THE COUNCIL OF EUROPE AS GENTLE POWER: THE CASE OF 'HATE SPEECH' IN THE CZECH REPUBLIC, SLOVAKIA AND HUNGARY

BY

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ABSTRACT

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In times of growing complexity of international relations, the interaction between international organizations (IOs) and domestic politics shows a new but largely unexplored dynamics. This thesis sheds light on this dynamics via a case study of the impact of the Council of Europe (CoE) on domestic politics in the Czech Republic, Slovakia and Hungary. It investigates the impact of the CoE in the country-level approaches towards 'hate speech' (HS). HS poses challenges to modern democracies, and that has been treated differently in the three countries. The analysis of the different mechanisms of the CoE's impact on the national level in three dimensions (political, judicial, civil) identifies the 'gentle power potential' of the CoE in general and its manifestation in determining the 'right' approach vis-à-vis HS in member states in particular. The CoE as gentle power uses several channels in the case of HS to uphold or modify certain domestic approaches to this phenomenon in the Czech Republic, Slovakia and Hungary. These results challenge the conventional understanding of IOs such as the CoE posed by neorealism ('no power' hypothesis). At the same time, while they do not dispute that of neoliberal institutionalism ('mediated power hypothesis'), they indicate that the independent impact of the CoE as gentle power can best be understood with the help of constructivist analysis.

Keywords: International Organizations, Council of Europe, 'Hate Speech', Czech Republic, Slovakia, Hungary, Gentle Power

PREFACE AND ACKNOWLEDGMENTS

Sitting on a bench by the river in Strasbourg during a peaceful, sunny afternoon, it is easy to forget the multiple challenges Europe faces today. The monumental, well known building of the European Parliament may seem as the triumph of European unity; similar impressions can be evoked by the Palace of Europe, where the intergovernmental institutions of the CoE—the Parliamentary Assembly and the Committee of Ministers—hold some of their meetings. Before both of these buildings, although they belong to different organizations, one older but also less known than the other, there are the flags of all member states—47 and 28 respectively, that already indicates the former incorporates a much more diverse group than the latter. However, there are two other buildings that are lost from sight when looking at the former two: the seat of the European Court of Human Rights and the Agora building where the administrative and monitoring structures of the CoE are concentrated. No flags of the member states waive before these buildings—only the 12-star 'European' flag, which is today considered mostly as a symbol of a rather different organization. Maybe the CoE is studied so rarely because it is not really important at all in contemporary Europe. But what if there is something in those two buildings with only the European flags, that indeed, in a less straightforward way, produces change we just do not (want to) see? And if so, what is that change, how does it work, why can it persist, and what are its consequences for 'Europe' as such?

The research I present in this thesis can strive to answer only much more minor questions that derive from these 'big' ones. Still, I believe, it can be a piece for the wider mosaic, which hides a pattern that is important to discover in order to know more what Europe really means and is about.

It would not be possible to realize the original idea for this thesis without the encouragement, advice and help of a number of people, to whom I would like to express my deepest gratitude.

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Finally, my academic writing instructor—John Harbord—for reading and commenting on about two hundred pages of draft texts including this one, as well as all Staff members and colleagues at CEU for the support throughout the year.

Sapere aude.

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LIST OF ABBREVIATIONS AND ACRONYMS

CEE	Central and Eastern Europe
CoE	Council of Europe
CoM	Committee of Ministers of the Council of Europe
Convention / ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome 4 September 1950 [European Convention on Human Rights]
Court / ECtHR	European Court of Human Rights
CUP	Cambridge University Press
ECRI	European Commission against Racism and Intolerance
FCNM	Framework Convention for the Protection of National Minorities
HCC	Hungarian Constitutional Court
HS	'Hate Speech'
IGO	Intergovernmental organization
INGO	International non-governmental organization
INT	Interview
IO	International organization
IR	International Relations
NHPA	No Hate Parliamentary Alliance
NHSM	No Hate Speech Movement
OUP	Oxford University Press
PACE	Parliamentary Assembly of the Council of Europe
SG	Secretary-General of the Council of Europe

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INTRODUCTION

After the breakdown of communism, young states from Central and Eastern Europe (CEE) wanted to return to Europe. While the EU played the 'shining city upon the hill' by imposing strict conditionality criteria for accession, the CoE, a key regional IGO in promotion and protection of human rights, democracy, and the rule of law, welcomed new members with open arms. This organization, 'operating in the field of soft security'[1] since 1949, acted in accordance with its aim to bring pan-European reconciliation, peace and justice by accepting most CEE countries in the early 1990s. But this is only the beginning of the story. After states with weak human rights standards acceded, the CoE mechanisms transformed them from within via the mechanism of 'internal conditionality.'[2] This success shows that while contemporary scholarship in European studies focuses dominantly on the EU[3] with the CoE remaining in the shadows of knowledge,[4] one should be wary of underestimating the potential of the CoE's open arms.

Today, the CoE includes 47 different members, yet its aim still remains 'to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage […].'[5] It is not clear, whether its

[1] Martyn Bond, *The Council of Europe: Structure, History and Issues in European Politics* (Routledge, 2012), 5.
[2] Rick Fawn, *International Organizations and Internal Conditionality: Making Norms Matter* (Palgrave Macmillan, 2013).
[3] The relationship between the CoE and the EU remain complicated, particularly after the EU increasingly took up several of the CoE's ambitions. See Marina Kolb, *The European Union and the Council of Europe* (Palgrave Macmillan, 2013).
[4] For instance, recent textbooks on IOs do not devote attention to the CoE within the discussion on European regional organization(s), although they deal with the EU, NATO and OSCE. See Herz, Monica. "Regional Governance," in *International Organization and Global Governance*, ed. Thomas G. Weiss and Rorden Wilkinson (Routledge, 2013), 236-250; Margaret P. Karns and Karen A. Mingst, *International Organizations: The Politics and Processes of Global Governance*, 2nd ed (Lynne Rienner Publishers, 2010), 153–178.
[5] CoE, "Statute of the Council of Europe," 1949, http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm.

current institutions are capable of making steps towards such a unity, if so, how, and in which areas they achieve good results.

Looking at these questions via comparative case study design can shed light on the wider dynamics of functioning of IOs which is at the core of IR research. A large strand of this research has suffered from 'the intense focus on proving that institutions matter, without sufficient attention to constructing well-delineated causal mechanisms or explaining variation in institutional effect.'[6] Contemporary IO research should thus concentrate on the interaction between domestic politics/institutions and IOs.[7]

In this thesis I follow this recommendation by focusing on the interaction between the CoE and selected countries to determine its impact in the area of policies towards 'hate speech' (HS). My central research question is how the different mechanisms of the CoE impact on the domestic level in political, judicial and civil dimensions.[8]

Two puzzles make studying the CoE's impact in the area of HS pertinent. Firstly, there are different theories on the potential and sources of impact of IOs on member states. Some say IOs are just 'extended arms' of powerful states, others that they are forums for discussion but without direct drive for change, yet others believe they can shape the 'rules of the game'. The presented study tests some of these theories.[9]

[6] Lisa L. Martin and Beth A. Simmons, "Theories and Empirical Studies of International Institutions," *International Organization* 52*(4)* (1998): 729–57.
[7] Ibid.
[8] Here, I do not assume the CoE as a pure independent variable existing 'out there' and (not) having an impact on member states. Instead, I stress the importance of the 'unity' vs. 'diversity' *within* the organization a necessary condition of its impact.
[9] For an overview of main theories see Thomas G. Weiss and Rorden Wilkinson, eds., op. cit., 87–204. Only the three main ones are discussed in this thesis.

The second puzzle points to the challenge HS poses to democratic countries,[10] and the differences that persist in approaches towards HS in the Czech Republic, Slovakia and Hungary. While Hungary is considered to have a more 'Americanized' model of freedom of speech that, at least in theory, tries to respond to HS with more speech,[11] the Czech Republic and Slovakia apply the more 'European' understanding of freedom of speech that accepts content-based limitations. During the relatively short period of their independence and CoE membership, these three countries have changed their legislation on HS several times. No analysis has looked at whether the CoE's positions played any role in these changes, nor why the differences persist despite the 'unifying ambition' displayed in the CoE's statute. Are these differences significant? Do they demonstrate a failure of the CoE's unifying ambition? Does the CoE lack impact because of internal disagreements about the proper response to HS? These questions need to be addressed.

Chapter 1 unpacks the first puzzle by providing several theoretical approaches to the study of impact of IOs in general and the CoE in particular. In Chapter 2, the methodology is justified and the second puzzle is outlined. Chapter 3 provides the empirical analysis of the impact of the CoE on the three countries in three dimensions.[12] This design makes it possible to capture both formal and informal processes of the CoE's activity and thereby answer the question how it influences member states' policies in responding to HS.

[10] For an introductory assessment of the dilemmas entailed in the concept of HS see Eric Heinze, "Hate Speech and the Normative Foundations of Regulation," *International Journal of Law in Context* 9*(4)* (2013): 590–617.
[11] Péter Molnár, "Towards Improved Law and Policy on 'Hate Speech'—The 'Clear and Present Danger' Test in Hungary," in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (OUP, 2011), 237–64.
[12] These are: the *political dimension* (national legislation and political strategies on HS); the *judicial dimension* (approach of national constitutional courts juxtaposed to the one of the ECtHR and ECRI); and the *civil dimension* (public campaigns, primarily the NHSM).

1. CONCEPTUALIZING GENTLE POWER: IMPACT OF IOS ON DOMESTIC HUMAN RIGHTS STANDARDS

The study of the nature and role of IOs has been a major field in IR.[13] Still, it is far from clear how, if at all, IOs[14] can affect domestic politics in its institutional, behavioural or agency-based mechanisms. If such an impact exists, several questions emerge, such as why it is possible and *whose* impact it is. Is it a 'genuine' impact of the IO or a 'mediated' one, in the background of which there are particular states that 'use' the IO to proliferate their own power? Thus, this chapter introduces the theoretical discussion about the impact of IOs on member states to conceptualize the core theoretical 'lenses' of analyzing the relationship between these two levels. I identify three hypotheses of the role of IOs: the 'no power', 'mediated power' and 'gentle power' ones, with the latter allowing most leverage for potential of independent impact of an IO. Subsequently, the relationship between this 'IR theory' approach and the one based on compliance theories is assessed. Finally, I discuss the role of the CoE in Central Europe that underlines the importance of analyzing whether the CoE can be understood in terms of gentle power.

[13] See Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press, 2004); John S. Gibson, *International Organizations, Constitutional Law, and Human Rights:* (Praeger, 1991); Lisa L. Martin and Beth A. Simmons, eds., *International Institutions: An International Organization Reader* (The MIT Press, 2001); Joel E. Oestreich, ed., *International Organizations as Self-Directed Actors: A Framework for Analysis* (Routledge, 2012).

[14] The CoE is an IGO as opposed to an INGO. However, this linguistic distinction assumes differences between the two based on purposes and actors (IGO as state-controlled and serving state interest vs. INGO as civil-society-controlled and serving the interest of 'world society'). See also Peter Willetts, "Transnational Actors and International Organizations in Global Politics," in *The Globalization of World Politics: An Introduction to International Relations*, ed. John Baylis, Steve Smith, and Patricia Owens, 6 edition (OUP, 2013), 320–37. For this reason, in the thesis I use the more neutral term of IO for the CoE.

1.1. The Impact of IOs: Three Answers

The theoretical answers to the question of the existence and nature of the IOs' impact can be clustered into three groups;[15] yet, all are to some extent related to an answer to the question of the *purpose* of establishing IOs. While IOs such as the CoE are usually set up by states, the reasons for such an action can be understood differently. The first answer, that of neorealism, views the establishment of IOs as the outcomes of the interests of 'great powers'. IOs, especially in the field of high politics such as human rights, constitute a 'false promise;'[16] they act as 'extended arms' of those in whose interests they were created. It is, therefore, states, not IOs, that really matter. The respective hypothesis to capture this position is the 'no power' one. According to this, the CoE has no independent impact on member states; these would comply with its standards and follow its recommendations insofar as it is in their interest.[17]

Neoliberal institutionalism[18] has a second, different answer to the puzzle of the role of IOs. This branch of institutionalist theory[19] does not dispute the rationalist and

[15] See the distinction between realism, rational functionalism and structural constructivism in Beth A. Simmons and Lisa L. Martin, "International Organizations and Institutions," in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse, and Beth A. Simmons (SAGE, 2005), 192–211. Another classification, which differentiates between contractualism (IOs as resources), regime analysis (IOs as fora) and constructivism (IOs as actors), mirrors Simmons' and Martin's one. See Ian Hurd, *International Organizations: Politics, Law, Practice* (CUP, 2010), 15–36. Alvarez distinguishes between realism, disaggregationism and constructivism but the three main approaches, with some subtle differences, are identifiable in these as well. José E. Alvarez, *International Organizations As Law-Makers* (OUP, 2006), 17–57. Some other approaches Alvarez lists are applicable to a different set of research questions than the one of this thesis. See also Robert W. Cox, "Critical Theory," in *International Organization and Global Governance*, op. cit., 157–68.

[16] John J. Mearsheimer, "The False Promise of International Institutions," *International Security* 19*(3)* (1994): 5–49.

[17] For example, the case of Russia seems to provide some ground for such hypothesis. Andrei Richter, "One Step Beyond Hate Speech: Post-Soviet Regulation of 'Extremist' and 'Terrorist' Speech in the Media," in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*, ed. Michael Herz and Péter Molnár (CUP, 2012), 290–305.

