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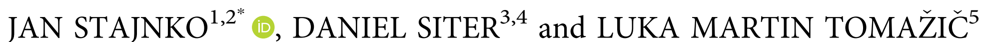
Discrimination, freedom of expression and two concepts of liberty: Assessing European legislation criminalizing hate speech



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ABSTRACT

Hate speech has been linked to categorization, stereotyping and discrimination challenges. Moreover, it presents an intersection of criminal law, criminology, philosophy of law and psychology. The authors analyse discrimination and freedom of expression in the legal framework of the European Union and in the practice of the European Court of Human Rights. They apply Berlin's two concepts of liberty, namely positive and negative liberty, to research the nature of European jurisprudence and the selected legislative frameworks. The choice between conceptions of essential moral and political values, such as positive and negative liberty, has an enduring meaning. It is a part of the human being and our thoughts and feelings about our identity. Such a choice may be why questions about the most appropriate regulation of the crime under consideration have a special place in the public discourse.

KEYWORDS

hate speech, freedom of expression, discrimination, liberty, human rights

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1. INTRODUCTION

Hate speech is a phenomenon 'covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance'.[1] Illegal hate speech is often at the centre of lay and expert public debates, interpretatively bold judicial judgments and intense legislative activities in the European Union (hereinafter: EU). It been linked to categorization, stereotyping and discrimination challenges. Moreover, it presents an intersection of criminal law, criminology, philosophy (of law) and psychology.[2] For the victim, hate speech is particularly devastating, as, by its very nature, it interferes with the essence of her identity.[3] In public debates, it stirs spirits because of its elusive nature and the difficulty of assessing different (legally protected) goods and interests, which can be particularly controversial due to disputes about the importance of the values of freedom and security. Bavcon argues that any deliberation on human liberty or security, even if it seems rhetorical and self-explanatory at first glance, is typically extremely difficult and controversial.[4]

This paper examines the most harmful forms of hate speech (which are criminalized at the European level)[5] from the point of view of Berlin's two concepts of liberty.[6] What is more, the paper discusses whether the current law and public policy in the EU and Europe are closer to a positive or negative concept of liberty. As will be shown, such an analysis can improve the general level of debates about the nature and essence of positive regulation, judicial review and, in particular, possible future criminal policy arguments related to the criminal offence in question. At the same time, it can also contribute to ensuring integrity in interpretation and legislative activity.[7]

First, Berlin's theory of two concepts of liberty will be presented, and then the EU and European Court of Human Rights (thereinafter: ECtHR) jurisprudence and legislative activities will be analyzed. In understanding the legal framework criminalizing hate speech, it is not enough to interpret the existing relevant norms. It is also necessary to know how the ECHR interprets the boundaries between illegal hate speech and freedom of speech and what relevant initiatives for future harmonization and other policy documents uncover about the Europe-wide response to hate speech.

Based on this analysis, we will assess which concept of liberty the current policy and practice are closer to and in which direction numerous legal changes have pushed the European legislation over time. The findings will be additionally placed in the context of Dworkin's concept of integrity in interpretation and legislative activity, which conceives legislative and judicial

[1] Council of Europe (1997).

[2] Dežman (2006); Šugman (2006).

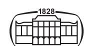
[3] Stratilati (2016) 120.

[4] Bavcon (2012) 97.

[5] Not to be confused with the notion of hate crime or decriminalized hate speech. While both phenomena are damaging to the victim as well as the society at large, they are not addressed in this article. For a discussion on distinction between hate speech and hate crime, see Bárd (2020) 256–57. For a discussion on hate crime and its relation to prejudice and agression, see Barna (2020) 297–301.

[6] Berlin (1969).

[7] Novak (2011).



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discourse as analogous to literary activity. The specific values and symbolic meaning of preventive and repressive practices are just as important as their institutional framework.[8]

The described treatment of hate speech and two concepts of liberty will not be value-based or elaborate on the current regulation's political-moral (un)desirability. Instead, it will offer a conceptual framework. It will strive to make such an assessment more comprehensible and analytically rigorous. Hence, this article emphasizes the importance of two concepts of liberty as an analytical tool with a broader value for legal practice.

2. TWO CONCEPTS OF LIBERTY

To understand Berlin's formulation of the two concepts of liberty more adequately, it makes sense to consider their ideological and historical background first. Such a genealogical distinction between positive and negative liberty can already be found in Kant, who writes in the Critique of Practical Reason:

Namely, in the absence of all the matter of the law (namely, of any desired object) and at the same time with the determination of a voluntary decision with a general legislative form, of which the leader must be capable, there is a common principle of morality. This independence, however, is liberty in the negative, while the inherent legislation of the pure, and as such, practical mind, is liberty in the positive sense.[9]

Kant's formulation is complex and not of great help in practical terms, but it can be argued that while the absence of experiential causes is essential for the negative aspect of liberty,[10] autonomy is necessary for the positive aspect of liberty. Kant roughly understands the latter as the ability of an individual to have his own will.[11]

A related idea can be found in von Humboldt, who distinguishes between negative and positive well-being.[12] In his theory, positive well-being is connected to the state's intervention. In contrast, negative well-being is related to the state allowing individual freedom without interfering in his sphere. Constant introduces a distinction between ancient and modern liberty.[13] In Constant, the concepts of ancient and modern liberty are historically connected.[14]

According to Berlin, negative liberty is the degree to which third parties or groups do not interfere in an individual's activity.[15] A person's behaviour can only be characterized as free if others do not prevent him from doing what he would otherwise like. Of course, this does not mean this abstract ideal is about unlimited liberty of action. If there were no social restrictions and incriminated acts, this would lead to social chaos, in which the strong would suppress the

[8]Meško (2008) 35.

[9]Kant (1788).

[10]Hille (2016) 73.

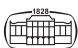
[11]Hille (2016) 71.

[12]Von Humboldt (1851).

[13]Constant (1988).

[14]Coser (2014).

[15]Berlin (1969) 123.



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freedoms of the weak. In the case of the idea of negative liberty, the right in each case is the one that should limit as little as possible the relatively wide area of personal liberty, which is not allowed to be interfered with in any case.

On the other hand, positive liberty is an individual's ability to be their master and to enjoy a state in which their life and decisions depend on them, not on any external influences.[16] Raz further explains Berlin's concept by meaningfully connecting it with autonomy and the existence of a sufficient number of possibilities, which he illustrates with the analogy of a persecuted woman. She lives on a small island of carnivorous beasts constantly trying to eat her.[17] Although she is free in the negative sense, it is impossible to claim that she is the mistress of her own life and therefore has no liberty in the positive sense. The latter is an ideal in which the state intervenes in a good way for her and society.

