Short Scientific Article

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Common and Comprehensive European Definition of Hate-Speech Alternative Proposal

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Abstract: Europe needs to define the term and legal (criminal & constitutional) concept of “hate speech” precisely. The definition must be written in legal literature and in legislation. It must also be offered by the European Constitutional Courts and, last but not least, by the ECtHR. A descriptive definition offered *inter alia* by the ECtHR judgement in case of *Vejdeland vs. Sweden* (2012) was only a guidance. The new ECtHR judgement in the case of *Carl Jóhann Lillíendahl vs. Iceland* (11th of June 2020) addressed “homophobic speech” as “hate speech” directly. By combining the ECtHR case-law on freedom of expression in the last five years with understanding of this concept in the Slovenian Criminal Code (and with only subordinated reference to the understanding of this term by the European Commission) the author offers an alternative proposal for a new, common and comprehensive European definition of “hate speech.”

Keywords: freedom of expression; hate speech; ECtHR; Slovenian Criminal Code Article 297 understood as hate-speech provision; alternative proposal for a common and comprehensive European definition of hate speech.

1 Introduction¹

In this article, I will first briefly explain my conviction regarding the legal problem which can arise if we try to easily and directly transfer the legal concepts and “legal terms” that have historically been formed and consolidated in the U.S. (especially in the U.S. Supreme Court precedents and doctrines) to Europe. In the following I will use as the example Article 297 of the *Criminal Code of the Republic of Slovenia*, which is closest in content to what is supposed to be understood as hate speech in Slovenia and in Europe. In the following I will highlight the most recent and important judgments of the European Court of Human Rights in Strasbourg (ECtHR), which have changed the previous European understanding of “hate speech” and provided the basis for a new, common and comprehensive European definition of this concept. In the central part of the article I will write down the alternative proposal for a new, common and comprehensive European definition of “hate speech”, taking into account the latest ECtHR judgment in the case of *Carl Jóhann Lillíendahl vs. Iceland* (2020).

2 Importing Legal Concepts and Terms

A fundamental feature of my public appearances on the subject, written or oratorical, has always been introduced by my personal opinion that the concept of hate speech is a typical and historically-politically conditioned creation of the U.S.

¹ Article is based on a shorter piece published on the ECHRCaseLaw.com: A NEW EUROPEAN DEFINITION OF HATE SPEECH? YES. 1st of July 2020. Available at: <<https://www.echrcaselaw.com/en/echr-decisions/a-new-european-definition-of-hate-speech-yes/>>

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social environment and history. Or in other words – by the U.S. constitutional tradition.² From this, legal concepts and doctrines such as “hate-speech,” “offensive speech,” “fighting words,” and the like have developed through history.³

So at least four problems arise at this point, most obviously. The first problem is the very definition and constitutional doctrine of “hate speech.” What “hate speech” means in the U.S. is not the same as what this term is *supposed to mean* in Europe. The reasons that made “hate speech” a social problem in the U.S. are historically and socially grounded. These reasons are not the same as the reasons why this term appeared in Europe. So if Europe does not have the same problem as the U.S. and if the reasons for the development of the doctrine of “hate speech” in the U.S. are not the same as in Europe, then this concept and this doctrine cannot be easily transferred to Europe. It cannot be easily »imported.« The second problem arises as soon as we use the term “hate speech” in Europe, and by that we mean its meaning and its content, which it has in the U.S. If we use this term in Europe without giving it a clear content, a definition, without developing an appropriate doctrine for its understanding and use, the problem becomes even bigger. Then there is the third problem, and there is only one way to solve this problem: either we will not use this term in Europe, or we will give it a clear meaning, a clear definition. But even in this case, an additional, fourth problem still remains: can the European definition and doctrine of “hate speech” be significantly different from the American one? I don’t think so. Why? Well, after all or above all it is a matter of understanding freedom of expression as such, as a fundamental human right, according to the international law, according to the National Constitutions of the European National States, according to the ECHR and according to the EU legal order.

I allowed the possibility to determine in Europe what, in the European environment, according to its specifics, »hate speech«, »fighting words«, »offensive speech« and the like mean. I also pointed out that the concept of »racial hatred« is not synonymous with the American concept of »hate speech.« I therefore opposed the use of the term »hate speech« in public sphere until the ECtHR formulated a clear, unambiguous and practically applicable definition of »hate speech.«⁴ But it did not.

