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HATE SPEECH AS A VIOLATION OF HUMAN RIGHTS: THE MEANING, IMPLICATIONS AND REGULATION IN CRIMINAL LAW

The freedom of expression...constitutes one of the essentials foundations of such a society, one of the basic conditions for its progress and for the development of every man.

Handyside v. United Kingdom, 1976.

Abstract:

Freedom of expression is one of the guaranteed human freedoms and the conditio sine qua non of contemporary society. However, its scope is not unlimited. Certain restrictions are necessary in order to prevent the violations of rights and freedoms of othersin the broadest sense. Hate speech represents the unprotected expression, but legal approaches to its sanctioning are not unique. This paper deals with basic features regarding hate speech and its criminal law regulation in selected legal systems. Having in mind modern European tendencies, we give the overview of specific case law from European Court of Human Rights, important for establishing legal standards in this area. At the end, provisions of Croatian criminal law are presented, including numerous changes that were adopted within the scope of this incrimination.

Keywords: *hate speech, freedom of expression, violation of human rights*

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I. INTRODUCTORY REMARKS ON THE MEANING OF HATE SPEECH IN MODERN LEGAL SYSTEMS

The position of freedom of expression can be described as constitutive element of the society, a basic prerequisite of its progress and for development of every man. This was stated almost forty years ago on behalf of European Court of Human Rights (ECtHR). [1] In its judgments this Court also stressed the necessity to fight against racial discrimination in all its forms[2] as well as the role of tolerance and respect for the dignity of all people in democratic and pluralist society.[3] Having this in mind, freedom of expression is not an absolute right. It assumes certain duties and responsibilities.[4] Limitations are also provided in European Convention on Human Rights and Fundamental Freedoms (ECHR). They are possible in exceptional cases under cumulative assumptions: ordered exclusively by law with purpose to protect explicitly specified individual and social values to the extent necessary in a democratic society and proportionate to the need.[5] Although democracy without freedom of expression is unthinkable, it can be conflicted with other guaranteed human rights as democratic society foundations.[6] [7] It is believed that freedom of expression has three elements: freedom of thoughts, freedom of dissemination of ideas

[1] «The freedom of expression...constitutes one of the essentials foundations of such a society, one of the basic conditions for its progress and for the development of every man» *Handyside v. United Kingdom* App no. 5493/72, (ECtHR 7 December 1976), Series A No. 24, para 49. The case is relevant since the *margin of appreciation* was determined for the first time. It is one of the main interpretive principles, meaning that ECHR may be interpreted in different ways in signatory countries, taking into account the diversity of legal systems.

[2] *Jersild v. Denmark* App no 15890/89 (ECtHR September 1994), Series A No. 298, para 30.

[3] *Günduz v. Turkey* App no 35071/97 (ECtHR 4 December 2003), para 40 and *Erbakan v. Turkey* App no 59405/00 (ECtHR 6 July 2006) para 56.

[4] For analysis of freedom of expression within Hohfeld`s and Dvorkin`s understanding of human rights, see I. Tucak, `Analysis of Freedom of Speech`, *Jura A Pecsi Tudomanyegyetem Allam-es*, Karanak tudomanyos lapja 2011, 1. szám, pp. 132-141.

[5] Of all the rights that the ECHR provides, only prohibition of torture, freedom from slavery, prohibition of retroactive application of criminal law and the prohibition of expulsion of its own nationals cannot be restricted (they are absolute), while all other rights are subjected to different restrictions modalities depending on the circumstances. I. Radačić ed., `Interpretativna načela Europskog suda za ljudska prava`, *Usklađenost hrvatskog zakonodavstva i prakse sa standardima Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda*, Centar za mirovne studije, 2011, p. 34.

[6] A. Weber, *Manual on Hate speech,* Strassbourg, Council of Europe Publishing, 2009., p. 2.

[7] When it comes to conflict of Human Rights with the same legal status, the fundamental problem is to set up a fair balance. When it comes to relation between particular human right and legitimately restrictions, fundamental problem is to establish proportionality of restrictions if the legitimate purpose to be achieved. The first problem is the case of the relation of two equal principles and the second problem is the relation between the primary principle and secondary exceptions. V. Alaburić, *Sloboda izražavanja u praksi Europskog suda za ljudska prava,* Zagreb, Narodne novine, 2002, pp. 56-57.

and information and the freedom to receive ideas and information.[8] A particularly sensitive problem occurs when this freedom is used to manifest various forms of incitement to hatred and intolerance that leads to the so-called "hate speech".

Even though our life experience teaches us that this speech is a common social phenomenon, relatively easily recognized, to this day there is no generally accepted definition.[9] This fact is often subjected to criticism.[10] The notion is common in ECtHR judicature, but this Court has not yet engaged in its strict definition. The result is a sort of substantial departure from the notion that national courts use.[11] Croatian literature contains a review of particular hate speech content as well as basic common features: expression of certain hate content oriented to certain social groups that have common characteristics.[12] In Recommendation of Committee of Ministers of the Council of Europe No. R (97) 20 it is stipulated that hate speech includes 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 through aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and immigrant origin persons.[13]

Weber classifies manifests of hate speech into three groups: incitement of racial hatred (hatred directed against persons or groups based on race), incitement to hatred on religious grounds (as well as hatred on the basis of the relationship between believers and

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[8] For every elements content see: Z. Đurđević, `Sloboda izražavanja: čl. 10 Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda` cited in I. Radačić (ed.), *pp.*154-159.

[9] R.M. Simpson, `Dignity, harm and hate speech`, *Law and Philosophy*, vol.32, 2013, pp. 701-728. The author states that hate speech includes, for example, violence and abuse based on assumptions of identity, use of certain epithets, extreme political and religious attitudes and use of certain symbols of hatred. These are activities that promote the idea of belonging to a common social determinism implies susceptibility to contempt. See also, Weber, p. 3.

[10] For example, Kiska stated that hate speech can actually mean whatever people choose, because it lacks an objective element of judgment. In this context, no one knows what hate speech is or how to determine it. R. Kiska, `Hate Speech: A Comparison between the European Court of Human Rights and the United States Supreme Court Jurisprudence`, *Regent University Law Review*, vol. 25, issue 1, 2012-2013, p.110.

[11] On judgments in which this was the case as well as the autonomous concept theory used by the ECtHR, see Weber, op.cit. (n 6) 3. The autonomous interpretation of certain terms is not uncommon. In doing so, the national law determinations are sometimes just a "starting position" which does not bound the Court. General principles of law as well as other international instruments on human rights and freedoms are taking into account. See, Radačić, pp. 38-39.

[12] See, V. Alaburić, `Ograničavanje «govora mržnje» u demokratskome društvu-teorijski, zakonodavni i praktični aspekti`, 1 *Hrvatska pravna revija*, 2003, pp. 63-65.

[13] «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.» Recommendation No.R (97)20 of 30 October 1997, the Committee of Ministers to Member states on «Hate speech» available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec%2897%2920_en.pdf, (accessed on 4 May 2015).

nonbelievers) and incitement to other forms of hatred based on intolerance on the basis of aggressive nationalism and ethnocentrism.[14]

The problem of appropriate social response to verbalization of discrimination, intolerance and violence is not easy to solve. There are no simple guidelines on how we should treat hate speech in the general communication process. The problem includes the relation of legal system towards the weak and different ones. Hate speech control is described as "certainly the most complex border problem in the freedom of expression field."[15] This control is aggravated through collision with freedom of expression, a fundamental human right enshrined in all major international documents on human rights and freedoms.

Generally speaking, there are two opposing models, known as the American and European model. The first one treats hate speech mostly as an integral part of freedom of expression. In second, this is abuse of freedom that needs to be sanctioned. Still, this division is to be taken *cum grano salis*, since the case law is showing the lack of strict dichotomy. More precisely it can be said that inappropriate expression of this kind is not absolutely prohibited in American jurisprudence, nor absolutely forbidden in European one. Appropriately designed indicators are used to show the breach of provided safeguard provisions. This will be discussed later.

