

Article

Freedom of Expression and Hate Speech: Human Rights Standards and Their Application in Poland and Slovenia

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Abstract: Even though hate speech is an extreme form of intolerance, which contributes to hate crime, the assessment of this particular behavior and its expressions is often problematic, because hate speech is difficult to define and even more difficult to investigate and punish. In the present article, the authors analyze the development of human rights standards (in particular as interpreted in the case-law of the European Court of Human Rights) regarding freedom of expression and hate speech and look at their application in Poland and Slovenia through a comparative analysis of Polish and Slovenian law and practice. We noticed that challenges with fulfilling international obligations to adequately respond to and fight hate speech can be observed and that some room for improvement on the level of lawmaking, policymaking, and their effective implementation is present. The most evident challenge remains in the low rates of prosecution of hate crimes recorded by the police, which need to be addressed by both States. In Slovenia, some positive systemic and regulatory changes have recently been introduced, while in Poland there has been little progress and not all victims of hate speech are adequately protected by law. The authors suggest a focus on educating individuals about the harmful consequences of hate speech and acts, adapting legislation to appropriately punish individuals who spread hate speech, raising awareness and understanding of the rhetoric used in the public sphere, and increasing media support for the aforementioned awareness, keeping in mind that solutions on how to appropriately address or prevent hate speech are by no means simple or straightforward.



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1. Introduction

Freedom of expression is one of the fundamental civil and political rights. It is undisputed that it constitutes “one of the essential foundations of [democratic] society and one of the basic conditions for its progress and for the development of every human being”, as emphasized by the European Court of Human Rights (hereinafter ECtHR or the Court) in one of the most important judgments *Handyside v. the United Kingdom*.¹ Notwithstanding this broad protection, freedom of expression is not absolute and may be subject to limitations² or even exceptions in times of public emergency.³ Hate speech is a special case of expression that does not enjoy protection.

The article begins with a brief presentation of the international normative framework relevant to the topic and the definition of hate speech in the IHRL. It then examines the case law of the ECtHR, in which the Court has progressively developed the criteria and a

¹ *Handyside v. the United Kingdom*, judgment of 7 December 1976, appl. no 5493/72, para 49.

² Cf ICCPR, art 19(3), ECHR, art 10(2).

³ The freedom of expression does not belong to the catalogue of non-derogable rights, see ICCPR art 4, ECHR, art 15(2).

“threshold test” to distinguish hate speech from acceptable expression (Dyer 2015). As we argue here, this distinction is often difficult in practice because of an underlying paradox. On the one hand, freedom of expression should be broadly defined to ensure pluralism, tolerance, and openness to the world, without which there can be no democratic society.⁴ On the other hand, these same values and goals may justify the need to restrict freedom of expression. In particular, the article provides insight into recent case law and addresses the “threshold” for hate speech and the factors that should be considered. Acknowledging that there is no generally accepted binding definition of hate speech, this part of the paper was crucial for setting up a standard (model) for the State Parties of the European Convention on Human Rights. Since the Convention’s provisions are not casuistic, dynamic/evolutive interpretation is one of the main tools for developing their meaning and substantive scope.

Against this backdrop, we examine whether these international standards are being applied appropriately in Poland and Slovenia, and whether public policy and the behavior of public officials are consistent with the international recommendations. In this part of the article, we provide a critical analysis of the Polish and Slovenian legal framework and public policy related to hate speech. The following questions will be addressed: Is hate speech defined according to international recommendations? Do Polish and Slovenian authorities honor their international obligations to protect citizens from hate speech and to investigate hate speech cases? Is hate speech appropriately identified and distinguished from acceptable free expression according to international recommendations and standards?

In the present article, the authors researched the subject with multiple methodologies, especially dogmatic, pragmatic, comparative, and qualitative methods with the goal of answering the fundamental research question: “What are the human rights standards regarding freedom of expression and hate speech, and what is their application in Poland and Slovenia?” A formal dogmatic method is predominantly used in Sections 2 and 3 of the paper, where the authors studied normative legal material (international human rights law) and other relevant international instruments, judgments, and decisions relevant to legal interpretation. This method is used in legal sciences to clarify the meaning and scope of legal norms. With the aim of presenting the evolutive (dynamic) interpretation of the European Convention of Human Rights standards, a thorough analysis of the European Court of Human Rights case-law was conducted. Research conducted in these sections was indispensable for further study that aimed at a critical analysis of national implementation of international standards. A dominating method in the subsequent sections of the paper is the comparative legal research that consists in the comparative evaluation of legislation and practice of the two jurisdictions in Poland and Slovenia. Apart from legal sources, the authors also relied on reports, public documents, and selected scientific publications. Quantitative data were obtained from national statistical offices and public documents.

2. Freedom of Expression and Hate Speech—Normative Framework and Definitions

Freedom of expression is among the most important civil and political liberties and is guaranteed by the main global⁵ and regional⁶ human rights instruments. In recent decades, the right to freedom of expression has grown in importance, as reflected, *inter alia*, by the activities of the UN Special Rapporteur on freedom of opinion and expression⁷, the

⁴ Handyside, *op. cit.*, para 49.

⁵ Universal Declaration of Human Rights, proclaimed by the UN General Assembly on 10 December 1948, Resolution 217 A, Article 19; International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171 (ICCPR), Article 19(2).

⁶ Convention on the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950), art 10; American Convention on Human Rights “Pact of San José, Costa Rica” (adopted 22 November 1969), OAS Treaty Series No 36, art 13; African Charter on Human and People’s Rights (adopted on 27 June 1981, entered into force on 21 October 1986) (1982) 21 ILM 58 (African Charter), art 9(2).

⁷ The mandate established by the Human Rights Commission in 1993 (UN Doc E/CN.4/1993/L.48), currently operating under the resolution of the Human Rights Council 43/4 of 2020.

Human Rights Committee⁸, and, at the regional level, for example, in the jurisprudence of the European Court of Human Rights, which has developed since the late 1970s (see, e.g., [Flauss 2009](#), pp. 809–49; [Schabas 2015](#), pp. 444–81).

Freedom of expression is a crucial democratic principle that supports the freedom of individuals and the community to express themselves without fear of censorship, retribution, or any kind of punishment. The mentioned principle is also incorporated into different national legislations, which we can see, when comparing the incorporation of the mentioned principle into the Constitutions in Slovenia and Poland, it is declared in Article 39 of the Constitution of the Republic of Slovenia, which guarantees freedom of thought, speech, and public appearance, the press, and other forms of public communication and expression, while stating that everyone may freely collect, receive, and disseminate information and opinions.⁹ Freedom of expression includes all forms of communication, such as written, oral, and also visual. The Polish Constitution guarantees the right to freedom of expression more generally in Article 54, which states that “freedom of expression and freedom to acquire and disseminate information shall be guaranteed to everyone” ([The Constitution of the Republic of Poland 1997](#)). A second part of this provision prohibits the preventive censorship of social communications and the licensing of the press. Only the operation of a radio or television station may be subject to licensing.

Freedom of expression is considered one of the cornerstones of democracy and pluralism and is comprehensively protected. It includes not only “information” or “ideas” that are positively received or considered harmless or indifferent but also those that offend, shock, or disturb. As the ECtHR has repeatedly emphasized, these are the requirements of pluralism, tolerance, and open-mindedness, without which there is no democratic society. At the same time, we have to be aware that “the line between hate speech and freedom of expression is often blurred” ([European Economic and Social Committee 2022](#)). As freedom of expression is an inherent and fundamental right that gives individuals almost unrestricted ability to freely articulate their viewpoints, hate speech presents a harmful form of expression characterized by intentional targeting and discriminatory treatment of select groups. The term “hate speech” as such does not appear in any of the human rights treaties for the simple reason that most of the treaties were adopted long before the term was coined and developed by philosophy, sociology, communication studies, and other academic disciplines. There is also no universally accepted definition of this term in international human rights law. However, conventional provisions today prohibit certain behaviors associated with it. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) prohibits in Article 4 “propaganda” and “dissemination of ideas” about racial superiority and racial discrimination, including these by public authorities or public bodies. The International Covenant on Civil and Political Rights provides in Article 20(2) that “any advocacy of national, racial, or religious hatred which constitutes incitement to discrimination, hostility, or violence shall be prohibited by law” ([International Covenant on Civil and Political Rights 1966](#)).

In the absence of a binding definition, soft law instruments are often used when defining hate speech for the purposes of human rights monitoring and judicial proceedings at both international and national levels. In particular, Recommendation No. R(97)20 of the Committee of Ministers of the Council of Europe to Member States on “hate speech” ([Rec\(97\)20 \(1997\)](#)), Recommendation CM/Rec (2010)5 of the Committee of Ministers to Member States on measures to combat discrimination based on sexual orientation or gender identity ([CM/Rec\(2010\)5 \(2010\)](#)), a General Policy Recommendation No. 15 on combating

⁸ UN Human Rights Committee, General Comment of the Human Rights Committee No. 34: Article 19: Freedoms of opinion and expression (12 September 2011), UN Doc CCPR/C/GC/34.

