression that advocates the use of force and even the threat of illegal action is granted protection on grounds of free speech unless the expression is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[116]

Arguments have been put forward in favour of that the ECtHR would also utilise the "clear and present" doctrine in examining whether an expression inciting towards violence should be sanctioned. For example in Sürek v Turkey judge Bonello stated in his dissenting opinion that the question of whether words encouraging violence deserved criminal sanction or not should be assessed on the basis of the US doctrine of "a clear and present danger".[117] He suggested that where the invitation to violence remains in the abstract and removed in time and space from the actual or impending scene, the paramount interest of free speech should prevail[118]. In addition,

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[109] Hirvelä and Heikkilä (n 105) 578.
[110] *Case of Erbakan v Turkey* App no 59405/00 (ECtHR, 6 July 2006).
[111] *Case of Feret v Belgium* App no 15615/07 (ECtHR, 16 July 2009).
[112] *Case of Vejdeland and others v Sweden* App no 1813/07 (ECtHR, 9 February 2012), para 55.
[113] Robert Post, 'Hate Speech' in Hare I and Weinstein J (eds), *Extreme Speech and Democracy* (Oxford University Press 2010) 134.
[114] Roger Kiska, 'Hate Speech: A comparison between the European Court of Human Rights and the United States Supreme Court Jurisprudence' (2012–2013) 25(1) Regent University Law Review 107, 142.
[115] Schenck v United States, 249 U.S. 47 (1919).
[116] Kiska (n 114) 142–3.
[117] *Case of Sürek v Turkey* (no 1)(n 108).26 (HUDOC). See also Arai (n 41) 453.
[118] *Case of Sürek v Turkey* (no 1) (n 108) 26 (HUDOC).

the judgements in the cases of Féret v. Belgium and Vejdeland v. Sweden have been criticised.[119] In Féret, the three dissenting judges were of the opinion that the majority of the judges broadened the concept of hate speech from the previous jurisprudence of ECtHR when it stated that incitement to hatred does not necessary presume incitement to a certain violent or criminal act[120]. Also Vejdeland has been said to mark a departure from previous very well-settled case law on freedom of expression since or decades the ECtHR had held that freedom of expression constitutes one of the essential foundations of a democratic society and that freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.[121]

Deciding what punishable hate speech is or should be is a contentious topic. It has been noted that an array of hate speech regulation aims to distinguish speech that is likely to cause harmful effects, like discrimination or violence, from speech with identical content that is not likely to lead to such effects. However, there are differences in legal systems with respect to how tightly speech must be connected to its possible effects. In the U.S, hate speech regulation that suppresses speech based on its general tendency to cause social harms would not be permitted.[122]In public debate, U.S. citizens must tolerate insulting, and even outrageous, speech and the fact that society may find speech offensive is not a sufficient reason for suppressing it, not even if the offensive speech is motivated by race, ethnicity, religion, or sexual preference.[123] In contrast, as already stated above, in the ECtHR jurisprudence an expression which entails racist speech but does not incite to violence or other criminal act might become sanctioned without violation of freedom of speech.

Finnish legislator has taken the view that in order an act to constitute ethnic agitation that is to say, hate speech – it does not need to have tendency to cause violence, hatred or discrimination towards the target group. In connection of total reform of the RL in the beginning of 1990, the Legal Committee recognised that even though there exists a possible conflict of interests between protecting a certain ethnic group and freedom of speech, the acts depicted in the Section concerning ethnic agitation are already intrinsically, without possible consequences, so severe that is well-grounded to place a criminal threat of punishment on them.[124]

In the Finnish criminal law, the requirement of "concrete" danger in the context of hate speech is only set in few instances. According to the RL 17:1 concerning public incitement to an offence it is required either that incitement or enticement to a certain criminal act causes danger that the act in question will be committed or that it otherwise clearly endangers public order or safety. The requirement of "concrete" danger is also found in the second ground for the qualification of the crime of aggravated ethnic agitation (RL 11:10a), which requires that the incitement or

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119 Dirk Voorhoof, 'European Court of Human Rights - Case of Féret v. Belgium' (2009) IRIS 2009-8:2/1 <http://merlin.obs.coe.int/iris/2009/8/article1.en.html> accessed 1 August 2013, 1. Kiska (n 114) 111–2.

120 *Case of Feret v Belgium* (n 111). See also, Voorhoof (n 119) 1.

121 *Case of Vejdeland and others v Sweden* (n 112). See also, Kiska (n 114) 111–2.

122 Post (n 113) 133–4.

123 Kiska (n 114) 140–1.

124 Lakivaliokunnan mietintö n:o22 hallituksen esityksestä rikoslainsäädännön kokonaisuudistuksen toisen vaiheen käsittäviksi rikoslain ja eräiden muiden lakien muutoksiksi (LaVM 22/1994).

enticement to other grave violent act than referred to in paragraph one[125] causes clear[126] danger to public order and safety. "Concrete danger" is considered to be present when, inter alia, incitement or enticement of certain violent act causes imminent danger that the act in question will be committed.[127]

However, it should be noted that even if the incitement or enticement to a grave violent act does not pass the "concrete danger" test, the act can still constitute the crime of ethnic agitation (RL 11:10).Thus, as mentioned above, according to the Finnish law punishable "hate speech" does not have to lead to any consequences.[128] This stance adopted by the Finnish legislature can and has been defended by appealing to the protection of human dignity, which is also specifically guaranteed in the Constitution of Finland. According to the Section 1, Paragraph 3 of the Constitution of Finland "the constitution shall guarantee the inviolability of human dignity and the freedom and rights of the individual and promote justice in the society". Racist speech is generally considered to be incompatible with the social and legal principles of human dignity and equality, and one reason for hate speech regulation is that it aims to protect, inter alia, members of minority, racial, ethnic, and other groups[129]. It was thus also specifically stated in the report of the Office of the Prosecutor-General of Finland that insistence of the inviolability of human dignity is impossible if the spreading of statements that violate human dignity is simultaneously allowed.[130]

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

7.1 Introduction

The main difference justifying the distinction between arts 10(2) and 17 ECHR is their difference of object and purpose. Several other differences exist, but are capable of being subsumed under the difference of object and purpose. The main differing element is capable of being objectively grounded. The articles do not seem to differ as regards the principle of subsidiarity. Depending on contextual elements, the articles may account for states' margin of appreciation in extremely differing degrees.

7.2 General overview on arts 10(2) and 17 ECHR

Art 10(2) ECHR

Art 10(1) guarantees the right to freedom of expression. While the premise of art 10(1) is that all forms and content of speech fall within its ambit and thus enjoy protection, restrictions may be

[125] Genocide, preparation of genocide, a crime against humanity, an aggravated crime against humanity, a war crime, an aggravated war crime, murder, or manslaughter committed for terrorist intent (RL 11:10a).
[126] The expression "clear" refers to concrete danger, Valtakunnansyyttäjänvirasto (n 9) 26.
[127] ibid
[128] ibid
[129] Barendt E, *Freedom of Speech* (2nd edn, Oxford University Press 2005) 171–4.
[130] Valtakunnansyyttäjänvirasto (n 9) 10–1.

imposed upon freedom of expression pursuant to art 10(2)[131]. In addition to pursuing at least one of the goals expressly listed in art 10(2), interferences must also be prescribed by law and be necessary in a democratic society[132].

Art 17 ECHR

Art 17 seeks to protect democratic governance and human rights by ensuring that none of the rights and freedoms guaranteed by the Convention may be invoked as justification for actions aiming at the destruction of these rights and freedoms. In other words, it seeks to ensure that democracy is capable of defending itself against anti-democratic abuse of rights.[133] Developments regarding the article's scope of applicability will be discussed below in further detail.

7.3 Differences between arts 10(2) and 17 ECHR

Object and purpose

From the outset it is clear that arts 10(2) and 17 pursue different objectives. The mechanism of art 10(2) seeks to ensure that the prima facie unlimited freedom of expression may, on a case-by-case basis, be abridged in favour of pressing social needs. The interests listed in art 10(2), compared to art 17, cover a significantly wider range of topics and issues. While the objectives of arts 10(2) and art 17 may overlap in a concrete case – e.g. aims described in art 17 could be considered matters of national security or subject to prevention of disorder or crime[134]– the object and purpose of the two articles remain distinctly different and are not interchangeable.

Applicability vis-à-vis Convention rights and freedoms

The two articles also apply to different rights and freedoms. Art 10(2) permits restrictions only vis-à-vis freedoms enjoyed pursuant to art 10(1). Art 17, while prima facie applicable to any Convention rights and freedoms, comes to question vis-à-vis any Convention articles that could facilitate attempts to derive therefrom a right to personally engage in activities within the

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[131] Arai (n 41) 450. Freedom of expression under the ECHR regime has been argued to conform to the external boundaries theory, see Hoikka (n 35) 62. Arai argues that any suggestions on inherent limitations to freedom of expression must be rejected under art 10, see Arai (n 41) 449.

[132] Arai (n 41) 444. cf Clare Ovey and Robin CA White, *Jacobs and White, The European Convention on Human Rights* (4th edn, Oxford University Press 2006) 319.

[133] The article has been considered to first and foremost be concerned with protection against totalitarian activities—e.g., early on, communist manipulation of political rights. See *Decision by the Commission on the admissibility* App no 250/57 (Commission Decision, 20 July 1957) 4–5 (HUDOC); *Case of Lawless v Ireland* (no 3) (1961) Series A no 3, 17, para 7 (HUDOC); Frede Castberg, *The European Convention on Human Rights* (A.W. Sijthoff 1974) 171; *Schimanek v Austria* App no 32307/96 (ECtHR, 1 February 2000) 7 (HUDOC); vis-à-vis freedom of expression, Holocaust denial in particular, *Garaudy v France* ECHR 2003-IX 22–3 (HUDOC); Tuula Linna, 'Oikeuden väärinkäytön kielto ja sen sovelluksia' (2004) 4/2004 Lakimies 623; *Norwood v the United Kingdom* ECHR 2004-XI 4 (HUDOC); Iain Cameron, *An introduction to the European Convention on Human Rights* (5th edn, Iustus Förlag 2006) 155–6; Ovey and White (n 132) 432 and – vis-à-vis freedom of expression – 434; *Case of Zdanoka v Latvia* ECHR 2006-IV, paras 98–101; David J Harris, Michael O'Boyle, Ed P Bates and Carla M Buckley, 'Articles 16–18: Other restrictions upon the rights protected' in David J Harris, Michael O'Boyle, Ed P Bates and Carla M Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009) 649.

[134] cf Arai (n 41) 476.

meaning of art 17 –e.g. freedom of thought, conscience and religion (art 9), freedom of expression (art 10) and freedom of assembly and association (art 11). Consequently, rights such as that to a fair trial (art 6) may not be abridged.[135]

Accounting for intent

Art 17, unlike art 10(2), requires that a group or a person has express aims falling within the article's ambit[136] – its applicability thus rests heavily on subjective intent. Where freedom of expression is used to advocate interests or policies other than those described in art 17, the article cannot be applied, art 10(2) remaining the only venue pursuant to which restrictions may be imposed.

Standards for applicability

With regard to what has been said above on the art 10(2) standards – prescription by law, pursuance of legitimate aims, necessity in a democratic society – justification of interferences within that paragraph's meaning require imperative necessities and narrow interpretation of exceptions[137]. As regards art 17, however, there exist no standards similar to those required in conjunction with restrictions pursuant to art 10(2)[138]. Still, art 17 has been considered to only be applicable "on an exceptional basis and in extreme cases"[139].

Use by Convention organs

ECHR organs rarely solve freedom of expression cases by the sole application of art 17 – more often they will have recourse to art 10(2) test[140]. Early on, in the German Communist Party case, the European Commission of Human Rights saw no need to consider the case in light of art

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[135] See *Case of Lawless v Ireland* (n 133) 17–8, paras 6–7 (HUDOC); Castberg (n 133) 171–2; Ovey and White (n 132) 434; Harris, O'Boyle, Bates and Buckley, 'Articles 16–18: Other restrictions upon the rights protected' (n 133) 649–50; Matti Pellonpää, Monica Gullans, Pasi Pölönen and Antti Tapanila, *Euroopan ihmisoikeussopimus* (5th edn, Talentum 2012) 853.

[136] *Case of Lawless v Ireland* (n 133) 17, para 7 (HUDOC); *Case of the United Communist Party of Turkey and others v Turkey* ECHR 1998-I, para 60; Ovey and White (n 132) 434; Harris, O'Boyle, Bates and Buckley, 'Articles 16–18: Other restrictions upon the rights protected' (n 133) 649.

[137] Arai (n 41) 443. See *Case of the Sunday Times v the United Kingdom* (no 1) (n 41), para 65; *Case of Informationsverein Lentia and others v Austria* (1993) Series A no 276, para 35; *Case of Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria* (1994) Series A no 302, para 37.

[138] See e.g. *Garaudy v France* (n 133) 22–3 (HUDOC)—the Court engages in no review of necessity whatsoever as regards the applicability of art 17. Art 10(2) measures, by comparison, are afforded the full three-standard review, see 23–4 (HUDOC).

[139] Pellonpää, Gullans, Pölönen and Tapanila (n 135) 853; *Case of Paksas v Lithuania* ECHR 2011, para 87. cf Castberg (n 133) 172; Harris, O'Boyle, Bates and Buckley, 'Articles 16–18: Other restrictions upon the rights protected' (n 133) 651.

[140] Hirvelä and Heikkilä (n 105) 579–80. Despite listing multiple cases where ECHR organs allegedly apply art 17, most of the listed cases have nothing to do with the abuse of freedom of expression, e.g. hate speech. The few where art 17 is actually brought up in the text are cases where the Court then continues to expressly or implicitly reject its applicability, see e.g. *Case of the United Communist Party of Turkey and others v Turkey* (n 136), paras 51–61; *Case of Refah Partisi (the Welfare Party) and others v Turkey* ECHR 2003-II, paras 96–136. A single listed case concerns the actual, direct application of art 17, see *BH, MW, HP and GK v Austria* (1989) 62 DR 216, 4 (HUDOC) – however, here the Commission only invokes art 17 vis-à-vis the applicants' art 14 claim, not art 10. In general, however, the argument of Hirvelä and Heikkilä corresponds to that of Arai, cf n 145.

10(2) when it could have recourse to art 17[141]. While the ECtHR has held that remarks directed against the Convention's underlying values do not enjoy protection under art 10[142], and it did deny art 10 rights on the basis of art 17 in *Garaudy v France*[143] and *Norwood v the United Kingdom*[144], its contemporary approach in cases concerning expression espousing anti-Convention values has been described as first recognizing the broad measure of protection under art 10(1), only then examining restrictive measures pursuant to art 10(2)[145]. In other words, and in stark contrast to the German Communist Party case, the starting point of the Court's examination lies with recognizing the prima facie all-encompassing nature of freedom of expression (to which, then, restrictions may apply), not with an outright rejection of certain types of expression (ie assumption of inherent limitations).

Subsidiarity and margin of appreciation

The general scheme of the Convention is that the initial and primary responsibility for the protection of guaranteed rights and freedoms resides with the States Parties[146]. The principle of subsidiarity allows for diversity as regards systems for the protection of Convention rights and freedoms, and grants primacy to national authorities in assessing what demands local circumstances impose vis-à-vis restricting Convention rights[147].

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[141] *Decision by the Commission on the admissibility* (n 133) 3 (HUDOC). This approach has been criticized by Arai, who argues that the suggestion that restrictions to freedom of expression could be subsumed under art 17 would subsequently entail the expressions of certain individuals falling outside the ambit of protection of art 10 by the mere basis of them being members to groups espousing anti-Convention values. It would also suggest inherent limitations to freedom of expression, which is incompatible with the premise of art 10. See Arai (n 41) 449, cf 457.

[142] *Case of Jersild v Denmark* (1994) Series A no 298, para 35; *Case of Lehideux and Isorni v France* ECHR 1998-VII, para 53.

[143] *Garaudy v France* (n 133) 22–3 (HUDOC). cf *Case of Lehideux and Isorni v France* (n 142), para 47; Ovey and White (n 132) 322–3. The Convention organs' jurisprudence on art 17 in Holocaust denial cases has been inconsistent. In *Garaudy v France*, the Court solved the first point of the dispute by recourse to art 17 alone without any examination under art 10. On the other hand, the Commission, in its time, declared several Holocaust denial cases inadmissible by finding the restrictions imposed upon the claimants acceptable under art 10(2) – making references to art 17, but only in support of the art 10(2) necessity test. See *Honsik v Austria* (1995) 83 DR 77, 5–6 (HUDOC); *Remer v Germany* App no 25096/94 (Commission Decision, 6 September 1995) 3–5 (HUDOC); *Walendy v Germany* (1995) 80 DR 94, 5–7 (HUDOC); *Marais v France* (1996) 86 DR 184, 189–90; Ovey and White (n 132) 321.

[144] *Norwood v the United Kingdom* (n 133) 4 (HUDOC). For a Commission case concerning the application of art 17, see *Glimmerveen and Hagenbeek v the Netherlands* (1979) 18 DR 187, 194–6.

[145] See Arai (n 41) 450.

[146] David J Harris, Michael O'Boyle, Ed P Bates and Carla M Buckley, 'The European Convention on Human Rights in context' in David J Harris, Michael O'Boyle, Ed P Bates and Carla M Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009) 13. See *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium* (Merits) (1968) Series A no 6, 31–2, para 10 (HUDOC); *Case of Handyside v the United Kingdom* (1976) Series A no 24, para 48; Ovey and White (n 132) 18; Colin Warbrick, 'Articles 8–11: General considerations' in David J Harris, Michael O'Boyle, Ed P Bates and Carla M Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edn, Oxford University Press 2009) 350; Hirvelä and Heikkilä (n 105) 25.

[147] Warbrick (n 146) 350. cf *Case of Müller and others v Switzerland* (n 37), para 35.

Strongly tied to the principle of subsidiarity is the concept of margin of appreciation[148]. Certain deference is given to national authorities in assessing the existence of a pressing social need and choosing measures to be taken in pursuance of those needs[149]. The power of appreciation is by no means unlimited; the doctrine of margin of appreciation is applied differentially, the margin's breadth depending on the context in which it is examined[150].

Additionally, in the context of freedom of expression, it must be borne in mind that the ECHR regime promotes tolerance and open-mindedness as hallmarks of a democratic society, and emphasizes the role of freedom of expression as one of the essential foundations of a democratic society[151]. Political speech and debates on matters of public interest enjoy particularly strong protection[152]. On the other hand, and despite being a form of expression, states have been argued to have a relatively wide margin of appreciation vis-à-vis historical revisionism[153]. The same has been said as regards incitement to violence[154].

Arts 10(2) and 17 do not seem to differ as regards the principle of subsidiarity. Neither mechanism places any more or less emphasis on national authorities' primary function in safeguarding Convention rights or the Court's subsidiary role. Major differences, however, can be seen in the context of margin of appreciation. Deference to national authorities' appreciation is ever present in cases concerning restrictions pursuant to art 10(2), the Court then reviewing whether a state remained within the confines of the margin afforded to it. No significant differences as regards the margin of appreciation can be noted between cases in which the Convention organs use art 17 only as interpretational support for an argument based on art 10(2) and its tripartite test and cases in which art 17 simply does not come into question. But as has been evidenced for instance by the German Communist Party case, *Garaudy v France* and *Norwood v the United Kingdom*, ECHR organs may at times rest their decision solely on art 17 – when they do, the state's power of appreciation is not reviewed at all, as the focal point will be the

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[148] See Harris, O'Boyle, Bates and Buckley, 'The European Convention on Human Rights in context' (n 146) 13. cf *Case of Silver and others v the United Kingdom* (1983) Series A no 61, para 97; *Case of Hirst v the United Kingdom* (no 2) ECHR 2005-IX, para 84; *Case of Dickson v the United Kingdom* ECHR 2007-V, para 78; *Case of Vilho Eskelinen and others v Finland* ECHR 2007-II, para 61; Warbrick (n 146) 350.

[149] Arai (n 41) 444. See *Case of Handyside v the United Kingdom* (n 146), para 48; *Sunday Times v the United Kingdom* (no 1) (n 41), para 59; *Case of Informationsverein Lentia and others v Austria* (n 137), para 35; Harris, O'Boyle, Bates and Buckley, 'The European Convention on Human Rights in context' (n 146) 11–2; Warbrick (n 146) 349–50; Pauli Rautiainen, 'Moninaisuudessaan yhtenäinen Eurooppa: konsensusperiaate ja valtion harkintamarginaalioppi' (2011) 6/2011 Lakimies 1152, 1153. cf Ovey and White (n 132) 232–3, 239.

[150] See *Case of Handyside v the United Kingdom* (n 146), para 49; *Sunday Times v the United Kingdom* (no 1) (n 41), para 59; *Case of Otto-Preminger-Institut v Austria* (1994) Series A no 295, para 50; *Case of Wingrove v the United Kingdom* ECHR 1996-V, para 58; Ovey and White (n 132) 233–5, 237; Arai (n 41) 444; Harris, O'Boyle, Bates and Buckley, 'The European Convention on Human Rights in context' (n 39) 13; Warbrick (n 146) 352–3, 354–5; Rautiainen (n 149) 1153–4, 1160. cf *Case of Evans v the United Kingdom* ECHR 2007-I, para 77.

[151] Warbrick (n 146) 352. See *Case of Dudgeon v the United Kingdom* (1981) Series A no 45, para 53; *Case of Barthold v Germany* (n 41), para 58.

[152] *Case of Wingrove v the United Kingdom* (n 150), para 58; *Case of Sürek v Turkey* (no 1) (n 108), para 61. See also Ovey and White (n 132) 319–20.

[153] Namely because the assessment of sensitive historical subjects of a particular society cannot be objectively defined on a European scale, see Arai (n 41) 450; Warbrick (n 146) 357.

[154] *Case of Sürek v Turkey* (no 1) (n 108), para 61; Arai (n 41) 453.

claimant's actions themselves and their correspondence to the activities described in art 17[155]. However, it must be noted that the ECtHR is yet to extend this latter category to cover revisionism (or negationism) of events other than the Holocaust[156].

7.4 Conclusion: assessment of objectivity

In light of the aforementioned study, the main difference between arts 10(2) and 17 is their different object and purpose. As all the other differences between the two articles can be subsumed under this difference – none of the other differences independently justify the existence of two separate mechanisms, they merely follow from the fact that the mechanisms serve different purposes – the assessment of objectivity will consequently focus on the difference of object and purpose.

Art 10 guarantees the right to freedom of expression, but, through art 10(2), permits restrictions to the aforementioned freedom where pressing social needs so require. Art 17, on the other hand, attempts to ensure that Convention rights and freedoms may not be invoked in support of activities seeking to destroy these rights and freedoms. The difference of object and purpose is an objective one – while some of the details subsumed under this difference look at subjective properties such as the intent of a person or a group seeking to invoke Convention rights, this does nothing to remove the objectivity of the most fundamental difference between the articles. As such, the conclusion is that the difference between arts 10(2) and 17 can be objectively grounded.

8 Harmonisation of national legislation

The principle of proportionality is a legal principle which was developed most notably in the German administrative law and which is in use in courts across Europe as well as in certain commonwealth systems.[157] In short, it can be defined as a "legal rule that state action must be a rational means to a permissible end, which does not unduly invade fundamental human rights".[158] It was first applied in police and administrative law, but its use has since then spread to constitutional law adjudication.[159] In addition to national courts, the principle of proportionality also exists in the systems of the Court of Justice of the European Union and the European Court of Human rights. In the system of the ECtHR, it is used for assessing whether the interference of a contracting state has been appropriate in relation to the rights protected by the European Convention of Human Rights.[160] As such it is used as a tool for analysing derogations from

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155 cf *Decision by the Commission on the admissibility* (n 43) 3–5 (HUDOC); *Garaudy v France* (n 133) 22–3 (HUDOC); Pellonpää, Gullans, Pölönen and Tapanila (n 135) 852.
156 Ovey and White (n 132) 323.
157 Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008–2009) 47 Columbia Journal of Transnational Law 72, 73.
158 Eric Engle, 'The History of the General Principle of Proportionality. An Overview' (2012) 10 Dartmouth Law Journal 1, 2.
159 ibid, 10.
160 Marius Andreescu, 'Principle of Proportionality, Criterion of Legitimacy in the Public Law' (2011) 18 Lex ET Scientia International Journal 113, 118.

fundamental rights. In the European Union law, it is understood as a general principle of Community law[161] and as such can be applied whenever assessing European Union legislation.

Proportionality analysis consists usually of a tripartite test, which a judge uses when assessing whether an infringement or limitation of a certain right is to be deemed proportionate in relation to desired means. These three stages are 1) appropriateness, 2) necessity and 3) proportionality in the strict sense.[162] Firstly, assessing the limitation's appropriateness or suitability consists of examining whether there exists a "causal connection between chosen means and the desired end". Secondly, the necessity of those means needs to be constituted. Thirdly, the court examines the "seriousness of the interference with the rights concerned" and "the urgency or necessity of the justification for such interference".[163] The third test or balancing is the core of the analysis and it requires assessing the benefits of the action taken in relation to the violation of the constitutional right.[164]

There are several positive aspects for adopting the principle of proportionality. It already has a guiding function in international and transnational action of nation states.[165] One of the reasons it has been adopted in so many different legal systems is that it is a standard-based tool, which still gives leeway to developing judicial systems as well as courts' own assessment. Another reason is the possibility it provides for creating a common language for constitutional law.[166] In order to fulfil the demand of proportionality, state action needs to meet the criteria stated above. However, room is also left for state's own discretion, which in turn allows the consideration of national legal systems' individual characteristics. As such it can be useful for harmonisation purposes. In addition, the proportionality analysis "combines aspects of common law and civil law systems making it possible to form global rules from substantive rules of national laws".[167]

However, the proportionality doctrine has been criticised for example for elevating the role of the judges in giving them the option of manipulating the proportionality analysis to receive their own desired outcome. It is also possible that, by using the proportionality analysis, different courts reach divergent judgments, because they emphasize different factors of a case at hand.[168] In particular the stages of necessity evaluation and balancing of rights enable judges to become

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[161] Xavier Groussot, 'Proportionality in Sweden: The Influence of European Law' (2006) 75 Nordic Journal of International Law 451, 452.

[162] T. Jeremy Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 Emory International Law Review 465, 467–8, summarizing leading English-language interpretations. Stone Sweet and Mathews suggest that there exists a fourth step, that of legitimacy, that starts the whole procedure, see Stone Sweet and Mathews (n 157) 75. Also Cohen-Eliya and Porat see that the tripartite test comes into question after the government has shown a legitimate purpose for its actions, see Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 American Journal of Comparative Law 463, 464.

[163] Patrick Quirk, 'An Australian Looks at German Proportionality' (1999) 1 University of Notre Dame Australia Law Review 39, 42, 44, 46.

[164] Cohen-Eliya and Porat (n 162) 464.

[165] Paul Loftus, 'The Rise and Rise of Proportionality in Public International Law' (1997) Southern Cross University Law Review 165.

[166] Cohen-Eliya and Porat (n 162) 466.

[167] Engle (n 158) 2.

[168] Gunn (n 162) 471.

lawmakers.[169] All in all, in the context of harmonisation this could mean that even though substantial law was harmonised to some extent its application might vary in different countries.

In Finland, the principle of proportionality is included in legislation and exists as a general legal principle. It is entailed in legal provisions concerning for example the administration, the police and criminal law. On an abstract level, proportionality affects the criminal law policy-making in Finland and on a concrete level the sentencing, since it is required by RL 6:4 that "[t]he sentence shall be determined so that it is in just proportion to the harmfulness and dangerousness of the offence, the motives for the act and the other culpability of the perpetrator manifest in the offence". The principle is embodied in the constitutional law as well, since in order for a limitation of a fundamental right to be considered constitutional, the limitation must, among other requirements, also adhere to the principle of proportionality.[170] The level of protection of fundamental and human rights is considered relatively high in Finland, and the level of national protection cannot be limited by for example EU measures.[171] The same applies to other international influences such as international treaties for the harmonisation of laws. Especially in pursuit of harmonising substantive criminal law, one should note that certain criminalisations may constitute a fundamental rights restriction[172] and would as such not be permitted according to the Finnish standard of protection guaranteed for fundamental rights.

9 Legal implications of "hate speech"

The legal definition of "hate speech" adopted on the national level in Finland has been discussed in some length above. Given that it has resulted in several convictions from the crime of ethnic agitation, it is quite reasonable to claim that a legally binding definition is possible on the national level, at least in the form that it has been adopted in Finland. Given that public authorities have limited resources and hate speech occurring online is a relatively common phenomenon, it is naturally questionable whether every and all acts of ethnic agitation can be investigated and prosecuted. That does not, however, affect the legally binding nature of the definition *per se*.

Adopting a legally binding definition at the international level is naturally a somewhat more complex question. As Marco Gercke explains, when it comes to so-called cybercrimes, "it is not unusual that several countries are affected. The offender might have acted from country A, used an Internet service in country B and the victim is based in country C. This is a challenge with regard to the application of criminal law and leads to questions about which of the countries have jurisdiction, which country should take forward the investigation and how to resolve disputes. While this case looks already challenging it is necessary to take into consideration that if the offence, for example, involves cloud computing services even more jurisdictions may be

[169] Stone Sweet and Mathews (n 157) 76.
[170] For the full list of the seven criteria, see chapter 3.3 of this report.
[171] Tuomas Ojanen, 'The Europeanization of Finnish Law – Observations on the Transformations of the Finnish Scene of Constitutionalism' in Kimmo Nuotio, Sakari Melander and Merita Huomo-Kettunen (eds), *Introduction to Finnish Law and Legal Culture* (Publications of the Faculty of Law University of Helsinki 2012) 103–104.
[172] Sakari Melander, 'Criminal Law' in Kimmo Nuotio, Sakari Melander and Merita Huomo-Kettunen (eds), *Introduction to Finnish Law and Legal Culture* (Publications of the Faculty of Law University of Helsinki 2012) 240.

triggered."[173] These problems also naturally apply to hate speech taking place in an online environment.

In Finland, in criminal cases issues relating to determining the site where the crime is deemed to have been committed are decided by RL 1:10, which stipulates that an offence is deemed to have been committed both where the criminal act was committed and where the consequence contained in the statutory definition of the offence became apparent. Hence, when materials constituting ethnic agitation are made accessible to the public online, they are distributed not only in Finland but also in the rest of the world, or vice versa; if the materials are made available somewhere else and their consequences become apparent if Finland, then they have been also made available in Finland.

In assessing where the offence has been committed geographically two issues are central: the physical location where these materials were made available and their intended target audience. In practice, in the most usual scenario the offender uses his/her computer at home or office in Finland when making the materials available to a Finnish audience. In a situation like this determining where the crime was committed is rather straightforward. It should be noted, however, that the possession of such materials alone has not been made subject to punishment, and thus what matters is the actual location where the materials are made available or distributed. In determining the intended target audience of the materials, the language in which they are presented is central. If the materials are presented in Finnish, and given that the use of the Finnish language is almost solely restricted to Finland, typically the target audience is also the Finnish public.[174]

In terms of case law, the Court of Appeal of Helsinki has resolved a case which involved examining ethnic agitation and the requirement of dual criminality in a situation where the offender had used his/her home computer to upload the materials to a server located in the United States and maintained by a party located in Australia.[175] The offender claimed that he/she had not distributed the materials to the public in Finland and the requirement of dual criminality was not fulfilled. The court stated that in determining the scene of the crime, the most important factor is the intended public to whom the materials are distributed. This being the case, the language used is essential and, as the offender had written in Finnish, it was clear that his/her intent was to target the materials at the Finnish public. As the messages were available online, they were also available in Finland, and thus the distribution had occurred in Finland. The physical location of the server had no bearing on the issue, and thus the offender was convicted of the offence of ethnic agitation.

In the case described above, the Court could relatively easily solve the jurisdictional issue and leave the question of dual criminality aside. Problems can, however, arise in situations where the offender would have to be extradited for prosecution or tried for offences that have occurred abroad in a country where hate speech is not subject to criminalisation. Similar problems can

[173] Marco Gercke, 'Understanding cybercrime: Phenomena, challenges and legal response' (International Telecommunications Union Publication 2012) <http://www.itu.int/ITU-D/cyb/cybersecurity/docs/Cybercrime%20legislation%20EV6.pdf> accessed 16 August 2013, 235.
[174] Valtakunnansyyttäjänvirasto (n 9) 25–6.
[175] HeHO 2009:2370.

naturally occur even if the countries in question have both criminalised hate speech, but their respective areas of criminalisation do not overlap.[176]

Adopting a legally binding definition at international level would naturally help to resolve some of the issues related to the requirement of dual criminality. However, practises relating to, for example, the criminalisation of genocide denial, vary even between the European Council member states. If we take a more global view, so do practices relating to protection of the freedom of speech and criminalisation of hate speech more generally, with the United States with its "freedom of speech fundamentalism" perhaps representing one extreme. Given that no global consensus seems to have developed in relation to the exact limits of freedom of speech or the exact definition of hate speech, it is highly unlikely that any legally binding definition could be implemented at the international level in the foreseeable future.

10 Legal implications and differentiation of related notions

10.1 "Incitement to hatred" in the Finnish legislation

In the Finnish legislation, there is no notion of "incitement to hatred" as such. The title of the provision on ethnic agitation, "kiihottaminen kansanryhmää vastaan", translates as "incitement against a determined group of people".[177] However, the essential elements of the provision cover the purpose of the notion "incitement to hatred", as the message spread among the public contains material that "threatens", "defames" and "insults". These notions in Finnish refer to the concept of hate speech in foreign legal literature.[178]

10.2 Applying the law – KKO 2012:58

In the amendment 511/2011 to the Criminal Code, the content of the essential elements of threatening, defaming and insulting is the same as in the previous law. For this reason, the legal guidelines that the Supreme Court gave in the case KKO 2012:58 must be considered a valid interpretation of the current law, although the decision was made in accordance with the previous law. This applies, above all, to the essential elements of threatening, defaming and insulting, and the related questions about the limitation of freedom of expression and the interpretation of intentionality.[179]

10.3 Intimidation

The punishable threat meant in RL 11:10 can be threatening another with an offence, for example, with a violent or a property crime. Moreover, a threat of economic discrimination can

[176] Within the European Union, the adoption of the European Arrest Warrant naturally has to be taken into account when extradition and dual criminality requirement are discussed. For this, see e.g. Elies van Sliedregt, 'The Principle of Dual Criminality and the European Arrest Warrant' (2008) <http://ssrn.com/abstract=1310194> accessed 3 September 2013.
[177] See n 2.
[178] Rask (n 85) 275
[179] Valtakunnansyyttäjänvirasto (n 9) 6.

meet with the element of threatening in the provision. Also the incitement to such activities can be understood as threatening.[180]

The actual content of the threatening statement is essential when evaluating whether the essential elements are met. The threat needs to be serious to some extent, although it is not interpreted as restrictively as the threat in the provision of menace (RL 25:7[181]). However, a direct threat is more likely to meet the element than an indirect threat. When evaluating the content of an indirect threat, it is essential to take into account the context. Such threat can be punishable especially if it is a part of the whole that includes direct threats or defamatory and/or insulting statements. Another important factor in the evaluation is the question of whether symbols of violence or hatred or other comparable material are included (Nazi symbols, burning crosses, etc.). If the people threatened as members of the group have reason to fear that their personal safety or property is at risk, the essential elements are met.[182]

10.4 Defaming and insulting

Punishable defaming and insulting signify about the same as described in the offences on defamation (RL 24:9–10). Defaming concerns a false statement that a group of people allegedly have committed crimes or similar comparable despicable acts. Typical defamation is for example fascist propaganda. The degree of intention does not require that the statements were certainly known to be contrary to the truth. However, a person may be held liable if he/she fails to sufficiently ascertain the truthfulness of the information being disseminated.[183] According to legal literature on defamation crimes, liability requires that the act is conducive to causing damage or suffering to that person, or subjecting that person to contempt.[184]

A punishable insult, on the other hand, may itself be a truthful claim but the perpetrator needs to commit the act for the purpose of offending; the degree of intention requires that the act is carried out for the purpose of causing hatred against the group in question. A coloured truth or truth told with an insulting tone can meet the essential elements. Also, insulting propaganda can be an offence when especially humiliating, not depending on its value of truth.[185] According to

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[180] Valtakunnansyyttäjänvirasto (n 9) 12.

[181] RL 25:7: Menace (578/1995): A person who raises a weapon at another or otherwise threatens another with an offence under such circumstances that the person so threatened has justified reason to believe that his or her personal safety or property or that of someone else is in serious danger shall be sentenced, unless a more severe penalty for the act is provided elsewhere in the law, for menace to a fine or to imprisonment for at most two years.

[182] Valtakunnansyyttäjänvirasto (n 9) 12 and Ari-Matti Nuutila and Kimmo Nuotio, 'Sotarikoksista ja rikoksista ihmisyyttä vastaan' in Tapio Lappi-Seppälä, Kaarlo Hakamies, Pekka Koskinen, Martti Majanen, Sakari Melander, Kimmo Nuotio, Ari-Matti Nuutila, Timo Ojala and Ilkka Rautio, *Rikosoikeus* (3rd edn, WSOYpro 2009) 247–78, 267.

[183] Nuutila and Nuotio, 'Sotarikoksista ja rikoksista ihmisyyttä vastaan' (n 182) 247–78, 267.

[184] Ari-Matti Nuutila and Martti Majanen, 'Yksityisyyden, rauhan ja kunnianloukkaamisrikokset' in Tapio Lappi-Seppälä, Kaarlo Hakamies, Pekka Koskinen, Martti Majanen, Sakari Melander, Kimmo Nuotio, Ari-Matti Nuutila, Timo Ojala and Ilkka Rautio, *Rikosoikeus* (3rd edn, WSOYpro 2009) 633–78, 674. Concrete damage is not required for liability; it is enough that the act is "conducive" to causing damage or suffering.

[185] Nuutila and Nuotio, 'Sotarikoksista ja rikoksista ihmisyyttä vastaan' (n 182) 247–78, 268.

legal literature on defamation crimes, an insult can be, for example, calling someone mentally ill, "Little Hitler" or a swine.[186]

10.5 Provocation and the limits of acceptable "hate speech"

Ethnic agitation typically involves disseminating strongly generalizing and misleading information, opinions or other messages. Also statements arguing that one group of people is inferior to other groups because of the biological characteristics of the people meet the essential elements.[187] Spreading self-made or forwarding others' discriminatory propaganda meets the essential elements.[188]

Because of the aspects of freedom of expression, applying the law regarding the essential elements of defaming and insulting must be considered more carefully than the element of threatening. Especially with statements that concern topics with political or general importance, these elements should be interpreted restrictively.[189] According to Section 1.2 § of the Act on the Exercise of freedom of Expression in Mass Media, interference with the activities of the media shall be legitimate only in so far as it is unavoidable, taking due note of the importance of freedom of expression in a democracy subject to the rule of law. Thus, for example, even harsh criticism of immigration policy or people responsible for such policies does not meet the essential elements of the offense.[190] In particular, the political freedom of expression is extended to a certain limit when it comes to exaggeration and provocation. The same applies to the debate on the areas of science and the arts. Intentional exaggeration or provocation can occur, for example, when the content of a statement is out of line, or even offensive.[191]

In the case KKO 2012:58, the statement that led to the prosecution reads as follows: "Looting passers-by and living by tax revenue is a national, perhaps even a genetic characteristic of Somali." The accused had denied the accusation, arguing that the act wasn't unlawful or punishable because, considering the context, the statement was criticism presented in a sarcastic manner. The Supreme Court found it to be possible that the intention of the accused was to present criticism against public media and the government's activities. The Supreme Court held, however, that such intention did not justify defaming and insulting the Somali as an ethnic group. The sarcastic genre did not provide sufficient cause to conclude otherwise. The Supreme Court stated that the accused undoubtedly had understood the defaming and insulting nature of his statement. This was the crucial factor with respect to the criteria of meeting the required degree of intention. In this respect, it did not matter whether the accused himself had held the claim true. The Supreme Court held that statements which defame and insult are likely to raise intolerance, contempt and possibly even hatred against the ethnic group as their object.

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186 Nuutila and Majanen, 'Yksityisyyden, rauhan ja kunnianloukkaamisrikokset' (n 184) 633–78, 674.
187 Valtakunnansyyttäjänvirasto (n 9) 14. The preparatory works give as an example the kind of statements that consider violence against a group or discrimination of a group acceptable or desirable, or people are compared to animals, parasites, etc., or a group is referred as criminals or inferior to others etc. See HE 317/2010 vp (n 4) 42.
188 Nuutila and Nuotio, 'Sotarikoksista ja rikoksista ihmisyyttä vastaan' (n 182) 247–78, 267.
189 Mika Illman, 'Uudistunut säännös kiihottamisesta kansanryhmää vastaan' (2012) 2 Oikeus 208, 218.
190 HE 317/2010 vp (n 4) 42.
191 Valtakunnansyyttäjänvirasto (n 9) 25.

Therefore they were to be viewed as so-called hate speech-like statements that do not fall into the scope of protection provided by freedom of expression.[192]

In this context, the provision on defamation (RL 24:9[193]) plays an important role. According to the provision, political criticism or public criticism of a person's actions in politics is permitted. Moreover, the provision does not limit the right to cultural criticism or public criticism of a person's actions on science, arts or other comparable areas. Political activities are public actions and as such permitted to be criticized, and even strong criticism should not be interpreted as defamation. Also the genre of the writings that defame a politician must be taken into account. Satire or parody may be permitted in social criticism. The scope of the right to criticism, however, is limited to acts recognized as insulting, whereas no one is obligated to submit to false statements.[194] The same right to criticism applies with RL 11:10.

Statements that are made purely for the purpose of delivering information in the media do not constitute a crime.[195] However, statements that violate the human dignity (PL 1.2[196]) will always be excluded from the freedom of expression.[197]

11 Comparative analysis

11.1 The process of implementation

Finland uses a dualistic model in the process of implementing international law obligations into domestic law. According to the dualistic understanding, international law norms must be brought into force by a special domestic introductory act, before they are generally binding to everyone inside the state borders.[198] The principles concerning the implementation of international law are stated in the Constitution of Finland. According to the PL 94 §, the Parliament's acceptance is required for treaties and other international obligations that contain provisions of a legislative nature, are otherwise significant, or otherwise require the approval of the Parliament under the Constitution. The PL 95 § provides that the provisions of treaties and other international

[192] About acceptable exaggeration or provocation see also KKO 2013:50, para 13.

[193] RL 24:9: Defamation (531/2000): (1) A person who (1) spreads false information or a false insinuation of another person so that the act is conducive to causing damage or suffering to that person, or subjecting that person to contempt, or (2) disparages another in a manner other than referred to in subparagraph (1) shall be sentenced for defamation to a fine or to imprisonment for at most six months. (2) Criticism that is directed at a person's activities in politics, business, public office, public position, science, art or in comparable public activity and that does not obviously overstep the limits of propriety does not constitute defamation referred to in subsection 1(2). (3) Also a person who spreads false information or a false insinuation about a deceased person, so that the act is conducive to causing suffering to a person to whom the deceased was particularly close, shall be sentenced for defamation.

[194] Nuutila and Majanen, 'Yksityisyyden, rauhan ja kunnianloukkaamisrikokset' (n 184) 633–78, 676. If the statement, on the other hand, is purely entertainment-based banter at one's expense, it can be punishable as an insult.

[195] e.g. *Case of Jersild v Denmark* (n 142). See also Valtakunnansyyttäjänvirasto (n 9) 23–24.

[196] PL 1.2 §: The Constitution of Finland is established in this constitutional act. The Constitution shall guarantee the inviolability of human dignity and the freedom and rights of the individual and promote justice in society.

[197] Valtakunnansyyttäjänvirasto (n 9) 25.

[198] Antero Jyränki and Jaakko Husa, *Valtiosääntöoikeus* (CC Lakimiesliiton kustannus 2012) 98–9.

obligations, in so far as they are of a legislative nature, are brought into force by an Act. International obligations that are not of legislative nature are brought into force by a decree.

Treaties that are of legislative nature are usually brought into force with a so-called blanket act, in which the treaty is confirmed to be "in force as agreed". The act gets its material content from the treaty itself, which is published as an annex to the supplementary decree. It is, however, possible and common that the incorporation is supplemented with so-called transformation, which means that the special legislation that touches on the treaty's subject matter is amended. In case when all the relevant legislation is amended before the treaty is accepted, it is possible to incorporate the whole treaty with just a blanket act.[199] In the case of the Additional Protocol, the Protocol was implemented by first amending all the relevant provisions in the Criminal Code of Finland, after which the Protocol was incorporated with a blanket act. Thus, in the process of bringing the Protocol into force both incorporation and transformation were utilized.[200]

The Parliament of Finland accepted the Additional Protocol on 1 March 2011. At the same time the Parliament accepted the reservations made to the Protocol and law amendments made on the basis of the Protocol.[201] The parliament confirmed the amendment of Criminal Code on 13 May 2011, which then came into force on 1 June 2011[202]. Finally, the decree by which the Additional Protocol was brought into force came into effect on 1 September 2011[203].

11.2 Amendments to the Criminal Code

Ethnic agitation (RL 11:10)

In order to fulfil the requirements of the Protocol, the RL 11:10 concerning ethnic agitation was amended by clarifying the way in which the crime of ethnic agitation could be committed as well as the group that constituted the object of protection. The purpose of these amendments was, inter alia, to broaden the applicability of the provision also to other hate crimes than those requiring a racist motive.[204] Before the amendments were made, the RL 11:10 contained the following definition: "a person who spreads statements or other information among the public where a certain national, ethnic, racial or religious group or a comparable population group is threatened, defamed or insulted shall be sentenced for ethnic agitation to a fine or to imprisonment for at most two years".

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199 Pellonpää M, *Euroopan ihmisoikeussopimus* (e-book, 4th edn, Talentum 2005) accessed 1 August 2013, 54–5.

200 European Union´s framework decision on combating racism and xenophobia (2008/913/YOS) was implemented together wit the Additional Protocol, HE 317/2010 (n 4).

201 Hallituksen esitys Euroopan neuvoston tietoverkkorikollisuutta koskevan yleissopimuksen lisäpöytäkirjan, joka koskee tietojärjestelmien välityksellä tehtyjen luonteeltaan rasististen ja muukalaisvihamielisten tekojen kriminalisointia, hyväksymisestä ja laiksi sen lainsäädännön alaan kuuluvien määräysten voimaansaattamisesta sekä laeiksi rikoslain ja tietoyhteiskunnan palvelujen tarjoamisesta annetun lain 15 §:n muuttamisesta (Eduskunnan vastaus 332/2010 vp).

202 Laki rikoslain muuttamisesta (511/2011).

203 Tasavallan presidentin asetus Euroopan neuvoston tietoverkkorikollisuutta koskevan yleissopimuksen lisäpöytäkirjan, joka koskee tietojärjestelmien välityksellä tehtyjen luonteeltaan rasististen ja muukalaisvihamielisten tekojen kriminalisointia, voimaansaattamisesta ja lisäpöytäkirjan lainsäädännön alaan kuuluvien määräysten voimaansaattamisesta annetun lain voimaantulosta (983/2011).

204 HE 317/2010 vp (n 4) 39.

The first technique added to RL 11:10 was the element of "making available to the public". This clause refers to, inter alia, placing material "online". It thus covers, for instance, the act of adding material on internet sites as well as the intentional establishment of links to websites, which contain racist or other types of agitation. This amendment was made in order to secure the consistency of the Section with Article 3 or the Protocol, namely with its clause "otherwise making available". The second technique added was the mention of "keeping available for public". The purpose of this amendment was to ensure that the concept of criminal spreading also included the act of keeping available"; by contrast, it was not clear whether the word "spread" used in the Section RL 11:10 in the form in which it was in force at the time also included the act of keeping material available for the public.[205]

Also the expression "statements or other information" concerning the distributable material, which was considered to be old-fashioned, was replaced with the more modern concepts of "information, an expression of opinion or another message", where the word "message" covers all methods of expression. These concepts more justifiably cover different forms of expression, for example pictures, symbols, movies, music videos and speech. The purpose of this clarification was to emphasise that the crime of ethnic agitation has a wide applicability and that it could be applied to any kind of racist expression despite of the chosen form.[206]

The part concerning the object of the protection was clarified by adding separate references to specific groups, which typically can become objects of hatred or violence. Even though the former RL 11:10 contained the phrase "a comparable population group", the principle of legality in criminal law meant that some uncertainty prevailed with regard to the limits of its interpretation. Therefore, the most typical minority groups, which in practise need the protection of the provision, are specifically named in the Section.[207] Amended RL 11:10 then reads as follows: "A person who makes available to the public or otherwise spreads among the public or keeps available for the public information, an expression of opinion or another message where a certain group is threatened, defamed or insulted on the basis of its race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or a comparable basis, shall be sentenced for ethnic agitation to a fine or to imprisonment for at most two years".

Aggravated ethnic agitation (RL 11:10a)

Completely new distinct statutory definition concerning aggravated ethnic agitation was added to the RL to address the most serious crimes committed with racist motive. The legal basis for this amendment lay, first of all, in Article 13, Paragraph 1 of the Convention on Cybercrime and its requirement of the sufficient effectiveness of the sanctions.[208] According to RL 11:10a, if the ethnic agitation involves incitement or enticement (1) to genocide or the preparation of genocide, a crime against humanity, an aggravated crime against humanity, a war crime, an aggravated war crime, murder, or manslaughter committed for terrorist intent, or (2) to serious

[205] ibid.
[206] ibid, 40.
[207] ibid, 40–42.
[208] ibid, 42–43. This amendment was influenced also by Article 3 of the European Union´s framework decision on combating racism and xenophobia and by the Rome Statute of the International Criminal Court.

violence other than what is referred to in paragraph 1 so that the act clearly endangers public order and safety, and the ethnic agitation also when assessed as a whole is aggravated, the offender shall be sentenced for aggravated ethnic agitation to imprisonment for at least four months and at most four years.

In order that the aggravated ethnic agitation becomes applicable, the distributable racist or corresponding material must include incitement or enticement to serious violence. Mere enticement to discrimination or defamation is not sufficient, and neither is mere public threat of violence.[209]

Grounds increasing the punishment (RL 6:5.1(4))

Even before the amendment of RL 6:5.1(4) a racist or corresponding motive constituted a ground for increasing the punishment.[210] According to the RL 6:5.1(4) in force at the time, the grounds for increasing the punishment were: "directing of the offence at a person belonging to a national, racial, ethnic or other population group due to his or her membership in such a group". Amendments that were made to the subparagraph 4 broadened the applicability of the provision: instead of being only applicable to crimes committed on racist grounds, it became to encompass a wider array of hate crimes in general.[211]

In order to clarify the applicability of RL 6:5.1(4) to motives concerning skin colour, birth status and religion, they were specifically included in subparagraph 4 even though they were considered to belong to the scope of application of subparagraph 4 even before these amendments. In addition, belief, sexual orientation, and disability were added specifically to subparagraph 4 in order to guarantee its application also to these motives, because it was unclear whether subparagraph 4 would have been applied also to crimes motivated by these grounds before the amendment.[212] The amended RL 6:5.1(4) then reads as follows: "commission of the offence for a motive based on race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or other corresponding grounds".

Corporate criminal liability

A whole new 15 § concerning corporate criminal liability was added to the Chapter 11 on war crimes and crimes against humanity[213]. According to the RL 11:15 provisions on corporate criminal liability apply to ethnic agitation and to aggravated ethnic agitation. The purpose of this amendment was to establish that corporate criminal liability now extends to agitation crimes not only when the crime is committed on racist grounds but also when the motive of the agitation crime is one of the other grounds stipulated in the statutory definitions of ethnic agitation and the grounds for increasing the punishment.[214]

[209] ibid, 43.
[210] ibid, 37.
[211] ibid.
[212] ibid, 39.
[213] ibid, 45.
[214] ibid.

New paragraph concerning corporate criminal liability was added to the Chapter 17 on offences against public order. According to the RL 17:24.2, the provision on corporate criminal liability also applies to public incitement to an offence referred to in Section 1 when the exhorted or incited offence is (1) ethnic agitation or aggravated ethnic agitation, or (2) aggravated defamation or illegal threat when the motive for the exhortation or incitement is race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or other corresponding grounds.

A whole new Section was added to Chapter 24 on offences against privacy, public peace and personal reputation[215]. According to RL 24:13, the provisions on corporate criminal liability apply to aggravated defamation when a motive for the offence was race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or other corresponding grounds. And finally, a new paragraph concerning corporate liability was added to the 10 § in Chapter 25 on offences against personal liberty[216]. The added paragraph 2 provides that the provisions laid down on corporate criminal liability apply to menace when a motive for the offence is race, skin colour, birth, national or ethnic origin, religion or belief, sexual orientation or disability or other corresponding grounds.

11.3 Reservations to the treaty

First reservation relates to the situation referred to in Article 3, Paragraph 3 of the Protocol, according to which Finland reserved a right not to apply criminalisation obligation defined in Article 3, Paragraph 1 to those cases of discrimination for which, due to established principles in its national legal system concerning freedom of speech, it cannot provide the effective remedies referred to in the paragraph 2 of Article 3.[217] According to the government bill, the law that was in force at the time of implementation process of the Protocol in essence already covered the criminalisation obligation of Article 3, Paragraph 1. Depending on the content of the distributed material and the object of the act, the act described in Article 3, Paragraph 1 could be punishable as ethnic agitation, defamation or public incitement to an offence.[218]

Although advocating, promoting or inciting discrimination of a certain national group can be considered to constitute a crime of ethnic agitation even when the statement is not associated with hatred or advocating of violence, due to the established principles of the Finnish legal system concerning freedom of speech, the crime of ethnic agitation does not cover all the cases where discrimination is advocated or promoted. The established traditions of transparency and freedom of speech in Finland indicate that the significance of freedom of speech is highlighted when evaluating whether a specific statement supporting for example discrimination on ethnic grounds fulfils the crime of ethnic agitation.[219]

In the government bill, it was considered to be evident that it would in some cases be acceptable use of freedom of speech to spread statements that defend or advocate the discrimination of a

[215] ibid, 46.
[216] ibid.
[217] Tasavallan presidentin asetus (n 203), Section 3.
[218] HE 317/2010 vp (n 4) 18.
[219] ibid.

certain national group, even if those statements would insult that group in question. The principle of freedom of speech might also in specific cases prevent the use of criminal or other effective sanctions in respect to acts that seek to advance or support discrimination in public. Therefore and because of the fact that the statements referred to in Article 3, Paragraph 1 were already criminalised in their pertinent parts in RL and because a complete prohibition of spreading such statements might in specific cases be in conflict with the PL, it was not considered necessary to extend the scope of application of the crime of ethnic agitation in a way that would fulfil the entire criminalisation obligation of Paragraph 1.[220]

The second reservation relates to Article 5, Paragraph 2, Subparagraph b, according to which Finland reserved a right, due to established principles in its national system concerning freedom of speech, not to apply in whole or in part the criminalisation obligation defined in Article 5, Paragraph 1 in cases where provisions concerning defamation or ethic agitation are not applicable.[221] Actions referred to in Article 5 of the Protocol are punishable in Finland on basis of defamation or ethnic agitation. If the act is directed towards something that a religious community deems holy, the act might become punishable under RL 17:10 as breach of the sanctity of religion.[222]

In the government bill, it was deemed unnecessary to extend the scope of criminalisation so that the requirements referred to Article 5, Paragraph 1 would be completely fulfilled, because these might in specific cases lead to a conflict with the Constitution and more specifically with freedom of speech. The purpose of the said reservation was to secure the national application procedure of the principle of freedom of speech in the crimes of ethnic agitation and defamation, especially in the areas referred to in RL 24:9.2. RL 24:9.2 serves to limit the applicability of the said provision on defamation in favour of the principle of freedom of speech. According to the above mentioned provision of derogation, criticism that is directed for example towards someone's behaviour in politics, public position, science, or art is not deemed as defamation as long as it does not clearly exceed the limit of what can be considered acceptable.[223]

The final reservation relates to Article 6, Paragraph 2, Subparagraph b, according to which Finland reserves a right, due to the established principles of its national system concerning freedom of speech, not to apply, in whole or in part, the criminalisation obligation defined in Article 6, Paragraph 1 in cases where the provisions concerning ethnic agitation are not applicable.[224] The acts referred to in Article 6 are generally defined as "Holocaust denial". Finnish legislation does not include penal provisions, which would explicitly forbid the expression of these types of statements in public or in any other way. However, these types of statements could fit into the scope of application of ethnic agitation. In particular, this concerns acts in which mass destruction or crimes against humanity are accepted or defended. Public defending of mass destruction or crimes against humanity can also be punishable as defamation or as public incitement to an offence, especially if the statements serve to entice to renew the

[220] ibid, 18–19.
[221] Tasavallan presidentin asetus (n 203), Section 3.
[222] HE 317/2010 vp (n 4) 19.
[223] ibid, 19–20.
[224] Tasavallan presidentin asetus (n 203), Section 3.

cruelties. However, the above mentioned penal provisions in the RL do not cover in entire array of deeds referred to in Article 6.[225]

It was suspected that those denials and minimizations, if not already punishable, might result in a conflict with the principles of freedom of speech. In addition, it was deemed unnecessary to fulfil the criminalisation obligation with regard to cases in which mass destruction or crime against humanity is discussed in accordance with journalistic principles, or in research or conversation that fulfils scientific criteria. It was stated that historical research might give rise to circumstances that could give reason to discuss whether some of the established concepts should be reviewed, and this may also concern events that have generally been regarded as crimes in Article 6[226]. It was deemed clear that this kind of discussion based on factual basis must be allowed. In this connection, reference was made to the constitutional freedoms of science, art, and higher education. There was therefore no reason to expand the scope of the current penal provisions so that the Article 1, Paragraph 1 would be completely fulfilled.[227]

[225] HE 317/2010 vp (n 4) 20–21.
[226] It was highlighted that denial of e.g. mass destruction directed towards Jews by the Third Reich cannot be questioned on material basis, HE 317/2010 vp (n 4) 22.
[227] HE 317/2010 vp (n 4) 22.

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ELSA France

National Researcher

Jimmy Astruc

Inès Djadour

Rebecca Fisli

Alexandre Ghafari

Rose Ngalako

Academic Adviser

Thomas Gaultier (Maitre)

National Coordinator

Cassandra Matilde Fernandes

1 National definition of Hate Speech

In your national legislation, how is hate speech defined? (e.g.: Is hate speech defined as an act?) (see Delruelle, "incitement to hatred: when to say is to do", seminar in Brussels, 25 November 2011).

French legislation does not provide a clear answer as to the definition of hate speech. Even if this definition can be deduced from the various pieces of legislation that relate to hate speech, no clear definition can be found. Thus it would be possible to state that national legislation is just as blurry on the notion of hate speech is just as unclear as the French dictionary.

The mainprinciple in the area of hate speech in French legislation is found in article 24 of the Law of 29 July 1881 concerning the freedom of media. It states that[1] "those that, through one of the means stated in article 23[2], provoke discrimination, hate or violence against a person or a group of persons by reason of their origin, race, belonging to an ethnic group, nation, race or religious belief, shall be punished by a one year prison sentence and/or a 45,000 euros fine.

The penalties mentioned in the preceding paragraph will be applied to acts which, by the same means, will have provoked hate or violence against a person or a group of persons because of their gender, sexual orientation or sexua identity, handicap or will have procoked, against these same persons, discriminations listed by articles 225-2 and 432-7 of the Criminal Code (...)".

From this article 24 of the Law of 29 July 1881 on the freedom of the press, comes other articles and in particular, Article 15[3] of Law No. 86-1067 of 30 September 1986 on freedom of communication (Act Leotard) which provides that:

"The Higher Audiovisual Council monitors (...) that the programs made available to the public by an audiovisual communication service does not contain any incitement to hatred or violence for reasons of race, sex, morals , religion or nationality. "

We can deduce from these two articles, that France prohibits the publication of a defamatory or insulting nature , but Article R- 624-3 of the Criminal Code also tells us that the non-public

[1]http://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=5F3B61EBC699403D3ACB3D4C82A1FB00.tpdjo13v_2?idArticle=LEGIARTI000026268340&cidTexte=LEGITEXT000006070722&dateTexte=20131020

[2]:Article 23 of the law of 29 July 1881 on the freedom of the press: " Shall be punished as accomplices of a qualified crime or offense those acts that, whether through speeches, shouting or threats uttered in public places or meetings or by written or printed matter, drawings, engravings, paintings, emblems, images or other support writing, speech or image sold or distributed, offered for sale or displayed in public places or meetings, or by posters or posters displayed in public, or by any means of communication public electronically, that directly incite the perpetrator or perpetrators to commit such action, meaning tha the provocation has been followed ". This article is also applicable when the provocation has only been followed up by an attempted crime as stated in article 2 of the Criminal code".

[3]http://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=7C02A06F785A665FBD1EF5BE6E2C690F.tpdjo09v_2?idArticle=LEGIARTI000022469879&cidTexte=LEGITEXT000006068930&dateTexte=20101023

incitement to hatred is prohibited, stating that: "Non-public incitement to discrimination , hatred or violence against a person or group of persons because of their origin or their membership or non-membership , real or supposed, of an ethnic group, nation, race or religion is punishable by a fine for offenses listed in the 5th class. "

It is therefore noted that through these various pieces of legislation, " hate speech " is not explicitly mentioned as such. Nevertheless, it is possible to identify a definition , and it is commonly accepted that hate speech " refers to a type of discourse that seeks to intimidate, incite violence or prejudice against a person or group of people based on various characteristics (race, age, gender, religion etc. .) . The term applies to written as well as verbal incitements as well as some public behavior[4] . "

2 Contextual elements of Hate Speech

What are the key contextual elements to identify a "hate speech"? Does the multiplying and wider effect of online dissemination always mean higher potential impact of online hate speech; why?

The European Court of Human Rights ("ECHR") recalls the importance of the right to freedom of expression under the first paragraph of Article 10 of the European Convention on Human Rights ("EConventionHR")[5].

This Article provides that "everyone has the right to freedom of expression. This right includes freedom to hold opinions and the freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from subjecting broadcasting, television or cinema institutions to a licensing permission regime. "

Each individual can therefore, in principle, freely express themselves and assert their ideas and opinions. However, the ECHR has the ability to restrict this freedom based on two articles: Articles 10 § 2 and 17 of the EConventionHR[6].

However, in order to apply these two articles, the ECHR must be able to distinguish the expression of law in conformity with the provisions of the EConventionHR and one that encourages extremism. In other words, the ECHR must "distinguish between, on the one hand, a real incentive to extremism and serious, and on the other hand, the right of people to express themselves freely and" hurt, shock or disturb "others."[7]

Since there is no universally accepted definition of " hate speech ", literally in French "discours de la haine", the ECHR has identified seven parametres that can be used to identify them.

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[4] http://www.e-juristes.org/wp-content/uploads/2010/02/incitation-%C3%A0-la-haine-Laverdet-Lefebvre.pdf

[5] ECHR, article 10 paragraph 1 : «Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from subjecting broadcasting, television or cinema enterprises to a licencing permission regime».

[6] We will study these Articles within questions 3 and 7.

[7] ECHR, Factsheet, « hate speech », march 2013.

The ECHR has identified as "offensive and contrary to the European Convention on Human Rights" many forms of expression, such as, "racism, antisemitism, xenophobia, all forms of hatred based on intolerance, including that which is expressed in the form of aggressive nationalism. [8]"

The first element to characterize a "hate speech" refers to speech that incites racial hatred. This type of speech is punishable because it can arouse within the public feelings of scorn, rejection and even more because of hatred.

In this regard, the ECHR has had the opportunity many times to sanction this type of speech; in its judgment of Feret versus Belgium in July 2009[9], the ECHR refused to enforce the provisions of the first paragraph of Article 10 of the Convention. It had sentenced a Belgian MP for incitement to discrimination. Similarly, a year earlier, it had sentenced a designer because it felt that his drawings could incite violence and cause an impact on public order (Leroy against France[10]).

In both cases, incitement to discrimination and violation of public order were two elements used to identify hate speech.

The second element relates to discrimination based on sexual orientation. A famous judgment of the ECHR in 2012 (Case Vejdeland and others versus Sweden[11]) condemned an applicant based on leaflets that were distributed inciting hatred against homosexuals. The Court found that these statements were serious and prejudicial. It also points out that such discrimination as equally harmful as that based on race.

In March 2013, the European Conference against discrimination and violence based on sexual orientation took place. In her opening speech , Najat Belkacem-Vallaud , the French Minister for Women's Rights recalled how this struggle was important and necessary. The situation is serious as more than 75 countries still condemn homosexuality .

The French government adopted, on 31 October 2012, its first national action plan against discrimination and violence against people " Lesbian Gay Bisexual and Transexual " (" LGBT ").

In June 2013, a seminar on " violence and discrimination on grounds of sexual orientation" was held[12]. Xavier Ronsin , director of the National School of Magistrates (" NHS ") , stated that the goal of this two-day seminar was to " educate not only magistrate judges, but also lawyers , police and special army police forces on the particular nature of discrimination and homophobic violence , to understand the roots, to examine the protests and their effects , and to nourish a joint reflection on ways to prevent and punish such offences. "

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[8] ECHR, The rise of political extremism in Europe : our response ?, June 24, 2013.
[9] ECHR, application n° 15615/07, Féret v. Belgium, July 16, 2009.

[10] ECHR, application n° 36109/03, Leroy v. France, August 2, 2008.
[11] ECHR, application n° 1813/07, Vejdeland and others v. Sweden, September 9, 2012.

[12] France, ENM, Séminaire du 3 juin 2013 sur les « violences et discrimination à raison de l'orientation sexuelle ».

This is currently an issue of particular concern. As we can see, it is unfortunately frequently brought up.

The third element concerns denial. This denial of the reality of a historical fact is one of the most flagrant examples of "hate speech ." Indeed, denying the existence of a crime against humanity amounts to defamation with regard to victims of these crimes. For the ECHR, this also constitutes incitement to hatred. On the occasion of the judgment of Garaudy versus France[13], the ECHR ruled that the denial of the Holocaust and therefore the denial of crimes against humanity "appeared as one of the most acute forms racial defamation of Jews and incited hatred against them. "

The fourth element relates to religious hatred. The most recent decision on the matter is a decision rendered in 2012. This decision, Hizb Ut- Tahrir and others versus Germany[14], had condemned an Islamic association , through its activities (it called for the overthrow of non-Islamic governments and the establishment of an Islamic caliphate), infringed the rights recognized by the Convention.

As basis for its decision , the ECHR relied on Article 17 of the ECHR, which prohibits the abuse of rights. The Court stated that the Association could not invoke the provisions of Article 11 (concerning freedom of assembly and association) to challenge the ban that had been made .

Other types of discourse can also be regarded as " hate speech" . Thus speeches inspired by a totalitarian doctrine (Communist Party of Germany versus the Federal Republic of Germany of 20 July 1957)[15] , political discourse (Otegi Montragon versus Spain of 15 March 2011 , Faruk Temel versus Turkey of 1 February 2011) as well as unconstitutional speech or national hatred (Dink versus Turkey of 14 September 2010, Association of Citizens " Radko " and Paunkovski versus "The former Yugoslav Republic of Macedonia" ...) are also considered as hate speech.

The ECHR considers that any claim based on a totalitarian doctrine should be declared inadmissible in that it is incompatible with the values of the Convention.

Thus , as it recalled during an intra- institutional work lunch, it is important not to forget that "the Convention was born out of the rubble of Nazism and totalitarianism .[16]" On the occasion of this lunch, the Court also recalled that "what the authors desired was to establish an institutional framework based on democratic values , including freedom of expression, to defeat the extremism that nearly led Europe and the world to their demise . "

The vision of the ECHR is clear. While acknowledging the undeniable importance of the freedoms recognized by the Convention (in particular freedom of expression) , it does not fail to recall that the rights of each individual are predominant. This respect, for the purposes of our report, is manifested by the prohibition of incitement to hatred .

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[13] ECHR, The rise of political extremism in Europe: our response? , June 24, 2013.

[14] ECHR, application n° 31098/08, Hizb Ut-Tahrir and others v. Germany, June 19, 2012

[15] ECHR, application n° 250/57, Communist Party of Germany v. the Federal Republic of Germany, July 20, 1957.

[16] ECHR, The rise of political extremism in Europe : our response ?, June 24, 2013.

In general terms, when a speech amounts to a call for violence, for xenophobia or racism and threatens the public order, it will be denominated as "hate speech" and will be subject to sanctions.

These speeches are themselves harmful, which is why they are punished, but when they are broadcast on the internet, the extent and seriousness of the injury caused is a different matter.

The effects of broadcasting over the internet:

Recommendation No. R (97) 20, adopted by the Committee of Ministers of the Council of Europe on 30 October 1997[17], condemns all forms of expression which incite hatred, while reiterating its commitment to freedom of expression and information as expressed in the Declaration on freedom of expression and information of 29 April 1982,

The Committee also states that "these forms of expression can have a larger and more damaging impact when disseminated through the media." This Recommendation applies notably to speech disseminated through the media, services and communications networks.

The Committee of Ministers already considered as early as 1997 that the dissemination of hate speech in the media was higher than the hate would have existed in the absence of this wide impact. It recognizes that the extent of this diffusion engendered a much greater harm.

This diffusion through the telecommunications network is actually not very different from that taking place through the internet. These two modes of communication tend to disseminate information to a wide audience. However, we must recognize that the impact of the Internet is far greater .

Indeed, if the dissemination of information through the media reaches a wide audience, this public is somewhat still more limited extent. For example, a speech made in France and distributed by the French media will first make an impact in France. This impact is likely to evolve depending on the persons involved in the dissemination, but again some it is to some extent restricted. However, in the case of internet distribution , the impact is far wider. Social networks also facilitate the rapid and global dissemination of information.

Given these findings, one can easily draw a certain reciprocity between media impact and dissemination of speech on the internet. Thus, when a "hate speech" is broadcast on the internet, victims can claim greater damage.

The damages claimed is essentially a moral prejudice. The feelings of the victim are affected and his fundamental rights as a victim are attacked. Thus a victim can take advantage of this violation to require the offender to pay an adequate compensation. This compensation may be material (publishing of conviction on a website, etc ...) or pecuniary.

There is therefore aggravated damage due to the dissemination of hate speech on the Internet.

[17] Council of Europe, Recommendation N° R (97) 20 of the Committee of Ministers to Members States on "hate speech" adopted by the Committee of Ministers on 30 October 1997.

The ECHR acknowledged this in its decision of Willem versus France on 16 July 2009[18]. In that case, it was held that "the call for an elected politician inciting an act of discrimination, reiterated on the website of a town/commune, was not free discussion on a topic of general interest." The Court added that "a political message in its discriminatory and therefore condemnable nature, was only compounded by its publication over the internet."

The ECHR reiterated this in the decision of Gunduz versus Turkey[19]. In addition to this case punishing France, the French courts have since recognized that, with regard to defamation, the dissemination of defamatory statements constituted an aggravating factor resulting in pecuniary damage suffered by the victim (TGI Paris 17th Chamber., 6 June 2012).

In practice , the "apology of crimes against humanity and incitement to racial hatred are two grounds on which may be victims of "hate speech" may act.

In January 2013, the case of anti-semitic "Tweets" has allowed for the revelation of certain indirect elements for the identification of "hate speech". The lawyer for the "Union of Jewish Students of France" (UEJF) movement, Stéphane Lilti , had chosen to intervene in the area of " advocating crimes against humanity and incitement to racial hatred ".

Following the request of Mr. Stéphane Lilti for interim relief, the Court of High Instance (" Tribunal de Grande Instance - TGI ") of Paris issued a decision which ordered Twitter to disclose the data required to identify the perpetrators of racist or anti-Semitic tweets .

The " Tweets" affair thus demonstrates that it is possible to identify hate speech on the grounds of " advocating crimes against humanity and incitement to racial hatred" , however, this is not enough and this loophole must be closed.

3 Alternative methods of tackling Hate Speech

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

To some extent, punishing "hate speech" reduces the freedom of individuals. This freedom is restricted because it seeks to punish the individual who uttered the hateful speech. So while these phrases would, in normal circumstances, fall under the protection of freedom of expression, they are here prohibited; thus restricting the legal protection afforded to the individual by Article 10 of the ECHR.

At European law level, as we have previously mentioned, it is therefore Articles 10 § 2 and 17 of the ECHR, which can validly be invoked to justify this restriction.

The first, Article 10 § 2, provides that " The exercise of this freedom , as it carries with it duties and responsibilities , may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society , in the interests of national

[18] ECHR, decision Willem c. France, July 16, 2009, § 36-38.
[19] ECHR, first section, application n° 35071/97, Müslüm Gündüz v. Turkey, December 14, 2003, § 40-41.

security , territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary . "

In other words, paragraph 2 of this Article recalls the well-known maxim that is to say that, "the freedom of one ends where someone else's begins." A balance must exist. Individuals enjoy freedom of expression, but it should not restrict the rights and freedoms of others.

Thus, the Convention subjects the exercise of this freedom to certain restrictions. As the ECHR noted in numerous cases[20], "hate speech" falls within the scope of this restriction. The Convention specifies, however, that this restriction must be prescribed by law and be consistent with its spirit; it refers to the provisions of Article 18[21] of the EConventionHR, which tend to limit the use of restrictions on rights. This article provides that any limitation of rights under the Convention shall be used only for the purpose for which it was set.

The ECHR has had the opportunity to make several decisions against France. In four important decisions[22], the Court condemned France for hate speech finding no violation of Article 10.

There is, of course, a European-level supervision of the restriction of Article 10. The ECHR ensures that all restrictions on the freedoms are limited or at least justified (Article 18 ECHR)[23].

Under French law, there is a law prohibiting the publication of defamatory or insulting statements, which encourage discrimination, hatred or violence against a person or group of persons because of their place of origin, ethnicity or absence of ethnicity, nationality, race or specific religion. This is the Law of 1881 on freedom of the press[24], as mentioned earlier

Chapter IV of the Law prohibits crimes committed through the press or by any other means of publication as provided by Section 23 of the Law[25].

Thus, hate speech on the Internet, as agreed previously, is an offense under this Article. The following Article further clarifies the types of speech punishable by imprisonment. According to this Article , those who, by one of the means set forth in the preceding article, directly incited , where this provocation would not been acted upon , to commit certain offenses, shall be punished by five years' imprisonment and a 45,000 euro fine. This includes "those who , by one of the means set forth in Article 23 have been advocating crimes referred to in the first paragraph[26] , war crimes , crimes against humanity or crimes collaboration with the enemy".

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[20] All the decisions cited above.
[21] ECHR, Article 18 : « The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed ».
[22] Decisions Marais v. France, decision of June 24, 1996, application n° 31159/96 ; Garaudy v. France, application n° 65831/01 ; Seurot v. France, application n° 57383/00, May 18, 2004 et decision Féret cited above,
[23] ECHR, decision Aleksey Ovchinnikov v. Russia, application n° 24061/04, § 51, December 16, 2010.
[24] French Law on 29 July 1881 concerning the liberty of the press.
[25] Page 1 of this report, footnore no. 2
[26] France's Law no. 78-17 relating to information technology, data and civil liberties

With particular regard to offenses on the internet, the law of 6 January 1978[27] relating to computers, files and freedoms is not clear on the subject , surely due to this being a dated piece of legislation.

In addition, the International Criminal Law Convention adopted by European countries and the United States, Canada, Japan and South Africa on 23 November 2001[28] was aimed at fighting against cybercrime and was intended to strengthen mechanisms established by States at national level .

However, as rightly pointed out by Jean Cazeneuve[29], one may wonder if this convention besides its objectives of harmonization of legislation on procedural matters and international cooperation in extradition and mutual assistance in criminal matters, is itself a genuine obstacle to what has become a global phenomenon. Among these existing challenges there exists the vast nature of information technology networks, methods of investigation and control that may be detrimental to human rights (especially the right to anonymity and freedom of expression) and the differences of interpretation of behavior from one country to another.