3 Slovenian Example of “understanding” the “Hate Speech” Term

I take the Criminal Code of the Republic of Slovenia,⁵ an EU Member State, as an example. But first I have to expose the Article 63 of the Constitution of the Republic of Slovenia, which speaks of the »*Prohibition of incitement to inequality and intolerance and the prohibition of incitement to violence and war.*« The content of this article is as follows: »*Any incitement to national, racial, religious or other inequality and any incitement to national, racial, religious or other hatred and intolerance is unconstitutional. / Any incitement to violence and war is unconstitutional.*«

Article 297 of the Criminal Code is derived from Article 63 of the Constitution and defines the criminal offence of »*incitement to hatred, discord or intolerance:*»

(Public incitement to hatred, violence or intolerance)

(1) Whoever publicly incites or advocates hatred, violence or intolerance based on ethnic, racial, religious or ethnic origin, sex, skin color, origin, financial status, education, social status, political or other beliefs, disability, sexual orientation or any other personal circumstance, and the act is committed in a manner which may endanger or disturb public order and peace, or by the use of threats, insults or insults, shall be punishable by imprisonment for up to two years.

² For a comprehensive insight into the topic see Frederick Schauer, John, H. Garvey: THE FIRST AMENDMENT: A READER. 2nd. Ed., West Publishing Co. (1996).

³ See Larry Alexander: IS THERE A RIGHT TO FREEDOM OF EXPRESSION? Cambridge University Press, 2005; Helen J. Knowles & Steven B. Lichtman (Eds.): JUDGING FREE SPEECH. FIRST AMENDMENT JURISPRUDENCE OF US SUPREME COURT JUSTICES. Palgrave Macmillan, New York 2015.

⁴ For a comprehensive analysis of the U. S. constitutional jurisprudence on the First Amendment to the U. S. Constitution and *free speech*, see John E. Nowak, Ronald D. Rotunda: CONSTITUTIONAL LAW, 5th Ed. West Publishing Comp. St. Paul, Minnesota (1995). See also Ian Loveland: IMPORTING THE FIRST AMENDMENT: FREEDOM OF SPEECH AND EXPRESSION IN BRITAIN, EUROPE AND USA. Hart Publishing (1998).

⁵ Kazenski zakonik (KZ-1-UPB2) (uradno prečiščeno besedilo) (“*Criminal Code (KZ-1-UPB2) (official consolidated text)*”) Uradni list Republike Slovenije (“*Official Gazette of the Republic of Slovenia*”), No. 50/2012, 29th of June 2012.

(2) The same punishment shall be imposed on anyone who, in the manner referred to in the preceding paragraph, publicly spreads ideas about the superiority of one race over another or gives any assistance in racist activity or denies, diminishes, approves, justifies, ridicules or defends genocide, holocaust, crimes against humanity, war crimes, aggression or other crimes against humanity as defined in the legal order of the Republic of Slovenia.

(3) If the act referred to in the preceding paragraphs is committed by publication in the media or on websites, the penalty referred to in the first or second paragraph of this Article shall also be imposed on the editor-in-chief or the person replacing him, unless it was broadcasted live, which he could not prevent or for publication on websites that allow users to publish content in real time or without prior supervision.

(4) If the act referred to in the first or second paragraph of this Article is committed by coercion, ill-treatment, endangering security, humiliation of ethnic, national or religious symbols, damage to foreign objects, desecration of monuments, memorials or graves, the perpetrator shall be punished by imprisonment up to three years.

(5) If an official person commits the acts referred to in the first or second paragraph of this Article by abusing his/her official position or rights, he/she shall be punished by imprisonment for a term not exceeding five years.

(6) Means and objects with the messages referred to in the first and second paragraphs of this Article, as well as devices intended for their production, reproduction and distribution, shall be seized or their use shall be appropriately prevented.

Is this kind of descriptive definition of “hate speech” enough? I would claim that it is close but still not enough. And what is meant by “*public incitement to violence or hatred*”? We don’t know that until the Judiciary (Constitutional Courts in the EU and Council of Europe Member States and the ECtHR) explains this concept in detail. So far this task (and not the easiest one) hasn’t been completed (as it has been by the U.S. Supreme Court).⁶

Nothing more has been officially said on the issue in Slovenia. There are no judgements or precedents of ordinary courts or higher courts or the Supreme Court nor the Constitutional Court defining what Article 63 of the Constitution and Article 297 of the Criminal Code “really mean.” And there isn’t even a single court judgement addressing the “hate speech.” Even though the term “hate speech” is frequently used in the public sphere, consisted of the daily-politics, media, academia, intellectuals and general public. “Hate speech” is even considered to be one of the biggest and most important contemporary social problems. How is this possible? Well, it is possible because such is the social reality. Is it ok? I guess not? Should we do something about it? Yes, we most certainly should and must. Either we stop using this term or we define it. Precisely and comprehensively enough in order to be applicable in social life, in legal proceedings, especially in criminal proceedings. A definition of a kind must be offered and it has to fulfil the fundamental constitutional principle of “certainty and predictability” which is the necessary golden rule for any legal, not only criminal prohibition and sanction.

