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Ireland

Prague, Czech Republic, on October 6th, 2017

Warning of a persistent violation of the European Convention on Human Rights by Facebook in the Czech Republic (and probably throughout the jurisdiction of the European Court of Human Rights)

Please give to Mr Mark Zuckerberg

Dear Mr Zuckerberg,

I would like to appeal to you as the founder and CEO of the company running the world's largest social network - Facebook.

As is often the case, I have been brought to writing to you and giving you my legal opinion on the issue of "blocking," or more accurately speaking on censorship, by my own situation where, after eight years of using your brilliant invention, I have been "blocked" for thirty days, without this ever having happened before (with a single 24-hour exception).

The reason why your company punishes its users by disabling access and disabling the use of your company's services are regularly "inappropriate" statements, especially of allegedly racist or xenophobic content. This was how my own statement was designated; in fact, it concealed hyperbole, irony and aphorism, which are legitimate means of literary expression. This is something which - unlike the vast majority of users and as the author of several books and hundreds of articles - I master very well.

In order to defend my legal opinion that your company is operating in an illegal indeed an unlawful manner, permit me to tell you a few facts about myself. I am 54 years old and have worked for 24 years as a lawyer. I have also worked in the public domain when, from 1990 to 1992, I was a Member of Parliament of the Czechoslovak Federation as it then was. Though I am not Roma, I was deputised at that time by a Roma political party to defend the interests of this national minority. Since the end of my political mandate, I have continued to work for the benefit of this nationality. In March 1993, I organised with Congressman Tom Lantos the first hearing on the status of Roma in Central and Eastern Europe held before the Human Rights Caucus of both US Houses of Congress. At the same time, I worked on gaining observer status at the UN for the International Romani Union. In the following years, I defended victims of racially motivated attacks in the Czech Republic, not only from among

the Roma. I have been involved in several “high profile” media cases where I have come to believe that membership of this national minority is the reason for a somewhat different approach by the courts to any given case. None of these controversial cases added in the slightest to my public popularity. Based on my experience, I wrote (in addition to hundreds of articles of a mainly legal popularisation nature) a book called "The Roma Question – The Psychological Grounds for the Social Exclusion of Roma", which is accepted in the Roma community as a true portrait of their situation and their problems.

In addition to representing and defending the Roma, I have long been involved in the field of family law, and it is these cases in particular that have led me to leading defences before the European Court of Human Rights in Strasbourg. With my fifteen successful cases before this court (with the bitter taste of representing my clients against my own country) I am one of the most successful Czech lawyers to have appeared before this court. In addition, I have had no small success before the Czech Constitutional Court.

My defence of members of the LGBT community had a somewhat piquant flavour when my position on this almost caused the dissolution of the Czechoslovak Federation a year before it actually happened. When negotiating the Charter of Fundamental Rights and Freedoms, the Czech version of the European Convention on Human Rights, as a young Member of Parliament I proposed in 1991 that a ban on discrimination on the basis of sexual orientation should be added to those explicitly listed situations for which discrimination is banned, such as social status, race, religion, language and political thought. Among my fellow MPs from predominantly Catholic Slovakia there was complete consternation at the time.

My legal and political attitudes have been backed up by my own personal attitudes when I married a Roma, with whom I now have a nineteen-year-old daughter of semi-Roma origin. For this reason - although I am so to speak the daughter of a "good" intellectual white family - the theory of critical whiteness does not apply to me, nor does the conventional conclusion of this interdisciplinary science apply to me, that on principle white people can never fully understand the life realities and perspectives of people of colour. I felt the bitterness of this destiny in 2003, when President Václav Klaus proposed me as a judge of the Constitutional Court of the Czech Republic. However, the Senate of the Czech Republic, which approves the presidential proposals, did not concern itself with my legal opinions and positions, but in the lobbies dealt rather with the thorny question of my origins, that is, whether I am a Jew, a Gypsy or a combination of these two. The Senate also rejected my candidacy under the influence of the fact that a few days before the vote on my candidacy I had reached a settlement with the Czech Republic on behalf of my Roma clients on a dispute that was ruled on by the European Court of Human Rights. Part of this settlement was financial compensation for my clients. However, this was received by a large part of the Czech public - including a large part of the Senate - with considerable dislike, and not with regard to justice, but with regard to whom the satisfaction was awarded and paid.

These lifelong professional and personal positions lead me to demand that people be careful when raising accusations against me of racism or xenophobia. I feel justified in objecting to the fact that I have been labelled as such by your company.