According to ECHR, the freedom of expression can be restricted due to three-fold legitimate objectives: protection of public interest (national security, territorial integrity, public safety, prevention of disorder or crime, health or moral protection), maintaining the authority and impartiality of the judiciary and the protection of others rights and interests (preventing the confidential information disclosure and the protection of the reputation and rights of others). It is the last objective that is *raison d'être* for hate speech sanctioning. Alaburić stipulates that the "rights of others" is a complex notion, a sort of common denominator for different individual and group rights and legitimate interests. It covers the right to protection from discrimination and from hatred and violence (based on race, colour, national origin, religion, gender, sexual orientation or on some other feature), the right to privacy protection, the right to a fair trial, to protection of professional, market-commercial and business interests, the right to an effective and unbiased democratic institutions etc.[16]

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[14] Weber, p. 4. More informations on minorities rights in the context of International Conveant on Civil and political Right regarding of hate speech protection, see, N. Ghanea, `Minorities and Hatred: Protections and Implications`, *17 International Journal on Minority and Group Rights*, 2010., pp. 423-446.

[15] Alaburić, op.cit. (n 12), p. 62.

[16] See Alaburić, op.cit. (n 7), p.52.

Fundamental rights and freedoms are proclaimed as general legal standards that need to be interpreted and applied *in conreto*.[17] They receive their full significance through interpretation of case law.

What does freedom of expression actually include? ECtHR interprets it extensively so that it covers freedom of opinion and freedom to receive and impart information and ideas, whereby the information itself is interpreted extensively. It is not just about facts, data and topics of public interest published through media, but also photographs, television and radio programs. The right of artistic expression is included which enables intercession with cultural, social and political information and ideas of all kinds, as well as freedom of information of commercial value. Furthermore, it is not only about the information content of but also transmission mode, taking into account the role of the media in a democratic society.[18] This broad and complex concept encompasses a variety of forms and methods of spreading and receiving information and ideas through any media and regardless of frontiers. It is about the various ways verbal and nonverbal expression, closely connected with other ECHR rights and freedoms.[19]

We can conclude that hate speech may include verbal or nonverbal manifest of hate, which is generally practiced in order to develop the culture of hatred against certain groups in society. Harm effects of this speech towards the individual and society have repeatedly been the subject of various scientific analyses.[20]

II. SHORT OVERVIEW OF RELEVANT INTERNATIONAL DOCUMENTS, COMPARATIVE REGULATION IN SELECTED SYSTEMS AND EUROPEAN COURT OF HUMAN RIGHTS PRACTICE

Legal approaches to hate speech sanctioning are not unique. Specific acts sanctioning this speech are the product of second half of twentieth century, significantly influenced by

[17] Freedom of expression is the primary principle and its possible limitations are only exceptions. These exceptions are to be precisely formulated and narrowly interpreted in practice. Hate speech belongs among these exceptions. Alaburić, op.cit. (n 12), p. 62

[18] Weber, op.cit. (n 6), pp. 20-22.

[19] For example, a fair trial, the right to privacy, the right to freedom of thought, conscience and religion, freedom of assembly and association, the prohibition of discrimination on any ground in the enjoyment of ECHR rights. Alaburić, op.cit. (n 7), p. 21-22.

[20] Previous analysis of (hate speech) harmful effects Alaburić classifies into six basic categories: causing emotional distress, humiliation and loss of dignity, denial and restrictions of human rights and freedoms; discriminatory messages, maintenance of social subordination and inequality; victim silencing through intimidation and encouraging individual and mass violence. Alaburić, op.cit. (n 12), pp. 66-68.

specific historical and national circumstances. The consequences of Nazi-regime in Germany led to hate speech restrictions are an obvious example. Certain scholars (mostly from USA), support the view that state should not sanction hate speech since freedom of expression is so valuable that it excludes the interference of repressive state mechanism. Therefore, it is stipulated that hate speech enjoys the protection of the First Amendment, allowing strong freedoms in the area of speech and expression in general.[21] This approach had inspired many authors to analyse it to the point of statement that the amount of American academic literature on this issue exceeds everything written in all other countries. Simpson stipulates that legal status of hate speech is an "absorbing issue" considering that it creates pressure in practicing liberal democratic freedoms of others. He emphasizes the fact that many American authors support the case law which favours the First Amendment, protecting wide freedom of speech.[22] In this regard it expresses significantly greater tolerance towards verbal and nonverbal manifests of hate speech contrary to European countries where legal restrictions are well established and basically unchallenged. Accordingly, hate speech is considered as a form of speech (despite that it may hurt others)[23] and generally is not subjected to sanctions in the United States. This applies even when it comes to, for example, racial violence proclamations, burning flags or protesting on homosexual equality held at the funeral of one soldier.[24] Despite of this liberal attitude, there are certain categories of speech that are not allowed: the obscene (licentious) speech (obscenity), slander (defamation) and speech that represents a "clear and present danger"[25] creating substantial damage.[26]

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[21] In American literature, themes related to the constitutionality of restrictions on freedom of speech and hate speech prohibitions are relatively frequent. One of examples are Campus speech codes: lists of rules that education institutions use to suppress hate speech. The sanction is usually a suspension or expulsion. See, N. Strossen, `Regulating Hate Speech on Campus: A Modest Proposal?` (1990), *Duke Law Journal*, June 1990, pp. 484-573. See also, Kiska, op.cit. (n 10), pp. 138-140.

[22] Simpson, op.cit. (n 9), p. 702.

[23] W. Brugger, `Ban On or Protection of Hate Speech? Some observations Based on German and American Law` vol.17., no.1, *Tulane European &Civil Law Forum*, 2002, p. 2.

[24] See, R. Cohen, `Regulating Hate Speech: Nothing Customary about It` (2014), *Chicago Journal of International Law*, vol. 15, no. 1, p. 231. Following decisions are important: *Brandenburg v. Ohio* (1969) 395 US 444, paras 448-449; *Texas v. Johnson* (1989) 491 US 397, para 420; *Snyder v. Phelps* (2011) 131 S. Ct. 1207, para 1220. The author points out that the protection covers even the most vulgar forms of hate speech since offensiveness alone does not provide a constitutional basis for combating hate speech.

[25] Clear and present danger doctrine is a result of *Schenck v. United States* (1919) 249 US 47, 52. The founder is Supreme Court Judge *Oliver Wendell Holmes*, who expressed the view that hate speech should be protected only when it does not impose a clear and present danger for people. It is to observe the circumstances which indicate a clear and present danger and will it cause certain harms that Congress has a right to sanction, since freedom of speech does not mean freedom to terrorize or to arouse hatred. See, http://definitions.uslegal.com/c/clear-and-present-danger/, last accessed on 10 May 2015. Also see N. Živanovski, `Različit tretman govora mržnje u procesima komunikacije u Evropi i SAD`, *Communication and Media Journal*, vol.32, 2014, pp. 63-64.

[26] Kiska, op.cit. (n 10), p. 139. One interesting category of punishable speech is called "fighting words". Those are words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

From this perspective, there are two reasons why the majority of European countries restrict freedom of expression. The first is the so-called "values-based" approach to speech, balancing between the principles of dignity and equality of the individual and freedom of expression. In this collision, principles take precedence over expression. Second reason is the fact that the governments of European countries are considered to be responsible for these values and principles realization (the state has an obligation to respect them as well as to protect them from encroachment of others). This justifies the regulated limits.[27]

A detailed review of relevant European documents, agreements and recommendations applicable to hate speech is beyond the scope of this paper.[28] It is sufficient to mention that some of them are the Charter of the United Nations from 1945 (Art. 55c); Universal Declaration of Human Rights from 1948 (Art. 19); International Convention on the Elimination of All Forms of Racial Discrimination from 1966 (Art. 2 (1) d and Art. 4, whereby Art. 1 broadly defines racial discrimination)[29], International Covenant on Civil and Political Rights from 1966, entered into force in 1976 (Art. 20 and 26); Recommendation of Committee of Ministers of the Council of Europe on Hate Speech, No.R (97) 20. Furthermore, Framework Decision on Combating Racism and Xenophobia as well as the provisions of the international courts statutes that criminalize incitement to genocide. Important is also the Convention on Cybercrime, concerning the criminalization of acts of racist and xenophobic nature committed through computer systems and the Additional Protocol to the Convention which extends its scope and deals with hate speech.

The ECHR was adopted in 1950 within Council of Europe and entered into force in 1953.[30] In addition to the proclaimed provisions, of significant importance is the supervisory mechanism which monitors the potential violations of the Member States: the ECtHR in Strassbourg. Every state has positive and negative duties: a negative obligation

[27] See, Cohen, op.cit. (n 24), pp. 238-239. The difference in the European and American courts approach to hate speech is evident. However, in one case, the US Supreme Court dealt with the balance between human dignity and freedom of speech. The preference was undoubtedly given to freedom of speech. It was said that importance of freedom of expression in a democratic society goes beyond any theoretical and unproven benefits of censorship: "The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship" *Reno v. ACLU* (1997) 521 US 844, 885.