Although Berlin claims that, in principle, there are two mutually exclusive types of liberty, this does not mean that they exist separately but rather that they are reflected in shades of social reality.[18] We are only dealing with two abstract extremes, ideal-typical models of liberty, between which there are many possible degrees of encroachment into the sphere of the individual. The example of criminalizing hate speech can explain this. Thus, the lawgiver may decide not to criminalize hate speech, choose to outlaw hate speech but define its semantic scope restrictively, or decide on an extensive definition encompassing a broader range of behaviours in the context of hate speech. By increasing the extensiveness of the semantic reach of incrimination, each positive regulation moves from the concept of negative to the concept of positive liberty. While extreme negative liberty means a state of Hobbesian bellum omnia contra omnes, radical positive liberty implies the danger of falling into totalitarianism. According to Berlin, a certain degree of moderation is desirable.[19]

3. EUROPEAN LEGAL FRAMEWORK ON CRIMINALIZED HATE SPEECH

3.1. Harmonization of legislation criminalizing hate speech in the European Union

The first legislative action[20] aimed at harmonizing hate speech legislation at the EU level was the Joint Action 96/443 on Racism and Xenophobia (1996).[21] It was based on historical developments and unfortunate past experiences, which led the Council to adopt the abovementioned legally binding document within the framework of common justice and home affairs policy.

The fight against racism and racial discrimination at the international and broader European level became important and developed after the end of the Second World War. The period from 1939 until 1945 marked the most significant human collapse in the history of mankind. Immediately after the end of this bloody war, allied countries realized they had to do everything in

[16] Berlin (1969) 131.

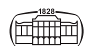
[17] Raz (1986) 374.

[18] Berlin (1969) 131.

[19] Berlin (1969) xlv.

[20] Bayer and Bárd (2020) 50.

[21] Joint Action of 15 July 1996 adopted by the Council based on Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia (96/443/JHA), OJ 1996, No. L185/5.



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their power to prevent anything similar ever happening again. Consequently, to support this aim, the United Nations was formed in 1945 and the Council of Europe in 1949. The United Nations agreed to the Universal Declaration of Human Rights (UDHR) in 1948, and the Council adopted the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR) in 1950.[22] Both include prohibiting discrimination on many grounds, including race, colour, religion and national origin.[23] After the end of the Second World War, post-war Germany criminalized '*Volksverhetzung*' ('incitement of popular hatred') to prevent the resurgence of Nazism. Almost all European and other countries involved in the Second World War fighting have soon done likewise, except for Italy.[24]

Since the mid-1980s, the problems of racism and racial discrimination have been debated within the EU, and repeated calls for legislative action (especially by the European Parliament) have been made. In 1985, the first Report of the Committee of Inquiry on the Rise of Fascism and Racism in Europe was adopted.[25] What is more, in the 1986 Joint Declaration,[26] the Council of the EU, the European Commission and the European Parliament for the first time jointly recognized the growth of xenophobia and racism and vigorously condemned intolerance of racial, religious, cultural, social or national differences. In this context, the above-mentioned Joint Action 96/433 was adopted by the Council. It did not outright call upon member States to criminalize hate speech; instead it focused on facilitating cooperation in criminal matters, aiming to ensure effective judicial cooperation to prevent those who perpetrate racist or xenophobic offences escaping prosecution by travelling from one Member State to another.[27] This plan, which aimed at 'action to combat racism and xenophobia', as its title states, also extended to religious discrimination and acts of religious hatred in the fight against racism and xenophobia.[28]

Despite a coordinated EU effort to tackle racism and xenophobia, hate speech has been a steadily growing social problem since the start of the new millennium.[29] Recent years have brought new challenges in Europe: a financial crisis, a migration crisis, political upheaval due to populism, disinformation and the pandemic – processes which increase feelings of insecurity and make the future unforeseeable. Populism is not only part of the problem but also a symptom.[30] Hence, Member States responded by further cooperation in the fight against hate speech

[22]Other important pieces of legislation which were aimed at preventing such attroticies from happening include the 1948 Genocide Convention and the 1949 Geneva Conventions. For a discussion on direct and public incitement to commit genocide as defined by the Genocide Convention and its role in the development of hate crime incriminations, see Bayer (2020) 270–71.

[23]Howard (2010) 17. Initially cited in Banton (1996); van Boven (2001) 127–129; Boyle and Baldaccini (2001); Niessen and Chopin (2004) vii–xi.

[24]Speciale (2021).

[25]Howard (2010) 22–23. EU immigration policy which appeared on the EU Agenda in the early 1990s due to pressure to improve the image of EU immigration policies was also one of the key factors contributing to the development of measures against racism and discrimination. Bell (2002) 67, 69.

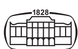
[26]Joint Declaration by the European Parliament, the Council and the Commission against racism and xenophobia, 11 June 1986, OJ 1986 C 158.

[27]Therefore, the Joint Action did not strongly obligate Member States to criminalize hate speech. Mitsilegas (2022) 136.

[28]Howard (2010) 23, 29.

[29]Devetak (2017) 94–104.

[30]Bayer and Bárd (2020) 20.



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and by moving from promoting effective judicial cooperation to harmonizing legislation criminalizing hate speech.

While the EU law still does not provide a legal definition of hate speech, there is a consensus that at least one piece of EU legislation focuses on criminalizing (at least certain forms) of illegal hate speech.[31] This is the Framework Decision 2008/913 on Racism and Xenophobia[32] which replaced Joint Action 96/443 on Racism and Xenophobia and set out criminal law definitions of the most severe forms of racism and xenophobia.

The Framework Decision defines two groups of offences that must be criminalized by the Member States.[33] The first group relates to crimes of publicly inciting violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin. The second group instead focuses on crimes of publicly condoning, denying or grossly trivializing crimes such as the Holocaust, but also other core international crimes such as genocide, crimes against humanity and war crimes [Article 1(1)].[34]

The harmonization framework is softened by allowing Member States 'to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting' [Article 1(2)]. This provision is essential because it allows for far-reaching restrictions on hate speech crimes, effectively limiting their reach to cases of concrete endangerment or harming further legally protected interests (public order or the affected person's honour and reputation).[35] Tying hate speech criminalization to such additional criteria is controversial, if not problematic, since there has been a noticeable shift in the perception and understanding of hate speech. This societal shift, Peršak argues, should be reflected in criminal law legislation. Hence, she advocates for a move away from public order disturbance and towards the dignity of an individual as the primary legal good protected by hate speech criminalization.[36] Be that as it may, the additional criteria laid out in the Framework Decision at least allow for a vast array of approaches to criminalizing hate speech in Member States. In this context, it should not be surprising that many EU policy documents point out that serious concerns exist about how national criminal codes correctly criminalize hate speech.[37]

What is more, there have been an increasing number of voices claiming that the Framework Decision 2008/913 on Racism and Xenophobia should be revisited since is too narrow in its scope and does not cover hate speech aimed at other vulnerable groups such as the elderly, disabled people or the LGBT community.[38] However, EU harmonization of criminal substantive law is only possible to the extent allowed for in the Treaty of Lisbon (thereinafter: TFEU).[39]

[31]Alkiviadou (2017) 6–7.

