

SOCIAL MEDIA, FREEDOM OF EXPRESSION, AND THE LEGAL REGULATION OF FAKE NEWS IN CROATIA



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1. Introduction

According to some estimates, in 2019, slightly more than 50% of the world's population had access to the Internet, while in 2009, this number was significantly lower (less than 5%).¹ Just over a year later, that number was estimated at over five billion people, representing somewhere around 65% of the world's population.² In Croatia in 2019, 79% of citizens used the Internet. For comparison, in 2009, 51% used the Internet, and in 1999, only 4% did. This means that in just twenty years, there has been a 75% increase in the Croatian population with Internet access.³ Some other sources point to as many as 92% of Croatian citizens who are Internet users.⁴ When it comes to social media, according to some estimates, in 2017, there were about 2.86 billion users, 3.6 billion in 2020, and it is estimated that by 2025, about 4.41 billion people will have profiles on social networks.⁵ According to a marketing agency survey,

1 See: <https://data.worldbank.org/indicator/IT.NET.USER.ZS?end=2017&start=1990>.

2 Ibid.

3 Ibid.

4 See: <https://www.internetworldstats.com/stats.htm>.

5 Supra note 1.

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at the beginning of 2019, “There were 1,900,000 Croats on Facebook, while there were about 1,100,000 on Instagram.”⁶ This exponential growth of users has not been coupled with increased media literacy, knowledge about the risks of victimization on global networks, or public awareness about harmful content.⁷ Legal regulation of the Internet and social networks is a problem that has just recently come under attention and which raises many questions, including: What are the (potentially) harmful side effects of freedom of expression on the Internet? How can we protect those who are the most vulnerable from harmful content and abuse? Who stands behind the creation and dissemination of fake news—foreign governments, terrorist organizations, the private sector, or someone else? What is the purpose of generating fake news—creating panic and confusion, maximizing profit in the spirit of the new pattern of surveillance capitalism, controlling certain target groups of users, or something else?

This paper is an attempt to address at least some of these issues from the Croatian perspective. For many reasons, this perspective is very peculiar. The rapid development of electronic communications over the years, underscored by the global crisis caused by the novel coronavirus (COVID-19) pandemic, has shifted citizens’ professional and private lives onto virtual platforms.⁸ These global trends have affected people in Croatia in a way that is not much different from other countries. However, the Croatian perspective on these issues is somewhat specific due to reasons that trace back to recent history. First and foremost, the country’s transition period is ongoing. The country was born after the dissolution of former Yugoslavia, and it gained its *de facto* independence through years of bloodshed in the Homeland War in the 1990s. Human casualties, economic devastation, and direct and indirect damages to private and state property were some of the serious consequences of the armed conflict and aggression, which resulted in the cessation of one third of the territory. These regions were regained and returned to the control of the capital in 1995 and 1998 through military campaign and peace negotiation settlements. Parallel to the atrocities, 90s Croatian society underwent a shady privatization process that generated huge inequalities among citizens.⁹ This negative stratification resulted in a global sense of injustice and a low level of public trust in the judiciary.¹⁰ Un-

6 See: <https://bit.ly/3tXS1XL>.

7 Henson, Reyns, and Ficher, 2013, pp. 475–497.

8 Volosevici, 2020, pp. 109–116.

9 Getoš Kalac and Bezić, 2017, pp. 1091–1120.; Roksandić Vidlička, 2014, pp. 1091–1120.

10 According to the 2020 European Union (EU) Justice Scoreboard, about 60% of respondents expressed their distrust of court judges in Croatia. This is the highest percentage in the EU. https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en; In the 2019 Global Competitiveness Report presented by the World Economic Forum (WEF), Croatia’s judicial independence was ranked 126th out of 141 countries, which is the worst rating in the EU, <https://www.weforum.org/reports/global-competitiveness-report-2019>; However, it is not only the justice system that is perceived as problematic in Croatia. For instance, in 2020 Croatia was ranked fourth (after the Russian Federation, Turkey, and Ukraine) for the total number of violations of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (fair trial), The ECHR in Facts in Figures 2020, European Court of Human Rights, February 2021).

doubtedly, this social context confused and disoriented people, most of whom use the Internet and social networks, and made them more vulnerable to victimization, abuse, and manipulation, both physically and in cyberspace.

Section 2 deals with freedom of expression and the prohibition of censorship in Croatia in the context of Internet and social media use. Section 3 provides an overview of the criminal legislation restricting free speech for the protection of some other constitutional values. Section 4 addresses legislative and institutional frameworks for regulating electronic media. The new Draft Electronic Media Act (DEMA), which introduces the concept of electronic media's responsibility for user-generated content, is analyzed in Section 5. The thematic focus of Sections 6 and 7 is on fake news in general and the legal regulation of this phenomenon in Croatia. Section 8 analyzes two issues relevant to this topic: What are the nature and scope of content provider responsibility for user-generated content? (Section 8.1.) Is there a need for *lex specialis* regulation of social networks? (Section 8.2.) Finally, Section 9 is a conclusion containing an attempt to answer the question: Does it make sense to counter fake news in a world where the truth has (almost) disappeared?

In sum, the purpose of this paper is to scrutinize and analyze regulations and procedures, identify their weak points, and offer proposals to improve dysfunctional legislation and the ineffective implementation of Internet and social network policies.

2. Freedom of expression and prohibition of censorship

Freedom of expression in Croatia is one of the greatest constitutional values. It is a political right guaranteed by Article 38 of the Constitution of the Republic of Croatia (hereinafter, the 'Constitution'). This provision guarantees freedom of opinion and expression. Freedom of expression includes, in particular, freedom of press and other means of communication, freedom of speech and public appearance, and the free establishment of all public communication institutions.¹¹ This constitutional provision prohibits censorship without specifically defining the term. Nevertheless, it can be concluded that the term 'censorship' refers to the performance of journalistic work or the journalistic profession because journalists' right to freedom of reporting and access to information are regulated immediately after the provision on the prohibition of censorship. In the literature, censorship refers to journalists and denotes different prohibitions on publishing certain information.

The Croatian encyclopedia defines censorship (lat. *censura*: assessment of property, assessment) as a system of administrative measures taken by the state, religion, party, and other authorities against the disclosure, reading, dissemination,

11 Ustav Republike Hrvatske, Narodne novine (Official Gazette) 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014; for an updated English version, see: <https://bit.ly/3nTPCwg>.

and possession, listening to, and viewing of printed and manuscript books, films, videocassettes, radio and television shows, theater plays, etc., and similar material considered undesirable and dangerous to society. There are several types of censorship: preventive censorship, self-censorship, and suspensive censorship.¹² The purpose of preventive censorship is to prevent or hinder publication by various measures such as the obligation to send manuscripts to certain bodies to verify the content, denying funding for publication costs, etc. Self-censorship is a procedure in which the authors themselves restrict their freedom of expression while facing the risk of the harmful consequences of publication. Finally, suspensive censorship manifests itself in the *ex post facto* procedures of indexation, prohibition, seizure, and other measures that restrict or prohibit the distribution of given content.¹³

In democratic societies, censorship is forbidden. It is considered unconstitutional because it restricts freedom of expression, which is among the fundamental constitutional values. However, notwithstanding the prohibition of censorship, in a democratic society based on the rule of law, certain restrictions on freedom of expression are allowed. These restrictions do not amount to censorship. Thus, the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the 'Convention') states that freedom of expression may be subject to formalities, conditions, restrictions, or penalties prescribed by law, which in a democratic society are necessary in the interests of national security, territorial integrity, or public order to prevent disorder or crime, protect health or morals, protect others' reputation or rights, prevent the disclosure of confidential information, and preserve the judiciary's authority and impartiality.¹⁴

The European Court of Human Rights (ECHR) has established through its rich case law that any restriction on freedom of expression must be prescribed by law, necessary in a democratic society, and proportionate to the nature of the restriction.¹⁵ Thus, the Court has repeatedly found states' margin of appreciation to be very narrow when it comes to expressions aimed at political criticism. This, in other words, means that in such situations, even statements that are offensive and shocking should be tolerated if they exercise a functional democratic right to freedom of expression.¹⁶ This is because such freedom is a condition for the functioning of a democratic society, and without freedom of expression, the normal course of the democratic process is inconceivable. Furthermore, such a restriction must be necessary in a democratic society (necessity test), which means that certain values cannot be protected in any way other than by restricting freedom of expression. Freedom of

12 See: <https://www.enciklopedija.hr/natuknica.aspx?id=11246>.

13 Ibid.

14 Convention for the Protection of Human Rights and Fundamental Freedoms, https://www.echr.coe.int/documents/convention_eng.pdf; Schabas, 2016, pp. 444–482; Alexander, 2005.