⁹ The Constitution of the Republic of Slovenia of the 28 December 1991, Official Gazette of the Republic of Slovenia, no. 33/91-I, 42/97—UZS68, 66/00—UZ80, 24/03—UZ3a, 47, 68, 69/04—UZ14, 69/04—UZ43, 69/04—UZ50, 68/06—UZ121,140,143, 47/13—UZ148, 47/13—UZ90,97,99, 75/16—UZ70a, and 92/21—UZ62a). Available online: <http://pisrs.si/Pis.web/pregledPredpisa?id=USTA1#> (accessed on 14 April 2023).

hate speech (CRI(2016)15 (2015)) and a more recent Recommendation CM/Rec (2022)16 of the Committee of Ministers to member states on combating hate speech (CM/Rec(2022)16 (2022)).

On a universal level, hate speech has been defined by the United Nations, with an emphasis on addressing the problem globally, as “any communication, spoken, written, or behavioral, that attacks a person or group on the basis of who they are, i.e., on the basis of their religion, ethnicity, nationality, race, color, ancestry, gender, or any other factor of identity, or uses derogatory or discriminatory language” (United Nations 2023). But, in recent years there has been an interesting contrast noted, due to the fact that instead of hate speech/actions being publicly condemned and prosecuted, they have been tolerated or even justified in the name of freedom of speech or in the name of the realization of human rights (Chakir 2012). The demarcation between hate speech and free speech is a very sensitive area, as the two limit each other. According to Wojciech Sadurski, these borderline cases include pornography, racist hate speech, and expressions of religious intolerance, insulting politicians and private citizens, contempt of court, incitement to violence, disclosure of military or trade secrets, and advertising of goods (i.e., alcohol or cigarettes) or services and entertainment (i.e., gambling and prostitution) manifested in hate speech and the associated promotion of hatred, racism, intolerance, and other discriminatory practices (Sadurski 2022; Pucelj 2019). The most famous example of the escalation of hate speech, which then manifested itself in hostile acts and eventually in the Holocaust, is the case of the Jews during Nazism, which Mirjana Ula also confirms (Pucelj 2019).

Comparative research shows that despite the absence of binding legal norms that would harmonize national laws in this area, a certain degree of commonality can be discerned. In most European countries, hate speech is defined as public statements that incite hatred against a person or a group of people on the basis of certain arbitrary and immutable identity characteristics (skin color, ethnic origin, gender, sexual orientation, disability, etc.) and thus:

- it directly threatens the rights of other individuals and groups;
- it threatens the universally accepted societal values of freedom and equality for all people, acceptance of diversity, and inclusion and contributes to the erosion of democratic values;
- in the final analysis, it negates the fundamental values of society, on the basis of which we understand freedom of speech to be one of the fundamental rights in the first place (Senta et al. 2021).

3. State Obligations and Context-Specific Approach to Hate Speech in the ECtHR Case-Law

A critical analysis of the Court’s jurisprudence shows that in some cases it can be difficult to distinguish hate speech from acceptable expression and to maintain a delicate balance between pluralism and tolerance (Mchangama and Alkiviadou 2021). In the absence of a clear universal definition of “hate speech”, human rights protection bodies (such as the ECtHR) have approached the concept and scope of hate speech on a case-by-case basis.

The concept and elements of hate speech have been gradually construed in the Court’s jurisprudence since their first appearance in the judgment *Sürek v. Turkey* (No. 4) in 1999.¹⁰ Hate speech has been divided into two categories, the first of which includes the most serious forms of hate speech and the second the less serious forms.¹¹ The former is considered to fall under Article 17 ECHR and is thus fully excluded from the protection of Article 10. The latter is not a priori excluded from the material scope of Article 10,¹² but may be subject to other limitations. As provided in Article 10(2) of the Convention, freedom of expression may be limited, provided that the following conditions are met: there is a legal

¹⁰ Judgment of 8 July 1999, appl. no. 24762/94, para 60.

¹¹ *Carl Jóhann Lillendahl v. Iceland*, dec. of 12 May 2020, appl. no. 29297/18, paras 34–35.

¹² *Schimanek v. Austria*, dec. of 1 February 2000, appl. no. 32307/96; *Witzsch v. Germany* (no. 2), dec. of 13 December 2005, appl. no. 7485/03; *Molnar v. Romania*, dec. of 23 October 2012, appl. no. 16637/06; *Perinçek v. Switzerland*, judgment [GC] of 15 October 2015, appl. no. 27510/08, paras 113–5.

basis, as the measure is necessary in a democratic society, it pursues a legitimate aim, and is proportional. In our view, the question of whether certain statements/comments constitute “hate speech” is of paramount importance, because in only very exceptional circumstances it may be convincingly argued that restrictions were not necessary in a democratic society and did not pursue a legitimate aim. To the contrary, if a statement is not considered as hate speech, it can be restricted, but strong and valid reasons must be provided to justify such restrictions.

How can one distinguish hate speech from protected and acceptable speech? In other words, when are the boundaries of freedom of expression crossed and when is it considered hate speech? Over the years, the Court has developed several context-specific factors relevant to determining hate speech.¹³ These constituent elements are crucial to the proper application of ECHR norms and should serve as guiding principles for national authorities, especially the courts. This jurisprudential development of “anti-hate speech standards” was all the more necessary in the absence of binding definitions. Although it may still be difficult to distinguish acceptable expression from hate speech in some instances, in our opinion, the ECtHR dynamic interpretation of the Convention provides sufficient guidance for most cases.

The first and most relevant factor is the content of the speech, in other words the substance of the ideas and information expressed. The ECtHR has, on many occasions, pointed out that speech that promotes or justifies violence, other criminal acts, hatred, or intolerance cannot normally¹⁴ claim protection.¹⁵ More recently, the Court has broadened a concept of hate speech to include incitement to discrimination—which is considered as a “form of incitement to intolerance, which, together with incitement to violence and hatred, is one of the limits which should never be overstepped in the exercise of freedom of expression. However, incitement to different treatment is not necessarily the same as incitement to discrimination”.¹⁶ Although this idea may seem unclear, it relates to a general concept that not all different treatment is automatically discriminatory, because it may be justified and necessary (Clifford 2015).

A tendency to further broaden the prohibited content may be observed in the Court’s case-law. For example, it covers negative public statements about a group (ethnic, religious, or other) that either insult, ridicule, slander, or cast a negative light on the whole group of the population¹⁷ or that can be seen as affecting the “private life” of individual members,¹⁸ statements that target the dignity of people;¹⁹ as well as aggressive nationalistic rhetoric.²⁰ The form and style of expression is rather of secondary relevance. The use of vulgar and provocative language and metaphors or emotional appeals is usually perceived as an acceptable mode of protest and dissatisfaction.²¹ In our view, form and style are important

¹³ Perinçek, *op. cit.*, paras 204–8, 229; Savva Terentyev v. Russia, judgment of 28 August 2018, appl. no. 1069/09, para 66; Mariya Alekhina and others v. Russia, judgment of 17 July 2018, appl. no. 38004/12, paras 217–21.

¹⁴ Selected examples of cases where expression was assessed—a contrario—acceptable and where violations of a negative state obligation were found: Dilipak v. Turkey, judgment of 15 September 2015, appl. no. 29680/05, para 62; Dmitriyevskiy v. Russia, judgment of 3 October 2017, appl. no. 42168/06, para 100.

¹⁵ Incitement to religious hatred and hostility—in Tagiyev and Huseynov v. Azerbaijan, judgment of 5 December 2019, appl. no. 13274/08, para 47; statements promoting intolerance towards homosexual persons—Lilliendhal, *op. cit.*, para 38.

¹⁶ Baldassi and Others v. France, judgment of 11 June 2020, appl. no. 1527/16 et al, para 64.

¹⁷ Perinçek, *op. cit.*, para 206; Le Pen v. France, dec. of 10 May 2010, appl. no. 55173/00; Kasymakhunov and Saybatalov v. Russia, judgment of 14 March 2013, appl. no. 26261/05 et al; Vejdeland and Others v. Sweden, judgment of 9 February 2012, appl. no. 1813/07, para 55; Beizaras and Levickas v. Lithuania, judgment of 14 January 2020, appl. no. 41288/15, para 125; Féret v. Belgium, judgment of 16 July 2009, appl. no. 15615/07, para 73.

¹⁸ Budinova and Chaprazov v. Bulgaria, judgment of 16 February 2021, appl. no. 12567/13, paras 53–68; Behar and Gutman v. Bulgaria, 16 February 2021, appl. no. 29335/13.

¹⁹ Atamanschuk v. Russia, judgment of 11 February 2020, appl. no. 4493/11, para 42.