[28] For overview, see Weber op.cit. (n 6), pp. 7-17.

[29] This act proposes various measures to combat racial discrimination and hate speech. In Art. 4 it requires to signatory parties to establish specific criminal offense: all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, any act of violence or incitement to violence against any race or group of persons of another skin colour or ethnic origin as well as any assistance to racist activities, including financing. The same goes for propaganda, promotion and encouragement of participation in such activities.

[30] For Croatia, it is binding from 05. 11. 1997, when the Act on Ratification of the ECHR came into force (Official Gazette-International Treaties 18/97). The basic proclamations of ECHR entered Croatian legal system earlier, we can say from the end of 1991, when Constitutional Act on Human Rights and Freedoms and Rights of Ethnic Minorities in the Republic of Croatia came into force since Art. 1 of this Act states the obligation to respect the ECHR and its protocols.

assumes "restraint" i.e. not to affect the guaranteed rights and freedoms more than necessary. Positive duty implies the obligation to ensure conditions for unhindered use of guaranteed rights and their protection.[31]

ECHR guarantees freedom of expression, but at the same time provides possible restrictions in Art. 10 (2). Some authors stipulate that ECRH is the first human rights instrument which provides restrictions on freedom of expression.[32] As mentioned earlier, they can be classified into three different categories. The existence of these restrictions is important when imposing repressive measures in national legislation, since Member states use reference to the legitimate convention limits.

When deciding *in concreto* on freedom of expression, two ECHR provisions are important. Already mentioned limitations are stated in the Art. 10 (2). Prohibition of abuse of rights, is regulated under 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 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" This is the basis renunciation of protection to specific content of the speech directed to promoting hatred and violence.[33] The basic difference in application between the Art. 10 (2) and Art.17, is the type of expression (we can call it the strength of injury to others). In cases when expression or speech is aiming at ECHR rights/freedoms denial, the Art. 17 will be applied. Decision is made when deciding on application admissibility, without deciding on the merits.[34] If the concerned expression does not have such a "heavy" content, but it represents specific term that can be considered as hate speech, the court will examine the restrictions provided in Art. 10 (2).

When deciding on violation, ECtHR applies three-part test. This test consists of fulfilment of following conditions regarding imposed restriction: prescribed by law, designed

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[31] In this regard, the State is treated in two ways in ECHR: as a possible violator of human rights and freedoms and as a guarantor of their compliance. Modalities for the violation of ECHR are acts or omissions. Alaburić, op.cit. (n 7), p. 12; Đurđević, op.cit. (n 8), p. 162.

[32] R. Clayton and H. Tomlinson, *The Law of Human Rights,* Oxford, Oxford University Press, 2008., p. 1058, cited in Đurđević, ibid, p.160.

[33] Specific relation between this Article and others is explained in *Lawless v. Ireland*, App no 332/57 (ECtHR 1 July 1961), Series A3, para 7. According to Weber, this Article was first applied in 1957. in *Communist Party (KPD) v. Federal Republic of Germany*, 20 July 1957 Weber, op.cit. (n 6), pp. 22-26

[34] Examples of such judgments: promoting national socialist values- *Schimanek v. Austria* App no 32307/96 (ECtHR 1 February 2000); denial of the Holocaust- *Garaudy v. France* App no 65831/01 (ECtHR 24 June 2003); expression of religious and racial hatred - *Glimmerveen and Hagenbeek v. Netherlands* App no 8348/78 and 8406/78 (ECtHR 11 October 1979); also *Rujak v Croatia* App no 57942/10 (ECtHR 2 October 2012).

to protect a legitimate aim (Art. 10 (2) ECHR), and necessity in a democratic society.[35] If all three conditions are satisfied, there is no violation.[36] Hate speech does not enjoy the ECHR protection, as confirmed by the ECtHR practice which will be presented in next chapter. However, political discourse enjoys a high degree of protection due to significant value for democratic society. When it comes to speech restrictions permissibility, ECtHR uses following criteria: the purpose of speech (intention to spread racist ideas, or to inform the public on matters of public interest), the content of the speech (can it cause feelings of hostility, rejection and hatred of the target population) and context (status and role of offender in society, the dominant social climate, manner, place and media of expression as well as targeted audience).[37]

Protocol 12 to the Convention[38] proclaims exercising all rights set forth by law, 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. Generally speaking, European countries prohibit discrimination already through constitutional provisions and their criminal law provisions are sanctioning not only discriminatory behaviour, but also hate speech.

An influential example of specific hate speech regulation we can find in Germany. Its criminalization and amendments are often perceived as a complex answer to the "darkest" period of German history, under the Nazi regime. This answer consists in the collective recognition of historic circumstances and developments as well as in providing safety guidelines for the future. Therefore it is often cited as an example of European model regarding the hate speech regulation (new model of democracy).[39] German Constitution guarantees freedom of speech, but also proclaims human dignity as an inviolable.[40] The apparent supremacy of human dignity compared to other values can be seen in Art. 21 of

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[35] The first two conditions are relatively easy to verify, while the third is subjected to more detailed examination. Weber, op.cit. (n 6), pp. 30-32; Kiska, op.cit. (n 10), pp. 122-129; Đurđević, op.cit. (n 8), pp. 160-162.

[36] In restrictions of speech assessment, American court apply three-part test also: is the speech protected by the First Amendment, what kind of place is the one in which the subject practiced speech ("the nature of the forum") which greatly dictates the restriction standards, and is the restriction justifying necessary standards (requisite standards). See, Kiska, op.cit. (n 10), p. 139.

[37] M.M. Vajda, `Zakonska podloga za sankcioniranje govora mržnje-devedestih i danas` in Maja Dubljević (ed): *Procesuiranje ratnih zločina-jamstvo procesa suočavanja s prošlošću u Hrvatskoj*` , Zagreb, Documenta, 2014, p. 368.

[38] Official Gazette – International Agreements 14-160/2002

[39] See, F. Kübler, `How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights`, Hofstra Law Review, vol. 27, no.2, 1998, pp. 336-338.

[40] Grundgesetz fur die Bundesrepublik Deutschland, Art. 5, available at https://www.bundestag.de/grundgesetz, (last accessed on 15 June 2015). German *Bundesverfassungsgericht* acknowledged human dignity as a central point of all decisions. See, C. Enders, `The Right to have Rights: The concept of human dignity in German Basic Law` (2010) 2(1) Revista de Estudos Constitucionais, Hermeneutica e Teoria do Direito (RECHTD)

German Constitution. Some authors point out that this is a result of increased sensitivity to human dignity in general. With this in mind, German Criminal Code (*Strafgesetzbuch*) contains extensive provisions against hate speech in Art. 84, 85 and 130.[41]

Although without written constitution, United Kingdom has a legal tradition that respects and protects individual rights and freedoms. Being signatory of many international treaties, UK guarantees their protection. Some authors stipulate that hate speech restrictions actually existed for centuries.[42] In this context, four acts are of significant importance. Race Relations Act from 1965, incriminates public speech and publications that are threatening, abusive or insulting and directed on promotion of hatred based on race, colour and origin.[43] Public Order Act from 1986 prohibits actions intended to encourage racial hatred. Protection from Harassment Act from 1997 prohibits behaviour (including speech) that increases the hatred towards "the other" and Racial and Religious Hatred Act from 2006, criminalizes speech that may encourage racial or religious hatred.[44]

France has the reputation of being a country with the strictest prohibitions on hate speech in Europe.[45] Some authors even claim that in relation to the other fundamental

[41] The criminalization of Holocaust denial is colloquially referred to as *Auschwitz Lüge* or Auschwitz Lie. It was the reason for the changes in limiting freedom of speech that was initially based on insult, libel and similar forms of verbal aggression. Given that former general provisions could not be applied to the protection of human dignity when it comes to this particular situation, in 1960 a new provision was written. German *Bundesgerichshof* distinguished simple and qualified Auschwitz lie, until 1994, when the provision was changed again and the entire § 130 (3) was adapted to Holocaust denial criminalization. Kübler, op.cit. (n 39), pp. 340-345. Denying the Holocaust or the complaint of victim exaggerating is considered to be a simple lie. It becomes qualified if associated additional conclusions or calls into action. Brugger, op.cit. (n 23), p.15. Today, the Article is as follows: *§130 Volksverhetzung, (3) Mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe wird bestraft, wer eine unter der Herrschaft des Nationalsozialismus begangene Handlung der in §6 Abs. 1 des Völkerstrafgesetzbuches bezeichneten Art in einer Weise die geeignet ist, der öffentlichen Frieden zu stören, öffentlich oder in einer Versammlung billigt, leugnet oder verharmlost. (4) Mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe wird bestraft, wer öffentlich oder in einer Versammlung den öffentlichen Frieden in einer Würde der Opfer verletzenden Weise dadurch stört, dass er die nationalsozialistische Gewalt- und Willküherrschaft billigt, verherrlicht oder rechtfertigt.* See, Detlev Sternberg-Lieben in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch, Kommentar*, (29. Auflage, C. H. Beck, 2014), pp. 1521-1522.

