



# PROCESSING OF HATE CRIME AND HATE SPEECH IN SERBIAN LEGISLATION AND THE EUROPEAN STANDARDS



**YUCOM**  
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for Human Rights



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LEGISLATION AND THE EUROPEAN STANDARDS

# Processing of hate crime and hate speech in Serbian legislation and the European standards



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## **For publisher:**

Milan Antonijević

## **Prepared by:**

Milena Vasić  
Tamara Blagojević

## **Proofreading:**

Ljiljana Korica

## **Translation :**

Ljiljana Madžarević

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# Introduction

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In 2012, when S.S. seriously injured two brothers in the public bus in Novi Sad, because he thought they were homosexuals and that one of them was “hitting on” him, Serbia still did not have hate crime incorporated in its Criminal Code as an aggravating circumstance for the crimes caused by hatred. During the defense before the court, the perpetrator made series of homophobic statements which led to the conclusion that the only and exclusive motive for the offence was hate for the assumed sexual orientation of two injured individuals. In the context of the events on the public and media scene in Serbia, after the brutal attack on the Pride Parade in 2010 by the groups of sports fans, hate speech which could have been heard from different sources, starting from the speaking podium in the Assembly, Christmas and Easter addresses of the representatives of the Serbian Orthodox Church, celebrities, it is not surprising that this perpetrator though his homophobic views were justification for the committed act. Although the court was not bound by the aggravating circumstance, the court convicted the perpetrator to a stricter prison sentence for attempted murder in accordance with the judge’s opinion about all the circumstances of the case and evaluated the motive of hate as an aggravating circumstance. Several months after sentencing, the Amendments to the Criminal Code of the Republic of Serbia came in force, introducing, for the first time in the history of national legislation, the legal concept of hate crime. As of that time, until writing of this publication, we have not received any judgments which refer to this Article. This example is also a response to the question: which is the purpose of this publication and why should a special attention be dedicated to hate crime and hate speech?

The aim of this publication is primarily to provide overview of some of the existing solutions for the problem of hate crime and hate speech in the European Union *Acquis*, as well as the practice of the European Court of Human Rights. In its numerous judgments, this court has thoroughly dealt with these issues though different legal systems of the states signatories of the Convention for the Protection of Human Rights and Fundamental Freedoms, and which, in their historical and social specifics, faced similar problems in processing of hate crime as Serbia today.

The issue of justification of the sanctions for hate crime and hate speech is demonstrated in the above mentioned case of the national court practice. Hate crime, as a special type of criminal offence, where the motive is hatred due to affiliation with a certain minority group, is not only the problem of the minority group affected by hate and prejudice. This presents the problem of the entire community since everybody could be a victim, and even those who are only friendly with a certain minority group or someone who became exposed to a perpetrator of a criminal offence due to presumed belonging to a certain minority group. In practice, the victims were persons who, due to their physical appearance, were characterized as members of a certain minority group, regardless whether they really belonged to that group or not. Hate crime is particularly oppressing for a minority group, and despite guaranteed prohibition of discrimination, **torture, inhuman** or degrading treatment, proclaimed principle of equality of all people, such criminal offence is a message to the entire group that it is not welcome and that it will not be tolerated. Also, the consequences

for an individual could be permanent and we come to the conclusion that the hate crime affects the entire society. It presents particularly violent expression of prejudice. All democratic values our system is based on – legal state, rule of law, and human rights are no longer relevant if we are unable to protect a minority group whose equality is guaranteed by the Constitution.

On the other hand, in order to secure equality, right to psychological and physical integrity, dignity and other rights regarded as fundamental human rights, although the law presents mandatory means in this fight, it is not sufficient. We must create social climate where differences of all the groups which live in it are respected. This is particularly challenging in the post-conflict society of Serbia, which has still not entirely faced the recent history of wars of the 1990s, where political points are earned through propagating of nationalism at the expense of minority groups. Thus, the hate speech has a special place in this publication as a specific abuse of the right to freedom of speech, which, in its most extreme form could serve as justification or even as indirect call for hate crime. Although hate speech and hate crime are two separate legal concepts, in the social context they are often entwined, as cause and consequence.