²⁰ Balsytė-Lideikienė v. Lithuania, judgment of 4 November 2008, appl. no. 72596/01, paras 73, 79.

²¹ However, this stylistic freedom also has its limits, as illustrated in Leroy v. France, judgment of 2 October 2008, appl. no. 36109/03, paras 36–48; Z.B. v. France, judgment of 2 September 2021, appl. no. 46883/15, paras 56–57.

and should be given more attention in the future. Similar expression/speech in terms of content may have a different impact depending on how it is presented. Even if a particular expression does not directly call for violence or hatred, it may still carry a very powerful negative message.

The second factor is the intent (motivation) of the speaker, although its determination may be difficult,²² especially with artistic expression.²³ For example, satire is a form of artistic expression and social commentary which, “(...) by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with the right of an artist—or anyone else—to use this means of expression should be examined with particular care”.²⁴ Particular statements/acts to be regarded as hate speech are characterized by their goal of vilifying a certain person or a group, to stir up prejudice and hatred towards them, or to cast them in a negative light.²⁵

The third factor is the most context-specific, as it requires the assessment of the probable consequences of a particular expression and likelihood of harm. For that purpose, the statements should be analyzed to find out if they were made against a tense political or social background²⁶. It is very important to realize that the same speech (in content and form) may have very different impact, depending on the source/author and publicity (audience and scale) generated by it. Therefore, views presented by a well-known user of social media,²⁷ a politician,²⁸ or published person in a popular newspaper²⁹ would most probably have a powerful and negative impact, in comparison to statements made by a regular citizen to a small public.³⁰ While it is often the case that negative and discriminatory statements are directed against a social group in general (i.e., ethnic or sexual minority), individual members of that group may feel personally affected by such statements. Such negative impact for an individual’s private life will not, however, be determined automatically in all cases, and a minimum severity threshold test that the negative stereotyping needs to reach has been suggested in *Aksu v. Turkey*.³¹ This proposition has been developed further in the ECtHR case-law to depend on several factors: “(a) the characteristics of the group (for instance its size, its degree of homogeneity, its particular vulnerability or history of stigmatization and its position vis-à-vis society as a whole); (b) the precise content of the negative statements regarding the group (in particular, the degree to which they could convey a negative stereotype about the group as a whole, and the specific content of that stereotype); (c) the form and context in which the statements had been made, their reach (which might depend on where and how they had been made), the position and status of their author, and the extent to which they could be considered to have affected a core aspect of the group’s identity and dignity”.³² Additionally, the social and political

²² Hate speech has been identified mostly in cases when intolerant expression has been repeatedly presented—*Pavel Ivanov v. Russia*, dec. of 20 February 2007, appl. no. 35222/04; *Belkacem v. Belgium*, dec. of 27 June 2017, appl. no. 34367/14. See also “Explanatory Memorandum” to ECRI’s General Policy Recommendation no 15 on combating hate speech, 8 December 2015, paras 14–15.

²³ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, submitted in accordance with Human Rights Council resolution 16/4, A/67/357, of 7 September 2012, para 46. See also *Dağtekin v. Turkey* (judgment of 13.1.2005, appl. no. 36215/97) that concerned a critical novel and *Leroy v. France* (judgment of 2 October 2008, appl. no. 36109/03) that concerned the publication of a caricature (drawing) with a caption that condoned terrorism.

²⁴ *Eon v. France*, judgment of 14 March 2013, appl. no. 26118/10, para 60 and cases cited therein.

²⁵ *In Kilin v. Russia*, judgment of 11 May 2021, appl. no. 10271/12, paras 90 and 93, the applicant’s intent has been decisive in the assessment of the interference. The case concerned conviction for sharing content online within a small social media group with intent to incite violence against non-Russian ethnicities, established in absence of commentary.

²⁶ *Perinçek*, op. cit., para 205.

²⁷ *Magyar Helsinki Bizottság v. Hungary*, judgment [GC] of 8 November 2016, appl. no. 18030/11, para 168.

²⁸ *Féret*, op. cit., para 76; *Erbakan v. Turkey*, judgment of 6 July 2006, appl. no. 59405/00; *Budinova and Chaproazov*, op. cit.; *Behar and Gutman*, op. cit.

²⁹ *Atamanschuk*, op. cit., para 63.

³⁰ *Lilliendahl*, op. cit., para 39; *Baldassi and Others*, op. cit., para 70.

³¹ Judgment [GC] of 15 March 2012, appl. nos. 4149/04 and 41029/04, para 58.

³² *Behar and Gutman*, op. cit., para 67.

climate prevalent at the time when the statements had been made should be taken into consideration.³³ We would like to point out that this element is particularly well developed in the case-law and even though it seems to be difficult to assess the possible consequences of expression/speech in advance, some indicators, such as the author, audience, and scale, should be treated as refutable presumptions.

Most cases adjudicated by the ECtHR concern a negative State obligation to respect freedom of expression. In recent years, however, in addition to this negative duty of non-interference, more focus has been put on the State positive obligation to protect the rights and freedoms of individuals and groups, in reaction to the polarization and radicalization of the societies, as well as to technological development and digitalization. It needs to be pointed out that the responsibilities related to illegal content, hate speech, and other harmful expression lie on the State,³⁴ as well as on private entities³⁵ or even individuals.³⁶ Such obligations may be of substantive or procedural nature. A judgment in *Association ACCEPT and Others v. Romania* provides a very good example of State positive obligations. Romanian authorities failed to ensure the peaceful process of an LGBTQIA+ event, without verbal abuse from a group of intruders, as well as failed to carry out effective investigation into homophobic motives of their behavior.³⁷ Properly drafted national law is a basic State obligation. Domestic criminal law provisions directed against verbal or non-verbal expression that stirs up, promotes, or justifies violence, hatred, or intolerance should clearly and precisely define the scope of the relevant offences. This general legality requirement has been formulated by the ECtHR to secure adequate protection against arbitrary interference by the national authorities.³⁸ However, legal precision is also desirable to “encourage” national authorities to prosecute hate speech, when necessary, instead of taking up a lenient approach. A post factum procedural obligation requires domestic authorities (courts in particular) to carry out the requisite balancing exercise, to respond adequately and effectively to discrimination, and to grant redress. In particular, when faced with hate crimes, domestic authorities have a duty to combat impunity for crimes perceived as “particularly destructive of fundamental rights”.³⁹

States are expected not to fuel conflicts, but to mitigate them, not to spread intolerance, but to promote pluralism. Public authorities are expected to take adequate preventive steps and become an active “manager” of diversity, in order to achieve social cohesion.⁴⁰ Since

³³ *Lewit v. Austria*, judgment of 10 October 2019, appl. no. 4782/18, paras 46–47; *Panayotova and Others v. Bulgaria*, dec. of 7 May 2019, appl. no. 12509/13, para 56; *Behar and Gutman*, op. cit., para 67.

³⁴ Hate speech on the Internet and social media: in *Beizaras and Levickas v. Lithuania* (judgment of 14 January 2020, appl. no. 41288/15) the Court found a violation of Article 14 taken in conjunction with Article 8 and of Article 13, on account of the authorities’ refusal to prosecute authors of serious homophobic comments on Facebook.

³⁵ Business responsibility in that context has been developed, e.g., by CJEU in, inter alia: *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein GmbH* of 5 June 2018 (C-210/16, EU:C:2018:388), where CJEU ruled that the administrator of a fan page hosted on Facebook must be characterized as being responsible for the processing of the data of individuals visiting the page and therefore shares joint liability with the operator of the social network, within the meaning of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281 of 23 November 1995, pp. 31–50). See also *Delfi AS v. Estonia* (judgment of 16 June 2015, appl. no. 64569/09), where the ECtHR found no breach of Article 10 as regards the domestic courts’ imposition of liability on the applicant company for not removing hate speech comments without delay.

³⁶ The question of responsibility of an individual (a politician standing for elections) for not deleting the unlawful comments posted by third parties on the “wall” of his Facebook account has been analyzed in *Sanchez v. France* (judgment of 2 September 2021, appl. no. 45581/15). The Court found that that the decision of the domestic courts to convict the applicant was not contrary to Article 10. The judgment is not final as the case has been referred to the GC.

³⁷ Judgment of 1 June 2021, appl. no. 19237/16.

³⁸ See e.g., *Altuğ Taner Akçam v. Turkey*, judgment of 25 October 2011, appl. no. 27520/07, paras 91–95; *Selahattin Demirtaş v. Turkey* (no. 2) judgment [GC] of 22 December 2020, appl. no. 14305/17, paras 269–70, 279–81.

³⁹ *Sabalić v. Croatia*, judgment of 14 January 2021, appl. no. 50231/13, para 94.