15 ECHR, *Observer and Guardian v. the United Kingdom*, application no. 13585/88, 1990.; ECHR *Prager and Oberschlick v. Austrija*, application no. 15974/90, 1995.

16 ECHR, *Handyside v. the United Kingdom*, application no. 5493/72, 1976; Alaburić, 1996, p. 537–557; Sears, 2020, pp. 1327–1376.

expression excludes incitement to hatred and violence.¹⁷ Hence, the Croatian Constitution prohibits any incitement to war or the use of violence, national, racial, or religious hatred, or any form of intolerance.¹⁸

Freedom of expression and its restrictions have been repeatedly scrutinized by the Constitutional Court of the Republic of Croatia (hereinafter, the ‘Constitutional Court’), which, applying the ECHR standards, has emphasized that free speech is the one of the fundamental pillars of a democratic society. Regardless of the importance of freedom of expression, it carries with it ‘duties and responsibilities’ that “take on importance, among other things, when the reputation of named individuals is attacked, and the rights of others are undermined.”¹⁹ The protection afforded to journalists reporting on matters of general interest is subject to the condition that their actions are taken in good faith with the intent to provide accurate and reliable information in accordance with journalistic ethics. Therefore, in assessing reporting on matters of general interest, state bodies are limited by the democratic societal interest to enable the media to play their key role as guardians of the public interest. Freedom of expression refers not only to ‘information’ or ‘ideas’ that are favorably accepted or not considered to be offensive or those which provoke no reaction, but also to those that offend, shock, or harass. This requires pluralism, tolerance, and free mindedness, without which there is no ‘democratic society.’ In assessing whether there has been a violation of freedom of expression, it is necessary to consider each case in the light of all the circumstances, including the content of the allegations in question, as well as the context in which those allegations were made. In particular, it is necessary to determine whether the measures taken to restrict freedom of expression are proportionate to the legitimate aim pursued by that restriction and whether the interference is ‘necessary in a democratic society.’²⁰

3. Freedom of expression and its restrictions in criminal legislation

The aforementioned content-based prohibitions, which are deeply rooted in the constitutional order, are also incorporated into other regulations that protect certain constitutional values. Thus, the Criminal Code²¹ contains provisions that criminalize so-called ‘expressive’ offenses. A long time ago, the Roman classical jurist Ulpian created the maxim that no one can be punished for his thoughts (lat. *cogitationes*

17 Cassim, 2015, pp. 303–336.

18 Supra note 11.

19 Constitutional Court, U-III-2858/2008, 22 December 2011.

20 Ibid.

21 Criminal Code, Narodne novine (Official Gazette), 125/2011, 142/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019.

poenam nemo patitur). However, certain manifestations of the will that are most often expressed in words (written, spoken) but can also be expressed in other ways (e.g., symbolic or real insult or *iniuria*) and which violate the rights of others, the legal order, national security, etc., are prescribed as criminal offenses and may imply criminal liability. These offenses can be divided into several categories:

- offenses of public incitement,
- offenses of breach of honor and reputation,
- offenses of breach of secrecy,
- other offenses.

For the purpose of this paper, only the first two categories will be addressed and briefly explained. There are two criminal offences in the first category: public incitement to terrorism and public incitement to violence and hatred. Public incitement to terrorism consists of the public presentation or transmission of ideas that directly or indirectly incite the commission of a criminal offense with elements of terrorism. The prescribed punishment for this crime is imprisonment from one to ten years.²² Public incitement to violence and hatred is a crime directed against a group of people or members of that group because of their racial, religious, national, or ethnic affiliation, language, origin, skin color, gender, gender identity, disability, etc.²³ It is very similar to discrimination. In this criminal offense, *differentia specifica* is incitement to violence and hatred—an element that is not present in the criminal offense of inciting racial and other discrimination. Organizing a group (linking three or more people together) or participating in a group that conducts public incitement to violence and hatred is particularly punishable. Public approval, denial, or significant relativization (mitigation) of international crimes against a group or group member on one of the discriminatory grounds, provided that such conduct is appropriate to incite violence or hatred against individuals or the group as a whole, is also punishable as a special form of this crime.²⁴

Criminal offenses of public incitement are commonly committed through a computer system. It does not matter whether certain criminalized content has been made available to the public via electronic publication, commentary, social network, etc. It must be a modality of committing an act (*modus operandi*) due to which prohibited content has become available to more people. Incriminations of public incitement should be distinguished from incitement to commit a criminal offense as a provision of the general Criminal Code. Unlike the general provision on incitement, in which the person being encouraged to commit the crime must be concretized or individualized by the instigator, public incitement is about influencing the will of unspecified individuals or groups. These individuals or groups are instrumentalized by the instigator acting as some sort of provocateur to commit the crime.

22 Ibid., art. 99.

23 Ibid., art. 325.

24 Ibid.

Insult and defamation are offenses against honor and reputation, which, based on a permissive constitutional norm, restrict freedom of expression. Insult consists of belittling another person. It is a negative value judgment or statement that is not subject to the proof of truth. The insult can be committed through words (*verbal iniuria*), signs (*symbolic iniuria*), or deeds (*real iniuria*). It is an aggravated form of the offense if someone insults another so that the insult becomes known to a larger number of people. One way is to commit such an act via a computer system or network. The penalty for insult is only monetary, and the procedure is initiated by private lawsuit.²⁵

Unlike insult, defamation must be about creating or disseminating a false factual statement or content with respect to which truthfulness can be equally established for all persons (e.g., claiming that someone was previously convicted). Defamation is a criminal offense in which the burden of proof is shifted to the defendant. This is an understandable exception to the principle of *actore non probante reus absolvitur* given that the plaintiff cannot be expected to prove a negative fact. As all people are considered good (*quisquis presumitur bonus*), those who claim otherwise must prove it. Like insult, defamation is also punishable only by a fine, and criminal proceedings are initiated by private lawsuit. The commission of the offense via a computer system or network is considered an aggravated form for which a heavier penalty (also a fine) is prescribed.²⁶

Apart from the aforementioned criminal offenses, some other laws have imposed permissible restrictions on freedom of expression. The regulation relevant to this analysis is the Law on Misdemeanors against Public Order and Peace, which prescribes the criminality of certain types of behavior in a public place, including the dissemination of false news. Section 7 analyzes this offense, together with some other criminal offenses (e.g., false alert).

4. The legislative and institutional framework of electronic media

In the context of freedom of expression on the Internet, regulations and practices relating to electronic publications are particularly relevant. The increase in the number of electronic publications in the world in the last few years is significant, and such a trend is noticeable in Croatia, too. DEMA reveals that the number of electronic publication providers has increased from 276 to 336 in a short period of time.²⁷ According to the Electronic Media Act (EMA), electronic publications are

²⁵ Supra note 21, art. 147.

²⁶ Supra note 21., art. 149.

²⁷ Draft Electronic Media Act. Available at: <https://bit.ly/2XvznKO>.

a type of electronic media, in addition to audiovisual and radio programs. They are published daily or weekly for the purpose of public information and education. A media service provider is a natural or legal person who has editorial responsibility for selecting audio and audiovisual content and audio and audiovisual media services and determining how these are organized.²⁸

Based on the constitutional norm, EMA guarantees freedom of expression and full programmatic freedom for electronic media, and no legal provision can be interpreted as granting the right to censor or restrict the right to freedom of speech and expression. However, the law prohibits media services from threatening the constitutional order and national security, inciting hatred and discrimination, expressing the ideas of fascist, nationalist, communist, and other totalitarian regimes, disclosing private family life pertaining to children, etc.²⁹

The central regulatory body for the implementation of the EMA is the Council for Electronic Media (hereinafter, the 'Council'). The Council is a part of the Agency for Electronic Media (hereinafter, the 'Agency'). It manages the Agency and performs the regulatory body's tasks in the field of electronic media. The president and members (seven in total) perform their duties as full-time employees. The transparency of the Council's work is ensured through the annual submission of reports to the Croatian Parliament. The Council's president and members are appointed and dismissed by the Croatian Parliament on the proposal of the Government of the Republic of Croatia. In proposing Council members, the Croatian government announces a public call. Members' term of office is five years, and they are eligible for reappointment. The formal criterion that should be met for appointment concerns citizenship (Croatian). Substantive criteria concern professional knowledge, abilities, experience in radio, television, or publishing, or cultural or similar activities. The status of a state official, an official in the executive or judicial branch, and a political party official is not compatible with Council membership.³⁰ The Council's responsibilities include, *inter alia*, granting concessions to the electronic media, decision making in cases of the revocation of concessions and permits, issuing warnings in cases of non-compliance with the provisions of the EMA and the bylaws, and/or reporting cases to other competent authorities (e.g., misdemeanor courts). The Council is also tasked with encouraging media literacy, organizing public consultations and professional gatherings, and conducting research related to the functioning of electronic media. The Council's decisions cannot be appealed, but there is the possibility of initiating an administrative dispute before the competent administrative court.³¹