# The terms hate crime and hate speech

The concept of **hate crime** may lead us to a wrong conclusion that it is a separate criminal offence, which has regularly defined substance and elements of a criminal act, which are punishable by suitable criminal sanction. Although there is no internationally recognized definition of hate crime, in all the countries which recognize this legal concept this includes existing of the primary criminal offence and separate motive of hate as the reason for the criminal offence. Without primary criminal offence (causing serious bodily injuries, insult, theft, murder) there is no hate crime. On the other hand, mere existence of the offence is not sufficient to consider it a hate crime. Primary criminal offence must be motivated by hatred due to affiliation of the injured party with a certain vulnerable group, or due to a certain protected characteristic of the victim. There does not have to be an injured party in order for the offence to constitute hate crime, in case hatred is directed at the entire group, for example, writing of anti-Roma graffiti on public surfaces. When evaluating whether certain criminal offence has characteristics of the hate crime or not, the list of protected characteristics, which varies from country to country, is very important. National criminal legislation recognizes the following characteristics: race and religion, nationality or ethnicity, gender, sexual orientation and gender identity. The hatred of the perpetrator towards an individual who is injured by the criminal offence is not relevant, he/she does not need to hate the victim. The important thing is what the victim symbolically represents for him/her - a vulnerable group towards which the hatred is directed.

Therefore, in a situation when someone seriously injures a person who is a hunter because he/she hates hunters, we will have a regular criminal offence where the motive of hate could possibly be considered as an aggravating circumstances, because the characteristic of a hunter is not a protected characteristic in accordance with our criminal legislation. However, if someone burns down a mosque because of the hate towards members of Islamic religion, that would a hate crime, because religion is legally protected characteristic.

Sometimes, like in above described cases, it is easy to recognize the motive of hate, but sometime it may entwine with other motives which do not exclude existence of the hate crime. Thus, certain offences, such as theft, will sometime be instigated by greed, and sometimes by greed and hate, depending on the circumstances of a particular case.

In the national legislation, the **hate speech** is defined by the Law on the Prohibition of Discrimination as *expressing ideas, information and opinions inciting discrimination, hatred or violence against an individual or a group of persons on account of his/her or their personal characteristics, in public media and other publications, at gatherings and places accessible to the public, by writing out and displaying messages or symbols, and in other ways*<sup>1</sup>.

In the national Constitution, the hate speech is recognized as a specific limitation of the freedom of speech which is considered as one of politically most important

1 Article 11 of the *Law on the Prohibition of Discrimination*, "Official Gazette of the RS" no. 22/2009

human rights, primarily though general possibility to limit human rights: *Human and minority rights guaranteed by the Constitution may be restricted by the law if the Constitution permits such restriction and for the purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right.*<sup>2</sup>

Article 49 of the Constitution of the Republic of Serbia stipulates prohibition of inciting of the racial, ethnic and religious hatred: *Any inciting of racial, ethnic, religious or other inequality or hatred shall be prohibited and punishable.*

This issue is particularly discussed in Article 50 of the Constitution (freedom of the media), which regulates that the *Competent court may prevent the dissemination of information and ideas through means of public media only when this is necessary in a democratic society to ... prevent propagation of war or instigation to direct violence, or to prevent advocacy of racial, ethnic or religious hatred enticing discrimination, hostility or violence*<sup>3</sup>.

At the international level, the Recommendation of the Council of Europe R (97) 20 to the members states is very significant as it defines the hate speech as *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.*

Although the European Convention for the Protection of Human Rights and Fundamental Freedoms does not contain the term hate speech in its text, in its extensive practice, the European Court of Human Rights has made the standpoint, at several occasions, that the hate speech is not in the spirit of the Convention, considering general prohibition of abuse of rights in the Convention, as well as permitted limitations in the freedom of speech in the interest of protection of reputation and rights of others, which will be discussed in more details in the text below.

Stated definitions do not, in any way, present *numerus clausus* of the existing definitions of the hate speech. The hate speech has been in the center of attention of numerous international documents of the United Nations, Council of Europe, European Commission, as well as international courts, since it has been recognized as a significant political instrument for inciting national, ethnic, religious and other hatred and prejudices.

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2 Article 20 of the *Constitution of the Republic of Serbia*, "Official Gazette of the RS" no. 98/2006

3 Article 50, paragraph 3 of the *Constitution of the Republic of Serbia*, "Official Gazette of the RS" no 98/2006

# Hate crime and hate speech in national legislation

When speaking about hate crime and hate speech in Serbian legislation, we should start from criminal offences which have hate as their motive in their description: Instigating National, Racial and Religious Hatred and Intolerance<sup>4</sup> and Racial and Other Discrimination<sup>5</sup>. Discriminatory behavior as the element of criminal offence has been also recognized in the offences Violation of Equality<sup>6</sup>, Injury to Reputation Due to Racial, Religious, Ethnic, or Other Affiliation<sup>7</sup>, as well as in the offence Violent Behavior at Sporting Events or Public Gatherings<sup>8</sup>. The common element of these offences is that they contain the motive of hatred and discriminatory behavior towards certain group of individuals based on certain personal characteristics.