French law therefore clearly penalises hate speech on the basis of the 1881 Act. The parameters used by the ECHR to identify these speeches are the same as those mentioned in the provisions of the 1881 Act. Although there is a diversity of national laws that diverge from each other in Europe, certain elements remain crucial for the characterization of "hate speech ". We can cite here, thus, racial hatred, negationism, advocating crimes against humanity and incitement to religious hatred.

4 Distinction between blasphemy and Hate Speech based on religion

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

As France is a secular State, respect for all religious beliefs goes hand-in-hand with freedom of expression and the freedom to criticize any religion.

The concept of blasphemy, with regard to outrage of a deity or a religion, has been permanently removed from French law by the Law of 29 July 1881 on the freedom of the press. However, insult or incitement to hatred when they constitute a direct personal attack against a person or group of persons because of their religious beliefs are repressed[30]. It should be noted that blasphemy is still considered an offence in one region of France: Alsace -Moselle. Article 166 of the Criminal Code of Alsace and Moselle states that, "He who causes a scandal by publicly

[27] French Law no. 78-17 relating to information technology, data and civil liberties

[28] Convention on Cybercrime established in Budapest on 23 November 2001 and its Additional Protocol done at Strasbourg on Jan 28, 2003, approved in France by Law No. 2005-493 of 19 May 2005 authorizing the approval of the Convention on Cybercrime and the Additional Protocol to the Convention concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, published by decrees No. 2006-580 and No. 2006-597 of 23 May 2006.

[29] Jean Cazeneuve, French sociologist and anthropologist, Directeur Stratégie Filières & Métiers Verlingue, Cybercrime: the emergence of new risks, AJ Pénal 2012 p. 268.

[30] Refer to Question n°1 of this report, in particular articles 23 and 24 of the Law of 29 July 1881 on freedom of the Press.

blaspheming God in a disparaging manner or who publicly insults a Christian cult or religious community established in the territory of the Confederation and that is recognized as a corporation, or institutions or ceremonies of these cults or in a church or other place devoted to religious meetings, has committed offensive and outrageous acts and shall be punished by imprisonment of up to three years."

The last sentence on the basis of this text dates from 1999[31], but there is very little chance that the text will be used again; following the scandal of caricatures of the Prophet Muhammad, Dominique Dagorne, lawyer at the Institute for Local Law in Strasbourg had stated that, "The use of this article cannot relate to the Muslim religion, which is not officially recognized by the local rules of religious cults." Thus, the legislation applies only to Catholics, Protestants and Jews. We deduce that following this statement , there is now very little chance that the text be used again , for reasons of equity between religions.

Given the above, it can be inferred that the difference between hate speech on religion and blasphemy only exists in one region: Alsace-Moselle. This difference notes that in this region, blasphemy in contempt of divinity or religion as hate speech on religion shall constitute an insult and a direct personal attack against a person or group of persons because of their religious affiliation.

5 Networking sites and the issue of online anonymity

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

(see http://frenchweb.fr/debat-propos-racistes-faut-il-contraindre-twitter-a-moderer/96053)

In light of the advent of technology and the rapid dissemination of information , internet and IT tools appear as a way to assert the freedom of expression of every citizen .

However, this increased freedom of expression opens the door to abuse and speeches that incite hatred. It therefore may concern a racist, xenophobic view. This is why the Council of Europe, in accordance with national legislations, had drafted the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950. Indeed, Europe has also worked on cooperation in criminal matters, producing the Convention on Cybercrime and its Additional Protocol dated 28 January 2003 which stated that, "freedom of expression constitutes one of the main foundations of a democratic society ".[32]

[31] In 1997, militants of the Up Law were sentenced for having disturbed a mass in a cathedral in Strasbourg. (cf http://www.ldh-toulon.net/spip.php?article1258). Their sentences were confimed by the Court of Cassation in 1999 (n°98-84916)

[32] Additional protocol on cybercrime

In this sense, therefore these "acts of a racist and xenophobic nature constitute a violation of human rights and a threat to the rule of law and democratic stability."

That is why this Protocol aims to harmonize the fight against racist and xenophobic propaganda. In addition, it aims to suppress acts of a racist and xenophobic nature committed through computer systems.

At international level too, the United Nations had developed the Convention of 21 December 1965 on the Elimination of All Forms of Racial Discrimination.

Thus, the Convention designates as racist and xenophobic material, " any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence against a person or group persons because of race, color, descent or national or ethnic origin, or religion, insofar as it serves as a pretext for any of these elements or that encourages such acts. "[33]

The problem of cybercrime may be found in the "confidentiality" of computer data belonging to blogs. Therefore, the question to be asked is whether websites must make available the data identifying anonymous alleged perpetrators in order to bring them to justice. It is also necessary to analyze the position of the French national law in this regard.

Currently, cybercrime can proliferate through foreign companies and more particularly in the case of Twitter. By way of example, in October 2012 tweets appeared, bearing the words "#unbonjuif and #unjuifmort"[34]. These terms are of an anti-Semitic nature, whose authors could be sued for libel and incitement to racial hatred or racial discrimination. However, given the complexity and unfamiliarity of the company it became difficult for the French justice to allow the communication of anonymous data of such persons. Indeed , this cannot happen without the consent of the American justice, on the grounds that they are, "collected and stored in the United States ," where Twitter has its headquarters. Therefore, the recent case of "anti-Semitic tweets" has attributed the French justice system the possibility to solve this problem .

In this sense, the associations went to Court and attacked the website, requesting to direct the social network to reveal the identity of the perpetrators of anti-Semitic tweets in order to bring them before the Courts. The Court of High Instance of Paris ordered Twitter to develop its platform in order to offer a signaling device in case "messages falling within the scope of necessitating an apology for crimes against humanity and the incitement to racial hatred" are published.

In addition, the French Minister for Justice, Christiane Taubira, recalled that "messages with racist or anti-Semitic notions" that spread on social networks are "punishable by law." "The virtual channel does not make these acts any less real thus making those who commit them, guilty".[35]

[33] Convention on cybercrime
[34] Translation: #agoodjew and #adeadjew
[35] Interview in the newspaper, Le Monde, on 17 octobre 2012

It is clear that the French national Court not only has jurisdiction to stop these attacks, but also retains the possibility of obtaining information of the alleged authors. It should be noted that judges face difficulty in invoking the closure of sites hosting the speech, as considerably high financial issues are at stake. A clear and daunting illustration is the ASK website, which was at the origin four suicides, which came under unwanted limelight, but yet still remains active, despite it being believed to encourage young people to commit suicide.

It is clear that legal means at both national and regional level are available to the Court. However, their execution seems difficult to achieve. This is why a lot of work must be put in place in order to ensure compliance of the most inherent fundamental rules to all democratic societies, namely that os respect for human dignity and, eventually leading to the eradication of hate speech.

6 Tackling the notions of "violence", "hatred" and "clear presence of danger"

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

The Additional Protocol, speaks several times of "hatred" and "violence" (Article 2, 3 and 6), but each time, the word "or" is used between them. The Additional Protocol therefore see these terms as being of an alternative nature.

The ECHR, meanwhile, had a more pragmatic approach, but the separation of terms also seems to be the rule in most cases as demonstrated in the cases, "Le Pen vs. France "of 20 April 2010, "Sürek vs. Turkey" of 8 July 1999 and "Gündüz vs Turkey" of 4 December 2003.

Could "Hate" not generate "violence" and vice versa? These terms would they not rather be cumulative? The judgment, "Vejdeland and Others vs. Sweden" of 9 February 2012 seems to push this idea, with regard to sexual orientation.

Schenck vs. United States of 3 March 1919, is a judgment of the U.S. Supreme Court where the judges decided that freedom of expression could not allow citizens to "scare" their fellow citizens; thus the law had to intervene.

"The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. [...] The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

This concept is also present in French law in many fields, such as social law, criminal law, tort law, etc

We must remember this idea that the protection of the public may limit freedom of expression, this area is widely casuistry and therefore highly regulated by judges of many countries.

This concept has a heavy role to play in the case of "hate speech" on the internet and this is proven by the cases previously mentioned in the report.

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

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

Articles 10 § 2 and 17 allow the ECHR to restrict freedom of expression. Although their purpose is the same, these two articles differ in their approach.

The first section aims to restrict freedom of expression by allowing States to interfere with the right to freedom of expression.

The Convention allows the interference if it is necessary and proportionate to the aim pursued by the latter. In the absence of these two elements, the ECHR will find a violation of Article 10 and thus a violation of the implicit tolerance of uttered speech.

The restrictions in this section are justified by a "pressing social need" and must be proportionate to the legitimate aim within the meaning of § 2 of Article 10. They must also be supported by reasoned judgments relevant and sufficient. A leeway is left to States to ensure that freedom of expression and individual rights can coexist.

Article 17 provides for the prohibition of abuse of rights. According to the article, "Nothing in this Convention may be interpreted as implying for any State, group or person, any right to engage in any activity or perform any act aimed at the destruction of any freedoms recognized in this Convention or at the limitations of these rights and freedoms as provided for in this Convention"[36].

In other words, this means that, "it is impossible to derive from the Convention a right to engage in any activity aimed at the destruction of the rights and freedoms recognized in the Convention." By this article, the Convention refuses to allow the use of freedom of expression to destroy recognized rights and freedoms. It refuses to allow that such freedom can become a pretext for trampling the rights of others.

Rights guaranteed by the EConventionHR can not be invoked to cover the impairment of a right guaranteed by that Convention. Moreover, the Court held that, "there is no doubt that any remark directed against the values that imply the Convention would be undermined by Article 17 for the protection of Article 10".[37]

[36] ECHR, Factsheet, « hate speech », March 2013.
[37] ECHR, 5e Sect. (déc.), June 7, 2011, Bruno Gollnisch vs. France, application n° 48135/08 – ADL, 24 July 2011

However, it should be noted that an application of Article 17 by the Court is rare. It is applicable only in extreme situations[38] and applies only to censor ideas or actions which might undermine democracy. The invocation of Article 10 is much more commonplace.

Moreover , Article 17 has a wider scope in that it prohibits all restrictions on the rights recognized within the Convention. Therefore, the restriction on freedom of expression is no longer the only concept to consider. The approach of hate speech under Article 10 is much more concentrated , as the scope of this article is limited.

Applicants may freely invoke the provisions of the Convention. However, as the scope of Article 17 is wider, it would be better to focus on Article 10 which is much more specific. However, for greater precaution, they may rely, as an alternative, on Article 17 of the EConventionHR.

8 Harmonisation of national legislation

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

Jean Pradel[39] said that the EU system of human rights is not a mechanism to replace national rights. Basically, the ECHR has created principles based on respecting the sovereignty of member states.

One such principal is the that of proportionality for example: states have a margin of discretion when deciding cases.

This margin aims to recognise the individual character of each system in order that respect is still given to the different cultural and ideology of each state. The Court confirmed this in the case of 19 December 1997 with the following terms[40]: The Courts role is not to be a substitute to the systems already in place, only the internal system is capable of interpreting national legislation, nor to judge the way the internal decision makers make their choices, the Court's role is just to make sure that the European Convention of Human Rights is respected and followed in the correct way.

The principle of proportionality requires that only means that are necessary are established , depending on the circumstances. National authorities enjoy a margin of maneuver to the extent necessary to achieve the aim pursued by them. As stated by the Court in 1996[41] , "there must be a balance between the demands of the general interest and the protection of human rights ."

With these two principles clear and well- defined, it is now appropriate to consider measures that can be taken to harmonize European legislation.

[38] ECHR, G.C., January 6, 2011, Paksas vs. Lithuania, Application n° 34932/04, § 87 – ADL, 7 January 2011.
[39] Jean Pradel, 50 années de jurisprudence strasbourgeoise en matière pénale, Bucharest conference 4 December 2008
[40] ECHR, 19 December 1997, Gomez de la Torre vs. Espagne
[41] ECHR, 7 August 1996, Zuboni vs. Italie

The first step that is required, and one which would not be a major difficulty with regard to compliance with the laws of the States, would be to write a single common definition of hate speech. In a globalized world , the Internet has erased boundaries and messages travel instantly from one country to another. A hate message posted on the Internet in Greece is immediately legible or audible for example, in Denmark . It is thus obvious that this message must be dealt with in a consistent and identical manner at European level because it impacts all Member States.

Once this common definition is adopted, it would then be appropriate to harmonize all types of possible responses to these instances of hate speech. Each State should have the same scale of sanctions in its national legislative arsenal.

9 Legal implications of "hate speech"

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

"There is no universally recognized definition of the expression "hate speech". The case-law of the Court has set some parameters that allow a characterisation of what is "hate speech", in order to exclude it from the being protected by the application of freedom of expression (art.10), or freedom of association and reunion (art.11)."

Notwithstanding the absence of a definition and the vacuum related to the term Hate Speech itself, its criminalization may be understood from the point of view of the prohibition to discriminate (art.14) , under EU law, but also considering the limitation to freedom of expression, art. 10 of the ECHR.

Hate speech brings together all speech that is racist, religious and related to sexual orientation. For this reason, a definition can be restrictive at national level but also at international level, in view of the juridical arsenal that is at our disposal.

Firstly, and mainly, the law of 1881 on freedom of the press in internal systems allows the authors of hateful statements to be persecuted when their statements are considered to be extremely violent and therefore suitable enough to arouse the hate. From a legislative point of view, these statements are legally punishable facts.

Is it possible and necessary an international level : why ?

From a regional perspective, it is important to refer to the work that the Council of Europe carried out in this field, in particular the Recommendation of the Committee of Ministers of the Council of Europe of 1997 on Hate Speech and the Additional Protocol to the Convention on Cybercrime on Xenophobia and Racism. In this recommendation, the Committee of Ministers reaffirmed the willingness to fight all forms of expression that encourage hate, in particular racial hate. In addition, it also reaffirms its strong link with freedom of expression as recalled in art. 10 of the Convention, but also art. 17. In fact, through this recommendation, the Committee of Ministers recognises that these forms of expression can be even more damaging using means of new technology and communication.

In particular, the means that is object of our research and that is of our interest is the Internet, where the propagation of information aiming to encourage hate can become of not negligible proportions, or even worse, can attain alarming levels. This is the reason why it was necessary for the Council of Europe to take a position on this delicate issue and attempt to bring a stop to it as it is in the process of creating increasingly critical situations.

The European Commission against Racism and Intolerance (ECRI) also plays a very important role in this issue and had adopted a Recommendation of general policies n.6 in the year 2000, concerning the fight against the distribution of racist, xenophobic and anti-Semitic material through the Internet.

On the other hand, at international level, with respect to the UN Charter of 1945, hate speech, in particular that related to xenophobia and ethnical matters, is a constant concern, following the Worldwide Conference against racism in Durban in 2001, further enhanced by the Resolution n.16/8 of the Human Rights Council and the Action Plan of Rabat against the propagation of national, religious or racial hate that was officially launched in Geneva on the 21st of February 2013 from the High Commissioner for Human Rights, Ms Navi Pillaï.

Moreover, the Human Rights Committee, which is an organ of independent experts, monitos the application of the International Covenant on Civil and Political Rights by signatory Member States. Consequently, it controls deritives of the principle freedom of expression that are protected by the Covenant.

Added to this is the work on this subject by the Special Rapporteurs on contemporary forms of racism and by several conventional Committees of experts, including the Committee for Human Rights and the Committee for the Elimination of Racial Discrimination . The Committee for Human Rights adopted, in 2011, an important general Recommendation on the interpretation of Article 19 of the International Covenant on Civil and Political Rights with regard to the protection of freedom of expression and its strictly defined limits.

These observations should be nuanced, as such enforceability is only valid when a State has ratified these Conventions. The action of the Committee for Human Rights is also qualified because if the Covenant on Civil and Political Rights is violated, it has little room to maneuver in that there are no means of constraints or retaliatory measures to stop these abuses that constitute hate speech .

It is therefore at the national and regional level that the measures will be more effective in the struggle against such practices. This is possible in particular at national level, by referral to the Courts and specifically to the "interim relief Court", who is able to order that all nature conservation measures to stop the infringement. This, therefore, can be demonstrated by, for example, the closure of the disputed website citing a speech clearly aimed to generate hatred. At regional level it will fall upon the European Court of Human Rights to halt abuses after all domestic remedies have been exhausted.

10 Legal implications and differentiation of related notions

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

It is necessary to define the terms mentioned before questioning the relation that they can entail with the encouragement to hate.

Intimidation: (from the legal dictionnary, Cornu)

"Pressure tactics (threats, violence, assault, operations) for the fear they inspire, to divert a person of their duties or to dissuade them from asserting their rights implicated as impediments to the exercise of justice when acting on a judge, referee, juror, expert, interpreter, lawyer (C. Pen., art 434-8), witness (art 434-5), the victim of an offense (Article 434-5) and as an attack on the government, when acting on an officer, public officer or elected official (Article 434-3) "[42]

435-5 of the French Criminal Code: "Any threat or other acts of intimidation against anyone that is committed to influence the victim of a crime or offense not to complain or conversely, to retract any statements, is punishable by a three year prison sentence and a fine of € 45,000".[43]

434-8 of the French Criminal Code : "Any threat or intimidation committed, against a judge , juror or any other person sitting in a judicial capacity, an arbitrator, an interpreter, expert or counsel for a Party, in order to influence their behavior in the performance of their duties is punishable by a three year prison sentence and a fine of € 45,000."[44]

As for the definition of 'Provocation', this emanates from the Latin, "provocatio, v provocare: to call, to challenge, to excite;

- It is (intended) to push others to commit an offense or punishable actions or as an act of complicity in exchange for gifts or promises or with threats and orders, an abuse of authority and power (French Criminal Code, article 127-7 paragraph 2) or as a separate offense ex. (French Code of Military Justice, article 414: incitement to desertion; or the provocation of child abandonment (French Criminal Code, article 223-13).

- It is a (causal) fact of having committed a person to react, more precisely, on a criminal initiative that may even spark a reaction against its author (retaliation, reprisal)."

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[42] " Pressure tactics (threats, violence, assault, operations) for the fear they inspire, to divert a person from their duties or dissuade them from asserting their rights implicated as obstacles to the exercise of justice when acting towards a judge, referee, juror, expert, interpreter, lawyer (C. Pen., art 434-8), witness (art 434-5), the victim of an offense (Article 434-5) and as an attack on the government, when acting on an officer, public officer or elected official (Article 434-3)"

[43] Article 435-5 Criminal Code: "Any threat or other acts of intimidation against anyone that is committed to influence the victim of a crime or offense not to complain or to retract, is punished by three years' imprisonment and a fine of € 45,000. "

[44] Article 434-8 Criminal Code: "Any threat or intimidation committed against a judge, juror or any other person sitting formed by judicial training, an arbitrator, an interpreter, expert or counsel for a Party, in order to influence his behavior in the performance of his duties is punishable by three years' imprisonment and a fine of € 45,000. "

These three concepts are hardly noticeable in national law, but are still subject to strict punishment under French criminal law. They are contained in Articles 434 onwards of the Criminal Code, with regard to intimidation. However, these considerations seem blurred as they are intended and aim to protect certain persons such as judges, lawyers, officials ... The definition of provocation remains, however, restrictive.

A comparison can be noted between the terms of intimidation and provocation against incitement to hatred because they are both distinct. In fact they do not have the same meaning nor the same scope, even though they are related to freedom of expression. Furthermore they have their limit, since it is imposing on a fundamental freedom, after all..

11 Comparative analysis

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

With regard to France, this comparison cannot be made in detail, given the lack of sufficient legislation and jurisprudence on the matter within national law.

In a more general sense, the problem does not seem to be the way the protocol was implemented in EVERY signatory State, according to Jean Cazeneuve[45], but rather in its implementation within the national law of each of these States.

The first obstacle is the virtually unlimited extended nature of the internet and mismanagement of government on this issue (many competent authorities, administrative delays, problems related to full power,etc).

The second obstacle would directly affect the very basis of the legal functioning of States.

Thus in France, if there is no constitutive element of the offense attached to France, the French Courts will not have jurisdiction. The law implementing the protocol would therefore be paralyzed.

This reasoning demonstrates once again the fragility of the law against this type of "crime".

[45] La cybercriminalité : l'émergence d'un nouveau risque, by Jean Cazeneuve

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National Coordinator: Cassandra Matilde Fernandes

National Academic Advisor: Maitre Thomas Gaultier (Attorney-at-law)

National Coordinators: Alexandre Ghafari, Jimmy Astruc, Ines Djadour, Rebecca Fisli, Rose Ngalako

ELSA Georgia

National Researchers

Beka Kiria

Nata Kapanadze

Ketevan Givishvili

Teona Gonashvili

Mariam Malidze

Tinatin Jolia

Academic Adviser

Tamara Makhatadze

National Coordinator

Tamta Zaalishvili

National definition of Hate Speech

In Georgian national legislation hate speech is not defined at all, not to mention its specific forms as hate speech based on religion. Thus it is impossible to somehow distinguish it from blasphemous. To our opinion such definitions should be given in the, Code of Administrative Offences" or in the, Law Regarding the Freedom of Speech and Expression".

Contextual elements of Hate Speech

It seems more and more difficult to identify the statements that could be recognized as hate speech because they may not include obvious expressions of hatred.[1] Therefore it is crucial to contemplate the contextual elements of the speech.

Article 10 of the European Convention on Human Rights (ECHR) stands for the right to free speech, stating: "Everyone has the right to freedom of expression." In spite of the indisputable role in progress of a democratic society freedom of speech is the subject of certain restrictions prescribed by law that:

- are necessary in democratic society;
- fall in scopes of the interests of national security, territorial integrity or public safety;
- are necessary for the prevention of disorder or crime;
- are necessary for the protection of health or morals;
- are necessary for the protection of the reputation or the rights of others;
- are necessary for preventing the disclosure of information received in confidence;
- are necessary for maintaining the authority and impartiality of the judiciary.

According to this regulation freedom of expression is not deemed to be an absolute right.

The line between hate speech and well-examined freedom of speech is vague. Thus it is difficult to reach the correct balance between the conflicting rights, interests and needs of society.

There is no universally accepted definition of hate speech[2]. Though, the concept can be defined by the specific content banned under the law prohibiting hate speech in the particular state. Thus the contextual elements of hate speech vary from one jurisdiction to another and there is no unique standard applicable.

[1] Anne Weber, Manual on Hate Speech, Council of Europe Publishing, p.5

[2] Council of Europe, Fact Sheet 4, "Hate Speech", p.1

The most general contextual elements can be determined by analyzing the interpretation of hate speech given by the Council of Europe's Committee of Ministers "Recommendation 97(20) on hate speech" which stipulates: "For the purposes of the application of these principles, the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."

For the purposes of the research three key aspects of hate speech – intent, incitement and what results are prohibited – are discussed. [3]

According to the definition mentioned above we can conclude that the crime can be identified as hate speech if it includes acts of spreading, inciting, promoting or justifying the forms of hatred in contexts based on intolerance.

The context in which speech appears helps to evaluate its impact, as well as the position of the person speaking. Only by analyzing contextual clues the potential threat a speech can be estimated.[4] Therefore evaluation of the treat depends on the background factors of the speech: intention of the speaker, understanding of the message by the audience, public conception, social environment etc.

The aim pursued by the applicant is deemed to be a delicate one to implement because of the difficulties connected with determination of the subjective attitude of individual. Thus the Court often refers to the content of the speech and to the context in which it occurred.[5]

Article 20(2) of the International Covenant on Civil and Political Rights states the following: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." Therefore, the provision indirectly indicates essential role of intent under the term "advocacy".

The importance of this element is also affirmed by the landmark case in Denmark. In the case Jersild V. Denmark the Court ruled that the primary intent of Jersild was to expose racism in Denmark and therefore while creating his television program he did not pursue the purpose of the propagation of racism or hatred. The European Court of Human Rights declared a violation of the right to freedom of expression by the Danish Courts.[6]

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[3] Toby Mendel, Hate Speech Rules Under International Law, p.5

[4] Hate Speech and Group-targeted Violence, The Role of Speech in Violent Conflicts, United States Holocaust Memorial Museum, p.6

[5] Anne Weber, Manual on Hate Speech, Council of Europe Publishing, p.33

[6] *Jersild v. Denmark*, 22 August 1994, Application No. 15890/89.

Automated system of word matching does not always reflect completely the whole potential of danger. Thus the context of the speech has a crucial importance and particularly the local environment in which speech occurs.

"Hate speech, propaganda, and incitement often rely on symbolism, vernacular, and coded language deeply rooted in a historical and cultural context specific to the region."[7]

On example of several national regulations regarding hate speech we can also infer that contextual grounds of infringement can also differ by the distinguished public orders. For instance Indian Penal Code includes regulation under which promotion of hatred on the ground of "castes and communities" is prohibited.[8]

In specific regions the risks of brutal result is comparatively higher considering the historical background involving marginalization of certain groups and prejudice.[9]

The Law against Holocaust Denial perfectly asserts the impact of historical background. 17 countries – Austria, Belgium, Bosnia and Herzegovina, Czech Republic, France, Germany, Hungary, Israel, Liechtenstein, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Spain and Switzerland – have criminalized genocide denial.

Alternative methods of tackling Hate Speech

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

All crime is wrong, but it depends, is it motivated by hatred of a particular characteristic of the victim whether it's their sexual orientation, perceived disability, faith, race or anything else. It is particularly corrosive. Tackling hate crime matters, it can divide communities' not just devastating consequences it can have for victims and their families. We don`t have to be attacked or abused for who we are, we believe that everyone has the right to live their life free from such kind of dependence. Georgia today is more diverse than ever before, and the vast majority of us embrace this rich mix of different races, cultures, beliefs, attitudes and lifestyles.

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[7] Hate Speech and Group-targeted Violence, The Role of Speech in Violent Conflicts, United States Holocaust Memorial Museum, p.9

[8] Indian Penal Code, Chapter VIII, Offences Against the Public Tranquility, 153A

[9] Hate Speech and Group-targeted Violence, The Role of Speech in Violent Conflicts, United States Holocaust Memorial Museum, p.9

For example everyone can become a publisher very, very easy, so it is becoming a more serious problem.

Some European countries have made certain forms of hate speech, like Nazi propaganda and Holocaust denial, a crime. Free Speech protections are guaranteed in the first amendment.

"The purpose of INACH and its annual convention is to have this international cooperation that allows for sharing of knowledge, exchanging best practices, and trying of civil rights for the ADL" so just bringing all these people from different countries together who are addressing this topic and for itself, is one of the goals of the conference" says Deborah Lauder .

The issue of what speech should or may be prohibited on the basis that it incites

Others to hatred – so-called 'hate speech' – is a matter of great dispute and argumentation globally, although the standards on this under international law are in fact reasonably developed.

The police and Criminal Justice System professionals have improved their understanding and recognition of hate crimes, there is still much more to do and no-one should think for a moment that this is a problem we have solved. International law not only allows, but actually requires, States to ban certain speech on the basis that it undermines the right of others to equality or to freedom from discrimination, and occasionally also on the basis that this is necessary to protect public order. In our point of view the lead for tackling hate crime must come from the local level, with professionals, the voluntary sector and communities working together to deal with local issues and priorities. Government, however, has a vital role to play in setting a national direction and supporting those locally-led efforts.

Georgian Laws in this regard are quite inflexible and is not criminalization hate speech. Despite the fact that the European Commission against Racism and Intolerance, the second time the Commission proposes to make to the criminalization of hate speech and to amend the Criminal Code.

Personally, our attitude to this issue more is liberal. We do not think that criminalization would make possible to overcome this problem and this will lead to the development of democratic processes. We think that criminalize will devastated freedom of expression. To solve this problem it is important that the public sector has to take more responsibility. Hate speech should be the priority areas of Ombudsman control too. Otherwise, we face a dilemma: Which is better to deny freedom of expression or say NO to hate speech?!

We remember one very Sensational fact, when one person released offensive video clip about Catholics-Patriarch of Georgia at Facebook. At the beginning started public campaign of judgment the persons who spread the videos, then followed criminal prosecution of the authors. Which now, due to lack of legal basis is expected to be suspended?! If recommendations of EU

would be outlined in the legislation that would clear the authors of clips could have been discovered and arrested. we think that open discussion would be more important for solving that problem. we think that the liberal attitude of the community imposes more responsibility; we think that the government should encourage citizens to stand up against such types of problems like hate speech.

Networking sites and the issue of online anonymity

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

The issue whether networking sites should be legally forced to reveal identities of persons at the origin of online hate speech has been the subject of debate. There are quite a number of arguments in favor for as well as in opposition to the concept of online anonymity. The hate speech happening online represents a subject of more concern as it is rather hard to control and may have the same, if not more, destructive effect on a victim as an offline hate speech. While arguments for online anonymity vary from one to another, real cases exist which show that people suffer from the abuse, defamation and vile threats on the internet powered by the misusage of the right of online anonymity.[10]

The necessity of online anonymity is obvious, especially in the society in which we live, where often it is quite dangerous to make bold and loud statements. People use anonymous profiles in order to more freely express their opinions or discuss the topics they would rather not discuss if their names were shared publicly for number of reasons. Anonymity is important for on line discussions involving sexual abuse, minority issues, harassment, and many other things, also to report illegal actions without being afraid of retribution. There are some vulnerable groups of people who find it the only way to express themselves. And this right cannot be taken away from them. But alongside with that there is also the right to be free from discrimination. Anonymity also supports promoting the freedom of expression but that does not mean that freedom of expression should become the freedom of hate speech and abuse.

[10] Weber, Anne, Manual on Hate Speech, Council of Europe publishing, France, 2009

Online hate speech often provokes offline illegal activities and criminal offences. Hate speech originated on internet does not only affect victims online but often it is a good start for an offline harassment and abuse. It should not be looked at as an inconsiderable issue. There are victims who have suffered from receiving messages of vile threats and vicious statements from anonymous users of networking sites. While the right of anonymity may seem so crucial that some of the anonymity servers, for example, like Helsingius, from penet.fi refuse to reveal identities (The ARMM censorship case), the lives of innocent citizens who use social network for only harmless purposes, can be under threat. That is why it is important to have proper laws enforced which will make networking sites reveal the identities of the abusers if necessary.

Absolute anonymity contains as much danger as absolute censoring and the policing of the net. Something in the middle has to be found. The right of anonymity could be restricted when it has been misused to violate other people's rights which overweigh an abuser's right to remain anonymous. [11]

The well known case of Nicola Brookes against Facebook which is believed to be one of the first cases where an individual has successfully taken legal action against Facebook to reveal the identities of cyber bullies, has proven the feasibility and the need of the existence of the legislation which will allow the victims of online hate speech acquire the data about an abuser.

Although, legally forcing the networking sites to reveal the identities of their users come with problems of its own. There are certain issues that need to be considered prior to this for it to be more attainable.

Above of all, an anxiety exists among those who are for online anonymity that these additional laws may cause counter effect and lead to total censorship of the internet. Therefore it is vital to clearly depart from each other what qualifies as an abuse/hate speech and what is merely a different opinion which has caused the frustration or uneasiness of another user. Otherwise this harmless and noble intention of the attempt to protect people from online violence and hate speech may easily end up restricting the freedom of expression on internet.

Besides, the ways of acquiring the personal information about a so-called "troll" should not become easily accessible at an every request from a supposed victim but should be demanded by way of a proper legal form. It will be more probable if future claimants will have to show and

[11] Kakungulu-Mayambala, Ronald, "Internet Censorship and Freedom of Expression: A Critical Appraisal of the Regulation of Hate Speech on the Internet"; BILETA conference, Glasgow Caledonian University Law School, 2008

prove the harm that the material or the statement has caused to avoid trivial claims and false accusations.

By revealing identity it means that the website administrators will have to share the name, email address and the internet protocol (IP) address of the abuser. It also could be connected with some complications as it is more likely that an abuser will use somebody else's computer or a shared computer in a café for example. In this case, for this to be feasible, legal body will have to ensure thorough investigation of the case to avoid violating other people's privacy who are not involved.

As well as that, website operators should be guaranteed to have a defense against libel.

There have been several actions taken addressing this problem in Europe, for example Council of Europe's "Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems" in 2003 as well as the United Kingdom's Defamation Act in 2013.

Georgian legal system in connection with cybercrime in general is rather vague not to mention online hate speech specifically. Hate speech has not been criminalized in Georgia. Georgian authorities did not consider the importance of cyber safety respectively until cyber attacks were committed against Georgian official governmental websites by the Russian side in 2008. After that, Georgian government has taken certain steps to address the problem. Among them is the one-year-long joint project implemented by the ministries of justice and Internal Affairs in cooperation with the European Commission and the Council of Europe from 1 June 2009 to 31 May 2010 aiming to harmonize the Georgian legislation about cybercrime with the Convention on Cybercrime. Georgia has signed the convention on Cybercrime on 1 April 2008 and did not ratify until 6 May 2012. The convention entered into force on 1 November 2012. On behalf of the convention there where two principles passed – "Presidential decree in regard to the enforcement of the "convention on Cybercrime" on 1 June 2012 and "Presidential decree in regard to the enforcement of the strategy of the cyber safety of Georgia and of the action plan for implementing the strategy of cyber safety of Georgia in 2013-2015" (17 May, 2013)[12]

Within the bounds of the legislative reforms in 2010, Parliament of Georgia has adopted the package of legislative amendments with reference to domestic cyber law. The changes included completely renewing the XXXV chapter of the Criminal Law code (replacing the old terms with the specific terms regarding the computer system and devices), also according to the changes, juridical persons now will also be charged for committing a cybercrime. "Law on operational and

[12] Rigby, Karina, "Anonymity on the Internet Must be Protected", Paper for MIT 6.805/STS085: Ethics and Law on the Electronic Frontier, Fall 1995

investigative activities" as well as "law on electronic communications" also have been revised and updated.

Georgia has not yet signed the "Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems" (28 January, 2003).

According to the announcement of the deputy minister of Justice, the ministry of Justice of Georgia has been working on a new project – Anti-Discrimination bill since January 2013. The bill aims to create an effective mechanism in order to prevent discrimination. The draft law will contain the term "multi-sided discrimination" which some of the EU countries' legislations are not familiar with. This new law attempts to ensure the existing human rights rather then to grant the new ones. While there is evidently the lack of regulations about hate speech, this initiative seems promising that the current obscurity in Georgian legislation referring hate speech and discrimination will be slightly cleared away.[13]

The awareness of society is one of the key elements in tackling online hate speech and other offences committed trough computer system and internet. Although "Presidential decree in regard to the enforcement of the "convention on Cybercrime"[14] includes the necessity of raising the awareness among people about the issue as one of the main key objectives of the strategy, there is limited information available for most of the population about cybercrime, hate crime or hate speech. There are limited websites or blogs throughout the internet which would provide articles and information for Georgian population in Georgian language.[15] There is only one cyber law office (R. B & Partners) which provides legal assistance in the field of the internet, virtual world, social networks, cyber crime, e-commerce, online banking and the protection of privacy and dignity. As for hate speech concretely, it is almost a strange concept for the most of the population. [16]

[13] Reforms in 2010 - http://www.justice.gov.ge/index.php?lang_id=GEO&sec_id=667

[14] "Project on Cybercrime in Georgia" , Project summary 19 May, 2009

[15] R. B & Partners (Rukhadze, Bodzashvili and Partners) – www.cyberlaw.ge

[16] Cybercrime project in Georgia - http://police.ge/ge/ministry/structure-and-offices/saertashoriso-urtiertobebis-departamenti/donorta-koordinatsia/proeqtebis-shesakheb/completed-projects/kiberdanashauli

Tackling the notions of "violence", "hatred" and "clear presence of danger"

We have to examine should the notion of „violence" and „hatred" be alternative or cumulative given the contextual approach to „hate speech". According to „ Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of racist and xenophobic nature committed though computer systems" and the relevant case law of European Court of Human Rights(ECHR)" It must be interpreted in order to clarify the exact meaning of each word, based on what we are able to compare term contextual. Furthermore, we should examine if it is possible to use term „clear and present danger" instead of term „hate speech".

There is no precise definition of „hate speech" , but variety of sources can be shaped its somewhat definition. For instance, according to the Council of European of Committee of Ministers "Recommendation 97(20) on "hate speech" defined it as follow: *the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other form of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."*

Furthermore, there is no any definition of term "hate speech" in the Additional Protocol, although its different articles prohibit such actions, which represent "hate speech". Second article of the Additional Protocol determines definition of "racial and xenophobia material". It's one of the features of hate speech actions. Definition uses terms of violence and hatred: *"racist and xenophobic material" means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors."* Those terms (violence and hatred) are used cumulative not alternative to refer one of the hate speech actions. It follows that, the notion of violence and hatred cumulative should be given the contextual approach to hate speech. Unlike hate speech those terms express itself different meaning of actions.[17]

For instance, we have action, characterized by violence, but there is no hate speech. The violence hate speech would be important motivation and purpose, which is directed towards racial discrimination, xenophobia, anti-Semitism or other form of hatred based on intolerance. Also, there are hate speech actions, but there is no violence.

[17] Manual on hate speech – Anne Webber, Applicable instruments , Recommendation and other instruments, Council of Europe, page 10

Note, that we cannot say same about "hatred." „Hatred" is almost indivisible notion of hate speech, because "hate speech's" each actions are characterized by subjective sign like hatred. Therefore, we can openly say, that if we have any action of hate speech, there will be hatred. But what happens when we use the term independent of hatred? In the time we mean hate speech or there is any obstacle like violence, which requires concrete definition to imply "hate speech"?

"Hatred" is a broad concept and it may be used in different cases. According to common definition*, hatred is a deep and emotional extreme dislike that can be directed against individual, entities, objects, or ideas. Hatred is often associated with feelings of anger and a disposition towards hostility.* [3] Thus, hatred cannot be the only racial hatred, xenophobia, anti-Semitism or other form of hatred towards. Therefore, hatred is a broad concept, we deem, that hatred requires concrete definition like violence to imply hate speech.

For reinforcing our supposition there are some decisions of ECHR below. Before that, it should be noted that hate speech is directly related to the right of freedom of expression. The right is not an absolute right and it may be restricted to protect overriding public and private interests, including equality and public order.[4]

Article 10 of convention of ECHR and Article 19 of the UDHR guarantees the right to freedom of expression, including to "seek, receive and impart information and ideas through any media and regardless of frontiers."

Now examine some cases of ECHR and its decisions:

CASE I

Denis Leroy is a cartoonist. One of his drawings representing the attack on the World Trade Centre was published in a Basque weekly newspaper on 13 September 2011, with a caption which read: "We have all dreamt of it... Hamas did it". Having been sentenced to payment of a [18] *fine for "condoning terrorism", Mr. Leroy argued that his freedom of expression had been infringed.*

The Court considered that, through his work, the applicant had glorified the violent destruction of American imperialism, expressed moral support for the perpetrators of the attacks of 11 September, commented approvingly on the violence perpetrated against thousands of civilians and diminished the dignity of the victims. Despite the newspaper's limited circulation, the Court observed that the drawing's publication had provoked a certain public reaction, capable of stirring up violence and of having a demonstrable impact on public order in the Basque Country. The Court held that there had been no violation of Article 10.[19] [5]

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[19] European Court of Human Rights, Hate Speech analyze, Racial Hate Speech, Leroy v. France (no.36109/03)

The Court concluded that there is hate speech based on racial discrimination. But there is no violence, despite the fact that Leroy called for violence. Because of there is no action of violence. Unlike hatred violence is illegal act. Action, which lead to a person's physical and mental damage. There are not same results in the case. That's why there is no violence. Although, Leroy spread racial hatred. It approves that the above supposition, that hatred is indivisible notion of hate speech.

CASE II

Faruk Temel, the chairman of a legal political party, read out a statement to the press at a meeting of the party, in which he criticized the United States' intervention in Iraq and the solitary confinement of the leader of a terrorist organization. He also criticized the disappearance of persons taken into police custody. Following his speech Mr. Temel was convicted of disseminating propaganda, on the ground that he had publicly defended the use of violence or other terrorist methods. Mr. Temel contended that his right to freedom of expression had been breached.

The Court noted that the applicant had been speaking as a political actor and a member of an opposition political party, presenting his party's views on topical matters of general interest. The Court took the view that his speech, taken overall, had not incited others to the use of violence, armed resistance or uprising and had not amounted to hate speech. It found a violation of Article 10.[20]

The court concludes that there is no hate speech, although Mr.Temel was convicted of disseminating of violence and hatred. Because of his speech had not incited others to use of [21]violence, uprising and had not amounted to hate speech.

CASE III

Daniel Féret was a Belgian member of Parliament and chairman of the political party Front National-National Front in Belgium. During the election campaign, several types of leaflets were distributed carrying slogans including "Stand up against the Islamification of Belgium", "Stop the sham integration policy" and "Send non-European job-seekers home". Mr. Féret was convicted of incitement to racial discrimination. He was sentenced to community service and was disqualified from holding parliamentary office for 10 years. He alleged a violation of his right to freedom of expression.

In the Court's view, Mr. Féret's comments had clearly been liable to arouse feelings of distrust, rejection or even hatred towards foreigners, especially among less knowledgeable members of the public. His message, conveyed in an

[20] European Court of Human Rights, Hate Speech analyze, Political Speech , Faruk Temel v. Turkey (no. 16853/05)

electoral context, had carried heightened resonance and clearly amounted to incitement to racial hatred. The applicant's conviction had been justified in the interests of preventing disorder and protecting the rights of others, namely members of the immigrant community. The Court held that there had been ***no*** *violation of Article 10.* [22]

There is hate speech, hatred, but there is no violation, also no violation of article 10 of convention.

There is violation of article 5 of the Additional Protocol, which took precedence over the right to freedom of expression. He was a politician and his message had carried heightened resonance and clearly amounted to incitement to racial hatred and incited hatred towards foreigners. That's why , the Court concluded fairly that there is no violation of freedom of expression and Mr. Temel's action is considered as hate speech.

Decisions of ECHR reinforced the above supposition, that hatred is indivisible notion of hate speech, but itself notion of hatred does not include hate speech. Also, notion of violence does not include hate speech. We have a cumulative three component necessary for the violence hate speech:1) act-that direct towards racial hatred, xenophobia, anti-Semitism or other form of hatred based on intolerance 2) a person's physical and mental damage.

Now we examine should the notion of violence and hatred cumulative given the contextual [23]approach to hate speech?

There are some actions, characterized by violence and hatred. For instance: A man hated his brother's killer, that's why he damaged killer physically. Although, there are both features: hatred and violence, there is no hate speech. Because of this act is not characterized by racial hatred, xenophobia, anti-Semitism or other form of hatred based on intolerance.

Therefore, notion of violence and hatred require concrete definition when we use alternatively, also cumulatively both terms require concrete definition. Because each notion themselves contextually mean different actions, which are not hate speech. Definition of "racial and xenophobia material" of the Additional Protocol is applicable, because both term (violence and hatred) are used with concrete definition and it directs towards hate speech.

Now we examine, how is it possible to use the term, clear and present danger" instead of hate speech?

„ Clear and present danger 'was introduced in the United States. It was a term used by Justice Oliver Wendell Holmes, concerning the ability of the government to regulate speech against the draft during World War I.

[22] European Court of Human Rights, Hate Speech analyze, Racial Hate Speech, Féret v. Belgium (no. 15615/07)

The U.S Constitution like Convention defined the right to freedom of expression, press and assembly. Note, that the free clause does not protect obscenity, defamation, fighting words, sedition or hate speech. That's why clear and present danger was adopted by the Supreme Court of U.S. to determine under what circumstances limits can be placed on First Amendment freedoms of speech, press and assembly.

There is act of clear and present danger that is characterized by intention, imminence and likelihood of the threat coming to fruition.[24]

Notion of Clear and present danger and notion of hate speech seemed to like each other. Both of them limit freedom of expression in some circumstances. But, clear and present danger is a much broader notion than notion of hate speech and it includes also hate speech. The features, which are characterized by a clear and present danger's actions are characterized by hate speech each actions. But notion of hate speech is a more specific direction, as it defines specific actions like racial hatred, xenophobia, anti-Semitism or other form of hatred based on intolerance xenophobia, anti-Semitism or other form of hatred based on intolerance and notion of clear and present danger is a more broad, general and its definition does not define specific actions like hate speech definition. It list the criteria that characterize the behavior of the action, which is regarded as clear and present danger and restrict freedom of expression.

It follows that we can say openly that using of notion of clear and present danger imply notion of hate speech and on the contrary , using of notion of hate speech imply notion of clear and present danger.[25]

In conclusion, notion of violence and hatred are broad concept, which can be used in various contexts. THE Court's decisions showed that independently of each term use cannot mean hate speech, because as noted above, they express different actions and not hate speech, but using of the term hate speech implies that there is racial hatred, xenophobia, anti-Semitism or other form of hatred based on intolerance. And the violence hate speech additional requires results with a person's physical or mental damage. Using of the term violence implies hate speech if there are cumulatively follows criteria:1)motivation and aim- racial hatred ,xenophobia, anti-Semitism or other form of hatred based on intolerance; 2) spread, incite, promote or justify racial hatred, discrimination and hostility against minority ; 3) results- a person's physical or mental damage. And using of the term hatred implies hate speech if there are cumulatively follow criteria: 1)

[24] Hate Speech : A Comparison Between The European Court of Human Rights And The United States Supreme Court Jurisprudence , Regent University Law Review, page 142; A Clear And Present Danger- The threat of Europe's hate speech laws -Paul B. Coleman

[25] Hate Speech : A Comparison Between The European Court of Human Rights And The United States Supreme Court Jurisprudence , Regent University Law Review

racial hatred ,xenophobia, anti-Semitism or other form of hatred based on intolerance; 2) spread, incite, promote or justify racial hatred, discrimination and hostility against minorities .[26]

Therefore, the notion of violence and hatred requires concrete definition alternatively and cumulatively to imply hate speech. Both of them must be concrete like violence and hatred against racial, xenophobia minority. Because of both terms are broads' concepts. That's why, we conclude that definition of racial and xenophobia material of the Additional Protocol is well formed.

The notion of clear and present danger is possible to use instead of hate speech, as both of them have same features, furthermore they limit freedom of expression in some circumstances. But differ of them is that notion of clear and present danger is more broad concept than hate speech, that is a specific direction and includes more concrete acts like racial hatred, xenophobia, discrimination ,hatred against minorities. And as noted above, using of term clear and present danger implies the term hate speech and on the contrary, using of the term hate speech implies the term clear and present danger.[27]

The European Court of Human Rights must make clear through its jurisprudence that, indeed, freedom of expression can only be limited in cases of necessity, and only then where the limitation is narrowly tailored and proportionate to one of the legitimate aims enumerated by Article 10 of the Convention. As with the settled case law of the United States Supreme Court, this means that limitations to free expression should be limited to speech that leads to an imminent and objective threat of violence. Established jurisprudence in Europe and the United States makes clear that existing time, place, and manner restrictions, as well as civil remedies such as for defamation and libel, are more than sufficient in protecting conflicting rights.

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

What are the justifying elements for the difference between the two approaches (exclusion in conformity with art17 of the Convention and restriction in conformity with art 10.2 of the

[26] Organization for Security and Co-operation in Europe The Office of the Representative on Freedom of the Media, report about freedom of expression on the Internet,pages 49-62

[27] European Court of Human R ights cases and decisions : Leroy v. France (no. 36109/03), Féret v. Belgium (no. 15615/07), Faruk Temel v. Turkey (no. 16853/05)

Convention) made by the ECHR on hate speech? Can these elements be objectively grounded? What about subsidiary and margin of appreciation?

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides the right to freedom of expression: 10 (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. The ECHR has repeatedly held that "freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for it`s progress and each individual`s self-fulfillment.

The ECHR has also held on numerous occasions that freedom of expression must be protected. The court has explicitly stated that freedom or expression protects not only the information and ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also protects those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society. While freedom of expression is subject to exceptions must however, be construed strictly, and the need for any restrictions must be established convincingly.

The right of freedom of expression is a fundamental human right which finds protection in all major human rights systems, as well as in national constitutions. At the same time, it is not an absolute right, and it may be limited to protect overriding public and private interests, including equality and public order.

International law contains a number of provisions which provide a framework for balancing freedom of expression against these interests in the particular context on hate speech.

It is clear that inciting an act in not the same thing as causing it. At the same time international court often looks for causation-related factors when assessing whether speech incites hatred. In the case of Ross v Canada, a teacher was removed from the classroom for his anti-Semitic, Holocaust denial publications. The Supreme Court of Canada noted the evidence that a"poisoned environment" had been created within the relevant school board and held that "it is possible to reasonably anticipate the causal relationship". Between that environment and the authors' publications. The HRC held that this satisfied the necessity of expression and that, as a result, there was no breach of this right. Hate speech, as defined by the Council of Europe,

covers all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin. The issue of racist or hate speech engages both Article 10 and Article 17 of the European Convention on Human Rights. The early admissibility decisions of the Commission, invoking Article 17 alone, or article 10 in conjunction with art 17, reflected a confused understanding of the relationship between the provisions. The Lehindeux and Isorvi vs. France (1996) judgment of the European Court on Human Rights clarified that Art 17 applies only in the context of Holocaust denial and related questioning of historical facts, and as a result, racist or xenophobic speech against minorities is protected under Art 10(1) of the Convention. The article asks under Art 10(1), interference being allowed only when balanced against the conditions of Article 10(2), or whether all such speech should be condemned and attacked under art 17. The philosophical arguments and legal implications of both approaches are analyzed. Finally the desire to protect criticism of religion at the European level is exposed in the context of the evolving meaning of the team "hate speech".

Racism as for example in Glimmerveen and Hagenbeek v Netherlands and in T. v. Belgium. These cases were held to be manifestly unfounded under Article 17. ECHR, and thus declared inadmissible by the European Commission for Human Rights. This article, an in built safety mechanism, was designed in order to prevent provisions of the Convention from being invoked in favors or activities contrary to its text or spirit. It reads: "Nothing in this Convention maybe interpreted as implying for any State, group or person any right to engage in any activity of any act aimed at the destruction for any of the rights and freedoms set forth herein or are their limitation to a greater extent that is provided for in the Convention."

Harmonization of national legislation

In this chapter, for purpose of the process of harmonization of national legislation will be discussed measures taking into account the principle of proportionality. On the first stage, will be demonstrated the brief historical background of human rights development in segment of xenophobia and racism and then in extended way will be answered questions about proportionality and harmonization of national legislations.

Universal Declaration of Human Rights adopted on 10th of December in 1948 underlines that 'recognition of the inherent dignity and of the equal inalienable rights of all members of the

human family is the foundation of freedom, justice and peace in the world'.[28] (Shaw, 2012) There is a comprehensive agreement about vital role of human rights in the international structure; as well, there is the significant confusion, because of their definite nature and role in international law. Definition of what is 'right' is under question and under heating debates in jurisprudential field. For instance, some 'rights' are designated as immediately enforceable mandatory commitments, others merely as indicating a conceivable future trend behavior. The issue of enforcement and prohibitions in international law related to human rights is another problem and can influence the characterization of the phenomenon. [29] These principles define an applicable balance between the human right to freedom of expression, guaranteed in International Law and regional human rights instruments. Moreover, almost every national constitution forced to protect individual reputations, widely accepted by international human rights instruments and the laws of all countries.[30] (19, 2000) Budapest Convention on Cybercrime elaborated by the council of Europe with the participation of Canada, Japan, South Africa and the USA and signed in 2004 in Budapest. As regards to Protocol of on Xenophobia and Racism committed through Computer Systems signed in 2003 and entered in force since 2006. [31] (Europe, 2013) The Convention on Cybercrime is the first international treaty, which conducted to look at and address Computer crime and Internet crimes by harmonizing national laws. This will lead to the improvement of investigative techniques and increasing role in cooperation between the nations.[32] (Europe, Convention on Cybercrime, 2013)

Principle of proportionality

[28] Shaw, M. N. (2012). *International Law*. New York: Cambridge University Press.

[29] Ibid p 266

[30] 19, A. (2000, August). *Library*. Retrieved from www.article19.org: http://www.article19.org/resources.php/resource/1802/en/defining-defamation:-principles-on-freedom-of-expression-and-protection-of-reputation

[31] Europe, C. o. (2013, August 10). *Conference 2010: Reports, presentations, resources*. Retrieved from Council of Europe: http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/cy-activity-interface-2010/presentations/Ws%203/cyber_octopus_WS_3_alexander_CCC_global_frame.pdf

[32] Europe, C. o. (2013, August 12). *Convention on Cybercrime*. Retrieved from Council of Europe: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=185&CL=ENG

The proportionality principle emerged in Aristotle's theory that the just is a proportion between two parties, negotiated by an abstract principle.[33] (Liesbeth Huppes - Cluysenaer) The general principle of proportionality illustrates a key aspect of contemporary legal thought that connects both positive and natural law. In addition, general principle of proportionality (means end rational review with strict scrutiny for suspect classes) influence that state action must be a rational means to a permissible end that does not breach fundamental human rights.[34] (Engle, 2012) Beside these explanations, proportionality as a universal principle for resolving fundamental conflicting norms appears one the pillar vectors that serve convergence of common law and civil law in the globalized law system.[35] (Emiliou, 1996) This law principle created dated back centuries ago, in modern law systems encompassing in different areas of law and usage is a very broader. In this brief overview of this principle, will be illustrated a short and actual topics about the concept of proportionality related to this research. According to Eric Engle article about the history of the general principle of proportionality, author reviews the principle of proportionality in a term of "balancing" perspective. *"The term "balancing" in law is used to indicate several different things, namely: 1) Commutative justice – After application, the scales of justice are restored to their ex ante balance, e.g., lex talionis. 2) Cost-benefit analyses – We weigh the costs and benefits of a policy against the costs and benefits of another policy and determine which method generates the most social wealth."*[36] (Engle, 2012) On the contrary, as a result the principle became instantiated into the law it involved in many law domains. The principle appears in a law of self-defense, then it progressed on international law level and it involved in the field of law of war; then as the principle of police law - as the law of crime and punishment.[37] (Susnjar, 2010) Topic about hate speech in consideration the principle of proportionality is a very complex. It needs to determine the specific description, how it relates to the brackets of proportionality. The authors, of the European Convention on Human Rights committed to base an institutional framework

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[33] Liesbeth Huppes - Cluysenaer, N. M. (n.d.). Aristotle and The Philosophy of Law: Theory, Practice and Justice. In N. M. Liesbeth Huppes - Cluysenaer, *Aristotle and The Philosophy of Law: Theory, Practice and Justice* (pp. 268-275). New York: Springer.

[34] Engle, E. (2012). The History of the General Principle of Proportionality: An Overview. *10 Dartmouth Law Journal*, 1-2.

[35] Emiliou, N. (1996). *The principle of proportionality in European law: A comparative study*. London and Cambridge: Kluwer Law International.

[36] Engle, E. (2012). The History of the General Principle of Proportionality: An Overview. *10 Dartmouth Law Journal*, 9-10.

[37] Susnjar, D. (2010). *Proportionality, Fundamental Rights and Balance of Powers.* New York: Martinus Nijhoff.

connected to democratic values in order to tackle with extremism issues in the world. European Court of Human Rights identified number of forms of expression, which listed as offensive such as, racism, xenophobia, anti-Semitism, aggressive nationalism and discrimination against minorities and immigrants. [38] (speech") The concept of proportionality in this legal research refers to balance between two legal rights, freedom of expression and protection of reputation (anti-defamatory) law. If between parties in concrete case there is a mediate balance, it should not breach rights of any party. However, the Court is also attempts to act in a careful way to make a distinction in its findings between, on the one hand, genuine and serious incitement to extremism and, on the other hand, the right of individuals to express their views freely and to "offend, shock or disturb" others.[39]

Measures for achievement the harmonization of national legislations

In this topic, will be discussed measures for harmonization of national legislations. This paragraph will assess all possible variations and provide clarified answer about harmonization of a national legislations related to the hate speech and all possible reforms which will be effective for achievement this task. Harmonization of the law, itself means the creation of common standards across the nationwide. Harmonization of anti-defamatory law in national legislations aims to create constituency of laws, regulations, standards and practices. This is a long process and requires as harmonized integration with the rest of state legislation. The reformative perspective should be smooth by checking all legislative bills and norms that they are in accordance of new rules in the country about the hate speech.[40] (Gerda Falkner, 2005) If these concepts and convention on cybercrime will apply to other state, then these principles will be the same for everyone without giving advantage to anyone. To be more specific, Budapest convention should applied to all countries, to achieve equality and effect of indoctrination of people about these values and principles, which stated in above-mentioned convention. However, as Noam Chomsky criticized the concept of indoctrination, this process should not perceive as a totalitarian approach or practice. [41] (Chomsky, 2013) Process of harmonization by

[38] Recommendation No. R97 (20) of the Committee of Ministers of the Council of Europe on "hate speech"

[39] Handyside v United Kingdom (no. 5493/72), § 49, 7.12.1976

[40] Gerda Falkner, O. T. (2005). *Complying with Europe: EU Harmonisation and Soft Law in the Member States (Themes in European Governance)* . Cambridge: Cambridge University Press.

[41] Chomsky, N. (2013, August 21). *Propaganda, American-style.* Retrieved from http://www.zpub.com/un/chomsky.htmlionality: An Overview. *10 Dartmouth Law Journal*, 1-2.

nature of this concept directly refers to incorporation different legal systems under a basic framework. It should take into account the local factors in specific state and general principles to achieve consistent framework of law. As regards the measures, it will be very useful to draw an example about model of harmonization of hate speech how could be achieved on national level. The similarity of harmonization could take from European Union, by verbatim of legislative act of Directives. [42] (EU Legislation: What is an EU Directive? , 2013) The legal effect based on the concept of Directives, could achieved in the same way. Adopted and created directives should derived to the member states including with a special scheme and timetable for the implementation of the aimed outcome. [43] (Linos, May 2007)

Legal implications of "hate speech"

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

Hate speech is a communication that carries no meaning other than the expression of hatred for some group, especially in circumstances in which the communication is likely to provoke violence. Hate speech is, outside the law, communication that vilifies a person or a group based on discrimination against that person or group.[44] (Dictionary.com, 2013) In law, hate speech is any speech, gesture or conduct, writing, or display which is forbidden because it may incite violence or prejudicial action against or by a protected individual or group, or because it disparages or intimidates a protected individual or group. The law may identify a protected individual or a protected group by certain characteristics.[45] (Criminal Justice Act 2003, 2013)

It is an incitement to hatred primarily against a group of persons defined in terms of race, ethnicity, national origin, gender, religion, sexual orientation, and the like. Hate speech can be any form of expression regarded as offensive to racial, ethnic and religious groups and other

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[42] *EU Legislation: What is an EU Directive?* . (2013, August 21). Retrieved from http://www.europeanlawmonitor.org/: http://www.europeanlawmonitor.org/what-is-guide-to-key-eu-terms/eu-legislation-what-is-an-eu-directive.html

[43] Linos, K. (May 2007). How Can International Organizations Shape National Welfare States? Evidence From Compliance With European Union Directives. *Comparative Political Studies*, vol. 40 no. 5 547-570 .

[44] Dictionary.com. (2013, August 29). *Definitions for "hate speech"*. Retrieved from www.dictionary.com: http://dictionary.reference.com/browse/hate+speech?s=t

[45] *Criminal Justice Act 2003*. (2013, August 29). Retrieved from www.legislation.gov.uk: http://www.legislation.gov.uk/ukpga/2003/44/section/146

discrete minorities or to women.[46] (Kinney, 2008) According to American Bar *"Hate speech is speech that offends, threatens, or insults groups, based on race, color, religion, national origin, sexual orientation, disability, or other traits. Should hate speech be discouraged? The answer is easy—of course! However, developing such policies runs the risk of limiting an individual's ability to exercise free speech. When a conflict arises about which is more important—protecting community interests or safeguarding the rights of the individual—a balance must be found that protects the civil rights of all without limiting the civil liberties of the speaker."*[47] (Bar, 2013)

Is a legally binding definition of "hate speech" on the national level possible?

Above mentioned "hate speech" definition could be legally binding on the national level for countries, signed the Convention on Cybercrime and the protocol. The framework of this goal should be concentrated on the reform of law and the process of implication on national legislative level. Basically, the framework should be based on public policy issued by the government and it should consist the theoretical explanation what is hate speech including the scenarios used in a sense of gestures. Our argument about hate speech is that, it should be criminally restricted and this statement is based on injuries provoked by widespread stereotypes and popular prejudices.[48] (Tsesis, 2002) Prejudice plays pivotal role in discriminatory expressions, those lead to combustible intolerance. Examples such as: "Most Indians are drunks, but he's hard worker," "He may be a Jew, but he's not a greedy," "I am usually careful around blacks, but he can be trusted" these all reflects to prejudice discriminatory language. [49] (Jr, 1995) To prevent crimes against humanity, narrowly tailored laws should be adopted prohibiting the dissemination of misethnic stereotypes which are intended to elicit crimes against minorities. [50] (Baez, 2001) Hate speech is a public expression of discrimination against a vulnerable group (based on race, gender, sexual orientation, etc.) and it is counter-productive

[46] Kinney, T. A. (2008). *Hate Speech and Ethnophaulisms*. Retrieved from The International Encyclopedia of Communication Blackwell Reference Online.

[47] Bar, A. (2013, September 1). *Students in Action*. Retrieved from www.americanbar.org: http://www.americanbar.org/groups/public_education/initiatives_awards/students_in_action/debate_hate.html

[48] Tsesis, A. (2002). *Destructive Messages How hate speech paves the way for harmful social movements*. New York.

[49] Jr, H. L. (1995). *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties*. New York: New York Press.

[50] Baez, B. (2001). *Affirmative Action, Hate Speech, and Tenure: Narratives About Race and Law in the Acadeour*. London: Routledge.

not to criminalize it. A society that allows hate speech to go unpunished is one that tolerates discrimination and invites violence. Decades of hateful anti-abortion rhetoric in the United States led to assassinations of providers, because hate speech is a precursor to violence. [51] (Gerstenfeld, 2013) Hate speech has no redeeming value, so we should never pretend it occupies a rightful spot in the marketplace of ideas or has anything to do with "rational debate." Challenging hate speech through education and debate is not enough. Governments have a duty to protect citizens and reduce discrimination and violence by criminalizing hate speech. Defining a crime with certainty, clarity, and consistency is always a somewhat subjective exercise, but one that courts are expressly designed to do. Hate speech can be defined and prosecuted fairly without going down a slippery slope. An example is Canada's "Taylor test," in which hate speech must express "unusually strong and deep-felt emotions of detestation, calumny and vilification." Specific arrests or even prosecutions of hate speakers may not meet the test of criminal hate speech, and do not prove that hate speech laws are counter-productive.[52] (Tatchell, 2013) In our view, however, only hate speakers with a wide audience or who engage in repeated ongoing hate speech should be prosecuted. The justice system is a human institution and abuses can happen, but the answer is to refine and reform laws, not scrap them.

Legal implications and differentiation of related notions

Along with the intent and results that are prohibited the incitement is deemed to be one of the key aspects of hate speech.[53]

The most general contextual elements definition of hate speech given by the Council of Europe's Committee of Ministers "Recommendation 97(20) on hate speech" which stipulates: "For the purposes of the application of these principles, the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."

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[51] Gerstenfeld, P. B. (2013). *Hate Crimes: Causes, Controls, and Controversies* . California: SAGE Publications.

[52] Tatchell, P. (2013). *Should hate speech be a crime?* Retrieved from www.petertatchell.net: http://www.petertatchell.net/free_speech/should-hate-speech-be-a-crime.htm

[53] Toby Mendel, Hate Speech Rules Under International Law, p.5

Therefore spreading, inciting, promoting or justifying appear to be the distinguished forms of the hatred, but the line which separates them is still vague.

Article 20(2) of the International Covenant on Civil and Political Rights states the following: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

In comparative analyzes with notions the "incitement to hatred" and "provocation", notion of "intimidation" refers to the fact of frightening. For instance, Connecticut passed a law, declaring that "A person is guilty of intimidation based on bigotry or bias in the third degree when such person, with specific intent to intimidate or harass another person or group of persons because of the actual or perceived race, religion, ethnicity, disability, sexual orientation or gender identity or expression of such other person or persons:

(1) Damages, destroys or defaces any real or personal property,

(2) Threatens by word or act to do an act described in subdivision (1) of this subsection or advocates or urges another person to do an act described in subdivision (1) of this subsection, if there is reasonable cause to believe that an act described in said subdivision will occur."[54]

The "incitement to hatred" is prohibited under Georgian legislation on the constitutional level.

Pursuant to Article 25(3) of the Constitution of Georgia "The formation and activity of such public and political associations aiming … propagandizing war or violence, provoking national, local, religious or social animosity, shall be impermissible."

[54] *Conn. Gen. Stat. § 53a-181l (2010)*

ELSA Germany

National Researchers

Sonja Hagenhoff

Eileen Müller

Thorsten Hagelgans

Alexander Trummer

Academic Adviser

Brain Valerius

National Coordinator

Julia Bianca Stock

1 National definition of Hate Speech

In your national legislation, how is hate speech defined? (e.g.: Is hate speech defined as an act?) (see Delruelle, "incitement to hatred: when to say is to do", seminar in Brussels, 25 November 2011).

Within the German legislation a definition of „hate speech" cannot be found. The reason for this is that „hate speech" is punishable under various laws with a wider scope of punishable actions besides „hate speech" making a definition unnecessary.

In 2008 the EU tackled a need to deal with hate speech1. Within the German Penal Code (GPC) only article 130 was changed to the extend of protecting individuals as well as groups2. But this is not the only law against hate speech3. Within this wide scope various articles of the German Criminal Code can be breached.

§111 – public incitement to crime

Whosoever publicly, in a meeting or through the dissemination of written materials (article 11(3)GPC) incites the commission of an unlawful act, shall be held liable as an abettor (article 26).4

This article is meant to protect the public order due to the fact that the culprit promotes to the public to commit an unlawful act5. It is possible to commit this crime in two ways; in a meeting or through the dissemination of written materials.

The element "publicly" requires that the incitement is made in front of an audience with an undefined number of people and not further defined individuals being able to attend it6. It is further possible to incite in "public" if an email, a homepage or a downloadable document that is accessible by an unlimited amount of people7.

The element of meeting crosses over with the element of public but can be challenged if a meeting is only for a certain group of people (e.g. labour party meeting or sports club meeting8).

Another way to commit a crime under §111 is to "incite with written material". Written material is further defined in §11, 3 and includes all physical ways to distribute content9. Since 1997 10 data storages have been included to this article. Due to the fact that "written documents" are defined as "physical kind of content" a written material of a data exist since it is physically on a

[1] European treaty 2008/913/JI.
[2] BT-Drs. 17/3124, p.5.
[3] http://www.nohatespeechmovement.org/ – accessed 15.09.2013.
[4] Translation provided by Prof. Dr. Michael Bohlander, via gesetze-im-netz.de – accessed 15.09.2013.
[5] von Bubnoff, Leipziger Kommentar (LK), §111, mn. 5.
[6] BGH NStZ 1998, 403 (404); Dallmeyer, BeckOK-StGB §111, mn. 5 – accessed 15.09.2013.
[7] Bubnoff, LK, §111, mn. 13C; Bosch, Münchener Kommentar zum StGB (MüKo-StGB), §111, mn. 23.
[8] Against: Bosch, MüKo-StGB, §111, mn. 11; pro: von Bubnoff, LK, §111, mn. 14, RGSt 57, 343.
[9] Bosch, MüKo-StGB, §111, mn. 22.
[10] BT-Drs. 13/7385, p.12.

hard-drive or RAM (in form of electrons or a chemical reaction)11. It is therefore possible to incite by sending out pictures, documents or such things to via mailing list and act against the §111 since the requirement to distribute is met12.

The last requirements is that the culprit has to incite. In order to "incite to an unlawful act" a certain level of motivation has to be reached13. It is not enough to welcome a certain harm to someone (e.g. "kill the government") rather than the need to make it clear that the culprit is serious about what is said and the crime is defined to a certain degree14 (e.g. "Kill the Jew", "Rape turkish women to show them to have respect").

§130 StGB – Incitement to hatred15

The incitement to hatred is the one article that has been changed in order to approach the EU-treaty16 regarding hate speech. This article is meant to secure the public order, the human dignity and to foster the international understanding depending on section17.

In order to be held liable under §130 it is required that the act is done in a way to "capable to disturb the public peace". The public peace means that is possible to live together peacefully and in legal certainty18. This implies that the public order has not to be disturbed, meaning it is enough that it could be19. It is required that from the view of a third party a serious concern arises that a considerable amount of people will be anxious and may lose the faith in the legal certainty20. If this is the case is judged by assuming the events will take place as they are likely to occur21.

The actions leading to the concern can either be inciting hate or violent/arbitrary actions (section 1) or assaulting the human dignity (section 2). Both times these actions have to be against a "segment of the population" meaning "a significant amount of people – enough to be of importance of daily live – with an external or internal distinctive feature marking them as an entity" (e.g. political, ethical, racial religious ...)22.

The second paragraph deals with written materials as defined in §11, 3. Unlike the first paragraph it is not required to disrupt the public peace23. It also differs in regard to the protected groups.

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[11] Valerius, BeckOK-StGB, §11, mn. 60; Bosch, MüKo-StGB, §111, mn. 22; Radtke, MüKo-StGB, §11, mn. 118.
[12] Bosch, MüKo-StGB, §111, mn. 23; BGHSt 47, 58f.
[13] RGSt 47, 411 (413).
[14] Bubnoff, LK, §111 mn. 23, Bosch, MüKo §111 p. 300, mn. 8
[15] Whole article in english: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1200
[16] European treaty 2008/913/JI; BT-Drs. 17/3124
[17] Miebach/Schäfer, MüKo, §130, mn. 2; Bubnoff, LK §130, mn. 6; Against: OLG München 2 Ws 242/85; In favour: OLG Karlsruhe, NJW 1986, 1277
[18] RGSt 18, 314-316; BGH 4 StR 406/73; Schönke/Schröder/Lenckner §126 mn.1
[19] RGSt 34, 268-271; BGHSt 16, 49, 56; Miebach/Schäfer, MüKo §130, mn. 17; Bubnoff, LK §130, mn. 13
[20] Bubnoff, LK §126, mn. 9; BGH NJW 1987 1898; Miebach/Schäfer, MüKo §130, mn. 16
[21] BGHSt 34, 329, 332; BTDruck 7/4549 p.8; Bubnoff, LK §126, mn. 9
[22] BGH GA 1979 391; OLG Hamburg NJW 1975 1088; Miebach/Schäfer, MüKo §130, mn. 21
[23] Miebach/Schäfer, MüKo §130, Rn. 50; Bubnoff, LK §130, mn. 32;

Whereas paragraph 1 is protecting people living in Germany; since paragraph 2 is missing the "public peace" part it also includes "segments of population" that are not living in Germany24.

Due to fact that the paragraph is dealing with written material (§11, 3) it is also possible to have a rather early liability. In an ruling from 1983 The Federal Court of Justice decided that a finished document, ready to be printed and intended to be published can already be punished under §131 25. Due to the fact that §131 and §130, 2 are the same this has to apply to §130 as well.

§185 – Insult

A rather wide article is §185 since it deals with "an dishonouring proclamation of ones' disrespect or contempt"26. The requirements for such an act are that the statement is depriving someones self determination (e.g. liar, cheater, nazi, fascist)27.

§189 - Violating the memory of the dead

The last article deals with the memory of a dead person and the act to violate the memory of him. One requirement is that the "defamation" is that strong that is exceeds the normal standards of §§185-188 28.

In regards to hate speech this can – for example – be breached with the so called "Auschwitzlüge" (lying about what happened in Auschwitz). If someone is denying the fact that Jews where killed, justifies the killing or glorifies the killing. Not only is it possible that this does fall under §130, 4 (if other requirements are met) but it can also fall under §189 even though this is highly disputed.

2 Contextual elements of Hate Speech

What are the key contextual elements to identify a "hate speech"? Does the multiplying and wider effect of online dissemination always mean higher potential impact of online hate speech; why?

(Online) Hate Speech occurs in all societies. Its aim is to radicalize people or to discriminate people. Hate speech did not start as recently as the internet. For example hate speech already existed in the time of National Sozialism. It was directed against Jews and other minorities. Following the end of the World War II., the International Military Tribunal at Nuremberg29 had to judge more than 20 people who created or disseminated Nazi propaganda. They were punished because of their actions during the Nazi regime, but not because of the dissemination of hate speech.
Legality of hate speech was a question, which stayed unanswered for some time, because it was not easy to get a clear definition.

[24] Btdrucks. 12/6853; Bubnoff, LK §130, mn. 33; Miebach/Schäfer, MüKo §130, Rn. 50
[25] BGHSt 32, 4ff; JZ 2002, p 308, 3a
[26] Zaczyk, Nomos Kommentar (NK), p375, mn. 2; OLG Köln NJW 1993, 1486
[27] Zaczyk, NK, p375f, mn. 6,9
[28] Zaczyk, NK, p398, mn. 4
[29] http://www.montesquieu-institute.eu/9353202/d/onderzoekspapers/jieskje%20hollander.pdf

In the following time, there has been a discussion about hate speech and its dissemination. Core questions have been:

What exactly is the role of hate speech and propaganda in a relation to (extreme) violence?30

Do words create direct violence? Do they treat people to commit crimes?

Can violence be averted by punishing speech? When is it permissible and who is allowed to make such a decision? When does limiting speech constitute an infringement on free speech?31

Those questions are not finally answered. Each country has its own view on it. There are some attempts to rule in a wider area (e.g. Additional Protocol to the Convention on Cybercrime), but there is no clear and definite law, which has to be considered in every country of the European Union.) There are big differences between Germany and for example the United States of America. In America freedom of speech has a much higher status than in Germany. Here in Germany it is possible to interfere freedom of speech to protect the youth or the right of personal honor.3233

Despite its frequent usage, no universally accepted definition of "hate speech" exists. But some people have made some thoughts on the key elements of hate speech so that it could be easier to get a definition which is accepted.

Most states have a law which prohibits a special field of hate speech (e.g. prohibition of denial of genocides), but nothing is ruled in general. The Council of Europe's Committee of Ministers recommends in its publication No. R(97) 20: "…the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."34 This is the only try of definition which is given by governing people of Europe. But it is not bounding; no one is bound to it. Even the Court has never given a precise definition of it.

Hate speech is a broad term that is used to identify a great variety of expressions. In general, hate speech can be identified by its words or symbols (metaphor) which are offensive, intimidating or harassing.35

But sometimes it is not obvious, what the author does mean. So the recipient has to interpret the meaning. Of course the freedom of expression is an internationally recognized human right, but there are restrictions on speech to safeguard other societal values set by national constitutions

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30 Weber, Anne; Manual on hate speech, Council of Europe Publishing, Strasbourg, pages 3-5

31 http://www.responsibilitytoprotect.org/index.php/component/content/article/134-americas/2791-hate-speech-and-group-targeted-violence-the-role-of-speech-in-violent-conflicts

32 See Art 5 I und II GG

33http://www.germanlawjournal.com/pdfs/Vol04No01/PDF_Vol_04_No_01_01-44_Public_Brugger.pdf

34http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec%2897%2920_en.pdf

35 http://www.enotes.com/topics/hate-speech/reference

and international conventions. If there would not be any restriction, discrimination would be advocated and social minorities are not protected by attacks of the social environment.

If a hate speech is published in several media or webpages it could be that more people do recognize it. Publishing such a speech on pages that are not read by a higher number of people, this hate speech will not be recognized. Publishing on social media pages like Facebook or Twitter often has a higher dissemination, because a lot of people are reading it. Often sharing content with other users is visible for everyone and not only by friends or followers. To limit the impact of hate speech in the internet, provider have to be commited to take care on what people are sharing.36

In another view, it depends on how people react to such a hate speech. There are people who feel attacked (despite they are not meant) and spread it to more people. The more people feel addressed the more people will protest against it. So it is spread to a larger group of persons. Of course, now it has a higher impact.

3 Alternative methods of tackling Hate Speech

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

Besides the criminal procedures various opportunities against hate speech exist.

Within the civil law it is possible to grant the victims of hate speech a way for legal actions against the culprit. Compensation, damages and refund for the cost resulting from taking these legal attack? against may be granted that way37.