The annual reports submitted to Parliament for adoption are the best source of information about the Council's activities. However, media coverage of their decision making is sporadic and on an ad hoc basis, and the Council's website is not

28 Electronic Media Act, Narodne novine (Official Gazette) 153/2009, 84/2011, 94/2013, 136/2013.

29 Ibid.

30 Ibid.

31 Ibid.

regularly updated nor does it contain current information about their activities.³² This is certainly something to be criticized because the mechanism in charge of evaluating the media's transparency procedures should be much more transparent than it has been so far. As to the measures the Council applies, the 2019 report states that based on citizens' complaints or upon *proprio motu* supervision, the Council issued three measures pertaining to the violation of the provisions on advertising and sponsorship, 14 measures concerning the violation of concession obligations and legal program minimums, 15 measures related to the violation of the legal provisions for the protection of minors, one measure regarding spreading and inciting hatred or discrimination, and one measure addressing an uncategorized violation of the law. All 34 measures, except one pertaining to the permanent revocation of the concession, represent warnings/admonitions. Two cases were forwarded for further proceedings to the Croatian Journalists' Association (HND) and the municipal state attorney's office in Varaždin.³³

In an illustrative warning case pertaining to a measure the Council applied, a decision was issued against a publisher (a television channel) in 2019. The Council found that there had been spread and incitement to hatred and discrimination in response to a viewer's complaint about the display of a flag bearing fascist (Ustasha) symbols (the letter 'U') attached to a central news broadcaster on January 21, 2019. The Council issued another warning in a different case that was ruled upon in 2019. The case concerned a publisher (a television channel) that violated Article 12, paragraphs 1 and 2 of the Ordinance on the Protection of Minors in Electronic Media. The disputed show featured an Arab physician and exorcist who spoke about healing diseases caused by spells, magic, and demons. The show aired at 6.15 pm in violation of the provision that programs depicting gambling, fortune telling, alternative healing methods, and other similar issues/services that are not scientifically based cannot be broadcasted before 11 pm, at which time it is mandatory that they bear an appropriate 'graphic' label/notice.³⁴

In the past, the appointment of Council members was controversial and fueled widespread public debate. For example, in June 2019, the HND opposed the possibility of appointing a member belonging to the Croatian Journalists' and Publicists' Association (HNIP)³⁵ due to Association funding of those authors, *inter alia*, whose shows had been banned by the previous Council due to hate speech. Those same authors and their banned shows were the reason the former Council president resigned in March 2016. Specifically, at the end of January 2016, the Council decided to stop broadcasting on local television for three days. The decision was made due to

32 See: <https://www.aem.hr/vijece/>.

33 Izvješće o radu Vijeća za elektroničke medije i Agencije za elektroničke medije za 2019. godinu. Available at: <https://bit.ly/39tp8Ju>.

34 Ibid.

35 See: <https://bit.ly/3EAUw7t>.

hate speech espoused by the journalist M. J., host and editor of the show ‘M.T.’ who closed the show with the following words:

Two Chetniks who were priests of the Serbian Orthodox Church were canonized in 2005. According to witnesses, they bled their hands. We do not know whether the Serbian Orthodox Church will continue to do so. Therefore, the people of Zagreb who walk through Flower square should be careful, especially mothers with small children. Be careful when passing by the Church so that no one runs out with a knife and performs their bloody Chetnik feast.³⁶

The Council’s decision triggered demonstrations by a number of protesters (including Homeland War veterans) who claimed the decision had reintroduced the communist regime’s verbal delict in Croatia. The Council president was presented with a Chetnik and partisan hat as provocation.³⁷ She construed this act as pressure and decided to resign.³⁸

The other controversial case upon which the Council ruled concerned a web portal. Following the public display of the body of the deceased saint L. M. in Zagreb, the journalist H.M. wrote an article titled “Dead in live: Catholic necrophiliac orgies are the craziest show on HRT (Croatian Television).”³⁹ The case was reported to the Council, who found that while the speech was offensive to Catholics, it did not amount to hate speech as prohibited under international and domestic standards. The Council quoted some ECHR standards concerning the distinctions between hate speech and other offensive and shocking statements that could appall certain groups and individuals but are protected under the function of free speech. In other words, the Council established that the alleged article “has the function of an exhaust or safety valve in a democratic society and does not deserve sanction.” The Council also pointed out that the concept of an insult does not apply to the religious community and faith in general: “To be an insult, the expression must be directed at any particular person to whom such expression could harm honor and reputation, and this text ridicules the Catholic Church and the faithful in general.”⁴⁰

This reasoning is flawed and shows substantive inconsistency in the Council’s reasoning. First, it is striking that compared to the positive decision in the aforementioned television-related case where there was found to be a violation that was sanctioned in just a few lines without any solid reasoning whatsoever, the Council’s decision regarding the web portal involved extensive reasoning in support of a negative decision and the finding that there was no violation.⁴¹ This is problematic because the facts of these two cases are not as different as they may initially seem. They

36 See: <https://bit.ly/3lD6Zig>.

37 See: <https://bit.ly/3Cx7KQS>.

38 See: <https://bit.ly/3tY2i6e>.

39 See: <https://bit.ly/3zvraDH>.

40 Ibid.

41 Ibid.

both concern the general insult and ridicule of a religious community and a church as an institution. Therefore, it does not seem plausible for the Council to find a tendency toward hate speech only in the first case rather than in both. Furthermore, the Council completely overlooked another important aspect of the Convention: the rights and freedoms under Article 9. The ECHR expressed that some criticism of religion, in general, should be considered as a vehicle fostering public debate about issues of common societal interest.⁴² However, extreme satirical (as well as other artistic and non-artistic) expressions made with the sole purpose of provoking and insulting others' religious feelings lack that function (i.e., speech that is 'gratuitously offensive'), and states must have a means to restrict their reliance on the margin of appreciation doctrine. Ostensible artistic or quasi-artistic nature of expression must not be used as a *carte blanche* to violate others' rights.⁴³ In its further jurisprudence, the Council should take this into due consideration. Otherwise, its decision making will remain subject to further criticism due to inconsistency and the upholding of double standards.

In cases of suspected violations, the Council can initiate proceedings on its own, without a formal report/claim. However, there are no clear and transparent criteria for establishing a threshold for conducting such *proprio motu* proceedings. A good example is a recent case involving a web portal founder. In his Facebook status, he called for the demolition and burning of churches and government buildings due to his dissatisfaction with COVID-19 restrictions and alleged cases of non-observance. He wrote, *inter alia*, the following:

If there were a world championship in accepting humiliation, Croats would win first place. Every unbroken window on the government and church buildings, every building of theirs that is not on fire even after this, every head that remains on their shoulders after all while you are free to rope, is proof that you can make as many jerks as you want from Croats. Whatever you take away from them, you can do even more.⁴⁴

A nongovernmental organization (NGO) reported the posting of this statement to the public prosecutor's office under Article 325 of the Criminal Code (public incitement to hatred and violence). Nevertheless, it is unclear whether the Council initiated the proceedings *ex officio* for the suspected violation of the EMA as gleaned from public sources. An argument against their jurisdiction in the case might be that this text was not published in an electronic publication but on the site founder's personal Facebook account. However, such an argument would not be plausible because there is an obvious link between the site founder's expressions on his social network account and the commercial Internet news portal's economic interest. Such cases

42 ECHR *Otto Preminger Institute v. Austria*, application no. 13470/87, 1994.

43 Derenčinović, 2018, pp. 194–212.

44 See: <https://bit.ly/3lOwZrb>.

should not be easily dismissed based on the lack of jurisdiction argument because in terms of the prohibited content, there is no *de facto* difference between the official social network account on the portal and its founder's account and the person who pulls the strategical and tactical strings behind the scenes.