[32]Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia employing criminal law, OJ 2008, No. L328/55.

[33]Stajnko et al. (2023).

[34]Lobba (2014) 64–65.

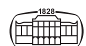
[35]Alkiviadou (2018) 228.

[36]Peršak (2022) 105–106. Compare Ginter and Soo (2022) 54; Gárdos-Orosz and Nagy (2019) 92–94.

[37]European Commission (2021a) 5; European Commission (2020a) 5.

[38]See, for example, European Parliamentary Research Service (2018) 43.

[39]Kettunen (2020) 226–29; European Commission (2021a) 2–3.



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According to Article 83(1) TFEU, such harmonization may cover areas of grave crime with a cross-border dimension resulting from the nature or impact of such offences or from a particular need to combat them on a typical basis. These areas are listed in the TFEU, and include terrorism, money laundering and corruption. And yet, the exhaustive list of these so-called 'Eurocrimes'[40] does not include hate speech or hate crime. The lack of inclusion means that the EU does not have the competence to harmonize hate speech as an area of substantive criminal law. The exception is if the Council, after obtaining the consent of the European Parliament, unanimously adopts a decision identifying hate speech as an area of crime that meets the specified criteria.[41]

Against this background, President of the European Commission von der Leyen, in her 2020 State of the Union speech[42] stressed the importance of building a Union of equality and announced that the European Commission would propose 'to extend the list of EU crimes to all forms of hate crime and hate speech – whether motivated by race, religion, gender or sexuality'. This intention was reflected in several EU policy documents, most notably in the LGBTIQ Equality Strategy 2020–2025. This strategy declared that 'in 2021, the Commission will present an initiative to extend the list of "EU crimes" under Article 83(1) of the Treaty on the Functioning of the European Union (TFEU) to cover hate crime and hate speech, including when targeting LGBTIQ people'.[43] Similar declarations can also be found in the Gender Equality Strategy 2020–2025[44] and the EU Strategy on Combating Antisemitism and Fostering Jewish Life.[45] Surprisingly, it cannot be found in the Strategy for the Rights of Persons with Disabilities 2021–2030.[46] This omission is even more striking given that in 2021, the European Disability Forum issued Recommendations on EU initiatives on hate speech and hate crime, warning that 'not enough is done to address and combat hate speech and hate crime faced by persons with disabilities'.[47]

Be that as it may, in December 2021 the Commission finally published an initiative entitled 'A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime'.[48] This initiative emphasizes that the current divergent and fragmented approach to the criminalization of hate speech results in gaps and uneven protection of the victims of such acts across the EU and further results in a lack of a level playing field for individuals who can fall victim to them.[49] Moreover, the Commission emphasized that the recent initiatives have

[40] Klip (2021) 282–89.

[41] Peršak (2022) 105–106.

[42] European Commission (2020b)

[43] European Commission (2020c) 14.

[44] 'The Commission intends, in particular, to present an initiative to extend the areas of crime where harmonization is possible to specific forms of gender-based violence per Article 83(1) TFEU, the so-called Eurocrimes.' European Commission (2020d) 3–4.

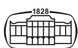
[45] 'To further strengthen the legal framework, in 2021, the Commission will introduce an initiative to extend the list of "EU crimes" to cover hate crime and hate speech.' European Commission (2021b) 7.

[46] European Commission (2021c).

[47] European Disability Forum (2021) 12.

[48] European Commission (2021a).

[49] European Commission (2021a) 15–16, 18.



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highlighted the need to ensure a robust EU-level criminal law response to hate speech and hate crime on grounds other than racism and xenophobia, particularly the grounds of sex, sexual orientation, age and disability.[50]

Consequently, the Commission proposed a two-step solution by first calling upon the Council to identify hate speech and hate crime as another area of crime that meets the criteria set out in Article 83(1) of the TFEU. Once the first step is completed, the Commission emphasized that it might carry out an impact assessment and propose the adoption of directives establishing minimum rules on the definitions and sanctions of hate speech and hate crime to be adopted by the European Parliament and the Council in line with the ordinary legislative procedure.[51] In September 2021, the European Parliament welcomed the Commission's commitment to harmonize hate crime and hate speech at the EU level.[52] In March 2022, the Council examined the proposal, and although the Council was not unanimous, a broad majority favoured the initiative.[53] In November 2022, the European Committee of the Regions adopted an opinion on the subject, warmly welcoming the European Commission's proposal and calling on the Council to swiftly extend the list of EU offences under Article 83(1) of the TFEU by setting common minimum standards for the relevant national criminal provision in full respect of the subsidiarity principle.[54]

However, despite a vigorous push from various EU institutions, it remains to be seen if the Council will be able to reach a consensus and thereby extend the competence of the EU to harmonize this area of substantive criminal law.[55] In 2019, the Council stressed in a debate on the 'Future of EU substantive criminal law' that at this stage, the emphasis should be on ensuring the effectiveness and quality of implementation of *existing* EU legislation.[56] It is, therefore, doubtful that there is a sufficient appetite amongst all Member State leaders for extending the competence of the EU in order for it to adopt a new batch of politically highly sensitive criminal law legislation.[57]

3.2. Tackling hate speech by regulating the media landscape in the European Union

Additional EU legislation tackles the issue of hate speech in the media landscape. Although it does not concern the scope of criminalization or sanctions for such criminalized conduct, it still complements the criminal law framework discussed above.

[50]European Commission (2021a) 5.

[51]However, the Commission is clear that the initiative relates to the first stage and is without prejudice to the actions that may be undertaken in the second stage. European Commission (2021a) 3.

[52]European Parliament (2021).

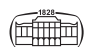
[53]European Parliament (2022).

[54]European Committee of the Regions (2022).

[55]'As Article 83(1)(3) requires unanimity from the Council, the question is whether it is worth taking the risk of having a Member State reject the proposal.' European Parliamentary Research Service (2020) 37.

[56]Council of the European Union (2019) 8.

[57]Csonka and Landwehr (2019) 266. See also Peršak (2022) 116–17, who argues that some Member States may be hesitant to embrace the proposal to wholeheartedly extend the list of Eurocrimes.



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Firstly, the Audiovisual Media Services Directive (2010)[58] sets out in Article 6 that 'Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality'.

It was later found that such a prohibition of broadcasting illegal content is too limited in scope since it only addresses hate speech and other discriminatory content based on race, sex, religion and nationality. Hence, Article 6 was extended in 2018 by the Directive (EU) 2018/1808, which amended the Audiovisual Media Services Directive.[59] The prohibition now includes incitement to violence or hatred directed against a group of persons or a member of a group based on *any* of the grounds referred to in Article 21 of the Charter of Fundamental Rights of the EU. This means that hate speech based on disability, sexual orientation, age, religious belief or other grounds which is broadcasted by audiovisual media services is now also covered by the Directive and should therefore be addressed by Member States.