Although other legal systems provide for the possibility to take civil actions against hate speech, the German Federal Court nevertheless hold in its famous "Toben-decision"38 that the accused is liable under German criminal law for inciting to hatred, even though his behaviour did only give rise to civil liability in Australia.39.

Another approach can be to block websites with criminal content such as child pornography or hate speech. The government – by the German State Treaty on Media Services (Mediendienstestaatsvertrag, MDStV) - is empowered to restrict the access trough the providers40. It is however still under dispute whether or not a website is a "media service". If this is denied the whole legal basis of the above mentioned treaty is taken away, rendering it

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36 Starting Points for Combating Hate Speech Online, by Gavan Titley, British Institute of Human Rights, László Földi, November 2012.

37 Blarcum, Christopher D. van: Internet Hate Speech – The European framework and the emerging american haven. - 2005.

38 BGHSt 46, 212.

39 NStZ 2001, 305.

40 See: Schnabel, Christoph: Sperrungsverfügungen vs. Access-Provider – technische Möglichkeiten und rechtliche Zulässigkeit anhand eines praktischen Beispiels. - Hannover : 2002.

useless in this regard41. Even though it is necessary to have an administrative approval in order to block a website this has not been done very often. In most cases it had been enough to confront the provider with the materials in order to take actions against it on their own accord42.

Apart from that, on 17 February 2010, the German legislator has implemented the so called "Zugangserschwerungsgesetz" (ZugErschwG)43, aiming at combatting child pornography on the internet. Thus, it would also have been possible to pass a similar law on combatting hate speech disseminated on the internt. Yet, the ZugErschwG had been repealed on 29 December 2011.44. Currently, there are many voices calling for deleting internet files.45

It is also possible to restrict a certain group to wear a specific item such as steel-caped boots, knifes, baseballbats or chains in public. This is not a direct approach against hate speech but a way to limit the peer pressure on an individual and give an opportunity to drop out of a radical group46.

Besides the juridical way other chances to tackle hate speech have been established. Such stepts could be supported both by public authorities and private associations. To give some examples:

In Saxony the State Office of Criminal Investigation has created a special unit against right-winged extremism, called SoKo REX (Sonderkommission Rechtsextremismus = special unit for right-winged extremism). The task of this unit is to participate in discussions, talk to children and teenagers about risks, dangers and wrong doing, as well as hosting events in schools and other educational institutions47.

"School without racism" is yet another project gaining more and more attention. Schools awarded with this slogan support project that prevent the rise of racism and do not tolerate racism within the school48.

The simplest way to prevent the rise of such ideas is to integrate immigrants in the local (or national) working associations or (sport-)clubs49.

4 Distinction between blasphemy and Hate Speech based on religion

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

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41 Hoeren, Thomas: Stellungnahme zur geplanten Sperrungsverfügung der Bezirksregierung Düsseldorf (Anhörung am 13.11.2001)
42 See: www.heise.de/newsticker/data/cm-28.05.01-000/
43 BGBl. I S. 78
44 BGBl. I S. 2958
45 See: http://www.sachsen-anhalt.de/index.php?id=36938
46 Oberverwaltungsgericht Bautzen (AZ: 3BS15/00) – 14.03.2000
47 Bundeskriminalamt: Kriminalprävention; Rechtsextremismus-Antisemitismus-Fremdenfeindlichkeit. - Neuwied [u.a.] : Luchterhand, 2000, S 21-24.
48 Bundeskriminalamt: Kriminalprävention; Rechtsextremismus-Antisemitismus-Fremdenfeindlichkeit. - Neuwied [u.a.] : Luchterhand, 2000, S. 51-54.
49 Bundeskriminalamt: Kriminalprävention; Rechtsextremismus-Antisemitismus-Fremdenfeindlichkeit. - Neuwied [u.a.] : Luchterhand, 2000.

In almost every confession of faith blasphemy is a serious crime. In some countries it is a crime to insult someone's religion. For example, in article 40 of the Irish constitution stipulates that publishing media with blashphemic content (speech, text or anything else) should be a punishable offence. Since a reform of the penal code in 2009 there is a paragraph which penalises blasphemy.[50]

Principally, blasphemy is punishable in Germany as well. Section 166 of the German Penal Code criminalises blasphemic speech, but requires the utterance to be capable of disturbing the public peace.[51]

§166 StGB (German penal code) is quite controversial, because criminalising blasphemy infringes on the right to freedom of speech[52]. One problem is that there is the danger, that majority view gets more protected than a minority opinion, because this paragraph could be used partial to prefer an opinion.

In addition the section 166 of the GPC contains very vague terms. It is not clear what constitutes a defamation: Does it cover each and every negative statement? And in which circumstances is a defamation capable of disturbing the public peace?[53]

Hate speech based on religion and blasphemy are both ruled in § 166 StGB. There is no difference in the punishment. The difference is who gets attacked by the statement.

Blasphemy is a defamation of God and hate speech is a defamation of the people who are supporter of a religion. Both kinds of defamation are ruled in §166 StGB. There is no difference in the punishment of these defamations, but there is a difference in who is attacked by the defamation.

5 Networking sites and the issue of online anonymity

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

(see http://frenchweb.fr/debat-propos-racistes-faut-il-contraindre-twitter-a-moderer/96053)

The German Constitution grants a secrecy of communication by post and telecommunications (Article 10, I) which can be limited by a law (Article 10, II).

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[50] Keller, Hellen/ Cirigliano, Luca: „Die Krux mit der Blasphemie – Analyse zweier richterlicher Lösungsansätze". In: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, München, Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V., 2010, S. 403-431

[51] §166 GPC

[52] Article 5 I GG (German constitution)

[53] Muenchner Kommentar, Band 3, §166, Rn 14-18

Due to the fact that the data transported by emails, internet-chats or newsgroups is done by ways of telecommunication means that it is also protected by Article 10 GG. There are however certain differences regarding secured and unsecured connections (e.g. in chatrooms) leading to the result that only secured connections are protected[54].

Considering "hate speech" it is possible to restrict the granted right § 100a I Nr. 1, II Nr. 1d StPO[55], in combination with §130 GPC. Sec 100a(1, 2) StPO restricts fundamental rights, so that investigative measures provided for by sec 100a StPO may only be adopted to investigate a limited number of offences listed in sec 100a StPO.

The additional protocol to the Convention on Cybercrime resulted in changes to the §130 GPC[56]. A surveillance of the telecommunication is only allowed if a decision is made by a judge upon application of the prosecutor (§100b StPO). It is also possible for a prosecutor to demand access to information from an agency regarding his case (§161 I 1 StPO). By enabling the prosecuting authorities to take necessary steps at an early stage, the German legislator aims at averting potential risks and dangers. However, this empowerment of the prosecution does not allow to unproportionally infringe on fundamental rights and thus only provides for less severe measures to be taken.[57]

The Federal Criminal Police Office (BKA) however has its own legal basis in order to store data for future investigations (§8 and §20 BKA-Law).

Another restriction to the Article 10 GG is §96 I Telecommunication Law wich allows to store the IP if a crime has been committed by the ways of telecommunication (§100g I1Nr.2 StPO). This method may only be used if it is the last way to continue the investigation[58].

If saved emails, secured newsgroups or secured chats are the subject of a possible surveillance the legal basis is currently not existing. This means that Article 10 GG may not be limited by federal law ("Ordinary Law") with regard to the above mentioned data[59].

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[54] Klesczewski, Diethelm: Strafaufklärung im Internet – Technische Möglichkeiten und rechtliche Grenzen von strafprozessualen Ermittlungseingriffen im Internet. In: ZstW 2011, S. 737-766.

[55] Code of Criminal Procedure

[56] Hellmann, Matthias; Gärtner, Julia: Neues beim Volksverhetzungstatbestand – Europäische Vorgaben und ihre Umsetzung. In: NJW 2011, S. 961-966.

[57] Meyer-Goßner, Lutz: Strafprozessordnung – Kommentar. 55. Auflage, München : Beck, 2012, § 161, Rn. 1.

[58] Geppert, Martin; Piepenbrock, Herman-Josef; Schütz, Reimund; Schuster, Fabian: Beck'scher TKG-Kommentar. - München : Beck, 2006, § 96, Rn. 3.

[59] Klesczewski, Diethelm: Strafaufklärung im Internet – Technische Möglichkeiten und rechtliche Grenzen von strafprozessualen Ermittlungseingriffen im Internet. In: ZstW 2011, S. 737-766.

6 Tackling the notions of "violence", "hatred" and "clear presence of danger"

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

One aspect of the contextual approach is that the case-law and the additional protocol are constantly compared. By comparing the cases held and the basis which the rules origin from it is guaranteed that the changes made stay in balance to the original intend. It is however the case that in the additional protocol the notions of hatred and violence are always alternative60.

But the approach by the Council of Europe takes also something else into consideration – the circumstances. If a made statement has aspects of racism it is also important under which circumstances it has been made61. The case law adopted two ways to deal with a breach of Article 10 ECHR: "Firstly, the Court can decide to exclude the expression in question from the protection offered by the Convention, by applying Article 17 of the ECHR. But the Court can also asses whether a restriction of freedom of expression is legitimate by applying Article 10(2) of the ECHR."62 By doing so it is important to determine if a statement is made in order to exchange ideas or promote a discussion63 or if it is going out of hand and just promoting racial hatred64. This results in a fine line to judge on and especially not a strict line. Depending on each case, each time the circumstances are different and are taken into consideration. The Court has therefore adopted a policy in late 2002 that frames the criminal actions to a certain amount by stating that hate speech related actions done intentionally should be punished65. In this policy the Council of Europe again states that:

The law should penalise the following acts when committed intentionally:

a) public incitement to violence, hatred or discrimination

Again the notions of violence and hatred are alternative. Especially under the circumstances of the contextual approach it is important to give the court a certain range to act in. The limitation by providing prove that an action would fulfill a sentimental element (hatred) and a physical element (violence) are burdensome and time consuming. If hatred and violence needed to be cumulative a wide loop-whole might be formed, ready to be exploited by not being able to prove the sentimental aspect.

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[60]Chapter 1, Article 2,II ; Chapter II, Article 3,II , Article 6, II

[61]Anne Weber, Manual on Hate Speech p.33

[62]Anne Weber, Manual on Hate Speech p.19; for further definition regarding the approaches see q.7

[63]Gündüz v. Turkey, paragraph 44

[64]Jersild v. Denmark, paragraph 33

[65]ECRI general policy recommendation No. 7, part IV (Criminal law), point 18 (a) to (e).

Summing it up; the additional protocol as well as the General Policy Recommendation No. 7 – the only policy recommendation regarding hate speech and criminal law – are supporting the alternative notion.

A too extreme restriction can provide a problem by limiting the court or the law-creating organs of a government. An example is the USA constitution with the Amendment 1, worded as follows:

Congress shall make no law [...] abridging the freedom of speech, or of the press66

Giving this vast right every statement or threat against a race, religion or minority could be justified and protected by Amendment I of the US Constitution. On the other hand this granted right may also bring forth "certain substantive evils that the United States constitutionally may seek to prevent"67 and leaving the Congress crippled by prohibiting the creation of a law regulating the freedom to a healthy point. It was necessary to establish a certain balance with the granted right and the idea of this amendment.

In 1915 the Supreme Court (henceforth referred to as "Court") – Mr Justice Holmes delivering the opinion – introduced the so called "bad tendency test"68 stating that, publishing or somehow spreading text that is "encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor."

Four years later – in 1919 – the Court, again with Mr Justice Holmes giving the opinion specified the "bad tendency test" further.

„The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."69

It was now necessary to have a "clear and present danger". The results of this verdict was that the requirements to restrict the Amendment I70 became more difficult; but not impossible. Considering the legal footage that existed in the US prior to the above mentioned verdicts it is an opening for a possible charge. A further hindrance is the definition of "clear and present danger". Mr Justice Holmes wrote in the Schenck v. United States (1919) ruling that

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66Cited from http://www.usconstitution.net/xconst_Am1.html – opened on 06.09.2013

67Abrams v. United States - 250 U.S. 616 (1919)

68Fox v. Washington - 236 U.S. 273 (1915)

69Schenck v. United States - 249 U.S. 47 (1919)

70In combination with Amendment XIV it opens states to create laws

"the character of every act depends upon the circumstances in which it is done […]. When a nation is at war, many things that might be said in time of peace are such a hindrance [...] that no Court could regard them as protected by any constitutional right."

What Mr Justice Holmes said is certainly true and opens a possibility to a flexible interpretation however leaves many things on uncertain footage.

In 1969 a speech was held by the Ku Klux Klan (KKK) while holding weapons and having a cross burned. It included the following phrases:

"Nigger will have to fight for every inch he gets from now on.", "Bury the niggers." or "Freedom for the whites."[71]

In the State of Ohio this person was hold liable under the Ohio Criminal Syndicalism statute. The Court however overruled this statute stating that

"the mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action,"[72]

leaving various preachings of hate, violence and defamation not only unpunished but rather protected by the constitution. Overall a balancing phrase like "clear and present danger" is useful in order to determine the weight of the crime and not if a crime/felony has been committed. The higher the danger to e.g. public order, rights of others or amount of people, the harder the verdict.

In conclusion we can see that the Amendment I. granted protection to speeches in every regard for almost 130 years. It was a long struggle to get to the point of a verdict that opened a position for the court, state and congress to actually be able to act for the wellbeing of its citizens. Each time the limitation set by the amendment was opened a little bit, the court had to redefine its course or render the Amendment I. useless.

A parallel aspect can be drawn for the Council of Europe. Limiting the scope of punishable crimes can render the idea behind it useless. The more there is to prove beyond a reasonable doubt, the harder it will become for the law to be effective. The court however is not opening the law for every action by using the alternative notion but rather giving the opportunity to bring a case to court and then decide what to do with it; discard it since a comparison with similar cases leads to the conclusion that a breach of Article 10 has not been made or convict the culprit.

[71]Brandenburg v. Ohio - 395 U.S. 444 (1969)

[72]Brandenburg v. Ohio - 395 U.S. 444 (1969), org. Noto v. United States, 367 U. S. 290, 367 U. S. 297-298 (1961)

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

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

The two approaches adopted by the ECtHR to tackle hate speech:

The ECtHR has adopted two approaches when faced with hate speech to limit the offender's right to freedom of speech: On the one hand, the ECtHR limits the right to freedom of expression by excluding its applicability in conformity with art 17 ECHR ("non-application approach"), and, on the other hand, by restricting the right in conformity with art 10 § 2 ECHR ("approach of indirect application"[73]), thus conciliating and balancing the interests involved[74]. However, there is still no consistency in the jurisprudence of the ECtHR[75], but some tendencies might crystallise by examining its case-law.

As concerns utterances aiming at inciting to hatred, the ECtHR appears to distinguish between statements that do not have any objective and verifiable content (and thus do only aim at defaming others)[76], and those that comment on political, historical, or cultural topics of important public interest[77].[78]

Concerning the denial of genocides and other crimes against humanity, the different approaches adopted by the ECtHR might be explained by referring to the content of the utterance in question: If it questions "clearly established historical facts" it is likely to be excluded from protection under art 10 ECHR. If it concerns topics of "on-going historical debate" the Court might be more willing to not deny protection under art 10 ECHR in the first place, but to consider the circumstances in which the statement had been made, and to decide then whether the actions taken by the national authorities justify the prohibition of the utterance under art 10 § 2 ECHR.[79]

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[73] The term "indirect application" has been used by Arai, in Peter van Dijk and G.J.H. van Hoof [eds.] *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 1085.
[74] Cf. Anne Weber, *Manual on Hate Speech* (Council of Europe Publishing 2009) 19.
[75] See for a thorough overview of the Court's jurisprudence on hate speech Mathias Hong, 'Hassrede und extremistische Meinungsäußerungen in der Rechtsprechung des EGMR und nach dem *Wunsiedel*-Beschluss des BVerfG' [2010] ZaöRV 73.
[76] *Lehideux and Isorni v. France* App no 55/1997/839/1045 (ECtHR, 23 Sept. 1998), para. 47; *Pavel Ivanov v. Russia* App no 35222/04 (ECtHR, 20 Feb. 2007).
[77] *Jersild v. Denmark* App no 15890/89 (ECtHR, 23 Sept. 1994), para. 33.
[78] Grote and Welzel in Rainer Grote and Thilo Marauhn (eds) *Konkordanzkommentar* (= KK-ECHR) (Mohr Siebeck 2006), chapter 18 para 35.
[79] *Lehideux and Isorni v. France* App no 55/1997/839/1045 (ECtHR, 23 Sept. 198), para. 47; *Garaudy v. France* App no 65831/01 (ECtHR, 24 June 2003). But see also *Witzsch v. Germany* App no 41448/98 (ECtHR, 20 Apr. 1999) and *Witzsch v. Germany (no 2)* App no 7485/03 (ECtHR, 13 Dec. 2005).

As regards the EComHR, the Commission appears to have preferred the "approach of indirect application".[80] This approach might be the better one in order to do justice to the demands of the Convention. The ECtHR has emphasised that the right to freedom of speech "constitutes one of the essential foundations of [a democratic] society".[81] The right to freedom of speech is, however, not only the cornerstone of democracy, but also a necessary precondition for exercising other fundamental rights[82]; and should thus be restricted or even excluded only in exceptional cases.

Subsidiarity:

According to the ECtHR, "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. […] The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines."[83] The principle of subsidiarity is clearly to be found in the Convention's articles 1, 13, and 35 § 1.[84] In Kudla v Poland, the ECtHR emphasised the procedural aspect of the principle of subsidiarity, holding that it is primarily the member states who have to provide for effective remedies for the infringement of Convention rights and providing the states with the "opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court".[85]

But the principle also bears a substantive aspect in that the Convention organs will not substitute their own view for that of the national authority with regard to the measures found to be necessary to restrict fundamental rights in order to pursue a legitimate aim[86], for it is primarily the states to implement and give effect to the rights and freedoms under the Convention.[87] This substantive aspect of the principle of subsidiarity is closely linked to the doctrine of "margin of appreciation".[88]

Margin of appreciation:

The "margin of appreciation" has been defined as "the latitude of deference or error which the Strasbourg institutions will allow to national public organs before it is prepared to declare a

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[80] Grote and Welzel *KK-ECHR,* chapter 18 para 35. But see also *Glimmerveen and Hagenbeek v. the Netherlands* (1979) 18 DR 194.
[81] *Handyside v. the United Kingdom* App no 5493/72 (ECtHR, 7 Dec. 1976), para 49. See also *Lingens v. Austria* App no 9815/82 (ECtHR, 8 July 1986), para 41; *Lehideux and Isorni v. France* App no 55/1997/839/1045 (ECtHR, 23 Sept. 1998), para. 55.
[82] Logemann*, Grenzen der Menschenrechte in demokratischen Gesellschaften* (Nomos 2004) 249.
[83] *Handyside v. the United Kingdom* App no 5493/72 (ECtHR, 7 Dec. 1976), para 48.
[84] Petzold in R.St.J. Macdonald and others (eds) *The European System for the Protection of Human Rights* (= ESPHR) (Nijhoff 1993) 44 et seq.
[85] *Kudla v. Poland* App no 30210/96 (ECtHR, 26 Oct. 2000), para 152.
[86] Cf. *Belgian Linguistic case* App no 2126/64 (ECtHR, 23 July 1968), para 10; *Fayed v. the United Kingdom* App no 17101/90 (ECtHR, 21 Sept. 1990), para 81.
[87] Petzold *ESPHR,* 49.
[88] Cf. Petzold *ESPHR,* 59; Anne Weber, *Manual on Hate Speech* (Council of Europe Publishing 2009) 31.

derogation from the Convention, or restriction or limitation upon a right guaranteed by the Convention, to constitute a violation of one of the Convention's substantive guarantees".[89]

The doctrine, having been developed in derogation cases[90], is now closely connected to the limits on the fundamental rights as enshrined in the ECHR in that the margin of appreciation plays an important role in interpreting the vague terms of articles 8 § 2 to 11 § 2[91]. Thus, the margin does not only refer to the finding of the necessity in a democratic society of the restriction of the right to freedom of speech, but also to the measures taken.[92] The member states' discretion, however, is subject to the supervisory jurisdiction of the ECtHR, who reserves the right to make the final judgment on the compatibility of the restriction with art 10 ECHR.[93]

The scope of the margin granted depends on the facts of each individual case[94], with the national authority being left to flesh out the guiding principle within the jurisprudence of the ECHR, which has harshly been criticised as inconsistent[95]. However, as concerns the right to freedom of speech, the following observations can be made[96]: The scope will depend, firstly, on the kind of restriction involved[97], secondly, the type of speech[98], and, thirdly, the nature of the aim pursued by restricting the right[99].

In general, a wider margin will be accorded if there is no consensus among the member states as to what restrictions on fundamental rights are necessary so as to pursue a certain legitimate aim.[100] In order to find such consensus, it has been proposed to take into account legislation of the European Union[101], which could lead to the Court making reference to the Framework Decision 2008/913/JHA on combating racism and xenophobia. Yet, the lack of such consensus

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[89] H.Ch. Yourow, 'The Margin of Appreciation Doctrine in the Dynamics of the Strasbourg Jurisprudence and the Construction of Europe' [1998] ZEUS 233, 238.

[90] Cf. Eva Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' [1996] ZaöRV240, 242 et seq.

[91] Logemann, *Grenzen der Menschenrechte in demokratischen Gesellschaften* (Nomos 2004) 146; S.C. Prebensen, 'The margin of appreciation and Articles 9, 10 and 11 of the Convention' [1998] HRLJ 13, 13.

[92] Grote and Welzel *KK-ECHR,* chapter 18 para 95.

[93] Cf. *Handyside v. the United Kingdom* App no 5493/72 (ECtHR, 7 Dec. 1976), para 49*; Lingens v. Austria* App no 9815/82 (ECtHR, 8 July 1986), para 39*;Lesideux and Isorni v. France* App no 55/1997/839/1045 (ECtHR, 23 Sept. 1998), para. 51.

[94] Christian Calliess, 'Zwischen staatlicher Souveränität und europäischer Effektivität: Zum Beurteilungsspielraum der Vertragsstaaten im Rahmen des Art. 10 EMRK' [1996] EuGRZ 293, 304; Macdonald *ESPHR,* 85.

[95] Cf. Matscher in Fritz Schwind (ed) *Aktuelle Fragen zum Europarecht aus der Sicht in- und ausländischer Gelehrter* (Verl. der Österr. Akad. der Wiss. 1986), 103, 120, 122.

[96] Prebensen [1998] HRLJ 13, 14. See for further elaboration on the subject Anne Weber, *Manual on Hate Speech* (Council of Europe Publishing 2009) 31 et seqq.

[97] Cf. *Jersild v. Denmark* App no 15890/89 (ECtHR, 23 Sept. 1994), para. § 35 *(freedom of press).*

[98] Cf. *Lingens v. Austria* App no 9815/82 (ECtHR, 8 July 1986), paras 42-44, and *Castells v. Spain* App no 11798/85 (ECtHR, 23 Apr. 1992), para 46 (criticism on government)*; Casado Coca v Spain* App no 15450/89 (ECtHR, 24 Feb. 1994), paras 50, 54 – 55 (advertising); *Oberschlick v. Austria* App no 11662/85 (ECtHR, 23 May 1991),para 59 (public debate).

[99] Cf. *Lingens v. Austria* App no 9815/82 (ECtHR, 8 July 1986), para 45 (protection of morals); *Wingrove v. the United Kingdom* App no 17419/90 (ECtHR, 25 Nov. 196), para 58 (protection of religion).

[100] Eva Brems [1996] ZaöRV 240, 276 et seqq.*;* Matscher in Fritz Schwind (ed) *Aktuelle Fragen des Europarechts aus der Sicht in- und ausländischer Gelehrter* (Verl. der Österr. Akad. der Wiss. 1986) 103, 123.

[101] Christian Calliess [1996] EuGRZ 293, 295.

among the member states is only one of several factors allowing for a wider margin, urging the Court to take into consideration, inter alia, the importance of the right restricted in a democratic, pluralist society[102], leading directly to the opinion of the Court on the role of the right to freedom of speech for democracy, restricting the application of art 17 ECHR to offensive utterances (see above).

The doctrine of the "margin of appreciation" might be legitimised for reasons that both refer to practicality[103] as well as to the delicate balance to be struck between European supervision and national sovereignty[104].

8 Harmonisation of national legislation

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

The principle of proportionality serves as barrier to the exercise of power of the European Union (e.g. Art.5 IV ECT – European Community Treaty).

All actions between the European Union and its member states are covered by this principle105. It states that these actions are legal as long as they are required and suitable to achieve the intended goal106.

The European Union is however limited by the Protocol No 2 to the Treaty on European Union (Protocol on the Application of the Principles of Subsidiarity and Proportionality) as well as the adopted principle "margin of appreciation" regarding the rulings on Article 14 ECHR107.

Member States shall now turn their commitments into reality and therefore may be guided by the organs of the European Union to at least achieve a minimum harmonization.

This minimum is tried to be obtained by interpreting various international human right treaties (e.g. Article 6, Article 8 ECHR) through the ECtHR108.

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[102] Cf. Logemann, *Grenzen der Menschenrechte in demokratischen Gesellschaften* (Nomos 2004) 159, referring to *Dudgeon v. the United Kingdom* App no 7525/76 (ECtHR, 22 Oct. 1981), para 52; *Gillow v. the United Kingdom* App no 9063/80 (ECtHR, 24 Nov. 2986), para 55; *Leander v. Sweden* App no 9248/81 (ECtHR, 26 March 1987), para 59.

[103] *Handyside v. the United Kingdom* App no 5493/72 (ECtHR, 7 Dec. 1976), para 48; *Sunday Times v. the United Kingdom* App no 6538/74 (ECtHR, 26 Apr. 1979), para. 59; *Wingrove v. the United Kingdom* App no 17419/90 (ECtHR, 25 Nov. 1996), para 58.

[104] Logemann, *Grenzen der Menschenrechte in demokratischen Gesellschaften* (Nomos 2004) S. 156.

[105] Jarass, Hans D.: EG-Kompetenzen und das Prinzip der Subsidiarität nach Schaffung der Europäischen Union. In: EuGRZ 1994, S.214.

[106] Lenz, Otto; Borchardt, Klaus-Dieter: EU-Verträge Kommentar; EUV-AEUV-GR-Charta. - 6.Aufl. - Köln : Bundesanzeiger-Verl., 2012, Art. 5, Rn. 36.

[107] Stieglitz, Edgar: Allgemeine Lehren im Grundrechtsverständnis nach der EMRK und der Grundrechtsjudikatur des EuGH; zur Nutzbarmachung konventioneller Grundrechtsdogmatik iim Bereich der Gemeinschaftsgrundrechte, S. 83.

Common objectives and general rules shall be set up for the Member States as minimum harmonization approach. This will still give them sufficient freedom in how to implement those at national level. (In this way local, regional or national circumstances can be taken into account a lot better.)

Regardless of this approach a general prohibition on harmonisation (e.g. Article 165, IV TFEU) should not be the goal109.

Member States are always remained free to introduce measures into their domestic laws which go beyond and are more stringent than the minimum requirements laid down by the EU as far as they are compatible with the Treaties. It falls to the Member States to define the extend of the protection they find appropriate, necessary and desirable.

Member States shall therefore be involved as much as possible from the beginning onwards so no safe havens can still exist simply based on a wrong way of interpretation.

Since the only way to secure a powerful European standing is by avoiding disputes over respective areas of authority110.

Besides that it was settled in the treaty of Amsterdam to establish "a space of freedom, security and justice" within the European Union111.

In addition, non-binding measures (e.g recommendations made on EU-level, exchange of best practice, etc.) may have an effect on achieving a full harmonisation throughout the European Community. Efforts must be made all over Europe by the Member States via e.g. the usage of already existing mechanisms as the open method of coordination (OMC) of the EU. The OMC may only rest on soft law mechanisms (e.g. guidelines, best practice) but its effectiveness can help harmonizing national legislation. Especially good practice is a great way for achieving full harmonization throughout Europe since existing regulations and measures may be adopted by the other Member States not wanting to face the fact being the last state on the list of Member States which did not further strengthen the rights of cyber crime victims.

Slowly but gradually conflicting national laws will be eradicated by taking this path and as all national laws may get more stringent than the minimum standard of the EU, they shall be revised in order to achieve a full harmonization step by step.

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108 Stieglitz: Allgemeine Lehren im Grundrechtsverständnis nach der EMRK und der Grundrechtsjudikatur des EuGH, S. 195.

109 Geiger, Rudolf; Khan, Daniel-Erasmus; Kotzur, Markus: Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union; Kommentar. - 7.Aufl. - München : Beck, 2010. Art. 352 AEUV, RN. 7.

110 Hauck, Pierrre: Funktionen und Grenzen des Einflusses der Strafrechtsvergleichung auf die Strafrechtsharmonisierug in der Europäischen Union. In: Strafrechtsvergleichung als Problem und Lösung, S. 269.

111 Sieber, Ulrich; Brüner, Franz-Hermann; Satzger, Helmut; Heintschel-Heinegg, Bernd von: Europäisches Strafrecht. Baden-Baden : Nomos, 2011. § 10, Rn. 3.

All in all minimum standards and practices should be revised concerning cyber crime by the organs of the EU in order that states have a common starting point e.g. on substantive criminal law in the area of cyber crime, procedural law and international judicial cooperation. Member States must shape their fundamental principles themselves – the most relevant steps need to be taken at national level. The EU can only supplement national policy. But it should start now by using the minimum harmonization approach as the first step on their path to full harmonization.

9 Legal implications of "hate speech"

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

A legally binding definition of hate speech is possible, but it is not easy to find. Hate speech is an issue, that is really complex. The first trails dealing with a first draft of hate speech took place before the time of National Socialism. But until today there is no clear definition despite hate speech is as actual as 70 years ago.

Another difficulty to find a legal binding definition is, that there are several possibilities to act against hate speech in the German penal code, for example §130, §166 and §§ 185-189. More detailed information is given in the answer.

Finding a precise definition on the national level is not easy, but on an international level it is even more difficult, because there are more opinions and laws which have to be considered. If one country thinks its opinion is not represented good enough it won't subscribe it.

No country is committed to work on a definition or to sign a final version. This is also a problem. It is not easy to get everyone at a place to debate on it. Due to different law systems it is even more difficult. In different countries, different rights are protected. For example only in Germany the fundamental right freedom of opinion can hardly be restricted by law. In the United States of America freedom of speech can be restricted as recently as there is a clear and present danger for people.

But it is necessary to have a consistent definition which has to be binding for all countries. In times of the internet, radio, TV a clear and strict law has to exist, because actions in those medias do cross the borders of one country. If there would be a clear definition, "hate speakers" could not pick a country where hate speech stands not under punishment.

10 Legal implications and differentiation of related notions

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

Incitement to hatred

The Explanatory report to the Protocol defines "incitement to hatred" as "urging others to hatred, discrimination and violence"[112]. The offence coming nearest to that definition of "incitement" is sec 130(1), no. 1 German Penal Code (hereinafter GPC), which proscribes incitement to hatred. In the German criminal law system, incitement to hatred in the sense of sec 130(1), no. 1 GPC refers to any behaviour that is, objectively, capable of, and, subjectively, intended to, cause or increase a hostile attitude that goes beyond mere contempt.[113] The offence does not require the hostile attitude to actually arise or to result in physical attacks against the offended segment of the population or the offended individual.[114] However, the behaviour, amounting to incitement to hatred, must be capable of disturbing the (domestic[115]) public peace.

"Public peace" refers to a situation of common legal certainty and pacified coexistence of the nation's citizens, as well as the citizens' trust to live in peace and quiet[116], and does not have to actually be disturbed nor endangered.[117]

Examples: qualified Auschwitz Deception[118]; displaying the slogan "Juda verrecke!" ("Judah, die out!") and the swastika on the car[119]. In contrast, it is considered not to incite to hatred, if, without the concurrence of further aggravating factors, prohibition signs are installed in front of restaurants etc., prohibiting certain groups of persons to enter the venue.[120]

Provocation

There is no uniform definition of "provocation". Whereas the Duden defines "provocation" as the act of inducing somebody to do something[121], the Oxford Dictionary describes "provocation" as the "act of doing or saying something deliberately in order to make somebody angry or upset"[122]. The latter, narrower definition is already to be found in the act of inciting to hatred as proscribed by sec 130(1), no. 1 GPC.

In contrast, the first definition of "provocation" is broader, in that the behaviour in question must aim at inducing a third person to do something. Offences penalising a behaviour coming

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112 Explanatory Report, para 14.

113 BGHSt 21, 371 (372); 40, 97 (102); 46, 212 (217). See also Römer, 'Nochmals: Werden Gastarbeiter und andere Ausländer durch § 130 StGB gegen Volksverhetzung wirksam geschützt?' [1971] NJW 1735, and BGH 20 September 2011 – 4 StR 129/11, paras 18 et seqq.

114 Schäfer in Wolfgang Joecks and Klaus Miebach (eds) *Münchener Kommentar zum StGB* (= MK-StGB) (vol 3 2nd edn, C.H. Beck 2012), § 130 para 41.

115 Ostendorf in Urs Kindhäuser and others (eds.) *Strafgesetzbuch* (= NK-StGB) (vol 2, 4th edn, Nomos 2013), § 130 para 16; Lenckner and Sternberg-Lieben in Adolf Schönke and Horst Schröder (eds.) *Strafgesetzbuch* (= Sch/Sch-StGB) (28th edn, C.H. Beck 2010), § 130 para 1a.

116 Higher Regional Court Hamburg NJW 1975, 1088; Schäfer *MK-StGB* (vol 3 2nd edn), § 130 para 22. See for a thorough overview Fischer 'Die Eignung, den öffentlichen Frieden zu stören' [1988] NStZ 159.

117 BGH NJW 2001, 624; Higher Regional Court Hamburg NJW 1975, 1088; Higher Regional Court Cologne NJW 1981, 1280.

118 BHGSt 31, 226 (231 - 232); 46, 212 (216 - 217). See also BGHSt 40, 97 (101); BGH NStZ 1981, 258.

119 Higher Regional Court Coblenz MDR 977, 334.

120 Krauß in Heinrich Wilhelm Laufhütte and others (eds) *Leipziger Kommentar zum Strafgesetzbuch* (= LK-StGB) (vol 5, 12th edn, De Gruyter Recht 2009), § 130 para 42; Lenckner and Sternberg-Lieben, Sch/Sch-StGB, § 130 para 5a; Schäfer *MK-StGB* (vol 3 2nd edn, C.H. Beck 2012), § 130 para 45; *Systematischer Kommentar zum Strafgesetzbuch* (= SK/StGB), vol 3, § 130 para 4 (R September 1998).

121 *Duden Das Fremdwörterbuch* (vol 5, 9th edn, Bibliographisches Institut AG 2007).

122 *Oxford Advanced Learner's Dictionary of Current English* (7th edn, Oxford University Press 2005).

nearest to such broad a definition can be found in sec 130(1), no. 1, alt. 2 GPC (calling for violent or arbitrary actions against certain segments of the population, in sec 111 GPC (public incitement to crime), and in sec 26 GPC (abetting).

Sec 130(1), no. 1, alt. 2 GPC proscribes calling for violent and arbitrary actions against any individual group, determined by their nationality, race, religion, or ethnic origin, against segments of the population or against any individual because of their belonging to such a group or segment, if the behaviour is capable of disturbing the public peace. "Calling" is understood as referring to any utterance towards a third person, with the content that the addressee is ought to commit an offence.[123] "Violent actions" are those that, without right, contradict elementary commandments of humanity, which disadvantage a third person (e.g. by oppressing, persecuting, ostracising).[124] (Examples: pogroms, violent evictions)[125]. "Arbitrary actions", on the other hand, are all other discriminatory acts contrary to elementary commandments of humanity.[126] (Examples: Calling for hindering others from holding public offices, based on their belonging to certain segments of the population[127]; calling for a boycott of Jewish shops[128]).

"Calling for violent or arbitrary actions" in the sense of sec 130(1), no. 1, alt. 1 (incitement to hatred) does not require the inciting behaviour to be conducted in a certain form, so that one and the same behaviour can amount both to incitement to hatred and to calling for violent and arbitrary actions. For instance, the Higher Regional Court of Brandenburg found the slogan "Ausländer raus!" ("Foreigners out!"), having been exclaimed in a group of 50 on their way to a New Year's Eve party, to both incite to hatred and to call for violent or arbitrary action against foreigners.[129] However, "calling for violent or arbitrary actions" is construed more narrowly than "inciting to hatred" in that the former implies an increased responsibility for causing the decision of the addressee to commit such an action. Thus, mere propaganda, typical of "incitement to hatred" under sec 130(1), no. 1., alt. 1 GPC, does not suffice.[130]

Sec 111 GPC imposes criminal liability on calling for unlawful actions, provided that the call has been made publicly, at a meeting, or by disseminating written material. In contrast to "incitement to hatred", under sec 111(1) GPC, the addressee principally has to follow the call, i.e. has to commit the offence.[131] Furthermore, "calling for unlawful actions" does not require the call to be capable of disturbing the public peace.

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[123] Higher Regional Court Stuttgart NStZ 2008, 36.
[124] Altenhain in Holger Matt and Joachim Renzikowski (eds) *Strafgesetzbuch Kommentar* (Franz Vahlen 2013), § 130 para 7.
[125] Altenhain in Holger Matt and Joachim Renzikowski (eds) *Strafgesetzbuch Kommentar* (Franz Vahlen 2013), § 130 para 7. See also BVerfG NJW 2008, 2907.
[126] Lenckner and Sternberg-Lieben, Sch/Sch-StGB, § 130 para 5b.
[127] BGHSt 21, 371 (372 - 373).
[128] Krauß, LK-StGB (vol 5, 12th edn), § 130 para 44; Lenckner and Sternberg-Lieben, Sch/Sch-StGB, § 130 para 5b; Schäfer, MK-StGB (vol 3, 2nd edn), § 130 para 47.
[129] Higher Regional Court of Brandenburg NJW 2002, 1440.
[130] Cf. Higher Regional Court Cologne MDR 1983, 338; Higher Regional Court Karlsruhe NStZ 1993, 389; Bosch, MK-StGB (vol 3, 2nd edn), § 111 para 10. See also BGHSt 32, 310 (312).
[131] Cf Bosch, MK-StGB (vol 3, 12th edn), § 111 para 26; Rosenau, LK-StGB (vol 5, 12th edn), § 111 para 60.

Finally, abetting under sec 26 GPC is defined as evoking the decision to commit the crime envisaged by the abetter.[132]

Intimidation

To intimidate is defined as "frighten or overawe someone, especially in order to make them do what one wants".[133] Such actions are proscribed by sec 240 GPC (using threats or force to cause a person to do, suffer or omit an act), by sec 241 GPC (threatening the commission of a felony) and by sec 126 GPC (breach of public peace by threatening to commit offences).

According to sec 240 GPC, whosoever unlawfully and with force or threat of serious harm causes a person to commit, suffer or omit an act shall be liable to imprisonment not exceeding three years or a fine. "To threat with serious harm" comes nearest to the aforementioned definition of "intimidation", since it refers to holding out the prospect of serious harm, on whose infliction the offender claims to exert influence.[134] The "serious harm" does not have to specifically entail physical or other, racist or xenophobic attacks.

In contrast, sec 241 GPC covers the threatening to commit a felony against the threatened or a person close to him.

The offences of sec 240 GPC and sec 241 GPC differ from "incitement to hatred" under sec 130 GPC insofar as the former require the threat to be communicated to the person the threat is aimed at[135], whereas under sec 130 GPC the victim does not have to become aware of the incitement[136], but the inciting behaviour must only be capable of coming to the knowledge of a wider public[137]. What is more, contrary to the Explanatory Report, which emphasises that, in art 4, the Protocol aims at specifically criminalising threats for racist and xenophobic motives[138], the offences of sec 240 GPC and sec 241 GPC are not limited to such threats.

Finally, the act of "intimidating" is penalised by sec 126 GPC, which imposes criminal liability for threatening to commit certain offences listed in subsection 1 (e.g. murder under aggravated circumstances, sec 211 GPC; murder, sec 212), provided that the act is capable of disturbing the public peace. As well as under sec 130 GPC, sec 126 GPC does not require any actual or impeding disturbance of the public peace.[139] As opposed to the offence under sec 126, which aims at protecting the public from being faced with the threat of committing serious offences, and thus at preventing common upset, fear, and terror within the population, sec 130 GPC goes

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[132] BGHSt 9, 370, 379; Heine *Sch/Sch-StGB*, § 26 para. 4; Kudlich in Bernd von Heintschel-Heinegg (ed) *Strafgesetzbuch Kommentar* (C.H. Beck 2010) § 26 para 12.
[133] Oxford Dictionary. As of 15 Sept. 2013: http://oxforddictionaries.com/definition/english/provoke?q=to+provoke.
[134] BGHSt 16, 386 (387); Eser and Eisele *Sch/Sch-StGB,* Vor §§ 334 ff. paras 30 – 34.
[135] To § 240 GPC: Eisele and Eser *Sch/Sch-StGB*, § 240 para 13. To § 241 GPC: Eser and Eisele *Sch/Sch-StGB,* § 241 para 15; Sinn *MK-StGB* (vol 4, 2nd edn, § 241 para 15.
[136] Krauß *LK-StGB* (vol 5, 12th edn), § 130 para 68; Schäfer *MK-StGB,* § 130 para 25.
[137] Higher Regional Court Coblenz MDR 1977, 334; Higher Regional Court Cologne NJW 1982, 657; Krauß, LK-StGB (vol 5, 12th edn), § 130 para 68.
[138] Explanatory Report, paras. 33 – 35.
[139] Vgl.: BGHSt 34, 329 (331 - 332); Krauß *LK-StGB* (vol 5, 12th edn), § 126 para 5; Lenckner and Sternberg-Lieben *Sch/Sch-StGB,* § 126 para 9; Schäfer *MK-StGB* (vol 3, 12th edn), § 126 para 29.

a step further by also aiming at protecting a minimum standard of tolerance, being an aspect of public peace.[140] However, the Federal Supreme Court has found sec 126 GPC having been breached by creating a "mental environment", in which offences such as those referred to in the threat are likely to be committed.[141] Thereby, it cannot be ruled out that the one and same behaviour in question falls under sec 126 GPC as well as under sec 130 GPC. However, such a case – as far as can be seen – has not yet been decided by the German courts.

11 Comparative analysis

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

Germany:

The German legislature has implemented the Protocol by adjusting the offence of "incitement to hatred" under sec 130 GPC to the requirements set forth by the Articles of the Protocol.[142] The amendments of sec 130 GPC entail an expansion of the group of persons protected, now also comprising, inter alia, attacks against individuals, and a specification of the characteristics by which the protected groups are to be defined against the rest of society. Further amendments were, according to the legislature, not necessary to fully comply with the implementation obligations under the Protocol.[143] For the same reason, the legislature did not find it necessary to make a reservation in accordance with art 6(2)(b) of the Protocol.[144]

Art 3, Dissemination of racist and xenophobic material through computer systems

Art 3 of the Protocol criminalises the dissemination of racist and xenophobic material through computer systems. According to art 2(1) racist and xenophobic material means any written material etc. which advocates etc. discrimination or violence against, inter alia, any individual. To transpose that offence into German criminal law, the legislature expanded sec 130(2) GPC to the protection of individuals. However, individuals are only protected if they are victims of racist or xenophobic attacks precisely because of their belonging to one of the groups specified in sec 130(2) GPC. Thus, not the individual per se is protected, but the group to which that individual belongs. Art 2 of the Protocol does not provide for such a restriction on the

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[140] Cf. Lenckner and Sternberg-Lieben *Sch/Sch-StGB,* § 126 para 1; Schäfer *MK-StGB* (vo 3, 2nd edn), § 130 para 22.

[141] Cf BGHSt 34, 329 (331); BGH NStZ 2010, 570.

[142] Cf. Gesetz zur Umsetzung des Rahmenbeschlusses 2008/913/JI des Rates vom 28. November 2008 zur strafrechtlichen Bekämpfung bestimmter Formen und Ausdrucksweisen von Rassismus und Fremdenfeindlichkeit und zur Umsetzung des Zusatzprotokolls vom 28. Januar 2003 zum Übereinkommen des Europarats vom 23. November 2001 über Computerkriminalität betreffend die Kriminalisierung mittels Computersystemen begangener Handlungen rassistischer und fremdenfeindlicher Art of 16 March 2011, BGBl. I S. 418.

[143] BT-Drs. 17/3124, S. 7.

[144] BT-Drs. 17/3124, S. 7.

protection on individuals. Consequently, in this respect, there is perceivable little to no change in the law.[145]

Further, sec 130(2) GPC does not adopt the wording of art 2 in terms of the characteristics defining the protected group of persons against the rest of society. As opposed to the Protocol, the characteristics of colour and descent have not been integrated. However, these characteristics are already comprised by the characteristics of race, and national and ethnic origin[146], so that there was no need for further amendments of sec 130(2) GPC.

On the other hand, the offence under sec 130(2) GPC is broader, in that it, firstly, does not only protect individuals or individual groups as defined by race, national or ethnic origin or religion, but also undefined segments of the population.[147] Secondly, protection is granted against discrimination on religious grounds as such, sec 130(2) GPC not adopting the restriction laid down in art 2 ("[…] as well as religion if used as a pretext for any of these factors").

Art 4, Racist and xenophobic motivated threat, and Article 5, Racist and xenophobic motivated insult

As already stated, the German Penal Code does not contain offences that have been specifically enacted to penalise racist and xenophobic motivated threats. Thus, such acts might give rise to criminal liability under sec 241 GPC. Equally, there is no provision within the GPC that specifically proscribes racist and xenophobic motivated insults, so that the "common" offences of libel and slander stipulated in sections 185 et seqq. GPC will come into play. Art 4, however, does not allow for derogation, and, concerning art 5, Germany did not make a declaration under art 5(2)(b).

Art 6, Denial, gross minimisation, approval or justification of genocide or crimes against humanity

The legislature did not find it necessary to specially transpose art 6 of the Protocol into German criminal law. Currently, sec 130 GPC only covers approval, denial and minimisation of any act committed under the Rule of National Socialism of the kind indicated in sec 6(1) of the German Code of International Criminal Law (sec 130(3) GPC), and the approval, glorification or justification of the National Socialist tyranny (sec 130(4) GPC).

According to the legislature, the denial etc. of other genocides or crimes against humanity is already criminalised by various other offences within the GPC, namely:

Sec 130(2) GPC (incitement to hatred through dissemination of racist or xenophobic material): It is held that, as sec 130(2) GPC penalises inciting behaviour regardless of its particular form, the offence does also cover any inciting behaviour that consists of the denial or gross minimisation of genocides.[148] The Protocol, in art 6(2)(a), provides for the possibility of the signatory states to

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[145] Cf. Ostendorf *NK-StGB* (vol 2, 4th edn), § 130 para 19a; Schäfer *MK-StGB* (vol 3, 2nd edn), § 130 para 36, both referring to BGHSt 21, 371 and Higher Regional Court Stuttgart NStZ 2010, 453.
[146] See Stefanie Bock, 'Die (unterlassene) Reform des Volksverhetzungstatbestands' [2011] ZRP 46, 47.
[147] See Mathias Hellmann and Julia Gärtner, 'Neues beim Volksverhetzungstatbestand – Europäische Vorgaben und ihre Umsetzung' [2011] NJW 961, 964.
[148] Bt-Drs. 17/3124, p. 7. See also Mathias Hellmann and Julia Gärtner [2011] NJW 961, 965.

require that the denial etc. is committed with the intent to incite hatred, discrimination or violence, so that, principally, the legislature has complied with its obligation to fully implement the provisions of the Protocol. However, for reasons of transparency and clarity, the legislature should have made, as required by the Explanatory Report[149], a declaration to that effect.

Sec 185 GPC (insult) and sec 189 GPC (violating the memory of the dead): The Federal Supreme Court has held that the denial of the Holocaust amounts to insulting the victims of the National Socialist tyranny and violating the memory of the persons having been murdered under the National Socialist rule.[150] Therefore, the legislature opined that the denial etc. of genocides and other crimes against humanity would fall under sec 185 GPC and sec 189 GPC as well, rendering it unnecessary to adjust sec 130(3) GPC to that effect.[151] However, it is highly contested whether the "mere" denial etc. of the Holocaust actually does fall under the offences against libel and slander.[152] The same, one might argue, would be true of denying etc. other genocides and other crimes against humanity.

Sec 140, no. 2 GPC (rewarding and approving of offences) in conjunction with sec 126(1), no. 2 GPC (breach of the public peace by threatening to commit offences): sec 140 GPC penalises the rewarding or public approval of specified offences, referring in its no. 2 to sec 126(1), no. 2 GPC, which, in turn, refers to, inter alia, genocides of the kind proscribed in sec 6 of the German Code on International Criminal Law, and to crimes against humanity of the kind proscribed in sec 7 of the German Code on International Criminal Law.

Contrary to the provisions in art 6 of the Protocol, the offence being rewarded or approved of does not need to be recognised as such by a final or binding court decision[153], neither does the offence have to be chargeable, but only to have been committed without right[154]. In that respect, criminal liability under the German provision is much wider than art 6.

On the other hand, criminal liability under sec 140 GPC is heavily restricted compared to criminal liability under art 6. Firstly, sec 140 GPC aims at protecting the public peace, thereby requiring the behaviour in question to be capable of disturbing that peace. Thus, it is held by some national legal scholars that the offences rewarded or approved of, in case they have been committed abroad, must have a special connection to Germany, so that they potentially could be committed in Germany as well.[155] Consequently, rewarding or approving of an offence having been committed abroad will not constitute an offence under § 140 GPC, if, due to its nature and peculiarities, its impact is limited to the territory of other states.[156] Secondly, sec 140, no. 2 GPC

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149 Cf. Explanatory Report, para. 43.
150 Cf. BGH NStZ 1994, 390.
151 Bt-Drs. 17/3124, p. 7.
152 Hilgendorf *LK-StGB* (vol. 6 12th edn), § 194 para 1; Lenckner and Eisele *Sch/Sch-StGB,* § 185 para 3; Günther Jakobs, '*BGH, dec. of 15 March 1994 – 1 StR 179/93'* [1994] StV 540, 541. See also Thomas Wandres, 'Die Strafbarkeit des Auschwitz-Leugnens' (Duncker & Humblot 2000), pp. 100 et seqq., 123 et seqq., 177 et seqq.
153 Ostendorf *NK-StGB* (vol 2, 4th edn) § 140 para 11.
154 Hohmann *MK-StGB* (vol 3, 2nd edn), § 140 paras 6 – 7); Sternberg-Lieben *Sch/Sch-StGB,* § 140 para 2.
155 Hanack *LK-StGB* (vol 5, 12th edn), § 140 para 10. See also Hohmann *MK-StGB* (vol 3, 2nd edn), § 140 para 9.
156 Hanack *LK-StGB* (vol 5, 12th edn), § 140 para 10; Heinrich Laufhütte, '*Das Vierzehnte Strafrechtsänderungsgesetz* [1974] MDR 441, 445.

refers to sec 126, no. 2 GPC, which in turn refers to the German Code on International Criminal Law, whereas art 6 of the Protocol makes reference to international legal instruments such as UN Security Council Resolutions or multilateral treaties[157]. The German Code is based on the provisions of the Rome Statute on the International Criminal Court[158], but in some aspects, especially concerning the offence of crimes against humanity, the Rome Statute has not been adopted fully so as to comply with national constitutional commands[159]. Finally, "rewarding" or "approving" under sec 140 GPC does not cover the acts of minimising, of denying[160], and, at least not necessarily, of justifying other offences[161].

The legislative actions taken by the German legislator to implement the Protocol might be subject to criticism. This is even more the case against the backdrop of Germany claiming to have been an important instigator in the making of the Protocol.[162] However, the approach of the German legislature, especially as concerns the transposition of art 6, might be owed to both constitutional and pragmatic reasons: On the one hand, the German Constitutional Court has repeatedly emphasised that it is only for the peculiar German history that the criminalisation of the denial etc. of the Holocaust and the crimes committed under the National Socialist rule would not infringe upon the right to freedom of speech as granted under art 5 of the German Constitution.[163] On the other hand, proscribing the denial etc. of genocides other than the Holocaust or other crimes against humanity might give rise to serious, and, potentially, insurmountable evidentiary difficulties.[164]

Other countries:

The Protocol has been signed by 35 Council of Europe member states and two non-member states, having been ratified by only 20 member states. The Protocol came into effect on the first of March 2006.[165] Information on the implementation of the Protocol into national legal systems is quite limited and often not accessible in other languages than the official language of the respective state. Thus, the following observations will necessarily only illustrate the current legal situation, and, if appropriate, make references to the Protocol.

Hungary:

Hungary has not signed the Protocol, although its criminal code does contain provisions imposing criminal liability on certain racist and xenophobic acts. Nevertheless, it might be of

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157 Cf. Explanatory Report, para. 40.
158 Cf. Gerhard Werle and Florian Jeßberger, 'Das Völkerstrafgesetzbuch' [2002] JZ 725, 725 and 729.
159 Helmut Satzger, 'Das neue Völkerstrafgsetzbuch – Eine kritische Würdigung' [2002] NStZ 125.
160 Stefanie Bock, 'Die (unterlassene) Reform des Voksverhetzungstatbestands [2011] ZRP 46, 47 et seq.
161 Hanack *LK-StGB* (vol 5, 12th edn), § 140 para 14; *SK-StGB,* vol 3, § 140 para 7 (March 2007).
162 Cf. Nationaler Aktionsplan der Bundesrepublik Deutschland zur Bekämpfung von Rassismus, Fremdenfeindlichkeit, Antisemitismus und darauf bezogene Intoleranz, pp. 98 et seq. As of 24 Sept. 2013: http://www.bmi.bund.de/cae/servlet/contentblob/150674/publicationFile/18318/Nationaler_Aktionsplan_gegen_Rassismus.pdf

163 BVerfG NJW 2010, 47 paras [64] – [68].
164 See Stefani Bock [2011] ZRP 46, 48 – 49.
165See chart of signatures. As of 23 Sept. 2013: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=189&CM=4&DF=&CL=ENG.

help to examine these provisions and the potential reasons for the Hungarian government not to sign the Protocol so as to, as the case may be, make adjustments of the Protocol necessary to accommodate Council of Europe member states' concerns as to implementing the provisions of the Protocol.

The Hungarian Penal Code (hereinafter HPC) penalises sedition (art 332 HPC), the public denial of crimes committed by the National Socialist and communist regime (art 333 HPC), the insult of national symbols (art 334), and the usage of prohibited symbols of arbitrary governments such as the swastika, the arrow cross of the Hungarian national socialist party, or the five-pointed red star (art 335)[166]. According to the Hungarian Constitutional Court, usage of these symbols aims at creating such arbitrary conditions, and also at propagating the political ideologies depicted by the respective symbols.[167]

Despite of these far-reaching provisions, Hungary has not signed the Protocol (yet?). The reasons might be found in the jurisprudence of the Hungarian Criminal Court and the impact its jurisprudence had on the national criminal courts.

According to art IX(1) of the Constitution of Hungary, every person shall have the right to express his or her opinion. According to art I(3), the fundamental rights of the Constitution are subject to regulation, and may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right.

In 1992, the Hungarian Constitutional Court delivered its leading judgment[168] on the freedom to speech. It declared the right to freedom of expression the "mother right" of the fundamental rights of communication, which allows the individual to participate in the social and political life of the community (on p. 232), and held that the constitutional right was not to be construed as to exclude certain opinions based on their content: the right to freedom of expression comprises opinions irrespective of the veracity or the value of its content (on p. 236); opinions must not be prohibited merely because of their content, but only because of the circumstances under which they have been expressed. Thus, whereas incitement to hatred would run counter constitutional values, the rule of law and human dignity, so that imposing criminal liability is, if the law is proportionate and sufficiently definite, constitutional (on pp. 233 et seqq.), the mere abstract protection of the public peace through the prohibition of insulting or degrading expressions against certain segments of the population was not (on pp. 236 et seqq.).

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166 See Krisztina Karsai, 'Symbole als Gegenstand des ungarischen und europäischen Strafrechts – Verkehrtes Gesinnungsstrafrecht?' (2007) 119 ZStW 1037, elaborating on the Hungarian Court's jurisprudence of this offence.

167 Decision no 14/2000 ABH, at Krisztina Karsai (2007) 119 ZStW 1037, 1040 – 1041.

168 Decision no 179/1992 ABH, English translation by László Sólyom and Georg Brunner, 'Constitutional Judiciary in a New Democracy' (Univ. of Michigan Press 2003), pp. 229 et seqq.

Afterwards, the Hungarian Constitutional Court declared subsequent attempts of the Hungarian government to implement laws against hate speech unconstitutional, either by reason of the provisions' lack of clarity[169] or proportionality[170].

The criminal courts have taken account of these constitutional developments, and, consequently, have construed the provisions against incitement to hatred extremely narrowly: The offence would only be committed, if, trough the utterance, immediate danger of violent actions against the attacked had arisen.[171] This corroboration of constitutional and criminal jurisdiction has led to the de facto admissibility of hate speech.[172]

On the other hand, although the ECtHR has declared the prohibition of displaying the five-pointed red star breaching art 10 ECHR[173], the then Hungarian Parliament strongly confirmed its criminalisation[174].

Current constitutional developments and jurisprudence might give rise to changes of the Hungarian approach of tackling hate speech and complying with international obligations. Firstly, the Hungarian Constitutional Court, in 2013, declared art 269/B HPC (predecessor of art 335 HPC, prohibition of displaying the five-pointed red star) unconstitutional, noticing that the provision was too vague as to be compatible with the constitutional right to freedom of speech and the rule of law.[175] Secondly, the amendment of the constitution in 2011 introduced provisions regulating the substantive restriction of constitutional rights (cf. art I(2) of the constitution), the prior lack of which led to an almost extreme protection of the right to freedom of speech.[176] These developments finally led to art IX of the constitution being amended in 2013, so as to lay down further restrictions on the right to freedom of speech in case the utterance in question is directed against the dignity of the Hungarian nation, of minorities and of religious groups.[177]

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[169] Decision no 12/1999 (V. 21.) AB, ABH 1999, 106 et seqq., at Christian Kovács, 'Hassrede und Meinungsfreiheit in der Abwägung des ungarischen Verfassungsgerichts' [2005] OstEuR 17, 26.
[170] Decision no 18/2004 (V. 25) AB, Magyar Közlöny 2004 (vol 40), pp. 7201–7210, at Christian Kovács [2005] OstEuR 17, 29 et seqq.
[171] Cf. Zsolt Szomora, 'Schranken und Schrankenlosigkeit der Meinungsfreiheit in Ungarn' [2011] ZIS 29, 39 – 40.
[172] Cf. Zsolt Szomora [2011] ZIS 29, 38.
[173] *Vajnai v. Hungary* App no 33629/06 (ECtHR, 8 Oct 2008); *Fratanoló v. Hungary* App no 29459/10 (ECtHR, 8 March 2012).
[174] Parliamentary decision 58/2012. (VII. 10.) OGY, at Herbert Küpper [2012] WiRO 346, 347.
[175] Decision no 4/2013 (II. 21.) AB, judgment of 21 February 2013, at Herbert Küpper [2013] WiRO 189, 190.
[176] See Zsolt Szomora [2011] ZIS 29, 31.
[177] Cf. 4th amendment of the Hungarian Constitution of 25 March 2013, at Herbert Küpper [2013] WiRO 218, 218 et seq.

ELSA Italy

National Researchers

Serena De Filippis

Natasha Divina Renzetti

Francesca Varano

Laura Mihaela Voinea

Luisa Zappalŕ

Academic Adviser

Dr. sc. Francesca Bosco

National Coordinator

Giulia Franzoso

1 National definition of Hate Speech

In Italy a specific law devoted to online hate speech does not exist. Nevertheless Italy complied with the Recommendation No. 20 of the Committee of Ministers to Member State on "Hate Speech" (adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers' Deputies) where the term "hate speech" covers all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.

The Italian Constitution, in its article 3, guarantees the "equal dignity" of all citizens and the principle of equality before the law "without distinction based on sex, race, language, religion, political opinion, or personal and social conditions". The Italian Constitutional Court has repeatedly interpreted article 3 as applicable to all persons within Italian territory.

Italy has robust anti-discrimination legislation: for example Law n. 654/1975 that is ratification of the International Convention on the Elimination of All Forms of Racial Discrimination signed in New York, March 7th 1966. In this Convention, the term "racial discrimination" means any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. After the ratification, the doubts of compatibility of hate speech with freedom of expression increased. Italy has announced that Article 4 of the International Convention must be interpreted taking into account other international instruments about the protection of freedom of thought. In article 3 of Law n. 654/1975 Italy, according to Article 4 of International Convention, condemns to imprisonment up to 3 years who spreads ideas or theories of superiority of one race or group of persons. Furthermore Italy condemns to imprisonment from 1 to 6 years who promotes, incites and leads organizations, groups and other propaganda activities based on racial discrimination and recognizes participation in such organizations or activities as an offence punishable by imprisonment from 6 months to 4 years.

Then the Law n. 654/1975 was modified by the so called *Mancino Law* (L. n. 205/1993) that also makes it a crime to "propagate ideas based on racial superiority or racial or ethnic hatred, or to instigate to commit or commit acts of discrimination for racial, ethnic, national or religious motives", punishable by up to 3 years in prison; and to "instigate in any way or commit violence or acts of provocation to violence for racist, ethnic, national or religious motives", punishable by six months to four years in prison. This second paragraph of Article 1, on the other hand, governs the case of inciting violence, rather than instigation or propaganda, and is therefore less applicable to what happens on the Internet. The *Mancino Law* protects the supremacy of the human being, transforming the previous offense against the personality of the State in a crime against the human being. In January 2006 the Italian Parliament adopted an act, requested by the party Lega Nord (i.e Northern League), which significantly weakens the penalties against hate speech and instigation to racial discrimination: the *Mancino Law* was modified by Law n. 85 (24th February 2006), that substituted the word "instigate" with the original "incite".

"Incitement"[1] does not stimulate action but the formation of a certain type of thinking: the propaganda is a crime of abstract danger and mere conduct as the damage is inherent in the concept of propagating. A general criminal intent is required: the subject has already achieved its

[1] Palmina Tanzarella "*Il discorso d'odio razziale. Le tappe legislative e giurisprudenziali di un discutibile reato costituzionalmente protetto. Diritto, immigrazione e cittadinanza n. 4/2010*".

goal by simply spreading a racist thought, without verifying a relationship of cause and effect. Instead "instigation" stimulates to acts of discrimination making *quid pluris* than a simple expression of personal beliefs. A specific criminal intent is required, verifying the relationship of cause and effect.

The *Mancino Law* is still a sound instrument, but it is inadequate: it was enacted before the spread of the Internet and the social networks. Since nothing is said about the media through which this propaganda is disseminated, the *Mancino Law* can also theoretically apply to the Internet, but the problem of identifying "ideas based on racial hatred" remains a complex matter. The reason why the law is difficult to enforce is that it targets individuals who instigate or commit acts of discrimination on racial grounds, whereas in Italian criminal law the conduct to be sanctioned must be objective and immediately identifiable and not generic.

Domestic law should also provide an instrument similar to Law No. 38 (6th February 2006) for combating online paedophilia, which enables the Italian police to interact directly with the provider, reporting criminal sites and ordering them to be closed down. A sound legal basis are provided internationally by Budapest Convention on Cybercrime adopted by the Council of Europe in 2001, which Italy has already signed and ratified (Law No. 48, 18th March 2008). This Convention provides procedural and investigative tools appropriate to the Internet, which link investigators throughout the world and, even without letters of request being issued, enables them to take action by requesting the seizure of sites or the freezing of data. Later, on 28th January 2003, the Council of Europe adopted the Additional Protocol to Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, which Italy has signed on 9th November 2011 but not yet ratified.

In addition the 2000/43/CE Directive concerning the implementing of the principle of equal treatment of racial or ethnic origin, has been transposed by Italy with the Legislative Decree n. 215/2003 issued at the same time with the Legislative Decree n. 216/2003 executing Council Directive 2000/78/CE, the "Employment Equality Directive". The first enactment of advanced anti-discrimination rules took place with the 1998 Immigration Act. This law provides a good set of remedies against racial, ethnic and religious discrimination, and in many respects anticipated the requirements of Directives 2000/43/CE and 2000/78/CE on these grounds. The 1998 Act forbids, through private law rules, direct and indirect discrimination by individuals and public authorities, with definitions roughly corresponding to those of the Directives, but with a list of fields of application, which is open-ended. Protection extends to discrimination on ground of nationality.

The same act contains also special procedural rules for anti-discrimination cases, in order to make them especially swift and effective, as well as providing the possibility for compensation of non-pecuniary losses, that in Italian law is otherwise restricted to criminal offences.

The main development has been the opening, in 2004, of the new Bureau for the promotion of equal treatment: the National Office Against Racial Discrimination (UNAR) mandated to receive complaints of cases of discrimination, analysing them and giving qualified assistance to victims and to promote studies, research, training, awareness raising and disseminating information on the struggle against racism.

In 2010 Fiamma Nirenstein, Vice-Chair of the Foreign and European Union Affairs Committee was appointed to chair the Sub-Committee for the Inquiry on anti-Semitism of the Italian Chamber of Deputies hosted a hearing of Dr. Oboler, together with a famous Italian expert on online anti-Semitism, Dr. Stefano Gatti. Their contribution is now a formal document adopted by the Italian Parliament, a fundamental tool in the fight of contemporary anti-Semitism: the Sub-Commission approved on 14th December 2010 the Resolution n. 7/00445 presented by Fiamma Nirenstein and Paolo Corsini, that commit the government to sign the Additional Protocol, because it is a necessary instrument to strengthen international cooperation. Ratification will allow Italian investigators to apply existing laws to Internet based material hosted outside the country. Italy is playing an important role in this area through the efforts of

this committee, through participation in the Global Forum to combat anti-Semitism and through a leading role in the Inter-parliamentary Coalition for Combating anti-Semitism. Dr. Oboler has paved the way for the recognition of "anti-Semitism 2.0" as a new and widespread form of hatred, which is not enough known and therefore not enough contrasted. Today the problem is that such values - anonymity and absolute freedom to do as one pleases - are the values in mainstream online communities. In the future, Dr. Oboler hopes to bring some real world values to these communities, creating a social pressure. Democratic societies learnt not to tolerate anti-Semitism writings on the street walls but not yet in the virtual walls of Facebook or other social networks.

In 2011 a procedural change was made, enhancing coordination between the various laws enacted over recent years. Article 28 of Legislative Decree n. 150/2011 revoked the special procedure for anti-discrimination cases provided by Legislative Decree 286/1998 on Immigration, which has been replaced by the general fast track procedure provided by article 702-*bis* of the Civil Procedural Code.

In especially urgent cases, the judge can issue an interim order, the violation of which is a criminal offence. The judge can order the production of a plan for the rectification of discrimination. Moreover, the general law on pre-trial mediation now applies to all anti-discrimination claims, thus extending the possibility that Decree n. 216/2003 had already provided for employment and occupation-related claims alone. Prosecutors conduct the pre-trial investigation with the help of police and Carabinieri (national military police in Italy) assigned to judicial police functions. Once the initial investigation is concluded, the prosecutor asks the Judge for Preliminary Investigations (i.e GIP) to either dismiss the case for lack of probable cause or charges the defendant and asks the GIP to commit to trial. The GIP can approve or reject the prosecutor's conclusions, and may order the prosecutor to continue the investigation. Criminal procedure allows for what is defined as "direct trials" (i.e giudizio direttissimo), often within 48 hours, where the perpetrator is arrested while committing a crime. Verdicts are not final until all appeals have been examined, and the law provides for the possibility of bail pending a final verdict.

During the last years, the Italian government has planned to introduce new legislation to beef up measures countering anti-Semitism and hate speech in cyberspace: at the beginning Angelino Alfano as Minister of Justice in 2011, then the Integration Minister Andrea Riccardi in Monti's government worked with the Minister of Justice Paola Severino, Minister of the Interior Anna Maria Cancellieri, the Senator Amati (PD) and Malan (PDL) with the support of many Parliamentarian of Scelta Civica, Sel, Movimento 5 stelle to "give a clear response to those who disseminate hatred via the Internet". Riccardi planned to introduce measures that could allow the postal police to block racist websites and also target regular visitors of the shameful web pages. The increase in the number of websites with racist, xenophobic and anti-Semitic content required to update the measures currently in force: the imprisonment up to 3 years for who denied genocides, crimes against humanity , war crimes, who spread racial/religious/ethnic hate, who incited to commit discrimination acts through internet. At that time, the Prime Minister Mario Monti promised that the new law would be passed within the 27th January 2013, International Day for the Victims of the Holocaust. But due to a government crisis, nothing's happened. Nowadays the Integration Minister Cecile Kyenge is studying a new legislative instrument to prevent and repress provocation to online hate speech on the social networks. She herself is victim of offences gravely harmful of honour and reputation.

On 29 May 2013 at Università Cattolica del Sacro Cuore in Milan, the Ambassador Janez Lenarčič Director of ODIHR (the OSCE Office for Democratic Institutions and Human Rights) and the Prefect Francesco Cirillo Deputy Director General of Public Security and Director General of the Criminal Police, signed a "Memorandum of Understanding": an agreement for training police, commanders, police cadets/trainees, uniformed officers and investigators in recognizing, understanding and investigating hate crimes in order to implement ODIHR

"Training Against Hate Crimes for Law Enforcement" (TAHCLE). The TAHCLE programme was launched in 2011 and it will be implemented in Italy in close co-operation with the Italian Observatory for Security against Discriminatory Acts (OSCAD).[2]

"Hate crimes are often symbolic crimes and the police is in the best position to send a zero-tolerance message against these acts", said Floriane Hohenberg, the Head of ODIHR Tolerance and Non-Discrimination Department. This programme helps them acquire the necessary skills, evaluating case studies of responses to hate crimes by law enforcement officers.

Professor Fumagalli Carulli, the Director of the Department of Law at the Università Cattolica del Sacro Cuore, welcomed the signing of this important agreement to combat hate crimes, following the Seminar "Preventing and Responding to Hate Crimes: The Italian Experience" arranged in collaboration with OSCE-ODIHR, last December at Università Cattolica del Sacro Cuore.

The Ambitious aim is the establishment of a permanent working group on hate crimes in Milan, in partnership with OSCE-ODIHR, in order to prevent the hate crimes.

In reference to jurisprudence, in Italy judges have discretion with respect to sentencing within the parameters established by law. A sentence for a racially motivated offense can be increased by any amount of time up to one half again the minimum sentence for the offense in question. In particular, Section 3 of Law n. 654/1975, as amended by Section 3 of the Law n. 205/1993 applies an aggravating circumstance of racist or other hate purpose to any crime, except those punishable by life in prison (the harshest penalty under Italian criminal code). Reversal of the burden of proof is now specifically provided for in civil and administrative law if the complainant establishes factual elements that can precisely and consistently show the presumption of the existence of discriminatory acts, agreements or behaviours. Legal protection against victimisation of the complainants has also been introduced in order to prevent any acts of retaliation against them and, as regards the prohibition of discrimination in the field of employment, the right to take legal action on behalf of the victims or to support their case has now been granted not only to trade unions but also to other organisations and associations representing the interests concerned.

According to Palmina Tanzarella, Research Professor at University of Milano-Bicocca, online hate speech is an opinion crime and it is a controversial problem in the area of manifestation of thought that represents a constitutional right with no unjustifiable exception (art. 21 Italian Constitution). The case law is favourable to the incrimination of hate speech, instead the majority doctrine is opposed to combat the problem with criminal law instruments.

In Italy, the courts have applied the cases of hate speech in two situations that are particularly emblematic, avoiding doctrinal criticism:[3]

1. as aggravating circumstance in the verbal abuse for discriminatory purposes;
2. when politicians due to their charisma or reputation influence negatively the audience , spreading hateful ideas (in support of it, *Mancino Law* provides for the suspension of rally for a maximum period of three years).

The courts have justified the application of the laws using the pattern of real danger than the alleged danger. The main difficulty is to assume in advance what consequences the diffusion of ideas or incitement to acts of discrimination can cause. Faced with this difficulty, judges verify the real offence of any act because not every manifestation of ideas, even if the content is considered racist, can be a crime. It must be considered the suitability of the behaviour on a case by case basis depending on the contexts in which diffusion and incitement happen "to rebalance the gap between an abstract danger and the real damage of freedom".[4]

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[2] Italian Government, Secretary General, Study Office and Institutional Relations, Study n.60, May 2013.

[3] Palmina Tanzarella *"Il discorso d'odio razziale. Le tappe legislative e giurisprudenziali di un discutibile reato costituzionalmente protetto. Diritto, immigrazione e cittadinanza n. 4/2010".*

[4] E. Fronza, *Osservazioni sull'attività di propaganda razzista*, cit., in nota n 95, pag. 59.

According to the doctrine, use the parameter of public order aims to protection of an ideal order, hate speech is instead related to a concrete disorders that threaten the coexistence between groups.[5]

Indeed on the 10th of July 2009 the Supreme Court (i.e Corte di Cassazione) definitively confirmed the sentence n. 41819, which condemned Flavio Tosi, Mayor of Verona, to two months of imprisonment for promoting racist ideas. The facts date back to 2001 when Tosi, as regional councillor, organised a collection of signatures for the removal of a gipsy camp in the town of Verona; the Northern League party member was then sued by seven Sinti citizens and by the organization Opera Nomadi Nazionale (i.e *National Action for Nomads*). The title of the campaign was: "Sign to send away the gypsies from our city". At first, in December 2004 the Court of Justice of Verona sentenced Tosi to six month imprisonment for promoting racist ideas and inciting to commit acts of discrimination; however, on the 30th January of 2007, the Court of Appeal of Venice reduced the sentence to two month imprisonment after the charge of incitement to racial hatred was declared non-existent. The verdict was then partially revoked by the Court of Cassation and deferred to a new examination of the case by the Court of Appeal which, passing sentence on the 20th October of 2008 confirmed the offence of propaganda of racist ideas; this decision was then reconfirmed by the Court of Cassation in July 2009.

Tosi case has delimited more precisely the aspects of the hate speech: the legal interest protected by the law is the breach of the peaceful coexistence of various ethnic groups, the dignity and the equality of people. This is a crime of abstract danger and mere conduct. According to what the judges say, the social and legal protection of equality is fundamental: "discrimination consist of denial of equality or the affirmation of social inferiority of others". The dignity deserves to be protected in any case, apart from the fact that incitement or provocation perceived by the people. Today the Italian law incorporates the "implicit racism" against the members of a targeted community due to biases or a sort of ontological status.

In October 2009 the Court of Justice of Venice sentenced the deputy mayor of Treviso, Giancarlo Gentilini, to 4.000 € fine and prohibited his participation at public meetings for a period of three years as a consequence of the contemptuous words and tones he used against immigrants during a meeting of the Northern League party held in Venice in 2008.

In 2011 Vittorio Aliprandi, former deputy of the Northern League party and town councillor in Padua, published on Facebook the following post: "The Roma and Sinti people make me want to throw up". The Court of Padua condemned him to a fine of Euro 4.000 € for violation of the *Mancino law* against the propaganda of racial hatred based ideas and incitement to commit racist acts.

As underlined by the European Commission against Racism and Intolerance (ECRI), cases of hate speech have increased considerably whether they come from local politicians whether from national representatives.[6]

Recently, the Italian Supreme Court (i.e. Corte di Cassazione) with sentence n 33179 passed on the 31st of July 2013 has extended the application of the Article 416 "Criminal association" (a crime against public order) to hate speech on virtual community, blogs ,chat and social network. According to the Italian legal tradition: a criminal association is an organized criminal group that must be necessarily carried on by a plurality of people (three or more) joining together to commit crimes trough continuing criminal programme of serious crimes and a permanent organizational structure. The persons who promote, direct or organise the association shall be punished, for this sole offence, with imprisonment for 3 to 7 years. For the sole fact of participating in the association, punishment shall be imprisonment for 1 to 5 years. In this case, the Court of Cassation has enforced, in an extensive way, the International Convention on the Elimination of All Forms of Racial Discrimination signed in New York on March 7th 1966. This

[5] P. Barile, *La libertà d'espressione del pensiero e le notizie "false, esagerate, tendenziose",* in Foro it., 1962,860.
[6] IV Report on Italy, 21st February 2012.

is an offense of mere behaviour with a generic criminal intent.