I will take a risk and try to offer a possible alternative for such a definition. But I most strongly emphasize in advance: the last step in this regard can only be done and must be done by courts, through jurisprudence, by case-law, by standards and doctrine introduced and fortified by courts. And when this task is done then professional commentaries can be produced and make “hate speech” an element of legal teaching, common knowledge and a part of legal culture and consciousness.

⁶ According to the 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, certain forms of conduct as outlined below, are punishable as criminal offences. The European Commission considers **hate speech** to be the following type of expression: *public incitement to violence or hatred 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; the above-mentioned offence when carried out by the public dissemination or distribution of tracts, pictures or other material; publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court (Articles 6, 7 and 8) and crimes defined in Article 6 of the Charter of the International Military Tribunal, when the conduct is carried out in a manner likely to incite violence or hatred against such a group or a member of such a group.* Instigating, aiding or abetting in the commission of the above offences is also punishable. With regard to these offences listed, EU countries must ensure that they are punishable by effective, proportionate and dissuasive penalties, by a term of imprisonment of a maximum of at least one year. Furthermore, the *initiation* of investigations or prosecutions of racist and xenophobic offences *must not depend on a victim’s report or accusation*. The European Commission also presented its understanding of the so-called **hate crimes**: *In all cases, racist or xenophobic motivation shall be considered to be an aggravating circumstance or, alternatively, the courts must be empowered to take such motivation into consideration when determining the penalties to be applied.* See EUR – LEX, available at:

<<https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=LEGISSUM:l33178>> (29.6.2020)

4 ECtHR Case-Law

It seems that Europe needs and wants its own “hate speech” concept. So it needs to define it precisely. I claim the definition must also be offered by the ECtHR.⁷ Its judgement in the case of *Vejdeland vs. Sweden* (2012) came close to doing that. But still it offers a descriptive guidance of which definitional path to follow, stating that “*offensive*” and “*hostile tuned remarks*” can be legally prohibited and criminally prosecuted if they can be recognized and evaluated as “*very severe accusations based on strong and really unfounded prejudice.*”

I believe this is not enough. Even if the ECtHR starts regularly using the term “hate speech” in its judgements that still wouldn’t be enough. Europe needs a well thought through and precisely enough defined *doctrine* of “hate speech” applicable to concrete cases of using concrete words in concrete circumstances and by concrete people with concrete public status and influence, based on concrete presuppositions, facts and social impact of certain words, aimed at certain groups of people or individuals.

On the 11th of June 2020, the ECtHR judgement in the case of *Carl Jóhann Lilliendahl vs. Iceland* was publicly announced and introduced as the judgement on “homophobic hate speech.”⁸

I publicly opted for a comment on the legal (constitutional) effect of this judgment. The ECtHR has changed its case-law on freedom of expression over the last five years. That is a fact.⁹ It started gradually with the introduction of the term »hate speech.« I will take the risk with the thesis that it is a consequence of the (political?) decision of the Council of Europe to motivate and encourage the ECtHR to thoughtfully and unambiguously introduce this controversial term into the common European supranational law on common fundamental human rights and freedoms. To introduce a new legal philosophy on freedom of expression. This complemented the current substantive interpretation of Article 10 of the ECHR, which guarantees the fundamental human right to freedom of expression in its Article 10. In other words, it restricted it, cut off its sharp outer edges and »shrunk« it in that sense. Persuasively? I still have reservations about such an assessment. Legitimate, socially justified and factually justified, in terms of compelling social reasons? I will not oppose such an assessment.

In the following I will propose one of the possible alternatives for a new, common and comprehensive »European« definition of the *concept* (not merely the term) »hate speech.« It will be based on the following judgments of the ECtHR:

Vejdeland vs. Sweden, Belkacem vs. Belgium, M’bala vs. France, Perincek vs. Switzerland, Faber vs. Hungary, Faruk Temal vs. Turkey, Otegi Mondragon vs. Spain, Dink vs. Turkey, Otegi vs. Spain, Faruk vs. Turkey, Faber vs. Hungary, Delphi vs. Estonia, MTE and Index.hu vs. Hungary, Pihl vs. Sweden, (and above all a newest judgment) *Carl Jóhann Lilliendahl vs. Iceland*.