In a similar way - through denial of service by your company - hundreds, or even thousands, of my fellow citizens are affected, who pronounce opinions other than those which are currently officially accepted and considered as “desirable”. Your company makes its own judgement about which are desirable and which are forbidden. I will now pass over legal aspects of your company's behaviour. However, I can state my opinion, stemming from a knowledge of history, that behaving like this to a nation that has been used for hundreds of years to suffering death at the stake for the truth (witness the Czech scholar and church reformer Master Jan Hus), is somewhat less far-sighted. Deciding what is and is not inappropriate to say and to force this on a society that had 50 years of Communist censorship, eight years of Nazi terror, and 300 years of oppression under the rule of a foreign country, is definitely not the kind of behaviour which would earn admiration or respect in my country.

However, let us keep to the legal aspects of assessing the situation. Not only the countries of the European Union, but the countries of the whole of Europe, including Russia and Turkey (the only non-member state of the Council of Europe is Belarus), are subject to the jurisdiction of the European Court of Human Rights. All of these countries have undertaken to comply with the Convention for the Protection of Human Rights and Fundamental Freedoms. Among the rights guaranteed by this Convention, according to Article 10, is the right to freedom of speech. During its nearly 60 years of existence, the Court has developed standard jurisprudence on how to interpret this freedom of speech and how to balance it with other rights guaranteed by the Convention with which freedom of speech might possibly interfere. Its chief idea in balancing the individual legitimate objectives to which protection of speech or limitation on it leads can be summed up in the position that *“...freedom of speech is also applicable to “information” or “ideas” that offend, shock or disturb the State or any sector of the population¹.”*

This almost absolute freedom of speech is - as the Court has repeatedly stated in a number of other cases - *“one of the essential pillars of democratic society, and a fundamental condition for its progress and the [...] development of each individual.”* The linkage of democracy and freedom of speech as its necessary condition is underlined by another human right, so we may speak of a necessary triumvirate of democracy. It is that *“the protection of opinions and the freedom to express is one of the objectives of the freedom of association as enshrined by Article 11 of the Convention².”*

1 see: Handyside v. United Kingdom, Plenary judgement of 7 December 1976

2 see: Unified Communist Party against Turkey, Judgment of 25 May 1998, Judgement of the Communist Party and Ungurean v. Romania of 3 February 2005, Linkov v. Czech Republic - Judgement of 7 December 2006 and others.

In particular, the Court made a clear statement about political statements by saying that *"...there is no democracy without pluralism. One of the principal characteristics of democracy is in ... the possibility of debating, through dialogue and without resorting to violence, the issues posed by various political views, even when it is feared or anxious. Democracy is actually fed by freedom of speech ..."*³

As I have stated earlier, the European Court works on the basis of balancing individual rights. On this issue, it is necessary to recall the wording of Article 17 of the Convention, which is often forgotten; and I therefore permit myself to cite it in its entirety:

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

The Convention is in fact anchored in an ideological and value system with respect to the type of social order compatible with it. This social order is a democratic, pluralistic political system that respects the rule of law and the rights of the individual. In other words, even a pluralist democracy has the right to defend itself against (its own) destruction.

But what does your company do? Under the guise of "good intentions", it is completely destroying the pluralistic debate that is a guarantee - and not just in my opinion the only guarantee - of a shift of opinions in society⁴. Opinions develop only through discussion, and not just through "measured" discussion, but also through the use of irony, mockery, awkward and careless expressions, aphorisms, parables, through the use of unliterary, even vulgar language. In evaluating the contribution of your users (which, by the way, your company is not at all entitled to do, even on the basis that it owns the social platform on which even "inappropriate" debates take place), it is also necessary to take into account the different intellectual abilities of those in the discussion, which are various. There are also differences between the written and spoken word, which the absolute majority of society - all over the world - completely misses. According to psychological research, under "normal circumstances" a harshly predominant part of the communication between people is non-verbal.⁵ Maintaining that "everyone can write" in the same way that "everyone can talk" is very stupid. Put simply, people have to learn to express themselves in writing - which is what statements on Facebook are⁶.

³ see: *Herri Batasuna and Batasuna v. Spain*, Judgement of 30 June 2009.

⁴ How changes occur in views, starting with fashion and the spread of epidemics and ending with political opinions, is very well described by Malcolm Gladwell in his book "The Tipping Point". FB's interference, however, prevents this natural shift in opinion.