The court of Cassation passed a judgement on IT crimes: Italian judges are competent on defamation aggravated by racial hate through offensive sentences/denigrating imagines posted on internet, even if website is registered abroad, as long as the offense is perceived by users in Italy.

According to Domenico Vulpiani, Director of the Police Postal Service there were 836 racist websites in 2008 and 1.172 in 2009 (40 % increase). There have been 54 criminal complaints related to cyber-bullying in 2013, compared with 30 such formal complaints in all of 2012. More than a quarter of all Italian students say they have been sent offending messages or threats via social-networking avenues like Facebook, Twitter and Whatsapp.

Massimiliano Monnanni, the Director General of the National Antidiscrimination Body (UNAR) has expressed concern at the data relating to the media: the proportion of complaints increased by more than two percentage points between 2010 and 2011, accounting for 22.6% of total complaints received by UNAR.[7] Internet was confirmed as the area with the highest number of racist behaviour (84%): the anonymity guaranteed by Internet seems to be one of the factors feeding the proliferation of racism. In particular, the phenomenon of anti-Semitism on the Internet gives no sign of slowing down, as highlighted by a parliamentary investigation on anti-Semitism carried out by the Commission for Constitutional and Foreign in cooperation with the Premiership.[8]

One of the tools put in place to combat racist violence and crimes is the Observatory for Security against Acts of Discrimination (OSCAD), created on 2nd September 2010 by chief of police Antonio Manganelli. OSCAD is part of the Department of Public Security - Central Direction of Criminal Police and is made up of representatives of the National Police and the Carabinieri. It was established to protect the victims of hate crimes, to help individuals who belong to minorities enjoy their right to equality before the law and guarantee protection against any form of discrimination. OSCAD till the 6th February 2013 has received 329 reports of discriminatory acts from institutions, professional or trade associations and private individuals among which: 138 are crimes and 58 warnings concerning internet, 55,8% based on race or ethnic origin, nationality, 10% religion, 3,6% age, 2,2% physical or mental disability, 29% sexual orientation and gender identity. Based on the reports received, OSCAD starts up targeted interventions at local level to be carried out by the Police or corps of Carabinieri; follows up the outcome of discrimination complaints lodged with the police agencies; maintains contact with associations and institutions, both public and private, dedicated to combating discrimination; prepares training modules to qualify police operators for anti-discrimination activity and participates in training programs with public and private institutions; puts forward appropriate measures to prevent and fight discrimination.

Racism and discrimination in Italy have attracted international consternation. Doudou Diène, the UN special rapporteur on contemporary forms of racism, observed in 2007 that Italy was "facing a disturbing trend of xenophobia and the development of manifestations of racism, primarily affecting the Sinti and Roma community, immigrants and asylum-seekers primarily of African origin but also from Eastern Europe, and the Muslim community." [9]

Council of Europe Commissioner for Human Rights Thomas Hammarberg said in 2009 following a visit to Italy on 13-15 January 2009[10] that he was "particularly worried by consistent reports that continue to evidence a trend of racism and xenophobia in Italy, occasionally supported by activities of local authorities, which has led also to violent acts against migrants,

[7] The European Network Against Racism (ENAR). Shadow Report 2011-2012 on racism and related discriminatory practices in Italy.

[8] Cognitive survey on anti-Semitism, available at: *www.osservatorioantisemitismo.it.*

[9] Report by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. U.N. DOC. A/HRC/4/19/ADD.4, February 15, 2007.

[10] Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe.

Roma and Sinti or Italian citizens of migrant descent." Italy has clear obligations under human rights law to undertake effective measures to prevent racist and xenophobic violence, to vigorously investigate and prosecute perpetrators and to publicly and unequivocally condemn such violence. The duty to protect and the duty to provide an effective remedy apply whether the perpetrators of the violence were agents of the state or private actors. The problem stems from the great difficulty by the police to manage the dissemination of these messages. The Internet is now the voice of the people, the chance for everyone to express their views and any form of censorship on it becomes a delicate step that from the point of view of many would be to undermine the spread of freedom something that by its very nature must be guaranteed.

2 Contextual elements of Hate Speech

Before proceeding to the identification of the key elements for 'hate speech', it seems appropriate to point out that the international community does not have a precise and clear definition outlined for 'hate speech'. This concept widely varies from state to state and from region to region. Furthermore, domestic definitions lack of consistency when establishing what is being forbidden by law. Nevertheless, the expression 'hate speech' is frequently used and adopted by the international community.

A general definition for the European community was given by the Council of Europe Committee of Ministers', with the Recommendation No. R (97) 20 on 'hate speech' [11], as it developed this general definition for the European community: "*the term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin*".

Starting from this definition, it is possible to say that 'hate speech' includes any comments and/or statements which are inevitably directed against a person or a specific group of people, identified by a particular race, religion, ethnicity, sexuality[12]. Analyzing this concept through the definition just mentioned above and through the numerous judgments that European and national Courts had given since now, it is possible to say that 'hate speech' is broken into three constant elements: intent, incitement and prescribed results.

The first element required is the 'intent', which can be defined as a psychological will. The author of 'hate speech' is aimed by the purpose of saying something discriminatory or inciting violence and hatred, he/she is aware that the speech has a potential to generate a negative reaction. It is the presence of this psychological element in a statement or a comment that makes it a 'hate speech'. A fitting example of the importance of embodying this element in the definition given, can be found in the judgment No. 2203/2005 of the Tribunale di Verona[13] (i.e. *Court of Verona*), dealing with a of case offense under Article 3, § 1, letter a), Law 654/75[14]. The Court specifically stated that "*as regards to the subjective element*" these kind of crimes are "*crime of*

[11] Council of Europe, Recommendation No. R (97) 20 on Hate Speech.

[12] Anne Weber, 'Manual on hate speech', (2009).

[13] Court of Verona, Judgment n. 2203/2005.

[14] It is the so-called Mancino law, an Italian law introduced in 1993 and named like this for his proponent Nicola Mancino, who was the Minister of Interior at that time. This law condemns actions and slogans related to the Nazi ideology, having for purpose the incitement to violence and discriminations based on race, ethnicity, religion and nationality. It was founded as Decreto-legge (i.e. decree-law) on 26th April 1992 no. 122, concerning urgent measures for combating racial, ethnic and religious discriminations and then converted with amendments into Law no. 205/1993. The Mancino Law is still the main Italian legislative instrument that deals with the prosecution of hate crimes.

specific intent: the agent must operate with the awareness and willingness to violate the dignity of the victim considering racial, ethnic, national or religious factors".

The second element is the 'incitement', which deals with the promotion of ideas. Incitement is a call to violent actions grounded in hatred toward a person or a group of people.

It is not easy, and really controversial, to establish what constitutes 'incitement'. International courts have worked on a definition considering a number of factors (such as the environment, the context, etc…) and focusing on the nexus or on a sort of relationship that must exist between the statements and the proscribed results. Nevertheless, there is still a lack of a consistent and solid definition in the international community. Our Courts have interpreted this element including in it "*the conduct of those who, through the collection of signatures, promotes the removal of a particular ethnic group from their city, presenting the initiative in a special press conference and widely publicizing it with putting up posters on walls of the city and making statements to the press. (…) The conduct* [is] *punishable because affecting the dissemination of ideas based on racial and ethnic superiority and hatred, and also dealing with the incitement of the competent public administrators to commit acts of discrimination based on the race or ethnicity, consequently creating, by requiring the adherence to the discriminatory initiative, a real disturbance to the peaceful coexistence of various ethnic groups*"[15].

The last part of the judgment just cited leads to the last necessary requirement: the 'prescribed results' such as discriminations and violence. The consequences of 'hate speech' are almost always human rights violations. In the notion of 'prescribed results' we must also include the determination in other people's mind of hatred against a person or a group of people, even if it doesn't bring to any sort of physical actions[16]. In fact, in the judgment analyzed before it is specified that "*the conduct in question must also be punished independently of any specific evidence of a lesion of public order, which eventually flows from it*".

Italy became a State member of the Council of Europe on May the 5th, 1949. It is a founder member of the Organization. Considering its status, Italy has joined the definition and the interpretation of the term 'hate speech' given by the Committee of Ministers.

This is the reason why, in many Italian judgments[17] in Italian courts (*Tribunali*) and also in the Supreme Court (*Suprema Corte di Cassazione*), it is possible to identify the key elements analyzed earlier in hearing cases of 'hate speech'.

It has been said above that the promotion/diffusion of ideas based on hatred and discrimination is an essential characteristic of 'hate speech' itself. Obviously all means of communication can be used to this end of propaganda.

We in fact live in the so-called 'Information – Age', where it is widely accepted that the Internet is the fastest, easiest and widest communication medium. In 1996, the European Commission affirmed that '*the potential of the Internet to inform, educate, entertain and conduct business on a global scale is considerable*'[18].

The Internet has given to persons from opposite sides of the world the opportunity and the possibility to communicate with relative ease, to connect and share opinions simultaneously: '*a unique characteristic of the Internet is that it functions simultaneously as a medium for publishing and for communication. Unlike in the case of traditional media, the Internet supports a variety of communication modes: one-to-one, one-to-many, many-to-many. An Internet user may "speak" or "listen" interchangeably. At any given time, a receiver can and does become content provider, of his own accord, or through "reposting" of content by a third party. The Internet therefore is radically different from traditional broadcasting. It also differs radically from a traditional telecommunication service*'. The Internet has implemented for everybody with the

[15] Judgment no. 2203/2005, Court of Verona (cited before).

[16] Toby Mendel, 'Hate Speech Rules Under International Law', (2010).

[17] Associazione Studi Giuridici sull'Immigrazione (ASGI), Raccolta della giurisprudenza penale in materia di reati a sfondo razziale e di discriminazione etnico-razziale (2011).

[18] European Commission, Illegal and Harmful Content on the Internet (1996).

opportunity to express ourselves in a different way, annulling distances and destroying real world boundaries. But there are no rights without duties: freedom of expression is a very important pieces for our progress, but being conscious of how to deal with it correctly.

In fact, always more frequently, the Internet has been easily exploited as a mean or a facilitation for illegal activities and has also allowed these people to hurt each other in new different ways.

When concerning 'hate speech' specifically, can it be said that, in regards to wider dissemination, more Internet use will lead to a higher potential impact of online hate speech?

First of all, it is important to note that the anonymity on the Internet (thanks to what users don't feel themselves culpable for what they post or publish) and the possible extensive publicity that someone is able to captivate, can cause a viral spread of harmful diction[19]. With this tool, anyone can actually interact and diffuse ideas to a large number of people in different areas of the world, crossing the borders simply by a click on the keyboard. That is why the Internet can be a perfect way to promote and publicize ideas (in this case discriminatory or hatred based ideas), helping to increase in this way the key element n.2 (which is, as said before, the incitement) considering also the fact that it is free, simple to use and accessible to almost everybody. Furthermore, it has been demonstrated by the experience that people tend to obey to what they are being told[20].

Given its characteristics, the Internet has risen the possibility to different and divided groups of people to get together and connect, creating a global (racist) community from small isolated units[21]. Thanks to these features, the Internet is now the newest, widest and most inexpensive platform to recruit, incite and diffuse hate propaganda and online hate speeches, especially considering the increasing number of social networks (such as Facebook, Google+, Twitter…). Therefore, contributing information to circulate without any control or regulation can have a great repercussion and a higher potential impact on a large group of people's consciousness, facilitating a wider dissemination of online hate speeches.

In fact, for what concerns Italy, Art. 17 of the *decreto legislativo* (i.e. legislative decree) no. 70/2003[22] states that there is not a universal obligation of supervision for Internet Providers on the users' publications and downloads. The article expressly enunciates that '*the provider is not subject to a general duty of monitoring the information transmitted, nor to a general duty of actively seeking facts or circumstances that can be considered illegal*'.

However, the Italian Courts, for example the *Tribunale di Milano* (i.e. Tribunal of Milan), are trying to prosecute online discriminatory actions. With the judgment no. 1972/2010[23], the Italian judge of the Criminal Section IV of the Tribunal of Milan, O. Magi, affirming that '*the Internet is not a boundless prairie where everything is allowed and nothing is forbidden*', condemned three former executives of Google Italy for not having avoided the publication of a video, loaded on the web, which portrayed a Down child insulted and beaten by some classmates[24] (though the decision has

[19] Joint submission by the network of Italian associations on racial discrimination, Observations for the Thematic Discussion on "Racist Hate Speech, (2012).

[20] See Milgram experiment.

[21] James Bank, 'European regulation of cross-border hate speech in cyberspace: the limits of legislation', 2011.

[22] It is the legislative decree no. 70/2003, concerning the implementation of the Directive 2000/31/EC on certain legal aspects of the information society services, in particular the electronic commerce, in the Internal Market.

[23] Court of Milan, Judgment n. 1972, 24th February 2010

[24] Unione Forense per la tutela dei diritti umani (UFTDU): *Observations on the sixteenth to eighteenth periodic reports of Italy to the Committee on the Elimination of Racial Discrimination*, 2012.

been completely overturned in the Court of Appeal by the appeal judgment[25] that has discharged the three defendants with the full formula '*perché il fatto non sussiste*', i.e. because the fact does not exists).

Nevertheless, considering the borderless nature of the Internet, it is still not easy for nations to prosecute and avoid online statements and behaviors, given also the fact that each state has its own national laws on hate crimes, widely different form each others. Notwithstanding, it must be recognized the big effort that the European nations are making to create virtual borders into cyberspace, with the specific end to combat online discriminations. The harmonization is not easy, considering potential conflicts of extraterritorial jurisdiction between states when extending the reach of national laws beyond their borders[26].

Yet, the Council of Europe introduced a multilateral Convention on Cybercrime[27], extended by an Additional Protocol (concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems), aimed with the purpose to achieve this ideal goal by creating a general accepted standard of what constitutes online crimes, fixing legal investigative procedures and implementing the collaboration among States to pursue whoever acts illegally in cyberspace.

3 Alternative methods of tackling Hate Speech

Online hate speech is a global issue which must be countered by a global reaction, first of all providing a universally accepted definition of the dissemination of racist and xenophobic material through computer systems in order to establish as criminal offence under domestic law when committed intentionally and without right.

States should investigate on the causes, processes and consequences of discrimination, draft proposals to overcome the issue, examine ways and means to stimulate and co-ordinate research on the effectiveness of existing legislation and legal practice; while a legal prohibition and prosecution may be of key importance in some cases, a more effective toolbox containing positive measures is also necessary to tackle the root causes and various facets of hate.

According to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, [28] a clear distinction should be made between three types of expression: expression that constitutes a criminal offence; expression that is not criminally punishable but may justify a civil suit or administrative sanctions; expression that does not give rise to criminal, civil or administrative sanctions but still raises a concern in terms of tolerance, civility and respect for the rights of others. He underlined that those different categories posed different issues of principle and called for different legal and policy responses. Diverse responses to the phenomenon of hate speech are symptomatic of the unclear normative environment surrounding the issue.

According to Jeremy Waldron, a New York University and Oxford professor: legislatures, rather than courts, should take the lead in formulating public policy. But this faith in the power

[25] Court of Appeal of Milan, Judgment n.8611, 27th February.

[26] A fitting example of the obstacles concerning European countries trying to expand their jurisdiction extraterritorially, implementing their national laws against scripts/videos uploaded beyond national borders, is given by the Yahoo!, Inc v. la Ligue Contre le Racisme et l'Antisemitisme case.

[27] Convention on Cybercrime, CETS No. 185 (also known as Budapest Convention), signed in 23rd November 2001.

[28] United Nations, General Assembly A/66/290

of legislation to protect fundamental rights makes him naively optimistic about the capacity of legislatures to balance the competing values of dignity, privacy, and free speech.

He maintains that hate speech creates what he calls "an environmental threat to social peace."

There are four objective standards to determine whether a threat is credible: time, place, method, and target. If three of the four criteria are satisfied, post or videos will be removed.[29]

States should promote a culture of peace and tolerance at all levels, establishing a comprehensive strategy of interaction to stimulate tolerance and a culture of public discourse in which one can freely and without fear of retaliation articulate and debate experiences.

This can include initiatives to host interreligious platforms for cooperation and dialogue at various levels of leadership, including the local, regional and international levels. Such initiatives should aim not only to combat prejudices and stereotypes, but also to facilitate coalition-building across diverse cultural and religious communities and incorporate conflict prevention and de-escalation strategies. There is no doubt about the role of a good cultural education in preventing and combating a distorted use of the Internet and the social networks. The school education system is a prime avenue to do so.

The European Commission against Racism and Intolerance (ECRI) recommends that, in the context of schooling, the Italian authorities strengthen their efforts to provide teachers with training in delivering intercultural education and that they strengthen the human rights dimension of civic education courses. States should promote awareness in the young people through innovative courses, the use of blogs and social networks, the sharing of information, knowledge and experience aimed at eliminating prejudices and encourage them to report incidents of racism (through student grants, art competitions, mobility programs in Italy and abroad, chances to travel and come into contact with situations and environments other than their own, meetings, events, etc).[30]

For this reason Simonetta Fichelli, from the Italian Ministry of Education, Universities and Research, launched in 2009 (Law n.169/2008) the "Citizenship and the Constitution" course which was compulsory for all students. The aim was to encourage students to be active citizens and be more aware of their behaviour, through an in- depth analysis of the values and principles of the Italian constitution, as well as the key principles of the EU and other international conventions, covering *inter alia* the respect of human rights and non-discrimination. The idea was not only to pass on knowledge, but also to give young people a learning experience that allowed them to become active, informed members of society.

The Department of Education has also held training seminars for teaching and auxiliary staff in schools. These seminars included subjects such as the inclusion of Roma children at school or how to promote integration in schools.

The network of Italian associations on racial discrimination recommends[31] to arrange a comprehensive training program for the judiciary in order to ensure a clear and consistent understanding of the forms and thresholds of hate speech under international law (because in several instances legislators and judges are unaware of international human rights treaties and the nature of State obligations) as well for law enforcement agencies' officials (police officers and public prosecutors) in order to encourage effective ex-officio prosecutions of these criminal acts. Moreover the governments of member states should raise awareness among journalists on racist and xenophobic phenomena, training them on all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred base on intolerance.

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[29] His recent book " The Harm in Hate Speech"

[30] ECRI General Policy Recommendation No. 10 on Combating racism and racial discrimination in school education.

[31] Observations submitted to the Committee on the Elimination of Racial Discrimination for the Thematic Discussion on "Racist hate speech", 28th August 2012, Palais des Nations – Genève.

States should review the existing legal framework in order to ensure that it applies in an adequate manner to the various new media and communications services and networks. National law and practice in the area of hate speech should take due account of the role of the media in communicating information and ideas which expose, distinguishing clearly between the responsibility of the author of expressions of hate speech, on the one hand, and any responsibility of the media and media professionals contributing to their dissemination as part of their mission to communicate information and ideas on matters of public interest on the other hand.

States should build of databases on all forms of discrimination and a national reporting system in accordance with the existing regional and provincial observatories connected to territorial antennas, associations, centres and NGOs in order to enable an effective exchange of information.

In Italy the National Office Against Racial Discrimination (UNAR) has concluded agreements[32] with Regions of Sicilia, Puglia, Emilia Romagna, Liguria and Piemonte; with the provinces of Messina, Mantova, Pistoia and Roma; with the Observatory for Protection against Acts of Discrimination (OSCAD), in order to encourage the victims and witnesses of racist incidents to bring cases before the courts in order to obtain access to effective civil and administrative law remedies. Moreover States should provide for compensation for victims of hate speech encouraging and promoting the establishment of an independent special fund, supported also by the voluntary contributions of banking foundations.

New reforms recently introduced in the Italian civil and procedural law now definitely envisage the prior and compulsory conciliation stage (Law No. 69/2009), the creation of special agencies having the powers for investigation and decision-making.

The Italian authorities have indicated that they recognise the urgent need to combat all expressions of racism and intolerance on the Internet: indeed a special section has been created on UNAR website to allow Internet users to report directly any racist or discriminatory material.

Where appropriate, UNAR then notifies the Postal and Communications Police, involved in combating cybercrime, or the ordinary police, so that they can institute criminal proceedings.

The police also monitor websites created in Italy whose content might be punishable and, if necessary, notify the judicial authorities.

ECRI invites[33] the Italian authorities to denounce publicly all manifestations of racist behaviour or racial discrimination by members of the police or public statements by politicians, establishing independent commissions that investigate.

According to Andre Oboler, CEO of the Online Hate Prevention Institute (OHPI) and a consultant on various online projects: non-governmental organizations or individuals should combat the hate speech by maintaining websites against discrimination, regularly monitoring sites where messages of hate speech has previously been posted (providing lists of offending sites), lobbying for international awareness about the harms and abuse of technology, helping institutions that want to set up reporting mechanisms and increase responsibility of all parties concerned.

Parents, teachers, employers and generally those with authority or responsibility over a computer should install computer blocking programs at home/schools/work/public institutions in order to block access to hate sites for minors.

Internet service provider associations should establish codes of conduct, mechanisms for the detection and reporting of websites and a complaints response mechanism, should encourage a model global uniform Internet contract. Best practices must also be defined and providers must be encouraged to monitor and close down any sites that carry crude expressions of hatred.

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[32] UNAR n. 719/ 24 October 2011.

[33] ECRI Report on Italy, 21st February 2012

In many cases the providers already do this spontaneously and voluntarily.

What is therefore essential is to ensure that the authors of posts on the Internet are identifiable, resisting any form of protection of anonymity, to make authors responsible for what they write, and make sure that the positions expressed there can be rebutted interactively.

As far as specific enforcement measures are concerned, the removal of specific content from the Internet requires the goodwill and cooperation of governments and providers, which first and foremost should share standard instruments for combating crime of opinion.

Andre Oboler has coined the expression "anti-Semitism 2.0": the combination of a viral idea, such as hate speech, and the technology designed to take ideas viral.

OHPI recommends that the following factors be used to determine how well an online platform is removing online hate:

1. how easily users can report content: OHPI recommends the 'Support Dashboard' be improved with the inclusion of a unique ID number that is visibly assigned to each complaint in order to enter a description of the page they are complaining about;
2. how quickly the platform responds to user complaints: OHPI recommends Facebook automatically checks any flagged page against a database of previously upheld complaints (by using a pre-defined and updated list of blocked words);
3. how well the platform recognises mistakes: OHPI recommends where a very close match is determined, the content should be removed automatically and immediately by train machines that pick up possible abusive messages and prevent them from being sent (automated moderation also has a risk of getting it wrong, it's easy to programme a machine to spot banned words, but more difficult to teach it how to understand context).

OHPI makes several calls for Facebook to formally recognize certain categories of hate speech, to educate their staff and to establish constructive channels of dialogue for experts. This should be part of a learning process and not simply a process to remove specific items of content or resolve specific complaints. Having hate speech on the Facebook platform also damages the experience for many users (some users have already abandoned Facebook as a result of hateful speech)[34].

Today, the creator of any cruel content and insensitive humor must include the authentic identity to remain on Facebook. Marne Levine, Vice President of Global Public Policy of Facebook, said that they will continue to develop these policies for creating a better environment for Facebook users. Facebook works hard to remove hate speech quickly, however there are instances of offensive content, including distasteful humor, that are not hate speech according to Facebook definition.

Facebook defines "harmful content" as anything organizing real world violence, theft, or property destruction, or that directly inflicts emotional distress on a specific private individual (bullying). Facebook prohibits "hate speech": direct and serious attacks on any protected category of people based on their race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability or disease. Facebook is an enormous social network with more than a billion users around the world, making the sites extremely influential in shaping social and cultural norms and behaviours, for this reason User Operations Team uses the Guidelines to evaluate reports of violations of Community Standards around hate speech and works to apply fair, thoughtful, and scalable policies.

To combat online hate, we need new laws that enable a more proactive response.

We need laws that ensure online spaces enjoy the same protection as physical spaces.

The approach of doing the minimum necessary in the area of online hate prevention and defending existing systems as good enough is not acceptable.

[34] Report from the Online Hate Prevention Institute (OHPI) called "Recognizing Hate Speech – Antisemitism on Facebook".

4 Distinction between blasphemy and Hate Speech based on religion

One of the most important recommendation that the Council of Europe directed to the States members was the adoption of laws in favour of freedom of thought and freedom of expression, which are considered as the pillars of any democratic society, characterized also by the popular sovereignty and a political pluralism. In the Italian Constitution, the guarantee of freedoms of thought and expression can be found in the article 21.

However, there are some manifestations of thoughts and some expressions that integrate case criminally sanctioned.

The first one is 'blasphemy', which is considered as an offence and is punished by national criminal laws in many state members of the Council of Europe (Austria, Denmark, Finland, Greece, Italy, Liechtenstein, the Netherlands, San Marino).

Preliminarily, it is important to specify that there is not a general and worldwide accepted definition of 'blasphemy'.

In its report on '*Blasphemy, religious insults and hate speech against persons on ground of their religion*', the Committee on Culture, Science and Education (of the Council of Europe) stated that '*blasphemy can be defined as the offence of insulting or showing contempt or lack of reverence for God and, by extension, towards anything considered sacred*'.

Furthermore, the Committee described also the concept of 'religious insults' 'as insults to a religion which are subject to religious rather than legal penalties. A religious community may consider statements as insulting and thus a violation of its religious norms. This is part of freedom of religion as guaranteed by Article 9 of the European Convention on Human Rights. The religious penalty typically consists of a religious stigma: for instance, a person may be called a sinner, be excluded from a religious community, or be threatened with spiritual consequences such as being excluded from heaven. Physical punishment or death threats by religious leaders, can obviously not be tolerated in a democratic society built on the rule of law'. Unlike the concept of blasphemy given by the Committee, this definition has not been accepted, and in fact in around half the member states of the Council of Europe (including Italy), religious insults are criminal offences sanctioned by criminal national laws. Relevant European provisions appear to blur different concepts when describing the category of religious insults, together incorporating 'insults based on belonging to a particular religion' and 'insult to religious feelings' [35].

The difference between 'blasphemy' and 'religious insults' is fundamental, considering the fact that some countries, in place of blasphemy which is not considered as a crime but an administrative offence, prohibit incitement to hatred based in religion, the contempt of religion or religious insults with criminal sanctions.

In Italy, the Treccani Encyclopedia defines blasphemy as an "*insulting and disrespectful expression against God, the saints and sacred things*".

The Italian penal code of 1889, known as *Zanardelli Code*, predisposed at articles 140-143 a system that was characterized by having as object of protection not a particular religion but the freedom of the individual to profess and exercise any religion among those admitted in the State, in an equal way and without discrimination among cults. The next Italian penal code (so-called *Rocco Code*, dated 1930), in its original formulation, considered and protected the religion as an institution, as a good in itself, as the value of a civilization related to the type of state at the time (fascist), and offered protection to the Catholic faith far greater than that to other religions practiced in Italy, giving even the status of state religion [36].

[35] Venice Commission, Report 2010, (2010).

[36] Giovanni Fiandaca, Enzo Musco, Diritto penale – parte speciale, vol.1, (2012), Zanichelli.

The code was split on the regulation of the religious phenomenon in articles 402-406 on the one hand and 724 on the others.

Precisely, the article 724 deals with blasphemy. Blasphemy has been originally foreseen as a crime and was inserted in the section of violations of moral and ideal standards. In its first formulation, article 724 punished only the offences to the Catholic religion, for the reason said above; when the insult was made toward another religion, it constituted only the crime of 'obscene language', sanctioned under article 726 [37]. Over time, this limitation has begun to be considered harmful of the principle of equality, especially after the entry into force of the Republican Constitution (1948): the new liberal-democratic state is a secular state, pluralist and tolerant of all values, religious and not, present in the society. However, the situation changed only after the stipulation of the New Concordat[38], when Catholicism was not considered as the religion of the State anymore. In fact, by judgment No. 440 of the October 18th, 1995, the Constitutional Court decided for the extension of the criminal liability to every conduct that offended the deity worshiped in every religion. The Court asserting that "*it is now required the equal protection of the conscience of each person who recognizes himself in a faith, no matter the religion they belong to*", declared the unconstitutionality of the article 724, first paragraph, of the Penal Code '*o i simboli e le persone venerati nella religione dello Stato*' (i.e. the one that considered Catholicism as the religion of the country).

Later, the legislative decree of December 30th, 1999 No. 507 decriminalized the crime in question and in fact, nowadays, blasphemy is considered an administrative offence. The current version of the article 724 of the Penal code ('*Blasphemy and outrageous events to the dead*') establishes that "*Anyone who publicly blasphemy with invective or abusive words against the Divinity, shall be punished with a fine from € 51 to € 309 […] the same penalty is applied to those who carry out any public manifestation outrageous to the dead*".

According to some critics, the crime of blasphemy would compromise the freedom of thought, granted by the Italian Constitution by article 21 '*Everyone has the right to freely express his thought with words, in scripts and in any other vehicle of communication*'. However, in this regard, in a judgment of the Supreme Court about the article 724 of the penal code, it is affirmed that it is unbelievable and out of place to include the blasphemy in the concept of manifestation of thought and of the freedom that originates from it (either considering the article 21 cost. or the article 19 cost., which constitutes itself a specification of the precedent one). What indeed comes sanctioned with the rule in question, is the fact of swearing with invectives and outrageous words: not the manifestation of a thought but a public demonstration of vulgarity. From this assumption, it derives that blasphemy cannot be included in the manifestation of thought and in the consequent freedom, constitutionally guaranteed, that belongs to it, also because this freedom is itself limited when the manifestation irritates the public morality.

As mentioned before, other articles of the Italian penal code deal with religious crimes. Those are provided by Chapter I, Title IV, Book II of the Penal Code, actually named 'crimes against religions'. This title was not the original one[39] from the Zanardelli Code, but it has been given by article 10, 2 paragraph, of the Law of February 24th, 2006 No. 85.

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[37] This crime sanctions anyone who uses in a public place a language contrary to the public decency. It is now considered as an administrative crime and it is sanctioned with a fine of 300 euro.

[38] The New Concordat (*Nuovo Concordato*), was signed in Rome (in Villa Madama) on February the 18th, 1984 by the Prime Minister of the time, Bettino Craxi, and by the Cardinal Agostino Casaroli.

[39] The original title was '*Delitti contro la religione dello Stato e i culti ammessi*' (i.e. Crimes against religion of the State and admitted cults).

In this chapter, articles 402-406[40] granted a protection to the offenses brought to the religion of the State, through the defamation of the religion itself, of persons or things, as well as the disturbance of Catholic religious worship and also to cases in which these facts are made towards other cults[41]. The legal interest protected by the laws in question can be identified in the protection of religious denomination as a good of civilization[42].

Though, in these two categories of religious crimes it is not possible to include hate speeches based on religion.

Hate speeches, and in general the entire category of hate crimes (which comprises all the acts of violence perpetrated against a person or a group of people identified by their race, ethnicity, religion, sexual orientation, gender or a particular physical and psychological condition), are, in Italy, pursued by the Law No. 205 of June the 25th, 1993 (so-called Legge Mancino, from Nicola Mancino, the Italian Prime Minister of the time, that proposed this law in the Parliament) which deals, in fact, with racial hatred. This law was born as a *Law decree* No. 122 of April the 26th, 1993 concerning '*Urgent measures in respect of racial, ethnic and religious discrimination*' and then converted with modifications into the Law cited above ('*Legislative Decree No. 122 of 26 April 1993, converted into Law No. 205 of 25 June 1993 on urgent measures in respect of racial, ethnic and religious discrimination*').

The *Mancino Law* incriminates not only gestures and violent actions but also the incitement to violence and discriminations based on race, religion, ethnicity or nationality. A coordination can be found between this law and Law No. 654 13rd October 1975 by which Italy ratified and transposed in its national legislation the International Convention on the Elimination of All Forms of Racial Discrimination. Thanks to this interaction the Italian legislation provides additional sanctions/punishments to those who belong to groups or associations having for purposes the incitement to violence or discrimination based on race, ethnicity, religion or nationality.

Articles 1 and 2 of the *Mancino Law* are the most important when considering hate speech.

Article 1 ('*Discrimination, hatred and violence based on racial, ethnic, national or religious grounds*') sanctions '*anyone who, by any means whatsoever, disseminates ideas based on racial or ethnic superiority or hatred, or commits or incites others to commit discriminatory acts on racial, ethnic, national or religious grounds* and '*who, by any means whatsoever, commits or incites others to commit acts of violence or acts designed to provoke violence on racist, ethnic, national or religious grounds*'. These crimes can be committed either by individuals or organization, association, movement or group. Anyone who participates in such an organization, association, movement or group, or helps it with its activities is punished solely on account of such participation or the provision of such assistance. Promoters or heads of the association are punished more severely.

Furthermore, also the flaunt of emblems or symbols owned by organizations, associations, movements or groups (as defined above), in public manifestations or meetings, are sanctioned (article 2 of the *Mancino Law*).

It can be noted that what is considered illegal is basically the promotion and the incitement of hatred based ideas and actions. The incitement, as known, is considered a fundamental key element of hate speech itself and that is the reason why the law is more concerned about this aspect of the crime and it is aimed by the prosecution of it.

The analysis carried out has shown how the Italian legislation has distinguished between 'blasphemy' and 'hate speeches based on religion': blasphemy cannot be included in a

[40] Article 402 has been declared invalid by the Constitutional Court, by the judgment No. 508 of November the 20th, 2000. Articles 403, 404, 405 have been reformatted by Law No. 85 of February 24th, 2006 (precisely by articles 7, 8, 9). The Law (art. 10, par.1) also abrogated article 406.

[41] Osservatorio delle libertà ed istituzioni religiose (OLIR), *L'evoluzione della giurisprudenza costituzionale sulla tutela penale in materia religiosa. Un excursus.* (1957-2005)', (2005). A cura di Maria Cristina Ivaldi.

[42] Giovanni Fiandaca, Enzo Musco, *Diritto penale – parte speciale*, vol.1, (2012), Zanichelli.

manifestation of thought and seen as a limitation of freedom of expression, constitutionally guaranteed, that belongs to it, especially because this freedom is itself limited when the manifestation irritates the public morality or incites to hatred, flowing so in hate speeches.

5 Networking sites and the issue of online anonymity

The current debate over "online anonymity" and the criminalization of online hate speech as stated in the "Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems" is in progress. As for the criminalization of the online hate speech, while reading the mentioned Protocol we can see how one of its purposes is "to provide legal responses to propaganda of a racist and xenophobic nature committed through computer systems" while "being aware of the fact that propaganda to such acts is often subject to criminalization in national legislations" and "concerned, however, by the risk of misuse or abuse of such computer systems to disseminate racist and xenophobic propaganda". So, the present criminalization is actually in progress. Italy for example, has signed that Protocol in 2011, but it has not ratified it yet and so in case of such acts, Italian legislation lacks a clear and compulsory regulation.

That takes us to the next step of the issue here considered: if an Internet user committed acts linked to hate speech should networking sites be forced to reveal the identity at its origin?

In order to give an answer, it is necessary to better understand online anonymity. It is a topic of great importance because "without anonymity, there cannot be true freedom of speech.[43] Anonymity can be defined in different ways and considered in its different aspects. One possible characterization was given by Andrea Maggipinto, President of the Observatory CSIG (Centro Studi di Informatica Giuridica), in Milan: "is a condition where an individual, in a public context, maintains his liberty to not be recognized or identified".[44]

Therefore, according to the former member of the Defence Italian Minister, Giovanni Nacci, if we consider anonymity in a "passive meaning" it is a precious instrument of protection for personal and private information that we do not want other people to see while we surf the Internet. If instead, we consider anonymity in an "active meaning" it is a way of running away from responsibilities, from any possible consequence derived from our action. In this second frame we can situate the online hate speech and the question if networking sites should be forced to reveal identities of the persons at the origin of racist and xenophobic nature committed through computer systems.

The issue of the "responsibility": first of all, who is supposed to be considered responsible for the prevention of illegal activities online?

Without going out of the issue considered, it is important to distinguish the "ISPs" (Internet Server Providers) from the "host providers": the first ones allow connection between a web server and the rest of the internet, while the second ones "host" a website on their servers, managed by the third party independently. "If you want to run a website, you will need both: a hosting provider to house your site, and an ISP to connect your web server and the rest of the Internet".

According to the European case-law, both the ISPs and the hosting providers are considered not responsible for the behaviours of the users committed online. In fact, the Court of Justice of

[43] *Sicurezza e anonimato in rete*, Andrea Maggipinto e Michele Iaselli, Preface.

[44] *Sicurezza e anonimato in rete*, Andrea Maggipinto e Michele Iaselli, 63.

the European Union decided so in SABAM v Scarlet and SABAM v NETLOG[45]. The two cases regard an ISP (Scarlet) and a hosting provider (NETLOG).

The Court gave the same solution to both issues: a private, meaning the Belgian Copyright society SADAM, cannot ask an ISP of a hosting service to implement a general filtering system to prevent unlawful activities or to identify files on which SABAM holds rights (these were basically the two requests made in the different judgments). The Court applied Article 15 of the Directive 2000/31, which provides for a prohibition to impose general obligation or to monitor what they transmit or store, without any distinction between ISP or service providers.

According to Article 17 of the Legislative Decree 70/2003, which implemented the Directive 2000/31, ISPs do not have an obligation of monitoring the user's activities in order to avoid unlawful activities; according to the second paragraph though, they have to inform the Public Authorities of presumed illegal activities and communicate them, if they ask so, information concerning investigations of the illegal activities. Furthermore, from the 2005 Report of "Data Protection Authority" we can deduce that ISP is not obliged to communicate information of their users in case of private request.[46]

Italian case-law and confrontation with other European contexts

A) "Fapav v. Telecom"

The case "Fapav v Telecom" is also very important. It is the case of victory of Telecom Italia (the largest Italian telecommunications company) against Fapav (the Italian Industry Federation against Audiovisual Piracy). A Court in Rome has sentenced that Telecom Italia cannot be legally forced to provide Fapav the list of names of users who download illegal files, because only the justice department is entitled to obtain this list. The court case was brought up by Fapav which asked the civil judges in Rome to force Telecom to block, report and disconnect users who download illegal files and to put offline common websites used for file sharing like Italianshare, ItalianSUbs, Vedogratis, Youandus, Italianstreaming, 1337x, Dduniverse, Angelmule, Italiafilm and Ilcorsaronero. Fapav's proof was a study, which it had commissioned to CoPeerRight Agency which, through dubious means, was able to discover the IP addresses of 2.5 million users, Telecom costumers, who had downloaded 9 copyright protected movies. The judges also sentenced that they are downloading illegal content, only the authorities can; Fapav cannot use shortcuts and has to verify that a user is actually committing a crime. The only victory for Fapav is that Telecom now needs to relay to the authorities the infringement claims that copyright holders bring up.

B) Lycos v. Pesser

The case "Fapav v Telecom" is similar to the first case ever decided by a European Court on the same issue. In fact, in 2005 the Hoge Raad (Supreme Dutch Court) obliged an Internet Server Provider, to communicate the identification information of an user who had a site through which he discredited Pesser, a stamp seller. The Court said that the right to freedom of speech protected by Article 10 of the "European Convention on Human Rights" is a qualified right and so subject to limitations in case of violation of other rights, like when publishing certain information. That, though, does not mean that an ISP is obliged to supervise the users' activities in order to avoid an unlawful usage; they simply have to communicate the identification information of the users when certain acts reasonably seem to be unlawful and the victim has the right to act in court.

In conclusion, just like in "Lycos v. Pesser", that judges in Italy have to make an evaluation of the different interests involved in a case and decide whose protection must prevail and also if an

[45] Sabam v. Nelog (2012), http://kluwercopyrightblog.com/2012/02/20/sabam-v-netlog-cjeu-c-36010-as-expected/

[46] *Diritto all'anonimato: anonimato, nome e identità personale*, Giusella Finocchiaro, 329-334.

ISP has to communicate the identification information of an Internet user. This might be a precedent for a case of hate speech act committed online.

C) "Google v. ViviDown"

In 2010 the Tribunal of Milan made it clear that "the Internet is not an endless prairie where everything is allowed and nothing is forbidden."[47] This is a judgment where the conviction regards the violation of the Italian privacy laws because of a video uploaded into the popular search engine, which portrayed a disabled child insulted and beaten by classmates. Furthermore, in 2012 the Court of Appeal of Milan solved the case with a sentence that acquitted the defendants because the preventive control required in the previous sentence (and so linked with the violation of the mentioned laws) it was afterwards considered to be impractical and even a narrowing of the freedom of expression.

The relevance of all this judgments, which seem to have few or nothing in common with the issue concerning hate speech and online anonymity, it can be given by the following consideration: at the moment there is no clear and compulsory discipline for the punishment of the authors of online hate speech. These judges though allows us to imagine a possible solution to such future cases, meaning that: if people are recognized protection against hate speech by legislation (see *Mancino Law*) and hate speech conduct happens online, it is feasible to ask IPSs or service providers the identification of the persons at the origin of the crime. That, of course through the Public Authorities request.

As for legislation, in 2009 there was an attempt to forbid anonymity, with the Carlucci bill which to ban uploading any type of content on the Internet anonymously (text, video, sound) and enabling such use in order to stifle online piracy.

Here also, it may not be clear which the link between piracy and online hate speech is. Both concern conducts which take place online and so, if in order to stop piracy online a legislative measure was feasible, that might also happen for online hate speech.

In 2012 though, in the "Shadow Report"[48] of the "Unione forense per la tutela dei Diritti Umani (UFTDU, an association of lawyers) it is given particular attention to "the absence of specific regulations for the prevention and punishment of crimes of incitement to racial hatred committed by the so-called "new media" (social networks). In its conclusions, the report makes many recommendations against the Italian Government, such as the one to ratify the Convention on Cybercrime, to take legislative measures for the criminalization of the dissemination through the web of racist and xenophobic material, insults of a racist and xenophobic nature; it clears out that the rights and duties of the information providers on the web(including social networks) should be adjusted according to the principle of equality in order to supervise and monitor the content transmitted from the web pages and to give priority to the substance(the respect for fundamental rights) on the form; it also encouraged a closer cooperation between social networks and institutions in order to outline the general rules and abstract to prevent and discourage the spread of discriminatory content on the web.

In July 2013, the Minister for Integration, Cécile Kyenge said: "We are studying new legislation to prevent and punish incitement to racial hatred on the Internet and social networks". So, there actually exists the idea of punishing and restricting the use of social networks to insult and threaten other people.

Even if in Italy it seems there is no general and legal obligation to reveal identities in case of hate speech, protection is assured when other interests of value are involved, such as the right to privacy.

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[47] "*Caso Vivi Down. Finalmente le motivazioni*", http://punto-informatico.it/3731576/PI/Commenti/caso-vividown-finalmente-motivazioni.aspx

[48] http://www.unionedirittiumani.it/wp-content/uploads/2012/07/Rapporto-2012.pdf

The usage of the Internet is more and more subject to limitations, with respect for one's freedom but also in the awareness that it must not be an instrument of damaging others and be forever unpunished.

In conclusion, for now, the obligation to reveal the identities of Internet users guilty of hate speech crimes seems feasible in the future and what is for sure is that the criminalization of online hate speech is increasingly seen as needed.

6 Tackling the notions of "violence", "hatred" and "clear presence of danger"

The approach to the online hate speech in the "Additional Protocol" and the "Explanatory Report"[49]: in Chapter II (Measures to be taken at national level) Article 3 (Dissemination of racist and xenophobic material through computer systems) paragraph 2 of the "Additional Protocol to the Convention on Cybercrime, concerning the criminalization of act of racist and xenophobic nature committed through computer systems" it is said that a conduct of "distributing, or otherwise making available, racist and xenophobic material to the public through a computer system"(as specified in paragraph 1) it is not considered a criminal offense if "it is not associated with hatred and violence". In this Article two different words are associated to hate speech: "hatred", defined by the Explanatory Report" of the Protocol as "intense dislike or enmity" (point 15) and "violence" as an "unlawful use of force".

The question is: are the notions of "violence" and "hatred" both necessary for the hate speech crime or are they alternative?

While some jurisdictions, such as the United States one, absorb the racist discourse in the ordinary case of abuse (the so-called "fighting words") or the incitement to commit a crime ("clear and present danger" doctrine), Italy is one of the countries where hate speech is punished by criminal law[50]. For example, according to Palmina Tanzarella, Researcher in Constitutional Law in Milano-Bicocca University, it seems legislative provisions and case law are favourable to the indictment of hate speech with such instrument. In fact in Italy there is a law, which regulates hate speech hypothesis and which was applied by judges since 1993, when the mentioned law was modified.

On the contrary, the majority of criminal and constitutional doctrine views with suspicion the idea of fighting the problem with criminal law instruments. As Michela Manetti, professor of Constitutional law in Siena, illustrates, since it is a crime of opinion, hate speech is not only difficult to define, but also the application of clear means of protection is not easy to establish. For instance, the requirement of danger, the proof of ones intention to commit the crime, might get to the opposite consequence of assuring no protection; also, the justification of the freedom of speech in order to protect, for example, the human dignity, makes the borders of the protection of hate speech even more uncertain.

The input for the legislation came, if we can say so, from the "outside" because the Royal Law 654/1975, two times modified, implemented the "International Convention on the Elimination of All Forms of Racial Discrimination. The purpose established by the international obligation was the prevision of crimes with preventive and protection functions.

The first version of the law, though, was too generic; in fact, it merely laid down a prison sentence of up to three years against anyone who incited "in any way to discrimination". Moreover, no distinction was mentioned for 'dissemination' "in any way of ideas based on racial superiority or hatred and for ' incitement' " in any way to discrimination or commission of acts

[49] http://conventions.coe.int/Treaty/en/reports/html/189.htm

[50]https://www.aric.unibo.it/AssegniRicerca/_doc/2010/ID%5B6329%5DProgetto_assegno_di_ricerca_2010_-_GIUPPONI.doc.

of violence or provocation to violence against people because they belong to a national, ethnic or racial group." In both cases the punishment was the imprisonment from one to four years. This shows how from the beginning, the hate speech was punished without seriously considering this type of sanction and in time the choice of a criminal discipline remained the same; that is, according to Palmina Tanzarella, both because such provisions were considered to be the most effective way to make justice for the injuries received, and to deter from committing new acts of discrimination.

After the modification by *Mancino Law* n. 205/1993, the Royal law establishes the following provision: at section 3(1)a prohibits the dissemination of ideas based on superiority or racial and ethnic discrimination, as well as the incitement to commit or the commission of discriminatory acts for racial, ethnic national or religious reasons, while at Section 3(1)b it punishes the incitement to commit or the commission of violent acts of provocation on racial, ethnic, national or religious grounds[...]. And so, unlike the original version, letter a) predicts the "hate speech", while letter b) predicts "hate crimes".

The last version, as modified by Law 85/2006, is characterized, on one hand, by the diminished punishment (one year and six months) and, on the other hand, by the change of the words "dissemination" and "incitement" with respectively "propaganda" and "instigation". This means that in case of "instigation" is needed a 'precise dolus', meaning the appropriateness of the action to harm even if this last one is not achieved; in the case of propaganda a 'generic dolus' is enough for the punishment, meaning the simply existence of a conduct.

In the conclusion, even it was modified also in 2006, in all the different versions the words "hatred" and "violence" are present in two different paragraphs, meaning there both necessary for hate speech crimes to happen, even if alternatively because are present in two different paragraphs.

Since the first version of the Royal Law the doctrine showed serious doubts on its conformity to the Constitution.

The reasons for the opposition of the doctrine were linked with the status given to freedom of expression, consider being a fundamental value and constitutionally protected right as established in Article 21 of the Constitution and not subject to undue sacrifices.

The fact is, as Michela Manetti, Professor of Constitutional law at Siena University, recalls, that hate speech is considered to be a so called "crime of opinion" and that is why, it is difficult to find a constitutional foundation, for it is necessary a reason for making an exception to application of article 21 of the Constitution: there has to be a right, a good or an interest to be protected, that otherwise would be in danger.

Different theories were elaborated. One, for example, concerns the implicit limits of the equality principle, of the public order and of the respect of the human dignity. The minority doctrine (Pugiotto) affirms, all these theories are objectionable. Other theories concern the logical limits to freedom of speech adopted by the Constitutional Court: Giupponi and Pigiotto explain that according to the Constitutional Italian Court, there are conducts which cannot be considered "speech *strictu senso*"; that happens when they are actually an action not protected by Article 21.

As for case law, the legislation had a great influence on the Judges decisions, both ordinary and constitutional.

Before explaining how that happened, it is important to consider that, as Palmina Tanzarella says, the Law n. 654/1975 was not applied at the beginning because of the too general formulation. In fact, as a crime of opinion, the hate speech derogates the freedom of speech. The first application of article 3 was not adequate to find a right, good or interest to protect and so justify its qualification. With the second and third version of the Royal Law, judges were more predisposed to apply the law, but they never thought there was a serious problem of

unconstitutionality, solvable only by the Constitutional Court. In fact, even if the provisions of the law consider enough "an abstract danger" for the punishment, the judges interpreted it according to the American "clear and danger" scheme.

After the *Mancino Law*, the modifications gave the judges the opportunity to justify criminal charges against the dissemination and incitement to racial hatred with the safeguard of the human person, turning the offense crime rather than against the personality of the States, as it is for all other crimes of opinion, against the human being. The human dignity was to be the "good" to protect and which allowed the derogation of the freedom of speech. There was also a sentence in 1993 which admitted that the two versions of the law have the same purpose of preventing ideologies concerning ideas like the primacy of the race from leading to aberrant discrimination, with the danger arising therefore hatred, violence and persecution In another judgment of 2001 the Supreme Court stated that "the right to free speech , protected by Article 21 of the Constitution , cannot be extended to the justification of acts or conduct which, although are just an externalization of his convictions , however adversely affect other principles of constitutional importance and the values protected by the legal domestic and international law"

As for other judgments where the Royal Law and its different versions are applied, there are some to be mentioned for their great importance in the area.

For example, in 1997 the Court of Appeal of Rome condemned the defendants for violation of art. 3, letter b), Law 654/1975 for "incitement to commit or the commission of violent acts of provocation on racial, ethnic, national or religious grounds", while in 2008, the Court of Appeal of Trieste condemned the defendant for the violation of the Law n. 205/1993 for acts of incitement discrimination of violence "on racial, ethnic, national or religious grounds". The judgment of the Court of Appeal of Rome was revoked by the Italian Supreme Court with the sentence 434 of 1999[51], while the second judgment was confirmed by the Supreme Court with the sentence 25184 of 2009.[52]

In December 2004, the first instance Court of Verona found six local members of the Northern league guilty of incitement to racial hatred in connection with a campaign organized in order to send a group of Sinti away from a local temporary settlement. These persons were sentenced to six month jail terms, the payment of 45 000 Euros for moral damages and a three-year suspended ban from participating in campaigns and running for national and local elections. Afterwards, the Court of Appeal of Venice acquitted them of the crime of incitement and maintained the conviction for propaganda, with a reduction in the custodial sentence of two moths (because meanwhile the Mancini Law was modified); then the Supreme Court quashed the appeal judgment with reference to the district Court in order to ascertain whether the criminal case was motivated by an idea which discriminates on racial diversity or to several reasons not punishable. That is how, the judgment of the Court of Appeal on the offence and also the Supreme Court confirmed the sentence established by the Court of Venice. The Supreme Court recognized only the change, and consequently the limitation of the law's application, from "dissemination" to "propaganda (it "implies that the spread should be such as to build consensus around the idea disclosed)", but it is not relevant in that case because the defendants, according to the complaint, they were not be limited to spread their idea to remove the gypsies from Verona, but also publicized and propagated in order to gain public consensus.

From all this judgments we can understand how a person in charge with a public office, especially a politician, it is perhaps more "subject" than others to be subject to be punished for hate speech.

[51] Supreme Court, 434/199, www.asgi.it/public/parser_download/save/sent.cass.434.99.doc

[52] unipd-centrodirittiumani.it/public/docs/CCP_563-11.pdf

This last one is an interpretation, which started to be considered also in the case law of the ECHR. In fact, recently it did not condemn Belgium for the violation of article 10 ECHR, given precisely the quality of person in charge with public office, a road that seems to have been implicitly accepted even by the Italian courts (Féret v Belgium, 2009).

Getting back to the focal problem, it is important to mention, that if we read different cases disputed in front of the ECHR we can see that the punishments are referred to "violence" and "hatred" alternately: in fact, there are cases of conviction of incitement "to ethnic, racial and religious hatred" (Pavel Ivanov v Russia, 2007; Féret v Belgium, 2009) and other cases of, for example, glorification of violence: conviction for public defence of violence and terrorist methods (Faruk Temel v. Turkey, 2011) and so on.

Hate speech and the "clear and present danger" doctrine

The First Amendment in the USA Constitution was inspired by John Stuart Mill, who was a British utilitarian who considered free speech essential. In practice, though, the Supreme Court had great problems to solve cases involving speech that allegedly pose threat to security: that is how the doctrine of the "clear and present danger "was elaborated. It is a parameter to establish when it is due a protection for freedom of speech and when instead there is a case of hate speech. The character of each act depends upon the circumstances in which it is done.

From this point of view, hate speech can be considered a semi-protected speech; it is considered an in-between category between free speech and unprotected speech. As for the consideration of violence and hatred there are two judgments to be considered. The first one is Garrison v. Louisiana (1964): here it is said "that hate-motivated speech will be protected if the speaker honestly speaks out of hatred, and honestly believes they are contributing to the free interchange of ideas and the ascertainment of truth". The other one is R.A.V. v. City of St. Paul (1992): it involved "teenagers who burned a cross inside the yard of an African-American family. The Court ruled the teenagers could not be punished under an overly broad hate crimes statute and that since the conduct contained a political message, it should be protected, but that hate crimes in general should be dealt with in other ways than bringing the First Amendment into the picture."

So, although the doctrine expressed many doubts for the punishment of the hate speech, both because of the necessary limits to Article 21 of the Constitution and for the criminal instruments adopted the legislation and consequently the judges felt the need to assure protection to the hate speech victims. For the more, there was an evolution finalized to solve, as much as possible, the problematic consequences the punishment of hate speech provoked.

In the end, it is quite evident that the legislation separates the conviction for acts of hatred and those for acts of violence or incitement to violence: the first is the hate crime and the second the hate speech. The same conclusion can be drawn for the case law. An accurate analysis of the Italian case-law shows how hate or violence, if are the reasons of a behaviour cannot be considered elements of a hate crime; it is necessary in fact, the presence of the intention to make the idea get at the exterior, want to be known by other people and so get them influenced by the discriminatory idea based on religious, ethnic, national or racial reasons (Supreme Court 44295/2005). In this last sentence it is said that the simple feeling of hate is not enough for the application of the legislation, it is needed a strong feeling of hatred. So, from all the considerations made, we can deduce that these two notions are to be considered alternative both in the Italy (because of the separation in two different paragraphs made in the Royal Law) and in accordance with the ECHR' case-law (considered the cited cases of hate speech in presence of hatred or violence) and even in the USA (the illustrated cases show different sentences for hatred and violence).

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

First, we must define and explain which are the two principles respectively present in Articles 10 § 2 and 17 of the ECHR.

Article 10 § 1 of the ECHR establishes: "*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises*". So, in Article 10 of the Convention we find the right to free thoughts and opinions, but also the right to receive information without any interference by any Authority (public or private) and by any other super-national entity.

We find the same right at article 21, section 1 of the Italian Constitution, which states: *"All have the right to freely express their own thoughts by word, in writing and by all other means of communication"*.

The right established in article 10 of ECHR and article 21 of the Italian Constitution, is an inviolable freedom and a primary and fundamental value of any Democracy: it guarantees ideological pluralism, that is, the possibility for all individuals to express and spread their personal political, economic or cultural opinions.

It is important to note, however, that the particular nature of the asset protected - essential in a democratic judicial system reflecting the values of the ECHR - can often create conflicts with other essential assets, also protected by the ECHR and Italian laws.

This particular circumstance has brought the States and the European Court of Human Rights to think how to discipline situations which can be configured as the so-called "crimes of opinion". Among these, the hate speech presents as a material element the expression of opinions, judgments or feelings; unlike insult or defamation, hate speech, as a crime of opinion, is not justified by the need to safeguard the honour or the reputation of another person.

Prohibition of hate speech means to prohibit expressions of "extreme intolerance or extreme aversion". The qualification of "extreme" represents a prerequisite, since intolerance and hate are themselves human feelings that any legal system could avoid.

The crucial point is to find a balance between freedom of expression and the protection of other significant interests, when these are identified as fundamental by constitutional principles.

It is harsh to find possible exceptions to freedom of expression. Inspired by the Anglo-Saxon liberal doctrine, the mainstream in Italian doctrine firmly objects the definition of limits to Article 21 (freedom of expression).

In contrast, there are those who support the application of two different kind of limit: "logical limit" and "implicit limit". Accordingly to the first argument, hate speech can be punished for thoughts that are not considered so, and that instead materialize in a principle of violent action. Otherwise the theory of the implicit limit says that freedom of expression is already subjected to limits in order to protect other individual rights, such as privacy, reputation and honour, or to safeguard public order and human dignity. The Italian Constitutional Court with sentence no. 1/1956 stated that the concept of limit is within the concept of law and that in Italian law the different juridical spheres must be limited to each other so that they can coexist in the orderly civil society.

In the paragraphs above, the position of the Italian doctrine was briefly explained.

Article 10 of the ECHU, unlike the Italian Constitution article 21, provides an accurate list of explicit limits whose meaning has been defined and thoroughly enriched by the European Court. The second paragraph of Article 10 provides indeed the principle of the so-called "restriction" to the right to freely express thoughts: "*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of*

others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

In the Italian legal system the only restriction to freedom of expression is provided by article 21 of the Constitution, which states that "*printed publications, shows and other displays contrary to morality are forbidden*".

The main problem posed by the article is the definition of the notion of "morality" since positive legislation assigns different meanings to it. In the Italian Civil Code (article 1343) "morality" is identified with the set of ethical principles dominant in a certain historical moment or with the concept of "public morality".

A much more restrictive meaning than that, is provided by article 529 of the Italian Criminal Code which defines "obscene", so in contrast with morality, "the acts and objects that, according to common sense, offend decency"; in this perspective, morality is connected to the common sense of decency. The latter is defined as a particular form of reserve that accompanies the manifestations of sexuality or any other representation, which could cause annoyance, embarrassment, inconvenience and sometimes even disturbance, in particular when the viewer is a minor.

However the constitutional jurisprudence has pointed out that this concept must not be connected either to morals or to the ethical conscience but conducted to "a series of rules of cohabitation and behaviour that must be observed in a civilized society" (Constitutional Court February 19th, 1965, n. 9 and March 16th, 1971, n. 49).

In the judgment of July 17th, 2000, n. 293, the Constitutional Court stated that public morality must necessarily be in connection with the demonstration of thought which is contrary to the human dignity: "...this minimun content is nothing but the respect for human beings, the value that forms Article 2 of the Constitution, where we find the denounced incriminated prevision. Only when the attention of the civil community is negatively affected and offended by written publications with striking or horrifying details and therefore noticed by all the community, the regulation reaction begins".

In Article 17 of the ECHR, entitled "Prohibition of abuse of rights" is clearly affirmed the principle of "exclusion": "*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention*".

Article 17, which provides the abuse of rights, affirms the hypothesis that the member States invoke some conventional freedom as a shield to affirm values that threaten the democratic regulations.

As known from ECHR, the Italian law does not provide a specific constitutional provision where it is clearly expressed the concept of "abuse of rights", even if the figure of the opinion crime appears in various provisions of the Italian Criminal Code and special laws.

The category of crimes of opinion is controversial since it includes heterogeneous cases; the only element they have in common is to represent exceptions to the freedom of expression. In these cases is often not easy to determine which interest they aim to guarantee: indeed, the latter is neither an individual right, nor it can be assumed that this has a constitutional status, which would give legitimacy to any restriction of the freedom of expression.

The Italian Criminal Code of 1930 includes in the category identifiable as "crimes of opinion" several cases: for example, incitement of soldiers to disobey the laws and apology to soldiers to actions contrary to military laws, swearing, discipline or other duties (article 266); crimes of contempt (articles from 290 to 293 as amended by the Republican Parliament) such as contempt of the Italian Republic, of the constitutional Institutions and Military Forces, of the Italian Nation, of the national flag or other symbols of the State.

In addition, among the typical crimes of opinion, there are some contraventions provided by the same Criminal Code, such as the publication or diffusion of false information, exaggerated or tendentious, likely to disturb public order (Art. 656).

In particular, referring to the contempt of flag or other symbols of the State (art. 292 of the Criminal Code and art. 83 of Military Criminal Procedure Code) the Italian Constitutional Court in 2000, and then the Military Court of La Spezia in 2001, pointed out that "the interest protected by the norm is the dignity of the symbol of the State, as an expression of the dignity of the State Unity, of the National Institutions and of the entire Italian society".

In the mentioned judgement, the Italian Constitutional Court stated the Italian judges' duty to verify if there is a concrete offence to the asset protected, in order to avoid to punish mere exercise of the freedom of expression guaranteed to each individual by both ECHR and Italian Constitution.

In regard to the principle of subsidiarity, introduced by the Maastricht Treaty on European Union (EU) in 1992, it has to be pointed out that its operation is grounded in the article 5 of the European Treaty and on the Protocol no.2 on the application of the principles of subsidiarity and proportionality.

According to this principle, in areas which do not fall within the exclusive competence, the Union shall take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effect of the proposed action, be better achieved by the Community.

The principle of subsidiarity has a dynamic character, which enables expansion of the EU competences where necessary and, on the contrary, limit them when not necessary, not being able to add further power to the EU. In addition any adoption of legislative acts of the EU institutions, hypothetically justified by the exercise of the principle of subsidiarity, is subject to control by the Court of Justice of the European Union.

In the Italian legal system, the principle of subsidiarity is argued when the State undertake to refrain from intervening in certain sectors, to avoid hindering those who could better satisfy a particular need, for examples, territorial Public Entities (Regions, Provinces and municipalities). In fact it is assumed that the free aggregations of people acknowledge certain peripheral realities better than public administrators of higher level.

With reference to the right of free expression of thought and in particular to Hate Speech, the European Court of of Human Rights wanted, as you can see from Art. 10, comma 2 (*"The exercise of this type of freedom , since it involves duties and responsabilities, may be subject to formalities, conditions, restrictions or penalties prescribed by Law and which are necessary in a democratic society..."*) , in accordance with the principle of subsidiarity adopted at a community level , leaves it to the States, through specific laws and targeted interventions, to regulate the configurability of an eventual crime of opinion, as to protect the principles which found the State itself, as the democratic and national protection.

The principle of subsidiarity recognises States to be more suitable in regulating the behaviour of citizens since the national level of regulation is more aware of the social and cultural context, traditions and specific legal system; of course regulation provided by States must take into account the fundamental principles elaborated by the European Court and established as imperative and unavoidable. These principles are considered the "minimum" in order to ensure that the right of each individual to freely express its own thoughts would not be violated.

In addition to all this, it has must be said that the European Court of Human Rights expressly grant a "margin of appreciation" to the States in order to adopt exceptional measures or measures constituting an "interference" with respect to the ECHR disposition.

It must be remembered that the total number of countries supporting the Convention is now 47, all with historical-legal traditions very different from one another, not allowing a uniform application of the conventional rights.

The margin of appreciation is very important and used because it seems to be the only way to avoid conflicts between so many States which composed the Council of Europe.

The "margin of appreciation" is also an "essential component of the judgment of reasonableness and proportionality" which are two important *criteria* in finding the balancing point between fundamental rights.

The most important role of the "margin of appreciation" is that it guarantee the subsidiarity principle as analysed above: using the margin of appreciation the States can create appropriate and consistent laws, without any need for the States to be substituted by a higher level of regulation.

8 Harmonisation of national legislation

"*Today more and more people are sharing stories over the Internet. The Internet has brought enormous good to our world. It has transformed the way we live and work. Yet, we know there are also a few dark alleys along the information superhighway. There are those who use information technology to reinforce stereotypes, to spread disinformation and to propagate hate. […] We understand the power of words. Words can hurt or they can heal. They can rapture or they can repair. Electronic harassment and cyber-hate can have a searing impact. We must be aware. We must remain vigilant*".[53]

The speech of the UN Secretary General Ban Ki-moon perfectly outlines the current situation of the Internet. Through the progress of technologies and innovations it became the most relevant mean of communication, a borderless platform where anyone can share ideas and information, connecting worldwide. Cyberspace broke physical and psychological barriers promoting freedom of expression and social and political inclusiveness, fostering the pursuit of better conditions of life. Nevertheless, as cyberspace has grown, cyber-criminality has followed, becoming a serious international issue. Regulatory interventions have been made and States are aware of the danger of such a boundless, unfettered area, with particular regard to the problem of cyber-hate. Indeed, hatemongers use the Internet to spread their opinions, their intolerance. In this scenario international and national lawmakers should determine rules applicable all over the Internet, in order to reduce criminal offences and the dissemination of racist material through the computer system.

A uniform and harmonized international legislation is essential to tackle cyber-hate crimes, and it is a prerequisite for avoiding domestic lawmakers taking different approaches mining the applicability of international rules.[54] The harmonization of national legislation requires the States to introduce within domestic legal systems a series of rules, a common minimum standard in order to enhance the application of international rules. In the process of harmonization European States should, first of all, take into account the principle of proportionality, in order to comply with the fundamental treaties which the European Union lies on. At European level, the principle of proportionality was firstly widely affirmed by the European Court of Justice (hereafter ECJ), and then raised to a treaty provision. It was codified in art. 5 § 4 of the Treaty on European Union and it states as follows:

"*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*"

The principle of proportionality entails an evaluation between the suitability of means and methods used with respect to the aim to pursue, requiring that means and methods should be limited to the real necessities in order to achieve the purpose. Since it represents the basic principle of international and national legal systems, it binds both European Union (EU) and State members. It operates both for the content of their actions and for the type of acts adopted:

[53] Ban Ki-moon, UN Secretary-General, Speech at the seminar 'Cyber-hate: Danger in Cyberspace', New York, 16 June 2009.

[54] Fausto Pocar, 'New Challenges For International Rules Against Cyber-Crime', (2004) European Journal on Criminal Policy and Research Vol. 10: 27–37.

legal instruments' compulsoriness should be graduated and acts should be properly adopted with regard to the goal.[55]

The ECJ considers the principle of proportionality as a general principle of EU law, a judicial tool leading the decision making progress. The Court applies the principle of proportionality when legislative or administrative measures, taken by EU or member States, affect private interests, fundamental freedoms or individual rights. In all those cases it values the violation of the principle considering the three criteria of suitability, necessity and adequacy, which are useful tools to balance the interests at stake. The approach of the ECJ for violations of the principle of proportionality changes in consideration of the object of the judgment. The vertical dimension of the ECJ approach entails that, while assessing a regulation of national legislation, the Court repeals the provision if national legislator adopts a disproportionate measure which is considered illegitimate as too much restrictive of individual rights. Unlike, in the horizontal dimension, involving cases regarding EU laws, the Court applies proportionality in a less strict way, repealing the provisions only if manifestly improper. The discrepancy between the two means of application can be motivated by the prominent relevance of European integration, thus avoiding to abolish EU rules and decisions.[56]

Within Italian domestic law, principle of proportionality has been receipted in art. 1 of Act n. 241/1990, containing a significant reform of public administration principles and procedures, as modified by Acts 15/2005 and 69/2009.[57] It is a general principle of administrative law, strictly linked to the principle of reasonableness. It amounts to a parameter leading the action of public administrations while interacting with individuals and their legitimate interests and rights.

Proportionality has been recognized by Italian courts in its European definition and execution thanks to the decision of the Supreme Administrative Court of Italian Republic. The Court declared that any assessment on proportionality of national legal instruments and measures should be based on the evaluation of the three criteria of suitability, necessity and adequacy[58].

The principle of proportionality can be an indispensable tool for the enforcement of cybercrimes and hate speech regulations, serving as guidance for the coordination of criminal legislation. Each State or international body should appreciate that the provisions ruled out comply with rights, responsibilities and interests of third parties.[59]

Furthermore, in the harmonization of national legislation, international rules, already into force, must be considered and applied. Indeed, the process of standardization of national legislation begins at a universal level, to which domestic legislations are bound. The current legislative international background on the matter counts various measures adopted by international organizations, NGOs and regional organizations, revealing the constant efforts made by such actors and lawmakers in order to establish and ensuring the cyberspace safety. The United Nations (UN) has intervened on the matter underlining the increasing relevance of information technologies and encouraging States to tackle criminal misuse of computer systems. The UN has developed numerous recommendations and resolutions[60], also through the work of

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[55] Ugo Villani, Istituzioni di Diritto dell'Unione europea, (2nd edt, reviewed and updated, Cacucci Editore 2010) 75-77.

[56] Tor-Inge Harbo, The Function of the Proportionality Principle in EU Law, March 2010. European Law Journal, Vol. 16, No. 2, pp. 158–185.

[57] Law n. 241/1990, Art. 1: "L'attività amministrativa persegue i fini determinati dalla legge ed è retta da criteri di economicità, di efficacia, di imparzialità, di pubblicità e di trasparenza, secondo le modalità previste dalla presente legge e dalle altre disposizioni che disciplinano singoli procedimenti, nonché dai principi dell'ordinamento comunitario".

[58] Consiglio di Stato, sez. VI, decisione 17 aprile 2007 n. 1736.

[59] Judge Stein Schjølberg and Amanda Hubbard, 'Harmonizing National Legal Approaches on Cybercrime', (June 2005), WSIS Thematic Meeting on Cybersecurity, International Telecomminication Union.

[60] UNGA Res 56/121 (2001) and UNGA Res 56/261 (2002), GA 56th session.

its prevention and monitoring agencies, such as the UN Office of Drug control and Crime prevention and the Economic and Social Council[61]. Alongside the UN, several other bodies are committed to strive for cyber-security and are involved in finding a common legal framework to promote the law enforcement, such as the International Telecommunication Union (ITU), the World Summit on the Information Society (WSIS), the Group of Government Experts on Information security, and so on.

Particularly important at international level is the Convention on Cybercrime, whose aim is to strengthen international cooperation, fostering the harmonization of the domestic regulation of States parties on cybercrime. It is a multilateral compact sponsored by the Council of Europe and approved in Budapest, Hungary, on 23 November of 2001. In its four chapters, it provides legal definitions of Information Technology terms and identifies specific offensive conducts as computer-related crimes, by establishing substantive and procedural criminal provisions aimed at enhancing the collaboration among contracting States on specific issues. Originally, the Convention included also some prescriptions on the criminalization of hate speech and hatred expression inciting to violence, which later became subject of an additional protocol. As hate speech, harassment, bullying and discrimination on the web increased[62], States became aware of the urgency to adopt regulation against hate propaganda and dissemination. The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts with a racist and xenophobic nature committed through computer systems is the very first treaty concerning online hate speech. It recognizes new crimes to be added to the list of the Convention on Cybercrime, in particular regarding the dissemination of racial and xenophobic material, endorsing a broad application of investigatory techniques and procedural rules stated in the Convention. European Countries tried to impose virtual boundaries to the Internet and they sought to extend their jurisdiction beyond geographical borders, claiming the right to prosecute offenders also when the criminal act has been committed elsewhere. Nonetheless, the main obstacle to the application of the Additional Protocol is the First Amendment of the Constitution of the United States of America (US), which allows freedom of expression without any restriction. The contrast between US and European regulations affects the effective application of the prescriptions of the Additional Protocol, for those perpetrators who use US servers to publish discriminating or hatred contents on the Internet. Therefore, the intent to create minimum standard rules, valid also beyond the national borders, cannot be fully accomplished and international cooperation for investigations and prosecutions should be strengthen.[63] The legislative progress has some obstacles to overcome, but efforts should be made in order to find a common ground of intervention in fighting cyber-hate.

Finally, the harmonization of national legislations can be achieved also through means different from laws. On April 2008 the global Conference "Cooperation against Cybercrime", within the context of the Council of Europe, adopted a useful, non-binding tool, which endorses the cooperation between law enforcement and Internet Service Providers (hereafter ISPs). The Conference stressed the fundamental role played by ISPs in order to strengthen the trust of users in cyberspace and to combat against the use of the Internet for illegal purposes. It involves ISPs in the establishment of standard rules on two main subjects: reporting criminal offences perpetrated on the web to national authorities and providing law enforcement with any

[61] Commission on Crime Prevention and Criminal Justice, 'Promotion of activities relating to combating cybercrime, including technical assistance and capacity-building', Res 20/7 (15 April 2011).
[62] Alexander Tsesis, 'Hate in Cyberspace: Regulating Hate Speech On the Internet', (2001) 38 San Diego L. Rev. 817.
[63] James Bank, Regulating hate speech online, 2010.
International Review of Law, Computers & Technology, vol. 24, No. 3, 233–239.

assistance required.[64] The guidelines refer to cybercrimes in general, and they can also be applied to hate speech and hate incitement. Moreover, ISPs can enhance cyber-security by opting for a self-regulation entailing the adoption of a code of conduct and by submitting to all users Terms of Service agreements which inhibit any hatred and harmful content. Through the mechanism of voluntary codes of practice ISPs can delete offensive materials and ban users who do not observe the rules.[65] When ISPs' control fails, individuals and public powers (i.e. Government, Judges) can decide to what content they may access. In this case, filters - particular software operating on the basis of established criteria - prevent users to access to certain websites by blocking injurious contents. Public use of filter is a purely political decision based on the will of States to monitor the situation and implement the respect of domestic laws.[66] The limit between censorship, on one side, and protection of minorities and multicultural society, on the other side, is really thin and easy to exceed, thus States carefully apply filters to stop hate propagation. Concerning voluntary filtering, the most famous social networks recognize upon users the responsibility to report misuse to specific authorities within the companies. *Youtube* explicitly forbids hate speeches[67], *Facebook* has a "report button" which is the tool available to any user in order to draw the attention on certain contents, recently introduced also by *Twitter*.[68] The reporting systems should be implemented, but they represent a strong signal of intolerance towards hate.

Yet, racial hate speech is not just a matter of crime: it is, above all, an issue of attitude towards diversity, it is the result of the culture of intolerance, in a world where frequently "different" means "inferior, dangerous". The very first step to move is to civilize people, teaching them not to be afraid of others, educating them to tolerance and coexistence and developing integration among cultures and ethnic groups, also through campaign to raise awareness. Harmonization should be achieved also in every day life, where we live all together despite of diversities.

9 Legal implications of "hate speech"

Since the approval of the so-called Royal Law n. 654/1975, which ratified the New York Convention on the elimination of al form of discriminations signed on 17th March 1966, the Italian legislature has never introduced a specific "hate speech crime".

However, Italian courts have identified human dignity (article 3 of the Italian Constitution), as the asset which would justify compressions of freedom of expression.

Indeed, article 21 of the Italian Constitution, which guarantees freedom of expression, would give way to articles 2 and 3 of the Italian Constitution which state the right to equality, non-discrimination and the principle of superiority of the human dignity with respect to other individual rights.

If it is true that the solution chosen by the Italian courts can ensure respect for the identity of minority groups, it is equally true that judges, but above all the political power, can give a unique

[64] Council of Europe, Guidelines for the cooperation between law enforcement and Internet service providers against cybercrime, Conference Cooperation against Cybercrime (Strasbourg, France, 2 April 2008).

[65] James Banks, European Regulation of Cross-Border Hate Speech in Cyberspace: The Limits of Legislation, (2011) European Journal of Crime, Criminal Law and Criminal Justice 19, 1-13.

[66] Anti-Defamation League: Combating Extremism In Cyberspace: The Legal Issues Affecting Internet Hate Speech (2000).

[67] YouTube Community Guidelines: "[...] But we do not permit hate speech (speech which attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status and sexual orientation/gender identity)".

[68] Heather Saul, Twitter report abuse button is launched across all platforms. The Indipendent.

meaning to the notion of human dignity, filling it with imposed "institutional" content, with the result to constrain freedom of expression to a sort of a public policy ideal.