Moreover, not only audiovisual media services providers but also providers of online platforms such as social media platforms, online forums and similar are covered by EU legislation targeting hate speech. The EU first opted for regulating this area by issuing soft law instruments and initiatives for self-regulation, such as the 2016 Code of Conduct on Countering Illegal Hate Speech Online[60] and the 2018 Recommendation on measures to effectively tackle illegal content online.[61] However, this changed in 2022 with the adoption of the *Digital Services Act*,[62] which aims at increasing and harmonizing the responsibilities of online platforms and other information service providers and reinforcing the oversight of platforms' content policies in the EU.[63]

Under the Digital Services Act, hate speech, criminalized under Framework Decision 2008/913 on Racism and Xenophobia or under the law of any Member State, is considered a form of illegal content. In order to tackle such illegal content, online platform providers need to put in place notice and action mechanisms which allow users (Article 16) and trusted flaggers (Article 22) to provide substantiated notices of illegal content. Suppose the platform service provider promptly removes or disables access to the illegal content upon receiving such a notice. In that case, it is not liable for the content shared on the platform by its users (Article 6).[64] While

[58]Directive 2010/13/EU of 10 March 2010 on coordinating certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ 2010, No. L95/1.

[59]Directive (EU) 2018/1808 of 14 November 2018 amending Directive 2010/13/EU on the coordination of specific provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) given changing market realities, OJ 2018 No. L303/69.

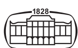
[60]As of 2022, the following platforms agreed to participate: Facebook, Microsoft, Twitter, YouTube, Instagram, Snapchat, Dailymotion, Jeuxvideo, TikTok, LinkedIn, Rakuten Viber and Twitch. See European Commission (2022).

[61]European Commission (2018).

[62]Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)

[63]European Comission (2020e) 12.

[64]Directive 2000/31/EC already introduced a comparable liability exception regime on certain legal aspects of information society services, particularly electronic commerce, in the Internal Market (e-Commerce Directive), OJ. See Čufar (2022) 12.



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this does not directly affect criminal legislation, it creates a strong incentive for online platforms to remove any reported hate speech.

What is more, where an online platform provider becomes aware of any information giving rise to a suspicion that a criminal offence involving a threat to the life or safety of a person or persons was, is being or is likely to be committed, it needs to inform the law enforcement or judicial authorities of Member States concerned of its suspicion and provide all relevant information available (Article 18). It is safe to assume that this responsibility of online platforms also extends to the most reprehensible forms of criminalized hate speech, including serious threats or direct incitement to violence against a person or a particularly vulnerable group of persons.

Last but not least, the Digital Services Act also includes provisions which concern orders to act against illegal content issued by the relevant national judicial or administrative authorities (Article 9). When such an order is issued and served on the online platform provider, it needs to inform the authority of any effect given to the order. It must specify if and when the effect was given to the order. The Digital Services Act does not provide the legal basis for issuing such orders or their cross-border enforcement. However, its approach can nonetheless be considered ground-breaking since it burdens the platform provider with the responsibility to respond to an order for removal of online hate speech issued by an authority from another Member State which did not necessarily consult local authorities or obtain their approval (provided that the national legal framework of another Member State allows for the judicial or administrative authorities to issue such an order).

3.3. Hate speech in the case law of the European Court of Human Rights

While criminalizing and otherwise limiting hate speech may infringe on various human rights and freedoms, such as academic freedom,[65] the ECtHR case law predominantly concerns its impact on freedom of expression. In the context of the ECHR, freedom of expression is dealt with in Article 10.[66] It enacts in paragraph 1 that everyone has the right to freedom of expression. Paragraph 2 of the same article limits the right so that its exercise may be subject to formalities, conditions, restrictions or penalties following the law and necessary in a democratic society.

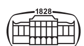
The three prominent reference cases for understanding how the practice of the ECtHR might pertain to the issues concerning freedom of expression and hate speech are *Handyside v the United Kingdom*, *Erbakan v Turkey* and *Seurot v France*. Of course, the above cases are illustrative and the relevant case law is far broader. A good overview is included in cases such as *Stoll v Switzerland* and *Pentikäinen v Finland*.[67]

In the *Handyside case*, freedom of expression is understood by the court to be one of the essential societal foundations and, as such, applies to ideas that offend, shock or disturb any

[65]For a discussion on academic freedom as an emerging freedom of international law, see Pap (2021) 11–12.

[66]For a discussion on key judgements related to Article 10, see Szentgáli-Tóth (2018) 100–107.

[67]*Handyside v the United Kingdom,* App. no. 5493/72 (ECtHR, 7 December 1976); *Erkaban v Turkey,* App. no. 59405/00 (ECtHR, 6 October 2006); *Seurot v France,* App. no. 57383/00 (ECtHR, 18 May 2004); *Stoll v Switzerland,* App. no. 69698/01 (ECtHR, 10 December 2007); *Pentikäinen v Finland,* App. no. 11882/10 (ECtHR, 20 October 2015).



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sector of the population. This approach is demanded by tolerance and respect for equal dignity in a pluralistic society.[68]

The ECtHR reiterated this viewpoint in the *Erbakan case* while simultaneously emphasizing that sometimes it is necessary to sanction or even prevent the types of expression that spread, incite, promote or justify hatred based on intolerance, in line with the principle of proportionality.[69]

The *Seurot case* upgraded and clarified the Erbakan judgment, stating that remarks directed against the underlying values are not to be understood as falling within the scope of protection of Article 10 since they would entail an abuse of rights, per Article 17 of ECHR.[70]

Since the *Handyside v United Kingdom* decision, the ECtHR has loosened the protection of speech that offends, shocks or disturbs. It instead produced a body of case law, which can be claimed to be inconsistent, and which allows for restrictions to the freedom of expression based on a diverse plethora of grounds.[71]

Similar arguments regarding the understanding of hate speech by the ECtHR are made by Niewenhuis, who claims that it might entail a shift from a negative to a positive obligation.[72] If before it was expected that someone refrains from hate speech, the states might now be expected to actively curtail offensive kinds of communication that express an ideology of hate using stereotypes and target different protected characteristics such as gender, religion, race, and disability.[73]

In this manner, according to Article 10 of the ECHR, the exercise of the freedom of expression may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. In accordance with the practice of ECtHR, the following broad spectrum of acts are either excluded from the protection of Article 10 of the ECHR, or the protection may be restricted: a threat to the democratic order, racial hate, negationism, religious and ethnic hate, revisionism, incitement to violence, support for terrorist activity, condoning war crimes, denigration of national identity, insulting state officials, extremism, public defamation of a person or group of people with specific characteristics (e.g. sexual orientation or gender identity), praising crime, racial insults, online hate speech and infringements upon the right to privacy.[74]

[68] *Handyside v the United Kingdom,* App no 5493/72 (ECtHR, 7 December 1976) 49. See also relevant court practice of the Hungarian Constitutional court, which stressed that it is sometimes necessary and proportional to limit freedom of speech if there is an overriding social interest when doing so. Gárdos-Orosz (2020) 164.