In summary, the current legal and institutional framework concerning Croatia's electronic media seems to be quite sound. Unfortunately, this is only theoretically true. In reality, there have been numerous implementation problems, along with apparent politicization, ideological clashes, and double standards. Much more should be done regarding the transparency of the Council's work (ad hoc sensational media coverage and annual reports submitted to Parliament are insufficient), the quality of its work through raising public awareness, the training and education of Council members (on media law and standards developed in ECHR case law), better coordination with other competent authorities to address cases of alleged hate speech and content that may be harmful to minors, etc.

5. New Draft Electronic Media Act

International standards governing the conditions under which content providers establish and manage electronic publications have been enshrined in European law. Among these are, first and foremost, Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation, or administrative action in the member states concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.⁴⁵ The 2013 directive was amended to fill the gaps regarding the legal regulation of video-sharing platforms on which users generate their own content, as the content may be contrary to the interests, needs, and protection of children and young people. Therefore, the new directive has improved the protection of minors from harmful content and the protection of all users from hatred, violence, and incitement to terrorism. An additional purpose is to increase users' media literacy. Media literacy refers to the skills, knowledge, and understanding that enable citizens to use media effectively and safely.⁴⁶

To harmonize national legislation with the amended directive, the Croatian Parliament is passing a new EMA. DEMA's explanatory memorandum states, *inter alia*, that it:

45 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation, or administrative action in the Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities. PE/33/2018/REV/1. OJ L 303, 28.11.2018, p. 69–92. See: <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>.

46 Ibid.

stipulates that audiovisual advertising must be easily recognizable as such and must not use subconscious techniques; question human dignity; include or promote discrimination; encourage behavior that is detrimental to health or safety; encourage behavior that is highly detrimental to the environment. Furthermore, audiovisual media services must not contain incitement to violence or hatred directed against groups or members of a group based on discrimination based on sex, race, color, ethnic or social origin, genetic characteristics, language, religion or belief, political or any other opinion, belonging to a national minority, property, birth, disability, age, sexual orientation or citizenship, as well as content that provokes the commission of a terrorist offense. As a novelty, this Act also introduces providers of video-sharing platforms who must take appropriate measures to protect minors from content that could affect their physical, mental, or moral development and the general public, from incitement to violence or hatred or public provocation to commit a terrorist offense.⁴⁷

The Draft Act is still undergoing the parliamentary procedure, and it is expected to be sent to its final reading in the near future.

DEMA has also undergone the (online) public consultation procedure, through which several major issues have been identified. First, there is concern that some of the provisions are vague. For example, the obligation to respect human dignity, non-compliance with which results in sanctions, raises many questions as to what belongs under the heading of ‘human dignity.’ Some commentators have pointed out that human dignity is not fully protected by media legislation anywhere in the world and that in some situations, it is permissible to question certain categories’ dignity (e.g., politicians’) in the interest of public debate. Hence, there have been concerns that such a vague provision could negatively affect freedom of expression and lead to self-censorship.⁴⁸ In principle, this is true. However, there was little maneuvering room for drafting DEMA given that the directive itself stipulates that audiovisual commercial communications must not jeopardize respect for human dignity. In any case, this provision would, in practice, require the delicate balancing of competing interests. Another argument related to DEMA is that it significantly intensifies repression, which will, in challenging the conditions of the media’s functioning in Croatia, shut down many publishers in the electronic environment.⁴⁹ The number of violations that DEMA envisages is higher than that of EMA. Nevertheless, the maximum fine is still HRK 1,000,000.00 per legal entity, and this has not been changed. For regulator standards regarding the imposition of measures, see *supra* Section 4.

DEMA’s most important novelty is Article 93, paragraph 3, which states that the provider of an electronic publication is responsible for all the publication’s content, including that generated by users.⁵⁰ This provision has caused the most doubts and

⁴⁷ *Supra* note 27.

⁴⁸ See: <https://bit.ly/3At1RTT>.

⁴⁹ See: <https://bit.ly/39nZbLt>.

⁵⁰ *Supra* note 27., article 93. par. 3.

spawned a host of diverse interpretations. There have been concerns that extending service providers' responsibilities to user-generated content will call their normal functioning into question. Specifically, for web portals with many followers, it will be difficult to expect editors to peruse all the comments and, if necessary, filter those with inappropriate or banned content. Several factual and legal questions also arise here: According to the draft provision, will service providers be obliged to verify certain content's veracity? Will they have to determine whether certain content is, for example, incitement to violence or hatred?

The legal basis for the attribution of responsibility for others' acts, over which the content provider has limited supervision possibility, is disputable. This solution is also questionable when it comes to the personal culpability standard. The mentioned criminal offenses are, without exception, punishable only when they are committed with intent, which means that the perpetrator either seeks to achieve a prohibited consequence (e.g., incitement to discrimination) or at least agrees to it (*dolus eventualis*—it is immaterial whether the consequence occurs). On the other hand, a content provider's liability may be based on an omission in which there are no elements of intent but where they may be negligence. This raises several doubts about how to assign responsibility to the publisher for user-generated content while maintaining the principle of guilt intact. There have been concerns that this could result in terminating the comments feature online. Given that many readers are attracted by the ability to publish comments, some electronic media fear that abolishing commenting will render their portals less interesting to the public.

On the other hand, there is no doubt that electronic publications generate revenue on the market not only through the content they offer to the public, but also through user-generated content in the form of comments. This is the logic underlying paid advertisement: the more clicks certain links receive, including comments, the higher the content provider's advertising revenue. If revenue is generated in this manner, i.e., the monetization of the activities on a given portal, then the same media should be considered responsible for the anonymous comments that help them generate profits. However, by introducing registration as a prerequisite to using the commenting feature on articles and other content, publishers would be exempted from liability, and possible criminal or other proceedings (e.g., civil proceedings for personal rights violations) could be initiated against persons listed as the authors of given statements. The purpose of this new legislative approach is to limit anonymous comments and introduce a system of responsibility for the spoken word in those cases where it is contrary to the principle of freedom of expression or when it serves to spread hatred and violence, discrimination, the abuse of children and youth, incitement to terrorism, etc.

This is a very delicate issue involving competing rights and interests, and the interpretation of this provision will depend not only on the circumstances of the given case, but also on the standards pertaining to electronic media's responsibility for user-generated content established in ECHR jurisprudence (see the discussion and conclusion on this issue *infra* in Section 8.1.).

6. The concept of fake news

The fake news phenomenon has been described in the literature as “spreading outrageous distorted information to discredit opposition or create divisiveness between opposing groups.”⁵¹ According to another definition, fake news is “false, often sensational, information disseminated under the guise of news reporting.”⁵² The European Union (EU) defines disinformation as “verifiable false or misleading information that is created, presented, and disseminated for economic gain or to intentionally deceive the public, and may cause public harm.”⁵³ For some commentators, the term is defined through the consequences it produces as the destabilization of the category of truth in a democracy for geopolitical gain.⁵⁴ According to the some consequentialists, the fake news phenomenon creates an environment where “emotion triumphs over reason, computational propaganda over common sense, or sheer power over knowledge.”⁵⁵

There have been some suggestions in the literature to resolve the conceptual confusion concerning the terminology related to fake news. In this regard, three similar types of information can be identified. The first is misinformation, which is false, although there was no intention behind its creation. Unlike misinformation, another type—disinformation—is characterized by its creator’s intention to deliberately harm others. Finally, there is malinformation, which is neither created nor fabricated. It exists in social reality (hate speech), but similar to disinformation, it is intended to harm others.⁵⁶

Fake news is not a 21st century invention. Its origin significantly preceded the Internet and social networks. Often deliberately placed, fake news has influenced the course of historical events. An interesting example from recent history is taken from historiography and known as the ‘Ems telegram.’ On the brink of the Franco-Prussian War, a meeting took place in 1870 between Prussian Emperor Wilhelm I and French Ambassador Vincent Benedetti. On that occasion, Benedetti kindly asked the Prussian emperor to relinquish his claim to the Spanish throne to his family members, and Wilhelm I, even more kindly, refused. Otto von Bismarck was informed of the brief courteous meeting via a telegram that described the whole event as an incident. By revising the telegram’s original text and giving it a more conflicting tone, Bismarck provoked France into declaring war on Prussia. The fake

51 Nielsen, 2020, cited in Dalkir and Katz, 2020, pp. 238–257.

52 See: <https://www.collinsdictionary.com/dictionary/english/fake-news>.

53 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions tackling online disinformation: a European approach. com/2018/236 final. See: <https://bit.ly/3tXUKAt>.