[42] Cohen, op.cit. (n 24), p. 241.

[43] See, P.N. Sooben, ´The Origins of the Race Relations Act´, Research Paper in Ethnic Relations No.12, Warwick, Centre for Research in Ethnic Relations, University of Warwick, 1990, available at https://web.warwick.ac.uk/fac/soc/CRER_RC/publications/pdfs/Research%20Papers%20in%20Ethnic%20Relations/RP%20No.12.pdf, (accessed 15 May 2015).

[44] All mentioned Acts are available at http://www.legislation.gov.uk, accessed 15 May 2015. In addition, the Crown prosecution service (Crown Prosecution Service-CPS) has issued guidelines for violent extremism prosecution. Some authors evaluated them as simple and extensive standards that are easy to fill and make it easier to prosecute. Cohen, op.cit. (n 24), p. 242.

[45] It is described it as a country that has ruthless culture of free speech repression, preventing that certain topics become public. See, S. Schulman, `The Great Free Speech Experiment. What good have Holocaust-denial bans done?`, *The Weekly Standard*, vol.20, no.19, 2015, p.1.

rights, freedom of expression has a "back seat" in the French constitutional hierarchy and is known for its freedom of speech inferiority recognition, compared to other rights. Nevertheless, the problem of speech and hatred motivated violence is progressive.[46] Within the relevant French legislation, we can mention the Pleven anti racism Law from 1972 and Gayssot Act from 1990. Pleven Law provides protection from racial discrimination in public and private sphere by banning speech that provokes discrimination, hatred or violence towards persons or groups based on ethnicity, nationality, race or religion. Gayssot Act was adopted as a response to growing violence and is described as the most controversial regulation of hate speech in Europe. It incriminates questioning of one or more crimes described in the Statute of International Military Tribunal (Art.6). Similar to German regulation, it prohibits Holocaust denial. This controversial act is criticized on behalf of large part of the French professionals and association for human rights and media freedom and described as a potentially unconstitutional.[47]

2.1. European Court of Human Rights

As mentioned, expressions protected with Art. 10 are not only limited to (written or spoken) words, but also includes pictures, visual presentations and the actions aimed at idea expression or information presentation. It is not only the content, but also the form in which they are expressed (means for the production and communication, transmission or distribution of information and ideas are also "covered"). Freedom of expression also includes the negative freedom, i.e., the freedom not to express. Likewise, one of the characteristics of Article 10 is that it protects expression that carries the risk of damage or actually harms the interests of others. In general, opinions held by the majority or large groups are not at risk to come to the intervention of the state. That is why protection provided by Article 10 includes information and opinions expressed by small groups or even an individual when such an expression shocks the majority. In this regard, the ECtHR determined that Article 10 protects not only information or ideas that are favourably received or regarded as inoffensive or something that does not cause reactions, but also those that offend, shock or disturb. Such are demands of pluralism, tolerance and broadmindedness without which there is no democratic society.[48],[49]

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[46] See, Cohen, op.cit. (n 24), pp. 243-244.

[47] Also, The "Lellouche" Law from 2003 establishes that racist or anti-Semitic grounds for an offence are considered as aggravated circumstances. See, Responding to Racism in France, European network against racism, ENAR-France, available at http://cms.horus.be/files/99935/MediaArchive/pdf/france_en.pdf, (accessed 15 May 2015).

[48] M. Macovei, `Sloboda izražavanja - Vodič za primjenu Člana 10 Evropske Konvencije o ljudskim pravima`, *Priručnik iz oblasti ljudskih prava br. 2*, 2004, pp. 5-14.; J.A. Frowein, `Freedom of expression under the European Convention on Human Rights`, *3 Monitor/Inf* , Council of Europe, 1997.

[49] *Handyside v. United Kingdom*, op.cit. (n 1), *Jersild v. Denmark*, op.cit. (n 2).

The opinions expressed by sharp and exaggerated language are also protected, and the scope of protection depends on the context and purpose of criticism. In matters of public controversy or public interest, during a political debate, in election campaigns or when critics refer to the Government, politicians or state authorities, sharp words and harsh criticism can be expected and the ECtHR tolerates them to a greater extent. In the case *Erbakan v. Turkey*[50] the ECtHR stated that by using religious expressions in his speech, Mr. Erbakan indeed reduced diversity – a factor inherent in any society – to a simple division between "believers" and "non-believers" and called for a political line to be formed on the basis of religious affiliation. The Court also pointed out that combating all forms of intolerance was an integral part of human-rights protection and that it was crucially important that in their speeches politicians avoid making comments likely to foster such intolerance. However, in view of the fundamental nature of freedom of political debate in a democratic society, a severe penalty in relation to political speech can be justified only for compelling reasons. The ECtHR concluded in that regard that it is particularly difficult to hold the applicant responsible for all the comments cited in the indictment. Furthermore, it had not been established that the speech had given rise to or had been likely to give rise to a "present risk" and an "imminent danger". Taking into account the seriousness of one year imprisonment, it was found that the interference with freedom of expression of the applicant was not necessary in a democratic society. Therefore, ECtHR accordingly held that there had been a violation of Article 10.[51] Likewise, in the *Jersild*[52] case the significant fact was that an interview containing racist statements was presented in a serious news program which was intended to inform the public about serious events in the community or abroad.

Article 10 does not provide protection in cases of direct expressions which promote violence or a real possibility for the violence exist. In the case of *Le Pen v. France*, the applicant was the chairman of the French party The National Front, who was in 2005 sentenced to a fine of 10000 Euros for "incitement to discrimination, hatred and violence towards group of people for their origin or belonging to particular ethnic group, nation, race or religion." He was convicted because of the interview he gave to a weekly newspaper Le Monde, in which he asserted, among other things, that the day there are no longer 5 million Muslims in France, as it was then, but 25 million they will be in charge. What he actually meant was that the French should be afraid of that moment. After that he was sentenced to another fine of the same amount, after having commented on the initial fine in the weekly Rivarol in the following words: "When I tell people that when we have 25 million Muslims in France we French will have to watch our step, they often reply: 'But Mr. Le Pen, that is already the case now!' – and they are right." The French Court of Appeal

[50] *Erbakan v. Turkey*, op.cit. (n 3).

[51] ibid

[52] *Jersild v. Denmark*, op.cit. (n 2).

considered that Le Pen's freedom of expression was not a justification for incitement to discrimination, hatred or violence. In a decision of 20 April 2010 the ECtHR has declared the application of Le Pen manifestly ill-founded and hence inadmissible since Le Pen's comments had certainly presented the Muslim community in a disturbing light, likely to give rise to feelings of rejection and hostility. Furthermore, in its comments it can be read that for him a rapid growth in the number of Muslims is a latent threat to the dignity and security of the French people. The ECtHR found that the interference with Le Pen's enjoyment of his right to freedom of expression was "necessary in a democratic society" and that his conviction in France represents allowed limit of freedom of (political) expression.[53] This decision shows there is no excuse for the speech of hatred[54] and that politicians must avoid comments that might promote intolerance.[55]

The speech that promotes Nazi ideology, denies the holocaust and incites hatred and racial discrimination represents a special problem. In the *Kühnen* case, the applicant was the head of an organization which tried to restore a National Socialist party, which was banned in Germany. He wrote and distributed publications in which he encouraged the fight for independent greater Germany. Kühnen lodged an appeal against the conviction, which was imposed upon him by the German Court, on the basis of Article 10. The application was declared inadmissible, relying on Article 17 of the ECHR which prohibits the execution of any action aimed at the destruction of any of guaranteed rights and freedoms. It was determined that the applicant advocated national socialism with the aim of compromising the basic order of freedom and democracy, and that his speech is in opposition to one of the fundamental values mentioned in the ECHR preamble. Basic freedoms set forth in the Convention are "best protected ..... by effective political democracy". In addition, it was found that the applicant's policy clearly contains elements of racial and religious discrimination.[56]

In connection with the ban of speech that promotes Nazi ideology, we should mention the decision of the ECtHR in the case of *Schimanek v. Austria*. The applicant was convicted in Austria for promoting Nazi ideology and sentenced to eight years imprisonment. The applicant, as the leader of neo-Nazi organization, recruited new members and organized special events where they glorified Nazi Germany (Third Reich), organized army and special forces, whilst at the same time denied systematic murders and the use of poison gas in the concentration camps that had happened in Nazi Germany. Furthermore, it was found that he transmitted a Nazi ideology to the members and organized distribution of pamphlets with similar content, organized paramilitary training camps in order to seize power in Austria and incorporate it into the great Germany (*Grossdeutschland*). The ap-

[53] *Jean-Marie Le Pen v. France* App no 18788/09 (ECtHR 20 April 2010).