[69] *Erbakan v Turkey,* App. no. 59405/00 (ECtHR, 6 July 2006) 56.

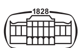
[70] *Seurot v France,* App. no. 57383/00 (ECtHR, 18 May 2004)

[71] Mchangama and Alkiviadou (2021) 1042.

[72] Nieuwenhuis (2019) 326.

[73] Chetty and Alathur (2018) 108.

[74] European Court of Human Rights (2022). As the array of cases is sufficiently and extensively dealth with the above.



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Limitations in terms of curbing a threat to the democratic order were put forth, among others, in the *Schimanek v Austria*[75] and *B. H, M. W, H. P. and G. K. v Austria* cases.[76] Limitations were placed on speech including racial hate in *Glimmerveen and Haqenbeek v the Netherlands*[77] and *Perinçek v Switzerland*.[78] Negationism was found to be prohibited by the ECtHR case law in *Pastörs v Germany*[79] and *Marais v France*.[80] ECtHR placed limitations on statements espousing religious hate in *Belkacem v Belgium*,[81] ethnic hate in *W. P. and Others v Poland*.[82] Incitement to violence and support for terrorist activity was found not to be within the scope of permissible freedom of expression in *Roj TV A/S v Denmark*,[83] condoning war crimes in *Lehideux and Isorni v France*[84] and denigration of national identity in *Dink v Turkey*.[85] Limitations were placed on denigrating national identity in *Dink v Turkey*, on insulting state officials in *Stern Taulats and Roura Capellera v Spain*[86] and *Asunto Otegi Mondragon v Spain*,[87] on extremism in *Yefimov and Youth Human Rights Group v Russia*[88] and on praising crime in *Yasin Özdemir v Turkey*.[89] Online hate speech was prohibited by the ECtHR among others in the *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* case.[90] With each such decision, a small move towards the abstract ideal of positive liberty is made in Berlinian terms.

In terms of balancing with other rights, the array of cases where limits are placed upon freedom of expression is also broad and diverse. Giving just a few examples, in 2003, in *Soulas and others v France*, no protection was granted regarding the publication of a book entitled 'The colonization of Europe: Truthful remarks about immigration and Islam'.[91] More recently, in 2020, in *Lilliendahl v Iceland*, the ECtHR found that the applicant's comments in an online article concerning measures to strengthen education in school on lesbian, gay, bisexual or transgender matters were homophobic by being serious, severely hurtful and prejudicial.[92]

[75]*Schimanek v Austria,* App. no. 132307/96 (ECtHR 1 February 2000).

[76]*B. H, M. W, H. P. and G. K. v Austria,* App. no. 12774/87 (ECtHR 12 October 1989).

[77]*Glimmerveen and Haqenbeek v the Netherlands,* App. no. 8348/78 & 8406/78 (EComHR 11 October 1979).

[78]*Perinçek v Switzerland,* App. no. 27510/08 (ECtHR 15 October 2015).

[79]*Pastörs v Germany,* App. no. 55225/14 (ECtHR 3 October 2019).

[80]*Marais v France,* App. no. 31159/96 (EComHR 24 June 1996).

[81]*Belkacem v Belgium,* App. no. 34367/14 (ECtHR 27 June 2017).

[82]*W. P. and Others v Poland,* App. no. 42264/98 (ECtHR 2 September 2004).

[83]*Roj TV A/S v Denmark,* App. no. 24683/14 (ECtHR 17 April 2018).

[84]*Lehideux and Isorni v France,* App. no. 55/1997/839/1045 (ECtHR 23 September 1998).

[85]*Dink v Turkey,* App. no. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECtHR 14 September 2010).

[86]*Stern Taulats and Roura Capellera v Spain,* App. no. 51168/15 and 51186/15 (ECtHR 13 March 2018).

[87]*Asunto Otegi Mondragon v Spain,* App. no. 2034/07 (ECtHR 15 March 2011).

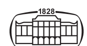
[88]*Yefimov and Youth Human Rights Group v Russia,* App. no. 12385/15 and 51619/15 (ECtHR 7 December 2021).

[89]*Yasin Özdemir v Turkey,* App. no. 14606/18 (ECtHR 7 December 2021).

[90]*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary,* App. no. 22947/13 (ECtHR 2 February 2016).

[91]*Soulas and Others v France,* App. no. 15948/03 (ECtHR 10 July 2008).

[92]*Lilliendahl v Iceland*, App. no. 29297/18 (ECtHR, 12 May 2020).



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Buyse emphasizes the inconsistency of such case law in terms of excluding certain acts from the protection of Article 10 under the umbrella of Article 17 of the ECHR.[93] Further practice of the ECtHR is expected to clarify whether freedom of expression protects other types of utterances, such as statements of knowingly false facts.

As Keane has convincingly argued, the ECtHR, in its practice after the 1976 *Handyside case*, has placed an ever-broadening set of restrictions on freedom of expression. It has been favouring the protection of minorities as an initial presumption, contrary to the United States, where freedom of expression is indeed the initial presumption.[94] In the ECtHR practice, a slow but long march towards positive liberty can thus be noted.

4. ANALYSIS OF THE EUROPEAN LEGAL TRENDS AND DE LEGE FERENDA USEFULNESS OF THE PRESENTED METHOD

On the level of the EU, documents such as the 2021 initiative 'A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime' are aimed at broadening the approach to criminalization to heighten the level of protection of victims of such acts.[95] At the same time, this necessarily narrows the scope of freedom of expression, considering the ideal of negative liberty.

Other legal provisions adopted in the last decade, such as the extended Article 7 of the Audiovisual Media Services Directive and certain provisions of the Digital Services Act, broaden the scope of instruments available for dealing with illegal hate speech. As such, they further aid in protecting the victims of hate speech by prescribing more limits on the unfettered freedom of expression. Amongst the EU institutions, only the Council of the European Union is slowing down the process of the shift towards a more positive understanding of liberty in the area of hate speech and freedom of expression.

Regarding the case law of the ECtHR, a similar trend can be noted, establishing an ever-broadening set of restrictions on freedom of expression.[96] A shift on the spectrum towards positive liberty can thus be noted, perhaps reflecting a broader societal paradigm shift. This does not entail an enhancing of the perpetrator's liberty, it entails a shift towards the abstract ideal on the level of court's authoritative decision-making.