[18] Arthur A. Stein, "Neoliberal Institutionalism," in *The Oxford Handbook of International Relations*, ed. Christian Reus-Smit and Duncan Snidal, (OUP, 2010), 201–21; James L. Richardson, "The Ethics of Neoliberal Institutionalism," in *The Oxford Handbook of International Relations*, 222–33.

utilitarian elements of neorealism; yet it assumes that IOs are capable of making cooperation possible where it would not work otherwise. Institutionalized cooperation in the form of IOs enables 'relative gains' for all sides that would not emerge if states unilaterally pursued their interests. In other words, 'institutions are created by states *because* of their anticipated effects on patterns of behaviour.'[20] This strand of theorizing does not assume that institutions set 'the rules of the game,'[21] given state interest being behind their functioning. Knowing this limitation, the hypothesis of this theory is that of a 'mediated power' of IOs. In the case under study, the CoE could be assumed to work for creation of a unified framework of HS that would minimize disparities between CoE members and advance multilateral cooperation in human rights policies among them. In other words, in the 'complex situation' of the diverging approaches towards HS across Europe, the CoE could 'step in to provide "constructed focal points" that make particular cooperative outcomes prominent.'[22] These 'constructed focal points' would manifest in impact in the cooperative political but not judicial or civil dimensions of the CoE's activity.

The third answer to the nature and impact of IOs goes beyond state interest in the background. It can be summoned under 'constructivist' heading, asserting the existence of a genuine interest of IOs that can, consequently, have an independent impact on

[19] An alternative institutionalist theory, liberal intergovernmentalism, argues that instead of "liberal great powers", it may be young democracies which push forward human rights treaties. In these democracies, human rights standards are more fragile and pro-democratic elites want an instrument that will help safeguard them even in case they lose power. Additionally, ratification of a human rights treaty may bring political success for that government. See Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organization* 54*(2)* (2000): 217–52. This theory, though, focuses on the ratification moment instead of developments after ratification. It also does not diverge from the essence of neoliberal institutionalism, asserting the 'mediated power' role of IOs.
[20] Robert O. Keohane and Lisa L. Martin, "The Promise of Institutionalist Theory," *International Security* 20*(1)* (1995): 46.
[21] Stein, op. cit., 205.
[22] Keohane and Martin, op. cit., 45.

domestic politics. This view, asserted by Barnett and Finnemore,[23] compares IOs to bureaucracies, in the enlightened, Weberian sense. IOs 'can have authority both because of the missions they pursue and of the ways they pursue them,' while human rights are certainly one of these 'missions.'[24] In line with 'mainstream' constructivist theory,[25] they argue that it is possible for IOs to 'constitute the world, [create] new interests, actors, and social activities.'[26]

This understanding of IOs raises concerns over their legitimacy and counts with the possibility of 'pathologies', that can arise within IOs characterized by 'division of labour', 'expert knowledge' or 'standardized rules of action.'[27] Hence, it states that the complexity of the subject matter and diverging preferences or meanings existing *within* an IO could hinder its effective exercise of power on domestic politics, e.g. in unification of approaches to HS. The 'gentle power' hypothesis thus reads that the CoE can push forward its own agenda on HS if it has an internally unified position. The questions then are whether there is such an internal unity and if so, what are the channels via which the impact is proliferated.

Thus, the three hypotheses on the 'impact potential' of IOs could be imagined as a continuum starting with the 'no power' one claiming IOs are only means for powerful states to realize their interests, through the 'mediated power' one which imagines IOs as forums for interstate discussion and thus places heaviest emphasis on political interaction, up to the 'gentle power' hypothesis that assumes IOs have the potential to tell what is

[23] Michael N. Barnett and Martha Finnemore, "The Politics, Power, and Pathologies of International Organizations," *International Organization* 53*(4)* (1999): 699–732.
[24] Barnett and Finnemore, *Rules for the World*, 5.
[25] See Alexander Wendt, "Anarchy Is What States Make of It: The Social Construction of Power Politics," *International Organization* 46*(2)* (1992): 391–425.
[26] Barnett and Finnemore, *Rules for the World*, 7.
[27] Ibid., 8, 156–173.

'right' and 'wrong' regardless of immediate state interests. Still, these hypotheses remain general and so it is useful to look at a further theoretical 'tool' to be able to evaluate the CoE's impact. For cases concerned with human rights, the enforcement of which is predominantly characterized by an international legal framework, theories of compliance need to be brought into the picture.

1.2. Do IOs Matter for Human Rights? Theories of Compliance and Their Application

How can the CoE impact on human rights standards at national level? One authoritative answer to this question is provided by theories of compliance that lie at the edge of IR and international law.[28] Law plays a role in 'ordering international politics', and empirical studies demonstrate there is in general compliance with human rights treaties by national governments, and a 'changing effect' of treaties on domestic policies.[29] There is an ongoing debate over how to 'measure' compliance, and under what circumstances governments do, or do not, comply with their international treaty obligations.[30]

[28] Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP, 2009). The main theories of compliance to a large extent resemble the three IR theories applied here: (neo)realist theories of compliance suggests that states do not comply unless it is in their material interests; 'institutionalist' compliance theories acknowledge that norms generated within an international regime built on agreement between states are themselves a reason to comply unless they substantially conflict with state interests; 'normativist' theories argue that 'norms *qua* norms influence and induce states' behaviour.' Markus Burgstaller, *Theories Of Compliance With International Law* (Martinus Nijhoff, 2004), 95–102.

[29] Simmons, *Mobilizing for Human Rights*, 108–112, 115.

[30] Some of them argue that compliance is in state interest because it provides the ruling government with legitimacy; others emphasize the existence of deliberative effort of (some) states to align their domestic standards with international ones. Yet others assert that if states do not comply, they lose reputation and thus bargaining power in international negotiations. Cf. Abram Chayes and Antonia Handler Chayes, "On Compliance," *International Organization* 47*(2)* (1993): 175–205; Andrew P. Cortell and James W. Davis Jr., "Understanding the Domestic Impact of International Norms: A Research Agenda," *International Studies Review* 2*(1)* (2000): 65–87; George W. Downs, David M. Rocke, and Peter N. Barsoom, "Is the Good News about Compliance Good News about Cooperation?," *International Organization* 50*(3)* (1996): 379–406; Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations, and Compliance," in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse, and Beth A. Simmons (SAGE, 2005), 538–58.

Based on this discussion, if CoE member states comply with the standards put forward by the ECHR, it could be assumed that the CoE has an impact on them. For this, however, what needs to be present is a clear *standard*, that is unambiguous and authoritative, and a consistent *commitment* to this standard by all CoE institutions. But the study of the CoE cannot be limited only to the Convention, the standards of which are interpreted and protected by the ECtHR. On the contrary, the 'continent's leading human rights organization,'[31] as it describes itself, has other means with 'impact potential', namely, the monitoring mechanisms,[32] the activities of the political bodies (CoM, PACE, SG), and the public awareness-rising campaigns. Therefore, looking just at compliance with the ECHR could lead to severe omissions in the analysis of the CoE's impact in the field of HS.

1.3. Does the CoE Matter for Human Rights? The CoE and Central Europe

Thinking about the CoE in terms of gentle power seems useful when looking at its general approach towards CEE. It allowed the newly emergent states to become members even without high democratic standards and tried to transform them 'from within'.[33] Apparently, moderate success has been achieved in this regard, at least when looking at the regular monitoring reports from the early era of CoE membership, which in the Czech

[31] CoE, "Who We Are," 2015, http://www.coe.int/en/web/about-us/who-we-are.
[32] Gauthier de Beco, "Introduction: The Role of European Human Rights Monitoring Mechanisms," in *Human Rights Monitoring Mechanisms of the Council of Europe*, ed. Gauthier de Beco (Routledge, 2012), 1–16. These monitoring mechanisms, together with the political instruments of the CoM and PACE, can be considered as the soft law instruments of the CoE (as listed in Dinah Shelton et al., "Human Rights," in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, ed. Dinah Shelton (OUP, 2003), 346) which may still induce compliance, sometimes even in forms that would not be possible by 'hard law' (ECHR). On the distinction between soft and hard compliance, see Dinah Shelton, "Introduction: Law, Non-Law and the Problem of 'Soft Law,'" in *Commitment and Compliance*, op. cit., 1–18. Incorporating a broad theory of compliance may be an alternative to the 'IR theory approach'. Yet, given the overlap between the two, different results could hardly be expected.
[33] Pamela A. Jordan, "Does Membership Have Its Privileges? Entrance into the Council of Europe and Compliance with Human Rights Norms," *Human Rights Quarterly* 25*(3)* (2003): 660–88.

and Hungarian cases demonstrate high, and in the Slovak case medium level of compliance.[34]

The CoE's strategy for this early period is generally assessed positively, emphasizing that there are limits in its 'unifying mission' of human rights standards in CEE.[35] These become especially salient in potential conditionality effects of the CoE in non-member states such as Belarus.[36] Allowing countries with limited standards to accede and then (as evidence from the 1990s suggests) acting as gentle power by demanding compliance with soft- and hard-law instruments thus seems a reasonable strategy that acknowledges the limitations of the CoE.

The ECtHR, which has already been largely institutionalized as a 'top' human rights court in Europe[37] also secured its role in CEE countries. A more detailed analysis poses some questions about what this role has been about. For example, Greer suggests, that after examining the three groups of CEE member states with 'good', 'satisfactory' and 'poor' human rights records (using Jordan's methodology),[38] a differentiated impact of the ECtHR can be identified.[39] More substantial impact was achieved in countries which, already at government level, were more inclined to fulfil their obligations. Greer uses these findings as a basis of his criticism of the ECtHR, that, despite of its institutionalization, had failed to articulate a clear-cut constitutional model for all CoE

[34] Ibid., 668, 674.
[35] Klaus Brummer, "Uniting Europe: The Council of Europe's Unfinished Mission," *European Review* 20*(3)* (2012): 403–18.
[36] Klaus Brummer, "The Council of Europe as an Exporter of Democracy, Human Rights and the Rule of Law," *International Politics* 51*(1)* (2014): 67–86.
[37] Mikael Rask Madsen, "From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics," *Law & Social Inquiry* 32*(1)* (2007): 137–59.
[38] Jordan, op. cit.
[39] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP, 2006), 118–131.

member states.[40] The need for such a model can be justified by the incremental link between democracy and human rights that rests on the need of existence of constitutional mechanisms 'on the ground' that secure human rights standards and make it possible for local groups to become active and foster this agenda.[41]

In sum, the existing research reveals an interplay between the CoE and domestic politics in CEE from the outset but no unambiguous evidence is present, whether it actually had a positive impact on domestic human rights standards in terms of their unification, which 'mechanisms' of impact were most relevant and why differences among the countries persisted even in the later stages when the relationship could be considered as 'settled'.

1.4. Summary: CoE as a Potentially Gentle Power

The conceptualization of the CoE as gentle power assumes that, as in Barnett's and Finnemore's theory, it can have an independent impact on member states if these show alignment with its approach towards a particular human rights issue and refer to it as a reference point for pursuing this policy. First, however, it is necessary to identify what 'reference point' is created by the CoE in the particular area, such as responding to HS, via its various mechanisms. Chapter 2 looks at which methods can help in distilling the CoE's position and subsequently identify whether and how some member states align their policies vis-à-vis this position.

[40] Steven Greer, "What's Wrong with the European Convention on Human Rights?," *Human Rights Quarterly* 30*(3)*: 680–702.
[41] Johan Karlsson Schaffer, "The Co-Originality of Human Rights and Democracy in an International Order," *International Theory* 7*(1)* (2015): 96–124.

2. METHODOLOGY AND CASE SELECTION: EXAMINING THE 'GENTLE IMPACT' OF COE ON 'HATE SPEECH' POLICIES IN THE CZECH REPUBLIC, SLOVAKIA AND HUNGARY

Answering the question of the nature and intensity of the impact of the CoE on domestic politics in the three countries requires the operationalization of 'impact' so that different forms and degrees can be distinguished from each other. In identifying the impact in approach towards HS, the CoE's position cannot be omitted; indeed, if there *is* a unified position on how democratic member states should respond to HS, that can provide a starting point for the examination whether this position is being reflected in the member states and whether such reflection is indeed happening largely *because* of the CoE's influence.

To assume that the CoE has a unified position would be mistaken because, not unlike other IOs, it has a complex organizational structure,[42] where different standpoints and even internal conflicts may emerge.[43] Hence, the positions of the key CoE institutions that have a say on issues connected to HS are examined and juxtaposed with those at national level. Depending on to what extent a unified position can be identified, the three hypotheses ('no power', 'mediated power' and 'gentle power') can be distinguished (Table 1).

[42] The simplest overview is available via CoE, "Structure," 2015, http://www.coe.int/en/web/about-us/structure. Bond, op. cit., 4–77 deals with each of the institutions in greater detail but not in a very structured manner as he focuses on different issue areas.
[43] Except if adopting the neorealist position which would think about a single position based on some state interests.