⁴⁰ *İzzettin Doğan and Others v. Turkey*, judgment of 26 April 2016, appl. no. 62649/10, para. 109. See also: OSCE High Commissioner on National Minorities, *The Ljubljana Guidelines on Integration of Diverse Societies*, 2012;

the media play an important function in shaping public opinion, States are expected to preserve impartiality of broadcasting on matters of public interest and ensure the audience's right to a balanced and unbiased coverage of matters of public interest in news programs.⁴¹ In general, a concept of media pluralism is intertwined with a rather unusual situation where in order to secure freedom of expression, the very same one has to be restricted. Thus, any interference and regulation in this area has to be well justified, proportional, and accompanied by sufficient procedural safeguards.⁴² This dilemma, however, does not arise in relation to hate speech, when other legitimate rights and interests are to be balanced against free expression, such as the right to private and family life, non-discrimination and human dignity, or even the right to life and freedom from degrading treatment.⁴³

4. Law and Practice in Poland. How Hate Speech Is Becoming Unrecognized in Populist Policy

The term "hate speech" as such does not appear in Polish law. Article 32 of the Polish Constitution establishes a general prohibition on discrimination in political, social, or economic life, on any ground.⁴⁴ However, the Equal Treatment Act of 2016 explicitly prohibits discrimination based on a *numerus clausus* grounds: "sex, race, ethnic origin, nationality, religion, belief, disability, age or sexual orientation".⁴⁵ Gender identity is not included, neither national origin, color, nor descent.⁴⁶ Articles 119, 256, and 257 of the Polish Penal Code, which criminalize the use of violence or threats, incitement to hatred, public insults, or violation of bodily integrity of a person or a group of people, mention a number of prohibited grounds including nationality, ethnicity, race, or religious beliefs, but not sexual orientation, gender identity, disability, and age.⁴⁷ As a consequence, Polish criminal law does not protect victims of hate speech and hate crimes in the same way (Habrat and Tragaki 2022), contrary to the international standards that recognize the importance of motives behind discrimination and violence. As we have pointed out earlier in the paper, intent has been addressed by the ECtHR and seen as one of the constituent elements to distinguish between hate speech and acceptable speech.

A *prima facie* conclusion can be made that these definitions and provisions are not fully in line with the recommendation No. R 97 (20) of the Committee of Ministers of the Council of Europe and other international standards. Recommendations to amend the Equal Treatment Act, as well as to investigate and prosecute crimes motivated by anti-LGBTIQA+ sentiments as hate crimes, and to recognize sexual orientation, gender identity, and racist motivations as an aggravated form of criminal conduct, were made by a number of international bodies, i.e., the European Commission against Racism and Intolerance (European Commission against Racism and Intolerance (ECRI) 2018), United Nations Human Rights Council (2022), and UN treaty bodies, in particular CERD (2019) and Human Rights Committee (2016). Similar concerns were raised by the European Commission that issued a letter of formal notice to Poland (as well as an additional letter of formal notice)⁴⁸ for incorrect transposition of the Framework Decision on combating racism

Guidelines of the Committee of Ministers to Member States on the Protection and Promotion of Human Rights in Culturally Diverse Societies, adopted on 2 March 2016.

⁴¹ *ATV Zrt v. Hungary*, judgment of 28 April 2020, appl. no. 61178/14, para 39; *NIT S.R.L. v. the Republic of Moldova*, judgment [GC] of 5 April 2022, appl. no. 28470/12, paras 174, 184–6.

⁴² See Joint dissenting opinion of Judges Lemmens, Jelić, and Pavli to *NIT S.R.L.*, op. cit.

⁴³ In extreme situations hate speech may lead to mass violence and even genocide, as illustrated by the examples of genocide in Rwanda and, more recently, the genocide of Rohingya in Myanmar.

⁴⁴ The Constitution of the Republic of Poland of the 2 April 1997, Journal of Laws no. 78, item 483. English version. available online: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (accessed on 3 April 2023).

⁴⁵ Act of 3 December 2016 on the implementation of some regulations of the European Union regarding equal treatment, Journal of Laws of 2016, as amended, Article 1.

⁴⁶ Concluding observations on the combined twenty-second to twenty-fourth periodic reports of Poland, 28 August 2019, CERD/C/POL/CO/22-24, paras 8 and 16.

⁴⁷ Penal Code of 6 June 1997, Journal of Laws of 1997, no. 88, item 553, as amended.

⁴⁸ INFR(2020)2322, Incorrect transposition of the Council framework decision 2008/913/JHA by Poland.

and xenophobia by means of criminal law.⁴⁹ In its 2021 follow-up report CERD considered the response of Poland to its recommendations regarding hate speech as unsatisfactory and requested further explanations (CERD 2021). To date, no changes on the legislative level have been made, and according to the Government's statements, there is no intention to do that in the future, because according to the Government, Polish law is in line with the European standards and "all Polish citizens are equal" (CommDH(2020)27 (2020)).

Let us now turn to the assessment of the current factual situation, policies, and implementing measures adopted by the Polish authorities. As already noted in the article, Poland, as a State party to a number of human rights treaties, has positive and procedural obligations to protect human dignity, life, privacy, and equality.

Following recommendations by various international human rights protection bodies, the Polish Government adopted the National Action Plan for Equal Treatment 2022–2030 and Police Action Plan for 2022–2025 for counteracting hate speech and crimes of incitement of hatred on national, ethnic, racial, or religious grounds or on the grounds of lack of religion (Ministry of Family and Social Policy Republic of Poland 2022). Nevertheless, their effective implementation has not been satisfactory so far, both when it comes to prevention and counteraction against hate speech and to the post factum legal remedies. The Polish authorities have not conducted effective campaigns to combat hate speech and prejudice, even though such measures were included (albeit in a very general manner) in the National Action Plan for Equal Treatment.

Concerns have also been raised as to the effective implementation by the law enforcement agencies of the Prosecutor General's Guidelines of 2014 regarding hate crime proceedings (Commissioner for Human Rights 2021a). Polish authorities are reluctant to provide statistical data and other information requested by the Polish Commissioner for Human Rights that are crucial to assess the correctness of hate speech cases' investigations (Ibid.). One of the problems that has not been effectively tackled is a recognizable practice of discontinuing criminal proceedings by public prosecutors (Ibid.). According to hate crime statistics by the OECD, about 50% (or even lower) of the people who have committed hate crimes recorded by the police are prosecuted (OSCE 2022). According to these data, the majority of the cases had a racist and xenophobic motivation. The second most frequent motivation was antisemitism.⁵⁰

A striking example of the said practice is a decision issued by the Regional Prosecutor's Office in Piaseczno that concerned the behavior of the participants of a gathering during the anniversary of the outbreak of the Warsaw Uprising on 1 August 2020 in Warsaw. The discontinuation decision was based on an argument that the "Heil Hitler" gesture does not constitute a promotion of Nazism but refers to the salute of Roman soldiers. The decision was later on revoked by the court. As correctly stated by the court: "(...) in the general public opinion, the gesture in the form of an outstretched right arm is a reference to fascist symbolism. The view presented by the prosecutor that it had its source in ancient Rome (and thus was a reference to Roman culture, and not necessarily to fascist regimes), did not have a historical foundation (...) It was an important element of Nazi culture." This court decision is in line with the standards set up by the ECtHR. Nevertheless, it should be noted that the use of swastikas and other symbols associated with Nazism may not always be seen as hate speech, as all factors should be assessed, such as the motives, author, audience, country's history, etc.⁵¹

⁴⁹ Council Framework Decision 2008/913/JHA.

⁵⁰ See also quantitative data gathered by the Polish Commissioner for Human Rights. In 2020, out of 1566 proceedings concerning promotion of fascism, 726 cases concerned acts committed using the Internet; 622 persons faced criminal charges and 304 indictments were issued. Available online: <https://bip.brpo.gov.pl/pl/content/jak-sciga-sie-propagowanie-i-pochwalanie-faszysmu-prokuratura-krajowa-w-koncu-ujawnila-rpo> (accessed on 7 April 2023).

⁵¹ Hans Burkhard Nix v. Germany, judgment of 13 May 2018, appl. No. 35285/16. Even though the Court found that the Applicant had not intended to spread totalitarian propaganda or to incite violence, he did not clearly and obviously reject Nazi ideology in his blog post, as was required by German law.

Another example of hate speech that called for adequate reaction on the part of the Polish authorities was an antisemitic assembly in Kalisz on 11 November 2021. During the gathering, its organizers and participants raised slogans such as “Death to the Jews”, “Not Semitic, not rainbow, but national Poland”, “Jews in Poland are masters, and we are their slaves”, “Never again will a Pole be a Jew’s slave” (RPO 2023). The investigation against police officers and local administration for not dissolving the assembly was discontinued by the Regional Prosecutor’s Office in Sieradz in January 2023. In our opinion, such expression falls within the hate speech criteria, as set up by the ECtHR. Even though there was no direct and serious threat to public security and order—as argued by the Prosecutor—possible long-term serious and harmful consequences should also be taken into account.