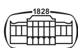
If we consider the mentioned trends from the point of view of Berlin's two concepts of liberty, a move towards positive liberty can be noted both in the legislative activity of the EU and in the development of the court practice of the ECtHR. A higher degree of state paternalism increases individuals' ability to be their own masters. It does this by encouraging good prospects. Protecting the goods of public order and peace, tolerance, and equality, regardless of personal circumstances, is in the interests of the victims and the perpetrator. With such interventions, the supranational institutions also increase the individual's positive liberty. On the other hand, this type of supra-state intervention reduces negative liberty. Namely, through its decisions, the EU

[93] Buyse (2014) 491.

[94] Keane (2007) 660.

[95] European Commission (2021a).

[96] Keane (2007) 660–61.



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and the ECtHR influence more rigorous intervention in the behaviour of legal entities on the national level.

It makes perfect sense that negative and positive liberties as analytical concepts are utilized to analyze the state's intervention in the individual's rights and not to explore the relationships between individuals. In other words, the type of liberty is assessed with this analytical tool from the perpetrator's perspective and not from the victim's perspective. Criminal law is the legislator's last means for regulating social conditions (ultima ratio). It defines prohibitions that relate directly to perpetrators and potential perpetrators of criminal acts. It can be understood as an analysis of the state's overinclusive prohibitions and repressive behaviour from the point of view of its legislative and judicial practice.

In this manner, the idea of two abstract concepts of liberty can be transferred to concrete legal regulations and judicial practice and is applicable in at least two contexts. It can be used to analyze legislative changes and jurisprudence trends. It is also possible to compare individual legal systems with other legal systems. With this, the ideal the particular legal order is closer to can be determined. In addition, the particularities of individual national regulations can be clarified. The potential of using this analytical tool is broader than the analysis of the criminalized hate speech discussed in this paper. However, the chosen field of crime is particularly suitable for this type of analysis since when dealing with illegal hate speech, the question of infringing on freedom of expression and, generally, the value of understanding individual liberty, is clearly manifested.

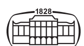
When using the ideas of positive and negative liberty in public and expert discourse, discussions about the existing (as it is) and the future legal system (as it should be) regarding the criminalization of hate speech in question are freely intertwined. Such interaction obscures the confrontation of different points of view, which is extremely valuable for society. In particular, it is a question of the appropriate level of repression regarding the public incitement of hatred, violence and intolerance. The understanding of the latter is also related to the question of the legislator's understanding of the concept of liberty and in what sense he would like to expand or contract it.

Using the idea of two concepts of liberty can also contribute to a higher level of integrity in judicial decision-making and legislative activity. We understand integrity here as Dworkin advocated it in his work Empires of Law. Dworkin distinguishes between integrity in judgment and integrity in legislative activity.[97] Both are related to the understanding that changing the legal system (in the sense of judicial practice or legislation changes) is analogous to literary activity. A judge or legislator who adopts a particular decision or legal rule or principle is in a similar position to the writer of an unfinished novel. According to Dworkin, he should strive to present the legal system in which he operates in the best possible light with his decision.[98]

In searching for the best possible interpretation, the novel writer should seek a balance between considering past arrangements or decisions and the possibility of improving the current system. Dworkin calls this desired ideal integrity. When assessing integrity (which is central), the legislator or judge should also consider important issues of political honesty, material justice and

[97] Dworkin (1986) 176.

[98] Dworkin (1986) 226.



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procedural rules.[99] An understanding of Berlin's two concepts of liberty can contribute to pursuing the ideal of integrity in criminal law. It acts as an aid in understanding the current and potential future state of the legal order within which the judge or legislator operates. It would be utterly contrary to integrity, for example, if the ECtHR arbitrarily decided to drastically change its previous understanding of the balance between protecting freedom of expression and allowing national legislators to criminalize hate speech. The result would be an excess of either positive or negative liberty for the subjects to which the norm applies.

The presented methodological tool can also be placed in the context of modern understandings of natural law. In addition, it can help in pursuing the common good, as understood by Finnis, who claims that law exists in nuances, and in its central meaning, benefits the common good. The more the regulation of an individual social issue is consistent with the common good, the closer such a norm is to the central meaning of the law. While Nazi or Stalinist law is barely law, according to Finnis, modern legal orders that respect the rule of law and enforce fundamental values are closer to the purpose of law – the enforcement of the common good. In this regard, Finnis defines and defends seven fundamental values: life, knowledge, play, aesthetic experience, friendship, practical reason and faith.[100]

Suppose we accept Finnis' assertion that the common good is knowable to bring the legal system closer to its central meaning. In that case, we must first establish the difference between such a central meaning and positive regulation. This differentiation goes beyond the content of this article. The article in question does not define the value issues of regulating the criminal act in question. Still, such a possible change in the direction of the common good is only possible based on the most in-depth understanding of the various implications of legislative regulation and judicial practice for the freedom of legal entities in society. Considering that liberty is vital for understanding all seven fundamental goods that, according to Finnis, make up the common good, the usefulness of the presented methodological tool in the context of his theory is all the more apparent.[101]

5. CONCLUSIONS

Regarding the criminalization of illegal hate speech, it is possible to identify a shift towards a positive conception of liberty in European transnational legislation and court practice.

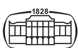
The most important contribution of this article is perhaps the introduction of a methodological tool in terms of supranational law for the analysis of the concept of liberty in the state's repressive legislative and judicial activity. This approach is based on Berlin's two concepts of liberty and distinguishes between positive and negative liberty. Both (otherwise abstract) ideals can be used with a concrete legal rule or judicial decision so that such a rule or decision is qualitatively placed closer to one of the concepts of liberty. It can also be used for a broader analysis of changes and the state of an individual legal order.

The fact that the two concepts of liberty can be used to analyze supranational legal regulations and judicial practice in the context of understanding two of the great contemporary

[99]Dworkin (1986) 177; Novak (2011) 67.

[100]Finnis (2011) 10, 23.

[101]Finnis (2011) 88.



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schools of legal theory (interpretivism and natural law) shows the theoretical rigour of the idea. With greater clarity about the type of liberty that the legislator or decision-maker seeks, the debate between the law *de lege lata* and *de lege ferenda* is facilitated. The distinction can contribute to ensuring integrity in legislative and judicial activity. It can also help determine the compliance of existing law with the central meaning of the law, which, according to some theorists, should strive for the common good.

This approach opens up the possibility of many further types of research. Similarly, it is possible to analyze other criminal offences using the idea of two concepts of liberty. The concept can also be transferred to misdemeanours, minor offences and administrative offences. They can be used for the needs of comparative legal analyses of the legal systems of different countries. Moreover, it is also possible to utilize it to interpret the collision of values as expressed by legal rules or principles. Interpretation favouring an individual value can be a shift towards negative or positive liberty.

It can therefore be concluded that the concepts of positive and negative liberty are conceptual categories that have great utility value in various stages of the creation and application of the law. They can enable a better understanding of political morality, which is the basis for criminal-political decision-making on the scope of criminalization in so-called hate speech and, more broadly, regarding other prohibited conduct.