Hypothesis (theoretical background)	Expected observations
'No power' (neorealism)	The CoE's institutions stress the role of domestic institutions in designing policies on HS. They emphasize subsidiarity. The ECtHR guarantees wide margin of appreciation to national courts when determining what 'counts' as HS and what kind of sanctions are imposed. If the CoE's institutions try to develop a common position or initiatives, there is no substantial reflection on them at national level.
'Mediated power' (neoliberal institutionalism)	The issue of treatment of HS belongs to the ones 'not characterized by significant externalities to state behavior,'[44] i.e. states may gain more by not deviating too much from the accepted European standards. The CoE takes over the responsibility to define what HS is. It emphasizes 'best practices' in some countries as opposed to others. Tendency towards unification of approaches exists but is pushed at political level (CoM, PACE), not via judicial or monitoring mechanisms or public campaigns.
'Gentle power' (constructivism)[45]	CoE's institutions are united in approaching the problem of HS and determined to secure unification in Europe-wide

[44] Botcheva, Liliana, and Lisa L. Martin. "Institutional effects on state behavior: convergence and divergence." *International Studies Quarterly* 45*(1)* (2001): 24.

[45] 'Soft power' coined by Nye would seem as an alternative term to gentle power. After all, while Nye seems reluctant to associate it with an IR theory, he admits that its essence—attraction and persuasion—are 'socially constructed' and thus 'soft power is a dance that requires partners'. Joseph S. Nye Jr, *The Future of Power* (Public Affairs, 2011), 84. Moreover, credibility of the source of soft power, matters an aspect

	approaches, as it was envisaged in the Statute. The ECtHR's doctrine is in accordance with the approach of other CoE institutions and is referred to in national constitutional courts' judgments. CoE monitoring reports are reflected upon in domestic political strategies and parliamentary discussions. Convergence among countries with initially diverging approaches can be observed.

Table 1. The three faces of the CoE's impact. Source: author based on literature review.

2.1. How Can 'Gentle Impact Be Uncovered'? Triangulation of Research Methods

Assessing the internal unity of the CoE's position vis-à-vis HS and evaluating its impact in the three dimensions entails identifying the variety of data sources at CoE and domestic levels. This thesis uses the following methods to triangulate[46] for the results:

1. Legal analysis:[47] looking at 'hate speech cases' dealt with by constitutional courts and the ECtHR is crucial to understand how the legal doctrines at the two levels interact. Firstly, the analysis identifies the number of violations found by the ECtHR against Slovakia, Hungary and the Czech Republic in Articles 10 and 17 ECHR which encompass cases of conflicts between freedom of speech (allegedly exercised via HS) and other fundamental rights (that can be undermined via activities and acts 'aimed at the destruction of any of the rights and freedoms' set

stressed by several interviewees (see Appendix). However, soft power is overwhelmingly applied in analysis of state power. In addition, while 'political values' as one source of soft power (ibid.) are clearly crucial for the CoE, the concept misses the dimension of impact via compliance with 'hard' international norms (ECHR). Gentle power is different from soft power because it combines these dimensions in a context transcending state boundaries.

[46] Earl R. Babbie, *The Practice of Social Research*, 12 edition (Cengage Learning, 2009), 118.

[47] For the special relevance of judicial decisions for determining the scope and extent of freedom of speech in conflicts with other fundamental rights see George C. Christie, *Philosopher Kings?: The Adjudication of Conflicting Human Rights and Social Values* (OUP, 2011).

forth in the Convention). Secondly, it explores the interaction between the ECtHR and national constitutional courts to answer whether and how national constitutional courts take the decision-making of the ECtHR into account in their case law.

2. Contextual analysis[48] is helpful when identifying the main principles, objectives and commitments of the CoE in responding to HS. Documentation of the CoE (monitoring reports, CoE handbooks, policy recommendations and resolutions by PACE and CoM, CoE campaigns etc.) are examined with the help of this method. At national level, parliamentary discourse and political strategies (such as combating extremism, human rights strategy) are analyzed to see whether they explicitly or implicitly encompass references to CoE positions.[49]
3. Semi-structured interviewing is perhaps the only way to get the 'inside', informal view on the efforts of the CoE to support convergence between national policies through a particular approach towards HS.[50]

2.2. Why 'Hate Speech'?

This section elaborates on the second puzzle of the thesis to show why for an IO committed to support human rights it is not unambiguous to decide what approach to take up vis-à-vis HS. In contrast to the general importance of freedom of speech, there is no consensus over how to treat HS, first of all because of the obstacle in defining what it

[48] For the main purposes and applicability of this method see Robert E. Goodin and Charles Tilly, eds., *The Oxford Handbook of Contextual Political Analysis* (OUP, 2008).
[49] As there are more political strategies in the Czech Republic and Slovakia and relevant samples of parliamentary debates in Hungary, the analysis uses more strategies in the former two countries and parliamentary deliberations in Hungary.
[50] For the variety of respondents interviewed, see Appendix.

is.[51] The CoM coped with this in a recommendation from 1997, where it defined HS as 'covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.'[52] This is a more extensive definition, which gathers under HS different kinds of speech acts hostile to minorities, individuals or groups, not only those that directly incite to violence against them.

Two problems arise with this definition, if viewed as a blueprint of the CoE's position. Firstly, it is not binding and therefore not only may the CoM revise it anytime but other CoE institutions may have a different approach based on different definitions. However, to date this is the only explicit, precise definition offered by a CoE institution. If the CoE's overall position is to be digested, a range of other sources needs to be consulted but even then the 'identification of statements that could be classified as "hate speech" seems all the more difficult because this kind of speech does not necessarily manifest itself through expressions of "hatred" or emotions.'[53] The prime example of this is historical revisionism, notably Holocaust denial that tries to reinterpret historical facts without expressing hatred in a clear-cut way.[54]

[51] This might be the reason why different phrases have proliferated, thus creating an overall confusion of how HS is different from racist speech or extremist speech (used in András Sajó, *Freedom of Expression* (Instytut Spraw Publicznych, 2004). Another formulations such as 'extreme speech' or 'homophobic speech', albeit the latter being more subject-specific, are used in Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (OUP, 2011).
[52] Committee of Ministers, "Recommendation No. R(97)20 to Member States on 'Hate Speech,'" 1997, http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec%2897%2920_en.pdf.
[53] Anne Weber, *Manual on Hate Speech* (CoE, 2009), 5.
[54] Still, several countries consider Holocaust denial or other forms of revisionism as HS. See Robert A. Kahn, *Holocaust Denial and the Law: A Comparative Study* (Palgrave Macmillan, 2004). This approach

Secondly, no definition of HS alone tells what democratic governments, societies and institutions should 'do' with it. If one adopts a narrow definition, that evaluates HS based on the context, i.e. whether it directly incites violence and therefore constitutes clear and present danger to the right to life and security, there is usually little doubt that such speech needs to be restricted by authorities which are entitled to punish the 'hater' not only through means of civil but also criminal law. With a definition such as that of the CoM, it is, however, more questionable whether legal restrictions are the right means to 'combat' HS (see examples in Chart 1 below). 'Legal responses' are only one way of diminishing the undesirable phenomenon of HS in democracies, and they may lag behind other responses, such as educational or artistic ones[55] that use 'more speech' to challenge HS without excluding the 'haters' from the society as such.

The CoM also recommends that 'the governments of the member states should establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech which enable administrative and judicial authorities to reconcile in each case respect for freedom of expression with respect to human dignity and the protection of reputation or the rights of others.'[56] This approach, similar to the one of ECRI, which even more explicitly calls for existence of criminal law

can be contested because of the chilling effect it has on the 'advancement of historical truth' (Uladzislau Belavusau, *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies* (Routledge, 2013), 166–200). There is also a problem with the scope of the prohibition; for CEE, Holocaust denial seems to be the 'most serious' kind of revisionism (Dieter Grimm, "The Holocaust Denial Decision of the Federal Constitutional Court of Germany," in *Extreme Speech and Democracy*, op. cit., 557–61) but does it mean that denial of communist crimes or, for example, the Rwandan or Armenian genocide, is not sufficiently 'serious' to be restricted? Moreover, these bans have questionable implications for the relationship between truth and (democratic) politics (see Hannah Arendt, "Truth and Politics," in *Truth: Engagements Across Philosophical Traditions*, ed. José Medina and David Wood (Wiley-Blackwell, 2005), 295–314). These concerns allow to argue that historical revisionism *per se* should not be equated to HS as defined by the CoM. At empirical level, however, bans on 'denials' are part of the legislation of the countries under study defined as HS, so a clear-cut separation of the two is impossible.

[55] Péter Molnár, "Responding to 'Hate Speech' with Art, Education and the Imminent Danger Test," in *The Content and Context of Hate Speech*, op. cit., 183–97.

[56] Committee of Ministers, "Recommendation No. R(97)20," 107.

framework to combat 'hate speech,'[57] seems to favour content-based bans over context-based or regime-based positions on legal regulation of HS (see Chart 1).[58] While some arguments support this position, others oppose it. In sum, therefore, if the preference for content-based restrictions can be identified all over CoE's institutions, notably the ECtHR, it means adoption of a distinctively 'European' approach to free speech,[59] with all the risks this entails.

2.3. Why Three Countries? The 'Hate Speech Puzzle' in the Middle of Europe

Despite the approach of the CoE, that seems to be in favour of content-based legal regulation of HS, the Czech Republic, Slovakia and Hungary, which share historical and cultural similarities,[60] differ in some respects when it comes to legislation on HS.[61] It is not clear why this is so and whether this difference amounts to a failure of the CoE to impact on national level and proceed towards greater unity as outlined in its Statute.

[57] Weber, op. cit., 12–13.
[58] There is no room to discuss the classification of bans in greater detail (apart from the difference of historical revisionism, see footnote above). For this purpose, see Alex Brown, *Hate Speech Law: A Philosophical Examination* (Routledge, 2015), 1–48.
[59] Erik Barendt, *Freedom of Speech* (OUP, 2005), 170–186.
[60] In addition, the position of these countries between the re-emerging 'two Europes' also justifies the importance of their study. Finding out what is the approach to HS in these countries and what influences its development can indicate whether they are more likely to turn to 'the West' or 'the East' if the differences in the style of a 'new [iron or other] curtain' will deepen. See Miklós Haraszti, "Revisiting the Three Europes: Diverging Landscapes of Media Freedom," in *Free Speech and Censorship Around the Globe*, ed. Péter Molnár (CEU Press, 2014), 45–57.
[61] Analysis of legislation is not sufficient to determine free speech standards in a country because of the influence philosophical justifications and jurisprudence. For more on the role of the former see e.g. Erik Barendt, "Freedom of Expression," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (OUP, 2013), 891–908; on the latter Victor Ferreres Comella, "Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights," in *Political Rights Under Stress in 21st Century Europe*, ed. Wojciech Sadurski (OUP, 2006), 84–119. Still, it can provide a framework that serves as a starting point for a more detailed analysis.

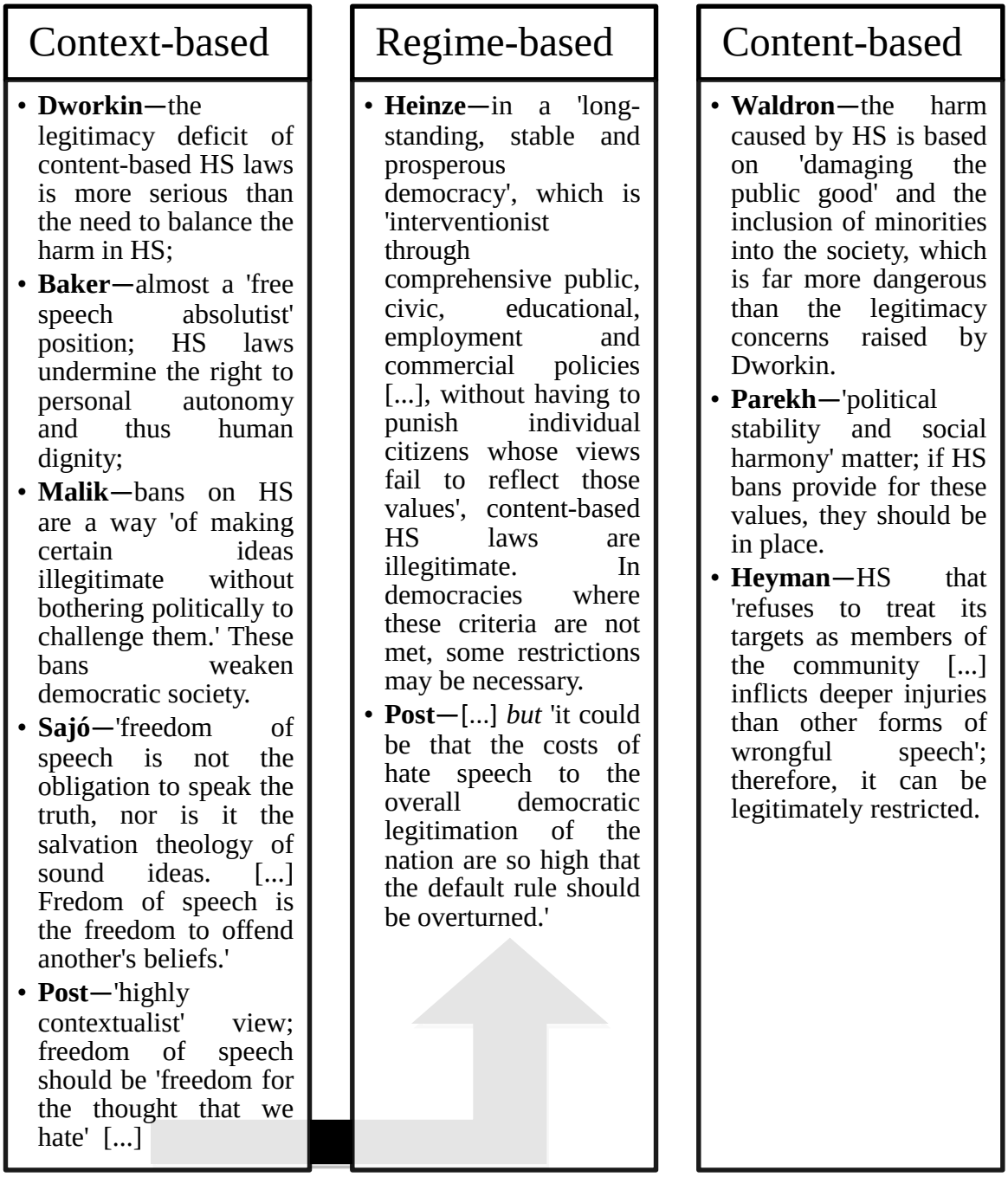


Figure 1. Three main scholarly positions on responses to HS.[62] Source: author.