Even the limit of public order might be a good counterpoint to the freedom of expression, but with respect to those cases where there is a clear and real danger.

The majority Doctrine always saw with suspicious the application of this limit, pointing out with preoccupation the confusion that could be take place public order and legal order, the former linked to a material sphere, and the latter to an ideal sphere. In the first case the limit would act to protect specific issues which threaten coexistence between groups; in the second case, it would defend a presumed ethics of State, thus becoming a way to restrict beyond measure freedom of expression or even totally denying freedom of expression; there is the fear to give to the judges a high grade of discretion which would enfeeble the subjective constitutional rights to mere interests, with a total overthrow of the general principles on the inflexibility of the Constitution and on the reserves of the laws and jurisdiction, in other words, all this can bring to a judgment call.

In a jurisprudence that is constructed case by case, as it actually happens for all the other crimes attributed to the wide category of crimes of opinion, it seems that it can be used as a reference to actually solve the cases of hate speech, the subjective element, which considers more "who" (that is who expressed that defamatory thought, for example, in the Tosi case, a subject with a particular public office) that the "thing" that offends and discriminates; a criterion of judgment that puts first the purpose to respect the dignity of marginalized groups with the fear of criminalizing the word even when it doesn't result so necessary.

This is the legal justification for the application of the crime of racial propaganda evidently innovative within the Italian legal system but, if attentively studied, it doesn't remain alone: even the European Court of Human Rights, in its most recent law case on this subject, shows how it oriented in the same direction of the common Italian judges. Since it the judgments of Strasbourg today have a particular significance because they are considered, if it is the case, a parameter of constitutionality of the Italian Court according to the interpretation given at the first paragraph of Article 117 of the Italian Constitution.

When the opportunity arrived, the Court did not avoid showing its support for the fight against racial discrimination. Nevertheless, in the past, it limited itself to support this position only in terms of general principle. Its with its recent sentence Feret c. Belgium on July 16th, 2009, that for the first time, made it made its orientation explicit. It was already confirmed how Strasbourg submits to an attentive scrutiny any limit to freedom of expression, as long as the news spread appears worthy of being divulged.

This interpretation has been endorsed by the Court even in a case of hate speech, Jersild c. Denmark in 1994, now old, but important to highlight the evolution of case law on the subject.

The facts originated from the condemnation of a journalist for the broadcasting on a radio/tv program in which several members of a group Greenjackets, were interviewed, who did not hide their racialist inclinations against immigrants and ethnic groups, indeed, they made it a bulwark of their life in the community.

The Court sentences Denmark for having applied sanctions against the journalist, believing that he had professionally prepared the program which had such a scalding subject that could not be ignored by the general public.

Put in this way, the outcome of the judgment could not surprise the studious expert who knows the Court laws on this subject, rather appearing as a further confirmation about the importance assumed at the European level not only by the right to inform, but also and above all, by the right to be informed. It is important to underline, in the position of Strasburg, the function that freedom of expression has in a democracy. It appears from the sentence that the Court wants to underline the "educational role" of information, cardinal principle without which no democracy could be considered mature.

It would appear inconceivable then to derogate from this value because only the diffusion and circulation of all ideas, even the most despicable, would allow the public opinion to take critical distances from certain positions, condemning civilly without the need to apply to coercions established by penal laws.

It is important to highlight that any provision of law that would introduce a restriction to the exercise of the freedom of expression, would not merely and directly regulate the expression, but would also establish the criteria and the guidelines to follow in order to establish if an expression is a crime or just a legitimated expression of an opinion/thought/etc. A law that criminalize hate speeches would never be neutral because hatred and discrimination, when they do not turn into violent material conduct to the detriment of certain subjects, are nothing more than thoughts.

That's why the Court seems to refrain from applying a binding definition: first for the socio-cultural diversity of each country, then because it is very hard to find a notion that is both specific (to best suit the particular case), but also neutral.

The European Court of Human Rights identified a number of expression which are to be considered offensive and contrary to the Convention (including racism, xenophobia, anti-Semitism, aggressive nationalism and discrimination against minorities and immigrants).

However, the Court is also careful to make a distinction in its findings between, on the one hand, genuine and serious incitement to extremism and, on the other hand, the right of individuals (including journalists and politicians) to freely express their views.

So, there is no universally accepted definition of the expression "hate speech" and, probably, it wont never be identified.

The Court's case-law has established certain parameters making it possible to characterise "hate speech" in order to exclude it from the protection guaranteed at article 10 of the European Convention or freedom of assembly and association (Article 11)."

In conclusion, with the identification of an universal definition (but also national) of hate speech, there is the concrete risk to punish in advance what is dangerous only "in abstract" without being sure that the sentences convicted could really incite violence; justifying policies which provide penalties and punish a crime of mere opinion as hate speech, appears to be disproportionate and calls into question the role that the expressions of thought play in the contemporary democracies. It would therefore seem more profitable to allow the widest circulation of ideas so that it is public opinion to decide freely.

10 Legal implications and differentiation of related notions

In the Conclusions and recommendations from the four regional workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012: states are obliged to "prohibit" expression that amounts to "incitement" to discrimination, hostility or violence under article 20.2 of the ICCPR.[69]

Attention is drawn to the following definitions that have been developed through consultations of expert workshops: "hatred" is a state of mind characterized as intense and irrational emotions of opprobrium, enmity and detestation towards the target group; "incitement" refers to statements about national, racial or religious groups that create an imminent risk of discrimination, hostility or violence against persons belonging to those groups; "discrimination" is understood as any distinction, exclusion or restriction made on the basis of race, colour, national or ethnic origin, nationality, gender, sexual orientation, language, religion, political or other opinion, age, economic position, property, marital status, disability, or any other

[69] Article 20 of the International Covenant on Civil and Political Rights reads that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".

status that has the purpose of nullifying the recognition of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field of public life. Discussions in the various workshops demonstrated the absence of the legal prohibition of incitement to hatred in many domestic legal frameworks around the world.

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Frank La Rue considers the following elements to be essential when determining whether an expression constitutes incitement to hatred.[70]

In this regard a six-part threshold test was proposed for those expressions which are criminally prohibited:

1. Context is of great importance when assessing whether particular statements are likely to incite to discrimination, hostility or violence against the target group and it may have a bearing directly on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated.
2. The position or status of the speaker in the society should be considered, specifically the individual's or organisation's (newspapers, radio stations or media stations) standing in the context of the audience to whom the speech is directed.
3. Article 20 of the ICCPR requires intent. Negligence and recklessness are not sufficient for an article 20 situation which requires "advocacy" and "incitement" rather than mere distribution or circulation. Advocacy is present when there is a direct call for the audience to act in a certain way. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech as well as the audience.
4. The content of the speech is a critical element of incitement. Content analysis may include as well a focus on the form, style, nature of the arguments deployed in the speech at issue.
5. Tone: the degree to which the speech was provocative and direct - without inclusion of balancing material and without any clear distinction being drawn between the opinion expressed and the taking of action based on that opinion may also be relevant under this test.
6. Extent of the speech: this includes elements such as the reach of the speech, its public nature, magnitude and the size of its audience. Further elements are whether the speech is public, what the means of dissemination are, considering whether the speech was disseminated through one single leaflet or through broadcasting in the mainstream media or internet, what was the frequency, the amount and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work of art) was circulated in a restricted environment or widely accessible to the general public.

Article 20 ICCPR requires a high threshold because, as a matter of fundamental principle, limitation of speech must remain an exception: expression labelled as "hate speech" can be restricted under articles 18 and 19 of the ICCPR International Covenant on Civil and Political Rights, on different grounds, including respect for the rights of others, public order, or even sometimes national security. Indeed the three part test for restrictions (legality, proportionality and necessity) applies to incitement cases: such restrictions must be provided by law, be narrowly defined to serve a legitimate interest, and be necessary in a democratic society to protect that interest. This implies, among other things, that restrictions: are clearly and narrowly defined and respond to a pressing social need; are the least intrusive measures available; are not overly broad, in that they do not restrict speech in a wide or untargeted way; and are proportionate in the sense that the benefit to the protected interest outweighs the harm to freedom of expression, including in respect to the sanctions they authorise. Application of this "three part test" builds a more

[70] United Nations A/67/357

coherent and cohesive legal framework in which freedom of speech is respected, protected and upheld while allowing for the legitimate and need restrictions that are needed to limit incitement to hatred.

It is ARTICLE 19 Association's view that laws on incitement do not always meet the "level of seriousness" set out in article 20 of the ICCPR. While ARTICLE 19 does not deny that the speech in these cases was hurtful, offensive and even in some cases inflammatory, they do not believe that it should pass the threshold of Article 20 of the ICCPR.

The Special Rapporteur Frank La Rue believes that States should adopt civil laws and procedural remedies: for example access to justice ensuring effectiveness of domestic institutions; adequate, prompt and proportionate reparations to the gravity of the expression, restoring reputation, preventing recurrence and providing financial compensation. Penal codes alone, however, will rarely provide the solution to the challenges of incitement to hatred in society. To prevent any abusive use of hate speech laws, the Special Rapporteur recommends that only serious and extreme instances of incitement to hatred be prohibited as criminal offences for their consequences and not for their content , because what is deeply offensive in one community may not be so in another.

In Italy incitement can only be punished when there is an "actual risk" that the incited person will commit the offences provided for in Article 302 of the Criminal Code imminently. Article 302 provides that "Any person who incites another person to commit intentional offences shall be punished, if the person incited does not agree to commit the offence or agrees but the offence is not committed, by imprisonment from one to eight years." If there is no actual risk, or if there is a long interval between the alleged incitement and the actual commission of the offence, this will amount to 'lawful incitement' protected by Italian constitutional provisions on freedom of expression. One important motivation underlying this position is the fear that a broader ban on inciting "discrimination or hostility" will be abused by governments or will discourage citizens from engaging in legitimate democratic debate. When applying these criteria, the Court of Assize of Rome considered as not punishable the conduct of the editorial staff of the magazine *Corrispondenza Internazionale*, who had decided to publish the full version of the work written by the Red Brigades' prisoners which contained open incitement to violence.

Evoking the complex equation between free speech and protection from incitement, UN High Commissioner for Human Rights Navi Pillay acknowledged that views on this issue diverge greatly, with some calling for much tougher restrictions on permissible expression while others have maintained that freedom of expression should be near-absolute, pointing out that laws limiting speech are very often misused by authorities to muzzle critics and silence dissent.

The UN Human Rights Committee has stated[71] that there is no contradiction between the duty to adopt domestic legislation under Article 20 ICCPR and the right to freedom of expression.

At the same time, the UNHRC has stressed that "restrictions on expression which may fall within the scope of article 20 must also be permissible under article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible." [72]

In other words, domestic laws adopted pursuant to Article 20 must, like all restrictions on freedom of expression, meet the three-part test. The terminology relating to offences on incitement to national, racial or religious hatred varies in different countries and is increasingly rather vague while new categories of restrictions or limitations to freedom of expression are being incorporated in national legislation. Some countries have offences which cover incitement to racial and religious hatred while others cover only racial and ethnic issues. Some countries

[71] General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Article 20), 29 July 1983, U.N. Doc. HRI/GEN/1/Rev.6 at 133, par. 2.

[72] Ross v. Canada, Communication No. 736/1997, 1 May 1996, UN Doc. CCPR/C/70/D/736/1997, par. 10

have also recognized the prohibition of incitement on different grounds: incitement to hatred gives rise to criminal offences or both criminal and civil law. Some countries have had a marked preference for a non-legislative approach to combating incitement to hatred through in particular the adoption of public policies and the establishment of various types of institutions and processes, including truth and reconciliation commissions.

In Italy the "pacchetto Pisanu" (law 155/2005 from the name of the Minister of Interior) contains an integration of the Art. 414 of Penal Code "Instigation and apologia of crime": "Whoever in public instigates to commit one or more crimes is punished, because of the instigation itself: with the reclusion from one to five years if the instigation is to commit crimes, with the reclusion up to one year or with the fine up to 206 Euros if the instigation is to commit offences. If the instigation is to commit one or more crimes and one or more offences, it is applied the punishment established in n. 1. The punishment established in n. 1 regards also whoever in public makes apology of one or more crimes."

Another example in the Italian legislation is Article 415 of Penal Code " incitement to break the law": "Anyone who publicly incites to transgress the law of public order or hatred between the social classes, shall be punished with imprisonment from six months to five years."

The judgment of the Constitutional Court no. 108/1974 declared the unconstitutionality of Article 415 for breach of Article 21 of the Constitution because it does not specify that the incitement to hatred between classes must be implemented as breach of the peace.

Please note: Article 415 does not respect the principles of stringency and definiteness due to the generic term "public order law" and " hatred between the social classes".[73]

In the "Pacchetto Sicurezza" (Bill 733) the Senator Gianpiero D'Alia (UDC) proposed an amendment to Article 50-bis "Repression of apology or incitement of criminal association or illegal activities through the Internet". In the cases of Article 414, 415, or 50-*bis*: the Minister of the Interior, after notice of the court, may issue a decree with the interruption of the activity indicated, ordering internet providers to use the appropriate filtering tools needed for this purpose within 24 hours. Any breach of this obligation results in a fine of between € 50,000 and € 250,000, whose imposition provides the Ministry of Economic Development.

The Article 594 of the Penal Code "the crime of injury" refers to offending one's honour and is punished with up to six months in prison or up to 516 Euros in fine. If the offense refers to the attribution of a determined fact and is committed before many persons, penalties are doubled to up to a year in prison or up to 1032 Euros in fine.

In addition, the crime of defamation Article 595 of the Penal Code refers to any other situation involving offending one's reputation before many persons, and has a penalty of up to a year in prison or up to 1032 Euros in fine, doubled to up to two years in prison or a fine of 2065 Euros if the offense consists of the attribution of a determined fact. When the offense happens by the means of the press or by any other means of publicity, or in a public demonstration, the penalty is of imprisonment from six months to three years, or a fine of at least 516 Euros.

Article 612 of the Italian Penal Code "threat": "Anybody who threatens others with unjust damage is liable with a fine not exceeding 51 Euros. If the threat is serious, the guilty is liable to an imprisonment for a term not exceeding a year and ex officio". If the offender is a person between the ages of 14 and 18, the provisions regulating juvenile criminal proceedings will be applied (pursuant to Decree No. 448 of the President of the Republic of 22 September 1988).

In Italy one fifth of the children reported having "rarely" (12.9%), "sometimes" (5.6%) or "often" (1.5%) received or discovered false information about themselves on the Internet. Cases of offensive or threatening messages, pictures or videos are "rarely", "sometimes" or "often"

[73] Bognetti, Il pericolo nell'istigazione all'odio di classe e nei reati contro l'ordine pubblico, in Giur. cost. 1974, 1437; De Vero, Istigazione, libertà di espressione e tutela dell'ordine pubblico, in Arch. pen., 1976, 13; Violante, L'istigazione a disobbedire alle leggi.

received by 4.3% of the sample population. Finally, 4.7% were victims of intentional exclusion from online groups.[74]

In Italy examples of "incitement to hatred", "intimidations" and " provocations" are frequent : during the last period Cecile Kyenge has been the target of numerous racist threats since accepting the Cabinet post in Enrico Letta's government. Kyenge says she won't be intimidated into stepping down, nor does she believe Italians in general are racist. The important work of regional human rights mechanisms, specialised bodies, a vibrant civil society, and independent monitoring institutions is fundamentally important. Positive traditional values, compatible with internationally recognised human rights norms and standards, can also contribute towards countering incitement to hatred. Steps taken by the United Nations Human Rights Council, in particular the adoption of its resolution 16/18 on "Combating intolerance, negative stereotyping , stigmatization, discrimination and incitement to violence" constitutes a promising platform for effective, integrated and inclusive action by the international community. A number of other international instruments have a bearing on hate speech. Of particular relevance is Article 4 of CERD International Convention on the Elimination of All Forms of Racial Discrimination which goes substantially further than Article 20 of the ICCPR and requires states parties, among other things, to declare an offence punishable by law all dissemination of ideas based on racial superiority or incitement to racial discrimination. In contrast to the ICCPR, CERD requires the prohibition of racist speech even if it does not constitute incitement to discrimination, hostility or violence. Throughout the world, case law on the prohibition of incitement to hatred is not readily available. This can be explained by, in some instances, the absence of legislation, of adequate legislation or judicial assistance to vulnerable groups who constitute the majority of victims of incitement to hatred. The weak jurisprudence can also be explained by the absence of accessible archives but also by the mere lack of recourse to courts owing to limited awareness among the general public as well as a lack of trust in the judiciary.

11 Comparative analysis

On 9th November 2011 Italy signed the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems without any reservation, but it has still to ratify it. As some new episode of hate speech based on racial discrimination has been stressed and widely followed by the media and public opinion[75], the need to transpose the Additional Protocol into domestic law has been perceived as an urgent issue to tackle. Hence, the question has been brought to the attention of the Chamber of Deputies, one of the two branches of Italian Parliament, and the Government has been urged to undertake the proper initiatives to comply with international obligations[76].

Despite the failure in ratifying the Additional Protocol, in the last two years the Italian legal system has offered some law provisions concerning racial discrimination, hate incitement and cybercrimes. The prescriptions reveal the efforts made by the Government in order to protect

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[74] Data on cyberbullying, according to the Survey on the Condition of Children and Adolescents in Italy, conducted by Eurispes and Telefono Azzurro in 2011

[75] It is the case of the speech of Roberto Calderoli, Senator and representative of the political party "Lega Nord", against Cècile Kyenge, the country's first black Cabinet minister, because of her racial and ethnic origns. Calderoli compared Kyenge to an orangutan saying she should be a minister in her homecountry, also moving to her the accuse to encourage illegal immigration.

[76] Motion 1-00139 presented by Federica Mogherini,. 47th Working Session of The Chamber of Deputies,5th July2013 <http://banchedati.camera.it/sindacatoispettivo_17/showXhtml.asp?highLight=0&idAtto=314&stile=8 >

public security and individuals from all means of hatred expression. The lack of a specific regulation of hate crimes and online hate speech requires an analysis of the guarantees and rules currently in force and applicable to those facts.

The request of criminalisation of hate speech draws the attention to the thorny issue of restriction on freedom of speech, which the Italian Constitution recognizes as a fundamental freedom, ranked among the primary values of the democratic society. The Italian legal system lies on the Constitution of the Italian Republic, adopted in 1947 and come into force on the 1st January of 1948. Article 21 of the Constitution[77] represents a *milestone for the democratic order*, as affirmed by the Italian Constitutional Court[78], ensuring pluralism and circulation of information[79]. Nevertheless, the Constitutional Court admits that freedom of expression is not unconditional and unlimited: the article itself contains the explicit limit of decency and morality at its sixth paragraph, Moreover, safety of public order should be considered as an implicit limit[80] in light of the relevance of freedom of speech in the community life and in the society, being public security necessary in order to ensure inviolability and practice of rights and interests equally guaranteed by the Constitution.[81]

Whereas the Italian legal system does not provide a Constitutional cover for hate speech crimes, the Grundgesetz, the German Constitution, while affirming the freedom of communications, provides for clear and exact limitations such as the general laws, protection of young persons and personal honour[82]. The protection afforded to human dignity and honour, as an extent of it, is one of the highest priorities of the German legal system, as it is stated in art. 1 of Grundgesetz. Therefore, the crime of insult occurs in case of speeches based on racial hate, racial discrimination or racial inferiority. According to the German Federal Constitutional Court, when hate speech directed to individuals and also to groups exceeds those limitations, individual insult and collective defamation meet the application of § 185 ff. of the German Penal Code.[83]

Within the Italian domestic law the hate speech crime cannot be punished as an insult or defamation crime, falling, instead, under the provision of apology and incitement crimes, in particular under the crime of incitement to class hatred, according to art. 415 of the Italian criminal code. Italian lawmakers made a step forward to the identification of a specific criminal conduct to punish a type of hate crime with the Constitutional Act 1/1967, concerning the execution of the Convention on the Prevention and Punishment of the Crime of Genocide which was adopted by the United Nations General Assembly on 9 December 1948. The Convention established the criminal relevance of direct and public incitement to commit genocide, considering it as a crime itself [84]. Yet, the very first criminal provision against

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[77] Art 21, 1, Constitution of the Italian Republic: "All persons have the right to express freely their ideas by word, in writing and by all other means of communication".

[78] Corte Costituzionale, sentenza 84/1969.

[79] Andrea Pugiotto, 'Le Parole Sono Pietre?, I Discorsi Di Odio E La Libertà Di Espressione Nel Diritto Costituzionale', (2013) Diritto Penale Contemporaneo.

[80] Corte costituzionale, I Diritti Fondamentali nella Giurisprudenza della Corte Costituzionale, Relaziona proposta in occasione dell'incontro della delegazione della Corte Costituzionale con il Tribunale Costituzionale della Polonia', (Varsavia 30-31 Marzo 2006).

[81] Corte Costituzionale, sentenza 168/1971.

[82] Art 5, 1-2,, Grundgesetz: "Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.
These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.".

[83] Winfried Brugger, 'The Treatment of Hate Speech in German Constitutional Law', (1 January 2003) German Law Journal, Vol. 4, No. 1 .

[84] Michela Manetti, 'L'incitamento all'odio razziale tra realizzazione dell'eguaglianza e difesa dello Stato', in Scritti in onore di Gianni Ferrara, (Giappichelli, 2005).

hate propaganda was introduced by the Act 654/1975, with the ratification of the International Convention on the Elimination of All Forms of Discrimination, adopted by the United Nations in 1966, as modified by the Mancino Act 205/1993 and the Act 85/2006. Article 3 of the Act 654/1975 condemns whoever disseminates ideas or commits acts of discrimination on race and ethnicity grounds, and whoever instigates others to commit or commit himself harassments or violence on race and ethnicity grounds. This provision also prohibit the creation of organization, association, groups or similar, with the intent to incite to racial discrimination and hatred. The Mancino Law intervened on the matter confirming the sanctions fixed by the previous Act and adding an aggravating circumstance, that is the increase up to the half the penalty for all those crimes committed with the purpose of discriminating or supporting associations, groups or similar whose aim is discrimination based on racial, ethnic, national and religious grounds. It includes also other substantive and procedural rules in order to enhance the application of the prescriptions. The aggravating circumstance affirmed by this Act is supported by the Italian Supreme Court decision, and it is applied also when crimes, even if different from instigation to racism as defined by *Mancino Law*, are committed: in a recent sentence, the Supreme Court declared that the aggravating circumstance is applied to the insult crime when the insult is founded on a feeling of aversion and discrimination rest on race and ethnicity, or on a feeling of exclusion from equal conditions. The Court stated that when someone decides consciously to behave moved by racial contempt the aggravating circumstance can be applied, irrespectively of the motive[85].

The regulation of hate propaganda and incitement made the national legislation much closer to other European Countries regulations. In several States, throughout Europe, the threat, insult or discrimination based on race, colour, ethnic origins are deemed as crimes (such as in Danish and Dutch Penal Codes[86]), and in certain cases it is even prohibited to discriminate or hatred, as established in Sweden[87]. One of the most strict regulation of hate speech comes from France: the Freedom of the Press Act of 1881 forbids to publicly incite to discrimination, hatred or harm, and to publicly defaming or insulting others because of race, ethnic origins, religion, sex, sexual orientation or handicap[88]. Moreover, the French Criminal Code prohibits any private defamation, insulting or incitement to hate, discrimination or harm against a person or group for belonging or not belonging, in fact or in fancy, to an ethnicity, a nation, a race, a religion, a sex, or a sexual orientation, or for having a handicap[89].

The French Courts are also pioneers of the application of regulation against hate speech and hate propaganda on the Internet. Indeed, there are two leading cases, which can be discussed: the *Yahoo! Inc. vs la Ligue Contre le racisme et l'Antisemitisme* Case, concerning the violation of art. 645-1 of the French Criminal Code, because on the Yahoo! auction site were displayed Nazi memorabilia, and the case of the *Union des Etudiants Juifs de France (UEJF), J'accuse!... action internationale pour la justice (AIPJ) vs Twitter Inc.*, regarding some offensive hashtags of the popular social network degrading and discriminating because of race and religion[90]. In both cases the Internet Service Providers have defended themselves from the charges declaring that French laws were inapplicable to the cases because the contents were from the United States of America, and fell under its jurisdiction. Nonetheless, French judges requested to the providers to comply with national legislation using a mechanism that could exclude French citizens from the offensive contents, warning them on the application of a severe criminal fine for each day of delay. Yahoo! eventually fulfilled the French laws and obscured the auction site selling Nazi

[85] Corte di Cassazione, Sezione V penale - Sentenza 15 luglio 2013 n. 30525 and Corte di cassazione - Sezione V penale - Sentenza 12 giugno 2013 n. 25870.
[86] Art 266(b) of Danish Penal Code, Art 137 of Dutch Criminal Code.
[87] Article 4 and 11, Chapter 7, on offences against the freedom of the press; Freedom of the Press Act.
[88] Articles 24, 32,33, Freedom of Expression Act 1881.
[89] Article 624, 3- 4, and Article 625, 7, French Criminal Code.
[90] Tribunal de Grand Instance de Paris, ord. 24.01.2013, (11.02.2013).

memorabilia[91], while Twitter was requested to eliminate the obnoxious hashtags also releasing the personal data of anyone tweeting incitement of racial hatred.[92]

Recently, a sentence of the Italian Supreme Court decided for the first time a case of hate speech on the Internet against the administrators of the Italian section of the website Stormfront.org. The trial, held in the Tribunal of Rome, was against the Neo-Nazi website where authors used to incite to hatred and violence on the base of racial, ethnic and religious prejudices. The Tribunal condemned the website administrators for creating an association with the purpose to instigate to violence and discrimination on race and religion grounds.[93] The trial continued before the Supreme Court which confirmed the sentence of the Tribunal of Rome establishing the violation of the article 3, paragraph 3 of the Act 654/1975, as well as the application of the provisions regulating the criminal organization also to all those virtual community which incite to racial discrimination and hatred.[94] The mentioned judgement represents the very first application of the legislation against hate speech and propaganda on the Internet. This sentence should be considered a starting point to move from in order to tackle racist hate speech.

The decision of the Supreme Court has resulted in the removal of the Italian section of the site to ensure the protection of individuals from racial discrimination and xenophobia. In order to reach the same effects, the Italian Government strengthened the cooperation with the Polizia Postale, a special police corps which has the duty to monitor and control web sites which incite to hatred and racial discrimination. The Polizia Postale encourages and collects the report of violations supporting the victims, providing assistance through its own website and also claiming the committed crimes in front of the competent authorities.[95] This system is not just an Italian model. Indeed, in the United Kingdom of Great Britain (hereafter UK) was launched a web facility, True Vision, created by the Association of Chief Police Officers, with the aim to inform citizens and to follow them during the process of reporting hate crimes online. It draws the attention of the Police and the Crown Prosecution Service on the reports, allowing them to be aware of all hate crimes committed online.[96] These systems have increased the reports and the acknowledge of crimes allowing to police and governments to promote the maintaining of cyber-security, preventing violations of the laws or hate incitement.

Courts and Police are precious allies of the lawmakers and they can provide relevant tools and offer them an inspiration in order to encourage law enforcement, and combat effectively against social issues, such as racial discrimination.

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[91] James Banks, European Regulation of Cross-Border Hate Speech in Cyberspace: The Limits of Legislation (2011). European Journal of Crime, Criminal Law and Criminal Justice 19, 1-13.

[92] Olga Khazan, *What the French war on anti-Semitic tweets says about hate speech in France*, The Washington Post online.

[93] La Repubblica, at Roma.it: Processo Stormfront, antisemitismo sul web. Condannati i quattro gestori del sito.

[94] Corte di Cassazione , Sezione III penale, Sentenza 31 luglio 2013 n. 33179.

[95] Ministero degli Affari Esteri, Comitato Interministeriale dei Diritti Umani, Controdeduzioni Dell'italia Sul Quarto Rapporto-Paese Della Commissione Europea Contro Il Razzismo E L'intolleranza.

[96] Paul Giannasi, The United Kingdom Approach to Hate Crime, October 2012.

ELSA Malta

National Researchers

Roberta Avellino

Myrna Azzopardi

Tessa Mallia Borg

Rachelle Micallef

Cosmin Chivu

David Lorenzo Alvarez

National Coordinator

Clement Mifsud Bonnici

1 National definition of Hate Speech

In your national legislation, how is hate speech defined? (e.g.: Is hate speech defined as an act?) (see Delruelle, "incitement to hatred: when to say is to do", seminar in Brussels, 25 November 2011).

The Maltese Criminal Code deals with hate speech under Article 82A(1) which is currently worded in the following manner:

> *Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up violence or hatred against another person or group on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion or whereby such violence or racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months.*

Following relatively recent amendments[1] to the Criminal Code and the Press Act, the law now not only provides safeguards against racial hatred but also against offences related to gender, gender identity, sexual orientation colour, language, ethnic origin, religion or belief or political or other opinion.

Article 82B and 82C of the same Criminal Code criminalise the condoning, denying or trivialising of heinous crimes such as genocide, against a group identified by the criteria above, and which is likely to incite violence or hatred against such group. Aiding and abetting in the breaches set out by Article 82A to 82C is also an offence.

On the other hand, the strong Maltese legal framework could prompt concerns regarding freedom of expression. Taking into account that freedom of expression is 'not only a consequence of democracy, but it also stands as one of its roots and continuously fosters it',[2] it may become problematic when there is an attempt to prohibit hateful speech or writings, which are nonetheless expressions of one's opinions and ideas. So in other words, how may a person, in a democratic context, be prosecuted on the basis of an opinion and not an act? In order to come up with an answer, E. Delruelle rightly points out that this is not a question about what type of opinions are lawful or not, but about which speech acts are compatible with democracy and which are not. When hate speech is proven, it becomes much more than just an opinion, it becomes and act.[3] This idea is reflected even more profoundly in the Maltese legislation where it mentions acts such as incitement to commit hate crimes related to gender, sexual orientation, and so on, and stirring up hatred. Considering the wording of Article 82A(1) it becomes clear that the law is more inclined in preventing violence against the dignity of the persons targeted than limiting one's freedom of expression by punishing those who resort to threatening, abusive or insulting words or behaviour.

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[1] Added by The Criminal Code (Amendment) Act, VIII. 2012.2.

[2] Anne Webber, Manual on hate speech [2009], page 19

[3] Francoise Tulkens, When to say is to do, Freedom of expression and hate speech in the case-law of the European Court of Human rights

In conclusion, there exists a strong legal framework that is potent enough to prevent violence but at the same time open to engagement in constructive dialogue that needs to be undertook in any democratic society in order to have social progress.

2 Contextual elements of Hate Speech

What are the key contextual elements to identify a "hate speech"? Does the multiplying and wider effect of online dissemination always mean higher potential impact of online hate speech; why?

From the definition of the offence in Article 82A of the Criminal Code, the following are the two requisites need for the offence to subsist:

(a) the formal act: which consists in the use of threats, abusive/insulting words, abusive/insulting behaviour, display of any written or printed material which is threatening, abusive or insulting, or other conduct of such a manner;

AND

(b) the intention: specifically to stir up violence or hatred against another person or group on the grounds of: gender; gender identity; sexual orientation; race; colour; language; ethnic origin; religion or belief; political or other opinion; or of there is no such specific intention, that the likely effect of the perpetrator's actions were, having regard to all the circumstances, to stir up violence or hatred.

From the description of the formal act, required for the subsistence of the offence under Article 82A, it appears that the context which the legislator envisaged were mainly public speeches and public demonstrations. There is no specific reference to the 'online' context, although, the broad drafting of the law may also include formal acts perpetrated in a purely online context.

Maltese jurisprudence on this offence is scarce. As far as we are aware, there is one case on this point, Police v Norman Lowell.[4] Mr. Lowell is a political figure in Malta who gained popularity for making outrageous statements against irregular immigrants and non-Maltese nationals. He was prosecuted in relation to three separate political meetings he conducted in the name of his political party 'Imperium Europa' and an article he published entitled 'Coming Cataclysmic Crises'. Videos of the meetings and the article were posted on the respective website www.vivamalta.org.

In the second instance, the Court of Criminal Appeal discussed the intention and formal act required by Article 82A. The Court highlighted the element of 'probability' in that no actual violence needs to result from the incitement, but it is enough if it might have encouraged such violence. In considering the probability of resulting in violence, there is no need for certainty beyond reasonable doubt. This was further enhanced by the fact that most of the individuals

[4] 518/2006, Police vs. Norman Lowell (27 March 2008, Court of Magistrates); 98/2011, Police vs. Norman Lowell (15 July 2013, Court of Criminal Appeal).

present at the meeting were persons who often frequented them and were members of Imperium Europa, and, were, therefore, more likely to be encourages by his words. The Court considered the fact that the speech was uploaded onto the website, meaning that it became easily accessible to more individuals and thereby increased the 'probability of inciting violence' factor. Therefore, in terms of Maltese law, online hate speech by its mere widespread audience automatically influences the determination of the intention of the perpetrator.

The Court of Criminal Appeal commented that the standard that must be applied is that of the reasonable man so that there would be no doubt to a man with average intellect that the words or actions are abusive and insulting and incite racial hatred, that is, that they discuss the differences between races in a degrading manner. It is irrelevant what the speaker intended but what the result of the words or actions are. The Court also clarified that the definition to racial hatred to be adopted is that found in the International Convention on the Elimination of All Forms of Racial Discrimination[5], which Malta ratified, as a definition is not found in Maltese law.

The Court of Magistrates, at first instance, discussed the margin of appreciation in that many argue that the criminalization of hate speech might impinge on the freedom of expression, but this restriction is justified because everyone has the right not to be insulted on the basis of his race, religion, sex etc. Both courts found Lowell guilty as they both concluded that there was no doubt of racial hatred based on the tone of voice and words used, such as when he describes Sudanese persons as 'vicious violent men trained for war'.

3 Alternative methods of tackling Hate Speech

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

Article 10 of the European Convention on Human Rights provides for the right of freedom of expression. Despite this right provided for in the Convention however, it is a simple reality that the right to freedom of speech may be abused and in contravention of other rights catered for in the same Convention. The reduction of the legal protection afforded by Article 10 of the European Convention on Human Rights is necessary to address hate-speech and other abuses of freedom of speech. Apart from the Convention, there are other methods which may be used to tackle hate speech which will be discussed below.

According to Article 45 of the Constitution of Malta discrimination is prohibited in Malta which means treating certain persons differently due to their 'race, place of origin, political opinions, color, creed or sex'.6 Using this Article in our Constitution, hate speech can indirectly be condemned as a contravention by the Constitutional Courts as being a form of discriminatory treatment on such persons.

[5] "Any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin, which has the purpose or effect of nullyfying or impairing the recognition, enjoyment or exercise on or equal footing of human rights and fundamental freedom in the political economic, social, cultural or any other field of public life."

[6] Constitution of Malta, Article 45

Despite the existence of Article 45 in the Constitution of Malta, in twelve of the Member States of the European Union hate speech is an official criminal offence even on the specific ground of sexual discrimination, however, Maltese legislation does not particularly include discrimination or hate speech against persons of a different sexual orientation as being a crime (although there has been the introduction of a bill seeking to introduce this). Therefore although there is in existence another method of diminished hate speech in domestic legislation, apart from Article 10 of the European Convention on Human Rights, this does not in actual fact include any legal protection against persons of a different sexual orientation.

The Convention on Cybercrime, also known as the Budapest Convention, began to be effective in 2004 after being drawn up by the Council of Europe, and tackles computer crime and internet crimes. This Convention harmonizes national laws, which seeks to improve their investigation and create a better communication and agreement between the different states. The Protocol to the Convention on Cybercrime orders European states to punish 'acts of racism and xenophobia committed through computer systems such as threats, public insults, and distribution of xenophobic material'.7 The Protocol defines such material as any 'written material, any image or any other representation of ideas or theories, which advocated, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if sued as a pretext for any of these factors'.8 This legislation is a milestone in this area, as it seeks to diminish intercultural hatred. Whilst the European Convention on Human Rights may be in conflict as Article 10 provides individual with the freedom to express themselves, the use of this latter article must be controlled so as to avoid putting legislation such as that found in the Convention on Cybercrime at a stand-still thus would be allowing hate-speech to thrive.

For example in Vejdeland and Others v Sweden the defendants had distributed a number of leaflets to a secondary school, which the court confirmed to be offensive to homosexual persons. On appeal, the charges against the applicants were rejected as they stated it was a violation of the right of freedom of expression as seen in the European Convention on Human Rights. However this was changed, as the Supreme Court said although it understands the applicants' right to freedom of expression, the leaflets' statements had been offensive for no reason.

Therefore although the right to freedom of expression is crucial, this must be in balance with the rights of those against who such speech is being made. Through domestic legislation as well as European legislation hate speech may be controlled to a certain extent.

4 Distinction between blasphemy and Hate Speech based on religion

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

[7] Convention on Cybercrime, Article 1

[8] Convention on Cybercrime, Article 2

Article 163 of the Criminal Code provides that whosoever 'publicly vilifies the Roman Catholic Apostolic Religion' by using words, gestures or any form of written matter would be liable to a punishment of imprisonment ranging between one to six months. The preceding article also criminalizes such actions against any 'cult tolerated by law', yet reduces the maximum punishment to three months.

Moreover, Article 338(bb) of the Criminal Code makes specific reference to the notion of blasphemy by penalizing any person who is caught uttering any obscene or indecent words against 'public morality, propriety or decency'. The punishment laid down for such offence varies between a fine up to a three month term of imprisonment.[9]

With approximately 99 people convicted of 'public blasphemy' in 2012, it is evident that blasphemy laws in Malta are actively persecuted by the Malta Police. The number of blasphemy convictions in Malta has been large for years yet a significant decrease is evidenced in recent years when compared to 2008 which saw approximately 620 cases.

Therefore although no clear-cut distinction between 'blasphemy' and 'hate speech based on religion' is drawn in Maltese legislation, it appears that whereas 'blasphemy' is an offence in itself, 'hate speech based on religion' appears to be penalized as an aggravation to any threat or similar offence.

5 Networking sites and the issue of online anonymity

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

(see http://frenchweb.fr/debat-propos-racistes-faut-il-contraindre-twitter-a-moderer/96053)

Unless there is an element of accountability, online hate speech will remain a haven of unprosecuted criminal acts. However, there are serious privacy concerns which need to be addressed. If the technology exists to trace back users in cases of online hate speech then the element of abuse will also exist. Regulatory procedures, such as those in place regarding data protection, need to be seriously considered.

In Malta, there is currently no legislation or regulatory procedure in place which specifically considers online hate speech. Currently, in the Maltese legal system, the online element will only serve to increase punishment, and to provide further evidence. Many have argued that there is no need that current laws may be extended to the online forum, and that the Internet is simply yet another playing field of the same rules. Recently, however, an 'Anti-Cyber Harassment Alliance'

[9] Article 342 of the Criminal Code, Chapter 9 of The Laws of Malta.

was launched which initiated a petition for better laws concerning cyber-harassment.[10] However, at the time of writing, this was still in its initial stages with no concrete developments.

6 Tackling the notions of "violence", "hatred" and "clear presence of danger"

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

As the reader can understand from a literal interpretation of the text of the additional Protocol to the Budapest Convention, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, namely in its article 2.1, concerning the definition of racist and xenophobic materials, the notions of violence and hatred are alternative (together with the notion of discrimination). The realisation of any of these two assumes the observance of the supposition of fact of this article and, consequently, the terms violence and hatred can go separately and alternatively under the definition of hate speech, online in our case.

We can note that in Article 2[11] – 1 For the purposes of this Protocol: "racist and xenophobic material" means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites **hatred, discrimination or violence**, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.

Another type of interpretation of the Protocol could lead us to different conclusions.

The most important jurisprudence of TEDH regarding the hate speech online can be found in the cases Mouvement Raëlien Suisse v. Switzerland and Yildirim v. Turkey, even though the ECHR does not establish a clear delimitation of both terms.

In any case the contextual approach to the issue among the majority of the Member States of the Council of Europe, together with the number of ratifications of the Additional Protocol, would lead to the conclusion that a wide and extensive interpretation would be the most appropriate one.

In any case the legislation and the jurisprudence of the Council of Europe let the States be quite autonomous regarding the definition.

Regarding the national Maltese case, in the Criminal Code, we can find an alternative definition of both terms, making them seem synonymous at a legal level.

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[10] JPO launches campaign against cyber har'assment' (*The Malta Independent,* 11 August 2013) < http://www.independent.com.mt/articles/2013-08-11/news/jpo-launches-campaign-against-cyber-harassment-2302640132/> accessed 7 September 2013.

[11] Additional Protocol to the Budapest Convention, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems [2003]

As in art. 82A(2)[12] "For the purposes of the foregoing subarticle "violence or hatred" means violence **or** hatred against a person or against a group of persons in Malta defined by reference to gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion."

In those States where there is a strong protection of the freedom of expression, the situation is different.

In the United States, since the Brandemburg case, the freedom of expression started to be protected irrespective of its contents, provided that it is not a fabrication and does not imply a clear and present danger.

The Appeal Court invalidated, in the case Collin vs. Smith (1978)[13], a municipal public announcement that forbid public demonstrations which urged to violence and hatred towards individuals or groups for ethnic reasons, religious reasons and so on. The later jurisprudence of United States reasserts that, even if in some cases the hate speech can be restricted, it benefits of the protection of the freedom of expression.

The so-called Brandenburg standard or 'clear and present danger' refers only to the prohibition of inducing an action that in fact turns out to be illegal and violent in the forthcoming future, but it doesn't restrict the incitement to violence itself. This concept shows itself because of the influence of the United States, in the American Convention of Human Rights where there is a minor restriction of the hate speech comparing to the European Convention of Human Rights or the International Covenant on civil and political rights.[14]

On his behalf, Germany has a restrictive position, while Hungary have the closest approach in Europe to the United States system.[15] The case 12/1999 (1999) III 1, of the Constitutional Court of Hungary[16], said that to protect certain legal rights, such as honour or maintaining social peace, can justify limiting freedom of expression, but the harm of the hate speech should be proven and be enough serious. This threshold of harming required to appeal directly inciting violent action by the incitation. This approach is more moderate than the Brandenburg standard.

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

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

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[12] Maltese Criminal Code [1854]

[13] Collin vs. Smith [1978] Appellate Court, Seventh Circuit (USA.), 578 F. 2d 1197.

[14] A. Paúl Díaz. "The Criminalization of hate speech in light of comparative case Law" (2011) *Revista Chilena de Derecho*, Chilean Review of Law. vol 38 No 2, 573-609.

[15] A. Paúl Díaz. "The Criminalization of hate speech in light of comparative case Law" (2011) *Revista Chilena de Derecho*, Chilean Review of Law. vol 38 No 2, 573-609.

[16] case 12/1999 (1999) III 1, of the Constitutional Court of Hungary

A considerable number of rights enshrined in the ECHR are applicable in respect to hostilities carried out towards a specific group of people, but when it comes to hate speech and the underlying relationship it has with freedom of expression, articles 10 § 2 and 17 serve as the focal point of any academic discussion on the subject of hate speech.

Considering that the nefarious effects of hate speech are discussed at length in this report, it may become easy to forget that 'freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man'.[17] With this in mind, a burning question arises: why has the European Court of Human Rights employed a dual approach in dealing with hate speech: one consisting from an all-encompassing exclusion from the safeguards of the Convention as presented in Article 17 which prevents the opponents of democracy from abusing the rights enumerated in the Convention and a second narrower approach of restrictions on the protection provided for by Article 10 § 2 of the Convention[18]. While using an article that was initially created to prevent totalitarian groups from exploiting the principles of the Convention in order to destroy the very rights and freedoms that the Convention is establishing may appear as an appealing option for striking down hate speech in one fell swoop, one may notice the absence of any kind of 'balancing process'[19] such as the one present in article 10 where freedom of expression as conveyed in article 10 § 1 is weighed against the limitations stated in article 10 § 2.

As more cases have been brought in front of the ECtHR the inconsistencies arising from either the engagement of article 10 by hate speech or the complete dislodgement of all Convention protection in article 17 have only multiplied. For example, in the case Lehideux v France[20] the subsequent interpretation ended up widening the scope of the article, as Judge Jambrek further clarifies: "In order that article 17 may be applied, the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others …". In some cases both articles are taken into consideration: article 17 is used just as a supplementary test under article 10 § 2 (Glasenapp v Germany[21],Vogt v Germany[22]). In other cases article 17 is viewed as a last rest after the justifications under article 10 § 2 have been exhausted. As opposed to the former view, some cases first take into account if the expression in question can rise up to the threshold[23] of article 17 before even considering if article 10 applies (this view was adopted in more recent cases such as Norwood v UK[24] and Garaudy v France[25]). In other words, these elements could become objectively grounded only if a greater harmonisation in jurisprudence is

[17] Handyside v. United Kingdom [1976], (5493/72)
[18] Francoise Tulkens, "When to say is to do; Freedom of expression and hate speech in the case-law of the European Court of Human Rights"
[19] D. Keane, "Attacking Hate Speech Under Article 17 Of The European Convention On Human Rights" (2007) 25 Netherlands Quarterly on Human Rights
[20] (2000) 30 EHRR 665 (App No 24662/94) (Grand Chamber decision)
[21] (1984) 6 EHRR CD499 (App No 9228/80) (Commission decision)
[22] (1993) 15 EHRR CD31 (App No 17851/91)
[23] Law Commission, Consultation Paper No 213, HATE CRIME: THE CASE FOR EXTENDING THE EXISTING OFFENCES
[24] (2005) 40 EHRR SE11 (App No 23131/03)
[25] App No 65831/01

pursued by following for example the suggestion of Professor Ian Leigh to deal with cases strictly under article 10 § 2 as opposed to article 17 in order to achieve a consistent and predictable relationship towards hate speech.

When it comes to the principle of subsidiarity, it is worth mentioning first of all that it is becoming more and more important in the current framework of the ECtHR due to the ever increasing number of cases. To put it in simple terms, States that are party to the Convention have the duty to reflect its contents in national legislation. When it comes to establishing that the role of the Court is subsidiary to the Party States, one would rightfully be inclined to conclude that it is more of a review mechanism than a court of final review. Article 10 clearly establishes that national authorities have the primary responsibility for procuring the rights and freedoms provided by the Convention and also the obligation to offer effective remedies[26]. Needless to say, access to the Court would only be available after all the domestic ways of appeal have been exhausted.

The doctrine of "margin of appreciation" gives States certain leeway in performing their obligations under the Convention[27]. It includes an "interpretative obligation"[28] to upheld traditions and values when it comes to human rights and "a standard of judicial review to be used when enforcing human rights protection; with the margin of appreciation entailing the idea that national authorities are generally in a better position than supervisory court to strike the right balance between the competing interests of the community and the protection of the fundamental rights of the individual"[29]

8 Harmonisation of national legislation

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

The Internet has been heralded by first generation Internet critics 'for its ability to cross borders, destroy distance and break down real world barriers'.[30] Its exponential growth as an efficient and affective means of communication has also triggered major cyberspace activity, which necessitates the establishment of complex legal and technological frameworks. However, while the Internet has proven to be, as described by O Brien,[31] 'wonderfully versatile' for modern day real time operations such as the dissemination and sharing of news and information and purposes of trade, it is also serving as an expedient launch pad for the activities of criminal networks and organized crime.[32] Indeed, cyberspace has evolved into a breeding space for online

[26] Steve Greer, THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS [2000]
[27] R Clayton and H Tomlinson, The Law of Human Rights (2nd ed 2009)
[28] R Clayton and H Tomlinson, The Law of Human Rights (2nd ed 2009)
[29] R Clayton and H Tomlinson, The Law of Human Rights (2nd ed 2009)
[30] James Banks, 'Regulating hate speech online' (2010) 24(3) International Review of Law, Computers and Technology 233-239
[31] Ruairi O Brien, 'Fighting hate on the internet' (2001) OECD Observer No 224, January 2001
[32] Examples of such illegal activities include hacking, industrial espionage, sabotage, fraud, infringement of copyright, illegal gambling, trafficking, the dissemination of hate literature and campaigns which are specifically targeted to instigate racism, violence and hatred.

hate groups, and States are being faced with the daunting and intricate task of tackling and dealing with online hate speech against clear and determinate obstacles.

In recent years, States have stepped up their efforts in the criminalization of hate propaganda and hate speech, however States' unilateral regulation of hate speech has been undermined by issues such as limited jurisdictional reach and conflicts, which ensue when States attempted to enforce laws extraterritorially into other jurisdictions. Banks[33] outlines these issues and refers to Harris[34] when he argues that this situation is quite unsurprising when one considers that national laws are embedded in 'unique socio-political responses to unique problems'. The landmark case of Yahoo!, Inc v. La Ligue Contre Le Racisme et L'Antisemitisme[35] clearly illustrated the arising cultural tensions in this regard leading to a judicial impasse. In this case, two French student organisations prosecuted Internet Service Provider (ISP) Yahoo! for contravening a French law[36] which stipulates that the offering for sale of Nazi merchandise is forbidden. Yahoo! was accused of violating this law by offering Nazi memorabilia for sale on its website. The French Court applied an effects-based jurisdictional analysis and found Yahoo! liable by granting prescriptive jurisdiction. Following the judgement of the French court, Yahoo! sought a judicial ruling from the United States District Court for the Northern District of California[37], which held that the enforcement of the French judgement would be in breach of the First Amendment of the United States Constitution. In this regard, it is evident that a suitable means to combat cybercrime and online hate speech would be to establish a multilateral system, with the power of meeting out supranational decisions.

The Council of Europe Convention on Cybercrime[38] is an example of such multilateral efforts as it strongly emphasizes the need to foster cooperation between the States parties to this Convention. In fact, the Convention refers to a common criminal policy with the main aim to protect society against cybercrime. This is to be carried out through the adoption of appropriate legislation to facilitate international cooperation. Once again, the Convention argues that a strengthened, rapid and well-functioning system of international cooperation is crucial in effectively fighting cybercrime. In its observer-status, the United States has signed and ratified the Convention, however it must be noted that it only signed the Convention after a Protocol dealing with Internet hate speech was withdrawn. This clash is due to the United States' view regarding hate speech in light of the First Amendment of the Constitution.

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[33] Banks (n 1)

[34] Candida Harris, Judith Rowbotham, Kim Stevenson, 'Truth, law and hate in the virtual marketplace of ideas: perspectives on the regulation of Internet content' Information and Communication Technology and Law 18 no. 2 (2009) 155-184

[35] *La Ligue Contre Le Racisme et L'Antisemitisme (LICRA) and Union Des Etudiants Juifs De France (UEJF) v. Yahoo! Inc. v. and Yahoo! France* [2006] United States Court of Appeals, Ninth Circuit, 433 Fed. Reporter 3d 1199 (en banc), cert. denied, 126 S. Ct. 2332

[36] Article R.645-1 du Code Penal (Penal Code)

[37] *Yahoo! Inc. v. La Ligue Contre Le Rascims et l'Antisemitisime*, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001).

[38] Council of Europe, Convention on Cybercrime, Budapest, 23 November 2001, CETS No. 185

Consequently, the Council of Europe introduced the Additional Protocol to the Convention on Cybercrime[39], concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems expressly notes the Member States of the Council of Europe's conviction of the need for harmonise substantive law provisions in the fight against racist and xenophobic propaganda. However, what measures can be taken in order to achieve harmonisation of national legislations, if at all? What kind of harmonisation is the Convention aiming to achieve? Finally, what are the obstacles impeding such harmonisation and is the harmonisation of national legislations the only affective means to foster international cooperation between States in order to abolish cybercrime and online hate speech?

The Explanatory Report[40] of the Convention stipulates that two of the principal aims of the Convention are to harmonise 'the domestic criminal substantive law elements of offences and connected provisions in the area of cyber-crime' and to set up 'a fast and effective regime of international cooperation'.[41] In this regard, Chapter II[42] of the Convention delves into measures that can be taken at the national level in the spheres of substantive criminal law, procedural law and jurisdiction with the main aim to create harmonisation. In fact, the Explanatory Report points out that such harmonisation in national systems, procedures and legislations would assuage the fight against these crimes on both the national and international levels. As a result, State parties would also foster a greater sense of cooperation in terms of procedures related to extradition and mutual legal assistance with the sharing of good practices and experiences.

The prosecution of cybercrime and online hate speech also requires harmonisation and cooperation with regard to the search and seizure of stored computer data. Title 4 of the Convention specifically deals with such procedures while Article 19 makes specific reference to the States parties' efforts towards the harmonisation of domestic laws in this regard.

> *1 Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to search or similarly access:*
>
> *a a computer system or part of it and computer data stored therein; and*
>
> *b a computer-data storage medium in which computer data may be stored in its territory.*[43]

Undoubtedly, the harmonisation of domestic laws on search and seizure of a computer-data storage medium is essential as such data is considered as the primary evidence with respect to the particular criminal investigations or proceedings. However, it has been reported that such procedures were not allowed to properly function due to the fact that in a number of jurisdictions, stored computer data does not constitute a tangible object and hence, cannot be seized as part of evidence during criminal investigations. In the light of these reported obstacles,

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[39] Council of Europe, Additional Protocol to the Convention on Cybercrime, concerning the Criminalisation of Acts of a Racist and Xenophobic Nature committed through Computer Systems, 28 January 2003, CETS No. 189

[40] Convention on Cybercrime – Explanatory Report, COETSER 8 (23 November 2001)

[41] Ibid., 16.

[42] Chapter II contains three sections: substantive law (Articles 2-13), procedural law (Articles 14-21) and jurisdiction (Article 22).

[43] Convention on Cybercrime, (n 9) 19.

Article 19 of the Convention aims to ascertain that stored data is seized through an equivalent power, which would take effect in the case of other tangible objects. Nonetheless, despite the Convention's attempts to create a sense of harmonisation in the fight against cybercrime, the Convention only affects the issues, which it addresses. This is amplified in Article 39(3), which clarifies that 'nothing in this Convention shall affect other rights, restrictions, obligations and responsibilities'[44] of the States parties. This approach prompts the question of what other areas may be strengthened through international cooperation and harmonisation. On the other hand, one may also point out that other affective measures may be undertaken to safeguard cooperation and in turn, lead to the further harmonisation of national legislations. The United States' stance vis-à-vis the protection of freedom of expression continues to highlight the difficulties in achieving a harmonisation of laws. Notwithstanding, this exercise would require great compromise and goodwill from all States. Sieber[45] lists another approach which would foster cooperation between States as he argues that international businesses, Internet providers and e-businesses could draw up 'codes of conduct', which are recognised by all States.

Munthe and Brax[46] argue that the greatest ambition is definitely that of European harmonisation, which is sometimes challenged by the different notions of values leading to legitimate variations between Member States. On the other hand, they discuss the prospects of a European Hate Crime Policy based on three pillars, namely coordination and monitoring; guidance and support (capacity building); and oversight and direction focused on human rights protection. The most important aspect, which is crucial to the proper implementation of such a policy is the coordination and monitoring facet, which would be successful with the support and participation of entities such as the Organisation for Security and Cooperation in Europe (OSCE)[47], who have also been active with previous similar attempts. A system of European hate crime monitoring is also necessary while methods must be in place to capture hate crime that is not covered by national policy. Finally, clear detection points, which are common to all Member States must be defined.

The harmonisation of national legislations in parallel with other multilateral legal efforts will tremendously facilitate the international fight against cybercrime with special reference to hate crime, however, the global nature of the Internet and its continuous technological development will present States with the task of the total legal regulation of cyberspace in impossible parameters. Henceforth, it must be realized that attention must also be dedicated to curbing the causes, which lead to the dissemination of hatred propaganda and the instigation of hatred online. This approach requires a multi-disciplinary combination with an approach, which is legal, technological and educational. In the end, hate speech is pertinent because words bear consequences. In the words of Lauter, 'terrorism and hate and genocide start with words and

[44] Ibid., 39(3).

[45] Sieber Ulrich, 'Fighting hate on the Internet' (2001) OECD Observer No. 224, January 2001

[46] Christian Munthe & David Brax , 'The Philosophy of Hate Crime Concepts, Values and Tensions in the European Context' (2011) Department of Philosophy, Linguistics and Theory of Science, University of Gothenburg

[47] See, 'OSCE Online Expert Forum Series on Terrorist Use of the Internet: Threats, Responses and Potential Future Endeavours' (2013) Action against Terrorism Unit, Transnational Threats Department

stereotypes'[48]. It is when States have fully recognised the magnitude of the exigent implications of these acts that they will truly cooperate and compromise their national positions to fight online hate speech.

9 Legal implications of "hate speech"

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

Academic debate surrounding hate speech often threads upon the parameters of the freedom of expression and the permissible constraints on such a significant freedom. States have widely recognized this freedom as a test of the 'well being' of societies, which embraces the rule of law and the principle of checks and balances. In fact, the European Court of Human Rights has declared freedom of expression as being 'one of the basic conditions for the progress of democratic societies and for the development of each individual' with its application covering even manifestations which may 'offend, shock or disturb'.[49] Nonetheless, even though States have openly acknowledged the utmost importance of the promotion and protection of the freedom of expression, their positions regarding permissible exceptions to this freedom vary.[50] Therefore, it is not surprising that there is no international consensus about the definition and constitution of hate speech as these are determined by the specific socio-political dimensions of individual States. On the other hand, a strong movement towards the consideration and determination of 'hate speech' on a case-by-case basis prompts queries about the possibility of establishing a legally binding definition of 'hate speech' even on the national level. More importantly, would a set definition facilitate the criminal investigations of the authorities and the deliberation of the courts?

The recommendation of the Council of Europe's Committee of Ministers of 1997 defined hate speech as:

> *Covering all forms of expression, which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.*[51]

In this sense, this definition includes comments which are specifically direct against a person or which target a specific group of persons. However, it is imperative to point out that all of the above mentioned grounds of hatred stem from a common source, which was referred to by

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[48] Stephanie Berrong, 'Internet Hate: A Tough Problem to Combat' (reporting Deborah Lauter) Security Management, The Magazine (March 2009) available at <http://www.securitymanagement.com/article/internet-hate-tough-problem-combat-005259> accessed 8 September 2013

[49] *Handyside v UK App* no 5493/72 (ECHR 5, 7 December 1976)

[50] Article 10 of the European Convention on Human Rights allows constraints of the freedom of expression only in the circumtances wherein, such an exception is one of the defined legitimate aims, is prescribed by law and is necessary in a democratic society. This approach contrasts with that of the United States embodied in the First Amendment to the United States Constitution.

[51] Committee of Ministers to Member states on "hate speech", 'Recommendation No R (97) 20 on "hate speech" and its Explanatory Memorandum' 30 October 1997

Jagland when describing the crime scene in Utøya, Norway. Jagland points out that it was evident that there subsisted a correlation between the online speech and this horrible act, which leads to the depiction of hate speech as an expression of 'group-focused enmity'.[52] However, it has also been argued that the lack of consensus, or rather the ever-complicated difficulties, on establishing a legally binding definition of 'hate speech' is due to the fact that in order to examine whether the balance of freedom of expression and the rights of others has actually been disturbed, one has to consider each circumstance on a case-by-case basis.[53] This ties in with the difficulty of establishing a legally binding definition of 'hate speech' even on a national level as instances of hate speech are not uniform and differ depending on the circumstances of the case and the person of the of the accused. On the other hand, while it is not desirable to enact a set legally binding definition of 'hate speech' it is then very much necessary that the authorities are fully empowered to seize and collect an evidence during their all-encompassing criminal investigations. In discussing the legal aspects of cyber-bullying and cyber-harassment, Borġ[54] addresses this issue within the context of Maltese legislation as she contends that the promulgation of specific legislation dealing with cyber-harassment is deemed superfluous. She supports her claims by arguing that the more specific legislation is, the harder it will be for the authorities to apply and enforce it with this claim becoming more relevant in consideration of technological development.

Pillay[55] outlines other important concerns and challenges in establishing legally binding definitions of 'hate speech', both on national and international levels and mentions key challenges in this regard. Firstly, it is argued that the main challenge deals with definition as sometimes 'intolerance and intense dislike of others' may be legitimate. Moreover, one must also address the severity of the statement and the intent. The other important factors are the context in which the speech was made and the element of causation. Nonetheless, it is held that it is still very difficult to identify between speech instigating hate and expression targeting ideas. This position has also been echoed by the UN Human Rights Committee when it clarified that the 'mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties'.[56] On the regional European level, the term 'hate speech' is also found in European case-law, however the Court has stopped short of giving a clear-cut definition notwithstanding the fact that it is not bound by classification of domestic courts. Instead, it refers to hate speech as 'all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)'.[57] Understandably, in dealing with 'hate speech', the Court deals with a multiplicity of situations[58], ranging from incitement of racial hatred, hatred on religious grounds, aggressive nationalism and

[52] Robin Wilson (Rapporteur), 'Indignity, indifference, indignation: tackling hate speech online', Report of the conference 'Tackling hate speech: Living together online', Budapest, 27-28 November 2012, 2-3
[53] *See*, *Vejdeland and others v Sweden*, European Court of Human Rights, no 1813/07
[54] Stephanie Borġ, 'Legal Aspects of Cyberbullying and Cyberharassment' (2012) University of Malta 113
[55] Navi Pillay, 'Freedom of Expression and incitement to hatred in the context of International Human Rights Law', Lecture at the London School of Economics, 15 February 2013
[56] United Nations Human Rights Committee, General Comment No. 34 (2011) CCPR/C/GC/34
[57] *Guduz v. Turkey*, CEDH 2003-XI No 35071/97, para. 40 and *Erbakan v. Turkey*, No. 50692/99, para 56, 6 July 2006
[58] Anne Weber, 'Manual on Hate Speech', (2009) Council of Europe, 3-4

ethnocentrism and homophobic speech[59]. These situations necessitate the Court to dissect Article 10 of the European Convention on Human Rights and determine, which statements and expressions are not covered by the freedom of expression or not justified by the second paragraph on the said article and, which modes of speech are worthy of a democratic society.

In view of the above, no universally accepted definition of the term 'hate speech' has been established and this is likely to be the case for the years to come. This does not mean that States are not stepping out their efforts to confront 'hate speech' even with difficulties on a national level, however the contrasting political and cultural climates, especially between Europe and the United States in their protection of the freedom of expression, pose struggles, which are not easy to overcome. Henceforth, in the absence of a set definition of 'hate speech', how can and should cases of 'hate speech' be discovered and recognised, especially when statements instigating hatred are concealed to mislead and deceive? This scenario places added significance to the necessity of State authorities to be able to distil identifying criteria arising out of Court judgements and guidelines issued by international organisations while at the same time proceed with the harmonisation of particular national legislations, which facilitate international investigating cooperation initiatives.

Conclusively, while it is believed that a legally binding international definition of 'hate speech' is not necessary, it is then crucial for States to be able and willing to participate in multilateral efforts in fighting 'hate speech' founded on the common recognition of identifying criteria.

10 Legal implications and differentiation of related notions

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

Article 339 of the Criminal Code which deals with contraventions against any person describes the notion of 'provocation' in relation to hate-crime law. The article denotes that any person is to be found guilty of a contravention should he/she utter any insult or threat, despite being provoked, if the insult reaches beyond the limit warranted by provocation. It appears therefore, that the notion of provocation is understood as a stimulus to direct an offender in uttering insults or threats to any person.

Nevertheless, no pardon is afforded should such threat exceed the limit "warranted by provocation". Reference to the term 'warranted by law' should be made in this regard. In Police vs. Paul Abela, the court rightly suggests that when considering the notion of provocation as a justification for any offence, such justification can only be considered if the provocation is spurred during the offensive act itself. Furthermore, the court, in quoting the Francesco Antolisei, requires the provocation to be morally unjust in order to mitigate punishment.

[59] European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis' (2009)

The notion of intimidation is dealt with in Article 82A. The marginal note specifically mentions incitement to hatred yet the article uses the phrase "stir up". The provision deals with racial hatred and condemns any one who uses any threatening, abusive or insulting words or behavior with the intent to stir up violence or hatred against another person. The term 'intimidation' therefore seems to be tied to crimes against racial hatred.

'Incitement to hatred' is also closely linked to hate crime based on race. A subsidiary legislation entitled "Requirements as to Standards and Practice on the Promotion of Racial Equality" which incorporates the provisions of the 'UN Convention on Elimination of all forms of Racial Discrimination', repeatedly makes use of the term.

It appears therefore, that even though all three notions are similar in their literal meaning, they tend to be linked to different crimes and contraventions within legislation. Whereas provocation ties with threats and insults, the notions of intimidation and incitement to hatred seem to be used frequently when dealing with the crime of racial hatred.

Most Case law and legislation tend to deal with such notions with respect to crimes such as willful homicide. The reason for such may be because of the recent regulation of 'hate-crime' to Maltese Law. Nevertheless, mention of all three terms is found in the Criminal Code, penalizing any offender who is guilty of hate-speech despite being 'provoked', intimidated' or 'incited' to do so, should the offender exceed the limits of such provocation / intimidation / incitement warranted by law.

11 Comparative analysis

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

The purpose of this Protocol is the criminalisation of racist and xenophobic acts committed through computer systems. According to Article 3 of this Convention:

"Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: distributing, or otherwise making available, racist and xenophobic material to the public through a computer system."

Therefore according to the Convention it is the duty of the parties of this convention to adopt such offence into their domestic laws. In fact those countries (including non-european countries also) which have acceded to this have their legislation already in line with the needs of the Convention, whilst other countries are reforming their legislation. The convention provides for the way the domestic law must be adjusted to be up to the standard of the convention, however despite this, there are certain differences between the different domestic laws of each country.

For instance in France, there was implementation of cybercrime laws both before and after the ratification of the Convention. It includes the criminal offences of hacking for instances, which is punishable by French law. They have included such provisions in their criminal code. According

to a study, when it comes to criminal procedure, the French provisions does not cover all that is found in the Convention. "Nevertheless, it does not mean that French criminal procedure law is not consistent with the Convention, as it seems to be covered by general provisions of French criminal procedure law referring to the bilateral agreements or international conventions".60

In Germany on the other hand, most of the offences are uniform with the Convention, and they have both changed the articles that were previously in existence and included new ones. According to the study "Most of the European countries, such as Italy, Germany or Spain, have placed the computer related offences close to the traditional offences, taking their structure as a model for the new cybercrime provisions, where possible".61 For example in Italy they include the offence of computer fraud in their legislation by correlating it with the traditional provision on simple fraud provision for in their law.

Malta acceded to the Convention in April 2012. The laws in Malta with regards particularly racism and xenophobia are tackled in Article 45 of the Constitution of Malta which speaks about the condemnation of any discrimination. Moreover, Article 82A of the Criminal Code states that:

"Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up racial hatred or whereby racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months."

Therefore the Maltese Criminal Code does provide a provision to prevent hate speech or hate crimes, and is one example of the way domestic law has transposed the provisions of the Convention of the Council of Europe. The words 'written on printed material' includes any online material which may be hateful towards certain individuals, thus clearly condemning such behaviour.

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[60] Available at <http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/documents/reports-presentations/567%20study2-d-version8%20_28%20august%2008.pdf> [accessed 6th September 2013]

[61] [61] Available at <http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/documents/reports-presentations/567%20study2-d-version8%20_28%20august%2008.pdf> [accessed 6th September 2013]

ELSA Norway

National Researchers

Ingeborg Collett Bjørgan

Pernille Edh Hasselgård

Pauline Sommerfelt Helle

Agnes Harriet Lindberg

Karoline Glückstad Torgersen

Academic Adviser

Inge Marie Sunde

Francis Augusto Medeiros

National Coordinator

Olav Vogt Engeland

1 National definition of Hate Speech

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

1.1 General outline of section 135a of the Norwegian Penal Code

Hate speech is criminalized pursuant to section 135a of the Norwegian Penal Code[1], which reads as follows:

> *"Any person who wilfully or through gross negligence publicly utters a discriminatory or hateful expression shall be liable to fines or imprisonment for a term not exceeding three years. The use of symbols shall also be deemed to be an expression. Any person who aids and abets such an offence shall be liable to the same penalty.*
>
> *A discriminatory or hateful expression here means threatening or insulting anyone, or inciting hatred or persecution of or contempt for anyone because of his or her*
> *a) skin colour or national or ethnic origin,*
> *b) religion or life stance, or*
> *c) homosexuality, lifestyle or orientation*
> *d) reduced functional ability*"[2]

The legal provision is neutral with regards to technology and this paper will mainly focus on its application to online expressions. Norway has ratified the Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of racist and xenophobic nature committed through computer systems (see chapter 9.2 and 11 of this paper).[3]

Section 135a is ordinary legislation and must be interpreted in light of the fundamental right to freedom of speech, which is introduced on a constitutional level, pursuant to Article 100 of the Norwegian Constitution[4] and Article 10 of The European Convention on Human Rights (ECHR). ECHR is incorporated as part of Norwegian law.[5]

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[1] Act of 22 May 1902 no. 10, the General Civil Penal Code (The Penal Code). Section 135a of the Penal Code is from now on referred to as section 135a. It is important to note that The Penal Code currently in force is from 1902. A new penal code was however passed in 2005 by the Parliament, but has not yet entered into force due to technical challenges relating to the introduction of this comprehensive act into the Police's computer system. Consequently, The Penal Code of 2005 will be briefly mentioned later in the report, but it will not be explored into detail.

[2] Ronald Walford and others, unofficial translation of the Norwegian Penal Code of 1902 (*The Norwegiane Ministry of Justice*) <http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf> accessed 8 July 2013.
At the time of writing, there is no official translation of this subsection and other amendments done this spring. I have therefore provided some corrections as to provide a version of section 135a that reflects the current legal situation in Norway.

[3] Council of Europe, 'Signatures and ratifications of the Additional Protocol to the Convention on Cybercrime', <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=189&CM=8&DF=&CL=ENG> accessed 3 June 2013.

[4] Article 100 of the Norwegian Constitution of 17 May 1814 reads:
"There shall be freedom of expression.

It is possible that an expression deemed at a first glance to contravene section 135a, is still protected by Article 100 of the Constitution. Moreover, if the level of protection differs between the latter and Article 10 of the ECHR, Article 100 will prevail. In practice, the court will try to avoid such conflicts by taking a flexible interpretation.

Section 135a is an offence "*against* eemed to be in the interest of the society as a whole, because striking down such expressions is m*the general order and peace*"[6]. Its purpose is to protect vulnerable minority groups. This is deant to support important democratic values of tolerance and respect. For this reason, it is not necessary that the expression is aimed at a specific person (victim).[7] Hateful expressions generally directed at one of the minority groups mentioned in section 135a are also prohibited. One consequence is that the police can initiate an investigation at its sole discretion, for instance when it has detected illegal expressions on the Internet. Procedurally, it is not necessary to await a formal report from an individual who belongs to the offended minority group.

1.2 The objective description of the offence

The wording of section 135a must be interpreted in light of other legal sources. The case law of the Supreme Court is of particular importance to its interpretation, along with preparatory works from the law-making process.[8]

1.2.1 "Expression": A criminal act

An expression can be a criminal act, cf. section 7 of the Penal Code.[9] In order for something to be considered an "expression" it must have an external manifestation. Thus, the law makes a distinction between an expression, which is considered a criminal act, and a thought, which is contained in somebody's mind. "Expression" is understood widely as encompassing spoken words, written texts, videos, sounds, pictures, paintings, symbols, etc. Expressions on the Internet may take all these forms

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No person may be held liable in law for having imparted or received information, ideas or messages unless this can be justified in relation to the grounds for freedom of expression, which are the seeking of truth, the promotion of democracy and the individual's freedom to form opinions. Such legal liability shall be prescribed by law.
Everyone shall be free to speak his mind frankly on the administration of the State and on any other subject whatsoever. Clearly defined limitations to this right may only be imposed when particularly weighty considerations so justify in relation to the grounds for freedom of expression.
Prior censorship and other preventive measures may not be applied unless so required in order to protect children and young persons from the harmful influence of moving pictures. Censorship of letters may only be imposed in institutions.
Everyone has a right of access to documents of the State and municipal administration and a right to follow the proceedings of the courts and democratically elected bodies. Limitations to this right may be prescribed by law to protect the privacy of the individual or for other weighty reasons.
It is the responsibility of the authorities of the State to create conditions that facilitate open and enlightened public discourse."
Translation of the Norwegian Constitution (*The Norwegian Parliament*, last updated 7 October 2013) <http://www.stortinget.no/In-English/About-the-Storting/The-Constitution/The-Constitution/> accessed 24 August 2013.

[5] Act of 21 May 1999 no. 30 relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act).

[6] The heading of chapter 13 of the Penal Code.

[7] See chapter 1.2.3.

[8] Preparatory works are considered a significant source of law in Norwegian jurisprudence.

[9] Section 7 paragraph 2 reads: "*if the act is constituted by an expression.*" (my translation).

1.2.2 The character of the expression: "discriminatory" or "hateful"

According to section 135a the expression must be "discriminatory" or "hateful". This is defined in the second paragraph as "*threatening or insulting anyone, or inciting hatred or persecution of or contempt for anyone*" (see chapter 10). Usually, this is the condition which is assessed by courts in 135a cases.

The main rule in Norwegian law regarding hate speech is that there is a large margin for distasteful expressions.[10] According to preparatory works only expressions that are of a "*qualified offensive character*" will be found discriminatory and hateful.[11] The Supreme Court has defined this as expressions that encourage or give affiliation to violation of integrity or expressions that imply a gross devaluation of the human dignity of a group.[12]

In the *Sjølie case*[13] (Rt.[14] 2002 s. 1618), the Supreme Court weighted the concept of freedom of expression against the conducts described in section 135a. It placed such a decisive weight on freedom of expression that it only considered utterances that encouraged violence to be illegal. The Supreme Court judgment in this *case* resulted in an opinion from the UN Committee on the Elimination of Racial Discrimination (CERD), which stated that the judgment was a violation of Article 4 of ICERD[15].[16] The Supreme Court has now lowered the threshold for protection under freedom of expression,[17] and has recently deemed illegal an expression which did not have any suggestion of incitement of violence, yet nonetheless disparaged a person's human dignity on the basis of his skin colour.[18]

1.2.3 The protected groups

The protected minority groups are described in section 135a, second paragraph, letters a-d. The list is exhaustive hence other groups are not protected. The fact that section 135a is focused on minority groups might raise questions about hate speech concerning groups that are not minorities, e.g. women, senior citizens and politically active people. In such case one has to seek recourse in provisions concerning threats, defamation etc.

The fact that the provision is directed against "anyone" brings about two elements: First it shall protect individuals who are identified with one of the minority groups. The rationale behind this is respect for the individual as a person.[19] Secondly the expression can be directed at an entire group that is protected under the provision. It is therefore not a criterion that the actual

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[10] Rt. 2012 p. 536, *Dørvakt*, paragraph 32 with reference to well established case law. See also chapter 2.1.
[11] Ibid. paragraph 28.
[12] E.g. Rt. 2012 p. 536, *Dørvakt*, paragraph 28. Rt. 2007 p. 1807 *Vigrid*, paragraph 33.
[13] Anti-Semitic remarks were proclaimed in a public square during a demonstration.
[14] Rt. = Norsk rettstidende (In English: Norwegian Supreme Court Law Review).
[15] United Nations International Convention on the Elimination of All Forms of Racial Discrimination (1965). accessed 10 July 2013.
[16] The opinion, CERD/C/67/D/30/2003, is available on: <http://www.regjeringen.no/upload/kilde/jd/prm/2005/0059/ddd/pdfv/255370-cerd_communication_30_2003.pdf>.
[17] Ot.prp. no. 8 (2007-2008), p. 249 and Rt. 2012 p. 536 *Dørvakt*, paragraph 37.
[18] Rt. 2012 p. 536, *Dørvakt*.
[19] Ibid.

expression reaches its target as long as it concerns a protected group. In the *Vigrid case, the audience was the* group of readers of an interview with neo-Nazis in a newspaper, and in the *Sjørlie* case other fellow neo-Nazis constituted the audience. Because the expressions concerned Jews as a group, they were covered by section 135a. There is no requirement that the protected group is limited or homogenous. In the *Kjuus case*[20] (Rt. 1997 p. 1821), dark-skinned immigrants (a varied group of over 140 000 individuals) were seen as a protected group under the provision.