[54] Ibid.

[55] Ibid.

[56] *Kuhnen v Federal Republic of Germany*, App. No. 12194/86 (ECtHR 12 May 1988).

plicant considered that the conviction constituted interference with his right to freedom of expression, which is prescribed by the law. In his complaint he stated that there was a violation of Articles 3, 7, 9 and 10 of the Convention. The ECtHR found in this case that the right to freedom of expression may not be invoked as a justification for actions aimed at denying the rights of others. The applicant was found guilty for holding a leading position in the Nazi organization, advocating a totalitarian doctrine incompatible with democracy and human rights. Applying Art. 17, ECHR declared that it does not constitute a violation of the right to freedom of expression, thus the application was inadmissible.[57]

The public debate statements that deny Holocaust are not protected by Art. 10. In the case of *Garaudy v. France*, Roger Garaudy, a French citizen, wrote and published a book titled "The Founding Myths of Modern Israel" In this book he questioned the nature and conditions of the Holocaust, using as an example the so called „myth of the six million". It was considered that the content of the book denies the Holocaust. The French courts convicted Garaudy for "Holocaust denial", a criminal offense under French law, for libeling against Jews and incitement to racial hatred. After that, he lodged a complaint to the ECtHR in which he alleged that his right to freedom of expression under Art. 10 was violated. However, the ECtHR concluded that the author's conviction did not violate his right to freedom of expression. In its decision it was stated that "denial of crimes against humanity is one of the most serious forms of offending Jews on racial grounds and incitement to hatred against them." Also, denial of the existence of clearly established historical events such as the Holocaust, is not a scientific or historical research, but the clear objective is rehabilitation of Nazi regime and blaming the victims for falsifying history. Therefore, as incompatible with the fundamental values of ECHR it is not protected by the right to freedom of expression.[58]

Case X v. Germany is one of the earliest cases concerning denial of the Holocaust. The applicant exhibited and distributed pamphlets containing statements which described the Holocaust as "unacceptable lie"and "Zionist fraud". These pamphlets were seen on his estate. His neighbor, a Jew, whose grandfather was killed in the German concentration camp Auschwitz, lodged a civil complaint against him. The Federal Court emphasized that denial of the Holocaust is not protected by the freedom of expression prescribed in the German Constitution. After that, Mr. X applied to ECtHR claiming that Art. 10 was violated, together with Art. 6 (the right to fair trial). Regarding Art. 10, it was found that "... in describing the historical fact of the murder of millions of Jews, the fact that the applicant himself recognized as lies and Zionist fraud, not only do these pamphlets give a distorted picture of the relevant historical facts, but also contain an attack to the reputation of all of those who were described as liars and swindlers... In addition, having found the complaint inadmissible, it was stipulated that the Holocaust is "well known historical fact", proved

[57] *Schimanek v. Austria* App no 32307/96 (ECtHR 01 February 2000).

[58] *Garaudy v. France* App no 65831/01 (ECtHR 24 June 2003)

beyond any doubt by numerous evidence of every kind, and therefore the ban was justified by the protection of the reputation and rights of others.[59]

In Witzsch v. Germany the applicant complained of the violation of Art. 9 and 10, when German courts did not take into account that his views were expressed in private letters. Among other things in these letters Mr. Witzsch denied the existence of gas chambers and mass killing by calling them "the so called gas chambers" and "historical lies".[60] German Federal Constitutional Court stated that although the applicant did not deny the Holocausts itself, he disparaged the dignity of the dead by denying the Hitler and Nazi party responsibility. Accordingly, the ECtHR declared that the views expressed by the applicant were contrary to the content and the spirit of the ECHR and that his statements, according to Article 17 of the Convention, cannot be protected by Article 10. The fact that his views are expressed in a private letter and not expressed publicly is of significant importance. Punishment of the applicant was necessary and proportionate in a democratic society in order to prevent disorder and crime for defamatory statements about the Holocaust, as well as the need to protect the interests of the victims.[61]

Prohibition of discrimination is established by Art. 14. "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." In the case of *Glimmerveen and Hagenbeek v. Netherlands,* the applicants were Glimmerveen, the chairman of the political party võiks Nederlandse Unie, supporting the need for "pure ethnic society", while Hagenbeek was the member of the party. They distributed pamphlets addressed to "white Dutch people" in which they insulted immigrant workers on racial grounds. The applicants were convicted for the possession and planned distribution of these pamphlets.[62] They lodged a complaint to ECHR, relying on Art. 10 and Art. 3 of the Protocol (right to free elections). The complaint was declared inadmissible, explaining that "the applicants attempted to exploit the European Convention on Human Rights in order to engage in activities which are contrary to the Convention", i.e. "in order to spread ideas of racial discrimination."[63]

The ECtHR did not find any violation of Art. 10 in convicting the applicant, the chairman of the *Front National* party, for public incitement to discrimination or hatred, upon receiving complaints about the flyers that his party had been distributing during the electoral campaign. Namely, he was convicted in Belgium for distributing election flyers with

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[59] *X v. Federal Republic of Germany* App no 92351/81, (ECtHR 16 July 1982) para 29.

[60] Alaburić, op.cit. (n 12), p. 14.

[61] *Witzsch v. Germany* App no 00041448/98, (ECtHR 13 December 2005)

[62] Alaburić, op.cit. (n 12), p. 14.

[63] *Glimmerveen and Hagenbeek v. Netherlands* App no 8348/78 and 8406118 (ECtHR 11 October 1979)

the slogans "stand up against islamification of Belgium", "Stop to fake integration politics", "Send back home non-Europeans seeking jobs", and the flyer "Mind your own business!" was in particular the subject of numerous criminal complaints submitted by citizens to the police.[64]

In addition to racial discrimination, ECHR also prohibits any form of discrimination based on sexual orientation. In case of *Vejdeland v. Sweden*, the applicant, with three other people, went to a higher secondary school and distributed about hundred leaflets, leaving them in student's lockers. The incident ended when the principle of the school intervened and forced them to leave the premises. The author of the leaflets was an organization called National Youth, and the leaflets alleged that homosexuality is "deviant sexual proclivity", which had "morally destructive effect on the very substance of the society", and which is responsible for the existence of HIV and AIDS. For these reasons the applicants were charged for agitation against national or ethnical group. The ECtHR concluded that the conviction of the applicant did not breech their right to freedom of expression. Furthermore, the Court considered that the allegations in the leaflets were serious and full of prejudices, hence they emphasized that discrimination based on sexual orientation is as offensive as discrimination based on race, origin or skin color.[65] Although these allegations did not represent direct call for hatred or other criminal offenses, the verdict could reasonably be considered "necessary"in a democratic society with an aim to protect reputation and rights of others.[66] Namely, attacks on persons or specific groups of population, exercised through insults, defamation and disparagement can be enough of a reason for the government to decide to combat racist speech when faced with irresponsible exercise of rights to freedom of expression.[67]

Article 10 also applies to all relations between employers and employees, i.e. other individual rights are protected as well. This is evident in the case of *Fuentes Bobo v. Spain.* ECtHR concluded that the Art. 10 of the Convention was breeched when a producer of broadcasting TV company was dismissed after making insulting remarks in two interviews about the manager of a Spanish TV company. The Court reminded that Article 10 is applicable to all relations between employers and employees even to those which fall under the domain of private law, and that the state, in certain cases, has positive obligations to protect the right of freedom of expression. In addition, the ECtHR pointed out the following: "...Article 10 of the Convention does not guarantee freedom of expression without restrictions, even when it comes to newspaper reports on serious issues of general interest." In this case, the use of expression such as "leeches" on account of certain executives could have, with no doubt, harm his reputation and it therefore justified the punishment.