[62] For the respective theoretical positions see Steven J. Heyman, *Free Speech and Human Dignity* (Yale University Press, 2008), 164–183; Péter Molnár, "Interview with Kenan Malik," in *The Content and Context of Hate Speech,* op. cit., 81–91; Péter Molnár, "Interview with Robert Post," in *The Content and Context of Hate Speech,* op. cit., 11–35; C. Edwin Baker, "Autonomy and Hate Speech," in *Extreme Speech and Democracy*, op. cit., 139–57; Ronald Dworkin, "Reply to Jeremy Waldron," in *The Content and Context of Hate Speech,* op. cit. 541–44; Heinze, op. cit.; Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2014); Jeremy Waldron, "Hate Speech and Political Legitimacy," in *The Content and Context of Hate Speech,* op. cit., 329–40; Bhikhu Parekh, "Is There a Case for Banning Hate

The Czech Republic has adopted a rather casual European approach vis-à-vis HS that is based on the principles of militant democracy, 'i.e. the idea that certain freedoms […] should be limited to prevent the growth of authoritarianism via the unrestricted exercise of civil liberties.'[63] This manifests through a Criminal Code which prohibits the establishment, support or propagation of movements intended to suppress human rights and freedoms (§403-404), the denial, questioning or apologizing of genocide, Nazi, communist, or other (§405), the defamation of nation, race, ethnic or other group (§355), and the incitement to hatred towards a particular group or the restriction of their rights and freedoms (§356).[64] Not all of these provisions were incorporated into the Criminal Code since the independence of the country in 1993; some, such as prohibition of denial of genocide, were approved by the legislature only in the 2000s.

Similarly, Slovakia, if it were judged only on the basis of 'formal' sources of law, would qualify as a 'normal' European country, where content-based restrictions of HS are applied via the Criminal Code. Slovak legislation offers a rich catalogue of criminalized HS, including 'supporting and promoting groups aimed at suppression of fundamental rights and freedoms' (§421) manufacturing, dissemination and possession of extremist materials (§422 a-c), defamation of nation, race and belief (§423) and incitement of national, racial and ethnic hatred (§424). To this, in 2011, §422d was added

Speech?," in *The Content and Context of Hate Speech*, op. cit., 37–56; András Sajó, ed., *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (Eleven International Publishing, 2007).
[63] Belavusau, op. cit., 128.
[64] *Criminal Code of the Czech Republic*, 2009, http://www.zakonyprolidi.cz/cs/2009-40#cast1.

which denial, questioning or apologizing of the Holocaust and crimes committed by political regimes grounded on fascist, communist or similar ideology.[65]

This list must be complemented by the *theory and practice* of prosecution, that is, how the law emerged, is justified and implemented. After the dissolution of Czechoslovakia, most human rights policies were adopted on the basis of the Czech model, with strong communist origins, e.g. in sanctioning the defamation of the Republic or state institutions. These provisions changed only in the 2000s, where efforts were made to introduce and clarify the term 'extremist crimes' in Slovak criminal law.[66] This 'clarification process', however, resulted also in an 'extension process', where, based on rather superficial parliamentary debates,[67] new restrictions such as the one on extremist materials and denials of crimes of political regimes were introduced. Therefore, the enshrinement process of HS laws in Slovakia went, in fact, from minimal regulation to a more extensive one.

In contrast to these relatively similar cases, Hungary has fewer restrictions on HS. These include provisions prohibiting 'incitement against a community' (§332), 'open denial of Nazi crimes and Communist crimes' (§333), 'blasphemy of national symbol' (§334) and 'use of symbols of totalitarianism' (§335).[68] However, there is no prohibition of defamation or spread of hatred without the element of 'incitement' present in the given context. The HCC, which declined more extensive legislative prohibitions of 'hate

[65] *Criminal Code of the Slovak Republic*, 2005, http://www.legislationline.org/documents/section/criminal-codes. A combination of fines and imprisonment (between six months and five years, depending on the paragraph concerned and the degree of seriousness of the crime) is used as sanction for any of these acts.
[66] Darina Mašľanyová, "Postih extrémizmu podľa slovenského trestného zákona," in *Aktuálne otázky trestného zákonodarstva*, ed. Jozef Záhora (Paneurópska vysoká škola, 2012), 143–56.
[67] Max Steuer, "A Subordinate Issue? An Analysis of Parliamentary Discourse on Freedom of Speech in Slovakia," *Czech Journal of Political Science* 2015*(1)* (2015): 55–74.
[68] *Criminal Code of Hungary*, 2012, http://www.refworld.org/docid/4c358dd22.html.

speech,'[69] was crucial for establishing this status quo, although the recent introduction of bans of historical revisionism signals some divergence from this approach.

In sum, are the differences between the three legal frameworks a pure coincidence, thereby confirming the 'no power' hypothesis on the potential impact of the CoE, or did the CoE stimulate a change in favour of its approach to HS or prevent initiatives from diverging from this approach? If so, did this impact appear at the level of legislation (e.g. via MPs referencing to the CoE when proposing legislative changes), judicial interpretation of HS by constitutional courts, or elsewhere? Or is the CoE present in this area only via public campaigns which raise awareness on HS in the countries but without clear-cut changes in legislation or jurisprudence? The next chapter looks at these three dimensions at both the CoE and national level to provide a comprehensive delimitation of the CoE's approach and its impact on the three countries under study.

[69] Belavusau, op. cit., 129–144.

3. BEST PRACTICES AND SOMETHING MORE: THREE DIMENSIONS OF GENTLE POWER

It is not clear whether in the field of HS the CoE acts as 'no power', 'mediated power' or 'gentle power'. In times when discussions about the 'proper' response to HS are reviving,[70] it is particularly important to assess the CoE's 'voice' in this discussion and whether it is loud enough to trigger any change. Hence, this chapter analyzes the impact of the CoE on treatment of HS in three countries.

However, while the investigation covers three dimensions, its limits still must be acknowledged. Using the words of interviewees, measuring the impact of the CoE and success of its initiatives is extremely difficult, if not impossible.[71] The reason is that most CoE instruments are not legally binding ('we don't tell them [national campaigns in the

[70] A few important pieces in this debate in the period after Charlie Hebdo attacks in January 2015 till May 2015 are as follows: Editorial Board, "The Guardian View on Charlie Hebdo: Show Solidarity, but in Your Own Voice," *The Guardian*, 08/01/2015, http://www.theguardian.com/commentisfree/2015/jan/08/guardian-view-charlie-hebdo-show-solidarity-own-voice; Timothy Garton Ash, "Defying the Assassin's Veto," *The New York Review of Books*, 19/02/2015, http://www.nybooks.com/articles/archives/2015/feb/19/defying-assassins-veto/; Peter Noorlander, "When Satire Incites Hatred: Charlie Hebdo and the Freedom of Expression Debate," *Strengthening Journalism in Europe: Tools, Networking, Training*, 01/2015, http://journalism.cmpf.eui.eu/discussions/when-satire-incites-hatred/; Teju Cole, "Unmournable Bodies," *The New Yorker*, 09/01/2015, http://www.newyorker.com/culture/cultural-comment/unmournable-bodies; Priyamvada Gopal, "The Texas Shooting Should Not Distort Our View of Free Speech," *The Guardian*, 04/05/2015, http://www.theguardian.com/commentisfree/2015/may/04/texas-shootings-dallas-gun-attack-charlie-hebdo-murders-free-speech; The Editorial Board, "Free Speech vs. Hate Speech," *The New York Times*, 06/05/2015, http://www.nytimes.com/2015/05/07/opinion/free-speech-vs-hate-speech.html; David Brooks, "I Am Not Charlie Hebdo," *The New York Times*, 08/01/2015, http://www.nytimes.com/2015/01/09/opinion/david-brooks-i-am-not-charlie-hebdo.html; Ben Hayes, "No, We're Not All Charlie Hebdo, nor Should We Be," *openDemocracy*, 09/01/2015, https://www.opendemocracy.net/ben-hayes/no-we%E2%80%99re-not-all-charlie-hebdo-nor-should-we-be; Cas Mudde, "What Freedom of Speech? Of Foxes, Chickens, and #JeSuisCharlie," *openDemocracy*, 09/02/2015, https://www.opendemocracy.net/can-europe-make-it/cas-mudde/what-freedom-of-speech-of-foxes-chickens-and-jesuischarlie.

[71] In other words, 'Failure is always an orphan and success has many fathers. Therefore you cannot say with certainty that because the CoE has set certain standards, that this is why it happens. Some countries would have been doing things without even having the CoE setting such a standard.' INT4, CoE, Secretariat of the FCNM, 28/04/2015.

NHSM] what activities they should do and they are not obliged to report back'),[72] and even for those which are 'there is no universal yardstick to judge the rate of compliance.'[73] These are, however, not reasons to give up; looking at, firstly, the CoE's position in the given dimension and, secondly, the reflection upon this position at the examined member states' level helps identify the impact of the CoE on the development of a European doctrine on HS.

3.1. Political Dimension

The political dimension at national level can be traced back to changes in legislation concerning HS and core political strategies on human rights. At CoE level, what belongs to the 'political' is defined by the formal—intergovernmental—character of the organization. As several CoE representatives have noted, this character remains at the core of the CoE: it is the 'guardian of human rights, democracy and rule of law but [...] a guardian without weapons.'[74] Similar is the view of the CoE as a 'club', 'a community of values [which] can promote those values and stand for them only as long as member states stand for them themselves.'[75]

The emphasis on interstate cooperation in this dimension does not mean that no 'greater unity' is fostered here, as envisaged in the Statute. The CoE may be 'an institution for intergovernmental cooperation' but despite the changing circumstances, 'the finality and scope of unity remains equally valid today than some sixty years ago.'[76] Hence, there can indeed be a process of greater unification of policies towards HS

[72] INT11, CoE, Coordinator, NHSM, 07/05/2015.
[73] INT9, CoE, Democratic Institutions and Governance Department, 29/04/2015.
[74] INT1, CoE, Education and Training Division, Youth Department, 22/04/2015. Later, this respondent admitted the possibility of existence of 'soft weapons' as the ECtHR. These, however, belong to the other two dimensions.
[75] INT5, CoE, Information Society Department, 28/04/2015.
[76] INT9.

fostered by the political dialogue. In theoretical terms, the existence of such a process in this dimension and its absence in others would confirm the 'mediated power' hypothesis.[77] As demonstrated below, this is not entirely the case.

3.1.1. CoE Level

The institutions of the CoE usually considered to represent the 'voice of the governments' are the CoM, PACE and SG.[78] They have issued documents that demonstrate their position vis-à-vis HS, and measures the member states should implement to combat it. The CoM recommends a definition of HS and stresses the need for 'proportionality' (principle 5) when applying legal restrictions in particular cases.[79] However, this clearly delimits the position *supportive of legal restrictions*, in particular civil ones, when it urges governments in member states to 'enhance the possibilities of combating hate speech through civil law.'[80] Other relevant CoM documents[81] keep to this approach; for instance, one finishes by labelling HS as an example of serious violation of fundamental rights and even allows imprisonment if 'the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty.'[82]

The same approach can be identified with PACE and the SG. PACE expressed its views on HS in a 2007 recommendation where, while arguing against criminalization of blasphemy and referring to ECRI recommendation (see Section 3.2.1.), it reaffirmed that

[77] If impact were identified only in this dimension in contrast to other ones, the 'no power' hypothesis could remain in the game as well. However, for it to be confirmed, common positions at this level should not be reflected at national level, which is not the case for HS.
[78] See Bond, op. cit., 11–15, 66–68.
[79] Committee of Ministers, "Recommendation No. R(97)20."
[80] Ibid., 108.
[81] See also Weber, op. cit., 9–12.
[82] CoM, "Declaration on Freedom of Political Debate in the Media," 2004, https://wcd.coe.int/ViewDoc.jsp?id=118995&Site=CM; see also CoM, "Recommendation CM/Rec(2011)7 to Member States on a New Notion of Media," 2011, https://wcd.coe.int/ViewDoc.jsp?id=1835645&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

'hate speech against persons, whether on religious grounds or otherwise, should be penalized by law.'[83] The SG's position goes along these lines. The current SG argues that 'hate speech is not "protected speech"'[84] and mentions criminal laws 'on incitement to hatred and hate speech' as instrument against HS in his 2015 report as well, albeit always with reference to the conditions set forth by the ECHR, in particular the proportionality and the 'pressing social need' that justify these laws.[85]

In sum, the political institutions of the CoE have a clearly defined approach towards HS and they regularly recommend member states to follow it in their domestic legislation and policies. The question remains whether this actually happens and if so, whether it does so with reference to the CoE's political instruments.

3.1.2. National Level

Looking at the reception of the political messages on HS coming from the CoE, it is hard to identify a direct link between these and the situation in domestic legislation and policies. Rather than significantly diverging in their approaches, domestic politicians do not seem to be very concerned with HS.