Antisemitic hate speech dominates because Polish society still remains homogenous in terms of ethnic and national origin, in comparison to many other European countries. Antisemitic sentiments stem from a long nationalistic “tradition” of the far-right part of Polish society. However, since the Arab Spring 2010–2012 and intensive migration to Europe, hateful rhetoric and attacks against migrants, especially from Muslim countries, were observed in recent years (Ibid.). On 19 April 2023, Poland’s Supreme Court Chamber of Extraordinary Review and Public Affairs⁵² overturned the hate speech conviction of a man who, in a Facebook post, wrote “Poland for the Poles”, calling for a “white Poland”. The Court’s justification relied on the argument that a conviction for inciting hatred must demonstrate the “ill intent” of the person responsible, and in the Court’s view this has been erroneously assumed by the lower instance court (Prawna 2023). This kind of behavior by courts and public authorities has been defined as a discriminatory legalism strategy (Demczuk 2020, pp. 128–34). The Government fails to implement the international recommendations and does not take any meaningful steps to prevent hate speech. This tendency falls squarely within a general populist approach towards IHRL and international human rights protection bodies, that questions the validity of international institutions and confronts them with ill-interpreted “national” interests (see Sadurski 2022; Humble 2022; Alston 2017).

Another problem with impunity for hate speech relates to homophobic acts. Most such cases are not even brought before the courts, and if they are, the courts rather tend to grant protection to statements with attributes of homophobic hate speech, finding such statements to be covered by freedom of speech (Commissioner for Human Rights 2019). One of the cases monitored by the Polish Ombudsman concerned placing a vulgar inscription on the wall of a tenement house, under the window of a same-sex couple’s apartment, with arrows pointing to the window. The prosecutor conducted proceedings for violation of Article 257 of the Penal Code (insulting a group of people or a particular person because of their national, ethnic, racial, religious affiliation, or because of their non-denominational affiliation). The proceedings were discontinued due to the absence of the statutory attributes of the crime. Such an outcome is highly questionable for several reasons. Firstly, even though incitement to hatred based on sexual orientation and gender identity is not a specific offence, such acts may be prosecuted on the basis of other provisions of Polish criminal law. Secondly, Poland’s criminal law contains a general provision requiring courts to consider the particular motivation and behavior of perpetrators when determining their sentence, thus, as correctly pointed out by the Polish Commissioner for Human Rights, prejudice and bias motivation (even though not formally required) should be taken into account in the course of the proceedings by the law enforcement authorities (Ibid.). Thirdly, lack of investigating hate motives is not in line with the developing human rights standards regarding hate speech.⁵³ There seems to be a problem with acknowledging the constituent elements of hate speech, as identified in the ECtHR case law. In particular, Polish prosecutors and judges often do not address the motives behind a particular form of expression. It should be emphasized that the authorities cannot absolve themselves by

⁵² It should be noted that this Chamber has been declared unlawful by the ECtHR in the case *Dolińska-Ficek and Ozimek v. Poland*, judgment of 8 January 2021, appl. nos 49868/19 and 57511/19.

⁵³ Sabalić judgment, op. cit.

arguing that there is still little guidance from the ECtHR and other international human rights protection bodies regarding the difference between acceptable free speech and hate speech.

Neither do the Polish authorities seem to recognize hate speech as a real problem that may lead to serious societal consequences or intentionally inspire tensions to shift public attention from other problems. Even though much hate speech is channeled through the Internet and social media, no meaningful measures are taken to tackle the problem, such as educational campaigns on tolerance and the elimination of prejudices and social stereotypes. A draft law on the protection of freedom of speech in online social networking sites (*Rządowy Proces Legislacyjny 2021*) does not include provisions nor definitions of hate speech and does not provide for specific measures against it. As explained in the justification to the draft, the service recipient using social networking sites will still be entitled to use criminal legal protection measures: “Due to the fact that a significant part of the behavior constituting the phenomenon of hate speech is a crime under the Polish legal order, there was no need to define this phenomenon in the act” (*Rządowy Proces Legislacyjny 2021*). It thus means that it is deemed reasonable that a person who became a victim of hate speech may have recourse to criminal action, notwithstanding the fact that it is often illusory and theoretical. The draft law’s ratio legis in fact lies in controlling and limiting service providers’ (i.e., Facebook, Twitter) ability to block specific content and users. It does not come as a surprise that the draft law has been proceeded after Facebook had blocked President Trump’s account after the attack on the Capitol. The new law is also aimed at the protection against disinformation and the protection of the freedom of expression. But the way the law was drafted raises doubts of possible abuse, as it may be used as a tool to control digital content according to the discretionary views and powers of the authorities.

The last problem to be addressed in this part of the article relates to the radicalization of the language of public debate.⁵⁴ It needs to be clearly stated that the engagement of public officials in discriminatory rhetoric violates State obligations to protect human dignity and equality. CERD, as well as other international human rights bodies,⁵⁵ recommended that Poland publicly condemn and distance itself from racist hate speech by public figures, including politicians and media officials; to send strong messages to journalists and broadcasters that had a responsibility to avoid the use of hate speech and stereotypes; and (particularly in the context of election campaigns) to closely scrutinize broadcasters with respect to content that incited hatred or strengthened xenophobic attitudes.⁵⁶ Hate speech and harmful stereotypes, when used by public figures, especially during election campaigns, have already been scrutinized by the ECtHR and assessed as particularly harmful.

Similar to “regular perpetrators”, also in cases of hate speech by public figures, Polish judicial authorities very often discontinue proceedings. This was, for example, the case with the anti-immigration spot of the PiS Election Committee that was broadcasted a few days before the local elections in 2018.⁵⁷ Criminal investigation in the case was initiated on

⁵⁴ Therefore, we express firm objection to the public statements of people holding high positions in the state, who in recent days have indicated that “LGBT is not people, it’s an ideology” (MP Jacek Żalek); “These people are not equal to normal people” (MP Przemysław Czarnek); “they are trying to convince us that they are people, and this is ideology” (the President of the Republic of Poland and the candidate for President of the Republic of Poland, Andrzej Duda); “Poland without LGBT is the most beautiful” (MP Joachim Brudziński); or compared the relationship of two men to the crime of bestiality (MP Tomasz Rzymkowski), as summarized in the Statement of the Commissioner for Human Rights. Opposition to homophobic speech of exclusion and contempt. Available online: <https://bip.brpo.gov.pl/pl/content/sprzeciw-wobec-homofobicznej-mowy-wykluczenia-i-pogardy-stanowisko-rzeczniaka-praw-obywatelskich> (accessed on 29 March 2023).

⁵⁵ Council of Europe Commissioner for Human Rights, Memorandum on the stigmatization of LGBTI people in Poland, 3 December 2020, CommDH (2020)27, p. 11–12. Available online: <https://rm.coe.int/memorandum-on-the-stigmatisation-of-lgbti-people-in-poland/1680a08b8e> (accessed on 2 April 2023).

⁵⁶ CERD, Concluding observations, op. cit., para. 16.

⁵⁷ Partially stylized as an information program, it presented a vision of Poland in 2020, after local governments decided to accept refugees, contrary to the Government’s policy. The images were accompanied by tension-building music and comments imitating a journalistic report, with the following content: “Enclaves of Muslim

the initiative of the Commissioner for Human Rights and subsequently discontinued twice by the District Prosecutor. Civil lawsuits seem to offer a more effective legal remedy.⁵⁸

An even more striking example of making hate speech “State practice” is anti-LGBTIQA+ campaigns and homophobic statements by leading public figures that fuel an atmosphere of hate and intolerance.⁵⁹ Surveys on Polish society’s attitudes towards LGBTIQA+ people show that there has been a slow improvement in that regard over recent decades, but in recent years, the opposite trend has been observed.⁶⁰ There are strong reasons to argue/believe that a major driving force of this negative tendency has been a populist hate speech public policy. In 2019, nearly one hundred local government entities in Poland have adopted “anti-LGBT resolution” or signed a document called the “Local Government Charter of the Rights of the Family”. Even though many of these local government resolutions have been successfully challenged before the administrative courts, it should be noted that the Prosecutor General lodged several appeals against these judgments (Ploszka 2023). The example of public anti-LGBTIQA+ campaigns clearly shows that Polish authorities and officials have been acting contrary to Poland’s positive obligations to protect human dignity, right to privacy, and principle of equality and non-discrimination.

The last point to be made in this part seems relevant because of the upcoming elections in Poland in autumn 2023. In the course of election campaigns, the media should be particularly guided by impartiality, pluralism, balance, and independence. As observed by the Parliamentary Assembly of the Council of Europe: “In addition to the legal rights and obligations set forth in the relevant legal norms, the media have an ethical responsibility towards citizens and society which must be underlined at the present time, when information and communication play a very important role in the formation of citizens’ personal attitudes and the development of society and democratic life”.⁶¹ The responsibility to actively monitor broadcasting media for compliance with the law during the election campaign and promptly respond to identified violations lies primarily with the National Broadcasting Council.⁶² Thus far, the National Broadcasting Council has not undertaken effective steps to counteract hate the speech incidents described above, which raises legitimate concerns for its future conduct.