54 Mueller, 2019.

55 Peters, Rider, Hyvönen and Besley (eds.), 2018.

56 Wardle and Derakhshan, 2017.

news (or distorted truth with many layers of lies) became the *casus belli* that affected European history in the late 19th century.⁵⁷

Another example from more recent history shows how the creation and dissemination of fake news has taken on the proportions of a mass phenomenon. This is clearly demonstrated by totalitarian regimes' propaganda. These are industries of lies calculated to discredit the opposition, i.e., groups perceived as potential points of resistance. Nazi propaganda utilized elaborate methods known as the phenomenon of the 'lying media' (Lügenpresse).⁵⁸ Similarly, communists fabricated 'news' about the ideal life behind the Iron Curtain. These were shallow stories about societies free of crime and social pathology. The reality was societies that celebrate and promote equality and a (distorted) version of human rights.

7. Legal regulation of fake news in Croatia

As espoused in Section 6, the creation and dissemination of fake news is not a new phenomenon; however, in the era of the technological revolution and global digitalization, it has taken on massive proportions. Thanks to social networks, it has never been easier or faster to share content, including fake news. An interesting source of information about fake news in Europe is the Eurobarometer research conducted in 2018 among 26,576 respondents from 28 EU member states. They were interviewed about their trust in media in general and about electronic media in particular. The results show that traditional information sources are the most trusted (television, radio, and print media), while social networks and messaging applications are much less trusted (26%).⁵⁹

Like their counterparts in other countries, respondents from Croatia mostly trust traditional media (for instance, 65% of them trust television, which is close to the EU average of 66%). When it comes to social media and messaging applications, 36% of respondents in Croatia do not trust them. The European average for distrust is 54%. Only respondents from Estonia, Lithuania, and Romania have more trust in news and information accessed through online social networks and messaging applications than those in Croatia. It is interesting that despite the higher level of trust in digital media in Croatia compared to most other European countries, almost 76% of the respondents come across news or information believed to be fake at least once per week. This is above the European average (68%). According to the respondents, the situation seems to be worse only in Spain (78%) and Hungary (77%).⁶⁰

57 See: <https://www.britannica.com/event/Ems-telegram>.

58 Supra note 51, p. 239.

59 See: <https://bit.ly/39q4F8I>.

60 Ibid.

At the same time, the respondents in Croatia seem to be among the most (self-) confident in terms of their perception of their ability to identify fake news (82% in comparison to the EU average of 71% and exceeded only by respondents in Denmark [87%] and Ireland [84%], who are more confident in this regard). Most of Croatian respondents believe that the fake information phenomenon is a problem (86%, compared to the EU average of 85%) and that it poses a threat to democracy (80% compared to 83% in the general sample).⁶¹ The total number of respondents in Croatia was 1,005, and there were some differences concerning regional distribution, age, and place of residence (urban vs. rural areas). An interesting but expected finding is that trust in the media decreases with age. Older persons have less trust in electronic media specifically, while television and radio enjoy a high level of trust irrespective of respondents' age.⁶²

The phenomenon of fake news on the Internet and in social networks in Croatia flourished after the outbreak of the COVID-19 pandemic. The Council issued the following warning:

All audiovisual media services are banned, including those via the Internet that publish or spread misinformation, especially those related to public health issues. Disclosure or dissemination of misinformation causes concern, the spread of fear and panic among the population and leads to even more severe consequences than those we face.⁶³

The state attorney office also released a statement concerning the placement of false information in the aftermath of the pandemic outbreak. The purpose was to instruct all county and municipal state attorney offices “to act thoroughly and immediately in accordance with the provisions of Article 38, paragraphs 1 and 2 of the Criminal Procedure Code and Article 35 of the State Attorney’s Office to detect and prosecute perpetrators.”⁶⁴

The following are some of the competent authorities' reactions to fake news that appeared on social networks concerning public health issues. In one instance, some ‘well informed’ citizens were offering ‘confidential’ information to the public via social media about when complete quarantine would occur, allowing persons to leave the house once per week. Others ‘reliably knew’ which stores/hospitals housed COVID-19 infected people, and they felt that this knowledge exempted them from self-isolation. Other cases concern a woman who falsely introduced herself as a doctor and published ‘real’ news about the spread of the virus, a night watchman who posted photos from previous gatherings on social media during his shift and claimed that they were happening in the present in violation of measures implemented to prevent

61 Ibid.

62 Biloš, 2020, p. 166–185.

63 See: <https://bit.ly/39lOQje>.

64 See: <https://bit.ly/2XA62Pe>.

the spread of the infection, a woman who falsely announced her own COVID-19 infection on her social media site, etc. In these and similar cases (32 in total), the police filed misdemeanor reports with the competent misdemeanor courts.⁶⁵

Following the series of severe earthquakes in Zagreb and surrounding areas from March 2020 onward, fake news concerning future earthquake predictions began to spread via social media. Although official geologists and other competent authorities explained that earthquakes cannot be accurately predicted, the fake news continued, creating confusion and panic in the citizenry. The police opened several cases, including one concerning a suspect who was persistently publishing false and disturbing news/content about earthquakes through a social network and a network for publishing and exchanging video clips.⁶⁶ Fake news was also disseminated through social networks in the immediate aftermath of the strong earthquake that hit central Croatia (Petrinja and surroundings) on 29 December 2020. This was in the form of a photo that showed large-scale damage and destruction in Petrinja, a city about 60 km southeast of Zagreb, the earthquake's epicenter. However, the photo was false because the city depicted was not Petrinja but Amatrice, a town in Italy that was also hit by a devastating earthquake in 2016.⁶⁷

The recent increase in the incidence of fake news on the Internet and social networks does not mean that this phenomenon has not been present in Croatia for quite some time. During the 2019 European parliamentary elections, two cases of alleged fake news perpetrated by the candidates were reported to the Ethics Committee of the Croatian Parliament. The first concerned a candidate who published on her official website that an association active in promoting patients' rights was "against vaccination and supports anti-vaxxers." The Ethics Committee compared this statement with the association's official webpage (also a signatory to the Declaration on Compulsory Vaccination of the World Health Organization) and concluded that the statement the candidate published was untrue. Hence, the Committee found that there had been a violation of the Code of Ethics in the Elections.⁶⁸

In another case, the Committee concluded that there had been no violation. This case was about a candidate's allegedly false paid advertisements on social networks. The advertisements claimed that according to the polls, the list would win three seats in the European Parliament. The Committee established that in legal terms, such advertising could not be considered false. The number of seats that candidates will win is an uncertain future fact, and candidates are free to make estimates, including their own predictions about the number of seats. The Committee also pointed out that it has no instruments to determine whether a particular advertisement is true or false.⁶⁹

65 See: <https://bit.ly/3tZq0iP>.

66 See: <https://bit.ly/3AxELFt>.

67 See: <https://bit.ly/3hP2NdZ>.

68 See: <https://www.izbori.hr/site/UserDocsImages/1975>.

69 Ibid.

Creating and disseminating fake news is prohibited under Article 13 of the Act on Misdemeanors Against Public Order and Peace.⁷⁰ Any person who invents or spreads false news that disturbs citizens' peace and tranquility can be punished with a fine. This legislation dates back to 1977, so the fine is still prescribed in the defunct currency German marks (due to the high inflation at that time in the former Yugoslavia). This means that whenever the sanction is imposed, the court calculates the corresponding amount in the domestic currency. In addition to the misdemeanor against public order and peace, some fake news-related behavior could also be qualified as the criminal offense prescribed in Article 316 of the Criminal Code, namely false alert.⁷¹ The perpetrator is whoever falsely informs the police or another public service that ensures order or provides assistance about an event that requires urgent action under that service. False alert can be punished with imprisonment of up to three years.⁷² The most common *modus operandi* for a false alert in previous years was a false report about planted explosive devices, forcing the police and other competent authorities to evacuate buildings to prevent loss of lives and property damage.⁷³ The *ratio legis* for this criminal offense consists of the high expenses the police incur when conducting their interventions without valid reason, as well as their diversion from other law enforcement activities. Given the pandemic crisis, some commentators have suggested that causing public panic for no reason should be a consideration for increasing the penalty in future legislative amendments.⁷⁴ However, there have been no initiatives to reintroduce the creation and dissemination of fake news as a separate criminal offense. Nevertheless, under certain circumstances, the spreading of fake news could be legally qualified under Article 316 of the Criminal Code in cases where the police or other competent authorities were activated to conduct an inquiry or investigation.