Neither parliamentary proceedings, nor political strategies display substantial engagement with CoE's position on HS in the Czech Republic. The only CoE actor who raised some concerns in the annual reports about the situation of human rights was the Commissioner for Human Rights, who visited the country several times to investigate

[83] PACE, "Recommendation 1805. Blasphemy, Religious Insults and Hate Speech against Persons on Grounds of Their Religion," 2007, http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm.
[84] Ellie Keen and Mara Georgescu, *Bookmarks—A Manual for Combating Hate Speech Online through Human Rights Education*, ed. Rui Gomes (CoE, 2014), 3.
[85] Thorbjørn Jagland, *State of Democracy, Human Rights and the Rule of Law in Europe: A Shared Responsibility for Democratic Security in Europe* (CoE, 2015), 36, 45, https://wcd.coe.int/ViewDoc.jsp?Ref=SG%282015%291&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

and raise awareness on the problems of extremist movements in some regions of the country.[86] For example, in a report from November 2010, the Commissioner stressed the dangers of extremist movements, praised state institutions for carrying out criminal law sanctions for a violent attack on Roma and the Workers' party which was banned by Czech courts. At the same time, he expressed the need to 'extend the protection against hate crimes so that all reasons for committing these crimes are taken into account with the same weight.'[87]

Yet in the Czech Chamber of Deputies, these issues were hardly discussed with reference to the CoE. In the debate about the scope of legislation against historical revisionism, various arguments were presented but none made direct reference to the CoE or any of its institutions.[88] In contrast, the CoE was considered relevant when discussing issues related to social rights[89] or media legislation.[90] In addition, the Czech Conception against extremism, prepared annually since 1997, rarely makes reference to the CoE and if so, this concerns mostly technical issues around ratification of conventions or exchange of information.[91]

[86] Government of the Czech Republic, "Zprávy: Lidská práva ČR," 1998-2012, http://www.vlada.cz/scripts/detail.php?pgid=302&conn=1806&pg=1.
[87] Government of the Czech Republic, "Komisař Rady Evropy pro lidská práva navštívil ČR," 2011, http://www.vlada.cz/cz/ppov/rlp/aktuality/komisar-rady-evropy-pro-lidska-prava-navstivil-cr-82461/.
[88] Chamber of Deputies, "Návrh poslanců Jiřího Payna a dalších," 2001, http://www.psp.cz/eknih/1998ps/stenprot/027schuz/s027079.htm.
[89] Chamber of Deputies, "Pokračování schůze poslanecké sněmovny," April 1, 1999, https://www.nrsr.sk/dl/Browser/Document?documentId=203972.
[90] Chamber of Deputies, "Začátek schůze poslanecké sněmovny," January 5, 2001, https://www.nrsr.sk/dl/Browser/Document?documentId=203992.
[91] Ministry of Interior of the Czech Republic, "Výroční zprávy o extremismu a koncepce boje proti extremismu," 1997, http://www.mvcr.cz/clanek/extremismus-vyrocni-zpravy-o-extremismu-a-strategie-boje-proti-extremismu.aspx. At the same time, especially in recent reports (e.g. from 2014), there is increased emphasis on education and preventive measures, in particular in the online environment. Even though there is no direct reference to CoE there, this approach bears striking parallels with the NHSM campaign of the CoE, discussed in Section 3.3.1. This points to the potential impact of the CoE in the civil dimension.

A possible explanation of the CoE being often 'ignored' by relevant Czech governmental documents and strategies related to HS is that the Czech approach of content-based regulation is generally in line with the CoE so there are no significant clashes between the two. At the same time, a commentary on Czech legislation notes the overly broad terminology in the criminal legislation that could cause violations of freedom of speech.[92] With regard to historical revisionism, the author stresses that 'delimiting what is the exact content of terms such as Nazism, communism or other 'ism' is a task for political scientists and historians, not legislators or judges.'[93] The only concern arises when realizing that, in fact, it is exactly legislators and judges, not political scientists and historians who ultimately decide on the standards of freedom of speech as well as proper responses to HS.

Similarly to the Czech Republic, the approach towards HS in Slovakia is largely based on content-based legal regulation that has gradually developed through several amendments in the 2000s. As mentioned, there was little discussion in the Slovak parliament over the scope of this legislation. One reference to the CoE, in particular to its monitoring reports, was made by an MP who successfully proposed the abolishment of several paragraphs in the old Slovak Penal Code, which had allowed prosecuting those who criticized the main state institutions (parliament, constitutional court, president and the executive). Several references to the CoE, including the CoM, were made in context of the right to reply during the debate on media legislation between 2008-2011,[94] but none of these discussions on freedom of speech dealt directly with HS. Only historical

[92] Michal Bartoň, *Svoboda projevu: principy, garance, meze* (Leges, 2010), 221–226.
[93] Ibid., 227–228.
[94] See National Council of the Slovak Republic, "Transcript of the Nineteenth Parliamentary Session," 2008; National Council of the Slovak Republic, "Transcripts of the Sixteenth and Twentieth Parliamentary Sessions," 2011.

revisionism was on the agenda, largely because of the initiatives of a single MP but while extension of Holocaust denial to denial of crimes of communism was indeed achieved in 2011,[95] there is no evidence that the views of the CoE as such, not even its particular political documents, mattered here.

Similar trends are identifiable in core Slovak political strategies that relate to HS. The first State Strategy on Human Rights, approved by the executive in February 2015 mentions the necessity of measures against all forms of intolerance as one of the priorities but does not deal directly with HS; nor does it refer to the political documents of PACE or the CoM. Only in the supplementary material, it acknowledges the CoE as 'another organization which deals with the approval of international human rights obligations and monitors compliance with them.'[96] In the regular Conceptions on Fight Against Extremism[97] (available for periods 2011-2014 and 2015-2019), there are references made to the case law of the Court and recommendations of ECRI but not the abovementioned political documents.

Turning to Hungary, which, as explained in Section 2.3., has had a different approach on the level of legislation, the presence of the CoE in political debates in the parliament is more visible compared to the other two countries.[98] The issue of HS

[95] Steuer, op. cit., 66–67.
[96] Government of the Slovak Republic, "Návrh Celoštátnej stratégie ochrany a podpory ľudských práv v Slovenskej republike" (Ministry of Foreign and European Affairs, 2015), http://www.rokovania.sk/Rokovanie.aspx/BodRokovaniaDetail?idMaterial=24253.
[97] Slovak Republic, "Koncepcia boja proti extrémizmu na roky 2015-2019" (Ministry of Justice, 2015), https://lt.justice.gov.sk/Attachment/vlastnymat_rtf.pdf?instEID=-1&attEID=75028&docEID=410109&matEID=7955&langEID=1&tStamp=20150128151502837; Slovak Republic, "Koncepcia boja proti extrémizmu na roky 2011-2014" (Ministry of Interior, 2011), www.minv.sk/?ministerstvo-vnutra&subor=158988.
[98] Hungary has no complex strategy on human rights that would be regularly updated or referred to. Recently, one of the ministries has prepared a 'National Catching Up Strategy', which is specifically focused on people in need and the Roma. In this strategy, the joining of the NHSM by Hungarian government is briefly mentioned as an example 'of a measure preventing crimes', without specifying what

regularly reappeared with regard to the CoE in several debates between 2001 and 2014 but the reference was made not to political declarations of the CoM and PACE, as it would be expected if the 'mediated power' hypothesis would apply, but to the CoE monitoring mechanisms, in particular to ECRI. For example, in debates about the need for antidiscrimination legislation, an MP wanted to 'raise the attention that there are no sanctions for HS in current Hungarian legislation.'[99] Another MP from the Hungarian socialist party (MSZP) complained that 'it is incomprehensible why, although for years we know that Europe monitors our legislation and its results, we did not make effective steps so that in accordance with the CoE [and] ECRI recommendations we create a general law, a general norm, that allows for equal treatment and prohibition of discrimination.'[100]

In the coming years, the lack of legislation on HS has been a concern of several MPs, who argued with the help of the CoE's monitoring mechanisms (but not the PACE or CoM).[101] This is an important evidence of the influence of the judicial dimension of CoE's activity but not necessarily of the political one. In contrast, only one reference on

kind of crimes and by whom should it prevent. Emberi Erőforrások Minisztériuma, "Magyar Nemzeti Társadalmi Felzárkózási Stratégia II.," 2014, 111.

[99] Hungarian Parliament (Országgyűlés), "211. Ülésnap, 152. Felszólalás," 30/05/2001, http://bit.ly/1BcvLGu. One can question whether this is a true statement as HS causing imminent danger has been restricted since the outset, in accordance with the HCC's reasoning. However, it is still important to see that this was perceived as insufficient and even non-existent regulation by some Hungarian MPs.

[100] Hungarian Parliament (Országgyűlés), "244. Ülésnap, 84. Felszólalás," 29/11/2001, http://bit.ly/1FBE85N. This MP also noted that 'as we know, in Hungary there is no means to prosecute hate speech or incitement against the community.'

[101] Hungarian Parliament (Országgyűlés), "44. Ülésnap, 130. Felszólalás," 18/12/2002, http://bit.ly/1LmfKDP; Hungarian Parliament (Országgyűlés), "193. Ülésnap, 120. Felszólalás," 03/03/2009, http://bit.ly/1JAx8px; Hungarian Parliament (Országgyűlés), "35. Ülésnap, 182. Felszólalás," 18/10/2010, http://bit.ly/1PX4GxC; Hungarian Parliament (Országgyűlés), "199. Ülésnap, 129. Felszólalás," 24/03/2009, http://bit.ly/1F2fMMW. The last debate indicated some emotional engagement when another MP from MSZP asked the rhetorical question: 'Should we get rid of the international conventions? Or should we leave the CoE? Or should we ignore that from time to time they are lecturing us that we are not able to align our national legislation to our own international commitments? [...] The only solution is to pass the constitutional amendment [...] which allows the defence of the dignity of communities through effective criminal legislation on hate speech within the limits of that amendment.'

PACE has been found, by an MP from the extreme right Hungarian party (Jobbik), who denounced the NHSM presented during PACE meeting and proudly announced 'that from two votes against [this campaign], mine was one.'[102] His conclusion on the CoE was that 'it does not fulfil its task, went away from the way it was originally intended to go, and so, unfortunately, the Hungarian people have to fight for their freedom alone.'[103] This clearly documents that the CoE served as a reference point for politicians trying to extend content-based regulation of HS in Hungary, but this 'service' worked mostly via the monitoring reports, not the political declarations of the CoM or PACE, that would be expected in the lines of the 'mediated power' hypothesis.

In sum, the findings in the political dimension of CoE's activity and its national reception point to a paradox: domestic political authorities, while they make references to the CoE in case there is (perceived) discrepancy between the domestic approach and CoE's approach to HS (the case of Hungary), use not the political declarations but the products of independent CoE institutions, most notably the ECRI. This does not dispute the nature of CoE that has been emphasized by several interviewees—the importance is placed on dialogue between states, although commitments need to be fulfilled.[104] At the same time, the fact that on the ground, it is not these political dialogues that are referred to but other instruments of the CoE, indicates that there can be more on the CoE's impact than would be assumed by the 'mediated power' hypothesis. It is precisely these other instruments that the next two sections turn to.

[102] Hungarian Parliament (Országgyűlés), "339. Ülésnap, 250. Felszólalás," 03/02/2014, http://bit.ly/1R48gsi.
[103] Ibid.
[104] E.g. INT1, INT5, INT9, also INT10, Former Representative of the Information Office of the CoE in Slovakia, 5 May 2015. This latter respondent spoke about the need for 'decent states' for functioning of the CoE. The idea of 'decent states' disputes the 'no power' hypothesis that focuses on self-interest of states, and emphasizes the 'gentle power potential' of the CoE.

3.2. Judicial Dimension

This section provides further evidence for the CoE as gentle power by looking at perhaps the two most characteristic instruments at the CoE's disposal: the ECtHR and its case law and the monitoring mechanisms. From these, ECRI,[105] the 'good cop' of the CoE is relevant for HS. ECRI provides non-binding but authoritative recommendations to 'guide' the countries to the right direction set by the CoE.[106]

Although indicators of the relevance of these mechanisms were already identified in Hungarian parliamentary discourse, here the judicial implementation of the 'CoE's doctrine' on HS is analyzed via identifying the main principles in the case law of the ECtHR and the monitoring reports, and in domestic constitutional courts' judgments. The analysis also points to a more dynamic process functioning in these institutions than in the political dimension.