5. Law and Practice in Slovenia: Towards a Systemic Anti-Hate Speech Policy

The concept of hate speech in the Slovenian legal order raises a lot of ambiguities (Završnik 2006). In the context of Slovenian criminal legislation, hate speech can be understood in the sense of the criminalization of inciting hatred, discord, or intolerance, which is based on the violation of the principle of equality, which derives from Article 300 of the Criminal Code (Criminal Code 2016). Motl and Bajt (2016) noted that while the Council of Europe has precisely defined hate speech as any propagation, promotion, or justification of hatred based on “intolerance, aggressive nationalism, or ethnocentrism, discrimination and hostility against minorities, migrants or persons with a migrant background”, the Slovenian legislation does not contain the concept of hate speech. The problem of the

refugees have appeared as part of the allocation; today residents are afraid to go out on the streets after dark; sexual assaults and acts of aggression have been observed”.

⁵⁸ On 21 June 2022, the District Court in Warsaw upheld the lawsuit of the Campaign Against Homophobia against a public broadcaster—TVP S.A. The judgment, in principle, concurred with KPH’s claim for protection of personal rights. The lawsuit concerned the program “Invasion”, broadcasted in 2019, shortly before the parliamentary elections (Case no I C 1143/21).

⁵⁹ Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights, memorandum, CommDH (2007)13, 20 June 2007, paras. 51–57.

⁶⁰ “Poles’ attitudes to homosexual relationships”, Centrum Badań Opinii Społecznej (CBOS), communiqué no. 90/2019 (in Polish), July 2019; “A long way to go for LGBTI equality”, European Union’s Fundamental Rights Agency, survey, 14 May 2019.

⁶¹ 1 July 1993, the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 1003 (1993) on the ethics of journalism.

⁶² See recommendations issued after the 2019 parliamentary elections by the Office for Democratic Institutions and Human Rights (ODIHR): Rzeczpospolita Polska, Wybory Parlamentarne 13 października 2019—Krótkoterminowa misja obserwacji wyborów ODIHR—Sprawozdanie końcowe, Warszawa 14 February 2020. Available online <https://www.osce.org/files/f/documents/8/8/448417.pdf> (accessed on 26 April 2023).

prevalence, acceptance, and still rare sanctioning of hate speech in Slovenia thus remains unsolved, and at the same time, the topic is still treated in a problematically underestimating way, as if it were only occasional excesses that are not worrisome (Motl and Bajt 2016).

Hate speech (which as a phrase is not directly included in the Slovenian criminal code) and freedom of expression are regulated:

- indirectly in Article 63 of the Constitution, where it is stated: “Any incitement to national, racial, religious, or other inequality, as well as incitement of national, racial, religious, or other hatred and intolerance, is unconstitutional. Any incitement to violence and war is unconstitutional” and in Article 39 of the Constitution, it states: “Freedom of expression of thought, freedom of speech and public appearance, freedom of the press, and other forms of public communication and expression shall be guaranteed. Everyone may freely collect, receive, and disseminate information and opinions”.
- directly in Article 297 of the Slovenian Criminal Code. It is explicitly stated: “Whoever publicly provokes or stirs up hatred, violence, or intolerance based on racial, religious, or ethnic origin, sex, skin color, origin, property status, education, social status, political or other beliefs, disability, sexual orientation or any other personal circumstances and the offence is committed in a manner that may endanger or disturb public peace and order, or with the use of threats or insults, shall be punished by imprisonment of up to two years”⁶³. Hate speech can also be considered a misdemeanor under the [Media Act \(2006\)](#) (Zmed) and the Act on the Protection of Public Order and Peace (ZJRM-1 2006).

The presence of hate speech in Slovenia can be attributed to a variety of factors stemming from social, cultural, and historical foundations. These factors include insufficient education and awareness of the consequences of hate speech, a historical context marked by ethnic, religious, and political tensions, including significant events such as the World Wars and the dissolution of Yugoslavia, the proliferation of social media platforms that allow for anonymous expression of opinions, social polarization leading to the formation of different groups with opposing ideologies, insufficient enforcement of existing laws against hate speech, the homogeneity of Slovenian society leading to limited exposure to diversity, and the influence of strong nationalism as a result of Slovenia’s historical immigration patterns since the 1950s.

The [United Nations Human Rights Committee \(2016\)](#) expressed concern about the increase in hate speech on the Internet, which appears on online forums, among others, while the European Commission against Racism and Intolerance of the Council of Europe ([European Commission against Racism and Intolerance \(ECRI\) 2019](#)) pointed out that cases of hate speech are almost never prosecuted in Slovenia ([Varuh človekovih pravic et al. 2021](#)). Due to the mentioned findings, the analysis entitled “Criminal Prosecution Of Hate Speech In Slovenia According To Article 297 Of The Criminal Code (Kz-1): Analysis Of Prosecution Practice Of Prosecuting The Criminal Acts Of Public Promotion Of Hate, Violence And Intolerance In The Period 2008–2018” was published in the year 2021, and revealed that during the researched period, the majority of the considered cases in connection with hate speech were related to actions against LGBTIQ+ persons (23 cases), Roma (15 cases), other nations of the former Yugoslavia (12 cases), various political beliefs (communists, right-wingers, etc.) (8 cases), Muslims (7 cases), refugees and migrants (6 cases—of which two were related to the Islamic religion), and people of color (6 cases). A comparison of the results of criminal proceedings over the years shows that, from 2013 onwards, there was a significant decrease in the proportion of cases in which the prosecution filed an indictment or closed the case by imposing a task on the perpetrator through the institute of deferred prosecution and this suggested that possible legislative changes should be considered in order to fight hate crime more adequately. It is also noted that out of the 145

⁶³ Criminal Code, Official Gazette RS, št. 50/12—official consolidated text, 6/16—corr., 54/15, 38/16, 27/17, 23/20, 91/20, 95/21, 186/21, 105/22—ZZNŠPP and 16/23.

closed prosecution files or cases, almost a quarter ended with a sanction for the perpetrator (Ibid.). In the implementation of the framework decision of the Council on the fight against certain forms and expressions of racism and xenophobia by means of criminal law, Slovenia limited the possibilities for prosecuting hate speech the most (Eržen 2019). Mentioned in the report of the OECD is also the acknowledgment that Slovenia has not officially reported data on hate crime to the ODIHR since 2020. They express their opinion that Slovenia would benefit from reviewing its existing legal framework to ensure that bias motivations can be effectively acknowledged and appropriate penalties can be imposed on perpetrators (OSCE/ODIHR 2022). From their data, we can also note that from 57 recorded hate crimes reported by the police in Slovenia in the year 2019, only 2 (3.05%) of the people who committed these hate crimes were prosecuted and then sentenced, while in the year 2020 from 94 recorded hate crimes reported by the police in Slovenia, 7 cases (7.45%) were prosecuted and only 6 cases (6.38%) sentenced.

We could see the precedential and shifted position of the Supreme Court of Slovenia interpretation of the hate speech prosecution in the year 2019, as they ruled in the court case entitled VSL Sodba II Kp 65803/2012. The phrase, which refers to a way of providing services that may threaten or disrupt public order and peace, must be interpreted in such a way that it is not necessary that the perpetrator's conduct would actually cause a direct threat to public order and peace, but rather enough that the act is capable of causing a concrete danger, which manifests itself in the endangerment of the protected property. Within the context of the description of the act, based on the circumstances of the life case under consideration, the court must assess whether the perpetrator's conduct was capable of leading to concrete danger. In this case, only the abstract danger of endangering or disturbing public order and peace is not sufficient (Vrhovno sodišče 2021). It was an important turning point in judicial practice in the field of prosecution of the worst forms of hate speech, as the judgment confirmed the previously inadequate (too narrow) interpretation of the Criminal Code. Bearing this in mind, the European Commission against Racism and Intolerance (ECRI) has expressed concern that the Council of Chief Prosecutors rejected a proposal aimed at bringing the legal position of the Supreme Prosecutor's Office to prosecute the crime of public incitement to hatred, violence, or intolerance under Article 297 of the Criminal Code in line with the above-mentioned Supreme Court ruling in 2019. ECRI also noted that recent data show little change in practice. Despite the significant increase in the handling of hate speech cases by the police, the number of charges brought by prosecutors remains relatively low (Stegnar 2022). Meanwhile, ECRI in 2022 concluded that alleged victims of hate speech have not yet been provided with an effective legal remedy when a prosecutor considers that a complaint is not founded or criminal proceedings are not justified (European Commission against Racism and Intolerance (ECRI) 2022). But we have to acknowledge that, despite the fact that we have very high standards for prosecuting hate speech in Slovenia, there are few cases of hate speech that were recognized as criminal offenses (SEENPM 2021).