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[64] *Feret v. Belgium* App no 15615/07 (ECtHR 16 July 2009)

[65] See, *Smith and Grady v. United Kingdom* App no 33985/96 and 33986/96 (ECtHR, 25 July 2000), para 97.

[66] *Vejdeland v. Sweeden* App no 1813/07 (ECtHR 9 February 2012).

[67] See also, *Féret v. Belgium*, op.cit. (n 64).

However, the impugned statements were an integral part of public and acrimonious debates on alleged irregularities in the management of the state TV. These statements were previously made by "radio speakers"and the applicant only confirmed them (...) during quick and spontaneous exchange of words". In addition, the managers did not initiate any proceedings for defamation and insults. According to the Court the applicant's dismissal with no rights to compensation represented "very sever character of disciplinary sanction, although less severe and more appropriate disciplinary sanctions could have been taken into consideration.[68]

III. HATE SPEECH REGULATION IN REPUBLIC OF CROATIA

Hate speech does not only include the abuse of freedom of expression, but also violation of equality[69] as one of the highest constitutional values. It is the right of every person not to be discriminated and their dignity and equality should be respected. Freedom of expression is protected in the Republic of Croatia at the constitutional level. In this context, the following Constitution provisions are relevant:[70] The freedom of thoughts and their expression (Art. 38) which may be restricted by law with purpose to protect freedoms and rights of others, public order, public moral and health (Art. 16). Restrictions are subjected to the proportionality principle and must not lead to discrimination on certain grounds (the scope of restrictions should be adequate to the endangerment nature and may not result in citizen's inequality based on race, color, sex, language, religion, national or social origin, Art.17). Furthermore, respect and legal protection of personal and family life, dignity, reputation and honor is guaranteed (Art. 35). Invitation or incitement to war or use of violence, national, racial or religious hatred or any form of intolerance is forbidden and punishable (Art. 39). In this regard, hate speech is not protected freedom of expression. It is interesting to mention that (freedom of expression) restrictions regulated in Art. 16 are shorter than legitimate aims for a restriction in the ECHR in Art. 10 (2): Constitution provides four and ECHR a total of eight of them. Certain forms of manifested hate speech owe their frequency to historical circumstances in specific multi-ethnic area. There is no official definition of hate speech in Croatia, but it does not mean it is not punishable. Sanctions are provided in criminal law since severe forms of hate speech

[68] *Fuentes Bobo v. Spain* App no 39293/98 (ECtHR 29 February 2000)

[69] The defendant, with his statements indulged in hate speech and justification of physical confrontation and attacks on the homosexual group. He directly incited to violence and hatred towards LGBT people. This represents discrimination prohibited by Anti-discrimination Act , Art. 4 (1) and Art. 1 (1), (2), based on sexual orientation. See, Vrhovni sud Republike Hrvatske, *eng.* Supreme Court of Republic of Croatia, decision VSRH Gž 38/2011-2, 7 March 2012.

[70] *Ustav Republike Hrvatske, eng. Constitution of Republic of Croatia,* (Official Gazette 56/90, 135/97, 113/00, 28/01, 76/10, 5/14).

are regulated as criminal offense in Criminal Code. In the context of criminal law regulation, it should be emphasized that freedom of expression is protected but limited. These limitations represent important legal interests that deserve criminal law protection as well: honor and reputation of individuals[71], prohibition of discrimination, confidentiality obligation…etc. Also, different forms of speech that are not considered hate speech can be characterized as unacceptable and discriminatory speech. Insofar, provisions of other acts are being violated. This enables misdemeanor law sanctioning or civil actions. There are Misdemeanors against Public Order and Peace Act[72], Anti-discrimination Act[73] Media Act[74], Electronic Media Act[75], Croatian Radio and Television Act[76], Gender Equality Act[77] and the Civil Partnership of the same sex Act[78] when regulating freedom of information and discrimination prohibition.[79] Further on we will concentrate only on criminal law provisions.

The Criminal Code/77[80] contained a criminal offense called Incitement to national, racial and religious hatred, division or intolerance. It was placed among the chapter of Criminal Offenses against Republic of Croatia, regulated in Art. 236k:

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[71] The protection of honor and reputation is considered a significant limitation to freedom of expression (some Croatian authors find it to be the most significant one, see Đurđević, op.cit. (n 8), p. 173). More on this group of criminal offenses see L.Cvitanović, `Kaznena djela protiv časti i ugleda` in Davor Derenčinović (ed) *Posebni dio kaznenog prava, Zagreb, Sveučilište u Zagrebu, 2013, pp.*133-156; I. Bojanić,`Die Rolle der Ehre im Strafrecht in Kroatien` in Silvia Tellenbach, (ed): *Die Rolle der Ehre im Strafrecht*, Berlin, Duncker&Humblot, 2007, pp. 405-457; T. Lenckner and J. Eisele, Vierzehnter Abschnitt. Beleidigung in Schönke, Schröder, op.cit. (n 41), pp. 1741-1768.

[72] *Zakon o prekršajima protiv javnog reda i mira,* (Official Gazette 41/1977, 47/89, 55/89, 83/89, 47/90, 55/91, 29/94).

[73] *Zakon o suzbijanju diskriminacije,* (Official Gazette 85/2008, 112/2012), Art. 25 (1). Whoever, with intent to intimidate another person or to create a hostile, degrading or offensive environment on the basis of race, ethnicity, skin colour, sex, language, religion, political or other opinion, national or social origin, property, trade union membership, social status, marital or family status, age, health, disability, genetic heritage, gender identity or expression, and sexual orientation violates the dignity, shall be imposed a fine of 5,000.00 to 30,000.00 HRK.

[74] *Zakon o medijima,* (Official Gazette Nos. 59/04, 84/11, 81/13).

[75] *Zakon o elektroničkim medijima,* (Official Gazette Nos. 153/09, 84/11, 94/13, 136/13).

[76] *Zakon o hrvatskoj radioteleviziji,* (Official Gazette Nos. 137/20, 76/20).

[77] *Zakon o ravnopravnosti spolova,* (Official Gazette Nos. 82/08, 125/11, 20/12, 138/12).

[78] *Zakon o životnom partnerstvu osoba istog spola*, (Official Gazette Nos. 92/14).

[79] A detail overview of provisions regarding freedom of speech as a part of anti-discrimination legislation see, Đurđević, op.cit. (n 8), pp. 163-172.

[80] *Kazneni zakon*, (Official Gazette Nos. 25/77, 50/78, 25/84, 52/87, 43/89, 8/1990, 54/90, 9/91, 67/91, 71/91, 25/92, 33/92, 39/92, 77/92, 91/92, 37/94, 28/96, 30/96, 110/97).

(1) Whoever incites or stirs national, racial or religious hatred, discord or animosity among nations and minorities living in the Republic of Croatia shall be punished with imprisonment from six months to five years.

(2) If the offense referred to in paragraph 1 of this Article was committed by coercion, maltreatment, compromising security, national, ethnic or religious symbols mockery, property damaging, monuments, memorials or graves desecration, the perpetrator shall be punished with imprisonment up to eight years.

(3) If the offense referred to in paragraphs 1 and 2 of this Article is committed by abusing position or authority, or if result is a riot, violence or other grave consequences to life of peoples and minorities living in the Republic of Croatia, the perpetrator shall be punished for the offense referred to in paragraph 1 of this Article by imprisonment up to eight years, and for the offense from paragraph 2 by imprisonment up to ten years.

Regardless of this criminalization, absence of judicial decision was the reality.[81] This situation should not be interpreted with the lack of social behaviour described with incrimination.[82]

It would be more appropriate to point out the lack of victim's awareness and education on their rights and protection, but also the lack of competent authorities' awareness in this matter.

In the Criminal Code/97 [83] hate speech was incriminated within the chapter of Criminal offenses against the international law values- Racial and other discrimination, in Art. 174 :

(1) Whoever, on the basis of race, gender, colour, nationality or ethnic origin, violates basic human rights and freedoms recognized by the international community, shall be punished by imprisonment for six months to five years.