3.2.1. CoE Level

If there is one institution of the CoE that transcends the others in visibility and 'impact potential', it is the ECtHR. The reason for this 'exceptionality' is that it acts as guardian of the 'greatest monument to the Council', the Convention, which symbolizes the distinctively European approach to human rights protection, marked with the horrendous historical experience.[107] In contrast to most of other HS-related instruments of the CoE, the Convention is legally binding and the Court acts to ensure member states'

[105] For an overview on ECRI, see Lanna Yael Hollo, "The European Commission against Racism and Intolerance (ECRI)," in *Human Rights Monitoring Mechanisms of the Council of Europe*, op. cit., 127–49.
[106] INT6, CoE, ECRI, External Relations Officer, 28 April 2015.
[107] Ivan Hare, "Extreme Speech Under International and Regional Human Rights Standards," in *Extreme Speech and Democracy*, op. cit., 66–68.

compliance with it.[108] Moreover, officials of the CoE themselves view the Court as their 'guide', which 'can change the mindsets [and] has been very active to move ahead the values that belong to the CoE.'[109]

It is less clear, though, *how* the Court has interpreted these values, in particular in HS cases. There is no room to provide a detailed overview of case law here;[110] however, the widely accepted conclusion is that the ECtHR indeed pursues a more restrictive approach towards HS, along the lines of the CoM's definition, which accepts content-based bans not only in case the speech incites to violence but also when it provokes or promotes ideas with a discriminatory potential. The most recent ECtHR Factsheet clearly states the two approaches the ECtHR applies when it comes to cases 'concerning incitement to hatred and freedom of expression':[111] either it justifies the exclusion of a particular speech from protection by Article 10, on the grounds presented in Article 17 ECHR, or it justifies restrictions on speech through Section 2 of Article 10 ECHR.[112]

Where there *is* a disagreement, which mirrors the disputes between the judges,[113] is whether this approach is consistent[114] or not.[115] The fact that one of the most elaborate

[108] The CoM is tasked with the execution of judgments but this by no means diminishes the role of the Court as the standard-setter and interpreter of the ECHR.
[109] INT7, CoE, Secretary to the Advisory Council on Youth. 28/04/2015. Similarly, INT1, INT4 and INT6 argue along these lines.
[110] For this purpose see Belavusau, op. cit., 48–69; Tarlach McGonagle, "A Survey and Critical Analysis of Council of Europe Strategies for Countering 'Hate Speech,'" in *The Content and Context of Hate Speech*, op. cit., 456–98. These reviews come to similar conclusions on the ECtHR's positions on HS.
[111] Without providing a definition how to distinguish those cases which fall under this category from those which do not.
[112] ECtHR, *Factsheet – Hate Speech* (ECtHR, 11/2014).
[113] One of the most visible manifestations of this is the Féret case, a Chamber judgment of a 4:3 majority where the majority supported the restriction of freedom of speech in the instance of anti-immigrant speech of a Belgian politician. The dissent written by Hungarian judge Sajó considered the majority decision as too restrictive for freedom of speech. ECtHR, Féret v. Belgium (2009).
[114] This side admits that the Court 'does not give precise definitions' of HS which it views positively. The Court allegedly proceeds on a careful case-by-case basis and 'avoids being constrained in its reasoning—and its case law—by definitions which could limit its power of action in subsequent cases.' [!] See Mario Oetheimer, "Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of

analyses of the Court's jurisprudence struggles with capturing its approach in three sections, coining the terms 'odious expression', 'revisionist expression', and adding 'incitement to violence' as the third section (without clarifying whether the former two 'kinds' of HS cannot sometimes include the incitement element) is an answer in itself.[116] In other words, one can be critical of both the *direction* and *consistency* of the Court's jurisprudence. Still, as heading in some direction implies some consistency, the latter seems to be increasing towards the gradual emergence of a 'duty to prosecute hate speech' in the interpretation of the Court.[117] This is certainly not an approach that would

Human Rights Case Law," *Cardozo Journal of International and Comparative Law* 17 (2009): 428–429. But how it can proceed *consistently* without definitions, when approaching the peculiarities of complicated cases which is the 'job' of each and every court?

[115] Roger Kiska and Paul Coleman, "Freedom of Speech and 'Hate Speech'—Unravelling the Jurisprudence of the European Court of Human Rights," *International Journal for Religious Freedom* 5*(1)* (2012): 129–42; Stefan Sottiaux, "'Bad Tendencies' in the ECtHR's 'Hate Speech' Jurisprudence," *European Constitutional Law Review* 7*(1)* (2011): 40–63. Based on recent HS cases, Belavusau concludes that 'Strasbourg judges have been mixing largely incompatible methodologies in order to achieve [wide margin of appreciation granted to national courts].' Uladzislau Belavusau, "Experts in Hate Speech Cases: Towards a Higher Standard of Proof in Strasbourg?" in *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, ed. Lukasz Gruszczynski and Wouter Werner (OUP, 2014), 258. At a different place, he characterizes the jurisprudence of the ECtHR as 'manifestly restrictive' of free speech when compared to the US. Uladzislau Belavusau, "A Dernier Cri from Strasbourg: An Ever Formidable Challenge of Hate Speech," *European Public Law 16(3)* (2010): 373. Buyse criticizes the inconsistent application of Article 17 ECHR in HS cases; in his view, all HS cases should be considered under Article 10 and potential limitations on freedom of speech listed there. Antoine Buyse, "Dangerous Expressions: The ECHR, Violence and Free Speech," *International and Comparative Law Quarterly* 63*(2)* (2014): 491–503.
Similarly, an independent expert sees 'most inconsistency' in the Court's jurisprudence on Holocaust denial and religious insult. As a consequence, in this highly politicized area, the 'Court's impact is diminished in terms of judgments in particular cases but whether it can [still] have a broad impact, is something else.' INT2, Assistant Professor, Expert on Freedom of Expression. 9 April 2015.
In sum, these scholars see the Court's approach diverging from the paramount value of freedom of speech. Because of the content-based approach that does not look closely at the context in which the speech appeared, legitimate speech may be restricted, that may be harmful for the quality and richness of political discourse. This debate goes back to the disagreement over whether the humans are capable of rational judgments in the Millian sense. If not, the Court's approach would be correct. However, as the presumption of human rationality seems to be the basis of Western societal identity with freedom of speech as its 'essential', the Court is moving away from this identity with the more paternalistic approach. See also András Sajó, *Constitutional Sentiments* (Yale University Press, 2011), 195–245.

[116] Yutaka Arai, "Article 10: Freedom of Expression," in *Law of the European Convention on Human Rights*, ed. David Harris et al., 3 edition (OUP, 2014), 621–629.

[117] On this and the related Karaahmed case from February 2015, see Stephanos Stavros, "A Duty to Prosecute Hate Speech under the European Convention on Human Rights?" 09/04/2015, http://ohrh.law.ox.ac.uk/a-duty-to-prosecute-hate-speech-under-the-european-convention-on-human-rights/.

support Hungarian domestic legislation, and thus generates a source for disagreement between Strasbourg and Budapest.

ECRI, which respects the Court and to whose reports the Court itself often refers,[118] has similar positions, based on a recommendation from 2002 where criminal law is advocated to prosecute different expressions, ranging from 'public incitement to violence, hatred or discrimination,' up to 'public insults or defamation' [against minority individuals or groups on different grounds], as well as various forms of historical revisionism and dissemination of 'storage [...] with a racist aim.'[119]

Thus, the approach of the relevant CoE's institutions in judicial/monitoring dimension is largely consistent internally, as well as with the institutions of the political dimension. It displays a clearly 'European doctrine' of freedom of speech, increasingly focused on restrictions of speech labelled as HS (with a binding definition still missing). Such an approach can pose a challenge to domestic courts, particularly in countries as Hungary where the legislation on HS seems to be based on different premises. Next, we look at how domestic courts in three countries responded to this challenge.

3.2.2. National Level

In all three countries, evidence points to the reception of the positions of the ECtHR and ECRI on HS by domestic constitutional courts, even though there is some tension present in Hungary in contrast to the other two. Table 2 displays the cases from the three

[118] According to INT6, so far this has happened 31 times.
[119] ECRI, "General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination," 2002, http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n7/ecri03-8%20recommendation%20nr%207.pdf. This position is reflected in INT6, who evaluated positively that this dispute 'is not more seen from the freedom of expression perspective, which is not our [ECRI's] perspective. [...] Freedom of expression is fundamental human right but our clients are more the latest clients of the Court, when they go to the Court and say, our dignity has to be protected against hate speech which is not freedom of speech.'

countries examined under Articles 10 and 17 ECHR by the ECtHR. The majority of these cases concerned defamation issues in civil proceedings, or the right to information, not HS in particular. The higher number of violations found by the ECtHR in Hungarian cases compared to the other two countries, therefore, cannot be regarded as sufficient evidence that the Court generally disproves the Hungarian approach towards HS.

Country	No. of violations of Article 10 found	No. of cases with no violation of Article 10 found	No. of violations of Article 17 found	No. of cases with no violation of Article 17 found
Czech Republic	1	1	0	1
Slovakia	9	1	0	2
Hungary	17	3	0	2[120]

Table 2. Cases where violation of Article 10 or 17 of the Convention has been claimed by the applicants. Source: author based on HUDOC Database.[121]

A more individualized picture shows that the ECtHR served as a respected reference point to domestic constitutional courts in all of the countries.[122] In the Czech and Slovak Republic, the number of cases of this kind handled by the constitutional courts has not been significant so far. The only decision of the Czechoslovak Federal Constitutional Court in 1992, shortly before the dissolution and emergence of separate legal systems, illustrates this similarity. In upholding provisions on historical revisionism

[120] The cases of *Vajnai* and *Vona* (the former is also included in statistics related to Article 10).
[121] The third and fifth column also include cases where the alleged violation has not been examined in substance because the part or whole of the claim has been rejected on the basis of procedural reasons (Article 35 §3 of the Convention).
[122] For ECRI as a reference point, see Section 3.1.2.

in the Criminal Code in force that time, the Court sided the aim of 'state and public security' that 'require preventing support and propagation of movements that threaten security of the state and citizens. These movements [can be named and justified with various ideals and goals] but they threaten the democratic state, its security and security of its citizens. Their prosecution is thus fully in accordance with the [limitations of freedom of speech according to the existing law].'[123] This reasoning was later confirmed by case law in both countries, often with numerous references to the Strasbourg court in the jurisprudence.[124]

Similarly, ECRI reports, often critical of particular developments on the ground in the two countries, generally acknowledge the existence of what they consider as 'proper legislative framework' for dealing with HS, including criminal law provisions. At the same time, they note the need for improvements, e.g. in collection of data on HS or legislation on banning extremist political parties.[125]

In contrast to these two countries, where the Court and ECRI have 'only' reaffirmed the already existing legislative framework on HS, in Hungary, where content-based restrictions have been developed only in a narrow sense,[126] there seems to have

[123] Czechoslovak Federal Constitutional Court: Decision 5/92 (1992).
[124] E.g. Czech Constitutional Court: Decision IV.ÚS 2011/10 (2011); see also Ján Drgonec, *Sloboda prejavu a soboda po prejave* (Heuréka, 2013), 262–264; Belavusau, *Freedom of Speech*, op. cit., 119–122. Drgonec notes that Slovak jurisprudence on HS has been very underdeveloped so far.
[125] ECRI, *Third Report on the Czech Republic*, 2003, http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/CZE-CbC-III-2004-22-ENG.pdf; ECRI, *Fourth Report on the Czech Republic*, 2009, http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Czech_Republic/CZE-CbC-IV-2009-030-ENG.pdf; ECRI, *Fifth Report on Slovakia*, 2014, http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Slovakia/SVK-CbC-V-2014-037-ENG.pdf; ECRI, *Fourth Report on Slovakia*, 2008, http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_04/04_CbC_eng/SVK-CbC-IV-2009-020-ENG.pdf.
[126] As indicated in Section 3.1.2., the parliament has made effort to extend them several times, using references of the CoE. The whole story of the Hungarian *'Csárdás'* between the parliament and the constitutional court has several rounds and cannot be reproduced here. See Belavusau, *Freedom of Speech,* op. cit., 132–149 for a more narrow and in-depth examination; Mahulena Hofmann, "Central and Eastern European Member States of the EU and the European Convention on Human Rights," in *Constitutional*

been more tension between the CoE's and domestic judicial institutions. ECRI reports, for instance, have consistently recommended the introduction of more criminal law restrictions, as it is usual in other European countries.[127] Surprisingly, though, while the ECtHR has decided cases related to HS against Hungary, its judgments found a violation of freedom of speech in national restrictions more frequently than they justified these restrictions (see also Table 2).[128] These numbers speak against the argument that Hungary guarantees more extensive freedom of speech for various kinds of HS than Slovakia and the Czech Republic in all areas.

More violations of Article 10 by Hungary than by the other two countries with the supposedly more restrictive approach to freedom of speech indicate that the differences between the implementations of legislation on HS are not as substantial as the formal differences in HS provisions, where a general content-based ban is absent in the Hungarian case. This opens up the room for impact of the ECtHR on Hungary in the country not diverging from Strasbourg jurisprudence in favour of a substantially narrower interpretation of HS.[129] Such an interpretation is supported, firstly, by the lack of cases in which the ECtHR would have found that Hungary violated other Convention rights

Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania, ed. Armin von Bogdandy and Pal Sonnevend (Beck/Hart, 2015), 284 for the main disputes brought before the ECtHR.

[127] See ECRI, *Fourth Report on Hungary*, 2008, 14, http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Hungary/HUN-CbC-IV-2009-003-ENG.pdf.

[128] Cf. cases of Vajnai, Fratanoló, or Fáber. For their overview, see ECtHR, *Factsheet – Hate Speech*; András Koltay, "Hate Speech and the Protection of Communities in the Hungarian Media System," *Hungarian Media Law*, 2013, http://hunmedialaw.org/dokumentum/554/hate_speech_regulation_in_Hungary.pdf.