Over the last several years, there has been an increase in various projects in Croatia dealing with preventive aspects of the fake news phenomenon. October 2020 saw the launch of the website 'Museum of Fake News.' It is envisaged as a repository of documents, essays, and other materials concerning the topic, and it also offers useful tools for self-prevention (also self-protection) and the promotion of media literacy.⁷⁵ According to the initiative's authors, the purpose of the website is to make citizens aware of the prevalence of fake news, raise media and information literacy levels, educate citizens about how to recognize fake news, etc.⁷⁶ Another interesting

70 Law on Misdemeanours against Public Order and Peace, Narodne novine (Official Gazette) 47/1990, 55/1991, 29/1994.

71 Supra note 21., article 316.

72 Ibid.

73 See: <https://bit.ly/3lJ92kQ>.

74 Moslavac, B., Lažna uzbuna i lažne vijesti, <https://www.iusinfo.hr/strucni-clanci/lazna-uzbuna-i-lazne-vijesti>.

75 See: <https://www.croatiaweek.com/croatia-to-get-museum-of-fake-news/>.

76 See: <https://mlv.hr/o-nama/>.

website is ‘Media literacy,’⁷⁷ founded by the Agency for Electronic Media and the United Nations International Children Emergency Fund (UNICEF) in partnership with several interlocutors from academia and NGOs. The website is mostly designed for younger people, including students, with a focus on those who are the most vulnerable to harmful content and therefore the most in need of media literacy. Major thematic focuses include the prevention of disinformation, safety on the Internet, children and the media, the media and violence, and the media and stereotypes.⁷⁸

Having been a member state since 2013, Croatia has joined the EU initiatives. Within the EU, various types of information disorder have been taken seriously. An action plan against disinformation was adopted in an effort to ensure that the 2019 European parliamentary campaigns would be free of disinformation and fake news.⁷⁹ The action plan clarifies that fake news and disinformation campaigns are part of hybrid warfare.⁸⁰ Those behind such campaigns include some foreign governments and non-state actors. The latter are mostly involved in spreading vaccination-related false news. The measures envisaged in the action plan are divided into four categories: improving the capabilities of Union institutions to detect, analyze, and expose disinformation; strengthening coordinated and joint responses to disinformation; mobilizing the private sector to tackle disinformation; and raising awareness and improving societal resilience. The dissemination of disinformation and growing populism were highlighted as thematic areas of interest for the EU in the Priorities of the Croatian Presidency of the Council of the European Union (1 January–30 June 2020).⁸¹ Various organizations sent their comments to the Priorities. For instance, the Commission of the Bishops Conferences of the European Union (COMECE) indicated that:

[A] rights-based approach should be promoted in any EU initiative to counter disinformation...definitions must be sharp and prevent unwanted effects on free expression and democratic debates...and self-regulation can be effective only as a complementary element...the key role must remain with the justice system.⁸²

The explanatory opinion requested by the Croatian presidency titled “The effects of campaigns on participation in political decision-making,” adopted in June 2020,

77 See: <https://www.medijskapismenost.hr>.

78 Ibid.

79 Joint communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan against Disinformation, JOIN/2018/36 final. Available at: <https://bit.ly/3ED6tcB>.

80 Joint communication to the European Parliament and the Council, Joint Framework on countering hybrid threats: a European Union response, JOIN/2016/018 final. Available at: <https://bit.ly/3hUHrfz>.

81 Priorities of the Croatian Presidency of the Council of the European Union. Available at: <https://bit.ly/3hV4OFQ>.

82 Contribution of COMECE and CEC to Croatia’s EU Council Presidency Programme “A strong Europe in a world of challenges,” January 2020, p. 8.

expressed support for the EU's efforts to counter disinformation, both external and domestic. The Commission was urged to:

ensure full compliance and follow-up regulatory action in respect of the Code of Practice on Disinformation, further development of the recently established 'rapid alert system' and STRATCOM's intelligence units, and an expansion of the European External Action Service's action against disinformation.⁸³

Croatia is among the 15 member states that signed a letter of concern regarding the spread of fake news and conspiracy theories about 5G technology in Europe. The letter sent to the Commission highlights that the EU needs "to come up with a strategy to counter disinformation about 5G technology or risk false claims derailing its economic recovery and digital goals."⁸⁴

One of the issues relevant in the context of Croatia and other countries concerns the advantages and disadvantages of adopting a special law that would regulate unacceptable behavior (including the dissemination of fake news) on social networks. Existing legislation in Croatia is limited to the EMA, which does not regulate the rights and obligations regarding communication on social networks. The adoption of a law that would regulate social networks was announced in 2018, and, in 2019, it was included in the legislative activities plan. Some commentators supported the adoption of such a law

which would regulate the obligations of social networks to monitor and act on user reports when there is a suspicion that the user's statements committed one of the listed criminal offenses considered a priority for the Croatian legislator.⁸⁵

Those who advocate adopting a special law believe that the Croatian law should be drafted on the model of the German Law on Law Enforcement on Social Networks (*Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken*, NetzDG).⁸⁶ In short, proponents of the German model stress that the new law should include social network service providers' obligation to filter content related to public incitement to violence and hatred, child pornography, and public incitement to terrorism.

On the other hand, due to some negative side effects during the implementation of NetzDG and the potential negative consequences to the constitutionally protected freedom of expression due to the risk of over-filtering, there is a majority in favor of maintaining the status quo. Thus, the 2019 Ombudsman's Report states that the approach of monitoring relevant policies at the EU level should be supported to avoid the "multiplication of national regulations governing hate speech on the Internet and fragmented regulation, which leads to unequal protection of citizens in the EU." The

83 The effects of campaigns on participation in political decision-making, rapporteur: Marina Skrablo, SOC/630-EESC-2019, <https://bit.ly/3lIS4TM>.

84 See: <https://www.reuters.com/article/eu-telecoms-int-idUSKBN2740Q3>.

85 Roksandić and Mamić, 2018, pp. 329–357.

86 See: <https://www.gesetze-im-internet.de/netzdg/BJNR335210017.html>.

report also highlights the reservation regarding adopting a special law concerning “remarks made in countries that have adopted national laws on unacceptable online behavior, but also the fear that regulation based on the German model could result in (self) censorship.”⁸⁷ Many information technology experts and NGO members reacted similarly to the announcement of the adoption of a special law. One commentator pointed out that the law cannot prevent the spread of hatred and that such initiatives are proposed by people who are not sufficiently familiar with the functioning of the Internet and social networks.⁸⁸ Critics are unanimous in claiming that there is no need to enact a new piece of legislation given that prohibited conduct is clearly defined through the Criminal Code, EMA, and editorial responsibility.⁸⁹ Furthermore, they suggest that “Hate speech cannot be solved partially, only on social networks, but holistic and complementary solutions should be considered, which include civic education, media literacy and efficient and fast sanctioning of the most severe forms of hate speech.”⁹⁰

There have been no significant legislative activities since the initial announcement of the drafting of the special law, which might suggest that this idea has been abandoned, at least for the time being. Given that this is a crucial issue in the context of freedom of expression on the Internet, analysis of this issue is left for Section 8.2..

8. Discussion

8.1. What are the nature and scope of content provider responsibility for user-generated content?

There have been three important cases decided by the ECHR that concern Internet content providers’ intermediary liability: *Delfi v. Estonia* (2013, 2015), *MTE and Index.hu v. Hungary* (2016), and *Pihl v. Sweden* (2017). In *Delfi v. Estonia*, the ECHR found that the state had not violated Article 10 (right to freedom of expression) when it established the media’s or the publisher’s responsibility for reader comments containing hate speech toward a transport company (SLK) and a member of its supervisory board.⁹¹ Delphi is an online news portal that publishes more than 300 news items daily. It allows readers to comment and automatically posts these comments immediately after they are written, without additional portal-supervised

87 See: <https://www.ombudsman.hr/hr/izrazavanje-u-javnom-prostoru/>.

88 See: <https://bit.ly/2XC3f8t>.

89 See: <https://bit.ly/39lPe1a>.

90 See: <https://bit.ly/3hROfur>.

91 ECHR *Delphi v. Estonia*, application no. 64569/09, 2015.

editing or deletion. The site argued that readers who leave comments are personally responsible for the content. Delphi's site has a feature that allows other readers to label comment content as offensive or inciting hatred; flagged content is deleted. There is also a mechanism that automatically detects and deletes obscenities. In the present case, at the beginning of 2006, 185 comments on an article about SLK were published, 20 of which contained personal threats and offensive language against L. L's lawyers requested the removal of those comments, accompanied by a monetary claim of EUR 32,000.00 for non-pecuniary compensation. The disputed content was removed six weeks after publication, but the portal refused to pay the compensation.