The choice between conceptions of essential moral and political values, such as positive and negative liberty, has an enduring meaning. It is part of the human being and our thoughts and feelings about our identity. It is what makes us human.[102] Such a choice may be why questions about the most appropriate regulation of the crime under consideration have a special place in the public discourse. We hope the article will contribute a little to clarifying this complex debate.

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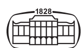
LITERATURE

Alkiviadou, N., 'Regulating Hate Speech in the EU' in Assimakopoulos, S., Baider, F. H. and Millar, S. (eds), *Online Hate Speech in the European Union: A Discourse-Analytic Perspective* (Springer 2017) 6–10.

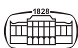
Alkiviadou, N., 'Regulating hatred: Of devils and demons?' (2018) 18 International Journal of Discrimination and the Law 218–36.

[102] Berlin (1969) 172.



Unauthenticated | Downloaded 01/26/25 04:13 PM UTC

Banton, M., *International Action against Racial Discrimination* (Clarendon Press 1996).
Bárd, P., 'Prerequisites for the effective fight against hate crimes' (2020) 3 Hungarian Journal of Legal Studies 255–68.
Barna, I., 'The genealogy of social hatred' (2020) 3 Hungarian Journal of Legal Studies 296–312.
Bavcon, L., 'Čovekova sloboda i/ili bezbednost' (Human Freedom and/or Helplessness) (2012) 15 Temida: časopis o viktimizaciji, ljudskim pravima i rodu 95–104.
Bayer, J., 'High-impact hate speech by persons of authority: A lower threshold needed?' (2020) 3 Hungarian Journal of Legal Studies 269–84.
Bayer, J. and Bárd, P., *Hate speech and hate crime in the EU and the evaluation of online content regulation approaches* (European Union 2020) <http://www.europarl.europa.eu/RegData/etudes/STUD/2020/655135/IPOL_STU(2020)655135_EN.pdf> accessed 28 December 2022.
Bell, M., *Anti-Discrimination Law and the European Union* (Oxford University Press 2002).
Berlin, I., *Four essays on liberty* (Oxford University Press 1969).
Boyle, K. and Baldaccini, A., 'A Critical Evaluation of International Human Rights Approaches to Racism' in Fredman, S. (ed.), *Discrimination and Human Rights The Case of Racism* (Oxford University Press 2001).
Buyse, A., 'Dangerous Expressions: The ECHR, Violence and Free Speech' (2014) 63 International and Comparative Law Quarterly 491–503.
Chetty, N. and Alathur, S., 'Hate speech review in the context of online social networks' (2018) 40 Aggression and Violent Behavior 108–18.
Constant, B., 'The liberty of the ancients compared with that of the moderns' in Fontana, B. (ed), *The political writings of Benjamin Constant* (CUP 1988) 309–28.
Coser, I., 'The concept of liberty: The polemic between the neo-republicans and Isaiah Berlin' (2014) 8 Brasilian Political Science Review 39–65.
Csonka, P. J. and Landwehr, O., '10 Years after Lisbon: How "Lisbonised" is the Substantive Criminal Law in the EU?' (2019) 14 Eucrim 261–66.
Čufar, K., '(Re)Constructions of Social Networks in Slovenian Case Law' (2022) 2 Law, Identity and Values 7–23.
Devetak, S., 'Respect of the Principle "Unity, Diversity and Solidarity" and Open Minded "Multiculturalism" as its Implementation is *Conditio Sine Qua Non* for the Existence of European Union' in Berting, J., Devetak, S., Inaç, H. and Villain-Gandossi, Ch. (eds), *European Union: Decide or Perish. The Major Risks the European Union is Confronted with* (ISCOMET Institute for Ethnic and Regional Studies 2017) 93–132.
Dežman, Z., 'Predsodki in njihov diskriminatorni pomen' (Prejudice and its discriminatory meaning) (2006) 2 Zbornik Pravne fakultete Univerze v Mariboru 307–25.
Dworkin, R., *Laws empire* (Harvard University Press 1986).
Finnis, J., *Natural law and natural rights* (2nd edn, Oxford University Press 2011).
Gárdos-Orosz, F., 'Covid-19 and the responsiveness of the Hungarian constitutional system' in Serna, G. J. (ed), *Covid-19 and Constitutional Law: Covid-19 et droit constitutionnel* (Universidad Nacional Autónoma de México 2020) 157–65.
Gárdos-Orosz, F. and Nagy, K., 'The Development of the Hate Speech Regulation in Hungary: From Criminal Law to Civil Law and Media Regulation' in Urbańczyk, M., Bartosik, Ł. D. and Zagórska, N. (eds), *In Search of the Euro-Atlantic Doctrine of Freedom of Speech* (ArchaeGraph Wydawnictwo Naukowe 2019) 89–121.
Ginter, C. and Soo, A., 'The "Public Order" Parachute in Combating Racism and Xenophobia' (2022) 31 Juridica International 48–58.



Unauthenticated | Downloaded 01/26/25 04:13 PM UTC

Hille, F. R., 'The deductions of freedom/morality as autonomy and the categorical imperative in groundwork iii and their problems' (2016) 50 Topicos, Revista de Filosofia 61–94.

Howard, E., *The EU Race Directive: Developing the protection against racial discrimination within the EU* (Routledge 2010).

Kant, I., *Critic der practischen Vernunft* (Hartknoch 1788).

Keane, D., 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights' (2007) 25 Netherlands Quarterly of Human Rights 641–63.

Kettunen, M., *Legitimizing European Criminal Law: Justification and Restrictions* (Springer 2020).

Klip, A., *European Criminal Law* (4th edn, Intersentia 2021).

Lobba, P., 'Punishing Denialism Beyond Holocaust Denial: EU Framework Decision 2008/913/JHA and Other Expansive Trends' (2014) 5 New Journal of European Criminal Law 64–65.

Mchangama, J. and Alkiviadou, N., 'Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?' (2021) 21 Human Rights Law Review 1008–42.

Meško, G., 'Prenos kriminalitetnih politik – sodobne kulture odzivanja na kriminaliteto in vloga kriminologov v procesih oblikovanja nadzorstvenih politik' (Transfer of crime policies – contemporary cultures of response to crime and the role of criminologists in supervisory policy-making processes) (2008) 59 Revija za kriminalistiko in kriminologijo 31–38.

Mitsilegas, V., *EU Criminal Law* (2nd edn, Hart Publishing 2022).

Niessen, J. and Chopin, I. (eds.), *The Development of Legal Instruments to Combat Racism in a Diverse Europe* (Martinus Nijhoff Publishers 2004).

Nieuwenhuis, A., 'A positive obligation under the ECHR to ban hate speech?' (2019) Public Law 326–42.