(2) The punishment referred to in paragraph 1 of this Article shall be imposed on whoever persecutes organizations or individuals for promoting equality between people.

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[81] M. Vajda, op. cit. (n 37), pp. 360-361 and V. Alaburić, `Ograničavanje «govora mržnje» u demokratskome društvu-teorijski, zakonodavni i praktični aspekti` *Hrvatska pravna revija*, vol.2, no.2, 2003, p. 85.

[82] Thus, in certain periodic reports on human rights numerous examples were stipulated where hate speech was used by public authorities, public figures as well as citizens. See, *Izvještaj Centra za ljudska prava, Rasna netrpeljivost i «govor mržnje»-međunarodni i hrvatski standardi i praksa*, http://www.ombudsman.hr/dodaci/036_izvjestajgovormrznje.pdf, (accessed 30 April 2015). A warning on hate speech was made by G. Vilović, *Govor mržnje u hrvatskim medijima, Odsustvo novinarskog senzibiliteta za osjetljiva pitanja*, available at http://www.mediaonline.ba/ba/pdf.asp?ID=407&n=ODSUSTVO%20NOVINARSKOG%20SENZIBILITETA%20ZA%20OSJETLJIVA%20PITANJA, (accessed 30 April 2015)

[83] Kazneni zakon, (Official Gazette 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11, 77/11, 125/11, 143/12).

(3) Whoever publicly states or propagates ideas of one race superiority over another, spreads racial hatred or incites racial discrimination, shall be punished by imprisonment for three months to three years.

The emphasis was on race, but without providing protection to religion, gender... Criminalization of inciting national and religious hatred was abandoned.[84] On the other hand, racial discrimination in international law had its broad meaning.[85]

Amendments to the Criminal Code/ 97 were made in 2000[86]:

(1) Whoever violates basic human rights and freedoms recognized by the international community, on the basis of race, religion, language, political or other opinion, property, birth, education, social status or other characteristics, gender, skin colour, nationality or ethnic origin, shall be punished by imprisonment of six months to five years.

(2) The punishment referred to in paragraph 1 of this Article shall be imposed on perpetrator who persecutes organizations or individuals promoting equality between people.

(3) Whoever, with the purpose of spreading racial, religious, gender, national, ethnic hatred or hatred based on skin colour, or with the purpose of underestimation, publicly states or disseminates ideas of superiority or inferiority of one race, ethnic or religious community , gender, nation or ideas of superiority or inferiority based on skin colour, shall be punished by imprisonment of three months to three years.

These amendments brought change by limiting incrimination actions on public statement and dissemination of superiority/ inferiority ideas. In addition, conducts in order to spread hatred or underestimation were inserted, which significantly narrowed the possibility of criminal proceedings.[87] The fundamental lack of legal description was the absence of incrimination of incitement to violence and ethnic, religious hatred or other forms of intolerance *per se*.[88]

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[84] See M. Vajda, op.cit. (37), pp. 360-361; Đurđević, op.cit. (n 8), p.178.

[85] International Convention on Elimination of All forms of Racial Discrimination, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx, (accessed on 05 May 2015)

[86] *Kazneni zakon*, (Official Gazette no. 129/00).

[87] A numerous examples of hate speech in Croatian political and public life, see, T. Erceg, `Sloboda govora najveći izazov sankcioniranju govora mržnje`, *Regionalni glasnik za promociju kulture manjinskih prava i međuetničke tolerancije, vol. 2*, 2004, pp. 17-18.

[88] In this context Đurđević stipulated that incitement to violence against a certain group of people or category or public disclosure of hate speech on national, religious or sexual orientation, but without presenting

Amendments to the Criminal Code / 97 from 2004[89]

(1) Whoever, on the basis of race, religion, language, political or other opinion, property, birth, education, social status or other characteristics, gender, skin colour, nationality or ethnic origin, violates basic human rights and freedoms recognized by the international community, shall be punished by imprisonment for six months to five years.

(2) The punishment referred to in paragraph 1 of this Article shall be imposed on whoever persecutes organizations or individuals for promoting equality between people.

(3) Whoever, with the purpose of spreading racial, religious, gender, national, ethnic hatred or hatred based on skin colour or sexual orientation or other characteristics or with the purpose of putting down, publicly states or disseminates ideas on the superiority or inferiority of one race, ethnic or religious community, gender, nation or ideas on superiority or inferiority based on skin colour, or sexual orientation, or other characteristics shall be punished by imprisonment for three months to three years.

(4) Whoever, in the purpose of paragraph 3 of this Article, by means of a computer system distributes or otherwise makes available to public materials which deny, significantly reduce, approve or justify the crime of genocide or crime against humanity, shall be punished by a fine or penalty imprisonment for three months to three years.

This amendment brought introduction of sexual orientation and other characteristics as a basis of discrimination, followed by distribution on Internet or making available to the public in other way of materials which deny, significantly reduce or justify the crime of genocide or crimes against humanity, with the intention of spreading hatred.

The last amendment[90] only changed sentencing range from the last paragraph to *imprisonment for six months up to three years*. Presented legal descriptions show that incrimination scope constantly grew, but regardless of that, there was almost no prosecu-

the idea of superiority or inferiority, was not punishable through former provision. So, for example, the one who incited to violence against the Roma, asylum seekers and homosexuals without presenting idea on their subordination, did not meet the elements of the offense. Đurđević, op.cit. (n 8), p. 179.

[89] *Kazneni zakon*, (Official Gazette no. 105/04).

[90] *Kazneni zakon*, (Official Gazette 71/2006).

tion of this offense. In this context, authors again stipulated the inadequate criminalization of hate speech.[91]

New Croatian Criminal Code/11[92] provided, *inter alia*, news in the field of limiting freedom of expression. Incrimination of public incitement to hatred was followed with European standardization trends and compliance with Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law of November 28, 2008[93].

Pursuant to Art. 89 (21) of CC, hate crime is criminal offense committed because of race affiliation, skin colour, religion, national or ethnic origin, disability, gender, sexual orientation or gender identity of another person and such action is taken as an aggravating circumstance unless harder punishment is expressly provided.[94]

New offense is called Public incitement to violence and hatred, and placed among crimes against public order and peace in Art. 325:

> *(1) Whoever, through press, radio, television, computer system or network, on public meeting or otherwise publicly incites or makes available pamphlets, pictures or other material that would incite to violence or hatred directed against a group or group member for their racial, religious, national or ethnic affiliation, origin, skin colour, sex, sexual orientation, gender identity, disability or any other characteristic, shall be punished by imprisonment of up to three years.*
>
> *(2) The punishment referred to in paragraph 1 of this Article shall be imposed to anyone who publicly approves, denies or significantly reduces genocide, crime of aggression, crime against humanity or war crime directed to a group or a group member based on their racial, religion, national or ethnic affiliation, origin or skin colour, in a manner appropriate to encourage violence or hatred against such a group or a group member.*

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[91] For example, Munivrana Vajda pointed out that prosecution obviously depends on two factors: the awareness of competent authorities and the prevailing "social climate" as well as the fact that hate speech, even after all of these changes, was not adequately incriminated. Munivrana Vajda, op.cit. (n 37), 364.

[92] *Kazneni zakon*, (Official Gazette, 125/11, 144/12, 56/15, 61/15).

[93] Official Journal of the European Union, L 328/55 from 06 12 2008., available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008F0913

[94] It is stated that definition of hate crimes is in line with the requirements of the Framework Decision no. 2008/913 /JHA of 28.11. 2008 on combating certain forms and expressions of racism and xenophobia criminal means. In some offences qualifying circumstance is provided and in others that should be taken as an aggravating circumstance. The reason for the severe punishment is discriminatory motive, which manifests in violence against members of the group. This Framework Decision provides certain possibilities for narrowing the responsibility of hate speech that are not used in CC. More, Turković, et al., *Komentar Kaznenog zakona,* Zagreb, Narodne novine, 2013, p. 400.

(3) The attempt of the criminal offenses referred to in paragraphs 1 and 2 of this Article shall be punished.

Shortly after its adoption, criminal offense was changed. Two new paragraphs were added regarding group or association in committing this offense.[95]

(1) Whoever, through press, radio, television, computer system or network, on public meeting or otherwise publicly incites or makes available pamphlets, pictures or other material that would incite to violence or hatred directed against a group or group member for their racial, religious, national or ethnic affiliation, origin, skin colour, sex, sexual orientation, gender identity, disability or any other characteristic, shall be punished by imprisonment of up to three years.