Norwegian scholars have discussed whether at all there can be personal victims under section 135a, which uses the word "anyone" to describe potential targets for hateful speech. Several cases only deal with hate speech against minority groups, e.g. immigrants and their descendants in the *Kjuus* case and Jews and immigrants in the *Sjølie* case. The question seems to have been solved in the *Dørvakt case where section 135a was applied when* a doorkeeper had been severely insulted, based on his skin colour, by a visitor. The doorkeeper was referred to as "the victim". It shows that the provision can be used also for expressions aimed at individuals (due to the individual identification with one of the protected groups).

1.2.4 Public expression

According to section 7 paragraph 2, an expression is uttered publicly when it is "*suitable to reach a large number of persons*"[21]. The preparatory works indicate that a number of 20 to 30 people is sufficient to be considered public.[22] Whether an expression is considered publicly uttered must be assessed with regards to the length of time that it is accessible. An audience of less than 20 people by the time the expression was uttered is not by itself an indication that it was not a public. If the said expression remains available to more than 20 people over time, the publicity criterion would be fulfilled.

In other words, expressions published online are considered public if the website is in principle open to access by the general public, regardless of the presence of access-control mechanisms or restrictions. This is the case regardless of how many people actually use it.[23] The ease of spreading an expression through the Internet can therefore be relevant in the assessment. An average Norwegian Facebook user has between 200 and 700 friends, so a post on someone's wall would likely be seen as a public utterance.[24] On Twitter someone might have so few followers that one could wonder if his tweet would be regarded as "public" in the legal sense. However, the expression could easily be re-tweeted and spread to a considerable number of people (see chapter 2.2). The "suitable to reach" wording is the key to define the public character of the expression.

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[20] On an extreme right wing party's program, statements about forced sterilization and abortion were directly linked at dark-skinned immigrants.
[21] The unofficial translation uses "likely" instead of "suitable", but "suitable" is better capturing the meaning.
[22] Prop. 53 L (2012-2013) cf. Ot.prp. nr. 90 (2003-2004).
[23] Prop. 53 L (2012-2013), p. 6.
[24] Inger Marie Sunde (eds), '*Forebygging av radikalisering og voldelig ekstremisme på internett*' (*Oslo Police University College* 2013) <http://brage.bibsys.no/politihs/bitstream/URN:NBN:no-bibsys_brage_43577/1/forebygging_av_radikalisering.pdf> accessed 5 July 2013.

2 Contextual elements of Hate Speech

What are the key contextual elements to identify a "hate speech"? Does the multiplying and wider effect of online dissemination always mean higher potential impact of online hate speech; why?

2.1. Key contextual elements to identify "hate speech"

This question must be answered in light of guidelines developed by the Norwegian Supreme Court and by the European Court of Human Rights (ECtHR) as Norway is bound not only by the wording of Article 10 of the ECHR, but also by its case law. Special care has to be taken in order to relate Article 10 case law to the application of section 135a, as hate speech is not a distinct and defined legal concept under the wording of the Convention. The ECtHR examines the contextual elements of unacceptable speech somewhat differently than the Norwegian Supreme Court. Overall, the latter has less systematic criteria, and prioritises freedom of expression slightly more than the ECtHR; however, there is general conformity with European standards on hate speech.

2.1.1 Norwegian case law on section 135a

In the *Sjølie case (2002)*, the Supreme Court had a strictly textual interpretation of the expressions. This case is no longer seen as a source of interpretation, and it is now accepted that an expressions should be understood in its context.[25] This test establishes an objective standard. According to the *Kjuus case* (1997), an expression is to be understood in connection with the rest of the text of which it is part.[26] The greater context of the statements rendered them hateful expressions pursuant to section 135a. This judgement also demonstrated that the Supreme Court takes into account the medium of the expression, which, in this case, was a political program. The Supreme Court explicitly outlines that political expressions are given greater leeway than other types of expressions, but may also be struck down by section 135a.

The manner in which the expression is uttered can also be of importance.[27] Symbols can constitute standalone expressions under section 135a. When a text is supplemented by symbols, the textual implications can be radically altered resulting in a contravention of section 135a. Furthermore, an expression may draw on a wider set of associations, which may also be considered relevant to the context. In the *Vigrid case* (2007), the Supreme Court considered several comments seen together as hate speech despite the fact that the hateful content was only implicit.

The veracity of the statement is not treated as an independent criterion in the Supreme Court assessments, but can be one of many factors that are taken into account.[28] It means that an expression which is to some extent true could still be considered illegal.

[25] Rt. 2012 p. 536 *Dørvakt*.
[26] Ot. Prp. No. 33 (2004-2005) p. 189.
[27] Ibid.
[28] Rt 1981 p. 1305, *Løpeseddel*, p. 1315.

In the *Sjølie* case, the expressions were found so absurd and illogical that they could not possibly be taken seriously or considered harmful. As per the subsequent change of practice (see chapter 1.2) also expressions with lack of meaning can be in contravention of section 135a.

2.1.2 ECtHR case law on Article 10

The ECtHR places particular scrutiny on the context of hate speech, as this element frames the other two assessed criteria, content and intention.[29]As mentioned earlier, impermissible speech according to Article 10 is not conceptually identical to hate speech in section 135a. Still, the contextual criteria emphasized by the ECtHR may be relevant to the interpretation and application of section 135a.

In qualifying whether an expression is hate speech, the context nuances the gradation of "hate", the probable impact of the comment and accordingly the margin of appreciation accorded to the sovereign state. Presently, the context of an expression is dissected by three categories: the status of the applicant in society (the alleged perpetrator), the status of person(s) targeted by comment (the victim), and the impact of the comment.[30] For each category, the Norwegian counterpart (or lack thereof) will be discussed. As there have been virtually no cases pertaining to *online* hate speech either nationally or internationally, it is assumed that the conclusions lend themselves to online forums as well.

Within the ECtHR these three contextual elements cumulatively generate a combined force that can sway an expression from being "hate speech" to a comment vital to political discourse. Firstly, the **status of the alleged perpetrator** provides him with varying levels of leeway and responsibilities with regards to freedom of expression. As part of the Court's fundamental belief in democracy, inflammatory comments by a politician in a political debate receive greater flexibility than by representatives of the state.[31] Individuals, who are channels for social and public debate and the preservation of effective democracy, are shown more tolerance.[32] The Supreme Court is sensitive to the context of the expression, but has not yet outlined the status of the perpetrator as an independent criterion. In the *Kjuus* case, the court agreed that the political context of the program led to more leeway on its scrutiny, though this was related to the expression, not to the perpetrator.

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[29] The weight of these three elements varies from case by case, as particularities of a case may lend itself more towards content over context and vice versa.

[30] Anne Weber, 'Manual on hate speech' (*Council of Europe Publishing* 2009) <http://act4hre.coe.int/no_hate/No-hate-speech-movement/Studies-and-Research/Council-of-Europe>, accessed 25 July 2013.

[31] Comparing *Incal v. Turkey judgment* of 9 June 1998 and *Seurot v. France* judgment of 18 May 2004, the Court enforces a milder standard on the former, where a politician had been accused of hate speech, than the latter, where the accused was a school teacher.

[32] Members of the press are differentiated into two "role" categories: authors and propagators. The press is a paramount actor in the maintenance of a democracy; accordingly the Court accords it both leniency and particular responsibilities. In *Jersild v. Denmark* judgment of 23 September 1994, a journalist had produced a documentary on a group of right extremists, the "Greenjackets", which was aired on national television. "[*T*]*aken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas, and was deemed apart of an important social debate.*" The journalist was thus not outside his freedom of expression in the dissemination of these racist ideas, accordingly the state was given a smaller margin of appreciation in the matter.

Secondly, the **status of the victim(s)** affects the threshold for "acceptable" criticism they may be exposed to. On one hand of the spectrum is the state, whose role intrinsically places it under permanent scrutiny from all actors of society. On the other end are private individuals whom are safeguarded from visceral scrutiny and criticism. The case *Lingens v. Austria* judgment of 8 July 1986 adeptly illustrates this; a journalist had criticized a politician with regards to his affiliations with the Nazi era. The Court denotes that:

> *"The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 [...] enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues."*[33]

The Norwegian Supreme Court, when assessing hate speech, does not have a general vulnerability evaluation as does the ECtHR in the sited judgement. The reason for this is that the purpose of section 135a is solely to protect particularly vulnerable groups (see chapter 1.2.3) whereas Article 10 is general and can in theory protect all groups of people (e.g. the above mentioned case which does not directly concern "hate speech"). When applying section 135a the question is whether the person belongs to a protected group (see the *Kjuus* case). Having for instance a public role is subordinate in this regard. However, *Lingens v. Austria* suggests that, in hate speech cases, a public spokesperson, for example, of a minority might have to endure more distasteful comments than others.

Thirdly, the **"impact" of the comment** encapsulates the potential harm it may have inflicted (see chapter 2.2). The level of harm is difficult to ascertain not only for the domestic court but even more so for the ECtHR who is both temporally and culturally displaced from the incident. Nonetheless, this is at the heart of the "context" and is crucial in branding a comment as "hate speech".

The impact of a comment is affected by several elements. It may vary according to the medium of dissemination. The written word, audio-visual media, and artistic works not only interact differently with the audience but also reach different quantities and demographics. As noted by the Court in the *Jersild v. Denmark* case[34], "*the potential impact of the medium is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media*". The medium of the comment has a direct relationship with the amount of harm it can cause (see chapter 2.2). There is presently no explicit case law in Norway focusing on the medium of an expression.

Perhaps the most important factor in the impact of a comment is the circumstance of its dissemination. The ECtHR has repeatedly placed particular emphasis on the temporal, historical and cultural circumstances a comment has been introduced in. Historically, the ECtHR bases its evaluation in the state's own assessment and provides it with great margin of appreciation in

[33] *Lingens v. Austria judgment* of 8 July 1986, para 42. My underlining.
[34] *Jersild v Denmark* judgment of 23 September 1994, para. 31.

determining the harmful impact of a comment (see chapter 9.1). The *Soulas and Others v. France* judgment of 10 July 2008 illustrates this dynamic: in this case, two authors had published a book on the incompatibilities between European and Muslim civilizations with strong underlying incitement towards violence. The Court denoted that the subject matter of immigrant integration has been intensely debated in the media and was particularly problematic in France. In fact "*in their most serious expression [the tension], resulted in violent clashes between police and some radical elements of the [immigrant] population*"[35]. Given the tense climate around this topic, the reception of such a book is far more inflammatory in current times than it would have been had it been published 100 years earlier.[36]

Overall, for the ECtHR contextual elements of a case are paramount in ascertaining whether a remark constitutes hate speech. The Supreme Court appears to conform to the standard set by the ECtHR but does not apply the same criterions as systematically. It does not evaluate each criterion separately but rather takes a general analysis. The lack of specificity in contextual criterion makes it less evident to systemize the threshold for hate speech in Norway.

2.2 The multiplying and wider effect of online dissemination

The Internet allows a user to reach a phenomenally large audience. With a low barrier of entry, few or no "gate keepers", generally easy access and multitudes of platforms, a user can spread words of hate with unprecedented effectiveness (see chapter 1.2.4). This multiplying and wider effect of information dissemination that the Internet provides – i.e. its reach - is not synonymous with equal ability to influence – i.e. its impact. The impact of online hate speech is by no means uniform. Much like traditional communication media, the impact of online hate speech is influenced by its form, perceived legitimacy, perceived goal and audience.

Online hate speech can be prolifically spread through different forms and channels. It can be in the form of written text, audio-visual aids or artistic works. As previously noted with regards to the *Jersild* case, audio-visual medium may have a more powerful impact and can "go viral". The impact of the comment will thus not only vary by content but also by form. Additionally, the form of the comment can be communicated through a multitude of platforms: web sites, blogs and online forums, personal messages, social networking sites, video and music streaming services etc. In fact, each platform has advantages and limitations in respect of their potential impact. The "comment culture"[37] that has emerged exemplifies this; whilst anyone can make a hateful online comment which could be read by hundreds of thousands, it may also be

[35] *Soulas and Others v. France* judgment para 37. My translation.

[36] See also *Féret v. Belgium* judgment of July 16 July 2009. Here the Court considered the effect of the timing of the distribution of pamphlets in an election period. Besides, it should be noted that attacks targeting religious beliefs fall in a special category. The state is granted particularly wide margins of appreciations in such instances as there is no European consensus about what constitutes an offensive remark about other religious beliefs. As such there will be great variance in the evaluation of the context of the comment from state to state.

[37] Gavan Tiltley, 'Hate speech online: considerations for the proposed campaign - Starting studies about online hate speech and way to address it' (*Council of Europe Publication* 2012) <http://www.beznenavisti.sk/wp-content/themes/beznenavisti/podklady-a-materialy/uvahy_ku_kampani.pdf> accessed 16 August 2013, p. 29.

completely overlooked or lost amongst other commentators. Moreover what such comments fundamentally lack, like most online hate speech comments, is credibility: such comments are largely discredited and disqualified, undermining its potential impact. This is particularly evident when comparing such forms to the printed press, as online hate speech generally lacks the authoritative stamp of more traditional modes of communication and thus has less of a meaningful impact.

Several extremist groups have effectively utilized online platforms which have both reach and impact. Stomfront, a white-supremacist web site, combines textual messages on its site, along with the publication of YouTube videos. They appeal to several demographics and have achieved, at least within their own members, a certain level of credibility. The Internet's cross-linking of web sites and other sources also strengthens the sense of authority and weight of a claim. A particular phenomenon is the "counter knowledge" sites, which present themselves as "truth" tellers whose information the mainstream media censors. When such sites are linked to real life associations, like political parties, their comments carries much more weight as the association confers them "real life" authority and credibility.[38] In this context, online hate speech does enable individuals to have a much larger impact than they would be able to gain by using traditional media.

Moreover, there is another harmful consequence of online hate speech: the use of the Internet to convey messages of hate can lead to confusion about what is considered actually acceptable discourse in society. Ideas that normally would have existed in subcultures may be wrongly considered as mainstream ones.[39] This affects the entire society and is not limited to certain individuals, and therefore endangers the climate for public debate.[40] It establishes new norms of discourse that go beyond what would otherwise be considered respectful and ethically acceptable. Besides, the Internet can also function as an "echo chamber": people believing in radical ideas may get the impression that their views are shared by many others and thereby feel justified.[41]

The Internet as medium has also reduced the space between thought and action.[42] Through the Internet, a statement can trigger an action which can be arranged and carried out more easily. One can find bomb recipes, videos of how to use weapons and some Internet games even provide links to arm dealers websites.[43] The Norwegian terrorist Anders Behring Breivik is an example of how hatred can transform ideas into real physical threats with the help of the Internet.[44]

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[38] The Front National in France has utilized this strategy to present the mainstream press as controlled by corrupt elites who misrepresent the realities of immigration or Islam.
[39] Øyvin Strømmen, 'Eit vegkart til ekstremismen', (*Morgenbladet* Oslo 4 April 2013), <http://morgenbladet.no/samfunn/2013/eit_vegkart_til_ekstremismen#.Ud_FKvm-2So> accessed 12 July 2013
[40] Sunde (2013), p. 32.
[41] Strømmen
[42] Sunde (2013), p. 48.
[43] Ibid.
[44] Sunde (2013), p.97.

Presently, there are no conclusive studies on the effect of online hate speech on different age groups. There are however, emerging trends suggesting that youth are the most susceptible, but even then that the "*impact that online hate speech can potentially have on youth is likely to vary on a case by case basis. Some youth are more susceptible than others and varying degrees of involvement will produce varying degrees of impact*"[45].

Overall, the multiplying and wider effect of the Internet enables users to get their comment "out there" but does not guarantee that these comments will have a larger impact. The impact of their messages will depend on for example the form and platform used, the authoritative weight of the author and the persuasiveness of the language and information. However, it is naïve not to acknowledge that the Internet has changed the way we communicate and can make it easier to cross borders that might otherwise be harder to cross in the offline world.

3 Alternative methods of tackling Hate Speech

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

3.1 Legislation

3.1.1 Substantive criminal law

One method of tackling hate speech is to establish prohibitions through legislation. This exists to a various extent, both on a national (see chapter 1 about section 135a) and European level (see Chapter 11). Apart from Article 10 (see chapter 2.1.2), the ECHR has Article 17, which can be used in order to prevent hate speech that violates fundamental values of the Convention (see chapter 7). This way of tackling hate speech creates a certain degree of predictability. However, every case is individually assessed making the result difficult to predict. Furthermore, section 431 of the Penal Code establishes a strict liability for editors. He may be objectively responsible for utterances that are published on his media platform.

> *"The editor of a newspaper or periodical shall be liable to fines or imprisonment for a term not exceeding three months if the newspaper or periodical publishes anything for which the editor would have incurred criminal liability pursuant to some other statutory provision if he had known the content. He shall not, however, be liable to a penalty if he establishes that he cannot be blamed as regards checking the content of the publication or supervision, guidance or instruction of his deputy, colleagues or subordinates."*[46]

3.1.2 Procedural law

[45] Peter Weinberg, 'A critical rhetorical analysis of selected white supremacist hate sites', (*Rhode Island College* 2011) <http://digitalcommons.ric.edu/cgi/viewcontent.cgi?article=1051&context=honors_projects> accessed 1 August 2013.

[46] First paragraph of section 431 of the Penal Code.

Another possibility is to implement measures for more efficient international cooperation in hate speech cases. It should be, de lege ferenda, possible for the investigating state in which the speech has occurred, to obtain identification data (traffic data about the source) from a networking site in another state, provided that the source is located in the investigating state. This implies a need for lessening the condition of double criminality as the legal protection of speech differs between states. The solution should only be applied to hate speech aimed at vulnerable minority groups of the investigating nation and not to hate speech in general, in order to avoid risk of suppression of political debate by the authorities through politically motivated prosecution.

3.2 Soft-law

Furthermore, online hate speech can also be discouraged through non-binding informal rules, known as soft-law. Although non-binding, soft-law still has a practical effect.[47] In Norway, an example of soft-law is the Ethical Code of Practice for the Press[48] which sets out moral requirements to the press and official publications both in traditional and online media.[49]

The Ethical Code imposes liability on editors for the content of their publications.[50] One can however not be criminally sanctioned by such a soft-law declaration. For this one has to seek recourse in section 431 of the Penal Code (see chapter 3.1.1). Further, the Ethical Code requires a certain degree of objectivity and general consideration when publishing.[51] This contributes to the limitation of hate speech, especially online where the majority of publications are now posted. The regulations' main objective is to create a preventive effect with regards to hate speech through visible moral standards.[52] The Press Professional Ethics Committee[53] is responsible for examining complaints on violations of the regulations and has the power to make statements when they believe the media has violated their ethical obligations.

Also, it has been argued that policy requirements towards the hosts of Internet pages be introduced, which obliges him to set clear boundaries and erase postings or messages which disregard the code of conduct,.[54] Freedom of speech is not a right to publicise on *others'* websites. Such requirements would involve a higher protection against hate speech than the Ethical Code as these regulations only target the traditional press.

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[47] Andrew Power and Oisin Tobin, 'Soft Law for the Internet, Lessons from International Law', <www2.law.ed.ac.uk/ahrc/script-ed/vol8-1/power.asp> accessed 10 August 2013.
[48] In Norwegian: "Vær varsom-plakaten".
[49] The regulations can be found on the Norwegian Press Association's web site: http://presse.no/Etisk-regelverk/Vaer-Varsom-plakaten.
[50] The Ethical Code of Practice for the Norwegian Press article 2.1.
[51] Iban. article 4.1.
[52] NOU 2011: 12.
[53] In Norwegian: "Pressens faglige utvalg" (PFU).
[54] Sunde (2013) p. 37.

On European level, presently no official common soft-law exists specifically for online hate speech. Initiatives have been taken in order to discuss and establish common non-binding informal rules for dealing with hate speech,[55] among others in the European Union where there has been discussed whether European "be cautious" principles should be established (see also chapter 8 and 9).[56]

3.3 Preventive initiatives

The term "preventive initiatives" is understood as initiatives taken by the authorities or the Internet industry aimed at preventing hate speech from arising and spreading online. Both direct and indirect initiatives have been implemented in Norway.

3.3.1 Direct initiatives

Filtering involves blocking of Internet pages that have a particular content. Filtering based on the individuals' personal preferences is offered worldwide.[57] It has been discussed whether there should be a national enactment on filtering in regards to all illegal speech and information online.[58] The Ministry of Justice and Public Security did not support such enactment because it would be difficult to prevent the filter from also blocking legitimate information from spreading. However, the host of an Internet page can remove hate speech without impinging on freedom of speech.

3.3.2 Indirect initiatives

Indirect initiatives have been implemented through education. Academics can have an awareness-raising function and can contribute to the launch of new ideas that can be discussed in the public sphere. Publication of articles is, among others, an important channel for legal professionals to promote differing views and contribute to a constructive debate. Raising awareness leads to increased dissemination of information and contributes to more well-informed attitudes by the population.

Norway and the rest of Europe have over the last years experienced an increase in the number of articles and reports concerning hate speech. The search engine Google indicates a substantial increase in the number of publications related to this topic. In 2008, there were in total 31.8 million hits on articles related to hate speech, in comparison to 44.7 million hits in 2010. For the first eight months of 2013, there were 143 million hits on publications covering the topic.[59] The sources of incorrectness in such a non-scientific research can be many, but the tendency seems to be visible.

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[55] Power and Tobin.
[56] Ringerikes Blad, 'Ønsker europeisk vær varsom-plakat' <http://mobil.ringblad.no/Utenriks/article1948636.ece> accessed 10 August 2013.
[57] See, among others, Windows' filtration services < http://windows.microsoft.com/nb-no/windows7/looking-for-web-filtering-and-activity-reports-in-windows-parental-controls> accessed 2 September 2013.
[58] Ot.prp.no.22 (2008-2009) pharagraph 2.18.1.
[59] Research of 10 August 2013.

4 Distinction between blasphemy and Hate Speech based on religion

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

Blasphemy is criminalized, according to the Penal Code section 142:

> *"Any person who by word or deed publicly insults or in an offensive or injurious manner shows contempt for any creed whose practice is permitted in the realm or for the doctrines or worship of any religious community lawfully existing here, or who aids and abets thereto, shall be liable to fines or to detention or imprisonment for a term not exceeding six months.*
>
> *A prosecution will only be instituted when it is required in the public interest."*

This section is seen as "sleeping" and the last person prosecuted was the famous poet Arnulf Øverland in 1933, who was acquitted.[60] The purpose of the provision is to protect the individual's religious beliefs, whereas section 135a protects against insults based on religion. Where the border between these two sections is to be drawn has not been clarified by case law.[61] The above-mentioned blasphemy section has not been included in the new Penal Code of 2005 which, as mentioned in footnote 3, has still not entered into force.

5 Networking sites and online anonymity

Should networking sites be legally forced to reveal identities of persons at the origin of such online hate speech and is this feasible? What is the current status in your country?

5.1 Revealing identities of persons at the origin of online hate speech

This question does not concern anonymity in general, but the disclosure of the identity of people posting expressions that might be found to be a violation of section 135a. It means that the issue is whether websites should be legally forced to reveal the identity of the author (source) of a possible offence to the police in the course of a criminal investigation.

Disclosing the identity of people posting online hate speech may be necessary for effective prosecution. Identifying the perpetrator can be difficult in cases where more than one person has access to the device used for posting online hate speech. This happens usually when there is no authentication control for accessing the network, such as in "guest networks" found in public libraries, Internet cafes and even on open Wi-Fi networks.[62] Such problems may result in "dead end" investigations. The problem may justify the imposition of an obligation to keep logs that show the identity of the users for such services, or even, authentication for logon to the network.

60 St.meld. nr 26 (2003-2004).

61 Ibid.

62 Inger Marie Sunde: Inger Marie Sunde: *Lov og rett i cyberspace. Internettkriminalitet og etterforskningsmetode* (Fagbokforlaget 2006), p. 268.

The extraterritorial character of the Internet also implies that the offending expression may be posted on a foreign website, out of immediate reach of local law enforcement. This problem can be countered by more effective cooperation procedures as mentioned in chapter 3.1.2.

The issue of freedom of speech versus crime prevention plays a role here: some people fear that revealing identities and having people prosecuted for their online expressions of hate, will result in less people taking part in the public debate, i.e. jeopardizing the right to freedom of speech. Given the destructive examples of hate speech we have seen in Norway recently[63] one might argue that restricting freedom of expression is necessary in order to facilitate a public debate where everyone feels encouraged to take part.[64]

5.2 The feasibility of obtaining identification data

Online anonymity means that identification data is concealed. There are three types of anonymity online: technical, legal and actual.[65] In this question we will present the three different types and then discuss some practical issues that emerge in this context.

On a *technical* basis it is to some extent feasible to compel networking sites to reveal identities of persons responsible for online hate speech. The sites have IP-addresses and sometimes even personal information about their users; e.g. name, address, telephone number etc. However, there are a number of challenges related to this. Some countries have laws that oblige the Internet providers to register their users so they can be identified while some do not.[66] This makes technical anonymity possible in some countries.

Legal anonymity means that a networking site has access to the identification data, but this cannot be disclosed directly to the police due a legislative prohibition.

Actual anonymity is when the networking site can choose if it wants to record the identification data from its users, [67] and when the act involves a foreign networking site subject to foreign assessment of the legality of the disclosure of the identity. In these situations extradition of the identity of the user can be refused. The EU Data Retention Directive[68] has however reduced the level of technical and actual anonymity in Europe.

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[63] A prominent example is the comparison of people of the Romani population with the slugs and encouraging them to commit suicide.
[64] See also chapter 1.1.
[65] Sunde (2006), p. 268
[66] In the Norwegian legislation it is a violation if the networking site fails to register the identification data, cf. The Regulations of 16. February 2004 on Electronic Communications Networks and Services (Ecom Regulations)
[67] This means any physical or juridical person who agrees to access to a electronic communication web or service for their own use or loan, cf. Act on Electronic Communication (The Ecom Act) section 1-5, n. 15.
[68] Directive 2006/24/EC of The European Parliament and the Council 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54.

On a practical level it can be difficult to reveal the identity because there are many different platforms for publishing opinions online. Facebook and Twitter have 1 billion[69] and 500 million[70] users respectively. On the largest online newspaper in Norway, Verdens Gang, there are posted over 800 000 comments per year.[71] On the same website, in a debate section, there are more than 4 million comments posted every year.[72] In total 120 000 different users left a comment on articles on VG the last year, which represents approximately 2.4 % of the total population in Norway.[73] The numbers indicate that monitoring online debate cannot be done manually by the police - there are not enough resources. In other words, the only way to prosecute hate speech is if someone reports it or if the police stumbles upon it by chance. A solution to this problem could be the establishment of a department committed only to fight hate crime, which is the approach in Sweden.[74]

On the other hand, the E-Commerce Directive[75], aimed at increasing the economic potential of online activities, has exempt Internet service providers (ISPs) from an active monitoring duty. Such an active monitoring obligation could have a major impact on the business model that has been successful so far.

5.3 The current status in Norway

The Ecom Act[76] section 2-9 first paragraph states that ISPs have a duty of confidentiality towards their users. This does not apply when the police demands information about identification data, according to third and fourth paragraph of the provision. If the police requires identification data the networking sites are as a main rule obliged to provide it. The Criminal Procedure Act[77] section 210 first paragraph states: "*A court may order a possessor to surrender objects that are deemed to be significant as evidence if he is bound to testify in the case*"[78]. It is well established since Rt. 1992 p. 904 that information stored online is regarded as an "object".

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[69] Donna Tam, 'Facebook by the numbers: 1.06 billion monthly active users' (Cnet 30 January 2013) <http://news.cnet.com/8301-1023_3-57566550-93/facebook-by-the-numbers-1.06-billion-monthly-active-users/> accessed 03.10.2013.

[70] Kari Rolfsjord, 'Twitter passerer 500 millioner brukere' (Dagens IT 28 February 2012) <http://www.dagensit.no/article2341629.ece> accessed 16 September 2013.

[71] Based on readers pr.day. -- 'Daglig dekning for nettaviser' (medienorge, 2013), <http://medienorge.uib.no/?cat=statistikk&queryID=253> accessed 29 July .2013.

[72] www.vgd.no.

[73] A. Kjensli Knudsen and K. Bendiksen, 'Skal vi tolerere intoleranse?' (*NRK P2*, 8 July 2013) viewed on 27 July 2013 <http://radio.nrk.no/serie/radioselskapet/mktr11013513/08-07-2013>, 00:31:58-00:32:18.

[74] Ingjerd Hansen, 'Hatkriminalitet – En drøfting av temaet og gjennomgang av anmeldelser i Oslo 2012' (*Oslo Police District* April 2013) <https://www.politi.no/vedlegg/lokale_vedlegg/oslo/Vedlegg_2144.pdf>, accessed 30 July 2013.

[75] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [200] OJ L 178/1.

[76] Act of 4 July 2003 no. 83 relating to electronic communication.

[77] Act of 22 May 1981 no. 25 relating to legal procedure in criminal cases.

[78] Ronald Walford and others, unofficial translation of The Criminal Procedure Act (The Norwegian Ministry of Justice) <http://www.ub.uio.no/ujur/ulovdata/lov-19810522-025-eng.pdf.> accessed 11 August 2013.

6 Tackling the notions of "violence", "hatred" and "clear presence of danger"

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

6.1 The notions of "violence" and "hatred"

The notions of "violence" and "hatred" are often used by the Norwegian Supreme Court when assessing if a certain expression is in contravention of section 135a. National legislation and case law, which are the main sources to our understanding of "hate speech" in a legal context, must be examined in order to decide whether the notions should be alternative or cumulative from a Norwegian perspective.

Section 135a applies the term "hateful". This covers both threats of integrity violations (violence), and highly derogatory utterances on human dignity (hate) (see chapter 1.2.2). Threats of integrity violations will not necessarily involve highly derogatory utterances on human dignity, and vice versa. There is therefore a need for a ban against both violence and hatred.

In the *Sjølie* case (2002), the Supreme Court analysed whether a demonstration containing derogatory utterances incited or supported integrity violations. It is natural to understand threats to violate the integrity of a person as illegal. The Supreme Court distinguished between this sort of hate speech, and hate speech without a violent aspect. Further, the Supreme Court found that there must be a close relation between the speech and the violent action. The offensive speech targeting Jews and immigrants, was not sanctioned by the Supreme Court in pursuance of section 135a, as the speech did not incite violence.[79] The notions were treated as cumulative. However, in *Vigrid* case (2007), the Court dissented from the *Sjølie* case.[80] The Court claimed that hate speech not inciting or supporting violence could be seen as a violation of Norwegian law. The notions were in this case treated as alternative.

In the above mentioned *Dørvakt* case (2012), the Supreme Court stated that the speech act did not incite violence, but was still covered by section135a. The person was convicted solely on the basis of expressing hatred. This judgement indicates a development in case law, where the notions are clearly treated as alternative.

Overall, the current legal status complies with the Additional Protocol of the Convention on Cybercrime, which expresses an alternative view on the notions by using the term "violence *or* hatred". This also corresponds with case-law of ECtHR who in more recent practice consistently seems to treat the notions as alternative.[81]

[79] 6 of 17 members of the Supreme Court dissented.
[80] See chapter 1.2.3.
[81] See, for example, the *Garaudy v. France* judgement of 23 June 2003.

6.2 The notion of "clear and present danger"

The US Supreme Court and some European countries have applied a notion of "clear and present danger" to determine when a state could limit an individual's right to free speech.[82] The notion refers to an evaluation of whether there exists a clear and present danger for the hate speech to trigger illegal actions. If this is the case, the speech could be limited. The notion is not specifically explored in Norwegian law, but such a danger could *contribute* to a speech being deemed as hate speech pursuant to section 135a. It will play a role when assessing the character of the expression (see chapter 1.2.2).

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

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

7.1 The justifying elements for the two different approaches of the ECtHR

The ECtHR has recourse to two provisions of the ECHR when presented with a hate speech case. Either Article 10(2) is used, which restricts freedom of expression, or Article 17, where the expression is deemed contrary to the aims of the Convention and thus without legal protection.

The ECtHR applies **Article 10(2)** in cases concerning comments that are generally hateful but not evidently discriminatory in content or purpose. The majority of cases are not clear-cut cases of hate speech, but fall in a grey area between freedom of speech and intolerance speech.

There are four elements within Article 10(2) that must be present for an expression to constitute hate speech. Firstly, there must be an interference with freedom of speech, secondly, the interference must be prescribed by the law, thirdly, the interference must pursue one or more of the legitimate aims within the article and finally, it must be necessary in a democratic society. While the first three elements are generally straight forward, the last element is more problematic.

The fourth element requires the state to have a "*relevant and sufficient*" reason for interfering with freedom of speech and the interference must address a "*pressing social need*".[83] As will be addressed further in chapter 7.3, states are accorded a wide margin of appreciation in determining this urgency and the Court rarely disputes the state's assessment.[84] When evaluating the purpose,

[82] The test was first presented in the judgement *Schenck v. United States* in 1919, formulated by Justice Holmes.

[83] Anne Weber, *Manual on hate speech* (Council of Europe Publishing 2009). The interference must also be proportionate to the aim pursued.

[84] There are however variations; the Court is most strict in matters that are incitements to hatred and most lenient when regarding "*matters liable to offend intimate personal convictions relating to morals or religion*", cf. Weber p.32

content and context of the comment, the Court aims to ascertain whether the objective is to disseminate hate or contribute to a social debate (see chapter 2.1.2). In the case of *Jersild v. Denmark*, the Court found that the impugned documentary was part of the social debate around immigration and that the journalist was not himself advocating racist ideas. As such, the Court concluded that Denmark's interference was not "*necessary in a democratic society*" and that there consequently had been a violation of Article 10. Conversely the case of *Soulas and Others v. France* the ECtHR determined there to have been a pressing social need to interfere and concluded that the book did not contribute to a debate but rather incited violence.

As a whole, the Court balances the right to freedom of expression in article 10 (1) against the interests in article 10 (2). That is, the Court considers whether an individual's potential contribution to public debate outweighs the needs of a democratic state. The assessment of that "need" is the focal point in the treatment of hate speech under Article 10 (2).

Article 17 is a general provision which protects against abuse of the rights and freedoms of the ECHR. The article has been applied in hate speech cases where there is a clear discriminatory comment and clarity of proof. The purpose of Article 17 in such cases is to safeguard the convention against situations where "*freedom of expression is asserted as a cover for hate speech*"[85].

Comments that are clearly racist, support totalitarian regimes or are of negationist[86] nature fall typically within the ambit of Article 17. In the judgement of *Garaudy v. France*, an author had published a book 'The Founding Myths of Modern Israel' in which he disputed the existence of crimes against humanity and incited racial hatred. The Court categorically denied his book protection:

> *"The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. It proponent indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention."*

In contrast to Article 10, "*there is no weighing up of interests at stake, no analysis of the importance of the rights being forfeited and the damage caused as a result*"[87]. The focus is thus whether the content of the comment is in conflict with the Convention. Its fundamental aim is to function as a self-preservation article for democracy. *"[W]here a government seeks to achieve the ultimate protection of the rule of law and the democratic system, the convention itself recognizes in Art. 17 the precedence such objectives take, even of the protection of the specific rights which the convention otherwise guarantees"*[88].

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[85] Françoise Tulkens, 'When to Say Is to Do: Freedom of Expression and Hate Speech in Case-law of European Court of Human Rights' (European Court of Human Rights 9 October 2012) <http://www.ejtn.net/Documents/About%20EJTN/Independent%20Seminars/TULKENS_Francoise_Presentation_When_to_Say_is_To_Do_Freedom_of_Expression_and_Hate_Speech_in_the_Case_Law_of_the_ECtHR_October_2012.pdf> accessed 10 July 2012.

[86] Negationism refers to the denial of crimes against humanity, such as denying the holocaust.

[87] Tulkens, p.5.

[88] *Glasenapp v. Germany* judgement of 11 May 1984, para.110.

Several scholars have however called for caution in the application of Article 17 as it carries a latent danger of "*serv[ing] as a pretext for the worst kinds of abuses*"[89]. Nonetheless, Article 17 performs an important role as a safeguard not only for the preservation of democracy but for the potential victims of hate speech. No speech that aims to destroy the aims of tolerance, justice, and peace of others will be be condoned or protected.

In sum, Article 10 is applied in instances where the comment is inflammatory but not in clear conflict with the aims of the Convention. If a comment does conflict, it is considered inadmissible for consideration under Article 10.

7.2 Objective or subjective interpretations of justifying elements

In applying Article 10 (2) and Article 17, the Court uses an objective standard. This approach is necessary, for if a subjective test were adopted, the protection of victims of hate speech and democracy more generally would be significantly weakened.

In the Case of *Norwood v. UK*[90], Norwood had placed an image of the twin towers burning in his window with the caption "*Islam out of Britain – protect the British people*". He submitted that "*[c]riticism of a religion is not to be equated with an attack upon its followers. In any event, [he] lives in a rural area not greatly afflicted by racial or religious tension, and there was no evidence that a single Muslim had seen the poster*"[91]. Even if we assume that this was Norwood's true intention, i.e. that he did not intend to attack the followers of Islam themselves, observer of the posters would not have been aware of this. That is, an observer cannot know the inner thoughts of the creator of such an image, thus the Court must adopt an objective and fair interpretation as a basis when evaluating the impact of an image. The Court, in applying an objective test, considered that:

> *"The words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination."*[92]

An objective test must be applied to determine whether a comment, such as in the aforementioned case, is blatantly racist or within the scope of freedom of expression. For example, in the judgement of *Klein v. Slovakia* of 31 October 2006, a journalist who criticized an archbishop was deemed by the Court to have been within his rights as he was not attacking all followers of the Catholic faith nor inciting violence. This finding demonstrates why a subjective approach to hate speech could result in unjust findings for both the victim and the accused. Without an objective interpretation, the Court's ability to provide an effective remedy would be fundamentally diminished.

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[89] Tulkens, p.5.
[90] *Norwood v. United Kingdom* inadmissibility decision of 16 November 2004.
[91] Ibid. p.4.
[92] Ibid.

7.3 Subsidiarity and margin of appreciation in cases of hate speech

There may be a tension between Article 17 and considerations of state sovereignty. On one hand, the ECtHR must be able to intervene if a state misuses Article 17 to silence public debate. On the other hand, hate speech is so contextually sensitive that subsidiarity is often prioritized. In the case of hate speech, the Court tends to give the state a wide margin of appreciation because the state is often better positioned to evaluate the consequences and impact of a comment. The consequences of inflammatory anti-Muslim books years after publication, such as that of *Soulas and Others*, may not be evident to an external court. Or, as expressed by the Court: "*The magnitude of these problems and the most appropriate way to remedy them are at the discretion of national authorities who have a thorough knowledge of the realities of the country*"[93].

As mentioned both in chapter 2.1 and in 7.1, states are given varying margins of appreciation depending on the case at hand. In situations where there is no European consensus, such as remarks on religious beliefs, states are given wide margins. A comment may provoke riots in one country yet not cause any controversy in another. For example, the Danish cartoons published in 2005 gave rise to vastly different reactions from country to country. On issues pertaining to the incitement of violence and claims that conflict with the Convention, the Court affords states a smaller margin of appreciation. This is so in relation to both publications which are clearly racist as well as interventions of the state which suppress public debate; the fibre of democracy.[94] Those targeting the fundamental aims of the Conventions will not be "excused" by cultural differences.

8 Harmonisation of national legislation

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

Harmonisation of national legislation concerning cybercrime is important because cybercrime in terms of online hate speech cannot be limited by geographical boundaries. Thus, if the intention of criminalising an act is the protection of a certain group of people, it may be futile to criminalise an act in one state, if the same act can be performed legally in a different state and still harm the same group of people.

Even though cybercrime legislation does exist to a certain degree on international level[95], one must bear in mind that these conventions do not necessarily deal with online hate speech directly.

The process through which harmonisation of national legislation can be achieved varies from state to state. Within the EU, harmonisation of national legislation can be achieved through the passing of regulations and directives that establish certain standards that are legally binding for

[93] Ibid. para. 31. Unofficial translation.
[94] As seen in *Jersild v. Denmark*, *Klein v. Slovakia* and *Vejdeland v. Sweden* judgment of 9 May 2012.
[95] E.g. the Council of Europe Convention on Cyber Crime (23 November 2001).

the EU member states.[96] Cybercrime directives, though not specifically targeting hate speech, are already in the process of being released.[97]

Harmonisation can only be achieved through an international effort of negotiation and mutual agreement which would lead to international conventions on online hate speech. One example of such an agreement is the Council of Europe Additional Protocol to the Convention on Cybercrime (see chapter 9 and 11). The implementation of this convention into the national legislations of a large number of European states has led to more harmonised cybercrime legislation on online hate speech throughout the region and in fact was signed also by two non-European countries[98].Thus, to achieve the greatest possible effect of harmonisation of cybercrime legislation, an attempt should be made to reach an even wider agreement (see chapter 3.1.2). International bodies like the UN can, and are being used as a forum for discussions and negotiations regarding a potential future global agreement on cybercrime legislation.[99]

With regard to harmonising national legislation on cybercrime, the principle of proportionality must be considered from several perspectives. On the one hand, international harmonisation of regulation may result in national laws that conflict with national legal systems. The laws within every state have developed over centuries and are greatly influenced by local culture and customs. Creating a global standard for cybercrime legislation might therefore undermine and jeopardise the justification of national legislation.

As pointed out by Schjølberg, being able to predict the legality of one's actions and to know the consequences (the principle of legality) is paramount in any state governed by rule of law.[100] The possibility to do so is based on the clarity and specificity of the wording of any treaty that is implemented into national legislation. However, if a national legislation provides for significantly differing punishments for similar crimes, this legislation will appear imbalanced and difficult to predict. Thus international harmonisation will be achieved at the expense of harmony within each state's national legislation.

On the other hand, if the international agreement only states that certain acts shall be criminalised, without providing more specific measures to be implemented, international harmonisation may not be achieved. The legal consequences of the same act will differ from state to state. It can further be difficult to justify different severity of punishment for the same offence, when the primary source of the criminalisation of that act is the same international treaty. Thus an international agreement which lacks specificity will undermine the goal of international harmonisation of cybercrime legislation.

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96 For example the The EU Data Retention Directive which also binds Norway and the other European Economic Area (EEA) states due to the EEA-agreement.

97 Martin Finch, 'EU Directive to Harmonise Legislation and Penalties for Cyber Crime' (*Commissum*, June 2013) <http://www.commissum.com/en/news/eu-directive-harmonise-legislation-and-penalties-c/> accessed 28 July 2013.

98 Canada and South Africa.

99 Stein Schjølberg, 'The History of Global Harmonization on Cybercrime Legislation – The Road to Geneva' (*Cybercrime Law*, December 2008) p. 19.

100 Schjølberg, p. 1.

In summary, harmonisation of national legislation on cybercrime within certain regions is achievable (see however chapter 9.2). Global harmonisation of such legislation may however present challenges for the global community due to significant differences between the cultural values and legal systems of states.

9 Legal implications of "hate speech"

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

9.1 A legally binding definition on national level

As seen in chapter 1, there is a legally binding definition of hate speech in Norwegian legislation, as per section 135a. When defining hate speech the states are given a wide margin of appreciation (see chapter 2.1.2 and 7.3) which might be seen as both positive and negative. On one hand it is positive because the state is in a better position of assessing its needs. For example, in the Norwegian definition also homosexuals are regarded as a minority group protected by section 135a. This is not the case in the international definition made in the Additional Protocol to the Convention on Cybercrime Article 2; hence demonstrating that the margin of appreciation has been crucial for the protection of this group and for the conservation of fundamental values in modern Norwegian society. On the other hand, the wide margin of appreciation can be negative because the state's individual definitions might hinder a subsequent common international definition, making a combined effort against hate speech difficult.

9.2 A legally binding definition on international level

A definition of hate speech is found in the Additional Protocol to the Convention on Cybercrime Article 2 (see chapter 8 and 11). Among the states that have signed and ratified the Protocol there are several countries that have made reservations. This shows that the view on what is possible and necessary varies even between European states which are culturally and politically similar in many respects. It is foreseeable that it will be even more difficult to find consensus on a definition among non-European states. In the United States for instance, the right to free speech has few restrictions, while China and Russia are examples of countries in which this right is much more limited.

Regarding the necessity of a common international definition, it must be considered that hate speech is a global issue. This speaks in favour of an international definition. An international definition would offer a minimum standard of protection in all states. This would demonstrate that hate speech will not be tolerated by the international community and therefore prompt every state to review its domestic approach to the issue. An increased international and national focus on hate speech may raise awareness among victims of their rights and lead to greater reporting of instances of such speech. In this way, the development of an international definition of hate speech may indirectly reduce online hate speech through a 'ripple effect'.

10 Legal implications and differentiation of related notions

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

Section 135a applies the term "*threatening*" as a synonym to "intimidation". "Provocation" refers to encouragement of illegal actions.[101] The notion of "incitement to hatred" covers encouragement of hateful speech or behaviour towards others (see chapter 1.2.2).[102] The notions are closely related, but still cover different areas of the concept "hate speech".

One of the main conditions in section 135a is the notion of **intimidation**. The provision prohibits promotion of discriminating or hateful speech in terms of threats towards others. The Penal Code does not provide any further guidance in regards to the content of the notion and neither do the preparatory works of the code. The notion has however been interpreted by the Supreme Court as explained in chapter 2.1.1.

The Penal Code does not contain one general provision relating to **provocation**, but the concept is mentioned in some of its provisions. Section 228 third paragraph concerns the infliction of minor bodily harm in retort of provocation. Section 250 concerns defamation caused by provocation, and section 127 second paragraph considers provocation in regard to the work of a public servant. Provocation is relevant to the criminal act in the sense that the court can either exempt or reduce the penalty. The action will still in principle be criminal. Provocation as a reason for dropping prosecution is a continuation of the principle in section 56 no. 1 on penalty reduction as a result of justified resentment.

The main provision on **incitement to hatred** is found in section 135a. The second paragraph prohibits promotion of discriminating or hateful speech, which among others includes incitement to hatred. Besides, there are other provisions aiming at preventing incitement to hatred, among others sections 246 and 247 of the Penal Code. These provisions protect people from defamation and the exposure of hatred.

The conducts of "intimidation" and "incitement to hatred" are treated in Norwegian legislation as potentially subject to legal sanctions. "Provocation" is on the other hand treated as a cause to reduce the penalty. Speech of "intimidation" and "incitement to hatred" can result in legal sanctions, while the act of provocation is not individually punishable.

11 Comparative analysis

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

[101] The Penal Code section 228.
[102] Ibid. section 135a.

At the time of ratification of the Additional Protocol in Norway, the new Penal Code of 2005 had already been adopted by the Norwegian Parliament. The ratification of the Protocol therefore necessitated changes to both to the Penal Code of 1902, currently in force, and the new Penal Code of 2005.

The ratification did not require any major amendments to Norwegian law. This demonstrates that cybercrime issues had been taken into account by the legislative body even before the ratification. In 2009, following the ratification of the Protocol in 2008, a new chapter of the 2005 Penal Code was adopted by the Norwegian parliament, namely chapter 21 regarding "*Protection of information and exchange of information*"[103]. According to the preparatory works of the act, this chapter was added to bring Norwegian domestic law in line with the Protocol.[104]

Norway has declared reservations in accordance with Article 3 paragraph 3, Article 5 paragraph 2b (except for hatred offences) and Article 6 paragraph 2b (except for hatred offences).[105] As we can see differences, it is interesting to compare the Norwegian reservation regarding article 6 with the adaptation of the same article by Germany and the Netherlands. This short comparative analysis is by far not comprehensive enough (nor does the limited space permit) to establish an adequate overview of how the Protocol has been transposed into the domestic law of Council of Europe member states. For this purpose, one should read this paper in the context of the other national reports of the ELSA International Legal Research Group on Online Hate Speech.

Comparing the implementation of the Additional Protocol in Norway and Germany, one can note that Germany did not make any reservation in relation to Article 6,[106] perhaps because the conducts described within the Article was already criminalised by German law. In relation to the Dutch ratification of the Protocol, it is interesting to note that their reservation in relation to Article 6 paragraph 1 means that the Netherlands must only implement this part of the Protocol in relation to material which by distribution incites "*hatred, discrimination or violence on the grounds of race or religion*"[107]. In contrast, Norway has only accepted the first paragraph of Article 6 insofar as the distribution of material is a "*hatred offence*"[108].

Protection of the freedom of speech serves as the best explanations for this. As mentioned in chapter 2.1, freedom of speech holds a strong position in Norwegian legislation. In conclusion, the transposition of Article 6 in various national legal systems is illustrative of the challenges regarding that arise in establishing and implementing effective international conventions (see chapter 8 and 9).

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[103] My translation. This chapter does not however concern online hate speech.
[104] NOU 2007: 2 Chapter 7.
[105] The Council of Europe, 'List of declarations made with respect to treaty No. 189', <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=189&CM=8&DF=&CL=ENG&VL=1> accessed 1 august 2013.
[106] Ibid.
[107] Ibid.
[108] Ibid.

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ELSA Portugal

National Researchers

Daniela Marques Cardoso

Carla Alexandra da Mota Mendes Andrade Silva

Maria Filipa de Aragão Homem

Rita Resende Soares

Bruno Filipe Lima Monteiro

Sofia da Costa Pinto Ribeiro

Academic Adviser

Andreia Sofia Pinto Oliveira

National Coordinator

Adriana Moças

1 National definition of Hate Speech

In your national legislation, how is hate speech defined? (e.g.: Is hate speech defined as an act?) (see Delruelle, "incitement to hatred: when to say is to do", seminar in Brussels, 25 November 2011).

Portugal, as a State of Law, based on human dignity1, has as its founding principles: pluralism of expression and democratic political organization. As such, not only does it have a duty to respect, but also to protect its citizens through the enforcement of laws, and ensure that all individuals are able to enjoy their fundamental rights and freedoms. Its duty is to protect everyone from behaviour harmful to human dignity.

"Hate speech" is understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.2 Even though this definition has been referred to by the European Court of Human Rights (ECHR), the analysis conducted by the court of whether a form of expression is considered hate speech or not, is not confined to this definition.3 The judicial review of "hate speech" is done on a case-by-case basis, in order to not restrict the court's future action.4

Just as the ECHR has yet to adopt a definition of hate speech, likewise, Portuguese law does not have one. Even though the Portuguese Penal Code (PPC) does not have any provision which explicitly criminalises "hate speech" as such, it does however condemn discriminatory conduct in its Article 240.

When examining if a particular form of expression is in fact "hate speech", the Portuguese judiciary begins its analysis by confronting the concrete case and the context and circumstances in which it was used, with Constitutional provisions and EHCR case-law.5 In line with ECHR

[1] Article 1 of the Portuguese Constitution

[2] Recommendation No R 97 (20) of the Committee of Ministers to Member States on "Hate Speech"

[3] See Gündüz v. Turkey, Judgement of 4 December 2003, para. 22

[4] Françoise Tulkens, "When to say is what to do: Freedom of expression and hate speech in the case-law of the European Court of Human Rights", October 2012, Strasbourg, p. 3

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case-law and Portuguese doctrine6, the assessment of "hate speech" is conducted on a case-by-case basis.

Article 37 of the Portuguese Constitution establishes, inter alia, that any citizen has the right to freely express his/her thoughts. Its scope of protection is broad, encompassing the freedom to express opinions, ideas, points of view, convictions, criticism and value judgments over any subject, regardless of its aim and valuation criteria.7 Even though this right should not be subject to censure8, its use should not be abusive9. Clarifying, the Portuguese Constitutional Court held that "no restrictions to the freedom of expression are allowed, unless such are necessary for the coexistences of other rights, nor may sanctions be imposed that are not required to ensure other legal interests which are under penal protection…"10. In line with the Constitutional Court's ruling, several authors concurred that only the extreme forms of speech which aim at stigmatizing, insulting or humiliating a specific group, rather than seriously and objectively confronting facts, ideas and opinions, should be criminalised.11

The Portuguese legislator, in Article 240 of the PPC established that any person found guilty of inciting any acts of violence against, or committing acts of defamation or insulting or even threatening an individual or a group of individuals due to their race, colour, ethnic origin, religion, sexual preference and gender identity will be held criminally responsible. 12 In addition, whoever is found responsible for the creation, constitution of or participation in organizations which incite or encourage discrimination, hate or violence against a person or group of people for reasons related to race, colour, ethnic or national origin, religion, gender, sexual orientation or gender identity; or for the development or participation in activities of organized propaganda which incite or encourage discrimination, hate or violence towards the abovementioned groups; or for the participation or assistance in the abovementioned organizations or in the abovementioned activities, including funding, will be sentenced to prison. Thus, it is clear, that

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[6] Miguel Salgueira Meira, Limites à Liberdade de expressão nos discursos de incitamento ao ódio, Verbo Jurídico, p. 12 (2011). <http://www.verbojuridico.com/doutrina/2011/miguelmeira_limitesliberdadeexpressao.pdf> accessed at 18 September 2013

[7] Canotilho, J.J. Gomes and Vital Moreira, "Constituição da República Portuguesa – Anotada", Vol. 1, 4th Edition, Coimbra Editora, p. 572 (2007).

[8] Article 37 nr 2 of the Portuguese Constitution.

[9] Article 37 nr 3 of the Portuguese Constitution.

[10] Constitutional Court, Judgement nº 81/84 (published in 2nd Series of Diário da República of 31 January 1985 and Vol. 4 of Acórdãos do Tribunal Constitucional, p. 225 ss.)

[11] Machado, Jónatas, "Liberdade de Expressão – Dimensões Constitucionais da Esfera pública no sistema social", Boletim da Faculdade de Direito, Studia Iuridica 65, Coimbra Editora, p. 847. (2002) Miguel Salgueira Meira, Limites à Liberdade de expressão nos discursos de incitamento ao ódio, Verbo Jurídico, p. 11-12 (2011).

[12] Article 240 nr 2 a), b) and c).

these extreme forms of speech provisioned in Article 240, in conformity with ECHR case-law, belong in the category of hate speech.

2 Contextual elements of Hate Speech

Portuguese law does not establish the key contextual elements to identify "hate speech". Moreover, jurisprudence revolving this particular issue has been scarce.

Nonetheless, the Portuguese Supreme Court had the chance to take a stand on "hate speech" in intellectual research. In this case, the judge had to verify if the research which involved the denial of crimes committed during World War II, conducted by a German researcher, arrested in Portugal, might constitute a form of "hate speech" or not. It held that the mere denial of the facts that occurred in World War II and providing a neutral and alternative explanation, is not a crime. However, what categorized the research as "hate speech", was the fact that the author adopted a negative value judgement towards the victims of the crimes in World War II, offensive of their dignity, calling those same crimes "the most profitable lie in the history of the human race". So what proves to be decisive to the Court is whether the perpetrator, when deciding to express himself/herself through what may be perceived as hate speech, made any value judgements over the facts he/she tried to express. In other words, what is conclusive is whether the author acted or expressed himself/herself in such a way that he/she shows approval over the" speech's" content.[13]

The Portuguese legal order recognises the impact that publicity has when different forms of hate speech are disseminated online. Such may be seen in Article 183 of the PPC where it is established that defamation and/or insult towards an individual or group of individuals committed through means which facilitate its dissemination will face an aggravated sentence. Publicity is considered an aggravated circumstance, since it divulges that form of expression to wider audiences. Thus the legislator considered that harsher sentence for this conduct was needed.[14] Likewise, in Article 240 in its subsection 1 and 2, any discriminatory acts are criminalised when organized propaganda is resorted to, or, the acts of incitement of violence, defamation, insult or threats are committed in a public reunion, through writing to be disseminated, or through any means of social communication or computer systems aimed at dissemination. The impact and what damages the online "hate speech" caused, is considered in the determination of the concrete sentence to be applied to the perpetrator.

3 Alternative methods of tackling Hate Speech

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

The Portuguese legal system, based on a democratic constitution, protects every form of speech. Freedom of Expression is a fundamental right and, according to common opinion, fundamental

[13] Portuguese Supreme Court of Justice, Judgement of 5 July 2012, Process nr.48/12.2YREVR.S1.
[14] Costa, José de Faria, "Comentário Conimbricense do Código Penal", Vol. I, 2nd Edition, Coimbra Editora, p. 948. (2012)

rights may suffer limitations only in three cases: when the Constitution itself establishes a limit to its exercise, when there is a collision of fundamental rights which must be decided according to a criteria of proportionality in the concrete case, or when there is a law, admitted by the Constitution, limiting the exercise of the right to Freedom of Speech (article 18, no. 2, of the Portuguese Constitution). In any of these cases, limitations to a fundamental right must be as surgical.

The Portuguese Constitution establishes the right to Freedom of Expression in article 37. The number 3 of the article itself establishes limits to the exercise of Freedom of Expression referring to the penal code which sanctions the unlawful exercise of the right.

Article 37 must be conciliated, on this matter, with article 13, which prohibits negative discrimination based on factors as race, religion, or sexual orientation, and with article 26, which ensures the right to be protected against discrimination. It is important to note that Freedom of Speech seldom prevails when there is a collision of this right with other fundamental rights – in particular, and more commonly, moral integrity, privacy, reputation, image, among others.

Therefore, hate speech is not automatically rejected in our legal system. In fact, it is common opinion that any kind of speech must be protected, even hate speech, unless it is exclusively directed to inciting violence, stigmatizing, or humiliating a certain group of persons (that is, when it constitutes a genuine and serious incitement to active discrimination). Otherwise, the complete prohibition of any type of speech is considered to create danger of falling into a system of automatic censorship, contrary to a democratic society and, in specific, to the provision of article 37, no. 2, of the Portuguese Constitution. Moreover, criminal sanctions apply only as a last resort (ultima ratio principle).

In face of this broad constitutional protection of freedom of speech and of equality, there are a few methods worth mentioning to tackle hate speech and, thus, finding an adequate balance between these two fundamental rights.

Firstly, denial or lessening of the protection of Freedom of Speech corresponds to the criminal provisions sanctioning the unlawful exercise of the right. The Portuguese penal code sanctions hate crimes in different forms. As a crime itself – crime of racial, religious or sexual discrimination – article 240; as an aggravating circumstance – article 132, no. 2, f), for murder, and article 145, for physical assault; or by sanctioning other crimes which, indirectly, may involve hate crimes – for example, crimes against public peace (eg. article 297, 298 and 299).

Furthermore, there has been, since 2000, a proliferation of legislation prohibiting discrimination in a wide range of sectors and creating a more effective system to eliminate hate crime. For example, Law 18/2004 (11th of May) and Law 99/2003 (2003 Labor Code) transpose the EU Directive 2000/43/EC which implements the principle of equal treatment between persons irrespective of racial or ethnic origin.

Particularly relevant is also Law 20/96 (6th of July) which enables communities of immigrants or associations which defend the interests of such communities to act as the complainant. This measure helps the effective persecution of perpetrators.

The Portuguese legal frame regarding hate crimes consists, mainly, of a complaint structure. There are several bodies competent to receive complaints and redirect them. The Portuguese Ombudsman is the main body responsible for protecting Human Rights and its action, on this matter, may be reactive or preventive. Regarding the first, the Ombudsman is competent to receive complaints, which he redirects: he is not competent to intervene in criminal procedures. The Ombudsman is mainly responsible for reporting situations of malpractice and for issuing recommendations. As for the second, the Ombudsman is responsible for promoting the divulging and awareness raising on human rights.

Especially relevant, regarding racial discrimination, is the High Commissioner for Immigration and Intercultural Dialogue (ACIDI), which has a specific body associated – the Commission for Equality and Against Racial Discrimination (CICDR) – responsible for accompanying the effective enforcement of anti-discrimination laws, for collecting all relevant data on discriminatory acts and its sanctioning, for recommending legislative, statutory, and administrative measures to prevent discriminatory practices, and for the promotion of studies and investigations on the subject, as well as, an annual report.

If these bodies have knowledge of a crime, they are obligated to communicate and hand over all relevant information to the competent body, in charge of the criminal procedure. CICDR may also be called upon to issue a legal opinion on the case. However, numbers show that a lot of the complaints are not followed through due to lack of proof[15].

Regarding hate speech online, in particular, there is no specific legislation regarding responsibility of internet service providers for hate speech related contents. However, some laws are also applicable to the internet. For example, the law regulating Advertisement - Article 7 of Decree-Law 330/90 prohibits advertisement that offends values, principles and institutions enshrined in the Constitution (as is the principle of equality, and prohibition of discrimination).

All in all, the proliferation of legislative measures to eliminate discrimination and protect minorities has had the effect of promoting the acceptance of these targeted groups.

Even though hate speech on the internet is still hard to prevent and sanction, there has been some developments as reactions to concrete cases. For example, online newspapers have developed different systems to identify and contain hate speech – one through a system that subjects comments to prior validation before made available to the public (criticized by its similarity to a censorship system) – Newspaper "Público"; another through an automatic system of comment deletion, which is exclusively activated by the reader – Newspaper "Diário de Notícias".

Outside the Legal Framework, the political power also invests on education to avoid further manifestations with a discriminatory intent. Policies to include minorities and awareness campaigns against discrimination have been conducted by state organizations and others (as referred above, for example, the Portuguese Ombudsman office and the ACIDI). Non-

[15] *Observatório da Imigração*: Discurso do racismo em Portugal – Essencialismo e Inferiorização nas trocas coloquiais sobre categorias minoritárias, no. 44, Março 2011

governmental organizations, like ILGA Portugal, receive public funding for projects promoting tolerance.

Although there is no specific guidance (to our knowledge) for public officials or state representatives to prevent hate crimes, there are examples of public actions and public figures promoting tolerance, for instances, open days at the Parliament.

In the jurisprudence there is very little data regarding hate speech. In fact, there is very little number of cases regarding hate crimes in judicial courts. Therefore, there is no information on other jurisprudential methods to tackle hate speech.

However, ERC – Entidade Reguladora para a Comunicação Social, meaning the Regulating Authority for the Media, has issued a wide number of deliberations condemning, for example, newspapers and journalists who had violated the Press Law, the Journalist's Statute, and the Journalist's Code of Ethics, by printing articles which contained discriminatory elements, no matter how tenuous – in Deliberation 16/CONT-I/2012, ERC has considered that even the slightest reference to one's nationality may be regarded as discriminatory if it has no relevance for the news itself. ERC considers, according to the legal instruments referred above, that it is a journalist's duty to pass accurate and exempt information, taking into account the Media's nature, capable of easily influence public opinion. Therefore, Media professionals have the responsibility of abstaining from comments or bias information, which can help perpetuate stereotypes and the stigmatization of minorities.

Reports are unanimous in recommending a better and more informed training of media professionals. In fact, although no law is infringed, there is still a tendency of the media to emphasize "bad news", that is to say, despite the attenuation of discriminatory messages, minority groups are still frequently associated with negative factors.

On this subject is also worth mentioning the awards ACIDI attributes to media professionals who stand out because of their work promoting tolerance – which also constitutes a way to motivate media professionals to contribute for the shaping of a more integrated and tolerant society.

Portugal has, in theory, an effective system to tackle hate speech, or any hate crime. However, reports[16] show that the number of complaints and effective proceedings don't correspond to the volume of customary discriminatory practices. The investigators conclude that there is little recourse to anti-discrimination mechanisms. On the other hand, there are still no statistics regarding the impact of education and awareness raising and its relation with a smaller (or not) number of hate crimes.

To conclude, hate speech is not autonomously considered when it comes to a specific method to tackle it. Hate speech is included in hate crimes and thus, the methods used to prevent hate crime also encompass hate speech. From this investigation becomes clear that the main methods

[16] Observatório da Imigração: *Discurso do racismo em Portugal* – Essencialismo e Inferiorização nas trocas coloquiais sobre categorias minoritárias, no. 44, Março 2011

to tackle hate crime are two: one, preventive; the other, reactive. To prevent hate crime, governmental and non-governmental organizations focus on campaigns to raise awareness of human rights, in particular, the right to equality and to be protected against discrimination, and on policies to protect and promote acceptance and integration of minority groups. To react, meaning, to sanction hate crimes, the Portuguese legal framework establishes a wide system of complaints, which may be directed to several bodies responsible for its analysis and for redirecting the complains to the responsible body in charge of leading the adequate criminal procedure. Furthermore, the penal code punishes with jail the offence of racial, religious and sexual discrimination, and also considers it an aggravating circumstance for some crimes.

Therefore, denial and lessening of legal protection of Freedom of Speech correspond to the criminal reaction. This materializes the conciliation of the right of Freedom of Speech and the right to Equality and Protection against discrimination - all enshrined in the Portuguese Constitution - according to which the unlawful exercise of the first, when endangering the others, constitutes a criminal offence, punishable by law.

4 Distinction between blasphemy and Hate Speech based on religion

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

There are frequent situations in which ethnic, religious, political groups are the target of insulting, menacing or angry statements from certain individuals. While in some circumstances this form of expression can be considered hateful, it is not always considered illegal, nor are individuals always granted the protection provided by penal law. However, if the speech meets the criteria established in the Portuguese penal provisions, the perpetrator will face criminal judgement. As an example, if the speech is directed at specific persons or group of people, with a clear intent to discriminate by inciting hatred and violence against them, for, among others, racist, xenophobic or religious motives, will incur criminal responsibility.17

While sufficient considerations were already made regarding permissible and non-permissible forms of expression when analysing the concept of "hate speech", it is necessary to distinguish how blasphemy, i.e. insult to religious beliefs, and religiously motivated hate speech is criminalised under Portuguese law.

The ECHR, when referring to blasphemy laws, held that Contracting States enjoy a wide margin of appreciation when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals, or especially, religion".18 The Portuguese Penal Code does not define blasphemy, nor does it refer to this concept explicitly. It does however, in its Section II, regulate two crimes which are committed against religious

[17] Article 240 of the Portuguese Penal Code.

[18] Wingrove v UK, Judgement of 25 November 1996, para. 58

sentiments. The rationale behind Article 251 and 252 of the PPC is to protect public peace when individuals express religious sentiments.19

Article 251 nr. 1 holds criminally responsible whoever insults or mocks another person due to his/her belief or religious function, in an adequate way to disturb public peace. So, in order for an insult to be subject to a prison sentence, it has to target a religious conviction, one that is connected to a belief in a deity.20 Although the insult or mock is directed to an individual for reasons related to his/her religion, it has to be so grave that it implies an aggression to his/her religious conviction, thus disturbing public peace. So, not every religiously motivated insult is covered by this provision, only the ones adequate to provoke a justified fear that religious coexistence and the principle of religious tolerance between other sectors of the population may be disturbed.21 Although it is not necessary for this fear to concretely occur, whether it was adequate or not to cause a justified fear is evaluated objectively. Not according to the reaction of the religious institution, but according to the judgement of an impartial observer.22 Article 251 nr. 2 establishes that whoever desecrates any place or object of cult or of religious worship, in an adequate manner to disturb public peace will be convicted to 1 year in prison or to pay a fine. Cult, within the meaning of this Article refers to the expression of a religious conviction.23 So, the objects and places of cult or of religious worship which are to be protected by this provision, are the ones that, due to their symbolism in the religious institution, are regarded as objects of worship.24 "Desecration" may include all acts, words or behaviour, which might offend religious sentiments. Similarly to Article 251 nr.1 , the conducts in nr. 2 have to be adequate to disturb public peace. The conducts have to seriously and in a grave manner breach the principle of religious tolerance.25

Article 252 prohibits any acts of violence or serious threat which may impede or disturb the legitimate exercise of religious cult or publicly vilify an act of religious cult. Cult within the meaning of this article signifies hommage to a deity through religious acts.26

With the analysis of these two provisions, we can conclude that the Portuguese Penal Code penalises only very grave or serious behaviour which is committed against an individual,

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[19] Cunha, J. M. Damião da, "Comentário Conimbricense do Código Penal", Vol. II, 1st Edition, Coimbra Editora, p. 637. (1999)

[20] Ibid., p. 639

[21] Ibid., p. 642

[22] Ibid.

[23] Ibid.

[24] Ibid., p. 643

[25] Ibid., p. 644

[26] Gonçalves, Maia, "Código Penal Português", 18th Edition, Almedina Editora, p. 873. (2007)

with intent to cause harm or to attack the very core on which the religious institution was founded.

As considered when analysing the concept of "hate speech", even though there is no definition of it in Portuguese penal instruments, the forms of speech criminalised in Article 240 of the PPC are certainly part of it. Similarly to Articles 251 and 252, Article 240 criminalises threats, violence and insults committed due to the victim's religion. Although this is not a distinction clearly made by the Portuguese Penal Code, it is possible to affirm that Articles 251 and 252 regulate extreme behaviour which may be classified as blasphemous, while Article 240 regulates "hate speech" based on religion.

Substantively, what distinguishes blasphemy from hate speech based on religion is the perpetrator's intent, the victim of each offense and the underlying legal interest protected by each provision. As stated earlier, the rationale behind Articles 251 and 252 is the protection of public peace when manifesting religious sentiments, while Article 240 aims to protect the equality between all individuals in the world.27 The victim in Articles 251 and 252, although it may be committed against an individual, is the religious institution, while in Article 240 the victim is a person. Lastly, the perpetrator's intent in Articles 251 and 252, is to gravely attack the core values of the religious institution, not the individual which may end up being the target of the offensive behaviour. In Article 240, the perpetrator's intent is to discriminate against the victim, excluding him or her from benefiting from the same rights and liberties as any other person in society.28

Therefore when an individual chooses to express himself/herself with the sole purpose to offend, humiliate and/or stigmatise a particular group, it cannot be considered that he/she validly made use of the right of freedom of expression. Being either through hate speech based on religious reasons or blasphemous acts as regulated in the Portuguese Penal Code, this form of speech has no other purpose but to undermine the equal dignity of the human being, so it cannot claim constitutional protection.

5 Networking sites and the issue of online anonymity

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

[27] Antunes, Maria João, "Comentário Conimbricense do Código Penal", Vol. II, 1st Edition, Coimbra Editora, p. 575. (1999)

[28] Albuquerque, Pinto de, "Comentário do Código Penal à luz da Constituição da República e da Convenção Europeia dos Direitos do Homem", 2nd Edition, Católica Editora, p. 728. (2010)

(see http://frenchweb.fr/debat-propos-racistes-faut-il-contraindre-twitter-a-moderer/96053)

The debate surrounding anonymity in cases of online hate speech in networking sites in Portugal involves a consideration of complex and somewhat conflicting fundamental rights. On the one hand we praise the value and virtue of freedom of expression[29] and the right of data protection[30]. On the other hand, the constellation of fundamental rights safeguarded by the Portuguese Constitution starts, in its very first article, by recognizing human dignity[31], and goes on to ensure the right to good name and reputation[32]. All of these rights have to be measured by a standard of equality[33], and are protected by a fundamental right against any form of discrimination[34].

To understand this debate it is therefore necessary to recognize it takes place in a vast place amidst a vast array of normative provisions, both substantive and procedural, which emanate from deeply rooted constitutional principles. We will conclude nonetheless that the debate is left unresolved for the moment. The unique characteristics of online hate speech, such as the possibility of being veiled under digital anonymity, challenge the normative predictions of our legal system.

The fundamental right to human dignity and the right against discrimination – rights which are negated by hate speech – have long since been establish in our Constitution and criminalized in our Criminal Code. More recently, however, in the 2007 revision of the Criminal Code, the right against racial or ethnic discrimination, defamation or violence, was further expanded, and it is now protected if threatened online through any form of information technologies[35]. Article n.°240-2) furthermore establishes that such offences may be punishable by a prison sentence that ranges from six months to five years.

Moreover, and symbolizing Portugal's continued commitment to this issue, the "Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems" was approved by Resolution Number 91/2009[36] of Portugal's Assembly of the Republic, and ratified by Presidential Decree Number 94/2009[37].

Notwithstanding the above-mentioned provisions, the problem of "online anonymity" and the criminalization of online hate speech, particularly in networking sites, still faces several challenges. Some of them are the normative challenges commonly encountered in the adaptation

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[29] Established in Article n.°37 of the Portuguese Constitution. Available at: < http://www.tribunalconstitucional.pt/tc/conteudo/files/constituicaoingles.pdf>, last accessed September 14 2013;
[30] Established in Article n.°35 of the Portuguese Constitution;
[31] Established in Article n.°1 of the Portuguese Constitution;
[32] Established in Article n.°26 of the Portuguese Constitution;
[33] Established in Article n.°13 of the Portuguese Constitution;
[34] *Id.*;
[35] Established in Article n.°240-2) of the Portuguese Criminal Code. Available at: < http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=109&tabela=leis>, last accessed 14th September 2013;
[36] Approved on the 10th of July 2009, published on the 15th of September 2009. Available at: <https://dre.pt/pdf1sdip/2009/09/17900/0641506421.pdf>, last accessed 14th September 2013;
[37] Published on the 15th of September 2009. Available at <http://dre.pt/pdfgratis/2009/09/17900.pdf>, last accessed 14th September 2013;

to the new reality of the digital age. Others stem from complex constitutional concerns over digital proof, data protection and an emerging notion of a right to internet privacy and a right to be forgotten (digitally).

In one of its most recent commentaries[38], the Cybercrime Office of Portugal's Prosecutor General's Office addressed some of these concerns. Recognizing that the cloak of anonymity does seem to allow for more frequent abuses of the freedom of expression, the Cybercrime Office conversely noted that digital anonymity is, in itself, a right safeguarded by other constitutional provisions.

The first hurdle we face therefore is one of mediating, harmonizing or resolving this conflict of fundamental rights. These rights were purposively envisioned without a clearly defined hierarchy[39], so as to allow for concessions to be made in a case-by-case scenario, according to the principles of proportionality and adequacy.

The second hurdle we face is, as stated by the Cybercrime Office, one of practicality, which results from the particular characteristics of networking sites and online hate speech. Portugal's body of procedural rules in regards to the obtaining of proof, specifically digital proof, do not contemplate all crimes committed through information technologies.

While Portugal's Cybercrime Law, Law N.º 109/2009, does create several procedural remedies and mechanisms to obtain digital proof of a cybercrime – such as an injunction to obtain data relating to the identity of the perpetrator (Article 14); intercepting communications (Article 18); seizing e-mails and communications logs (Article 17); and even covert operations (Article 19) – these provisions are only made available to enumerated and typified cybercrimes, and not all other crimes committed through information technologies, such as online hate speech.

Hate speech is, as of yet, not a typified crime within the Portuguese legal framework. Notwithstanding this fact, the Portuguese Constitution and Criminal Code ensure a vast array of rights against discrimination, defamation, racism, xenophobia, which could in theory be used to combat online hate speech accordingly. In practical terms, however, the procedural rules that would enable prosecutors to overcome data protection and unveil online anonymity have yet to be enacted. Thus, even though the substance of a right against certain forms of hate speech exists, it is still unclear how it can be fully enforced in an online setting sheltered by data protection and anonymity.

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[38] Cybercrime Office of Portugal's Prosecutor General's Office, Online Information and Freedom of Speech and the Violation of Fundamental Rights – a commentary on online media (July 17, 2013) <http://cibercrime.pgr.pt/documentos/conclusoes-do-coloquio_internet.pdf>, last accessed 13 September 2013;

[39] Dr. Miguel Salgueiro Meira, "Os limites à liberdade de expressão nos discursos de incitamento ao ódio", Verbojuridico (2011) http://www.verbojuridico.com/doutrina/2011/miguelmeira_limitesliberdadeexpressao.pdf>, last accessed September 14 2013;

This issue is also not confined to networking sites. The same challenges are felt, perhaps even in greater number and with more visibility, in other online contexts. According to a recent report[40] by the European Commission against Racism and Intolerance (ECRI), there has been an increase in racist websites in Portugal. The ECRI report attributes this increase to a lack of thorough monitoring and prosecution, noting that, in the last three years, only two investigations have been opened arguing a violation of Article 240 of the Criminal Code. It is important to note that the report does however highlight and praise the creation of an online reporting page, "Linha Aberta[41]", which allows victims of online hate speech to denounce the respective website.