Novak, A., 'Alkimija prava: Ronald Dworkin in sodnikovo ustvarjanje pravičnosti' (The alchemy of law: Ronald Dworkin and the judge's creation of justice) in Novak, A. (ed), *Izbrane razprave* (Lamut, V., trans., GV Založba 2011) 11–92.

Pap, A. L., 'Academic freedom: A test and a tool for illiberalism, neoliberalism and liberal democracy' (2021) 26 The Brown Journal of World Affairs 105–26.

Peršak, N., 'Criminalising Hate Crime and Hate Speech at EU Level: Extending the List of Eurocrimes Under Article 83 (1) TFEU' (2022) 33 Criminal Law Forum 85–119.

Raz, J., *The morality of freedom* (Clarendon Press 1986).

Speciale, A., 'Vatican Says Italy's Hate Speech Law Blunts Freedom of Speech', *Bloomberg* (22 June, 2021) <https://www.bloomberg.com/news/articles/2021-06-22/vatican-says-italy-s-hate-speech-law-blunts-freedom-of-speech?leadSource=uverify%20wall> accessed 30 December 2022.

Stajnko, J., Weingerl, P. and Šepec, M., 'Other Areas' in Ambos, K. and Rackow, P. (eds.), *The Cambridge Companion to European Criminal Law* (Cambridge University Press 2023).

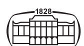
Stratilati, M. E., 'Hate crimes as discriminatory violations' (2016) 8 LeXonomica 115–23.

Šugman, K., 'Kategorizacija in stereotipiziranje ter njun pomen za kriminologijo' (Categorisation and stereotyping and their implications for criminology) (2006) 57 Revija za kriminalistiko in kriminologijo 15–27.

Szentgáli-Tóth, B., 'Freedom of expression as an instrument of Peace-building' (2018) 10 Constituição, Economia e Desenvolvimento: Revista da Academia Brasileira de Direito Constitucional 92–122.

Van Boven, T., 'Discrimination and Human Rights Law: Combating Racism' in Fredman, S. (ed.), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press 2001).

Von Humboldt, W., *Ideen zu einem Versuch, die Gränzen der Wirksamkeit des Staatszubestimmen* (Trewendt 1851) <http://www.deutschestextarchiv.de/humboldt_grenzen_185U7> accessed 28 December 2022.



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OTHER DOCUMENTS

Council of Europe (1997), 'Recommendation No. R (97) 20 of the Committee of Ministers To Member States on "Hate Speech"' <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680505d5b> accessed 5 May 2023.

Council of the European Union (2019), 'Outcome of the Council Meeting: 3697th Council meeting' Justice and Home Affair doc. no. 9970/19 <https://www.consilium.europa.eu/media/40358/st09970-en19.pdf#page=8> accessed 28 December 2022.

European Commission (2018), 'Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online' <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0334&from=EL> accessed 28 December 2022.

European Commission (2020a), 'A Union of equality: EU anti-racism action plan 2020–2025' Brussels, 18.9.2020 COM(2020) 565 final <https://ec.europa.eu/migrant-integration/library-document/union-equality-eu-anti-racism-action-plan-2020-2025_en> accessed 28 December 2022.

European Commission (2020b), 'State of the Union Address by President von der Leyen at the European Parliament Plenary' <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655> accessed 28 December 2022.

European Commission (2020c), 'Union of Equality: LGBTIQ Equality Strategy 2020–2025' Brussels, 12.11.2020 COM(2020) 698 final <https://commission.europa.eu/system/files/2020-11/lgbtiq_strategy_2020-2025_en.pdf> accessed 28 December 2022.

European Commission (2020d), 'A Union of Equality: Gender Equality Strategy 2020–2025' Brussels, 5.3.2020 COM(2020) 152 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN> accessed 28 December 2022.

European Commission (2020e), 'Shaping Europe's digital future' Brussels, 19.2.2020, COM(2020) 67 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0067&from=EN> accessed 28 December 2022.

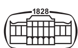
European Commission (2021a), 'A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime' Brussels, 9.12.2021, COM(2021) 777 final <https://commission.europa.eu/document/download/405d4be5-867b-4dcb-bf97-f61fae89868c_en?filename=1_1_178542_comm_eu_crimes_en.pdf> accessed 28 December 2022.

European Commission (2021b), 'EU Strategy on combating antisemitism and fostering Jewish life (2021–2030)' Strasbourg, 5.10.2021 COM(2021) 615 final <https://commission.europa.eu/system/files/2021-10/eu-strategy-on-combating-antisemitism-and-fostering-jewish-life_october2021_en.pdf> accessed 28 December 2022.

European Commission (2021c), 'Union of Equality: Strategy for the Rights of Persons with Disabilities 2021–2030' Brussels, 3.3.2021, COM(2021) 101 final <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8376&furtherPubs=yes> accessed 29 December 2022.

European Commission (2022), 'The EU Code of conduct on countering illegal hate speech online: The robust response provided by the European Union' <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination-0/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en> accessed 28 December 2022.

European Committee of the Regions (2022), 'Opinion of the European Committee of the Regions – Extending the list of EU crimes to hate speech and hate crimes' 30 November 2022, CIVEX-VII/015 <https://memportal.cor.europa.eu/Handlers/ViewDoc.ashx?pdf=true&doc=COR-2022-01407-00-00-AC-TRA-EN.docx> accessed 28 December 2022.



Unauthenticated | Downloaded 01/26/25 04:13 PM UTC

European Court of Human Rights (2022), 'Factsheet – Hate speech: December 2022' –<https://www.echr.coe.int/documents/fs_hate_speech_eng.pdf> accessed 28 December 2022.

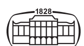
European Disability Forum (2021), 'Recommendations on EU initiatives on hate speech and hate crime' <https://www.edf-feph.org/content/uploads/2021/04/EDF-position-and-recommendation-on-hate-speech-and-hate-crime.pdf> accessed 28 December 2022.

European Parliament (2021), 'Resolution of 16 September 2021 with recommendations to the Commission on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU (2021/2035(INL))' OJ 2021, No. C 117/88 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021IP0388> accessed 28 December 2022.

European Parliament (2022), 'Legislative Train Schedule: Proposals to extend the list of EU crimes to all forms of hate crime and hate speech – In "A New Push for European Democracy"' <https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-hate-crimes-and-hate-speech> accessed 28 December 2022.

European Parliamentary Research Service (2018), 'Study: Equality and the Fight against Racism and Xenophobia: Cost of Non-Europe Report' March 2018, PE 615.660 <https://www.europarl.europa.eu/RegData/etudes/STUD/2018/615660/EPRS_STU(2018)615660_EN.pdf> accessed 28 December 2022.

European Parliamentary Research Service (2020), 'Study: Unlocking the potential of EU Treaties: An article-by-article analysis' May 2020, PE 651.934 <https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)651934> accessed 28 December 2022.



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