[129] A divergence is, though, present in the *lack* of adequate standards of freedom of speech for offensive speech in Hungary, because of prohibition of use of totalitarian symbols, which has been frequently found as violation of Article 10 in Strasbourg (see cases above). The fact that the HCC found the original ban unconstitutional indicates its close following of the ECtHR jurisprudence (this ban was reintroduced later, though, just in a little different fashion). Renáta Uitz, "Hungarian Ban of Totalitarian Symbols: The Constitutional Court Speaks Up Again," *Verfassungsblog*, 22/02/2013, http://www.verfassungsblog.de/hungarian-ban-of-totalitarian-symbols-the-constitutional-court-speaks-up-again/#.VWuYCUbDvEk.

because of protecting 'hate speakers' (see column 4 of Table 2 on no violations of Article 17 by Hungary found by the Court). Secondly, a general alignment of Hungary to Strasbourg jurisprudence is visible in the HCC that did not go against the ECtHR since the outset of its decision-making. Instead, it referred to the ECHR already in its landmark decision where it noted that '[the Convention] does not contain a direct obligation for the States to have incitement declared as a criminal offence' *and* 'the prohibition of racist communication is considered to be a valid restriction of the freedom of expression.'[130] Essentially, the HCC stressed the importance to be extremely careful when considering any restrictions of freedom of speech.[131] Instead, the problem (and thus the lack of the ECtHR's impact) seems to rest in the lower instance courts which often do not carefully investigate whether an alleged instance of HS constituted imminent danger of violence in the given context.[132]

Overall, while the 'gentle impact' created by the judicial and monitoring instruments of the CoE seems to reach its limits if there are internal discrepancies in the domestic legal system,[133] the results here point to the important and dynamic dialogue that is ongoing between the two levels. This dialogue is likely to be enhanced in the near future, when a new ECRI report is planned to be published on Hungary and a new

[130] HCC, Decision 30/1992 (1992).
[131] Some scholarly disagreement remains over whether an instance of incitement does or does not have to result in clear and present danger in order to be legitimately restricted. Cf. Molnár, "Towards Improved Law and Policy on 'Hate Speech', op. cit.; András Sajó, "Hate Speech for Hostile Hungarians," *East European Constitutional Review* 3*(1)* (1994): 84–86; András Koltay, *Freedom of Speech—The Unreachable Mirage* (CompLex Kiadó, 2013), 239–251.
[132] Péter Molnár, "A „gyűlöletbeszéd" tartalmi tiltásának paradoxona és a közvetlen veszély alapú tiltás környezetfüggőségének értelmezése," *Fundamentum* 17*(4)* (2013): 71–75.
[133] This is the case of Hungarian lower instance courts. These limits are, at the same time, not necessarily favouring greater scope of freedom of speech. At least in the area of prohibition of symbols of totalitarian regimes, on which there is criminal legislation supported by ECRI, Hungarian courts tend to decide restrictively, which has resulted in several ECtHR judgments declaring violation of Article 10 of the Convention because of the punishment of individuals who used these symbols in public meetings. This shows that it is not law which is problematic in Hungary but its interpretation and application by courts.

recommendation on HS is to be presented by this institution in 2016.[134] That domestic constitutional courts refer to the ECtHR case law[135] and their decisions by and large comply with ECHR, and that there is no significant number of cases emerging at national level, indicates the influence of the 'European doctrine' developed by judicial and monitoring institutions of the CoE.

3.3. Civil Dimension

The final dimension to test the interpretation of the CoE as gentle power is in essence a non-legal one, connected to civil society, education and preventive measures to counter HS on which the CoE places great emphasis.[136] Similarly to the political dimension, it is one where almost no legal obligations exist, so the core of the instruments available rests on dialogue between member states and directly with representatives of the civil society.[137] This section examines a core initiative on HS created and managed in the civil dimension: the NHSM of the CoE and its implementation in the three countries that highlights the essence of the 'gentle impact' the CoE can have on the ground.

3.3.1. CoE Level

The CoE initiatives in the field of education through campaigns and awareness-raising mechanisms are numerous and are all linked to its fundamental values, as it is

[134] INT6.
[135] In this vein goes the argument of Koltay, *Freedom of Speech*, op. cit., 86, albeit its scope is limited on the ECtHR.
[136] McGonagle, op. cit., 497–498.
[137] According to a respondent working in this area, of crucial importance is the 'richness of perspectives that you have to bring in [and] if you manage to do that, you will be more successful and have more impact.' This is a challenge at the same time, as diverse opinions may make it more difficult to reach consensus. INT8, CoE, Education Department, 29/04/2015.

envisaged in the related soft-law instruments.[138] The NHSM is an initiative proposed by young people actively involved in the CoE via the Advisory Council on Youth and other mechanisms.[139] Its self-description stresses that it campaigns for 'human rights online, to reduce the levels of acceptance of hate speech and to develop online youth participation and citizenship [...].'[140] In other words, while there is no doubt that the campaign is in line with the 'mainstream' CoE approach to HS, it does not focus on restrictions but on awareness-raising and capacity-building. 'We're not here to prevent anyone from speaking [but] to protect people's rights [and] to make people think that their acts [on the internet] may have consequences.'[141]

Obviously, there is the question whether one (protect people's rights) goes without the other (some restrictions on 'speaking'). It may well be that it does not but this is not the core criterion on the basis of which the relevance and potential impact of the NHSM can be evaluated. At the CoE level, if it is to be judged on the basis of institutional and political recognition and support, it has certainly played an important role, as is documented by the decision to extend it not only in time but also in scope,[142] in particular via the dialogue that is ongoing in PACE.[143]

[138] CoE, "Charter on Education for Democratic Citizenship and Human Rights Education," 2010, http://www.coe.int/t/dg4/education/edc/Charter/Charter_EN.asp.
[139] These were discussed in detail in INT3, CoE, European Youth Foundation, 22/04/2015. The campaign itself can be considered as an example of 'not dealing with definitions, but with very concrete projects [which] we evaluate on case by case basis.' These are, then, the 'tools', to ensure the 'diversity of Europe but with common values.'
[140] CoE, "No Hate Speech Movement," 2015, http://www.nohatespeechmovement.org/.
[141] INT1.
[142] INT11. The respondent referred to the recent implementation of a new Facebook policy on hate speech to which the constant pressure to introduce it by representatives of the NHSM might have contributed.
[143] This has manifested in the establishment of the NHPA in January 2015, that is via its approach connected to the PACE strategy from 2014 (these, however, also deal with the other dimensions, in particular they support more legal restrictions on HS). See Figure 2 and PACE, *A Strategy to Prevent Racism and Intolerance in Europe*, *Resolution 1967*, 2014, http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20431&lang=en; PACE, "Committee on Equality and Non-Discrimination

Figure 2. Promotion and logo of the NHPA. Source: CoE.

Thus, the NHSM, similarly to other initiatives in the civil dimension, creates a bridge between governmental and civil society cooperation.[144] It is a 'kind but firm' call on member states to turn their attention to HS online, that operates differently from e.g. the enforcement of compliance with the ECHR. In what follows, a look at the 'other side' of this bridge, i.e. the national responses to the CoE initiatives, is provided.

3.3.2. National Level

While different CoE member states adopt different frameworks as a response to the organization's initiatives in the civil dimension, this in itself is not perceived as an obstacle for the CoE's impact; the national response does not have to be uniform, the aspect that connects the campaigns is should be 'unity against hate speech.'[145] All three countries joined the campaign in its early stages via a combination of governmental and civil society support, and from the perspective of a CoE coordinator, these campaigns

Report on Strategy to Prevent Racism and Intolerance in Europe," 2014, http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20337&Lang=EN.

[144] This is exemplified by the design of the campaign where the CoE administers the campaign at European levels but national committees need to be established in member states for the campaign to start working. Cf. INT11.

[145] INT11.

have been 'very strong', in contrast to Western Europe, in the number of both active participants and followers (see the number of Facebook followers, that is viewed as an indicator of the campaigns' influence, in Table 3).[146]

As it is inherent in their characteristics as national campaigns of a broader European initiative, without engagement of civil society they would not work. However, as the overview of their activities so far[147] indicates, the campaign has served as a valuable tool for domestic initiatives, such as the ones that have emerged after the election of an extremist politician for a high regional position in Slovakia, or that have initiated projects on Roma education in Hungary.

Country	Name of national campaign	No. of Facebook followers
Czech Republic	No Hate CZ (together with 'Safely online' project)	617
Slovakia	Bez nenávisti na internete (No Hate on the Internet)	883
Hungary	No Hate Speech Mozgalom	1278

Table 3. National NHSM campaigns and their followers (as to 25 May 2015). Source: author.

On the whole, the CoE activities on HS in the civil dimension provide both governments and civil societies with a framework in which they can realize their own initiatives. Although there is no guarantee that these will be carried out effectively and consistently at domestic level, the general approach towards HS is embedded already in

[146] INT11.
[147] See the websites of and reports about the campaigns: No Hate Speech Mozgalom, "Magyar Kampánybizottság," 2013, http://nohatespeechmozgalom.hu/magyar-kampanybizottsag/; Ministry of Education of Slovakia, "Kampaň Bez nenávisti na internete už spustená," 20/05/2013, https://www.minedu.sk/kampan-bez-nenavisti-na-internete-uz-spustena/; Mladí proti nenávisti online, "O Projektu," 2013, http://nohate.cz/.

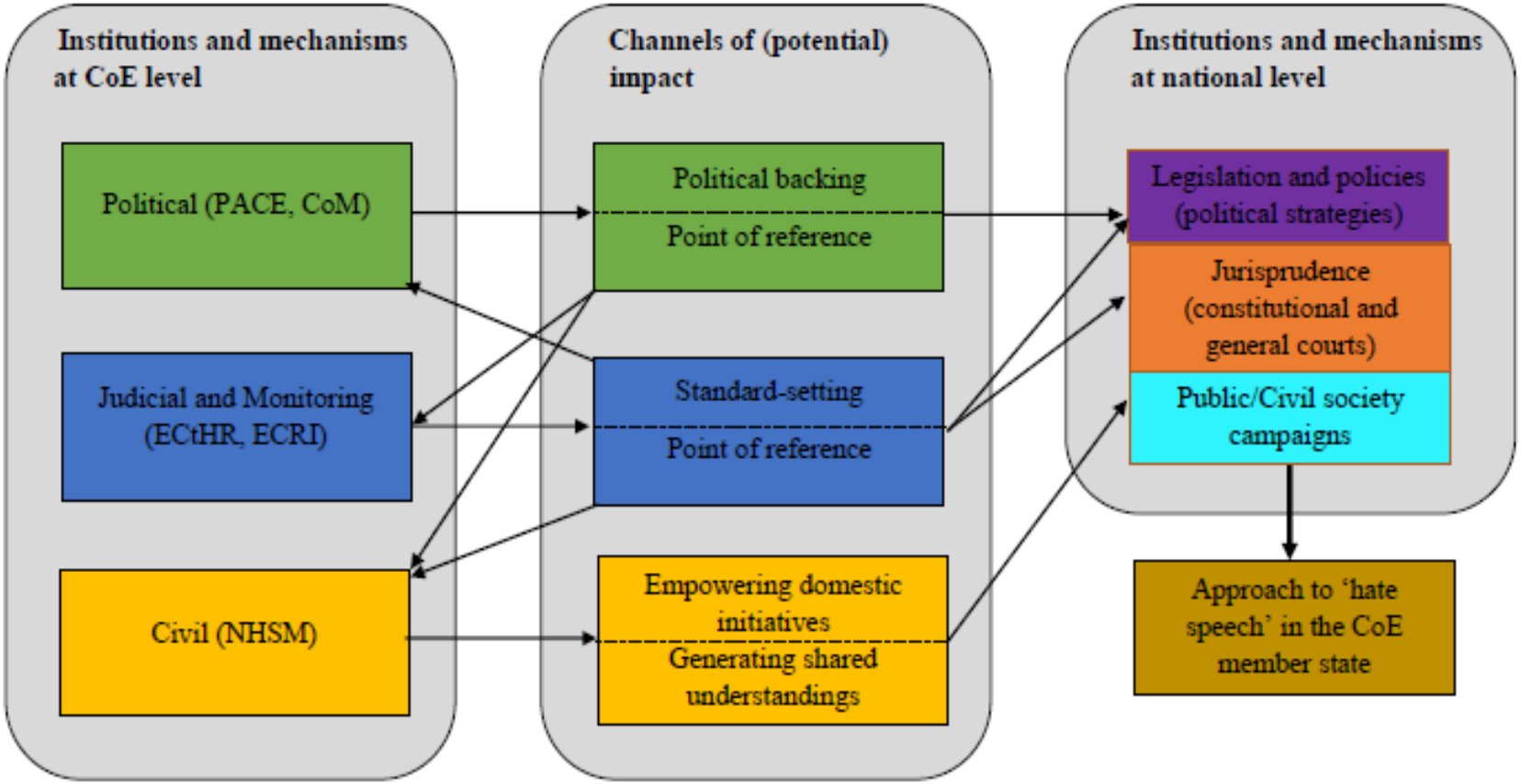
that framework. The NHSM and other CoE activities mostly in the field of education offer a 'platform for dialogue and cooperation, and provide support in accordance with the countries needs' and priorities', which allows participants (governments or citizens) to develop 'a sense of common ownership over this work.'[148] And while, especially for initiatives which are not legally binding, it is true that 'we [the CoE] have no mandate to change peoples' mindsets', the effort to help develop 'shared common understanding' between participants from different political systems which at highest level may be engaged in profound conflicts,[149] can at the end well lead precisely to this kind of change. What remains is to take stock of whether, in the field of HS, the CoE acts as gentle power as opposed to 'mediated power', and thus to respond to the theoretical puzzle about the impact of IOs on national political systems.