5 Common and Comprehensive European Definition of “Hate Speech” Alternative Proposal

I offer the still descriptive, but more precise definition of the concept of »hate speech.« Maybe (I am not the one to decide on this) it could represent a new, common European definition of this concept? Or at least (in the light of recent ECtHR case-law) a sufficiently good basis for a definition which is comprehensive enough to be applicable to concrete cases, to be enshrined in criminal law and to satisfy the legal criterion of »*clear predetermination*,« of “*certainty*” and “*predictability*”?

Hate speech, prosecuted as a criminal offense provided for in criminal law for which a fine or imprisonment shall be prescribed by law is deemed to be: (1) any incitement or promotion of ethnic, racial or religious hatred, discord or intolerance, or spreading ideas of the superiority of one race over another, or not refusing or not denying assistance in racist activities, or approving or ridicule or advocating or diminishing importance or denial of Holocaust or genocide or other historically established or legally proven mass and/or

⁷ For the “textbook” presentation of the ECtHR case-law on freedom of expression see never obsolete work; Andrew Nicol, Gavin Millar & Andrew Sharland: MEDIA LAW AND HUMAN RIGHTS. Blackstone Press Limited, London (2001).

⁸ Available at: <[https://hudoc.echr.coe.int/eng-press#{%22itemid%22:\[%22003-6718554-8953653%22\]}>](https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-6718554-8953653%22]}>)

⁹ See Alastair Mowbray: CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS. Oxford University Press. New York (2007)

systemic violations of human rights, or other atrocities, or provoking or inciting hatred or intolerance based on sex, sexual orientation or other personal characteristics determining a person's personal identity, or on national, ethnic or cultural origin; (2) anyone who makes inappropriate and impolite, harsh or very offensive statements about another person or group of persons on the basis of their personal characteristics or the circumstances referred to in sentence one, and thereby expresses strong prejudices or that his/her statements or tacit conduct constitute very serious and unfounded accusations or unfounded prejudice against other persons or groups of persons on account of their personal characteristics or the circumstances referred to in sentence one, shall be punished by a fine or imprisonment; (3) This includes acts committed by means of coercion, mistreatment, endangering security, humiliation of national, ethnic or religious symbols, damage to foreign objects, desecration of monuments, memorials or graves, or any conduct characteristic of Nazism (such as "Nazi salute") and fascism, including any use of symbols of Nazism and fascism, (*optional-explicit: or other symbols that directly reflect historically justified and legally proven crimes against humanity or other mass and systemic violations of fundamental human rights and freedoms*); (4) It also includes material and objects bearing the messages referred to in the sentences 1 and 2, as well as accessories intended for their production, reproduction and distribution; (5) If the act referred to in the sentences above is committed by publication in the media or on websites, the penalty referred to in sentences above shall also be imposed on the editor-in-chief or the person replacing him, unless such deeds were broadcasted live, so that he/she could not prevent the broadcast, or unless the publication on websites allow users to publish content in real time and without supervision, but only if such website in fact has no editor, guardian or supervisor.

The Holocaust is, by my strong opinion, logically included in this definition without its explicit mention. Also crimes: of war and others. This also follows directly from the judgments of the ECtHR. At the same time, I am not opposed to keeping the explicit reference to the Holocaust and war or other crimes in the definition.

I deliberately omit the diction from Article 297 of the Criminal Code »... *whether the act was committed in a way that may endanger or disturb public order and peace.*« First, because the disturbance of public order and peace is already regulated by law. And second, because such diction narrows the explanatory scope of "hate speech" as introduced by the ECtHR and European Commission¹⁰ – at least in my *bona fide* understanding.

I also deliberately omit the explicit mentioning of "disability" in good faith and for the reasons why I have (many years ago, in the 2002) opposed the explicit writing of this word in Article 14 of the Constitution: "equality before the law."¹¹ It goes without saying that this is a personal circumstance which doesn't allow unequal treatment and discrimination.

When this word "disability" was added to the text of Article 14 of the Slovenian Constitution, I publicly wrote down the question in several places: until the moment of supplementing the Article 14, was there at least one and only person living in Slovenia who thought that disabled people could be discriminated against on the basis of their disability? I added the question: why is this supplement necessary, if the very text of the Constitution in another place, in Article 52, defines disability as a special constitutional category and provides disabled people with special, additional constitutional protection - in the sense of »positive discrimination«? However, this term is also very unfortunate because it includes the word »discrimination.« A better term would be »positive legal protection«, which derives directly from the doctrine of positive legal obligations of the state to protect fundamental rights and freedoms (also included in the Article 15 of the Constitution and in the Preamble to the Constitution).¹²

So I add that *in the explicit enumeration* of "the personal characteristics or circumstances," something may not be inadvertently omitted, and unnecessary controversy may follow from this. Unnecessary (and sometimes quite stupid) questions may arise whether if what is explicitly written (enumerated) also applies to what has been omitted? As I have said, it did happen before, In Slovenia.