This issue has also been escalating in the commentary sections of online newspapers, which are regulated by the "Entidade Reguladora para a Comunicação Social" (ERC), the national entity that regulates all media. The ERC has received several complaints of online hate speech, and is urging the media to validate user commentaries before they are published online[42] and to apply better filters to online comments.

Recent articles and commentaries[43] [44] of both legal academics and professionals seem to be in agreement as to the root of this issue. Networking sites in Portugal are indeed subject to a legal framework that encompasses a vast array of national provisions in regards to freedom of expression, intellectual property rights, hate speech and personality rights, inter alia. At the same time, the specific characteristics of networking sites raise serious challenges to the application of said provisions. As long as networking sites offer the possibility of anonymity and so long as data protection laws do not require these sites to track and make available data that would allow identifying perpetrators of online hate speech, the legal framework that criminalizes online hate speech is one of challenging application.

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[40] ECRI Report on Portugal, adopted on March 21rd 2013 < http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Portugal/PRT-CbC-IV-2013-020-ENG.pdf>, last accessed 13 September 2013;

[41] http://linhaalerta.internetsegura.pt/, last accessed September 14 2013;

[42] ERC Deliberation 178/2013 (CONTPROG-NET) urging the newspaper Expresso to validate online user comments <http://www.erc.pt/download/YToyOntzOjg6ImZpY2hlaXJvIjtzOjM5OiJtZWRpYS9kZWNpc29lcy9vYmplY3RvX29mZmxpbmUvMjI3Ni5wZGYiO3M6NjoidGl0dWxvIjtzOjMyOiJkZWxpYmVyYWNhby0xNzgyMDEzLWNvbnRwcm9nLW5ldCI7fQ==/deliberacao-1782013-contprog-net>; as well as ERC Deliberation 2/CONT-NET/2012 urging Diario de Noticias (newspaper) to validate online user comments; and http://www.erc.pt/download/YToyOntzOjg6ImZpY2hlaXJvIjtzOjM5OiJtZWRpYS9kZWNpc29lcy9vYmplY3RvX29mZmxpbmUvMTk1My5wZGYiO3M6NjoidGl0dWxvIjtzOjI1OiJkZWxpYmVyYWNhby0yY29udC1uZXQyMDEyIjt9/deliberacao-2cont-net2012>, last accessed September 14 2013;

[43] Advocatus, "Obra aborda relação entre Direito e Comunicação Social", published June 3rd 2013, <http://www.advocatus.pt/actual/7941--obra-aborda-relacao-entre-direito-e-comunicacao-social>, last accessed 13 September 2013;

[44] Cybercrime Office of Portugal's Prosecutor General's Office, Online Information and Freedom of Speech and the Violation of Fundamental Rights – a commentary on online media (July 17, 2013) < http://cibercrime.pgr.pt/documentos/conclusoes-do-coloquio_internet.pdf>, last accessed 13 September 2013;

6 Tackling the notions of "violence", "hatred" and "clear presence of danger"

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

With the purpose to harmonize substantial criminal law in the fight against racism and xenophobia on the internet and to improve international co-operation in this area[45], was drafted, in 2003, the Additional Protocol to the Convention on Cybercrime, Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems.

In its Article 2, the Protocol defines racist and xenophobic material as

Any written material, any image or any other representation of ideas or theories, which advocates, promotes or incited hatred, discrimination or violence, against any individual or group of individuals, based on race, color, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors. (emphasis added)

By adopting a very broad and inclusive definition of the targeted behavior, the Protocol is allowing states to adopt and adapt the protocol and its provisions according to their own specificities. Nonetheless, in order to facilitate the application of the Protocol's provisions, the drafting Committee also prepared an Explanatory Report[46].

In its comments to Article 2, the report clarifies each of the terms covered by the definition, stating that said definition of racist and xenophobic material refers to a certain conduct to which the content of the material may lead, rather than the expression in itself. And it further defines "violence" as an unlawful use of force and "hatred" as an intense dislike or enmity[47].

One should notice that the Report mentions nothing about the notions being a cumulative requirement for a material to be considered as racist and xenophobic. In fact, considering the harmonization goal of the Protocol and the clarifying goal of the report, if that was the case, the Committee would have had included a note on it.

Indeed, it appears from the separate definition of the notions of 'violence' and 'hatred' and from the analysis of some case-law of the European Court of Human Rights (ECHR) that, in order to a material to amount to hate speech it has to be violent or hateful or even discriminatory. The requirements are not cumulative, but alternative, although they often appear associated with each other.

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[45] Explanatory report, Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems [2003], p.1.

[46] *Ibidem*.

[47] *Ibidem*, p.3.

In this matter, one can mention the Toben[48] case, although it was not decided under the European Court. Frederick Toben, a German immigrant living in Australia, ran the Adelaide Institute which argues that the Nazi regime never used gas chambers to murder Jews and other minorities during the Holocaust. He was arrested while on a visit in Germany, and prosecuted for violating German statutes because of the content of his website, which had racist and xenophobic content (hateful but not violent) towards the minorities suppressed during the Nazi era.

Regarding hate speech materials, one has always to bear in mind that the Additional Protocol, despite dealing with specific matters of cybercrime, it is a part of the European Convention of Human Rights, and that must be read in accordance with it.

Here, while article 10(1) settles the right to the freedom of expression, its second paragraph, article 10(2) settles the conditions under which this right can be restricted. In order to States to legitimately interfere into one's freedom of expression, it has to undergo a balancing process between the scope of the expression that is being restricted, the legitimate aim pursued and the restriction imposed over that expression (see further question 7 of the present report).

In respect of this 'balancing test' imposed by article 10(2) of the Convention, some authors[49] have mentioned the inclusion of the North-American 'clear and present danger' test into European jurisprudence.

In the United States Constitution, freedom of speech is protected under the First Amendment[50], which prohibits the making of any law that imposes a religion, that prohibits the free exercise of religion, restricts the freedom of speech and press, that interferes with the right of peaceful assembly or that forbids the petitioning for a governmental redress of grievances.

However, U.S. courts have been issuing judgments on cases where the freedom of speech can be restricted. One of the first cases was Patterson v. Colorado[51]. It formulated the 'bad tendency test', which allows the restriction of the freedom of speech if the government believes that the expressive act has a sole tendency to incite or cause illegal activity, that is, if a speech has a reasonable tendency to produce dangerous acts, no matter how remote, is sufficient to make the regulation of speech constitutional[52].

This principle was seemingly overturned on the case Schenck v. United States[53], where the 'clear and present danger' test was introduced. Here, the defendant, who was the responsible for printing and distributing leaflets opposing the recently enacted Selective Service Act to prospective military draftees, had been convicted of violating the Espionage Act, which prohibited the making of false statements with the intent to interfere with the operation of the armed forces.

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[48] *Jones v. Toben* [2002], Federal Court of Australia.
[49] See S. Sottiaux, *The 'Clear and Present Danger' test in the case law of the European Court of Human Rights*, in ZaöRV 63 (2003), pp 653-679, available on www.zaoerv.de.
[50] First Amendment to the United States Constitution, adopted on 15 December, 1791.
[51] *Patterson v. Colorado*, 205 U.S. 454 (1907).
[52] *Ibidem,* note 5, p 660.
[53] *Schenck v. United States*, 249 U.S. (1919)

Justice Oliver Wendell Holmes delivered the unanimous judgment of the Court, setting out the 'clear and present danger' test:

The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent. It is a question of proximity and degree. (emphasis added)[54]

According to Holmes and the Court, the character of every act depends on the circumstances in which it is done upon and that the fact that a nation is at war justifies restraints on freedom of expression to prevent 'grave and imminent threats to its security'[55].

Yet, despite this landmark judgment, the Court used again the 'bad tendency' test in Abrams v. United States[56], to convict the defendant on the publication and distribution leaflets advocating revolutionary and anarchist views. Justice Holmes, however, dissented, advocating the application of the 'clear and present danger' test, arguing for a broader interpretation of that standard, defending that a speech could only be restricted if "it produces or is intended to produce a clear and imminent danger that will bring about […] certain substantive evils that the United States […] may seek to prevent" and that all opinions must be protected "unless they imminently threaten immediate interference with the lawful and pressing purposes of the law"[57].

The 'clear and present danger' test once again was recalled in the concurring opinion of Justice Louis Brandeis and Justice Holmes in Whitney v. California[58]. Here, the applicant was convicting for assisting in the organization of the Communist Labor Party of California. The Court held that by assembling with others to form a group that advocated to the overthrow of the government, she had acted in a manner that posed a danger to the 'public peace'.

Holmes and Brandeis, while concurring with the judgment, thought that the law wrongly restricted Whitney's free speech, defended that speech could be restricted only if it was shown that "that immediate serious violence was to be expected or was advocated[59]. He further stated that "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State"[60].

Replacing the word "present" by the word "imminent", Brandeis sets out two requirements for a restriction of free speech to be justified: 1) there must be reasonable ground to believe that the danger apprehended is imminent and 2) there must be reasonable ground to believe that the evil to be prevented is a serious one[61].

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[54] *Ibidem,* para. 52.
[55] *Ibidem*, note 5, p 659.
[56] *Abrams v. United States*, 250 U.S. (1919).
[57] *Ibidem*, p. 630.
[58] *Whitney v. California,* 247 U.S. (1927)
[59] *Ibidem*, p. 377.
[60] *Ibidem*, p. 378.
[61] *Ibidem*.

Later, in Dennis v. United States[62] (a case involving individuals advocating the overthrow of the government), the Court also applied the clear and present test to uphold the conviction. It added, however, that the Court must determine "wether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger"[63]. It introduced then a "balancing test" that weighted free speech against the government's interest (the legitimate aim) to justify such restrictions to it.

The "clear and present test" was finally 'refined' in 1969 by Brandenburg v. Ohio[64] introduction of the "imminent lawless action" standard. The case concerned a Ku Klux Klan (KKK) leader in Ohio that was charged with advocating violence under Ohio's criminal syndicalism statute for his participation in a rally where speeches against "niggers", "jews" and "those who support them" where made (by him aswell).

The U.S. Supreme Court reversed Branderburg's conviction, holding that

The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action (emphasis added).

This test made the "clear and present test" more defined, rigorous and objective by requiring that, in order to restrict speech, a state must prove that (1) the speaker intended incitement; and that (2) the words used were, in context, likely to produce imminent, lawless action.

The decision in Branderburg v. Ohio overruled Whitney v. California and it is the standard used today in the United States for evaluating hate speech, as it is a formula much more protective of the right to freedom of speech[65].

As for the application of the "clear and present" test by the ECHR, one can affirm that it has never been objectively applied in hate speech cases. Nonetheless, there are cases that the test is mentioned as an influence to the decision or is invoked as an alternative.

In the case of Arrowsmith v. United Kingdom[66], the Court convicted the applicant for distributing leaflets to troops stationed in a camp, inciting them to abandoned duty, on the basis that its conviction served a legitimate aim consistent with Article 10(2). The question was on the third requirement for the restriction of free speech, if the restriction was "necessary in a democratic society"[67]. In this matter, the applicant suggested the application of the "clear and present test" standard. The Court, not rejecting the idea, considered it relevant to the interpretation of Article 10(2) regarding that "[t]he notion 'necessary' implies a 'pressing social

[62] *Dennis v. United States,* 341 U.S. (1951)
[63] *Ibidem,* p.510.
[64] *Branderburg v. Ohio*, 395 U.S. (1969)
[65] *Ibidem*, note 5, p 665.
[66] *Arrowsmith v. United Kingdom* [1978]
[67] See infra, point 7 of the presente report.

need' which may include the clear and present danger test and must be assessed in the light of the circumstance of a given case"[68].

Here, although it found that there had been no violation of article 10, the Court scrutinized the content and the expressions involved, something that may have been influenced by the North American jurisprudence, endorsing an important aspect of the aforementioned test: the relevance of the content and nature of the expression in its context.

In another case, Zana v. Turkey[69], the Court recalled another aspect of the American standard, namely the likelihood of danger. Here, the applicant, a former mayor of an important Turkish city, was convicted for making remarks supporting a party's national liberations movements, claiming that the massacres done by them were mistakes and that anyone can make mistakes. The legitimate aim pursued for this restriction of speech was the protection of national security and public safety.

The Court, supporting its conviction, recalled that the interference must be seen in the light of the case as a whole, including the content of the statement and the context in which they were made[70], especially if the interference is proportionated to the aim pursued and if the reasons for it are 'relevant and sufficient'. As a result, they reached the conclusion that the remarks made by the applicant were 'likely to exacerbate an already explosive situation in that region'.

Although the Court, in these and other cases[71], doesn't explicitly mention the 'clear and present test' as a basis for its decision, the influence is evident to the extent that one can also argue that the U.S. cases helped the interpretation and application of the restrictions to freedom of speech enclosed in article 10(2). Indeed, the European Court has also recognized that freedom of expression involves a balance of interests between the liberty of the individual to impart and receive information and the need to protect the community and other individuals against the harm that can be inflicted by speech[72].

Therefore, in order to conclude the present topic, one cannot question whether the "clear and present" standard is applied alternatively or cumulatively with the other notions, as it can be considered that materially encompasses the similar requirements as the restriction in conformity with article 10(2).

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

What are the justifying elements for the difference between the two approaches (exclusion in conformity with art 17 of the Convention and restriction in conformity with art 10 § 2 of the

[68] *Ibidem,* note 23, para.17.
[69] *Zana v. Turkey* [1997]
[70] *Ibidem*, para. 40.
[71] See *Incal v. Turkey [1998], Sürek v. Turkey [1999]*
[72] *Ibidem*, not 5, p. 655

Convention) made by the ECHR on hate speech? Can these elements be objectively grounded? What about subsidiarity and margin of appreciation?

When analyzing the interference of a State with the right to freedom of expression (article 10 of the European Convention on Human Rights), the European Court of Human Rights (the Court) has established a two-tier approach towards it, especially when that expression amounts to hate speech: the restriction in conformity with article 10(2), on one hand, and the exclusion in conformity with article 17, on the other.

While, in principle, the protection awarded by article 10(1) covers any expression, paragraph 2 establishes that this freedom may be subject, to an extent, to limitations or interferences by the State, provided that strict criteria is met. In the Sunday Times case, the Court established that "no other criteria than those mentioned in the exception clause may be at the basis of any restrictions"[73]. Moreover, being a possibility, and not an obligation[74], the burden of proof of such interference lies with the State, who has to prove that all three requirements are fulfilled in order to justify the legitimacy of the interference.

In this way, according to article 10(2) the interference has to be, first, prescribed by law[75], that is, the restriction has to be based on national law, whether statutes or unwritten law (common law)[76].

Second, the interference has to pursue a legitimate aim, which has to be encompassed in the exhaustive list of article 10(2)[77]. This means that the State cannot rely on grounds that fall outside the list provided[78]. For example, in Observer and Guardian v. the United Kingdom[79], in which the Government prevented the publication of extracts of a book written by a former intelligence agent, the Court supported the legitimate aim claimed by the Government that there was a need to protect the national security by assuring other states of the protection of classified information. In Jersild v. Denmark[80], where Denmark prosecuted a journalist for disseminating racist statements by broadcasting a program in which he interviewed a group of young people with racist views called 'Greenjackets', the ECHR also agreed that the State had a legitimate aim in protecting the rights of those insulted by the racist statements. However, the Court, in this case, found a violation of article 10 by Denmark by applying the third requirement of article 10(2).

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[73] *Sunday Times v. The United Kingdom*, [1977] (ECHR)

[74] Monica Macovei, *'Freedom of Expression: A guide to the implementation of Article 10 of the European Convention on Human Rights',* Human rights handbooks, no 2.

[75] *"The exercise of these freedoms […] may be subject to […] restrictions or penalties as are prescribed by law […]"*

[76] *Sunday Times, ibidem* (note 1).

[77] *"The exercise of these freedoms […] may be subject to […] restrictions as are necessary […] in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

[78] *Ibidem.* Note 2, p. 28.

[79] [1993] (ECHR)

[80] [1994] (ECHR).

The third, and final criteria, that has to be met for the interference to be legitimate is that it has to be "necessary in a democratic society"[81]. Under this requirement, the interference has to satisfy a "social pressing need"[82] while, at the same time, remaining "proportionate to the legitimate aim pursued"[83]. The Court, in Zana v. Turkey[84], stressed that, in its analysis, it should

look at the impugned interference as a whole in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference was 'proportionate to the aims pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.

In the above mentioned case, Jersild v. Denmark, the interference of the State was found not to be necessary in a democratic society and the means employed to be disproportionate to the aim of protecting the reputation or rights of others, as it was found that the applicant did not made the remarks himself, but simply assisted in its dissemination on his capacity as a journalist, and that the programme's purpose was not the propagation of racists views[85].

Under this approach, while racist or hate speech is accepted under article 10(1), it is restricted under article 10(2) for conflicting with another right. Due to the strict analysis demanded by the second paragraph for the interference to be legitimate, the courts (both national and European) have to undergo a fair balance between various interests that are intertwined, weighting the proportionality between the aim pursued and the restriction.

This analysis does not happen under the second approach, the exclusion in conformity with article 17 of the Convention. It prohibits the abuse of rights stating that

nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

As it cannot be invoked independently, its application is always dependent on another Convention right that is being abused[86], being linked to the right of freedom of expression (article 10) when the aim of the expression is to attack other freedoms and human rights protected by the Convention. In these cases, the Court has allowed State interference under article 17.

In some Court decisions, such as Kuhnen v. Germany[87], the abuse clause has been applied indirectly, as the Court incorporates article 17 when assessing the necessity of State interference

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[81] Paragraph 2, article 10 of the Convention.
[82] *Ibidem*. Note 7.
[83] *Ibidem*. Note 1.
[84] [1997] (ECHR)
[85] *Ibidem*. Note 8.
[86] H. Cannie and D. Voorhoof, *The Abuse Clause and Freedom of Expression in the European Human Rights Convention: an added value f or democracy and human rights protection?,* in Netherlands Quarterly of Human Rights, Vol 29/I (2011), 58.
[87] [1986] (ECHR)

under article 10(2), having stated, in the former case that "the freedom of expression enshrined in article 10 of the Convention may not be invoked in a sense contrary to article 17". The interference, based on article 17, was deemed to be 'necessary in a democratic society' with the meaning of article 10(2)[88].

The Court confirmed this view in Remer v. Germany[89]. Both the decisions seem to rely on both Article 17 and Article 10(2), employing the abuse clause as a guiding provision to the application of Article 10(2)[90].

In Lediheux and Isorni v. France[91], the Court, resurrecting the rational of an earlier case[92], established Article 17 as a 'stand alone provision'[93] – it removed certain expressions and materials from the protection given by Article 10(1).

In this case, the applicant was prosecuted for issuing an advertisement in a newspaper glorifying Phillipe Pétain, a French general who collaborated closely with the Nazi regime. While the French government claimed that the application should be dismissed, the Court found that the document had purely omitted to mention historical facts, and introduced the notion of 'clearly established historical facts' (such as the Holocaust), 'whose negation or revision would be removed from the protection of Article 10 by Article 17'[94].

It introduced, then, the direct application of Article 17 in hate speech cases by establishing that the abuse clause could remove from the protection of Article 10 (the right to freedom of expression) certain expressive acts, such as an attempt to deny or revise the Holocaust and other Nazi atrocities[95].

It further stated that the application of Article 17 requires that

The aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others[96]

While in Ledideux, the materials did not meet those strict requirements, in Garaudy v. France[97] the materials did. Here the applicant published a book that contained chapters entitled 'The Myth of the Nuremberg trials' and 'The Myth of the Holocaust'. Recalling the judgment in Lehideux, the Court held that the denial or rewriting of these types of established historical facts would undermine the values on which the Convention was draft upon. It further stated that, in

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[88] D. Keane, *Attacking Hate Speech Under Article 17 of the European Convention on Human Rights*, in Netherlands Quarterly of Human Rights, Vol 25/4 (2007), p 646.
[89] [1994] (ECHR)
[90] *Ibidem,* note 16.
[91] [1998] (ECHR)
[92] *Glimmerveen and Hagenbeek v. the Netherlands* [1979] (ECHR).
[93] *Ibidem*, note 16, 647.
[94] *Ibidem,* note 19, para 46-47.
[95] *Ibidem*, concurring opinion of Judge Jambrek, para 1.
[96] *Ibidem,* para 2.
[97] [2003] (ECHR)

accordance with Article 17, the applicant could not rely on the protection of Article 10, as such acts were manifestly incompatible with the fundamental values that the Convention sought to promote[98]. The claim was deemed inadmissible.

Both of the French cases established a direct application of Article 17 which entails the categorical exclusion of certain expressive act from the protection of Article 10 – in such cases (Holocaust denial and anti-Semitism, that is, cases where the underlying values of the Convention are being denied[99]) the applicant's claim is not considered under the scope of article 10. The Court decision is based on content only, eliminating then the need of undergoing through the balancing process necessary under article 10[100].

It appears then that this restriction of Article 17 shifts the burden of proof required to legitimate intervention into what it is intervened against: being based only on content, it would be only required to prove the content of the speech in question and not its effects[101].

In this regard, one should take into consideration a State's margin of appreciation, based on the idea that domestic courts are in better position to adapt the Convention to the local specificities. States enjoy a broader margin of appreciation when accessing whether interference is necessary or not in hate speech cases (interference based on article 10(2)). However, that is never unlimited, and such margin is under strict scrutiny of the Court (even it only acts in a subsidiary capacity)[102].

8 Harmonisation of national legislation

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

With regard to The Recommendation No.R(97)20 of the Committee of Ministers to Member States on Hate Speech, adopted in 30th of October 1997, the demanding effectiveness of the principle of harmonization requires the Member States to take a number of steps towards the development of a tolerant atmosphere.

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98 *Ibidem.*

99 More recently the case of *Norwood v. the United Kingdom* [2004], where the Court found that the materials amounted to an expression of attack on all Muslims, holding that it constituted an act with the meaning of Article 17 and, therefore, inadmissible under the protection of article 10.

100 *Ibidem*, note 14, p 58.

101 *Ibidem,* note 16, p 656.

102 *Ibidem*, note 14, pp 71-72.

Starting with the legislative process, different forms of expressions included the ones that might be reasonably understood as hate speech incitements, have to be globally recognized and assumed. That requires the preparation of specific protocols to the Convention on Cybercrime [103]that specify what kind of prosecution and legal proceedings have to take place in order to combat offences committed via Internet. So, before seeking a fix normative position, we need to initiate general monitoring of the problem which encourages international cooperation.

European harmonized guidelines need to be laid down for the governments of the Member States. These guidelines are believed to bring an open-minded set of rules and uniform legal actions against incitement to different forms of hatred expressions under a European scope. So, on these matters, the ways victims can resort to the European Court need to be clarified. Mutual legal assistance such as the development of European and international campaigns devoted to the fight against intolerance, racism and xenophobia are viewed as fundamental steps to be encouraged, particularly if such campaigns serve a fruitful information network at a european scale.

Regarding law revisions, sometimes legal response is not enough to provide us with amicable solutions. Considerable revision on media regulations is indispensable as well in order to advance with uniformity and strengthen human rights protection´ guarantees.

Law provisions are demanded to be necessarily wide and in search for broad consensus. Since procedural law is deeply difficult to gather in a unique framework, the harmonization of substantive law is one of the possible measures to take, enabling national authorities to initiate legal procedures and to comply with the provisions of European Regulations and Framework Decisions as the regular basis. We can quote some of the Regulations that have played an undeniable role as far as legal harmonization on these matters are concerned such International Convention on the Elimination of all Forms of Discrimination[104]; International Convenant on Civil and Political Rights [105]and the Convention on Cybercrime.

Uniformity relies on the healthy openness of Member States to transpose European provisions into their national legislation as long as they don´t contradict their own fundamental principles. Therefore, measures should be adopted in accordance with the principle of subsidiarity as established in article no. 2 from the Treaty on European Union.

For example, considering crime situations with a cross-border dimension, they would involve a strict cooperation already foreseen by law. As referred in the Council Framework Decision 2008/913/JHA of 28 November 2008 – Acts Adopted Under Title VI of the EU Treaty: "It is necessary to define a common criminal-law approach…in order to ensure that the same behavior constitutes an offence in all Member States".

The last statement lauches a host of questions: What kind of legal concessions Member States are willing to accept? Would not the so-called "definition of a common criminal law approach"

[103] Also know as the Budapest Convention on Cybercrime, which entered into force in Portugal on the 1st of July 2010.
[104] This Convention entered into force in 4th of January 1969.
[105] Adopted by the General Assembly of the United Nations on 19th of December 1966.

result in "creeping" codification? Would not be better to celebrate bilateral aggreements on these legal affairs?

The conclusion we reach is that it is up to Member States establish their own jurisdiction´s extension, mainly when the conduct is committed through an information system and the same goes for the accordance with common penalties, liability, instigation and aiding. There are situations whose features need to be understood inside the scope of a particular legal system due to historical and traditional reasons and there are others demanding a more rigorous approach on better laws – laws prescribing a sole procedure for complaints and notifications of cyberhate issues; guidance on safe use of the Internet; community and victim support and education, motivating States to sign and ratify international and european legal tools.

9 Legal implications of "hate speech"

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

Regarding Portuguese law, there is no legally binding definition of hate speech. Albeit the fact that such introduction in the national legal framework could be regarded as possible, it would constitute an obstacle hard to tackle.

The constitutional Portuguese order and the subsequent national legislation reflect the collision between freedom of expression and libel, calumny and other forms of discrimination electronically expressed. The analysis is made case by case which makes it difficult to understand which situations might be widely regarded as the ones that deserve legal protection. For example, conflict of opinions are prescribed in the article no 37.2º of the Portuguese constitution, but the same article does not hold a factual pattern that allow us to distinguish between the public insult / libel crimes and public opinion disagreements. In addition to that, the article does not cover eventual simulations in which there are questionable and punishable purposes under public insults.

Therefore, the definition of hate speech would involve a precautious work. There is not set of criteria out of which law-makers could achieve a legally binding definition not to mention the fact that possible concepts likely to be part of the definition such as "public order" or "specific offensive content" would rest in indetermination and complexity.

The way national law recognizes negative forms of expressions is also quite controversial: social, national, religious hatred; public intolerance; xenophobia; verbal violence, electronic discrimination…these notions are closely connected and intertwined. As a result, they "resist" codification as a single definition.

Another aspect that demands particular attention is the target group and the consequent legal procedure as the sanction, whether civil, criminal and / or administrative. The Portuguese criminal code impose the same criminal procedure and sanctions on private persons and legal entities, according to their articles no 180º, 187º and 188º, regardless of aggravated clauses. However, the requirements that need to be fulfilled so that the any exercise may be designed as a criminal offense are different.

For more explanation on this issue, I take into consideration the answer given to question number one.

Moving on to the next question, the definition of hate speech at international level is necessary but not possible in the foreseeable future, particularly, which raises issues of common concern.

Notwithstanding being a matter of a tremendous importance in a democratic society, there is a widespread absence of consensus on what may be included in the definition of "hate speech". For example, who and why would be contemplated in such legal provision? The type of discourse hereby studied is commonly linked to specific innate characteristics including gender, race, national origin, sexual orientation among others, but there are some legal orders that attribute major importance to some of them, particularly race and ethnicity, reflecting their different backgrounds and social tensions.

Starting with the necessity of such definition, it is highly necessary. Any further legal development will have to enhance the differences between tolerance, repression and verbal violence in order to create a tolerant European democracy. It is also important to draw attention to the fact that legal provisions with nature of this kind impel us to review the outlines and limits of the already designated duties and freedoms particularly because we are facing an informatics revolution. As long as our freedom of expression is much broader, it carries reinforced responsibilities. The context in which these duties and freedoms are operating is changing too. Hate speech as a repressed form of expression holds serious implications: freedom of expression; frontiers between contradictory or critical speeches and discriminatory ones; new media and online communication bounds and responsibilities; abuse of rights and, in most cases, it deals with the principle of proportionality because of the offences and its correspondent sanctions. Member states should be strongly advised on how, when and why legal proceedings have to be put in practice; whether the expression constitutes a cybercrime or not since they share different comprehensive standards for assessing the information.

Consequently, a global definition would promote legal cohesion and strengthen Human Rights Protection.

Not only is it needed as a means of addressing specific issues (the case of online intimidation as an example) and grab society attention to them, but also as the right step to advance with a regulatory approach.

Although the European Court has not provided us with a certain definition, it has denied the protection of "hate speech" resorting to two approaches provided by the European Convention on Human Rights: by applying the prohibition of abuse of rights prescribed by its article no 17.º and by applying the limitations provided for in the second paragraph of its article no 10.º - the exercise of freedom of expression may be submitted to some formalities, conditions, restrictions or even sanctions adopted by law, deemed necessary for the prevention of disorder or crime.

At last, focusing on the possibility, the issuing of harmonization directives on such matters would need to go hand in hand with the legal transformation process the Member States would have to suffer, which is not the easiest task to undertake. They would have to release themselves

from domestic constraints which mean to engage themselves in a new theoretical approach and rethink and readapt their criminal law and the structure in which the last one is based on.

Moreover, an eventual definition would have to find the common point between three acclaimed doctrinal perspectives. The first one enhances the total prohibition of any forms of incitement to hate speech since such expressions would constitute an abuse of human dignity and the principle of equality. The second one establishes the protection of freedom of opinion and public expression, so it comes up with a liberal ideal - States would not be provided with a coercive power to undermine public debate. The third one underlines a negative definition, the restriction of violent and hatred expressions although subordinated to a couple of requirements and specific situations.

Regardless of these attempts, a possible definition would solely constitute a superficial approach. Law provisions would have to embrace general principles, be circumscribed by objective criteria (establishing the basic differences between xenophobia, anti-Semitism, racism and other forms of intolerance), comply with the principle of proportionality and open the application of law to judicial review.

In addition to that, states are considered to enjoy a certain margin of discretion in determining the personal scope of any law they introduce. The same happens when it comes to define the boundaries of any international law application and the current interpretation of national and non-national legislation. In fact, considering the opportunity of creating a common and European definition of hate speech, such definition could not remain isolated from its own framework which refers to the establishment of legal sanctions for the wrongdoers. Consequently, the above mentioned law provisions would necessarily have to deal with national civil, criminal and administrative legislations and as we all know, these matters, especially criminal provisions, are believed to rest within the sole competence and autonomy of member states due to traditional and cultural structures. The States claim to have legitimate power to define, for example, the limits of acceptable political discourses. Moreover, additional protocols on some European tools are not conclusive too. To support this idea we can look into the Council of Europe Additional Protocol to the Convention on Cybercrime [106]concerning the criminalization of acts of a racist and a xenophobic nature committed through computer systems, which only regulates hate speech defined as racist or xenophobic.

10 Legal implications and differentiation of related notions

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

There is no specific legislation on (online) hate speech in the Portuguese legal system. However, Article 240 of the portuguese penal code, which is the core piece of legislation against discrimination, also encompasses discriminatory speech and internet as a mean to disseminate it. This provision sanctions the crime of racial, religious and sexual discrimination. No. 1 stipulates, a): "founding or constituting an organization, or developing activities of organized propaganda

[106] Strasbourg, 28th of January, 2003

inciting to discrimination, hate or violence against a person or group of persons on account of their race, color, ethnic or national origin, religion, sex, sexual orientation, or gender identity, or encouraging it" is punished with one to eight years of jail; and no. 2: "who, in public, in writing destined to be disseminated or through any means of social communication or informatics system destined to be disseminated", a) "provokes acts of violence against a person or group of persons on account of their race, color, ethnic or national origin, religion, sex, sexual orientation, or gender identity", or b) "defames or insults person or group of persons on account of their race, color, ethnic or national origin, religion, sex, sexual orientation, or gender identity, namely through denial of war crimes or of crimes against humanity and peace", or c) "threatens (…)" "with the intention of inciting racial, religious or sexual discrimination, or of encouraging it" is punished with six months to five years of jail.

Another important provision is article 297 (penal code) regarding public instigation of a crime: "who, in public, through mean of social communication, (…), provokes or incites to commit a crime" is punished with jail time up to three years or with a fine. Furthermore, article 298 (idem) sanctions the public praising of a crime: "who, in public, through mean of social communication, (…) rewards or praises someone who committed a crime, creating the danger of the perpetration of a crime of the same sort" is punished with jail time up to six months or with a fine. Praising is considered a form of provocation.

These articles should to be complemented with article 240 that sanctions the crime of racial, religious or sexual discrimination itself. Alone, these provisions intend to protect public order and are crimes of strict liability – prosecution is independent of the mens rea, and, moreover, it is not required that the agent's conduct actually led to another crime: that is to say, the law sanctions the agent's conduct only because of the danger it creates.

From the analysis of these provisions, one can realize that "provocation" is sanctioned regardless of the motivation – as incitement to a crime. However, article 240 sanctions more heavily speech inciting hatred or directly instigating to a hate crime.

The difference between the concepts in the Portuguese legal frame lays on their part as elements of the crime.

First of all, "intimidation", in the same sense as "provocation" to a crime – the act of frightening someone into doing something, is not used as an autonomous concept: it corresponds to the crime stipulated in al. b) of article 240 (above transcribed). On the other hand, in the sense of creating fear as a consequence of the speech, it has an equivalent in al. c) of article 240 (above transcribed): "threatens".

"Provocation" and "intimidation" constitute the actus rea, meaning the act which is punished by law (accompanied by specific circumstances: in public, in writing destined to be disseminated or through any means of social communication or informatics system destined to be disseminated) . Differently, "incitement to (…)" constitutes the mens rea, meaning the intention, the mental state of the accused at the time of committing the crime.

There is no specific reference to "incitement to hatred". However Article 240, no.2, refers to "incitement to racial, religious or sexual discrimination" which, although the nomenclature

suggests an active act, may be seen as an equivalent to "incitement to hatred". Article 240, no. 2 (all cases), establishes the "intention to incite to racial, religious or sexual discrimination" as the subjective element which must be proved in order to secure a conviction. "Incitement to discrimination" is the specific intention that drives the agent to act and it is because of this intention that the crime is sanctioned and considered particularly devious.

Article 240, no. 1, a), refers to "incitement to hatred" but in a different perspective. In this provision, it is the act that is characterized by the result, which is to incite to discrimination, hatred or violence. It is not the agent's mental state that is put to trial, but the consequence of his action: "founding or creating an organization or developing activities of organized propaganda that incite (lead to) discrimination, hatred or violence". No. 1 of the article requires a malicious intent, but not a specific intention (as no. 2 requires the specific intention of inciting to discrimination).

In conclusion, the concepts are elements that constitute the crime of racial, religious or sexual discrimination.

11 Comparative analysis

The Additional Protocol to the Convention on Cybercrime107, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems was signed by Portugal in 17 March 2003 and ratified on 10 July 2009.108

Currently, there are a few provisions in Portuguese penal instruments which regulate specifically racist and xenophobic acts committed through computer systems. As an example, subsection 2 b) of Article 240 explicitly criminalises any threats, insults, defamation and violence committed through "computer systems aimed at dissemination". There are other statutes in the Portuguese Penal Code which although they do not specifically mention computer systems, the criminalisation of racist and xenophobic behaviour committed online is achieved through interpretation.

Article 3 of the Additional Protocol requires Member States to establish as criminal offences under domestic law, when committed intentionally and without right, the conduct of distributing, or otherwise making available, racist and xenophobic material to the public through a computer system.

Subsection 1 a) and b) of Article 240 of the Portuguese Penal Code prohibits three different types of action109:

> the creation, constitution of or participation in organizations which incite or encourage discrimination, hate or violence against a person or group of people for reasons related to race, colour, ethnic or national origin, religion, gender, sexual orientation or gender identity;

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107 Hereinafter "Additional Protocol".

108 Presidential Decree n.º 94/2009

109 Antunes, Maria João, "Comentário Conimbricense do Código Penal", Vol. II, 1st Edition, Coimbra Editora, p. 576. (1999)

the development or participation in activities of organized propaganda which incite or encourage discrimination, hate or violence towards the abovementioned groups;

the participation or assistance in the abovementioned organizations or in the abovementioned activities, including funding;

Subsection 1 of this Article, in harmony with Article 3 of the Additional Protocol criminalises several conducts which may facilitate the dissemination or availability of racist and xenophobic material. However, Article 240 nr. 1 may only be resorted to when the organization is comprised by at least three persons, acting together and thus forming a collective will, during a certain period of time.110 Furthermore, for the purpose of subsection 1, organized propaganda is the dissemination of an idea or an ideology by an organization.111 Therefore, if a group of three people decide to create and manage a website or a social media group and, through it disseminate xenophobic and racist material, will face criminal responsibility under this provision. The same ruling will be held to any individual who participates in those same groups or organizations or assists in their activities.

If an individual person decides to disseminate or make available racist or xenophobic material through their own individual capacity, he or she will be, in principle, held criminally liable under subsection 2 b) of Article 240. The introductory part of subsection 2 starts by explaining that all the acts regulated under this number have to be committed in a public meeting, by writing to be disseminated or through whatever means of social communication or computer systems aimed at dissemination. With this in mind, subsection 2 b) establishes that, any individual who insults or defames a person or group of people due to their race, colour, origin, ethnic or national origin, religion, gender, sexual orientation or gender identity will be held criminally responsible. Since the introductory part has to be read in conjunction with subsection 2 b), which includes computer systems aimed at dissemination, it is possible to reach the conclusion that whoever engages in this conduct online will be incarcerated. However, subsection 2 does not refer to individuals who disseminate or make available racist or xenophobic material. This does not mean that this conduct would remain unpunished. However, to be criminalised, two situations have to be distinguished between.

If the person who disseminates or makes available the racist or xenophobic material, through a computer system aimed at dissemination, is also its author, then his or her actions will be criminally condemned under this subsection, due to its insulting nature. Conversely, if the perpetrator found responsible for disseminating or making available the racist or xenophobic material is not the author, then that person will be considered an accomplice of the offensive behaviour established in Article 240 2 b). So, unless the perpetrator, by making available or disseminating the offensive material is assisting an organization or activities of organized propaganda, as defined in subsection 1 of Article 240, his or her conduct will only be described

110 Albuquerque, Pinto de, "Comentário do Código Penal à luz da Constituição da República e da Convenção Europeia dos Direitos do Homem", 2nd Edition, Católica Editora, p. 728 and 838. (2010)
111 Ibid., p. 728.

as substantial assistance112, since it is aiding the principal perpetrator in distributing the discriminating material through computer systems.

Lastly, even though often the victims of these offenses are not individualised, it will be sufficient for this penal provision that the perpetrator responsible for the insult or the defamation, targets a person who belongs to the groups specified in Article 240 nr. 2. Supporting this interpretation is the fact that subsection 2 b) of Article 240 includes as an example of offensive behaviour the denial of war crimes or crimes against peace and humanity. When denying such crimes, the perpetrator often refers to the groups of people who were its main victims or their main focus, not to particular individuals who were involved. Such is the case of racist-motivated denial of World War II crimes against the Jew population.113

Throughout subsection 1 a) and b) it is not specified what concrete activities may be considered to be encouraging or inciting "discrimination", "hate" or "violent behaviour". However, judicial interpretation of these concepts will ensure that any activities which may be seen as breaching the right to equality will be condemned. Thus, all discriminatory activities, that is, all activities which distinguish, exclude, restrict or show a preference for a person or a group of people based on a quality or feature of that person or group of persons, having as a goal to prevent them from benefiting from the same rights and liberties as any other person in society, are prohibited.114 Similarly, all activities which may be seen as inciting or encouraging hate, that is, feelings of aversion, repulse or repugnance115 towards another person or group of people for reasons related to their racial, colour, ethnic or national origin, religion, gender or sexual orientation are also prohibited. Finally, all activities which incite or encourage physical or psychological violence to the aforementioned persons or group of people due to their unique qualities or features are also condemned.116 The forms which these activities may take vary and are atypical.117 Nevertheless, the form taken is irrelevant. Whether it is through writing, images or any other representations, what is important in the end and analysed by the judiciary is their discriminatory, hateful or violent nature.

Article 4 of the Additional Protocol provides that Member States should adopt, among others, legislative measures to establish as criminal offences under their domestic law, "when committed intentionally and without right, the following conduct: threatening, through a computer system, with the commission of a serious criminal offence as defined under its domestic law, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of people which is distinguished by any of these characteristics."

Subsection 2 c), establishes as criminal behaviour the conduct of threatening a person for reasons related to their race, ethnic or national origin, religion, gender or sexual orientation. To

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112 Article 27 of the Portuguese Penal Code.
113 Cunha, Maria da Conceição, *personal communication*. (2013) (Professor in Criminal Law at Catolica Global School – Porto Regional Centre).
114 Albuquerque, Pinto de, "Comentário do Código Penal à luz da Constituição da República e da Convenção Europeia dos Direitos do Homem", 2nd Edition, Católica Editora, p. 728. (2010)
115 Ibid.
116 Ibid.
117 Ibid.

fully understand the scope of this provision, the concept of "threat" has to be read within the meaning of Article 153 of the PPC.118 It establishes that whoever threatens a person with any acts against life, physical integrity, personal freedom, sexual self-determination and freedom or patrimonial assets of considerable value, in such a manner that is suitable to cause fear or anxiety or prejudice another person's liberty of determination, may be criminally responsible. In conformity with Article 153, subsection 2 c) of Article 240 of the PPC criminalises all threats committed against the aforementioned legal interests, however with the particularity that the offense has to be committed for reasons related to race, colour, national or ethnic origin, religion, gender, sexual orientation or gender identity. Moreover, it has to be committed with an intent to incite racial, religious or sexual discrimination or to encourage it. Article 240 nr. 2 c) explicitly establishes that racist and xenophobic motivated threats committed through computer systems are criminalised, as long as the aim of the system used is dissemination. The wording of the provision excludes therefore the use of computer systems for private usage (E.g.: instant messaging), and consequently disregards private communications. For threats committed through private communications, attention may be set towards Article 153 in order for the threat to not remain unpunished. However due to the specific intent and legal interest connected to Article 4 of the Additional Protocol, an amendment of subsection 2 c) to include private communications using computer systems would be preferable.

Article 5 requires Member States to adopt legislative measures to conduct as criminal offence under its domestic law: "insulting publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics."

Subsection 2 b) criminalises any acts of violence, defamation and insult against a person or a group of persons due to their race, colour, ethnic or national origin and religion.119 To fully understand the scope of this provision the notions of defamation and insult, have to read in conjunction, respectively, with Article 180 and 181 of the PPC. Particularly relevant to the Additional Protocol is the notion of insult within the meaning of its Article 5. Subsection 2 b) covers insults exchanged publicly, including computer systems as long as they are aimed at dissemination. If the act is committed directly at and in presence of the victim, it is categorised as an insult, if not, then the act will fit within the notion of defamation if committed through a third person.120 However, for the purpose of Article 240 2 b), that is, the protection of the underlying legal interest of equality between all people, the requirement of the victim's presence cannot be demanded. As noted above when analysing dissemination of racist or xenophobic material by persons through their own individual capacity, it may be sufficient that the perpetrator expressively targets the groups established in Article 240 when insulting another person. In other words, for fulfilling the concept of insult in Article 240 nr. 2, unlike Article 180, the presence or referral to a specific individual is not necessary. Thus, subsection 2 b) of Article 240 is in harmony with Article 5 of the Additional Protocol.

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118 Ibid.

119 Ibid.

120 Costa, José de Faria, "Comentário Conimbricense do Código Penal", Vol. I, 2nd Edition, Coimbra Editora, p. 911 and 912. (2012)

Article 6 requires Member States to adopt legislative measures to conduct as criminal offence under its domestic law, the intentional act of distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity.

Subsection 2 b) of Article 240 of the PPC explicitly establishes that the denial of war crimes or crimes against peace or humanity with intent to incite or encourage racial, religious or sexual discrimination is prohibited. Within the meaning of this provision, denial of war crimes or crimes against humanity only includes the denial of crimes acknowledged by final judgements in international courts. This is the only concrete example of racist or xenophobic conduct described in this subsection. Despite only the denial of war crimes having been included in this penal provision, this may only be seen as an example of an act of racist or xenophobic nature.121 Thus, in principle, other acts which do not deny, but grossly minimise, approve or justify genocide or crimes against humanity are also covered by subsection 2 b) of Article 240 of the PCC, in harmony with Article 6 of the Additional Protocol.

Finally, Article 7 of the Additional Protocol requires Member States to adopt legislative measures to criminalise any actions of aiding and abetting to the abovementioned offenses.

Under Portuguese law someone is considered an accomplice when, intentionally and in any way, offers substantial or moral assistance to the commission of someone else's intentional crime (Article 27 of the PPC). All offenses examined throughout this chapter are intentional crimes. Thus, as long as it is proven that there is a causal link between the secondary party's assistance and the offense committed by the principal perpetrator, it is possible for a person to incur criminal responsibility for aiding and/or abetting any conduct of the analysed provisions of the Portuguese Penal Code. Therefore, Article 27 of the PPC, read in conjunction with Article 240, is in harmony with Article 7 of the Additional Protocol.

[121] Antunes, Maria João, "Comentário Conimbricense do Código Penal", Vol. II, 1st Edition, Coimbra Editora, p. 576 and 577 (1999)

ELSA Romania

National Researchers

Ana Cojocaru

Gabriela Danila

Daniela Ghicajanu

Elena – Delia Halici

Raul Mazilu

Academic Adviser

Maxim Dbrinoiu, PhD; Alina Gentimir, PhD

National Coordinator

Luca Ciubotaru

Introduction

Hate speech, as defined by the **Council of Europe,** covers all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.

Critics have argued that the term "hate speech" is a contemporary example of Newspeak, used to silence critics of social policies that have been poorly implemented in a rush to appear politically correct. Today there are current debates all over the world about how freedom of speech applies to the Internet. The **European Convention on Human Rights** recognises a series of principles regarding the protection of human rights. First of all, there are a few interdictions that are particularly important.[1]

One of them refers to the interdiction of discrimination established on one hand by the article 14th from the Convention[2] which covers the rights from the Convention and on the other hand the 12th Additional Protocol of the Convention that comes with an extended protection against discrimination, stating that the principle of non-discrimination may be invoked not only for the rights covered by the Convention but also for the other rights. [3]

In spite of all these efforts, and in spite of the entry into force of the Convention on Cybercrime[4] and its Additional Protocol, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, not many states are willing to ratify it, being reluctant to such an extended protection. Why is this happening? We will try to emphasize this issue in the following.

1 National definition of Hate Speech

In law, hate speech is any speech, gesture or conduct, writing, or display which is forbidden because it may incite violence or prejudicial action against or by a protected individual or group, or because it disparages or intimidates a protected individual or group. The law may identify a protected individual or a protected group by certain characteristics. In some countries, a victim of hate speech may seek redress under civil law, criminal law, or both.

In nowadays' Romanian society, discrimination is one of the main issues. 62% of the population believe that discrimination occurs often or very often in their daily lives[5]. More than ¾ of them believe that this phenomenon has intensified since Romania has undergone its latest massive

[1] Renucci, Jean-Francois, *Traité de droit européen des droits de l'homme,* Hamangiu, 2009, 117
[2] Sudre, Frederic, *Droit international et europeen des droits de l'homme*, Presses Universitarires de France, 9eme edition, 2008, 269
[3] Gonzalez, G. , *Le protocol additionnel numero 12 a la Convention Europeenne des droits de l'homme portant interdiction generale de discriminer*, RFDA, 2002, 113
[4] Council of Europe Convention on Cybercrime, Budapest, 23.XI.2001
[5] Study on the phenomenon of discrimination in Romania, developed by TOTEM Communication, for the National Council For Combating Discrimination (CNCD, 2010), 9;

transition by becoming a Member State of the European Union in 2007[6]. But which of these acts of discrimination may actually be considered hate speech according to the Romanian law?

Previous authors have considered more than one kind of behaviour as being hate speech, thus being the case for group libel, harassment and incitement[7]. We believe that the Romanian lawmakers' intention was, as well, to feature as punishable more than one discriminatory behaviour, the incorporation of a certain offence in the provisions of different laws being directly linked to their degree of social peril. The forms of hate speech in Romanian law are **instigation to hatred** (also called instigation to discrimination) and **discriminatory acts**.

Both forms are directly prohibited by the **Romanian Constitution**, as limits of the fundamental right of freedom of expression[8], alongside to defamation of the homeland and of the people of Romania, instigation to wars of aggression and public violence. This placement, far from being accidental, emphasizes the gravity the two forms of behaviour have, enough to be associated with crimes against the state.

Despite the constitutional consecration of both instigation to hatred (to discrimination) and discriminatory acts, only the former is defined as a crime in the **Romanian Criminal Code**, being described as "**Instigation to hatred** *(instigation to discrimination) on the grounds of nationality, ethnicity, religion, gender, sexual orientation, opinions, political views, beliefs, wealth, social origin, age, disability, noncontagious chronicle disease or HIV/AIDS infection*"[9]. This offense is included in the title concerning crimes against the social life relations.

In the same time, the **Romanian Criminal Code** incriminates as an **aggravating circumstance** the offenses committed on the grounds shown before taking into consideration the aim. Therefore, the effect of this circumstance is the possibility of increasing the penalty to the special maximum and also the possibility to add up to five more years in case of imprisonment or a third of the fine.

However, the Romanian Criminal Code is completed by the **Government's Ordinance no. 137/2000** concerning the prevention and sanction of all forms of discrimination, which provides the definition and sanctions for **discriminatory acts** "*Any kind of behaviour manifested in public which has nationalist-chauvinistic propaganda traits, or is aiming to hurt human dignity or to create an intimidating, hostile, degrading environment for a person or a community, motivated by belonging to a minority or one of the vulnerable groups, as mentioned before*"[10].

In order to have a clearer image of the two possible manifestation of hate speech, we shall analyze them by the required pre-existing conditions, their subjective and objective content and their sanctions.

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[6] Study on the phenomenon of discrimination in Romania, developed by TOTEM Communication, for the National Council For Combating Discrimination (CNCD, 2010), 10;

[7] Lerner, Natan, *Is There a Right to Hate Speech?*, (Human Rights Brief by the Center for Human Rights and Humanitarian Law, Washington College of Law, American University, 3rd volume, no. 2, 1996), (http://www.wcl.american.edu/ hrbrief/v3i2/index32.htm accessed 10th October 2013.

[8] Romanian Constitution, art. 30-7;

[9] Romanian Criminal Code, art. 317;

[10] Romanian Government's Ordinance no. 137/31.08.2000 concerning the prevention and sanction of all forms of discrimination, art. 15;

Firstly, **regarding pre-existing conditions**, neither instigation to hatred nor encouragement of hatred require the perpetrator to have any kind of distinguishable quality. However, they both impose that the passive subject belongs to either a minority or another kind of vulnerable group. This condition reflects perfectly the sociological description of hate speech as being the process of singling out an individual or a group of individuals on the basis of certain characteristics, stigmatizing its target by ascribing it to highly undesirable traits and placing it outside normal society[11]. In Romania, the categories which are the most likely to be targets of any kind of discrimination, including hate speech, are persons who are either infected with HIV/AIDS, belong to the LGBT community, are part of the Roma population or are disabled[12].

Concerning the space and time of the action, there must be observed that only the discriminatory acts have to be done in a public space in order for it to become a contravention, whilst instigation of discrimination is a crime regardless of the environment in which it takes place. This has a great significance on the online manifestations of the two acts, as the person guilty of discriminatory behaviour of hatred must, presumably, manifest on a public website and not on his or her private account. However, the article 15 from the G.O. no. 137/2000 is applicable only if the acts are not catalogued as **Instigation to discrimination** and the stipulation provided by the Romanian Criminal Code is not applicable.

Secondly, regarding the **objective content** of instigation to hatred and discriminatory acts, both of them are defined as acts, the *verbum regens* of the stipulation being one that evokes an action – either instigating or manifesting a kind of propaganda-related behaviour in public. Whether these actions have a distinguishable result (e.g. if they conduct to acts of violence) has no relevance in this classification. The lawmaker has decided that the individuals' act of either committing dicriminatory acts or instigating to hatred present by themselves a sufficient degree of social peril to be sanctioned. When it comes to the subjective content, the only way the two may be sanctioned is if they were committed with intent.

Lastly, concerning the sanctions for the two behaviours, the **instigation to discrimination** has the highest degree of social peril and is, in consequence, considered **a crime**, sanctioned by imprisonment or criminal penalties, while **discriminatory acts** are **contravention**, punishable only by an administrative pecuniary penalty. Its incrimination has a supplementary purpose of providing for the cases in which the former doesn't apply, thus being created a hierarchy between the two.

2 Contextual elements of Hate Speech

Hate speech, as defined by the Committee of Ministers of the Council of Europe[13], consists of certain forms of expression, which are aimed at certain minorities and vulnerable groups. Its form of manifestation may be incitement, promotion or justification of aggressive nationalism,

[11] Parekh, Bhikhu, *Hate speech: Is there a case for banning?* in *The Content and Context of Hate Speech; Rethinking Regulations and Responses*, (edited by Hertz, Michael; Molnar, Peter; Cambridge University Press, 2012), 37-57;

[12] Study on the phenomenon of discrimination in Romania (Synthetic Report, developed by TOTEM Communication, for the National Council for Combating Discrimination - CNCD, 2010), 15;

[13] Council of Europe's Committee of Ministers' Recommendation 97(2) on hate speech;

racism, anti-Semitism or christianophobia or islamophobia, xenophobia, gender discrimination, discrimination on the grounds of sexual orientation and/or gender identity or disability.

However, the identification of the exact contextual elements which qualify a certain action as hate speech has proven itself elusive. There are several doctrinaire opinions and we shall illustrate all of them with examples from the European Court of Human Rights' decisions.

The context in which hate speech takes place is identified by some authors as being one of its main elements[14], the European Court's of Human Rights case of Erbakan v. Turkey, in which the Court has stated that an act may be identified and punished as hate speech only if the imposed formalities, restrictions and sanctions are proportional to the legitimate aim pursued[15].

Authors also note **intent** as a key element of hate speech, considering that only forms of expression that are made with intent are covered by international law[16], providing as proof the case of Jersild v. Denmark[17] . In this case, the Court decided that the mere presentation of facts, lacking the intention of harming a certain minority or vulnerable group, may not be considered abetting of dissemination of racist remarks. By contrast, in hate speech perpetrators act being led by an exclusionary intent, meant to de-legitimatize the participation of minorities and/or certain vulnerable groups in public life[18]. It has been shown that this kind of exclusion, especially when coming from the overwhelming majority, causes a disproportionate harm to the person or group to whom it is directed[19].

The identification of intent is especially difficult when the act takes place **online**. Some may argue that a comment on a forum does not contain sufficient elements to anything else but make assumptions about the intentions of the perpetrator.

There must be noted that, according to some international legislations, there must also be a certain repercussion to the incitement – either violence or discrimination. In those cases, a certain kind of result is also a constitutive element.

The impact of the proliferation of online information must also be discussed, especially as Europe is the continent with the greatest number of individual internet users, counting a little over 220 million in 2012. European countries also make for a half of the top of the countries with the highest internet penetration rate, having an average of considerably more than half of the population being active online[20].

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[14] Tulkens, François, *When to say is to do; Freedom of expression and hate speech in the case-law of the European Court of Human Rights*, (Seminar on Human Rights for European Judicial Trainers, 09.10.2012), 8 ;
[15] ECHR- Erbakan v. Turkey (2006), Application 59405/00, 56;
[16] Mendel, Tony, *Hate Speech Rules Under International Law,* Centre for Law and Democracy, (http://www.law-democracy.org/live/) accessed 10th October 2013; Tulkens, 4-9, *ibidem*;
[17] ECHR - Jersild v. Denmark, Application 15890/89, 23.09.1994;
[18] Harell, Allison, *A Right to Exclusion? Gender, Minority Status and Civil Liberties Judgements*, *Immigration, Minorities and Multiculturalism in Democracies conference*, Montreal, 25-27.10.2007, 2;
[19] Matsuda, Mari J., *Public Response to Racist Speech: Considering the Victim's Stor*" in "Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment", ed. Matsuda, M. J., Lawrence, C.R., Delgado, R., Crenshaw, K.W., Westview Press, San Francisco, 1993, 24-5;
[20] Poll made by the International Telecommunications Union, 2012;

It has been shown that the extraordinary mobility created on the Internet by the use of links exponentially increases the **chances of negative content appearing**[21]. The internet users worldwide confirm it, about 60% of the adults and teenagers who responded to a poll taking place in eight countries around the globe having said that they feel that too much is being divulged online[22]. The mostly public nature of digital actions, their permanence in the digital society, as well as the fact that all members of the real society are also digital neighbours have also been presented as potential problems of the online community[23].

But the amount of online information being disseminated by itself would not be enough to create a climate for perpetrating hate speech. Scientists have suggested that what makes the online environment so dangerous is **anonymity, the lack of social and biological constraints**, which leads to people to disclosing the worst side of human nature[24].

3 Alternative methods of tackling Hate Speech

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

Topic 1- National Legislation

In Romania, the European Convention of Human Rights has an infra constitutional power and is directly applicable. But there exist also other ways to tackle hate speech based on any type of discrimination. These are the most important legislative documents in which is clearly specified that any type of discrimination including hate speech will be punished:

- Romanian Criminal Code- Article 247 and 317
- Romanian Constitution- Article 30 par. 7
- Romanian Civil Code- Article 70-77
- Romanian Labour Code- Article 5
- Law no. 326 from 2006 preventing all types of discrimination
- Resolutions of the National Council for fighting against Discrimination
- Resolutions of the Romanian Government no. 31/2002
- Law no. 677 from 2001- Protection of personal data and freedom of data circulation

Topic 2- European and International Legislation

Nevertheless, the European legislation is a stimulant for the European countries. Conventions, treaties or documents adopted by the European Union bodies, all have the same purpose: to eliminate discrimination, to handle the hate speech and with the new technologies to find a way to stop hate speech on the internet. In Europe there are countries where hate speech is punished

[21] Dumitru, Horațiu D., *Problems concerning the negative content online*, Romanian Pandects, nr.1/2004;
[22] Poll made by Reuters on 7087 adults and 1787 teenagers from Australia, Brazil, China, France, India, Indonesia, Japan and the United States of America, commissioned by Intel, 2012;
[23] Institute for Responsible Online and Cell-phone communication, "Declaration of Digital Citizenship";
[24] Baroness dr. Susan Greenfield speaking at the Edinburgh International Book Festival, 2013;

by the national legislation like Denmark, the Netherlands, France, but also countries where hate speech is not forbidden like Hungary. The same situation exists in Romania where does not exist, yet, a clear article in the fundamental law of the Romanian state about hate speech. There exists just Article 16 named "Equality in rights for all the citizens of Romania ".

- European Convention of Human Rights- Article 9,10,14 and Additional Protocol to EHRC No. 12
- European Directive no. 2000/43/EC
- European Directive 2000/78/EC
- TFUE- Article 13
- European Social Charter
- European Convention on Cybercrime
- Advisory Committee on the framework convention for the protection of national minorities.
- International Covenant on Civil and Political Rights
- Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- European Council framework decision on combating racism and xenophobia: This framework decision of the European Union provides for the approximation of the laws and regulations of the Member States regarding offences involving racism and xenophobia[25].

Topic 3- National and European/ International Case Law

The European Court of Human Rights established in it's decisions the limits of freedom of expression and hate speech in cases such as **Handyside v. U.K**. The decision in this case plays an important role because here the Court stated one of the most well known phrase:

> *Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man and it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.*

Other relevant decisions are represented by cases such as: Muller and others v. Switzerland, Markt intern Verlag GmbH v. Germany, Autronic AG v. Switzerland, Goodwin v. U.K.

During the time the Court from Strasbourg adopted different ways to deny protection of hate speech: inapplicability of Article 10 and applicability of Article 17 from the Convention, denial of protection or even declaring the applications as manifestly ill or inadmissible. The ECHR's case law is a guideline for the national judges to pronounce and adequately motivate their decisions on this subject.

[25] László Földi *Mapping study on campaigns against hate-speech online* - (European Council, 2012)

However, there is a real problem because not all the European states know how to handle the problem of **freedom of expression and hate speech on the internet** and this problem can be seen in the Romanian judicial system, too. The jurisprudence on freedom of expression exists, but it is not very extended and is only at her early steps because important decisions on this matter appeared only in 2011 and 2012. In Romania the most common decisions are related **to freedom of expression** and **public reputation** or image and these issues are judged by the civil courts especially for assumption of civil liability and payment of damages. Perhaps in the near future the romanian courts will become more active not only regarding the civil proceedings, but also on the criminal ones regarding the freedom of expression issue and also the hate speech problems.

Topic 4- Other ways to tackle hate speech

1. NGOs' activity is one of the most important ways to fight against hate speech and discrimination on a global scale. There are some important NGOs who play an important role in campaigns against hate speech and who support the Hate Speech Movement. Between these are:

International Network against Cyber hate (It is a foundation under Dutch Law and is seated in Amsterdam. INACH was founded in 2002 by Jugendschutz.net and Magenta Foundation, Complaints Bureau for Discrimination on the Internet. The objective of INACH is to combat discrimination on the Internet. It unites and empowers organizations to promote respect, responsibility and citizenship on the Internet through countering cyber hate and raising awareness about online discrimination. INACH reinforces Human Rights and mutual respect for the rights and reputations of all Internet users. INACH tries to reach its goals by uniting organizations fighting against cyber hate, exchanging information to enhance effectiveness of such organizations, lobbying for international legislation to combat discrimination on Internet, support groups and institutions who want to set up a complaints bureau, create awareness and promote attitude change about discrimination on the internet by giving information, education) .

There are also other NGOs that developed activities with similar goals: Amnesty International, Human Rights Watch, ELSA International, and EHRA.

In Romania, one of the most involved NGOs in this process of tackling hate speech is represented by **Active Watch, the media monitoring agency**. The NGO is based on human rights protection and its goal is to ensure a free media communication for the public interest. Active Watch is developing tools and is creating research studies which are published in the end and made available for the whole Romanian society. The publications are various such as: "Legal Guide for Journalists" (2008), "International and European Jurisprudence on freedom of speech" (2009) and also reports regarding the media activity in Romania.[26] Also, there is the **Resource Center for Roma Communities foundation** that has as main objective the integration and the support of minorities from Romania such as Roma minority.[27]

[26] Active Watch - Antidiscrimination activities: http://www.activewatch.ro/ro/antidiscriminare/ce-facem/, accessed 10th September

[27] Description of the foundation's activities. http://www.romacenter.ro/

Another way to fight against hate speech is represented by the **conferences, meetings, seminars, summer schools, campaigns organized by the European institutions, universities and NGOs**. For example the conference organized by the Council of Europe in Budapest "Tackling Hate Speech: living together on-line", the Campaign "NO HATE SPEECH"- organized in many countries of Europe where different minorities face daily this problem, EYF Projects for combating Hate Speech, different trainings organized by EYF and European Council for youth to support the European Campaign "NO HATE SPEECH", the UN, EU, OSCE policies on human rights, are only some examples. To **Online Youth Campaigns** promoting **Human Rights on the Internet** and in Romania we can also add the activity of the **National Council of Discrimination** for fighting against any type of discrimination.

For example, the anual statistics from National Council of Discrimination show the following:[28]

- 2007- 6 complaints - 2 solutions ascertaining discrimination sanctioned by warning and recommendation
- 2008 – 6 complaints – 1 solution ascertaining discrimination sanctioned by fine amounting to 1000 lei
- 2009 – 4 complaints – 2 solutions ascertaining discrimination sanctioned by warning and recommendation
- 2010 – 5 complaints - 2 solutions ascertaining discrimination sanctioned by warning and recommendation
- 2011 – 3 complaints – 1 solution ascertaining discrimination sanctioned by warning and recommendation
- 2012 - 9 complaints and 2 self notifications – 8 solutions ascertaining discrimination (3 sanctioned by fine, respectively 1000 lei and 5 solutions ascertaining discrimination sanctioned by warning and recommendation)

Also, local groups part of the European Law Students' Association such as **ELSA Iasi** which organised this year the second edition of the **"Internet Law Summer School"** on the topic of "Freedom of speech from offline to online" can have a strong impact.[29]

The list can continue because all over Europe youth, NGOs and some institutions along with the ECHR try to find new methods to fight against hate speech, try to instruct the European citizens to be more comprehensive. This is a key point for tackling the online hate speech because in the end what we need to understand what it means and our behaviour stands in how well educated we are.

[28] National Council of Discrimination - Statistics on complaints that have as subject articles or comments on articles appeared in online media "HATE SPEECH".

[29] European Law Students' Association - event website for Internet Law Summer School: http://internetlaw.elsa.ro/

4 Distinction between blasphemy and Hate Speech based on religion

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

One of the most important sources which distinguish between these two concepts is the Canonical Code (translated into Romanian) and Law no. 489 from 2006.

1. Definition of BLASPHEMY

BLASPHEMY [30] = 1. a. A contemptuous or profane act, utterance or writing concerning God or a sacred entity. b. The act of claiming for oneself the attributes and rights of God.

2. An irreverent or impious act, attitude, or utterance in regard to something considered inviolable or sacrosanct.

2. Hate speech based on religion (the concept)

The concept of hate speech based on religion is a small part of what really means **Hate Speech**. As a matter of fact, hate speech based on religion developed over the European continent due to migration of Islamic people and of course due to the separations of Protestants form the Christian religion.

There does not exist a specific definition for the concept of hate speech based on religion, but it can be made a comparison between what means hate speech, generally speaking:

> *Hate speech covers all forms of expression which spread, incite, promote or justify racial hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin. For the purpose of the campaign, other forms of discrimination and prejudice, such as anti-gypsyism, christianophobia, islamophobia, misogyny, sexism and discrimination on the grounds of sexual orientation and gender identity fall clearly within the scope of hate speech*[31],

and the definition of blasphemy and we can see that even if it does not exist yet a scientific definition there are some characteristics of those two concepts.

Hate speech based on religion covers forms of expressions which tend to spread, incite, promote or justify racial hatred based on intolerance due to religious differences and lead to what it is called today christianophobia and islamophobia. Hate speech based on religion affects people's lives because others cannot accept their religion, the concept of being different and use prejudgements in order to make their opinions about someone. But when we refer to blasphemy, the unreligious behaviour targets a sacred entity, attributes and rights of a God or a sacrosanct object, place or person (Saints). As there can be seen blasphemy concerns more to the religious activity meanwhile hate speech based on religion refers to hatred, intolerance, discrimination and hostility to a group of people sharing the same belief/religion.

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[30] Definition of blasphemy, http://www.oxforddictionaries.com/

[31] "NO HATE SPEECH MOVEMENT" Youth Campaign for Human Rights Online brochure, emitted by the Council of Europe, 2013;

There is a fine wall between these two concepts and probably giving a separate definition for them is not proper due to the lack of information and legislation in some European states. In this case the Romanian legislator did not want to cross the limits and offer to the European judicial world a brief definition. It is a pity because in our country hate speech based on religion and blasphemy exists, but the media does not interfere enough to give a strong sign for the Parliament and the legislative bodies.

3. National and European Legislation

- Canonical Code
- Romanian Constitution - Article 29, 30, 53
- Romanian Criminal Code- Article 317 and 318
- European Convention of Human Rights- Article 9 and 14 and Additional Protocol to the ECHR no. 12
- Law no. 489 from 2006 concerning freedom of religion and the general regime of beliefs
- The European Charter of Human Rights- Article 10

4. National and European Jurisprudence

In Romania, even if there are cases of hate speech based on religion it cannot be found a wide jurisprudence on this matter. Also there are not many cases on the media. This is, perhaps, the reason why Article 9 of the Convention on the aspect of blasphemy and protection against hate speech based on religion is still out of force in Romania[32]

On the other hand, the European Court of Human Rights' jurisprudence on article 9 proves a reaction of the European Court in what concerns **protection of religion and religious beliefs**. In the case Otto-Preminger-Institute v. Austria and Kokkinakis v. Greece, ECHR admitted that States should interfere more if some people suffer of social exclusion or they cannot manifest their religion peacefully. Moreover, in Otto-Preminger-Institute v. Austria, the Court, even if it did not stated very clear about blasphemy, outlined that **provocative actions** against religious objects incite to hate and discrimination based on religion which is not allowed in a democratic society. The Court based its decision on an article from the Austrian Criminal Code adopted with the purpose of elimination of any form of blasphemy or behaviour which could lead to a hatred act against a religion.

Sometimes freedom of expression can affect more or less the freedoms protected by Article 9, so stated in some cases the ECHR: Case Giniewski v. France (even if freedom of expression has its limits, a journalist cannot be punished when he publishes shocking or disguising news) and case Paturel c. France (Article 10 was violated and Article 9 was not violated)[33]. Another interesting situation is the discriminatory treatment based on religious beliefs in employment proceedings. The ECHR made her call in the case Thlimmenos v. Greece where it stated:

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[32] Article about blasphemy in different countries: http://ro.wikipedia.org/wiki/Blasfemie, accessed on September 5th.

[33] Research Division "*Aperçu de la jurisprudence de la Cour en matière de liberté de religion* "- European Court of Human Rights and Council of Europe.

"The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. […] The Court considers that, as a matter of principle, States have a legitimate interest to exclude some offenders from the profession of chartered accountant. However, the Court also considers that, unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified.[…] It is true that the authorities had no option under the law but to refuse to appoint the applicant a chartered accountant. […] In the present case the Court considers that it was the State having enacted the relevant legislation which violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9 of the Convention. That State did so by failing to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants"[34].

A recent story from Romania, confirms also all the above: a woman, in a train heading to Bucharest, reported, all in tears, that she was threatened with dismissal because she was not a Christian, but an Evangelic. She was frightened of what their supervisors could do if she goes to the police. And yet Romanian legislative bodies do not adopt legislation on this subject when other European countries adopt laws to protect their citizens against **any type of discrimination**.

5 Networking sites and the issue of online anonymity

The Internet is considered a legislative paradise by criminals, due to the lack of a unified and verified identification system in cyberspace. The users refuse any judicial constraint and refuse to know the applicable norms of a certain conduct, using **anonymity** as a shield against issues ranging from unwanted advertisements from the online merchants to punishments from oppressive regimes. The anonymity has its perks, but it cannot be used as an instrument of placing racist or xenophobic content online, invoking the applicability of the right of free speech.[35]

In Romania the **Internet services** are part of the information society services, the legislation that is attributed to any type of legal issues containing:

1. **Government's Emergency Ordinance no. 111/14.12.2011**, modified by the Law no. 140 from 18.07.2012.

[34] *Thlimmenos v. Greece* [GC], no. 34369/97, Reports 2000-IV, paras. 39-49 at par. 44, 47 and 48.

[35] Case 4158/ 12.05.2011 regarding the online published materials and the violation of image and dignity. http://www.legi-internet.ro/jurisprudenta-it-romania/decizii-it/libertate-de-exprimare/materiale-publicate-online-libertate-de-exprimare-incalcarea-drepturilor-privind-imaginea-onoarea-demnitatea-si-viata-privata-judecatoria-bacau-cauza.html, consulted at 26 august 2013.

2. **Law no. 304/2003** for the universal service and the rights of the users regarding the networks and the electronics communication services
3. **Law no. 239/2005** regarding the modification and the add-ons of some normative acts from the communications domain.
4. **Law no. 365/2002**

Considering the dispositions presented in Law no. 365/2002 and the other above-mentioned laws, in the case of **racism, discriminations or hate crimes online**, the service supplier, the host or any other type of service supplier of the informational society, has the following obligations[36]:

- Will be responsible for the discriminatory or rasist content produced by him or his agents (art 11, second alignment from Law no. 365/2002[37])
- Will not be responsible for the discriminatory or rasist content hosted or conveyed in transit, without his knowledge (art 11, third alignment from Law no. 365/2002)
- A hosting service must inform any user the way in which his information will be protected, the way it will be stored, if his personal information will be transmitted to other people. Any person has the right of asking the operator to change, block, delete or transform into anonymous information, any information that may cause damage. (Law no. 677/2001[38])
- Must have a procedure that allows any persons to complain about any possible illegal activity conducted by the service addressee or about the apparent illegal information they deliver (art 11. Third alignment , GD 1308/2002) [39]
- If he will receive a complaint referring to any racist or discriminatory content that he is hosting, he has to file a complaint at the **National Council for the fight against Discrimination** (CNCD) in maximum 24 hours. Also, he will preserve the information and block any access to them. (Art. 13-15 Law no. 365/2002, and art 11, second alignment GD 1308/2002)
- If they will receive a CNCD decision concerning that discriminatory, racist or xenophobic content they have to obey it, having the obligation of ceasing the access of the addressee, temporarily or permanently to the information service. (Art 16, third alignment from Law no. 365/2002 and GO 137/2000)[40]
- CNCD has the obligation to inform MCSI (The Ministry of informational society) about any decision that may influence the service providers.

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[36] Bogdan Manolea, *Article about discrimination on the Internet* - 2006 http://www.legi-internet.ro/fileadmin/editor_folder/pdf/discriminare_pe_internet.pdf, accessed on 17th August 2013

[37] Law no.365 of 7 June 2002 on electronic commerce http://www.legi-internet.ro/en/romanian-itc-legislation-and-articles/comert-electronic/law-no365-of-7-june-2002-on-electronic-commerce-romania/law-no365-of-7-june-2002-on-electronic-commerce-romania.html

[38] Law no 677/2011 regarding the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data

[39] Law number 365/2002 regarding the e-commerce. http://www.legi-internet.ro/legislatie-itc/comert-electronic/hotarirea-guvernului-nr-1308-din-11202002-privind-aprobarea-normelor-metodologice-pentru-aplicarea-legii-3652002-privind-comertul-electronic.html, accessed at 24th august 2013.

[40] Government's Ordinance number 137/2000 regarding the prevention and punishment of all types of discrimination

To sum up, **anonymity** is a means of protecting the private sphere of the internet users, its usage aiding in avoiding observation by specific people, organizations or the government. In Romania, the legislators had created a curdled legislation protecting possible victims against hate speech, the anonymity being restricted if another person`s rights are infringed.[41]

6 Tackling the notions of "violence", "hatred" and "clear presence of danger"

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

The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems has been signed by 35 Member States out of the 47 members of Council of Europe. From the 35 signatory states, **only 20** of them ratified it and Romania is one of them.

When talking about the measures to be taken at the national level, **the article 3** regarding the Dissemination of racist and xenophobic material through computer systems, states in the second paragraph that: *A Party may reserve the right not to attach criminal liability to conduct as defined by paragraph 1 of this article, where the material, as defined in Article 2, paragraph 1, advocates, promotes or incites* **discrimination that is not associated with hatred or violence**, *provided that other effective remedies are available.*[42]

In 2005, Canada became the only non-European state to sign the convention. The United States government does not believe that the final version of the Protocol is consistent with the United States' constitutional guarantees and has informed the Council of Europe that the United States will not become a Party to the protocol.[43]

In the case of **Vona v. Hungary**[44]**, t**he court also considered the applicant's freedom of expression and it stated, that this freedom did not cover hate speech or **incitement to violence**.In this case, the notions of "violence" and "hatred" are treated **separately.** In this way we can state that these two notions are not cumulative in the Additional Protocol to the Convention on Cybercrime, but **alternative.** [45]

Regarding the notion of *clear and present danger* used by the Supreme Court of the United States, it has been discussed in the case of *Refah Partisi (The Welfare Party) and others v. Turkey*.

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41 Dumitru Horatiu Dan, Article *Constitutional issues of the internet* http://www.legi-internet.ro/constitutie_internet.htm accessed 3rd august 2013.

42 Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Strasbourg, 28.I.2003

43 U.S.A. Department of Justice - Frequently asked questions and answers Council of Europe Convention on cybercrime http://www.justice.gov/, accessed on 20th August 2013

44 Case Vona v. Hungary http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122183

45 Case of mouvement RAËLIEN SUISSE v. Switzerland

The Court accepts that where the presence of such a danger has been established by the national courts, after detailed scrutiny subjected to rigorous European supervision, a State may "reasonably forestall the execution of such a policy, which is incompatible with the Convention's provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime".