In domestic proceedings, the Internet portal was declared liable under the provisions of the Civil Obligations Act for publishing offensive value judgments insulting another person's honor and failing to remove such content on its own initiative. The ECHR found that the impugned comments constituted hate speech, which do not enjoy protection under Article 10 of the Convention. Moreover, the Delphi portal is a professional Internet news portal that, for commercial reasons, tries to attract as many comments as possible, even on neutral topics. Given the portal's obvious economic interest regarding comments, the ECHR concluded that the portal did not function merely as a passive technical service provider. The portal's filtering measures clearly did not offer sufficient protection against speech that openly spread hatred toward L. The ECHR found the same concerning the prolonged delay in removing the disputed comments and indicated that eventual removal was on someone else's initiative. Ultimately, the ECHR found (with two separate and dissenting opinions) that there had been no violation of Article 10 of the Convention in the present case.⁹²

The ECHR reached the opposite conclusion in *MTE and Index.hu v. Hungary* in 2016.⁹³ Plaintiffs were a self-regulatory body of Internet content providers and a major news portal. In this case, the ECHR found that the national courts violated the publisher's freedom of expression when they found them responsible for readers' comments on an article about a real estate company's allegedly ethically questionable advertising practices. After establishing their responsibility in civil proceedings before national judicial authorities in which the plaintiffs were awarded monetary compensation (a constitutional complaint was filed against these judgments, but was eventually rejected as unfounded), MTE and Index.hu addressed the ECHR with the argument that the state had disproportionately restricted their rights under Article 10 of the Convention. The ECHR preliminarily reiterated the standards established in its case law that Internet portals that publish news have certain rights and obligations that differ to some extent from traditional publishers', especially when it comes to content generated by third parties (commentators). However, the ECHR found

⁹² Ibid.

⁹³ ECHR *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, application no. 22947/13, 2016.

an essential distinction related to the Delphi case in terms of the disputed comments' content, which, although vulgar and potentially subjectively offensive, does not constitute hate speech or incitement to violence. Unlike the Delphi case, the first applicant has no clear economic interest in monetizing its web activity through user-generated content. Finally, the comments were removed promptly, without major damage to the allegedly injured parties' protected rights. In conclusion, the ECHR found that the domestic courts had failed to conduct a proportionality test between the conflicting rights and interests. Accordingly, this amounted to a violation of Article 10 of the Convention.

Some commentators on this judgment pointed out that the ECHR had corrected its views as expressed in the Delphi case and thus protected freedom of expression in favor of electronic publication service providers. However, as Judge Kuris rightly pointed out in his dissenting opinion, this judgment in no way derogates from the standards established in the Delphi case, as the facts on which the judgement is based differ. He added the following reflection on the media's moral responsibility to refrain from further contaminating the public space:

Consequently, this judgment should in no way be employed by Internet providers, in particular those who benefit financially from the dissemination of comments, whatever their contents, to shield themselves from their own liability, alternative or complementary to that of those persons who post degrading comments, for failing to take appropriate measures against these envenoming statements. If it is nevertheless used for that purpose, this judgment could become an instrument for (again!) white-washing the internet business model, aimed at a profit at *any* cost.⁹⁴

The most recent ECHR case concerning the media's responsibility for user-generated content is *Pihl v. Sweden*.⁹⁵ Unlike the two previous cases, the ECHR declared the application inadmissible on the grounds that it was manifestly ill-founded. The primary reason for such a decision was that the applicant claiming to have been the victim of a defamatory online comment sued the non-profit organization on whose website the comment was published. The ECHR found that the domestic court had properly balanced the competing rights and interests in rejecting his claims. From the ECHR's reasoning, it becomes apparent that the other two facts similar to those in the Hungarian case also contributed to the finding of no violation concerning Article 10 of the Convention. First, the statement, although offensive, did not amount to hate speech. Second, it was taken down immediately upon notification from the applicant.

These cases indicate what national legislatures and domestic judicial and regulatory authorities should consider with regard to the issue of the electronic media's responsibility for user-generated content. The provision on the media's responsibility

⁹⁴ Ibid.

⁹⁵ ECHR *Pihl v. Sweden*, application no. 74742/14, 2017.

should not be used as a *carte blanche* for holding them liable for any offensive or inappropriate user-generated content (comments). This would undoubtedly result in *sui generis* censorship, contrary to the principles of free speech. On the other hand, the mere theoretical possibility of holding Internet media responsible for violations without adequate enforcement could be interpreted as a poor signal from regulators that everything is allowed for the sake of profit. Therefore, sound and fair decision making should strive to balance competing interests. In this regard, decision makers should keep the following issues in mind: the statement's content (zero tolerance for hate speech), the electronic medium's profile (small non-profit vs. large profit-oriented corporations), preventive measures taken by the media (filtering of harmful content, i.e., hate speech, incitement to terrorism, images and video-clips of the sexual abuse of children and similar content), and the promptness of the media's reaction in removing the disputed content.

8.2. *Is there a need for lex specialis social network regulation?*

Regarding the need to enact a special law that would regulate harmful content (including fake news) on social networks, it is important to determine whether this is necessary or whether the existing legislation is sufficient. First and foremost, there is no doubt that the legislative term 'electronic publication' (as used in the EMA) excludes social networks, which are webpages and applications that allow users to create and share content or participate in social networking. Given the previously elaborated definition of electronic publication, which includes subjects or content providers, method of implementation, and purpose, it is obvious that the concept of an electronic publication is narrower than that of the social network. The social network concept focuses on user-generated content. Unlike electronic publications, there is no emphasis on editorially designed program content published via the Internet with the purpose of informing and educating the public. Therefore, under Croatian legislation, social networks do not fall under the ambit of the legislation regulating electronic media.

Nevertheless, irrespective of the difference between the legal term 'electronic publication' and the notion of the 'social network,' which has not been legally defined (at least not in legally binding domestic legislation), it would be wrong to think that expressions and statements posted on social networks are in a legal vacuum. On the contrary, any content that conflicts with positive criminal legislation, such as hate speech, incitement to terrorism, incitement to violence, and hatred, will be prosecuted, and the perpetrator will be punished under general legislation (the Criminal Code). The same applies to the dissemination of fake news, with the difference that there will be liability for a misdemeanor and not a criminal offense. This means that in terms of criminal/misdemeanor liability, there is no difference as to whether harmful content was published in an electronic publication (e.g., an Internet news portal) or via a social network (e.g., content or commentary posted on Facebook).

As previously mentioned, some commentators have advocated German law regulating social networks as a good model for future Croatian legislation concerning social networks (see *supra* Section 7). As German law refers to content that has already been criminalized (a reference to the list of offenses), the new legislation is not about defining harmful content *per se*; rather, it is concerned with private companies' responsibility to filter such content and remove it from their domains. Germany was the first European country to introduce an obligation to filter harmful content on social networks. Those under the scope of the law are profit-seeking service providers that operate "Internet platforms which are designed to enable users to share any content with other users or to make such content available to the public (social networks)."⁹⁶ However, the law does not apply to all social network providers, only to those with at least 2 million registered users in Germany. They are obligated to take measures to filter, block, and remove criminalized harmful content that could be subsumed under the Criminal Code's list of offenses.⁹⁷

There are some problems concerning the concept of social network providers' responsibility for user-generated content. First and foremost, it is a matter of transferring the responsibility for determining the issue of *prima facie* illegal content from public authorities to the private sector. According to longstanding principles and procedures in states governed by the rule of law, whether something is illegal is a matter that should be adjudicated in legal proceedings before the courts or other competent (public) authorities. The *ratio legis* for this is that any removal of content and penalization of its author must be based on law and only in cases where it is necessary in a democratic society and proportionate to the aim pursued by certain restrictions established under the law. Given that any filtering or blocking of content is a restriction of the right to freedom of expression, the weighing of protected interests must ultimately be left to the state (judiciary) and not to the private sector alone.

Furthermore, simple technical removal of inadmissible content creates a risk of impunity for the author of that content. There is a justified concern that prioritizing simple content deletion could jeopardize the justification of the criminal prosecution and punishment of those responsible for producing the content. This further raises the question of whether impunity will lead to reoffending. It is also closely related to the psychology of offenders. Imagine, for example, that it is forbidden to dispose of waste in a certain protected place (e.g., a forest). Some citizens turn a deaf ear to it and decide to dump garbage in the woods. The authorities in charge of clearing the forest remove the waste and transfer it to the appropriate disposal place, as provided by law. Had the competent authority failed to do so, they would have been sanctioned for failure. However, those who dumped the waste go unpunished. What message is being sent? Obviously, this one: Continue to dispose waste in forbidden places, and be assured that someone will clean up behind you because, otherwise,

96 Kettemann, 2019. Available at: <https://bit.ly/3CxZArj>.

97 Ibid.

that authority will be sanctioned. This is an instance of not properly insisting on consequences. Instead, the responsibility of those directly liable for the placement of the hypothetical waste should be strengthened through better collaboration between intermediaries and the state, not by entrusting decision making in this very delicate sphere of the most fundamental human rights to the private sector alone.