One of the main challenges in Slovenia in regard to hate speech remains the increased presence of online hate speech. The reporting point, the Spletno oko, that allows Slovenian Internet users to anonymously report hate speech and images of sexual abuse of children on the Internet and operates as part of the Center for a Safer Internet, together with Slovenian media portals and the Faculty of Social Science in Ljubljana, prepared the Code of Conduct for the Regulation of Hate Speech on Slovenian Web Portals earlier in 2013, with the aim of establishing uniform guidelines for regulating hate speech on Slovenian online portals (Spletnooko.si 2013). Implementation of the mentioned Code was not as successful as it was intended to be, which was also acknowledged by the Southeast European Network for Professionalization of the Media in the year 2021, as they noted that most intolerant expressions are still mainly found in the comments under online news and in various online forums (SEENPM 2021). In the research analysis published as part of the project "Hate narratives in online media and online communication in Slovenia, Croatia, and Serbia", by Šulc and Šori (2020), the researchers noted hate narratives against

certain groups: refugees and other migrants, political opposition, and journalists, while the fourth group was different for each of the examined countries: in Slovenia the LGBTIQ+ community, in Croatia the Roma national minority, and in Serbia young people. Besides the mentioned groups, hateful rhetoric could also be noted towards Muslims, especially covering Muslim women, which was confirmed in our research in 2019 and 2023 (Pucelj 2019, 2023). The General Police Administration analysis for the period from 2016 to 2020 confirmed that in the mentioned period the incidence of intolerant and hateful online communication increased, where they realized the biggest threat in the lack of appropriate tools for systematic monitoring of hate speech, as well as the techniques and technology, which are, in their opinion, key to the successful prosecuting of hate speech online (Varuh človekovih pravic 2021). The Slovenian ombudsman also warned that the Media Act amendments have still not been adopted, with the intention of implementing the prohibition of the spread of hatred in the media (Article 8), the methods of protecting public interest (inspection, misdemeanor control), measures to eliminate irregularities (i.e., immediate removal of illegal content), and sanctions for media that allow the publication of hate speech (Media Act 2006).

Taking a more affirmative step to limiting hate speech in Slovenia, an amendment to the Slovenian Criminal Code was adopted in 2023, adding so-called “hate crime” as an aggravating circumstance that the courts must take into account in determining the punishment when the crimes are committed with hateful or discriminatory motives, with a new third paragraph to Article 49, which reads: “(3) If the propensity to commit a crime was based on the victim’s nationality, race, religion or ethnicity, gender, color, origin, financial status, education, social position, political or other opinion, disability, sexual orientation, or other personal circumstance, this shall be taken into account as an aggravating circumstance.”⁶⁴ As explained by the Ministry of Justice, a crime committed out of hatred or prejudice based on the victim’s personal circumstances must be grounds for harsher punishment of the perpetrator, as the consequences of such crimes go beyond “just” the specific victim, as committing such a crime with such a motive can create a sense of threat and tension throughout the community. Legislation must also have a deterrent effect in this sense to ensure clarity and predictability of sanctions. Treatment of such offences highlights the particular seriousness of such behavior to potential offenders and the community at large. It conveys to society that discrimination against a group is unacceptable and increases the confidence of minorities in the ability of the State authorities to protect them from the worst forms of discrimination (IusInfo 2023). Nevertheless, it is important to recognize that not all forms of hate speech that are socially unacceptable qualify as criminalized hate speech. Criminal law is designed to punish the most serious offences swiftly and severely. However, there is a broad spectrum of expression that falls between criminal acts and socially acceptable behavior, as hate speech on the Internet and in the media often does not meet the criteria for a criminal offense, and also the current Slovenian legislation and practices do not provide the most effective way to address these cases.

Also, the Government of the Republic of Slovenia founded the Strategic Council for the Prevention of Hate Speech on 17 March 2023, which is the first of its kind in Europe. Its key tasks are, among other things, monitoring the distribution of hate speech in Slovenia and at the EU level and preparing proposals for activities to prevent it; consulting in the formulation of policies, changes in regulations, and other measures that will contribute to a more effective prevention of hate speech, as well as cooperation in the preparation of proposals for systemic changes and a network model for the implementation of campaigns and trainings at both regional and national levels (Gov.si 2023a). This was also a reflection of the statement of ECRI, which noted that Slovenia only partially implemented the recommendations against hate speech and discrimination (Dnevnik 2022) and also of the memorandum of the Commissioner for Human Rights from the year 2021, which noted that hate speech has been on the rise in Slovenia, in particular against migrants and Muslims,

⁶⁴ Law on Amendments and Supplements to the Criminal Code (KZ-1J), Article 49. (2023).

as well as Roma, Jews, and lesbian, gay, bisexual, transgender, and intersex (LGBTIQ+) people, in particular on the Internet (showing that sexist hate speech is a long-standing problem), and that hate speech was also noted by representatives of political parties, mainly against migrants, in particular during electoral campaigns. In the mentioned memorandum, it was also noted that there was a concomitant lack of jurisprudence on hate speech, due in part to an overly restrictive interpretation of the law by State prosecutors and the judiciary, requiring a concrete threat to public order to prosecute incitement ([Commissioner for Human Rights 2021b](#)). The Slovenian parliament also adopted the Resolution on the national crime prevention and suppression program for the period 2019–2023, where it is stated that “it is necessary to reduce the scope of all forms and phenomena of hate speech or public incitement of hatred and intolerance”.⁶⁵ Also, it was a reaction to the warnings of the researchers that, in recent years, significant instances of radicalized public behavior by right-wing extremist groups, as well as cases of xenophobic, homophobic, and Islamophobic hate speech by various individuals, including politicians and journalists in both online and offline communication, can be noted ([Bulc 2023](#)).

According to that mentioned above, society and the Government have made additional efforts in recent years to ensure the prevention of hate speech, as we can see in the rise of various campaigns in Slovenia in order to address and prevent hate speech, such as:

- the campaign of the Government’s Digital Transformation Service “Bite your tongue!” incorporated short videos of Slovenian athletes from different fields, with the goal of emphasizing that everyone faces prejudice and hate speech, regardless of their achievements, ([Gov.si 2022](#))
- “With the Count to 11” campaigns against hate speech, as part of the Telemach First League’s socially responsible campaign “Count to 11”, the topic of hate speech was presented to children in an adapted and interesting way, both on and off the field ([Gov.si 2023b](#)),
- “24ur.com campaign against hate speech” was a campaign of an online journal called 24ur.com in cooperation with stand-up comedians, where they encouraged registered users to write as many humorous comments as possible and in this way they drew attention to the issue of hate speech in a popular way, ([24ur.com 2022](#))
- the establishment of the Council for Response to Hate Speech, as part of the project “With (re)speech over hate speech” (implemented between 1 September 2014 and 1 April 2016), received quite a few initiatives and examples of hate speech directed at both Muslims and migrants and refugees from the Middle East and North Africa. However, very few of these hate speech cases saw a judicial conclusion ([Pucelj 2019](#)),
- the Pride Parade Association, which as part of the “Decontamination of Hate Speech” project, organized workshops on the counternarrative, where they educated interested individuals about effective ways of responding to hate, while similar recommendations were also given in the handbook of the campaign “No to Hate Speech” entitled “We can do it!”, which is dedicated to good practices for taking action against hate speech, especially with counternarratives and alternative narratives ([Šulc and Šori 2020](#)). This project also produced a special web map called Decontamination, which offers a place to record the occurrences of hate speech and hatred against marginalized and socially stigmatized groups ([Decontamination 2020](#)).

However, Slovenia faces numerous challenges in effectively addressing the escalating phenomenon of hateful rhetoric, which has witnessed a significant surge in recent years.

6. Comparative Results of Slovenia’s and Poland’s Effort to Combat Hate Speech

A comparative analysis in the two countries—Poland and Slovenia—allows for some conclusions (the previously mentioned findings are summarized in [Table 1](#)). The Slovenian criminal law protects all victims of hate speech, as the relevant provisions are more detailed

⁶⁵ Resolution on the national crime prevention and suppression program for the period 2019–2023. Official Gazette of the Republic of Slovenia, No. 43/19.

and are not limited to a numerus clausus list. Unlike in Poland, the term “hate speech” appears expressis verbis in the Constitution of the Republic of Slovenia and the Criminal Code. It may be concluded that definitions and provisions concerning hate speech in Slovenia are in line with the recommendation No. R 97 (20) of the Committee of Ministers of the Council of Europe.

Table 1. Comparative results of Slovenia’s and Poland’s efforts to combat hate speech.