That being the case, the Court cannot criticise the national courts for not acting earlier, at the risk of intervening prematurely and before the danger concerned had taken shape and become real. Nor can it criticise them for not waiting, at a certain high risk. In short, the Court considers that in electing to intervene at the time when they did in the present case the national authorities **did not go beyond the margin of appreciation** left to them under the Convention.

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

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

Article 17 of the European Convention of Human Rights prevents the abuse conducted by the state, carried out with the sole purpose of limiting or destroying the fundamental human rights protected by the convention. Art. 17 was firstly adopted to cease the atrocities committed in the past by totalitarian regimes attached to nazist, fascist or communist ideas.

Historically, Article 17 has been applied in cases involving Holocaust denial, Nazi propaganda, the Communist Party, and racist hate speech. The recent case and the Hizb ut-Tahrir and Others v. Germany case decided in June 2012 are the first applications of Article 17 to the Islamist group Hizb ut-Tahrir.[46] .Pursuant to a factsheet published on the European Court of Human Rights, The Court uses two means of protecting hate speech victims[47]:

- By applying Article 17, where the comments in question amount to hate speech and deny the fundamental values of the Convention
- By applying the limitations provided by the second paragraph or Article 10 and Article 11, where the speech in question is not able to destroy the fundamental values of the Convention

Article 17 is considered as the options of last resort and it has the unique characteristic of being **invoked by the state** against the applicant, in order to justify the interference by the state if the expression seeks to damage the rights of others.

[46] Jonathan Horowitz - Case Watch: *Europe's Broad View on Acceptable Limits to Free Speech* http://www.opensocietyfoundations.org/voices/case-watch-europes-broad-view-acceptable-limits-free-speech, accessed on 1st September 2013

[47] Council of Europe Fact Sheet - Hate Speech http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf, accessed 4th September 2013

The best of illustration of the way the Court makes the decision is presenting the next comparison of the two precedents[48] : Glimmerveen and Hagenbeek v. the Netherlands (1979) and B.H., M.W., H.P., and G.K. v. Austria (1989). In the first case, their application was denied to be heard before the European Court of Human Rights, because their racially divisive views advocated by them were **contrary to the text and spirit of the Convention** and likely to contribute to destruction of the rights of others, while in the second case, The Commission rejected their application, declining to pass the case onto the Court, stating that the "prohibition against activities involving expression of National Socialist ideas is both lawful in Austria, and, in view of the historical past, can be justified as being necessary in a democratic society."

In the The Lehideux and Isorni vs France (1996) judgement of the European Court of Human Rights it was clarified that article 17 applies only in the context of Holocaust denial and related questioning of historical facts, and as a result, racist or xenophobic speech against minorities is protected under article 10(1) of the Convention[49].

8 Harmonisation of national legislation

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

The principle of proportionality regards taking into consideration the fairness and justice in the interpretation process, especially in the judicial area because it is necessary to maintain balance between rigid notions regarding law and more flexible ones regarding people values and beliefs.

Regarding **online hate speech,** the principle of proportionality is the foundation in order to build something durable because a legislation which maintains a balance between people and law will have more chance to succeed and to avoid the hate speech in the online area.

In Romania there are a few laws regarding the antidiscrimination issue (Law no. 326 from 2006 preventing all types of discrimination, Resolutions of the National Council for fighting against Discrimination, Resolutions of the Romanian Government, Law no. 677 from 2001- Protection of personal data and freedom of data circulation) but they do not cover the entire picture on the online hate speach, actually the Parliament often avoids this subject because it is a very sensitive one and also involves the freedom of speech and looks like it is very hard to find the balance for this very sensitive subject. Recently, the Court of Appeal from Târgu-Mureş decided on 17th January 2013 that the profile from **Facebook is a public space** according to the Article 10 from the European Convention on Human Rights.[50]

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[48] Center for Education in Law and Democracy: *Hate Speech in the EU* http://www.lawanddemocracy.org/pdffiles/us.eu.speech.lesson3.pdf, accessed 4th September 2013

[49] Netherlands Instituite of Human Rights - Article on Hate Speech http://sim.law.uu.nl/SIM/Library/books.nsf/a75c937fd931aed7c125678d003c11fc/63924554ca2d93ccc12573a7003000d9?OpenDocument, accessed on 7th September 2013

[50] News about the decision where Facebook was declared a public space by a Romanian Court. http://www.hotnews.ro/stiri-esential-14369041-atentie-postati-precedent-instanta-din-romania-stabilit-pagina-facebook-este-spatiu-public.htm

In 2009 the journalist Iulian Comanescu[51] and the Agency which monitories the press had came with a project called **"The Ethic Code" for the online press regarding discrimination and the hate speech**. This project is very simplistic but contains the main ideas in order to have a balance between the freedom of speech and preventing the online hate speech. In my opinion this idea can be the first step in order to achieve the harmonization of national legislation, sadly this project did not have the expected impact for the Parliament and it was given apart.

Another project gained the attention recently because it is promoted by the **National Council of Audio-visual** which plans to create a new foundation in order to study the **genre discrimination** in the audio-visual area.[52] The president of the NCA, Laura Georgescu, said that it is very important for Romania to know the exact situation of the online discrimination because then the measures can be taken and granted to succeed.

Apart from the legislative measures than can be taken it is also very important to take effective measures in short notice, and creating **filters and a system which recognize key words** and this type of system to be installed in all the computers with public access. Also it will be very useful to implement the procedure called **"notice & take down"**[53] because this way each hosting page will have a database with the emails of the users and all the racist and xenophobic content will be removed by the service provider in a short time.

The education of young people it also a very important measure in order to prevent the online hate speech and the legislators should take this idea into consideration and make a law which allows schools to create programs for teaching about the online space, how to protect yourself in the online field and also how to respect the others, because only educated people will know how to prevent the hate speech.

In the future is it **a must** for Romania to have and implement a legislative measure in order to obtain the harmonization of national legislation and the best way to obtain a law which will bring balance between people and press is to create a common space where both partied interested to propose ideas and to work together because nor the freedom of speech can be violated neither the online hate speech can be permitted because there is no sanction for those whom use the online field to express their opinions is an discriminative way.

In conclusion the only measure that can function is the balance between combating the online hate speech without harming the freedom of speech, mostly because in Romania at this moment the legislation on online hate speech practically does not exists.

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[51] Iulian Comanescu, *An ethic code for online hate speech,* http://www.comanescu.ro/inca-un-cod-etic-pentru-online-despre-discriminare-si-discurs-de-ura.html accessed on 24th August 2013.

[52] News about the new foundation for studying the **genre discrimination** in the audio-visual area http://www.mediafax.ro/cultura-media/cna-vrea-sa-infiinteze-o-fundatie-care-sa-faca-studii-despre-discriminarea-de-gen-in-audiovizual-11025761, accessed on 15th August 2013

[53] Notice and take down is a process operated by online hosts in response to court orders or allegations that content is illegal. Content is removed by the host following notice. Notice and take down is widely operated in relation to copyright infringement, as well as for libel and other illegal content. (http://en.wikipedia.org/wiki/Notice_and_take_down)

9 Legal implications of "hate speech"

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

In Romania at this moment **there is no legal definition of "hate speech"** but there are a few laws regarding discrimination[54] and in the Criminal Code there is incriminated the hate instigation.[55]

Even though it is necessary to have a more precisely definition of "hate speech", the Romanian courts often include this kind of behaviour in **the large area of discrimination**, because the hate speech may be a very aggressive form of discrimination and the evolution of the internet made this problem even bigger as before because under the protection of anonymity everyone is tempted to use the hate speech in order to project in the other`s head a specific image about the character of the one who sits behind a computer and attacks others without an objective and pertinent excuse.

Recently Romania was confronted with a specific situation of **hate speech**. Sabina Elena, a Romanian teenager who attends a Hungarian school, wore a headband with the colours of the Romanian flag on March 15th 2013, Hungary's National Day. The event touched off a series of revanchist speeches between young people of Magyar and Romanian origin but also with the politicians and Sabina Elena received threats on her personal Facebook page.[56] In this case the only sanctions where applied to the class teacher and the director of the school by the regional education institution but there **were not any judicial measures**.

Another problem regarding hate speech in Romania is with the **Roma minority** but I think it is fair to say that almost all the Europe has the same problem, because there were cases of anti-Roma hate speech in Italy, Span and France. The European Roma Rights Centre (ERRC) identified a serious of situations of hate speech involving the Romani and the Romanians[57] and they major request for the Romanian authorities was to reject "tigan" (gypsy) terminology because is pejorative, inaccurate and deeply injurious[58].

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[54] Government's Ordinance number 317 from 31th August 2000 regarding the prevention and sanctions for all the forms of discrimination; The Resolution of the Government number 1194 from 27th November 2001 regarding the organization and functioning of the National Council against discrimination; The Government Emergency Ordinance number 31 from 13th March 2002 regarding the closure of all the organizations with fascist, racist and xenophobic character.

[55] Romanian Criminal Code, article 317.

[56] News about the investigations and the disciplinary measures taken in the case of Sabina Elena http://adevarul.ro/news/eveniment/directorii-liceului-covasna-invata-sabina-fata-bentita-tricolora-diriginta-sanctionati-inspectorat-1_5151a56c00f5182b85530552/index.html, http://www.romania-insider.com/romanian-tricolor-on-hungarian-day-and-burned-hungarian-flag-during-match-re-ignite-romanian-hungarian-heat/78131/ accessed on 27th August 2013.

[57] News about the case of Sabina Elena http://www.romania-insider.com/romanian-tricolor-on-hungarian-day-and-burned-hungarian-flag-during-match-re-ignite-romanian-hungarian-heat/78131/, accessed at 24th August 2013

[58] European Roma Rights Center http://www.errc.org/article/errc-urges-romanian-authorities-to-reject-tigan-terminology/3799 (The complete letter can be found here:

At international level there are numerous acts, resolutions and conventions regarding the freedom of speech, cyber space protection and discrimination. The Council of Europe recommended to member governments to combat hate speech under the Recommendation R(97)20 [59] and the Council of Europe created the European Commission against Racism and Intolerance. It recommends that the governments of member states:

1. Take appropriate steps to combat hate speech on the basis of the principles laid down in this recommendation;
2. Ensure that such steps form part of a comprehensive approach to the phenomenon, which also targets its social, economic, political, cultural and other root causes;
3. Where they have not done so, sign, ratify and effectively implement in national law the United Nations Convention on the Elimination of All Forms of Racial Discrimination, in accordance with Resolution (68) 30 of the Committee of Ministers on measures to be taken against incitement to racial,national and religious hatred;
4. Review their domestic legislation and practice in order to ensure that they comply with the principles set out in the appendix to this recommendation.

The European Court of Human Rights **does not offer an accepted definition for "hate speech"**[60], only gives some recommendations in order that the prosecutor will decide if the hate speech is entitled to the protection of freedom of speech (Article 10 from the Convention). The International Covenant on Civil and Political Rights makes and international standard on the "hate speech" issue by a balance of Articles 19 and 20 which guarantees the freedom of expression but also the possible restriction to this right including "for respect of the rights or reputations of others".

In conclusion there is no universally agreed definition on "hate speech" and all the legislative measures adopted by the countries are circling the idea of freedom of speech and anti-discrimination laws but still there is no exact definition of hate speech.

In Romania hate speech cases are treated using the legislation on discrimination mostly because the European Court of Human Rights has not given yet a definition for this issue. In a case involving Romania in front of ECHR[61] where hate speech was the main issue, the Court decided that the national intervention in the freedom of speech respected the principle of proportionality in a democratic society and the pecuniary damages were according to the principles of ECHR.

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http://www.errc.org/cms/upload/file/romania-letter-rename-gypsy-10-december-2010.pdf), accessed 27th August 2013.

[59] RECOMMENDATION No. R (97) 20 of the Committee of Ministers to the Member States on "Hate Speech" http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf, accessed on 3rd September.

[60] A Web of Hate: *European, U.S. Laws Clash on Defining and Policing Online Anti-Semitism* http://www.algemeiner.com/2013/02/28/a-web-of-hate-european-u-s-laws-clash-on-defining-and-policing-online-anti-semitism/

[61] Decision Corneliu Vadim Tudor against Romania (number. 1), 15th June 2006, 6928/04

10 Legal implications and differentiation of related notions

What about the notions of **"intimidation"** and **"provocation",** comparing to the "incitement to hatred"? How are 'incitement to hatred', intimidation and 'provocation' described in your national legislation? How, if at all, do they differ?

As we mentioned before, in Romanian legislation, both the act of incitement to hatred and that of intimidation are criminalized.[62] In its specific wording, the statute incriminates any public manifestation leading either to incitement to national or racial hatred, or to an intimidating, hostile environment. In this context, the Romanian legislation does not intend to create a profound distinction between the concepts of intimidation and that of incitement to hatred.

Notwithstanding, the adjacent notion of **"incitement to discrimination"** has been legally defined by the Romanian Criminal Code[63] as being "incitement to hatred on grounds of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinions, political allegiance, beliefs, wealth, social origins, age or disabilities".

As far as the notion of **intimidation** goes, the Romanian legislation is apparently lacking in this respect. One publicly available definition of intimidation considers it to be "repeated inappropriate behaviour that undermines the right to dignity at work".[64] On a closer look at the internal legislation, however, one can observe that such practices are covered by the statutes. A prime example is the aforementioned Government Statute no. 137/2000 which holds a wide scope of applicability – all political, economic, social and cultural domains, as well as any other domains pertaining to public life".

In addition, the concept of **intimidation at the workplace** is also covered by the Bill no. 202/2002 regarding gender equality. In its second article, the Bill expressly notes that all measures towards the promotion of gender equality and the elimination of direct and indirect discrimination between genders are fully applicable in the field of work, education, health, culture, as well as others.

Acts of harassment are also incriminated by Statute no. 137/2000, being viewed as leading to an intimidating, hostile, degrading or offensive environment.

11 Comparative analysis

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

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[62] Government's Ordinance no. 137/2000, Article 15.

[63] Romanian Criminal Code, Article 317

[64] Citizens Information - *Bullying in the workplace* http://www.citizensinformation.ie/ro/employment /equality_in_work/ bullying_in_the_workplace.html

The interplay between Romania's internal legislation and the international treaties it has ratified is that of **monism**. Although the usual controversy in matters of monism v. dualism pertains to whether they represent, in fact, two distinct legal orders,[65] this is not presently the case. Instead, the relevant issue is the transposition of CETS 189 in Romania's internal legislation.

The system of monism adopted by Romania is not merely a custom or a result of developed case-law. On the contrary, it is provided for by the Romanian Constitution. Pursuant to **Article 11(2),**[66] "The treaties ratified by the Parliament, in accordance with the law, are part of the internal law." Moreover, in the specific matter of international treaties regarding human rights, Article 20(1) expressly awards them prevalence over the bills and the other pieces of national legislation. Additionally, the direct applicability of international treaties is stipulated in Article 31(2) of the Bill no. 590/2003 regarding treaties.

Nonetheless, without prejudice to the issue of prevalence in case of conflict, the practice of the Romanian authorities indicates the **self-proclaimed monism** is actually only partly monism. The effect of partial monism is caused by the Romanian draughtsmen' desire to better enunciate the obligations contained in its ratified treaties; this, in turn, translates into some treaties being transposed into national law whereas others remain at the level of an international treaty with direct applicability.

Concerning the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS 189), **it has been signed by Romania on 9 October 2003**. Romania's actual deposition of the instrument of ratification took place on 16 July 2009, which meant that its entry into force was 1st November 2009. Similarly to 6 other Council of Europe member States signatories of CETS 189, Romania as well has formulated a reservation to the provisions of the Protocol.

Finally, with the exception of the Bill ratifying the Protocol, Romania did not do any one collective act of transposition; rather, it relied on the **existing legislation which also incriminated**, through its wider scope, the actions repressed by the Protocol.

Conclusion

In the end, we strongly believe that large and worldwide spread campaigns will raise awareness about hate speech online and its risks for democracy and for individual young people, and promoting media and Internet literacy. Even though only some of the member states of Council of Europe have signed and ratified the convention and its additional protocol, taking the adequate measures the key factor for reducing the cases of hate speech remains population's behaviour.

In the century of speed, where technology is covering more and more parts of our daily lives, each of us can still contribute to the others' human rights education by transmitting the importance of respecting the others and promoting the equality among the ones around us.

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[65] DJ Harris, *Cases and Materials on International Law*, Sixth Edition, Sweet & Maxwell, London, 2004, p. 66-68

[66] Romanian Constitution - article 11(2).

ELSA Slovak Republic

National Researchers

Katarína Kesselová

Michaela Komináková

Norbert Fecko

Zoltán Nagy

National Coordinator

Tomáš Pazmány

National definition of Hate Speech

Slovak legislation does not provide general definition of hate speech. However Slovak Constitution, Civil Code and Criminal code contain several provisions which are dealing with issues of freedom of expression, protection of personality and extremism crimes, which are connected with hate speech.

Under the provisions of Slovak Constitution, everyone has the right to the preservation of his human dignity and personal honour, and the protection of his good name. The freedom of speech and the right to information are guaranteed, however the freedom of speech and the right to seek out and spread information may be restricted by law if such a measure is unavoidable in a democratic society to protect the rights and liberties of others, state security, public order, or public health and morality. So these freedoms are not considered as absolute and unrestricted rights. [1]

According to Civil Code there is general protection of personality, specifically a natural person is entitled to protection of his personality, especially life and health, civic honour and human dignity and privacy, their names and expressions of a personal nature. In case of unauthorized interference, natural person has the right in particular, demand that was dropped from the interference with the right to protection of her personality, to eliminate the consequences of such interventions and that it was reasonable satisfaction. If it has not been thought sufficient satisfaction, particularly because it was largely reduced to that person's dignity or esteem in the society, an individual has also right to compensation for loss in money. The amount of compensation is determined by the court taking into account the seriousness of the injury and the circumstances under which the infringement occurred. [2]

The Criminal Code3 deals extremism. There is no specific definition of extremism in Criminal Code, however generally the extremism crimes are defined as hate crimes. Hate crime is any crime committed against person or property, if the victim or object of the crime is chosen on the bases of the real or assumed affiliation, connection or support of the group with specific common features recognized as race, nationality, origin, language, religion, sexual orientation, ect.[4] Governmental document "Conception of fighting against extremism for years 2011-2014[5]" states that current Slovak legislation is not sufficient and does not consider the crimes, which commission is motivated by hatred to specific group of people for its characteristic (hate crimes). Some of the hate crimes are already included in Criminal Code provisions, however for commission extremism crimes there is intention requirement and present experience shows difficulties with proving the intent of the accused person. Therefore it is inevitable to prepare the revision of Criminal Code, which will impose stricter liability on wrongdoers of extremism crimes.

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[1] Articles 19 and 26 of the Act No. 460/1992 Coll. Constitution of the Slovak Republic as amended
[2] Sections 11 and 13 of the Act No. 40/1964 Coll. Civil Code as amended
[3] Act No. 300/2005 Coll. Criminal Code as amended
[4] Ministry of Internal Affairs, *Concept of fighting against extremism for years 2011-2014* <http://www.minv.sk/?extremizmus> accessed 27 September 2013
[5] Ministry of Internal Affairs, *Concept of fighting against extremism for years 2011-2014* <http://www.minv.sk/?extremizmus> accessed 27 September 2013

This year there was an effort to change the law and last amendment of Criminal Code6 brought new provision which provides more protection to people with different sexual orientation. Before the amendment the provision of Criminal Code[7] stated that if the crime is committed "because of national, ethnic or racial hatred, or hatred caused by the colour of complexion" , it is considered as specific motivation for committing the crime. Specific motivation is the reason for the stricter criminal charge for the offender if it is prescribed in subject-matter of the relevant crime. Currently, according to the amendment, the sexual orientation is considered as specific motivation as well.

Then Criminal Code deals specifically with extremism crimes, they were implemented to Slovak legislation in 2009[8]. As criminal offence is defined Supporting and promoting groups aimed at suppression of fundamental rights and freedoms, therefore, any person who supports or makes propaganda for a group of persons or movement which, using violence, the threat of violence or the threat of other serious harm, demonstrably aims at suppressing citizens' fundamental rights and freedoms shall be liable.9

Criminally liable for the crime of Defamation of nation, race and religion shall be any person who publicly defames any nation, its language, any race or ethnic group, or any individual or a group of persons because of their affiliation to any race, nation, nationality, complexion, ethnic group, family origin, religion, or because they have no religion.10 There is no legal definition of "defamation", however in language interpretation it may be any statement and speech (no matter if oral, written or image or by any other mean) which aims to gross profane honour, dignity and reputation and which are insulting, mockery or scurrilous.[11]

Also Incitement of National, Racial and Ethnic Hatred is defined as crime. The provision is based on requirement of International Convention on Elimination of all Forms of Racial Discrimination[12], thus any person who publicly threatens an individual or a group of persons because of their affiliation to any race, nation, nationality, complexion, ethnic group, family origin or their religion, if they constitute a pretext for threatening on the aforementioned grounds, by committing a felony, restricting their rights and freedoms, or who made such restriction, or who incites to the restriction of rights and freedoms of any nation, nationality, race or ethnic group, shall be liable.[13]

And as crime is also enacted Incitement, Defamation and Threatening to Persons because of their Affiliation to Race, Nation, Nationality, Complexion, Ethnic Group or Family Origin, therefore any person who publicly incites to violence or hatred against a group of persons or an individual because of their affiliation to any race, nation, nationality, complexion, ethnic group,

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[6] Act No. 204/2013 Coll. as amended
[7] Section 140 of the Act No. 300/2005 Coll. Criminal Code as amended
[8] Act No. 257/2009 Coll. as amended
[9] Section 421 of the Act No. 300/2005 Coll. Criminal Code as amended
[10] Section 423 of the Act No. 300/2005 Coll. Criminal Code as amended
[11] Irena Bihariova, „Cyberhate- Nenavist na internete" < http://www.beznenavisti.sk/wp-content/themes/beznenavisti/podklady-a-materialy/Cyberhate-Nenavist-na-internete.pdf> accessed 20 September 2013
[12] Jaroslav Ivor *Trestne pravo hmotne- osobitna cast* (2nd edition IURA EDTION 2010) p. 568
[13] Section 424 of the Act No. 300/2005 Coll. Criminal Code as amended

family origin or their religion, if they constitute a pretext for the incitement on the aforementioned grounds, or defames such group or individual, or threatens them by exonerating an offence that is deemed to be genocide, a crime against humanity or a war, or an offence that is deemed to be a crime against peace, a war crime or a crime against humanity, if such crime was committed against such group of persons or individual, or if a perpetrator of or abettor to such crime was convicted by a final and conclusive judgement rendered by an international court, unless it was made null and void in lawful proceedings, publicly denies or grossly derogates such offence, if it has been committed against such person or individual, shall be liable.[14]

In conclusion, we may say that there are legal instruments how to fight hate speech in Slovak republic, however there is still large space for improvement. There are also current efforts of the government, for example last amendment of Criminal Code. On the other hand the same amendment was object of criticism, because there are also other social and cultural groups which members may be target of the hate crime (e.g disabled people, unemployed, different religious group, ect.) not just people with different sexual orientation and they are not protected by provisions of Criminal Code, so they might feel discriminated. [15]For that reason more complex solution of the situation will be necessary in the future.

Contextual elements of Hate Speech

After terrible experiences from the WW II member states of the Council of Europe strictly respect the principle of pluralism, tolerance and the guarantee of freedom to hold opinions and to receive and broaden information. These preconditions constitute one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Freedom of expression as it is understood by the European Court of Human Rights ("the Court" or "ECHR") protects the presentation of ideas and recognized protects not only the "'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society[16]. Analogous, the Federal Constitutional Court of Germany (Bundesverfassungsgericht) states that free speech does not lose its protection even if it contains offensive or insulting words. What the difference is between protected "shocking and offensive" speech on the one hand and criminal "serious and prejudicial" speech on the other hand?

Former Judge of ECHR Tulkens noted that the main contextual elements of hate speech legislation resulted from the relevant case-law of the ECHR. By the case I.A. v. Turkey[17], ECHR expressed confidence that the ideas which offend or shocked are protected only with certain limitations arising from the provision art. 10 (2) of Convention. From principle point of view, The Court considers necessary to punish some expressed statements, which are per se in democratic society unacceptable. Consistent case - law of the European Court of Human Rights

[14] Section 424a of the Act No. 300/2005 Coll. Criminal Code as amended
[15] Reasoning report to Act No. 204/2013 Coll. <http://www.nrsr.sk/web/Default.aspx?sid=zakony/cpt&ZakZborID=13&CisObdobia=6&ID=604> accessed 29 September 2013
[16] Handyside v. United Kingdom, app. no. 5493/72
[17] I. A. v. Turkey, 13.09.2005, app. no. 42571/98

holds that the universal definition of hate speech has not existed yet, and therefore every case which involved hate speech must by analyzing separately ad hoc. Although international human rights treaties[18] and conventions not only allow to signatory states to prohibit hate speech in their jurisdictions, but they are directly obliged to adopt this legislation. Similarly, in case above the Court stated rule that the absence of a universal European criteria in relation to the legal definition of hate speech expressions, which shall be excluded from the protection of the Convention, means that the conditions which define hate speech belongs to the sovereign right of Member States, accordance with doctrine of margin of appreciation. Of course, discretionally power of states is strictly limited by supervisory of the Court.

The most problematic issue of the practical application of hate speech legislation is question of identification of prohibited speech. In accordance with the principle of legal certainty in democracy, the fact that speech can be restricted or even criminalized by criminal law, limits of freedom of expression are define by using of certain objective criteria. In this context Bartoň distinguishes restriction of expression to protect other subjective rights of third person (right to protection of honour, dignity and equality guarantee) and restriction of expression to protect the public domain (morality, public order, etc.) [19].

Content of hate speech as a specific type of expression, deals with creating certain defamatory idea , directed against a group of persons defined by certain distinguishing characteristics - race, nationality, sexual orientation, gender, belonging to an ethnic group or religion. It is imply typically homophobic, racist and xenophobic prejudices that directly attack the human dignity of members of targeted groups, usually members of minority population.

Repík referred that racism is an attack on human dignity and, if it is aimed direct against some group, threatening the cohesion of society and its democracy. [20] Law protection of minority groups shall be legitimate purpose to constitute some restrictions in freedom of speech, eg. penalizing hate speech through law. In relation to the protection of minorities is hate speech usually associated with extremism problematic. As rightly noted the secretary general of the Council of Europe Thorbjorn Jagland, there was a clear connection between words on the internet that were used by certain groups and this awful act at Uttoya island.[21] Whereas spread of the hateful ideas can be a preliminary stage of a genuine violence, Criminal Codes includes group of verbal offenses[22], and thus the expression of such ideas may be per se defined as crime committed.

Tulkens outlined as the most important parameters which form the relative boundary of unprotected speech the particular context[23] in which the speech was made and the intentions of

[18] e.g. art. 20 of ICCPR
[19] See Bartoň, M.: Svoboda projevu: pricipy, garance, meze. Prague: Leges, 2010
[20] Repík, B.: Svoboda projevu versus rasismus ve štrasburské judikatuře. Trestněprávni revue, vol. 2/2004, p. 47
[21] Repík, B.: Svoboda projevu versus rasismus ve štrasburské judikatuře. Trestněprávni revue, vol. 2/2004, p. 47
[22] Madliak J., Mihaľov, J., Štefanková, S.: Trestne právo hmotné I. Všeobecná časť. Košice: University of Pavol Jozef Šafárik, p. 258
[23] Erbakan v. Turkey, 6.06.2006, app. no. 59405/00

the author[24] of expression. Similarly important is the assessment of the intensity and immediacy of prejudice directed against the targeted group (it must be analyzed from the author´s perspective) and a causal nexus between hate prejudices of expression. Although Barton notes that it is relevant to take into account the level of imminent danger, the European approach to this element can be defined as the concept of a latent danger, hypothetical, potential, or expected, but not imminent[25]. This approach emphasized in the judgment of the Court in case Vejdeland and Others v. Sweden[26], which shows that the state can prosecute racists, if they insult or ridicule revile a particular group of people, even if they do not encourage violence or other criminal offense. Before restricting the particular hate speech is thus necessary to take into account the primary element of aggressiveness and hate with coherence all context of the case.

Inherent legal consequences of hate speech are a collision between freedom expression and other fundamental human rights[27] - the protection of personal moral rights and protection of privacy. In the European hierarchy of virtues has priority the protection of the rights others. Undoubtedly speech containing hateful elements (racist, discriminatory, intolerant ideas, note) which may interfere with the rights of individuals or groups does not protected by art. 10 of Convention[28]. That argument is axiological basis for limiting or suspension of hate speech in a democratic society. Despite the fact that under the doctrine margin of appreciation the Member States have discretion power to consider the question of sanctioned a hate speech, the Court by its comprehensive case law has been determined numerous contextual elements of hate speech[29]. This line shall identify a hate speech expression. Necessary to note that every formality, condition, restriction or sanction aimed to the freedom of expression must be proportional to the legitimate objective[30].

The next part generally defined elementary criteria that should be reviewed to identify hate speech in coherence with the protection of the rights of others.

a) Individualization of an object and target´s subject hate speech - the more individualized and specific speech may cause the more potential damage to the rights of third person.

b) Social relevance of expression, sic to which the extent of hate speech lowers the dignity of the target group in the eyes of those who witnessed the speech. That element is related to the seriousness of expression in the context of a situation in which the speech was made. Right there the Internet plays an essential role, because via World Wide Web is the hateful verbal act globally widespread and accessible to public. There currently online hate speech covers a wide range of recipients thereby the severity of expression is increasing.

[24] Gunduz v. Turkey, 04.12.2003, app. no. 35071/97
[25] Bartoň, M.: Svoboda projevu: pricipy, garance, meze. Prague: Leges, 2010, p. 205
[26] Vejdeland a ostatní v. Sweden, 09.02.2012, app. no. 1813/07
[27] art. 8 and art. 10 of the Europen Convention
[28] Gunduz v. Turkey, 04.12.2003, app. no. 35071/97 § 41
[29] As well because the impossibility to find an objective definition of hate speech in diverse european countries..
[30] Pouperová, O.: Regulace medii. Prague: Leges, 2010, p. 165

c) Social status of the target group. The judgment in case Lingens v. Austria[31] defined the categories of persons as private persons and public persons (with an emphasis on politics and peace permissible critics). In relation to the restriction of freedom of expression, we can conclude that the Court distinguishes to what was a target group of hate speech. The reason lies politicians and public persons (e.g. celebrities) should be tolerate higher criticism and related possible negative content of statements against them.

d) As I mentioned above, the most important step (but not exclusive) is to evaluate the actual content in a specific context of concrete situation. In the last decade the developments in case law of the Court relating to restrictions on freedom of expression was marked by three essential factors. At the turn of the millennium it was the Turkish cases deals with glorification of violence, thereafter since 2008 started the era of racist or analogous homophobic expressions, and finally in 2012 the hate speech has experienced a new dimension of hate directed against the population of minority sexual orientation.

The Convention provides the strongest protection of political speech as well as speech content related to the res publica[32] . If we would use the words of the court - to limit the political and public expressions exist just "little room". Take into account the case of Castells v. Spain[33] where the Court noted that freedom of expression is especially appreciated in elections, mainly included expressions of fair political competition among elected representatives of the people. For this reason, the speech which was done in the context of free political competition shall have priority protection, and their potential restriction must be investigated with the extra sensitivity by judicial authorities. Further, the extra protection is afforded the expressions of artistic nature and expressions relating to the public interest.

e) The appropriateness of the form in which was speech manifested . The Court explicitly pointed out that in addition to context, special consideration shall be given to the medium through was the speech made.[34] In the case of journalist Jens O. Jersild the Court emphasized that the important factor during a dissemination of racist speech is the potential impact of speech, and audio-visual media are usually typical by more direct and widespread effect than the print media.[35] In modern days is the Internet regarded as essential information platform which supporting a various expressions. The Internet is a global system of interconnected networks, which is characterized by having a diffuse and global nature, the wide spreading of information, the simplicity of establishing contacts and the exchange of data.[36] Emotional expressions like hate speech may be found there in many forms. [37] Individuals and various extremist groups producing hate speech well know and use the main benefits of the Internet, which are:

[31] Lingens v. Austria (1986), app. no. 9815/82
[32] Sürek v. Turkey, app. no. 26682/95, § 62,
[33] Castells v. Spain, 23.04.1992, app. no. 11798/85
[34] Ferét v. Belgium, 16.07.2009, app. no.15615/07
[35] Jersild v. Denmark, app. no. 15890/89
[36] Goncalves A.: The applicaton of Rome II on the Internet Torts. Masaryk Universty Journal of Law and technology. Brno 2013, vol. 7 no. 1, p. 36
[37] See Výborný, Š.: Nenávistný internet versus právo. Prague: Wolters Kluwer ČR, 2013, p. 23

• broadening- spread hateful ideas, which are potential accessible to anybody, who pays for the Internet connection. Internet also allows quick and borderless contact among persons promoting racist and homophobic views.

• from economic point of view financial ease of the connection, i.e. financial ease of adoption and dissemination of hate speech in cyberspace

• anonymity of the hate speech announcer . Production of hate speech under the nicknames partially relieves the announcer of liability and gives that person a psychological courage. However, due to the existence of the IP address can be an element of anonymity to suppressed

• extremely important is the international element of the Internet, which provides the to announcer of hate speech the possibility to escape from jurisdiction of the State of which he/she are nationals. Users of the internet are generally in contact with more than one legal system.

f) Further the author of controversial statements shall be been analysed (e.g. his/her family or financial background).

g) From the perspective of criminal law theory will particularly relevant to examine intent and motive of the author. According to the Constitutional Court of the Czech Republic is also relevant that the author of the speech believed to the content of information, made it reckless and with grossly negligent without the first verifying the content of information [38].

Alternative methods of tackling Hate Speech

The issue of hate speech in cyberspace incorporates many different attributes that can be monitored by various disciplines. In the first case it is the area of information technologies and forms of dissemination of information in cyberspace. The second most important disciplines in the analysis of hate speech on the Internet are social sciences such as political science and its research of extremism and radicalism, psychology, sociology which can provide an important knowledge why hate speech is so widely preached and disseminated. The most important scientific disciplines within the given research are those which are closely related to body of law, namely jurisprudence. Traditionally, the law plays a central role in the various options concerning to restrictions on the dissemination of hate in the real and virtual world and as a system of normative rules may have a major influence on this area. For this reason a number of European and global organizations try to tackle this issue by way of adoption of legal measures to support the fight against hate speech. These legal actions aim to deny or reduce the legal protection of hate speech on the Internet. In response to the activities of international bodies, legal systems of respective states, more or less, regulate this issue in their national criminal codes. Even national courts often do not distinguish hate speech committed in real or virtual world and the judgments delivered by courts are equal for the offenders of cyber crimes as well as for other criminals. From this point of view the Internet is considered to be an equivalent mass communication medium than others. Generally it can be stated that the criminal law enforced by state and its courts acts as ultima ratio mechanism in case of hate speech on the Internet.

[38] Constitutional court of Czech Republic - Nález ÚS ČR zo dňa 17.07.2007, sp.zn. IV. ÚS 23/05

Tackling the issue of hate speech through law seems to be effective but not the only solution which is primary available. An appropriate attention should be paid to "pro futuro" prevention of hate speech on the Internet.

Therefore it is necessary to mention the alternative methods of tackling hate speech that might help lead effective restrictive state policy against hate websites. A partial solution to the problem could be an opportunity of using modern programs that would draw attention to abuse of a website while it at least partially filtered. At the level of practical precautions European Union fights against Internet threats using time-limited projects aimed to promote safer use of the Internet and new online technologies (Safer Internet, Safer Internet Plus, Safer Internet Programme). These programs are introduced mainly for children who may be particularly under threat of dangerous Internet content. Some of these programs also regulate access to the racist and xenophobic websites and thus prevent children obtaining inappropriate information. On the Internet there are several types of these programs primarily designed for children, such as Kids Web Menu, KidRocket, KidSplorer.

Above-mentioned programs do not govern all hateful content on the Internet and their functionality is sometimes very questionable. Although adults are able to reflect more critically received information, nevertheless many people agree with information distributed on the Internet (in Slovak Republic typically in case of insulting remarks against minorities). Teenagers are particularly a sensitive and vulnerable group. This group of young people still cannot critically reflect all the information and they are more inclined to radical solutions of social problems.

But these filters are not accepted without any reservation especially in the U.S. where they are offered by well-known organization, namely Anti-Defamation League - according to Dickerson's opinion it is the most widespread of all regulating freedom of speech based on content)[39], and the question is how these filters would be assessed in judicial practice.

Another alternative method is to give priority to activities that would alert users to an inappropriate content of individual web pages which can be viewed without necessity to remove it or obstruct his view. In practice hate website visitors might be aware of the content similar to that known for pornographic websites. Although these programs do not prevent access to websites containing intolerance, nevertheless they warn Internet users about propagandize colored content located on such servers and a need to recognize it. This warning could operate mainly to the user who still does not know an incriminated website and cannot detect their quasi-authenticity. Firstly the users could easily find out that the truth appearing on these websites may not be the real truth. The following measures, however, have to be taken at supranational level because their eventual enactment by legislative bodies in a single state would not compel a foreign provider's activities.

European Commission's Safer Internet Programme includes INHOPE (International Association of Internet Hotlines) as its part. INHOPE hotlines offer the public a way of anonymously reporting internet material, including child sexual abuse material, they suspect to be illegal. The hotline will ensure that the matter is investigated and, if found to be illegal, the

[39] DICKERSON, N. P. What Makes the Internet So Special? And Why, Where, How, and by Whom Should Its Content Be Regulated? *Houston Law Review*. 2009, XLVI, p. 61-102.

information will be passed to the relevant Law Enforcement Agency and in many cases the Internet Service Provider hosting the content. In Slovakia INHOPE activities are focused on website Stopline.sk, also called as "red button" programme or simply "hotline" which has been successfully installed since 2010. Stopline.sk works as an effective filter for the Police Force of the Slovak Republic, which are forwarded only cases of suspected illegal content or activity. Centre helps to avoid duplicate reporting administration in Slovakia, as well as INHOPE network.

Last alternative method that could protect Internet users against spreading extreme hate speech on the Internet is the regulation of Internet search engines. Primarily it is appropriate to ensure an advisable modification of searching certain words on the Internet – in the first place search engines would not provide links to sites with radical hate speech content, contrary such web sites suppress and thus they would not provide commercial or veracity of abusive sites. People often mistakenly consider that the first offered web references are the most credible. In practice, this can be demonstrated on the example of the search phrase "the constitution of Czechoslovak Republic" on the largest Internet search engine Google. On the third position we find the web link to website which gives the information about this historic event in extremist spirit and also contains anti-Semitic and other conspiracy theories. The cooperation of Internet search engines operators, who would not be excited to participate in the new actions, are necessary for effectiveness of these practical measures. The largest global Internet search engine Google, however, applies this type of regulation also sometimes in the U.S. and prioritizes some websites over others.[40]

Distinction between blasphemy and Hate Speech based on religion

Neither blasphemy nor hate speech based on religion are legally defined in Slovak legislation, there are only general provisions connected with freedom of religion and belief and extremism crimes in several legal acts.

First of all Constitution states that the freedoms of thought, conscience, religion, and faith are guaranteed. This right also comprises the possibility to change one's religious belief or faith. Everyone has the right to be without religious belief. and the right to publicly express his opinion. Everyone has also the right to freely express his religion or faith on his own or together with others, privately or publicly, by means of divine and religious services, by observing religious rites, or by participating in the teaching of religion.[41]

Secondly there is act on freedom of religious faith and on the position of churches and religious societies, which provides as well as constitution that everybody has the right to freely express their religion or faith, by themselves or jointly with other persons, privately or publicly, by divine service, tuition, devotional acts or maintenance of rites and everybody has the right to change their religion or faith or to remain undenominational. Everybody has the right to freely spread

[40] NUNZIATO, D. C. *Virtual Freedom: Net Neutrality and Free Speech in the Internet Ages*, Stanford: Stanford University Press, 2009, p. 12-17.
[41] Article 24 of the Act No. 460/1992 Coll. Constitution of Slovak republic, as amended

their religious faith or their conviction to remain undenominational. No person may be coerced into profession of a religious faith or into being undenominational.[42]

Finally, the Criminal Code provisions contain three subject-matters of extremism crimes, specifically Defamation of Nation, Race and Belief, National, Racial and Ethnic Hatred and Incitement, Defamation and Threatening to Persons because of their Affiliation to Race, Nation, Nationality, Complexion, Ethnic Group or Family Origin Moreover committing crime with intention to incitement of violence or hatred against group of persons or individual because of their religious belief[43] is considered as committing crime with specific motivation, which shall lead to the stricter criminal charge for the offender.

Defamation of Nation, Race and Belief commits any person who publicly defames any nation, its language, any race or ethnic group, or any individual or a group of persons because of their affiliation to any race, nation, nationality, complexion, ethnic group, family origin, religion, or because they have no religion [44]

The subject-matter of the National, Racial and Ethnic Hatred will be fulfilled if any person publicly threatens an individual or a group of persons because of their affiliation to any race, nation, nationality, complexion, ethnic group, family origin or their religion, if they constitute a pretext for threatening on the aforementioned grounds, by committing a felony, restricting their rights and freedoms, or who made such restriction, or who incites to the restriction of rights and freedoms of any nation, nationality, race or ethnic group.[45]

The crime of Incitement, Defamation and Threatening to Persons because of their Affiliation to Race, Nation, Nationality, Complexion, Ethnic Group or Family Origin is committed if any person publicly incites to violence or hatred against a group of persons or an individual because of their affiliation to any race, nation, nationality, complexion, ethnic group, family origin or their religion, if they constitute a pretext for the incitement on the aforementioned grounds, or defames such group or individual, or threatens them by exonerating an offence that is deemed to be genocide, a crime according to International Criminal Law, if such crime was committed against such group of persons or individual, or if a perpetrator of or abettor to such crime was convicted by a final and conclusive judgement rendered by an international court, unless it was made null and void in lawful proceedings, publicly denies or grossly derogates such offence, if it has been committed against such person or individual.[46]

To sum it up, even there is no legal definition of blasphemy or hate speech based on religion, the legal protection in cases of crimes committed on religious basis is provided.

[42] Section 1 of the Act No. 308/1991 Coll. on freedom of religious faith and on the position of churches and religious societies, as amended
[43] Article 140 of the Act No. 300/2005 Coll. Criminal Code, as amended
[44] Article 423 of the Act No. 300/2005 Coll. Criminal Code, as amended
[45] Article 424 of the Act No. 300/2005 Coll. Criminal Code, as amended
[46] Article 424 of the Act No. 300/2005 Coll. Criminal Code, as amended

Networking sites and the issue of online anonymity

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

On 28 May 2003 the Committee of Ministers of the Council of Europe adopted, at the 840th meeting of the Ministers' Deputies, the Declaration on freedom of communication on the Internet. The Principle 7 (Anonymity) reads as follows: "In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity. This does not prevent member states from taking measures and co-operating in order to trace those responsible for criminal acts, in accordance with national law, the Convention for the Protection of Human Rights and Fundamental Freedoms and other international agreements in the fields of justice and the police."

All activities carried out in information networks happen through providers. Social networking sites have become breeding ground for racists and extremist groups to spread their propaganda. It would be unfair to find ISPs legally responsible for illegal activities of their users. ISPs have no technical capacity to control all information that is communicated through their services and they are not required to monitor what is being transmitted or stored.[47] However, the law relies on them to enforce legal responsibilities because in some situations they have better means to factually enforce the law than police or courts alone. The national classification of ISPs is based on European Directive No. 31/2000/EC[48]. Slovakia harmonized its legal system by passing Act No. 22/2004 Coll. on Electronic Commerce.[49] Three types of ISPs are differentiated: Mere conduit providers, Caching providers, Hosting providers. The latter category relates to social networking sites, as we have seen in the Court of Justice of the European Union ruling in SABAM v Netlog.[50] The Court has effectively extended the "no duty to monitor" protection available to ISPs to social network owners, via their status as hosting providers. National court in Slovakia[51] came to the same conclusion and awarded the legal standing of hosting provider to an administrator of a discussion forum. Social networking site stores information provided by its

[47] Article 6 (5) of Act. No. 22/2004, Coll. on electronic commerce and amending the Law No. 128/2002 of the Collection of Laws on state supervision of the internal market in consumer protection matters and amending some laws as amended by the Law No. 284/2002 of the Collection of Laws.

[48] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

[49] Act. No. 22/2004, Coll. on electronic commerce and amending the Law No. 128/2002 of the Collection of Laws on state supervision of the internal market in consumer protection matters and amending some laws as amended by the Law No. 284/2002 of the Collection of Laws.

[50] CJEU C-360/10 Judgment Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV

[51] *Stacho v. Klub Strážov* [2012, case no. 19Co/35/2012,]. The County Court of Trencin (Krajský súd v Trenčíne)

users relating to their profile, on its servers, and that it is thus a hosting service provider within the meaning of EU law. If conditions are fulfilled, the directive and its implementing act limit the legal responsibility of a hosting provider. Since all the references from the aforementioned Act are to the private law legislation (namely to the Civil Code and the Commercial Code), Polčák[52] concludes that it was not the intention of the lawmaker to modify ISPs' administrative or penal legal responsibility.

Article 14 of E-commerce directive lays down conditions under which the service provider is not liable for the information it stores at the request of a user of the service. The first requirement is that the provider does not have actual knowledge of illegal activity or information. The term illegal activity or information is not explained in E-Commerce Directive. Therefore it applies to any content which is considered to be illegal according to EU or national legislation. Apart from sites containing infringements of intellectual property rights, this also includes sites containing racist and xenophobic content, incitements to terrorism or violence in general.[53]

Because of First Amendment concerns, the US would not sign the Convention on Cybercrime if it contained provision on hate speech. It was therefore decided to move hate speech provisions into a separate Additional Protocol. People against Racism, an independent civic community in Slovakia estimates that 95% of extremist websites with content in Slovak language is located in countries where dissemination and propagation of such materials is not illegal, that is primarily the US[54]. Internet intermediaries enjoy freedom to decide whether and how to regulate online expression. The First Amendment protects speech only from governmental restriction and thus does not govern private actors' decisions to remove or filter online expression.[55] It is ISP's own terms of service agreement that enables removal of offensive web material that breach their policies.

When it comes to connecting virtual identity with a "real" one, law enforcement agencies in Slovakia are dependent on cooperation with administrators of American servers. ISPs in US are reluctant to hand over the information about user's accounts, because according to their constitutional protection of free speech, alleged offender is not committing any crime. Facebook[56] discloses account records solely in accordance with own terms of service and the federal Stored Communications Act.[57] In case of international legal process requirements, a mutual legal assistance treaty request or letter rogatory may be required to compel the disclosure of the contents of an account. Data use policy informs Facebook's users that: "We may access, preserve and share your information in response to a legal request (like a search warrant, court order or subpoena) if we have a good faith belief that the law requires us to do so. This may include responding to legal requests from jurisdictions outside of the United States where we

[52] Radim Polčák. *The legal classification of ISPs*, 1 (2010) JIPITEC 172.
[53] European Commission, Commission Staff Working Paper, Online services, including e-commerce, in the Single Market (SEC(2011) 1641 final) (Jan. 11, 2012) p. 25
[54] 2004 International Network Against Cyber Hate (INACH): Hate on the Net - Virtual nursery for In Real Life crime http://www.inach.net/content/inach-hateonthenet.pdf
[55] Danielle Keats Citron and Helen Norton. *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age* (2011). Boston University Law Review, Vol. 91, p. 1435, 2011; U of Maryland Legal Studies Research Paper No. 2011-16
[56] https://www.facebook.com/safety/groups/law/guidelines/
[57] 18 U.S.C. Sections 2701-2712

have a good faith belief that the response is required by law in that jurisdiction, affects users in that jurisdiction, and is consistent with internationally recognized standards." It is clear from that wording that likelihood of handing over the information is subject to discretion of the social networking site.

If a non-U.S. law enforcement agency seeks to obtain data on a user of Yahoo services, the non-U.S. agency must work through the available diplomatic channels in its jurisdiction including any bi-lateral or multi-lateral legal assistant treaties or letters rogatory processes. Such requests may be made to the U.S. Department of Justice Office of International Affairs. Only after such requests have been processed by the U.S. Department of Justice and U.S. legal process is issued to Yahoo, will Yahoo respond to the process.[58] Yagoo's guidelines further state that disclosure request must identify the user account that is subject to the request by user ID, email address, screen name or other appropriate identifier. Requests to identify users based on real names or IP addresses may be declined. If a non-U.S. agency goes through a diplomatic process to obtain a U.S.-issued subpoena, court order or search warrant, American ISP would produce the same information as if the request originated directly from a U.S. agency. In cases where Google[59] honors legal process issued directly from the non-U.S. agency, the information disclosed could include, for example, Google or YouTube account registration information (name, account creation information and associated email addresses) and recent sign-in IP addresses and associated time stamps.

Through a mutual legal assistance treaty a foreign government can ask the U.S. government for help in obtaining evidence from entities in the U.S. If a request is approved by U.S. government, American ISPs will respond to it. Up to this date, Google,[60] Twitter,[61] Yahoo[62] and Facebook[63] didn't receive any information requests from Slovak law enforcement officials. The US as a party to the Convention on Cybercrime is not obligated to extradite defendants sought for prosecution for violating provisions of the Additional Protocol and there are no other multilateral treaties on point.[64]

On the other side, it is a common practice that network providers established in Slovakia are requested by police to breach the telecommunications secrecy[65] even when police is investigating misdemeanors and other petty offenses.[66] Online hate speech occurring on Slovakia based website (notably www.pokec.sk[67]) is prosecuted. The majority of cases where racist and xenophobic material was uploaded onto Facebook were adjudicated without the need to request

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[58] http://info.yahoo.com/transparency-report/us/law-enforcement-guidelines/
[59] http://www.google.com/transparencyreport/userdatarequests/legalprocess/#what_does_google_do
[60] http://www.google.com/transparencyreport/userdatarequests/countries/
[61] https://transparency.twitter.com/information-requests/2012/jul-dec
[62] http://info.yahoo.com/transparency-report/government-data-requests/
[63] https://www.facebook.com/about/government_requests
[64] Christopher D. Van Blarcum. *Internet Hate Speech: The European Framework and the Emerging American Haven*. 62 Wash & Lee L. Rev. 781 (2005).
[65] § 63 Act No. 351/2011 Coll. on Electronic Communications
[66] European Information Society Institute: The template complaint before the Slovak Constitutional Court in case of data retention. Available at http://www.eisionline.org/images/finish%20-%20podanie%20na%20ussr.pdf
[67] The Regional court of Dunajská Streda (Okresný súd Dunajská Streda, case no. 1T/199/2007)

identification information because convicts had created profiles under their own names.[68] Is should be noted that Act. No.204/2013 Coll. amended the Act. No. 301/2005 Criminal Procedure Code by adding extremist speech to the list of crimes that allow for of usage of ICT means of investigation, i.e. wiretapping and recording of telecommunication operations.

Tackling the notions of "violence", "hatred" and "clear presence of danger"

The American and European approaches to tackling hate speech differ enormously. In its First Amendment jurisprudence, the United States Supreme Court has construed very broadly the constitutional protection of free speech. Governments in Europe, however, have adopted laws restricting certain types of speech, particularly hate speech, based on the view that the human rights of oppressed groups cannot be protected fully if hate speech is permitted.[69] The US has become the place where hate groups use URLs or base their websites because they're protected under the First Amendment.

As adopted, Additional Protocol defines racist and xenophobic material as any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors. Within this wording "hatred" and "violence" are alternative conditions. The term "violence" refers to the unlawful use of force, while the term "hatred" refers to intense dislike or enmity.[70]

The Additional protocol requires that signatories ban racially motivated hate speech that is associated with violence. It is not clear how strong this association has to be, states are left some room to interpret this according to their own laws. The connection between speech and violence has to be very strong in US as was stated in United States Supreme Court decision Brandenburg v. Ohio.[71] The Court held that government cannot punish inflammatory speech as long as the speech does not reach the point of direct incitement to criminal action. Unless that speech is likely to incite imminent lawless action, online hate speech will not be punishable. Since the speaker and listener are separated and often do not even know each other, it is doubtful whether extreme speech on the Internet would result in immediate violence.[72] Online hate speech will therefore rarely be punishable under the Brandenburg test (also known as the imminent lawless action test).

Under the First Amendment, hate speech in the U.S. must be likely to cause violence or harm before it can be deemed criminal. But in the European Union, speech can be prohibited even if it

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[68] The Regional court of Povazska Bystrica (Okresný súd Považská Bystrica, case no. 2T/199/2011); The Regional court of Prievidza (Okresný súd Prievidza, case no. 2T/200/2011); The Regional court of Zvolen (Okresný súd Zvolen, case no. 5T/116/2011)

[69] Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 Wm. & Mary Bill Rts. J. 305 (1999),

[70] Explanatory Report to Additional Protocol to the Convention on Cybercrime

[71] Brandenburg v. Ohio, 395 U.S. 444 (1969)

[72] David Rosenberg, Jordan Kessler, Stephanie Wexler, B'nai B'rith: *Combating Extremism in Cyberspace: The Legal Issues Affecting Internet Hate Speech.* (2000)

is only abusive, insulting or likely to disturb public order.[73] At the European level, the right to freedom of expression is rooted in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. When deciding Article 10 cases the ECHR balances the exercise of the right to freedom of expression with its limitation by legitimate aims under Article 10(2). The court addresses the issue of whether the restriction is "necessary in a democratic society" as required by Article10(2), a phrase which the court has not interpreted to mean useful or desirable, but to correspond to a "pressing social need".

The European Court of Human Rights has explicitly stated that freedom of expression protects not only the information or idea that are favorably received or regarded as inoffensive or as a matter of indifference, but also protects those that offend, shock or disturb.[74] However, the Court held that the State's actions to restrict the right to freedom of expression were properly justified under the restrictions of paragraph 2 of Article 10 of the ECHR, in particular when such ideas or expressions violated the rights of others.[75]

In the case of Vejdeland v. Sweden, the ECHR held that while the particular speech in question "did not directly recommend individuals to commit hateful acts," the comments were nevertheless "serious and prejudicial allegations."[76] The ECHR further stated that attacks on persons can be committed by "insulting, holding up to ridicule or slandering specific groups of the population," and that speech used in an "irresponsible manner" may not be worthy of protection. Some authors view this as a departure from clear jurisprudence protecting expression that includes the right to shock, offend, and disturb and conclude that a chilling effect is created that leads to self-censorship and an overly sensitive society.[77]

This different approach is reflected in praxis. In 2002, Google quietly deleted more than 100 controversial sites from some search result listings. Most of the sites that were removed from Google.fr (France) and Google.de (Germany) were anti-Semitic, pro-Nazi, or related to white supremacy. The removed sites continue to appear in listings on the main Google.com site.[78]

The enforcement of domestic law online has recently led to surprising court rulings in several European countries, putting transatlantic ISPs under pressure.[79] We can mention a landmark case Yahoo! Inc v. La Ligue Contre Le Racisme et L'Antisemitisme. European law enforcement sought to extend their jurisdiction and enforce their content laws against material uploaded beyond national boundaries. It was alleged that Yahoo! had violated French law by displaying Nazi memorabilia on its auction website. Although the content originated in the USA, the French court ruled that Yahoo! was liable and should eliminate French citizens' access to the sale of Nazi merchandise. Yahoo! argued that its actions lay beyond French territorial jurisdiction, as

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[73] http://www.jweekly.com/article/full/68076/european-u.s.-laws-clash-on-policing-online-hate-speech/
[74] See, e.g., Handyside v. United Kingdom, 24 ECHR (1976)
[75] Explanatory Report to Additional Protocol to the Convention on Cybercrime
[76] Judgment on the merits delivered by a Chamber. *Vejdeland v. Sweden.* No. 1813/07, ECHR
[77] Roger Kiska. Hate speech: a comparison between the European court of human rights and The United States Supreme Court Jurisprudence.(2012) p.112
[78] Cohen-Almagor, Raphael, *Fighting Hate and Bigotry on the Internet* .Policy and Internet, Vol. 3, No. 3, Article 6, 2011.
[79] Frydman, Benoit and Rorive, Isabelle, *Regulating the Internet Through Intermediaries in Europe and the USA* Zeitschrift für Rechtssoziologie, Vol. 23, No. 1, pp. 41-59, 2002

the material was uploaded in the USA where such conduct is protected by the First Amendment. The court ruled that Yahoo! apply such mechanisms in order to seek to reduce access to the sale of Nazi merchandise. Yahoo! subsequently sought and received, from the United States District Court for the Northern District of California, a judicial ruling that the enforcement of the French authorities would breach the First Amendment of the Constitution.[80] The United States would likely qualify its participation in an extradition treaty to those cases where incitements pose an imminent threat of harm. But it appears that none of the provisions of the Protocol would be constitutional in US, with the possible exception of the Article concerning true racist and xenophobic motivated threats.[81]

Harmonisation of national legislation

Freedom of expression as one of the oldest guaranteed fundamental human rights[82] is prescribed by all relevant human rights documents. The Slovak Republic is a signatory to the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and the Charter of Fundamental Rights of the European Union. National jurisdictions are impacted by all these codes which harmonize (even to unify) the international humanitarian law. Because the law on hate speech is actually about an assessment the mechanisms of restrictions on freedom of expression, in this section we will examine this issue with emphasis on its harmonizing character.

A speech protected by law must be consistent with democratic principles. Freedom of expression as one of the cornerstones of democratic governance may be limited only in a way that is not contrary to the conditions contained in the above-mentioned sources of law. That premise is a common philosophical core to suspend the certain expressions (e.g. restriction of hate speech) in Western legal culture.

In accordance with the Convention under art. 26 (4) of the Slovak Constitution freedom of expression may be limited only by statute, if it is an necessary measure in society to protect the rights and freedoms of others or for the protection of public goods (national security, public order , and etc.). Fact still remains that in a culturally differentiated Europe have not been existed clear unifying criteria which define the concepts of public good or the protection of the rights of others. Therefore, in a case of restrictions on freedom of expression Member states enjoy a wider margin of appreciation.[83] That discretion power is linked to recognize the limitations to freedom of expression. Discretion power is much wider when it comes about protecting national security as in the case of granting the authority of the court to protect the rights of the others. A border of the discretion of Member States of Council of Europe is supervised by the European Court of Human Rights[84].

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[80] James Banks. *International Review of Law , Computers & Technology Regulating hate speech online Regulating hate speech online*. International Review of Law, Computers and Technology, 24, 3: 233-239, 2010.
[81] Christopher D. Van Blarcum. *Internet Hate Speech: The European Framework and the Emerging American Haven*. 62 Wash & Lee L. Rev. 781 (2005).
[82] See art. X and art XI *Déclaration des droits de l'homme et du citoyen* (1789) or *United States Bill of rights* (1791)
[83] Čapek, J.: Evropská úmluva o ochraně lidských práv. I. část – Úmluva. Prague: Linde Praha, 2010, p. 427
[84] *Müller* and Others v Switzerland, app. no. 10757/84

The hate speech generally causes a collision of two fundamental human rights[85]. The common European element of all jurisdictions which regulate hate speech is a test of proportionality, developed by the Court and others European constitutional courts. The test consists in judicial review of legal and factual issues, whether the restriction of freedom of expression is necessary in a democratic society, with an accent to the proportionality of a legitimate aim. The importance of the proportionality test in conjunction with hate speech cases lies in the ability to detect conclusive arguments in favour or against the need for restrictions on freedom of expression in order to protect human dignity and democracy[86]. Proportionality test consists of three steps:

a) Does the measure in question pursue a sufficiently important objective? - The main question is whether restriction freedom of expression is suitable to achieve the objective pursued. Thereby imitations of free speech by law are the appropriate mechanism to eliminate racist and xenophobic manifestations of society. Indeed, critics point to the fact that the law can not change a person's inner beliefs. They argue that against hate speech restrictions should lead the fight through education[87]. On the other side, empirical experience from Eastern Europe (anti-Roma pogroms) or Breivik massacre suggest that legal action against hate speech are important, even necessary because there exists close relation between hate speech and hate crime[88].

b) The criterion of necessity - Is the restriction measure rationally connected with objective? Focus on whether it is really necessary in order an author of hate speech will be regarded as criminals

c) The criterion of seriousness - Does the measure achieve a fair balance between the interests of the individual(s) and the wider community? During a final phase should be consider on conflicting fundamental rights, in particular on the meaning, context and scheme of the rights in question

If restrictions against freedom of speech do not pass over proportionality test, this measure will be excluded and the speech will be included in the protection of the Constitution, alternatively under protection of Convention. Despite fact, that test of proportionality is common element of jurisdiction of Member states of Council of Europe we should note the doctrine of margin of appreciation, because it is likely that different national courts may consider the question - what measures are necessary in a democratic society - differently. Therefore country A may classify similar speech as hate crime and country B may have own autonomous criteria for hate speech legislation, which are not harmonize with the legal order of country A.

Key harmonizing factor in Europe is the ECHR, its supervisory power and its comprehensive case law. Similarly states the Parliamentary Assembly in its Recommendation 1805 (2007) point 9: "any restriction on freedom of expression must be in accordance with the case-law of the ECtHR."

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[85] freedom of expressions versus freedom on privacy
[86] Výborný, Š.: Nenávistný internet versus právo. Prague: Wolters Kluwer ČR, 2013, p 52
[87] Baker, C. E.: Hate speech. Public Law and Legal Theory. http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1197&context=faculty_scholarship
[88] Výborný, Š.: Nenávistný internet versus právo. Prague: Wolters Kluwer ČR, 2013, p 55

The future legislation of the Slovak Republic should consider adopting the law to regulate more precise the hate speech in cyber space (especially in the criminal code). As is rightly mentioned in the Conception[89], the present international trend[90] focuses on the definition of the hate crime. It is a crimes in which the victim of the offense is selected on the basis of their actual or presumed belonging, connection , support , or membership of a group determined by common characteristics such as race , nationality or ethnic origin , language , religion , sexual orientation, etc. Slovak legislature should inspire by Criminal Codes of countries from west Europe and adopt this group of criminal offenses in the Slovak Criminal Code. Online hate speech should belong to subset of hate crimes. As well from the international point of view Slovak republic should become the next signatory of the Additional protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer system.

Legal implications of "hate speech"

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

There are many theoretical approaches and definitions of hate speech; they usually differ in number of targeted social and cultural groups. One of the broadest definitions says that „hate speech is bias-motivated, hostile, malicious speech aimed at a person or a group of people because of some of their actual or perceived innate characteristics. It expresses discriminatory, intimidating, disapproving, antagonistic, and/or prejudicial attitudes towards those characteristics, which include gender, race, religion, ethnicity, colour, national origin, disability or sexual orientation. Hate speech is intended to injure, dehumanize, harass, intimidate, debase, degrade and victimize the targeted groups, and to foment insensitivity and brutality against them."91

In practice, there are legal definitions of hate speech in many European countries. They tend to place questions of race and ethnic origin, and religion and philosophical belief in the foreground, with increasing attention being paid to sexuality, but relatively little being paid to gender, or "disability"92, so they specify hate speech in quite narrow way. For instance, Denmark defines hate speech as publicly making statements that threaten, ridicule, or hold in contempt a group due to race, skin colour, national or ethnic origin, faith, or sexual orientation.93 Then the Dutch Criminal Code holds: "anyone, who publicly, orally, in writing or graphically, intentionally expresses himself insultingly regarding a group of people because of their race, their religion or their life philosophy, their heterosexual or homosexual orientation or their physical, psychological or mental disability, shall be punished by imprisonment of no more than a year or

[89] Conception of fight against extremism for years 2011-2014
[90] See documents from OSCE or ODIHR
[91] Council of Europe,"Starting points for Combating Hate Speech Online" < https://www.act4hre.coe.int/rus/content/.../Starting%20points.pdf> accessed 15 September 2013
[92] Council of Europe,"Starting points for Combating Hate Speech Online" < https://www.act4hre.coe.int/rus/content/.../Starting%20points.pdf> accessed 15 September 2013
[93] Article 266(b) of the Danish Criminal Code

a monetary penalty of the third category."94 Norway prohibits hate speech, defined as "publicly making statements that threaten or ridicule someone or that incite hatred, persecution or contempt for someone due to their skin colour, ethnic origin, homosexual life style or orientation or, religion or philosophy of life."95 These examples show that national legislators consider important to define hate speech and set the border between hate speech and freedom of expression.

On the other hand The United States have more liberal view on the issue of hate speech and strictly protect freedom of expression. Regulation of freedom of expression in the United States emerged from the interpretation of the First Amendment of the United States Constitution. The First Amendment provides that Congress shall make no law abridging the freedom of speech. This standard runs contrary to the European development.[96] The different approaches of the United States and European states might bring difficulties in case of online hate speech, as Internet is currently the easiest way how to spread information including also hate speech ideas.

The landmark case Yahoo! Inc v. La Ligue Contre Le Racisme et L'Antisemitisme shows that, while states are able to successfully prosecute hate crime that takes place within their own territorial boundaries, they have not been able to extend their reach beyond their borders. Consequently, online hate speech which originates in one jurisdiction, but whose effects are felt elsewhere, continues to go unregulated. In the relevant case French court held Internet Service Provider Yahoo liable for breaching French law forbidding the offering for sale of Nazi merchandise by displaying Nazi memorabilia on its auction website. Yahoo argued that its actions lay beyond French territorial jurisdiction, as the material was uploaded in the USA where such conduct is protected by the First Amendment of the US Constitution and subsequently sought and received, from the US Court, a judicial ruling that the enforcement of the French authorities would breach the First Amendment of the Constitution. The US court made it clear that while hate speech is odious, it will be protected under the First Amendment unless it can be demonstrated that such speech contains a direct, credible 'true' threat against an identifiable individual, organization or institution; it meets the legal test for harassment; or it constitutes incitement to imminent lawless action likely to occur. What makes this case unique is that the Internet in effect allows one to speak in more than one place at a time. Although France has the sovereign right to regulate what speech is permissible in France, this Court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders.[97]

The Yahoo case proved that the definition of hate speech on international level is inevitable because hate speech may be easily spread via Internet all around the world. Cyberspace crosses traditional geographic and jurisdictional boundaries making the implementation of jurisdiction-

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94 Articles 137(c) and 137(d) of the Dutch Criminal Code

95 Norwegian Criminal Code, Straffeloven,section 135a

96 Yulia A. Timofeeva, "Hate Speech Online Restricted or Protected? Comparison of Regulations in the United States and Germany" (2003) 12:2 J.TRANSNATIONAL LAW & POLICY <http://www.law.fsu.edu/journals/transnational/vol12_2/timofeeva.pdf> accessed 16 September 2013

97 James Banks, "Regulating Hate Speech Online" (2010) 24:3 International Review of Law, computers & Technology <http://dx.doi.org/10.1080/13600869.2010.522323> accessed 16 September 2013

specific laws difficult to implement. An activity which may cause one party in his jurisdiction to feel aggrieved may not be illegal in the other party's jurisdiction.[98]

Therefore Council of Europe introduced The First Additional Protocol to the Convention on Cybercrime, which requires the adoption of measures prohibiting the transmission of racist or xenophobic messages through computer systems. It criminalizes Internet hate speech, including hyperlinks to pages that contain offensive content[99]. The United States[100] however informed the Council of Europe that it will not be party to the protocol as it is inconsistent with their constitutional guarantees (above mentioned First Amendment of the Constitution). So while the European countries have increased coordination and cooperation in combating hate crime, the USA's commitment to unilateralism is problematic. USA has also no bilateral extradition treaties with European countries and therefore no commitment to deliver defendants to be charged with committing hate speech offences. Consequently, European countries are unable to enforce civil judgements in US courts and unable to extradite US offenders for criminal prosecution. This is likely result in the USA increasingly becoming a safe harbour for hate speech propagators. Increased cooperation between European countries may simply result in an increase in the number of bigoted websites originating in the USA as racists and extremists seek to avoid prosecution by moving their operations to America.[101]

The Additional Protocol to the Convention on Cybercrime is considered as important milestone in the fight against hate[102], however the hate speech there is restricted on race, colour, national or ethnic origin and religion, thus there are still social and cultural groups which are not covered in the definition. For combating hate speech on international level s most important to find the compromise between stricter European regulation and liberal approach of the United States.

Legal implications and differentiation of related notions

Like in real world, there are various "online" forms of "hate speech" in the virtual world working in various directions. This chapter is aimed to present further possible diversifications of cyber hate expressions and explain the terms "intimidation" and "provocation" and their close relation to the term "incitement to hatred". We suppose that these terms are similar but not equal with regard to content. The terms mentioned in the following text will be explained, we will compare and examine the Slovak criminal law whether or not it regulates these terms.

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98 Carliste George, Jackie Scerri, "Web 2.0 and User-Generated Content: legal challenges in the new frontier" (2007) Journal on Information, Law and Technology < http://ssrn.com/abstract=1290715> accessed 14 September 2013

99 "racist and xenophobic material means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors" (Art. 2 of the Additional Protocol to the Convention on cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer system)

100 The United States are not member state of Council of Europe, however they signed and ratified the Convention on Cybercrime

101 James Banks, "Regulating Hate Speech Online" (2010) 24:3 International Review of Law, computers & Technology <http://dx.doi.org/10.1080/13600869.2010.522323> accessed 16 September 2013

102 Cohen- Almagor, "Fighting Hate and Bigotry on the Internet Policy & Internet" (2011) 3/3 <http://www.psocommons.org/policyandinternet/vol3/iss3/art6> accessed 16 September 2013

In contemporary globalized world with increasingly meeting various cultures and nations, there are attacks of "those others", those who differ from majority society in any manner. However, such attacks don´t need be inevitably of a physical nature in real world but they are increasingly experienced in virtual world of Internet network. Intimidation represents the first term included in the category of such attacks. In general, intimidation can be understood as a feaze, threatening, provocation of concerns on restriction of rights and freedoms. Intimidation can have verbal or written form as well as mass media and Internet form. While provocation and hate-encouraging is mainly directed towards an individual, we have reported also a group of citizens exposed to such actions. Hateful private e-mails with content capable of fear arousal at the recipient are a typical example of online intimidation. Public online intimidation, e.g. on the social networks (Facebook, Twitter) is directed towards certain group of citizens that differs from majority of the society. These hateful expressions are often race or religion motivated and systematically directed towards denial of fundamental human rights and freedoms.

The term "intimidation" isn´t expressly stated in the Slovak national legislation. The term is similar to "dangerous threatening" that is legally defined in § 360a of the Criminal Code.[103] We suppose that the term implicitly contains intimidation since factual substance of the criminal act requires arousal of reasonable concerns. Dangerous persecution (§360b) is another criminal act regulated by the Slovak Criminal Code, closely related to the term "intimidation". In this case, the Criminal Code also stipulates arousal of reasonable concern of victim´s or his/her relative´s life or health or, alternatively, significant worsening of the victim´s life quality. With regard to perpetrator´s acting form, it is completely clear that dangerous persecution can be committed also through Internet since it is sufficient according to the law when a perpetrator contacts its victim through e-communication system that Internet undoubtedly is. The Slovak criminal law doesn´t distinguish a legal definition of intimidation but poses it as an alternative factual substance of particular criminal acts.

Provocation can be explained in general as an encouraging of certain activity. It can be described as a provoking act or conduct that is capable of outraging the public because of its unacceptable and shocking content. Provocation includes cases of hateful expressions with indirect or hidden hate. Contrary to intimidation, provocative conduct isn´t primarily aimed to raise victim´s concern of life, health, etc.; it can refer also to irony use on account of certain nation or race. Provocation is only aimed to raise tension inside the society that could further result in hateful expressions. From this point of view, provocation seems like a softer form of hate. That however doesn´t mean that the cases of provocation, in concreto online provocations, should be non-punishable. On the contrary, hidden danger of provocation lays in its efficient creation of a room for violation encouraging in the society and oppression of rights and freedoms of an individual. Provocation appears on websites in various forms, e.g. as jokes with racist implication or ironical expression directed towards ethnical, religious and political minorities. Other examples include provocative drawings, pictures or photos and video-records published on the social networks. Misuse of Internet mail for declaration of false and provoking information aspersing the attacked minority represents an independent category. Primarily, it is not about the spam issue but "hoax" phenomena. Hoax can be defined as a spread of alarm, dangerous and useless chain messages distributed by virtual mail users trusting the hoax content and considering

[103] Act No. 300/2005 Coll. Criminal Code

important to forward it to their relatives and friends, which is an important factor of this phenomena. In this way, hoax is able to provoke a part of community to hateful expressions.

The Slovak legislation doesn´t contain legal definition of the term "provocation" nor does it enlist acting that can be considered provocative. To our opinion, the term "provocation" similar to "intimidation" is incorporated in many other factual substances of particular criminal acts, namely encouraging national, race and ethnical intolerance (§ 424 of the Criminal Code), denial and approval of Holocaust and political regimes´ criminal acts (§ 422d of the Criminal Code) and partly also defamation of nation, race and belief (§ 423 of the Criminal Code). Factual substances of the enlisted criminal acts require public commitment. The Slovak Criminal Code defines the term "public" as a criminal act commitment in front of three or more people but doesn´t regulate criminal act commitment on Internet. Accordingly, virtual criminal act commitment might be seen problematic when considering „public commitment". The Slovak Criminal Courts solve this problem rather unambiguously if a hateful expression is published on public accessible mass social network; that meets requirement of "public" and imposes criminal responsibility of perpetrator.

We should mention that not every provocation committed online reaches criminal act intensity. Less serious forms of provocation can be punished by the civil law as civil delinquencies. Affected party (physical and legal entity) can sue author of such act on protection of honor and goodwill. Such civil-legal type of protection is ensured by provision of § 11 – 17 of the Slovak Civil Code,[104] regulating personal protection. Provoking conduct can be found also in the commercial law within business competition, frequently witnessing various unfair practices applied by deceitful businesses trying to put a slur upon competitors, for example through provocation advert, false and misleading information about products on Internet. Commercial Code provisions on economic competition protect businesses against such unfair actions.

"Incitement to hatred" refers to the last term discussed in this chapter. "Incitement to hatred" usually means an expression through which the perpetrator intends to raise hate towards a nation, nationality, race or ethnical group at other persons or to make people to act towards restriction of rights and freedoms of such group members. The expression form isn´t important but we can state that such hate is mainly encouraged on the Internet that is freely accessible by a wide public. This fact multiplies the risk of hate encouraging expressions, be it in direct, indirect or hidden form.

The web category, so called "mobilization webs" represents a special form of hate encouraging since these webs are aimed to mobilize members of particular sub-culture to an action along with promotion of ideas (e.g. in the form of participation on demonstration, active fight against ideological enemies, civil and illegal activities etc.) With regard to risk and hate rate, the mobilization web category belongs to those most important since the mentioned actions are often full of hate, calling for illegal acts including violence. These servers also contain information about already organized events aimed to close up the community and encourage the members to future activities. This category is closely related to the category of information propagandistic servers, aimed to distort the information so as it supports the members´

[104] Act No. 40/1964 Coll. Civil Code

conviction. Violent actions have been increasingly encouraged on the social networks that, namely Facebook, represent most frequently used virtual mean of hate spread. Social networks can serve as a mutual communication server for particular sub-culture members as well as a platform for attracting attention and recruiting sympathizers of their ideas.

Specific cases of encouraging violence on the Internet include also Internet shops focused on sale of clothes and further things related to any hateful movement or, in general, to the extremism scene. The shops are not only aimed to spread material associated with particular ideas or communities among their supporters but also to raise funds that could be later used for sponsorship of any activities or support of people facing troubles with law.

Internet games with hateful context represent the last category of hate encouraging. These games represent potential danger mainly because of ability of virtual violence to support approval of citizens with such form of problem solving.

The Slovak Criminal Code doesn´t define the term "incitement to hatred", yet the national legislation applies the term in various provisions of the Criminal Code, e.g. encouraging national, race and ethnical hate (§ 424) and encouraging, defamation and threatening of persons because of their affiliation to a race, nation, nationality, skin colour, ethnicity or origin (§ 424a). According to the law theory, these criminal acts can be included in a broader group of criminal acts, generally called "hate-grounded criminal acts".