Recently *Protection against Discrimination Act* was adopted.¹³ Soon after the adoption of this Act, the first problem arose. Namely, the Act explicitly lists prohibited forms of discrimination. In this enumeration, however, some possible forms of discrimination were inadvertently omitted. And there was no need to wait long for a lawyer to defend in court a party accused of discriminating against a particular person, arguing that the law does not explicitly provide for a

¹⁰ See footnote no. 6.

¹¹ The Constitution of the Republic of Slovenia. Article 14 (equality before the law): "In Slovenia, everyone is guaranteed equal human rights and fundamental freedoms, regardless of nationality, race, gender, language, religion, political or other beliefs, financial status, birth, education, social status, **disability** or any other personal circumstance. / They are all equal before the law."

¹² Article 52 of the Constitution reads as follows: "(rights of the disabled) In accordance with the law, disabled people are provided with protection and training for work. / Children with physical or mental disabilities and other severely disabled persons have the right to education and training for active life in society. The education and training referred to in the preceding paragraph shall be financed from public funds."

¹³ Zakon o varstvu pred diskriminacijo (*»Protection against Discrimination Act«*) Uradni list Republike Slovenije (*»Official Gazette of the Republic of Slovenia«*), no. 33/16 in 21/18 – ZNOrg).

specific form of discrimination for which his client was accused. Technically, the lawyer was right. Seen from the point of view of »common sense« and »common sense«, not to say »decency«, it was nonsense in terms of content. But it is precisely such problems, this kind of nonsense, that can and does occur in practice, if too many laws try to list in too much detail what the law is supposed to regulate, or protect and prevent. But I cannot convince the Slovenian legal community and the legislative branch of government to avoid such an approach to writing legislation.

I also wanted to omit the third paragraph of Article 297, which concerns editors or administrators of media or websites, because in my opinion it is a matter of »logical necessity.« But I would not oppose maintaining this paragraph so I did write its substance into the alternative definition proposal (which also has a direct basis in ECtHR decision in the case of *Delphi v. Estonia*).

To all this I add that I consider the absence of an explicit prohibition of the “Nazi salute” and any use of symbols of Nazism as well as Fascism to be an unconstitutional and unconventional loophole in the criminal law of any of the Council of Europe and EU Member States. For this reason, I have recently (in early August 2020) written and (together with the applicant, whom I will not name here) sent an INITIATIVE for the constitutional review of the constitutionality of Article 297 of the Slovenian Criminal Code to the Constitutional Court of the Republic of Slovenia, in which I suggested to define the omission of this explicit prohibition as an unconstitutional loophole in criminal law and also to define conditionality of such a crime as “*if the act is committed in a manner that may endanger or disturb public order and peace*” as an unconstitutional legal requirement for the existence of such criminal offence. By claiming that this violates the constitutional and fundamental human right to protection of the personal dignity of all people who either fought against Nazism and Fascism in the II. World War, or their relatives, friends, fathers or mothers, daughters or sons... took part in the fight for freedom and homeland or even died.

6 Conclusion

By my understanding of the above mentioned Council Framework Decision 2008/913/JHA and of the listed judgments of the ECtHR, criminal codes of the EU Member States could literally include a criminal offence of “hate speech” which would have such content that it would have to pass the possible constitutional review of the Constitutional Courts in any of the European state. . If it would not pass it, it would have had to answer to the ECtHR if the complaint would be addressed to this Court, by invoking “*excessive interference with freedom of expression.*” And, according to the most recent ECtHR judgments, it should have passed the scrutiny of the Court as pursuing the “*legitimate aim,*” as being “*prescribed by law*” and as non-excessive interference with the right to freedom of expression, which is “*necessary in democratic society,*” as a “*coercive urgency.*”

So my question, asked in *bona fide*, is: Am I right? Could this be a common and comprehensive European definition of “hate speech?” I kindly invite experts on freedom of expression to evaluate my conclusions in this article and to express possible critical comments.¹⁴

¹⁴ For the previous understanding of »hate speech« concept and its controversy see Andraž Teršek et al.: SVOBODA IZRAŽANJA, MEDIJI IN DEMOKRACIJA V POSTFAKTIČNI DRUŽBI (»*Freedom of Expression, Media and Democracy in a Post-factual Society*«). GV založba. Ljubljana (2018).

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