3.4. Summary

An impact of the CoE on the three member states has been demonstrated in all three dimensions. In the political dimension, Hungarian parliamentarians refer to the positions of the CoE on HS to support proposals for more content-based regulation. Slovak and Czech political strategies occasionally mention the CoE but as the approach of legislation in these countries does not differ from what the CoE recommends, there does not seem to be a deeper reason for extensive referencing. In the judicial dimension, ECRI and the ECtHR are taken as authorities by national constitutional courts, although it is true that especially in the Hungarian case, limits seem to be reached at lower-instance domestic

[148] In contrast, 'when frameworks are created by a small group of experts [who] may be the best in that they produce the most advance text, but without due consultation, nothing happens with it because it does not correspond to needs.' INT8. For the similar interpretation speaks the identification of the CoE as a 'think-tank, where countries come together and hear the best ideas, practices', which can inspire them for different kinds of changes back home. Cf. INT7.
[149] INT8.

courts. In the civil dimension, the NHSM of the CoE empowers domestic organizations which have started national campaigns in all three countries. This variety points to multiple channels through which impact can be achieved (Figure 3) which would not be expected if the 'no power' or 'mediated power' hypotheses would adequately capture the reality. The next chapter identifies how these channels work and why they demonstrate an impact that fulfils the criteria set by the 'gentle power' hypothesis.



→ implies the direction of the process via which the CoE can impact on member states (displayed for the case under study). It starts with an institution/mechanism in one of the dimensions that sets up a channel via which impact is exercised on an institution/mechanism at domestic level. Under the condition of convergence between the institutions/mechanisms, the process can work within the CoE institutional system as well (e.g. the CoM definition of HS being used by the NHSM or built on by ECRI).

Figure 3. Summary of the model based on findings of empirical analysis. Source: Author.

4. WHAT KIND OF POWER IS THE COE? A THEORETICAL EXPLANATION

Chapter 3 demonstrated the existence of channels through which the CoE can impact on the approaches towards HS in the member states (see Figure 3). Table 4 describes these channels, two in each dimension.

Dimension	Channel
Political	Political backing – political instruments confirm the support for CoE's approach from the member states.
	Point of reference (predominantly inside the IO) – other CoE institutions use the definitions provided by political instruments to underline the appropriateness of their own activities in the field.
Judicial	Standard-setting (both inside and outside the IO) – the ECtHR uses the legally binding Convention to authoritatively interpret what is 'right' and what is 'wrong' in relation to HS.
	Point of reference (predominantly outside IO) – case law and products of monitoring mechanisms are used by domestic political elites and domestic courts to align with the common approach vis-à-vis HS.[150]
Public	Generating shared understandings – via providing the opportunities for dialogue among governments and civil societies, joint initiatives emerge that foster the general principles on which the approach

[150] This channel can be limited, as shown in the case of Hungary, where national courts do not provide careful consideration of the ECtHR's doctrine in particular cases. Whether this is a result of the ECtHR's weakness or the weakness of its approach (content-based regulations on HS with relatively uncertain criteria for application) remains to be explored.

	towards HS is based.
	Empowering domestic initiatives – individual and collective activities are supported with the possibility for new, creative solutions via the framework provided by the CoE that encompasses the main pillars of its response to HS.

Table 4. Summary of channels through which the CoE impacts on member states. Source: author.

Considering the dominant theoretical approaches[151] outlined in Chapter 1, what do the results say about the applicability of neoliberal institutionalism and constructivism in the examined case? Firstly, there are reasons to believe that the CoE indeed fulfils what could be expected from a 'mediated power' – either in terms of the intergovernmental forum it offers for member states to debate and exchange best practices, or in terms of its limits in the political dimension, where mutual consent of governments is required to adopt a new instruments regarding policy towards HS. Secondly, however, the channel of impact identified in the judicial and civil dimension extend to the areas where it is not likely a merely 'mediated power' would reach out. The by and large compliance[152] with the ECHR *as interpreted by the ECtHR* identifiable in the jurisprudence of the domestic constitutional courts (even though the Hungarian one is somewhat different at the first

[151] The evidence allows to falsify the 'no power' hypothesis, as in none of the three dimensions, the lack of interaction in any of the three dimensions has been identified.

[152] Again, compliance could be evaluated with soft law instruments (see Section 1.1.) but given the overlap between the obligations prescribed by the ECHR as interpreted by the Court, ECRI monitoring reports and political instruments by the CoM and PACE, it is virtually impossible to distinguish between the two. See Jonathan L. Charney, "Commentary: Compliance With International Soft Law," in *Commitment and Compliance,* op. cit., 115–19 for the same argument in general terms. A broad compliance theory that would count with 'informal social norms' (Edith Brown Weiss, "Conclusions: Understanding Compliance with Soft Law," in *Commitment and Compliance,* op. cit., 539–546) could be applied to the three countries in the case of HS (due to the fact that the CoE has a generally unified position on it). However, it is unlikely that the results would differ from the approach of 'general IR theories', precisely because of the intensive overlap between the two (Section 1.1. and Peter M. Haas, "Choosing to Comply: Theorizing from International Relations and Comparative Politics," in *Commitment and Compliance,* op. cit. 43–64). Thus, this methodological 'road not taken' would most likely lead to similar conclusions.

sight); the references made to the monitoring reports of the CoE by MPs in Hungary where legislation is not fully in line with the CoE's expectations; the internal coherence of the CoE's approach exacerbated by the general respect shown to the Court by all other institutions scrutinized here; and the initiatives emerging at government and civil society levels as a continuation of the ones facilitated by the CoE all point to the CoE as an 'actor' in standard-setting and implementation of policies on HS.[153]

It may be thus be more helpful to think about the CoE as gentle power in the field of HS.[154] This argument does not exclude the possibility of thinking of the CoE as a 'mediated power,' which may work better in other areas or countries. Still, when it comes to HS, the CoE is able to act autonomously from agendas of particular states, largely because of the exceptional expertise it has in the field and define what is 'right to do' when it comes to HS.[155] Thereby, it can 'orient action and create social reality [and] use knowledge and exercise power to regulate the social world and thereby change incentives and help create social reality.'[156]

[153] And this is what neoliberal institutionalists do not seem to acknowledge. Even though they maintain the possibility of an occasional 'independent, important and beneficial impact on world affairs' by IOs, they do not view it autonomously from state interests. David P. Forsythe, "Neoliberal Institutionalism," in *International Organization and Global Governance*, op. cit., 129; Stein, op. cit.

[154] This word has been used by one of the interviewees who argued in favor of a possibility of 'the political gentle pressure that can be put on member states, arguing that their behavior in this or that field is definitely too far off the mark'. INT9. This gentle pressure can be generated not only by institutions/mechanisms of the political dimension but also (and perhaps even more) by ones of the judicial and civil dimensions.

[155] Whether this 'right' is right also from the perspective of desired impact (lowering of instances of 'hate speech') would require another analysis. The evidence presented here justifies the emphasis on prevention via education and legal restriction in cases when speech generates an imminent danger of violence. The Hungarian case indicates the failure of courts to apply the 'hate speech bans' properly, which indirectly helps 'anti-antiracist groups' to develop new ways to challenge antiracist agenda. See David Boromisza-Habashi, "Dismantling the Antiracist 'Hate Speech' Agenda in Hungary: An Ethno-Rhetorical Analysis," *Text & Talk* 31(*1*) (2011): 1–19.
Such problems are also present in the other two countries, where the low number of cases on HS does not have to mean that the 'socializing effect' of laws is in place. Hence, these laws might not always achieve their original purpose, in contrast to what the CoE's general approach would suggest.

[156] Rodney Bruce Hall, "Constructivism," in *International Organization and Global Governance*, op. cit., 150–151; Barnett and Finnemore, *Rules for the World*, op. cit.

At the same time, the CoE may not act as gentle power in other areas or countries. This is most likely because of the absence of a unified approach *within* the organization (this is what Barnett and Finnemore call 'pathology'),[157] and, consequently, because of the non-existence of impact in judicial and/or civil dimension of the CoE's activity. In that case, it may still provide the political means for dialogue and/or political support via the political dimension; but without the effects demonstrated in the field of HS. Further research can delve into this fruitful area to investigate the CoE's 'gentle power potential' in other fields.

[157] Barnett and Finnemore, "The Politics, Power, and Pathologies of International Organizations," op. cit.

CONCLUSION

This thesis has explored how the CoE impacts on its three CEE member states in the approaches towards the salient issue of HS. As there is no single and generally agreed solution to the phenomenon of HS in democratic theory, it is increasingly important to identify the response of the CoE, for which protection of democracy, human rights and rule of law lie at the core of its identity. In turn, the nature and extent of the influence of this response on member states, especially when these seem to have differences among national policies in the field, becomes the core question. This question highlights not only the empirical puzzle between the Hungarian approach on one hand and the Slovak and Czech one on the other hand but also the theoretical puzzle of the possibility of impact of IOs such as the CoE, with or without convergence in the support of the IO's approach among some or all member states.

Throughout the thesis I have argued that the CoE is best understood in terms of gentle power that is in accordance with the constructivist assumption of the ability of IOs, under certain conditions, to set the rules and determine what is 'right' and 'wrong' in a particular policy area. Different institutions of the CoE have a largely unified position on HS that prevents them to run into deep internal conflicts or 'pathologies'. This can be explained by the fact that HS is not in the centre of political discourse, although it increasingly provokes public attention. The emphasis on both prevention mostly via education and content-based restrictions on various forms of HS (despite the persistent lack of a unified definition of what it actually is) opens up multiple channels through which the impact on member states can be carried out.

Furthermore, the existence and functioning of these channels disputes the mainstream neorealist assumption on IOs being 'extended arms' for powerful states and thus having 'no power' on their own, as in that case the CoE would be expected to have no impact at all, that would be exemplified by persistence of diverging approaches towards HS in the analyzed countries. In contrast, these channels do not disregard the conceptualization of IOs provided by neoliberal institutionalism that sees them as 'mediated power' and outcome of interstate cooperation. The fact that perhaps the closest effort to define what HS is has been provided by political instruments issued by the CoM and PACE shows that the role of the CoE as a forum for debate, as it is assumed by this theory, is present and cannot be ignored.

However, the CoE as a 'mediated power' should have marginal impact in what I identified as judicial and civil dimension via setting the standards of what to do with HS by the ECtHR, monitoring mechanisms and campaigns designed to empower particular civil society initiatives and cooperation with governments. In reality, it is not, though, because of the key importance these instruments play either in providing reference points for politicians to propose legislative changes that would bring the country closer to the 'official' CoE position (the case of Hungary), or in reaching out directly to the civil society by offering a framework for realization of own initiatives which are nevertheless in line with the CoE's approach to HS (the NHSM).

According to one of the respondents, 'In any system ran by humans you will never reach full convergence, nowhere, because people change, institutional standards change, perceptions and morals and outlooks change.'[158] Some empirically puzzling differences

[158] INT4.

in legislative responses to HS between Hungary and Czech Republic/Slovakia, which have indeed been identified, tend to confirm this impossibility to reach full convergence. However, these differences turned out to be much milder than expected, notably because of the approach of the HCC not diverging fundamentally from the ECtHR's jurisprudence, and the element of convergence based on introduction of new legal restrictions on historical revisionism in Hungary, as well as the push of several Hungarian legislators for more restrictions, using ECRI reports for justification of their proposals. The CoE is acknowledged as a standard-setter in the area and while there seem to be shortcomings in its impact reaching out to domestic lower-instance courts, and its approach towards HS *per se* is not unambiguous and necessarily the most effective in all circumstances, there is sufficient portion of evidence to conclude that it acts as gentle power and influences the developments in all three countries via the channels in political, judicial and civil dimensions.

Thus, this research has demonstrated that there is power in gentleness but this power is not unlimited. The CoE as gentle power shows what is 'right and 'wrong' in policies related to HS in so far as it has an internally unified position on what this 'right' and 'wrong' is. By the same token, this position does not have to equal the 'objectively' right thing to do from the perspective of the results the proposed solution bring in the light of improved standards of human rights and democracy. The problems in implementation of HS bans are not a substantial limit of gentle power; however, in other areas where the member states' initial positions are much more divergent, internal disagreements between the institutions of the CoE persist or there is a political conflict

where one neighbour in the 'club'[159] fears the other, always being gentle may be normatively right but without the desired impact on reality. That gentle power is a strength and weakness at the same time, remains a general lesson to be taken into account by all IOs balancing between intergovernmental and supranational institutional design.

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[159] INT9.

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APPENDIX: LIST OF INTERVIEWS

Code	Position	Place and Date
INT1	CoE, Education and Training Division, Youth Department	Budapest – Strasbourg [via Skype], 22 April 2015.
INT2	Assistant Professor, Expert on Freedom of Expression (Dr. Sejal Parmar)	Budapest, 9 April 2015.
INT3	CoE, European Youth Foundation	Budapest – Strasbourg [via Skype], 22 April 2015
INT4	CoE, Secretariat of the FCNM	Strasbourg, 28 April 2015
INT5	CoE, Information Society Department	Strasbourg, 28 April 2015
INT6	CoE, External Relations Officer, ECRI	Strasbourg, 28 April 2015
INT7	CoE, Secretariat to the Advisory Council on Youth	Strasbourg, 28 April 2015
INT8	CoE, Education Department (Yulia Pererva)	Strasbourg, 29 April 2015
INT9	CoE, Democratic Institutions and Governance Department	Strasbourg, 29 April 2015
INT10	Former Representative of the Information Office of the CoE in Slovakia (Viliam Figusch)	Bratislava, 5 May 2015
INT11	CoE, Coordinator, NHSM	Budapest – Brussels [via Skype], 7 May 2015

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