Topics	Slovenia	Poland
Implementation of the term “hate speech” in national legal regulations	Hate speech and freedom of expression are implemented in the Constitution of the Republic of Slovenia and the Criminal Code	The term “hate speech” as such does not appear in Polish law
Definitions and provisions concerning hate speech are in line with the recommendation No. R 97 (20) of the Committee of Ministers of the Council of Europe and other international standards	Yes	Not fully in line. Recommendations by a number of international bodies were given to amend the Equal Treatment Act, to investigate and prosecute crimes motivated by anti-LGBTIQ+ sentiments as hate crimes, and to recognize sexual orientation, gender identity, and racist motivations as an aggravated form of criminal conduct
State has positive and procedural international obligations to protect human dignity, life, privacy, and equality	Yes	Yes
National or local measures to counteract hate speech, crimes of incitement of hatred on national, ethnic, racial, or religious grounds or on the grounds of lack of religion	Amended Slovenian Criminal Code, establishment of Strategic Council for the Prevention of Hate Speech, Resolution on the national crime prevention and suppression program for the period 2019–2023, etc.	National Action Plan for Equal Treatment 2022–2030 and Police Action Plan for 2022–2025
Existence of effective campaigns to combat hate speech and prejudice	The campaign of the Government’s Digital Transformation Service, the campaign “Bite your tongue!”, the 24ur.com campaign against hate speech, the “Decontamination” of Hate Speech, the “With the Count to 11” campaigns against hate speech, etc.	Polish authorities have not conducted effective campaigns to combat hate speech and prejudice, even though such measures were included (albeit in a very general manner) in the National Action Plan for Equal Treatment
Opinion of international human rights protection bodies about the implementation of recommendations against hate speech and discrimination	United Nations Human Rights Committee expressed concern about the increase in hate speech on the Internet, which appears on online forums, among others, while the European Commission against Racism and Intolerance of the Council of Europe (ECRI, in 2019) pointed out that cases of hate speech are almost never prosecuted in Slovenia. The ODIHR observed that Slovenia has not reported data on hate crime to the ODIHR since 2020. In addition, Slovenia would benefit from reviewing its existing legal framework to ensure that bias motivations can be effectively acknowledged and appropriate penalties can be imposed on perpetrators	In its 2021 follow-up report, CERD considered the response of Poland to its recommendations regarding hate speech as unsatisfactory and requested further explanation. CERD, as well as other international human rights bodies, recommended that Poland publicly condemn and distance itself from racist hate speech by public figures, including politicians and media officials, to send strong messages to journalists and broadcasters that they had a responsibility to avoid the use of hate speech and stereotypes, and (particularly in the context of election campaigns) closely scrutinize broadcasters with respect to content that incited hatred or strengthened xenophobic attitudes

Table 1. Cont.

Topics	Slovenia	Poland
Effective protection of victims of hate speech	No	No
Pending legislation relating to hate speech	The Slovenian Ombudsman warned that the Media Act amendment with the intention of implementing the prohibition of the spread of hatred in the media (Article 8), the methods of protecting the public interest (inspection, misdemeanor control), measures to eliminate irregularities (i.e., immediate removal of illegal content), and sanctions for media that allow the publication of hate speech have not still been adopted	There have been some limited regulations included in the draft law on the protection of freedom of speech on online social networking sites
Statistics on prosecuted hate crimes according to the OECD or other available data	According to hate crime statistics by the OECD, from 57 recorded hate crimes reported by the police in Slovenia in the year 2019, only 2 (3.05%) of the people who committed hate crimes were prosecuted and then sentenced, while in the year 2020 from 94 recorded hate crimes reported by the police in Slovenia, 7 cases (7.45%) were prosecuted and only 6 cases (6.38%) sentenced; while from the Ombudsman's analysis of the practice in prosecuting the crime of public incitement to hatred, violence, and intolerance in the period from 2008 to 2018, it is clear that out of the 145 closed prosecution files or cases, almost a quarter ended with a sanction for the perpetrator	According to hate crime statistics by the OECD, about 50% (or even lower) of the people who committed hate crimes recorded by police were prosecuted
Which hate speech dominates?	Hate speech towards refugees and other migrants, Muslims (especially covering Muslim women), political opposition/various political beliefs, journalists, the LGBTIQ+ community, Roma, Jews, other nations of the former Yugoslavia, and people of color	Racist, xenophobic, and antisemitic hate speech, more recently also homophobic hate speech
Challenges in addressing hate speech	Radicalization of public debate	Radicalization of public debate

The most evident challenge remains in the low rates of prosecution of hate crimes recorded by the police and needs to be addressed by both States. Slovenia and Poland have undertaken some steps to counteract hate speech. Slovenia has amended its Criminal Code, established the Strategic Council for the Prevention of Hate Speech, and implemented a Resolution on the national crime prevention and suppression program for the period 2019–2022. Poland adopted a new National Action Plan for Equal Treatment for 2022–2030 and a Police Action Plan for 2022–2025.

Slovenia has made more efforts than Poland to implement effective campaigns to combat hate speech and prejudice, although the Media Act amendment has to be adopted, with the intention of implementing the prohibition of the spread of hatred in the media (Article 8), the methods of protecting the public interest (inspection, misdemeanor control), measures to eliminate irregularities (i.e., immediate removal of illegal content), and sanctions for those media that allow the publication of hate speech.

In both countries, intensified homophobic anti-LGBTIQA+ campaigns and hate speech can particularly be observed. In Slovenia, hate speech is also largely directed against the Roma minority and persons representing the various different nations of the former Yugoslavia. In Poland, antisemitic, racist, and xenophobic bias continuously accounts for a large number of hate speech incidents, while anti-immigrant sentiments are on the rise.

Researchers in both States noted radicalization of the language of public debate, which implies that more emphasis will have to be given on the public alignment with the more sensible, emphatic language in public debate. Social justice and equality are becoming an increasingly “hard to reach” ideal of democracy, which is also reflected in the increased intolerance between people, (cultural) racism, and hate speech that we experience on a daily basis.

This results, on the one hand, in people’s indifference to an appropriate response to hostility and, on the other hand, in the strong nationalism and expressions of hostility and xenophobia that we can observe in many countries, such as Slovenia and Poland. Solutions to the problem of how to properly address or prevent hate speech are by no means simple or straightforward. Above all, it is necessary to emphasize the education of individuals about the harmful consequences of hateful rhetoric or hateful actions, to adopt legal regulations that ensure the appropriate sanctioning of individuals who spread hateful speech, and to sensitize and empathize the rhetoric used in public space and in the media.

In Table 1 below, we summarize all the findings of the comparative results of Slovenia’s and Poland’s efforts to combat hate speech.

We can conclude that the challenges with fulfilling international obligations to adequately respond to and fight hate speech can be observed in both States and that there is still a lot of room for improvement both on the level of lawmaking and policymaking and their effective implementation. The most evident challenge remains in the low rates of prosecution of hate crimes recorded by police, which need to be addressed by both States. In Slovenia, some positive systemic and regulatory changes have recently been introduced, while in Poland there has been little progress and not all victims of hate speech are adequately protected by law.

7. Final Conclusions

Using the formal dogmatic method and comparative legal research, we answered the research question “What are the human rights standards regarding freedom of expression and hate speech, and what is their application in Poland and Slovenia?” We have noted that discriminatory and hateful rhetoric is a very dangerous phenomenon observed in many countries, as also in Poland and Slovenia. This negative tendency may and should be mitigated by international human rights standards. Pluralism, as one of the foundations of a democratic society, has for decades been firmly defended by the ECtHR.

But the more recent case law proves that pluralism has to be redefined and reconciled with other values and principles, in order to address the modern challenges of fast-spreading hate speech. As we argued in the article, even without a binding definition of hate speech in IHRL, soft law instruments, the dynamic jurisprudence of the ECtHR, and the recommendations of various human rights protection bodies provide sufficient guidance for national lawmakers and policymakers. It has to be acknowledged, at the same time, that it may sometimes still be difficult to assess and adjudicate particular cases related to the freedom of expression.

However, with regard to the well-established criteria and hate speech-relevant factors, States enjoy a narrower margin of appreciation. It is thus difficult to explain why Polish and Slovenian judicial bodies (public prosecutors in particular) still often fail to identify hate speech. One possible explanation is that there is a dominating public “acceptance” of this kind of rhetoric and expression or that they are not familiar with the constantly evolving international standards.

According to the research conducted in the present article, it could be argued that sanctioning hate speech with criminal prosecution, accompanied by strict judicial review,

would be a better course of action. However, merely symbolic criminalization, whether in the form of a felony or a misdemeanor, is not sufficient if the legal provisions are not implemented or the acts in question are not adequately prosecuted.

We believe that we must act against hate speech by legal means but also—and this is important—within the framework of informal social control by (civil) society, which must react promptly to any kind of hate speech. We need to combat hate speech by strengthening peaceful and dialogic discourse that could reflect the values of empathy, tolerance, respect, and pluralism through a firm and positive response from the broader society, rather than just suppressing hate speech.

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