(2) Whoever organizes or leads a group of three or more persons to commit the offenses referred to in paragraph 1 of this Article, shall be punished by imprisonment for six months to five years.

(3) A person who participates in the association referred to in paragraph 2 of this Article shall be punished by imprisonment of up to one year.

(4) The punishment referred to in paragraph 1 of this Article shall be imposed to anyone who publicly approves, denies or significantly reduces genocide, crime of aggression, crime against humanity or war crime directed to a group or a group member based on their racial, religion, national or ethnic affiliation, origin or skin colour, in a manner appropriate to encourage violence or hatred against such a group or a group member.

(5) The attempt of the criminal offense under paragraphs 1 and 4 of this Article shall be punished.

Data from Central Bureau of Statistics[96] concerning reports and convictions for hate speech (criminal offenses: Racial and other discrimination and Public incitement to violence or hatred) are presenting an interesting fact. The percentage of reports and convictions in relation to the overall yearly crime is almost negligible. For example, in 2010, there were 25 reports and only 3 convictions, in 2011, 27 reports and 6 convictions, in 2012, 15 reports and 3 convictions, in 2013, 14 reports and 2 convictions.

[95] This was due to recommendations of ECRI (European Commission against Racism and Intolerance) to anticipate sanctioning for organiser or leader of a group inciting to violence and hatred. Ibid.

[96] Yearly Publication `Punoljetni počinitelji kaznenih djela-prijave, optužbe i osude, statistička izvješća` for 2010, 2011, 2012, 2013, by Državni zavod za statistiku.

Also, a restrictive incrimination interpretation is advocated, in order of "clearer" demarcation from misdemeanours under the Anti-discrimination Act and misdemeanours against public order and peace.[97]

According to the Ombudsman Report for 2012[98], unacceptable, discriminatory expression and hate speech were present in the Croatian public during 2012, especially on the Internet, football games, and in public speeches, particularly those coming from politicians.[99] It was most often related to national minorities or minority ethnic groups. In comparison with 2011, the amount of such public expression related to the Pride Parade was decreased, specific speech referring to people and groups defined on the basis of their religious affiliation or lack thereof was increased. In 2013, discriminatory expressions and hate speech were mostly focused on national minorities, in particular the Serbian and Roma, which was connected with putting the Cyrillic inscription and the perpetuation of stereotypes about Roma as thieves.[100]

IV. CONCLUDING REMARKS

Hatred is the greatest chameleon in human emotions.

I. Mandić

Having in mind all previously mentioned, it is needed to make some concluding remarks regarding hate speech. Hate speech content includes various statements. A case in which a certain speech meets the necessary "hate qualifications" is not always easy to assess. New Croatian criminal offense called Public incitement to violence and hatred is harmonized with mentioned Council Framework Decision 2008/913/JHA and last recommendations made by European Commission against Racism and Intolerance.[101] It remains to be seen if new criminal law provisions will lead to different situation regarding

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[97] For example, the opinion that new incrimination will not lead to a significant increase in hate speech persecution, since criminal law is *ultima ratio societatis*. Attention should be focused to misdemeanours. M. Vajda, op.cit. (n 37), 368. Also see, M.M. Vajda, `Novi Kazneni zakon u svjetlu pristupanja Europskoj uniji: inkriminiranje govora mržnje i nekih drugih oblika rasizma i ksenofobije`, *Godišnjak Akademije pravnih znanosti Hrvatske*, vol.4 (1), 2013, pp. 131-144.

[98] See, Ombudsman Report, *Sažetak izvješća o pojavama diskriminacije za 2012*, http://www.ombudsman.hr/index.php/hr/izvjesca/izvjesca/finish/21-2012/3-sazetak-izvjesca-o-pojavama-diskriminacije-za-2012-godinu, (accessed 16 May 2015)

[99] Certain examples are presented in I. Dojčinović et.al., `An introductory report on legal matters regarding online hate speech in Croatia and Europe`, *Pravnik*, vol.47 (1), 2014., p. 147.

[100] Izvješće pučke pravobraniteljice, *eng.* Ombudsman Report, http://www.ombudsman.hr/index.php/hr/izvjesca/2014/finish/41-2014/562-izvjesce-pucke-pravobranaiteljice-za-2014-godinu, 2014, (accessed 16 May 2015)

[101] Available at http://hudoc.fcnm.coe.int/ecri/query.asp?action=query#results, (accessed 19 May 2015)

hate speech prosecuting. In this regard, restrictive interpretation of incrimination was proposed, for a clearer demarcation from misdemeanours since hate speech is mostly being sanctioned through these misdemeanours proceedings. Due to adequate descriptions as well as the possibility of faster completion of misdemeanor proceedings in relation to the criminal, this is legal treatment appears to be particularly suitable. If conducted properly, it would also disable the breach of *non bis in idem* principle. Also, a private anti-discrimination lawsuit is always a possibility.

It is reasonable to point out the lack of awareness of hate speech victims on the rights they are entitled to as well as possible protection envisaged within the legal system. It seems that when it comes to limiting freedom of expression, the forefront offenses are ones against honour and reputation: insult, libel and embarrassment/defamation. Unlike Public incitement to violence and hatred prosecuted *ex officio*, these offenses are prosecuted through private lawsuit. So, one part of what is actually hate speech certainly "goes through" these offenses. But, due to this criminal proceedings initiation, greater financial resources are needed, which contributes to weaker victim initiative. The collision with other criminal offenses is not excluded: criminal offenses against human rights and fundamental freedoms (Chapter XI of Criminal Code) or Criminal offenses against Republic of Croatia (Chapter XXXII of Criminal Code).[102]

Complaints directed to broad hate speech prohibitions (made mostly by American scholars) can be reduced to the following three: the lack of a standard definition of hate speech, selective criminal proceedings and symbolic prohibition function. Regarding the first complaint, the same can be said for notions like corruption and terrorism. Standard consensus is not easy to achieve, but the current situation has its advantages. Specific definition would assume restriction on certain forms of hate speech. This "disadvantage" can only be a challenge to existing provisions improvement. Regarding the selective criminal proceedings complaint, we can say that political influence is often used in this

[102] This is the example of the latter. It is a ECtHR decision in case of *Rujak v. Croatia*. App no 57942/10, (ECtHR 2 October 2012). Applicant is a Croatian citizen of Serbian ethnic origin, V. Rujak. In 2004, he participated in a fight with two other recruits. He stated a series of curses, insults and outbursts of hatred against members of the Christian religion and Croatian ethnic origin. When asked by superior if he intended to insult someone's religion or ethnic origin, he replied affirmative, continuing with his statements. Other soldiers soldiers witnessed this. Rujak was charged with a criminal offense: Reputation violation of the Republic of Croatia. (former Art. 151 of the CC), acknowledged culpability, expressed regret and sentenced to 6 months. Prison. County Court in the reasons pointed out that the defendant "... publicly ridiculed the contempt and severe disdain the Croatian people and the Republic of Croatia ... more humiliation, spite ... which objects are insulting lost dignity." The Supreme Court, acting on an appeal of the convicted confirmed the verdict and reversed the sentence, a suspended sentence: six months. Sentence replaced with a probation period of two years. Beyond that filed a constitutional complaint by the Constitutional Court declared it inadmissible, and subsequently a complaint to the European Court of Human Rights, complaining that he had violated the freedom of expression. The court rejected the applicant's complaint (as incompatible *ratione materiae* with the provisions of the Convention), pointing out that indecent and obscene speech has no significant role in the expression of ideas, and that is evident from the context that the only intention was to insult what is not included in Art. 10 ECHR.

context. But this would require a separate analysis since there are opinions where "left" political affiliation is stipulated. However, criminal proceedings initiation does not have to have political context, depending on legal system possibilities for hate speech sanctioning. As presented, Croatian system includes misdemeanour sanctioning which is primarily used option.

The last is "symbolic function of prohibition" complaint. European academic authors unquestionably support hate speech sanctioning. This approach should be confirmed. Hate speech is based on discrimination whose suppression and sanctioning is a part of the constitutional provisions of most European countries as well as international treaties. This speech causes a significant amount of discomfort and fear to targeted group members. When repeated, it can lead to an escalation. Public stigmatization of certain society members based on their individual characteristics or features may cause the so-called "Silencing effect" or their marginalization and disintegration which leads to the society that cannot respect the fundamental values of modern civilization: multiculturalism, mutual respect, pluralism and tolerance.