⁵ The effect of spoken communication depends on 3 basic aspects. 7% depends on message content, 55% on facial mimics and body language and the remaining 38% depends on the way words are spoken, i.e. voice and speaking technique. Thus, a total of 93% depends on non-verbal and para-verbal communication

⁶ Here I would like to remind you of FB's tremendous influence on general literacy, especially among the intellectually and socially weakest sections of the population. I am also extremely grateful that FB has created a global platform that is bringing about the revival and development of languages that would otherwise have a

But your company shows no respect for any of this. Your company not only ignores, but deliberately sets out to demolish, all the fundamentals and achievements of the search for justice.

I have heard several times the view that "at home everyone is their own master" and therefore that everyone can do what they want. Such an interpretation of the law is its complete denial. To give a specific example taken ad absurdum - if you committed murder in a house you own, does ownership of that place justify that murder? Not in the slightest. Likewise, your company also has a duty to comply with the laws of the countries in which it operates. It is therefore bound to comply with the European Convention on Human Rights and Freedoms, including the interpretations given by the relevant case-law of the European Court of Human Rights.

Your company de facto replaces the legislative role of the state when it assumes the right to determine laws, to enforce those laws and punish non-compliance with them. According to the most general principles of legal theory, such power belongs only to the state - it is the only legislative sovereign. Any transfer of this authority can only take place through an international treaty; for example, as the countries of the European Union have done by signing the Treaty of Lisbon. However, as far as I am aware your company has no international treaty with the European Union or the Czech Republic that would entitle it to legislate in our country, in the European Union or in the countries of the Council of Europe. Your company completely displaces and destroys political pluralism in an anti-democratic manner. You arrogate legislative power and through de facto revision of the judgements of the European Court of Human Rights, you lay claim to judicial power. What authorises you and your corporation to take such a power-based approach, which is in its essence totalitarian?

There are also opinions that if we, the users of your platform, have the opportunity to use this platform for free, this gives you the absolute right to regulate its content. I do not want to repeat the legal arguments, instead allow a lawyer to think in economic terms. Of course, we, your users, use the benefit of your services for free. That does not mean, however, that we are not generating profit for you. Today, the global community of your users is a pasture for the fattened cows of the advertising agencies and individual retailers or manufacturers and providers of services. This pasture gives you full-fat milk, indeed cream. It is from us, the common blades of grass, that you have made your riches. Well, good luck to you - but do not you think that we ordinary consumers should have a little respect for the fact your platform generates these profits? FB users want nothing more than those blades of grass, to wave freely in the wind and to turn their faces to that sun known as social cohesion. In return for that they are willing to put their money in the direction indicated by FB's advertisers. Between us, your consumers and you - or your corporation - there are mutually beneficial relationships in which everyone gets what they want: you make money and people

significant tendency to disappear. Tens of thousands of FB chats going on in the Romani language have done more for that language than all the Faculties of Roma Studies in the world put together.

make social contacts. Now, however, it seems that that is not enough for you. You feel you are stronger than a state, stronger than the democratically elected (albeit not the smartest and most perfect) representatives of their countries.

From an economic point of view, one more aspect needs to be remembered: by ideological interferences in the texts of your users you are spinning the wheels of positive feedback. The more you silence the commentaries and deliberations of any view which is allegedly hostile to you, the more such views will be sought out and the more they will spread. This will lead at the same to destabilisation of the system. An avalanche-like spread and destabilisation are the basic characteristics of positive feedback. Based on this silence controlled by you (which we, who have grown up in times of real socialism, know so well), there may of course be changes and social tensions that will slip out of control and will move in an opposite direction to the one you are now trying to influence. And if your analytical department tells you that "you can handle it", then let us look to the past with a simple reminder: ... others have thought that in the past....

Dear Mr Zuckerberg,

You have decided that through your corporation you will define human history, that you will promote an ideology that you think is right. You forget that the path and the goal to which the path leads are varying values, mutually interchangeable. In the first lessons at law faculties around the world, they teach us that right cannot arise from injustice. Similarly, if your good intentions make use of means that give rise to legitimate distrust of their legality, then the goal itself will collapse. Please consider your company's strategy to date. Try to overcome the cognitive dissonance and look into the face of a reality in which the results of your steps could be exactly the opposite of what you are intending.

And above all: in a situation where extremists around the world are demonstrably using Facebook to carry out their terrorist attacks, do not play God, the only one who knows what is and is not true and correct. Do not bully ordinary people who are expressing themselves as best they can - and in a way to which they have a legal right. Stop your inquisitor-like abuse of your power, which, as has been proven many times in history, always leads to effects opposite to the ones desired. You will not fix anything by blocking anyone. End this strategy that blunts not only us, the users of your platform, but above all yourself.

Yours most sincerely,

Klára A. Samková, J.D., Ph.D.