It should not be forgotten that the ECHR standards regarding protected and prohibited expression also apply to the Internet. This was clearly established in the cases of *Yildirim v. Turkey*⁹⁸ and *Cengiz and Others v. Turkey*.⁹⁹ The margin of appreciation on this is left to the state and depends on the type of expression (e.g., some poetic and satirical forms enjoy a very high threshold of protection), the mode of expression (e.g., even expressing opinions that are ‘offensive’ and ‘shocking’ will not be *a priori* prohibited if they serve a positive social function, dialogue, or pluralism in a democratic society), etc. Only certain content or forms of expression in this sense are prohibited in Europe (e.g., hate speech, Holocaust denial, incitement to discrimination, etc.).

In order to protect freedom of expression as one of the fundamental values of a democratic society, it is assumed that certain content is allowed if there are no circumstances that preclude it. In other words, the burden of proof is on the prosecutor/plaintiff or whoever claims that certain content is prohibited. The exception in this regard is defamation; the reason for the inversion of the burden of proof in this case has already been explained in Section 3. Shifting responsibility for determining whether particular content is *prima facie* illegal to the private sector alone fully relativizes freedom of expression by inversion through assuming something as *prima facie* illegal. This paradigmatic shift could be very dangerous for freedom of expression. Any reasonable service provider will, in dubious situations and faced with the risk of high penalties and reputational damage, act quite safely, preferring ‘easy censorship’ to the detriment of freedom of expression.

Concerning *prima facie* prohibited content, it should also be noted that this fact may be relatively easy to identify in some cases (e.g., content related to child sexual abuse). However, in other cases, it will not be that easy. For example, in cases of incitement to terrorism or public provocation to commit terrorist offenses, it will not always be *prima facie* clear whether this is a prohibited expression or one that enjoys protection under Article 10 of the Convention. The same applies to incitement to violence and hatred, and especially to fake news. Standards for distinguishing between what is allowed and what is prohibited under Article 10 of the Convention exist and have been elaborated in the ECHR’s jurisprudence. However, the application of these standards in specific situations should not be left to the exclusive assessment of social network intermediaries’ technical protocols and procedures. In this regard, the fact that artificial intelligence algorithms are often used to filter activities raises further legal and ethical doubts. Although these algorithms are programmed by

98 ECHR *Yildirim v. Turkey*, application no. 3111/10, 2012.

99 ECHR *Cengiz and Others v. Turkey*, application 48226/10, 2020.

humans, the operative filtering/blocking decision is taken by an algorithm fueled by artificial intelligence. This is another reason for concern about and reconsideration of the existing models (e.g., the German model).

This criticism does not mean that the private sector should be excluded from the regulation of social networks. On the contrary, a wide range of Internet intermediaries (including social network providers) must be involved in this process. However, their involvement should neither be seen nor treated as a substitute for the competent (public) authorities' balancing of competing rights and interests. The reason for this is clear. The former's role is not to protect freedom of expression, but rather to make a profit on the open market. It follows that the measures they take (filtering, content removal) lack deterrent effect in terms of special and general prevention. Hence, it is unlikely that a model relying solely on their responsibility for user-generated content would prevent the creation and dissemination of harmful content on social networks. Last but not least, law enforcement and the judiciary could misunderstand this to mean that the harm has been remedied and that no further action is needed.

That is why models of Internet intermediaries' (including social network providers') responsibility should be complementary to those involving other interlocutors, particularly those who are, per the Constitution, in charge of balancing competing rights and interests. In terms of semantics, passing new legislation on regulating Internet intermediaries' rights and responsibilities could be understood *per se* as a political tool to suppress freedom of expression on the Internet. Given that social networks constitute a global phenomenon and that the suppression of illegal and harmful content requires effective and genuine international cooperation, it would be preferable to further discuss and eventually negotiate a global (or at least regional) legal framework based on established human rights standards. In the meantime, as an alternative to unilateral legislative reform, some other measures toward better collaboration models between intermediaries themselves as well as between intermediaries and state authorities should be given preference. This could entail, for instance, adopting memoranda of understanding and codes of conduct, organizing and attending training and education for intermediaries' employees, promoting media literacy among users, etc. In any case, the standards established by the 2018 Council of Europe Recommendation on Internet intermediaries' roles and responsibilities should be closely followed to avoid interference with protective mechanisms under the Convention (by not imposing a general obligation or responsibility on intermediaries to monitor the content to which they merely provide access to, transmit, or store through the provision of an effective remedy for all human rights and fundamental freedom violations set forth in the Convention by Internet intermediaries, etc.).¹⁰⁰

100 Council of Europe Recommendation on roles and responsibilities of Internet intermediaries, CM/Rec(2018)2. Available at: <https://bit.ly/3zr3lgo>.

9. Conclusion – Does it make sense to counter fake news in a world where the truth has (almost) disappeared?

Some commentators have suggested that countering fake news does not make any sense in a world where the truth has disappeared. They are deeply convinced that we already live in a post-truth world, that is, an environment where the common standards of humanity that were agreed upon through layers of history first faded and then vanished. For those who are more moderate, the modern world seems to be in a 'crisis of truth' or an epistemological limbo. They have suggested that ubiquitous post-modernism has relativized most historical narratives. Some modern collective ideologies (movements) have served the same purpose. The first victim of their aggressive imposition of the new narrative(s) was freedom of expression, which is on the verge of being altered for the sake of empty political correctness.

The truth is, as always, somewhere in between. While the truth has not disappeared entirely, it has indeed come under multiple attacks. The cannons are being fired not only by those already mentioned, but also by profit-oriented corporations, non-democratic governments, totalitarian regimes and ideologies, aggressive non-state actors, terrorist and anarchist cells, and many others. Cyberspace is the central arena for this global warfare. The result is a physical world polarized by emotions (instead of harmonized by reason) and divided through street spectacles (instead of united through democratic institutions). How do we get back on the right track?

The answer lies in the problem itself. The truth has to be revitalized, protected, and reinforced. It is absolutely crucial because a still dystopian (fortunately) post-truth world will lack values, as no truth means no values. A world without values will distort the concepts upon which modern (Western) societies were built, namely democracy, human rights, and the rule of law. In more practical terms, defending the truth means protecting the (generic) constitution as an expression of will and consensus on the most fundamental values shared by free citizens in democratic societies governed by the rule of law.

On this quest, the most crucial task is to keep a rational approach that prefers soft law alternatives, building partnerships, and investing in education (as a barrier to indoctrination and probably the most common method utilized by the aforementioned anti-truth/anti-democratic initiatives and alliances). With this in mind, the over-criminalization/overregulation of the Internet and social networks does not seem to be a viable model. Specifically, while it is undeniable that the negative potential of fake news is a serious threat to democratic societies, the idea that this phenomenon should be suppressed at all costs is perhaps even more dangerous. Democratic societies are based on the concept of freedom of expression, which is why a widespread campaign advocating various forms of repressive action against fake news would be deeply wrong and harmful to the very core of democracy.

Along these same lines, not all fake news threatens democracy. Rather, the threat is posed only by those massive campaigns run by the aforementioned entities

with the aim of destabilizing the system, causing panic, creating confusion, and fueling social polarization. Therefore, to avoid preventive over-filtering and over-blocking, the self-regulation of the Internet and social networks must be complementary to other measures rather than exclusive. Social media, content providers, social network providers, Internet service providers, and other interlocutors should closely collaborate among themselves as well as with regulators, law enforcement, and the judiciary. The court is the most appropriate forum (and the only one that is constitutionally authorized) to balance competing interests. Domestic court judges should follow the standards established in the ECHR's jurisprudence, which will certainly continue to evolve through new ethical and legal dilemmas concerning digital technology and artificial intelligence.

To conclude, it makes perfect sense to counter fake news as a phenomenon that harms society (created and disseminated on a large scale and/or capable of causing panic and destabilizing democratic institutions). The same applies to other forms of harmful content on the Internet and social networks. However, the truth has not disappeared from the world entirely. Sometimes it is under pressure, hiding, or silent, but those are temporary states. Like water, which is also essential for life, the truth will find a pathway.

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