We will particularly reflect at the first three offences which contain both hate speech and hate crime in their descriptions. The legislator does not separate hate speech and hate crime in different articles of the law regarding incrimination, and thus recognizes mutual social correlation and connection of these criminal offences.

In its original form, the criminal act of Instigating National, Racial and Religious Hatred and Intolerance is as follows:

**Whoever instigates or exacerbates national, racial or religious hatred or intolerance among the peoples and ethnic communities living in Serbia, shall be punished by imprisonment of six months to five years.**

The main offence has two qualified forms. The first is defined by the method the offence is committed: by coercion, maltreatment, compromising security, exposure to derision of national, ethnic or religious symbols, theft of other persons' goods, desecration of monuments, memorials or graves. The second one is defined by the position of the perpetrator (public official) and the consequence - if these offences

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- 4 Article 317 of the *Criminal Code of the RS*, "Official Gazette of the RS" no. 85/2005, 88/2005 – corr., 107/2005 – corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016
  - 5 Article 387 of the *Criminal Code of the RS*, "Official Gazette of the RS" no. 85/2005, 88/2005 – corr., 107/2005 – corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016
  - 6 Article 128 of the *Criminal Code of the RS*, "Official Gazette of the RS" no. 85/2005, 88/2005 – corr., 107/2005 – corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016
  - 7 Article 174 of the *Criminal Code of the RS*, "Official Gazette of the RS" no. 85/2005, 88/2005 – corr., 107/2005 – corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016
  - 8 Article 344a of the *Criminal Code of the RS*, "Official Gazette of the RS" no. 85/2005, 88/2005 – corr., 107/2005 – corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016

result in riots, violence or other grave consequences to co-existence of peoples, national minorities or ethnic groups living in Serbia.

Such definition of the offence includes only three bases which define a vulnerable group of individuals: national, racial or religious hatred and intolerance. The offence is however very significant if we discuss the hate crime which, in a post-conflict society such as Serbia, is frequently directed precisely at these three bases.

The offence Racial and Other Discrimination covers much broader scope of protected groups, as well as individuals, and it reflects at the position of the defenders of human rights as well.

Therefore, the primary form of this offence is as follows:

***Whoever on grounds of race, color, religion, nationality, ethnic origin or other personal characteristic violates fundamental human rights and freedoms guaranteed by universally accepted rules of international law and international treaties ratified by Serbia, shall be punished by imprisonment of six months to five years.***

The second paragraph incriminates persecution of organizations or individuals due to their commitment to equality of people, and the third one – propagation of ideas of superiority of one race over another or propagation of racial intolerance or instigating racial discrimination.

The fourth paragraph applies to public approval, denial of the existence or understating the seriousness of genocide, crimes against humanity and war crimes committed against a group of individuals or a member of the group based on the race, skin color, religion, origin, state, national and ethnic affiliation. These offences need to be committed in a way which may lead to violence or expressing hatred towards such group of individuals or a member of that group and for these crimes to be determined by a final judgment of a court in Serbia or the International Criminal Court.

The fifth paragraph refers to public denial of the existence or understating the seriousness of genocide or war crimes recognized by the final judgment of the national or international courts, if committed against a group of individuals or a member of the group based on the race, skin color, religion, origin, state, national and ethnic affiliation, and may lead to violence or expressing hatred towards such group of individuals or a member of that group.

Finally, the sixth paragraph sanctions whoever publically threatens to commit a criminal offence punishable with imprisonment of more than four years against a person or a group because of their race, skin color, religion, nationality, ethnic origin, or some other personal characteristic.

This Article defines only four protected personal characteristics of the injured parties – race, religion, nationality and ethnic origin, but it leaves space for other personal characteristics which may be the basis for discriminatory actions, i.e. violation of human rights. Unfortunately, it has almost never been applied in practice, due to the problems which will be discussed in final segments of this publication.

The offence Violation of Equality incriminates denial or restriction of the right of man and citizen guaranteed by the Constitution, laws or other legislation or general acts or ratified international treaties on grounds of nationality or ethnicity, race or religion or due to absence of such affiliation or difference in political or other conviction, sex, language, education, social status, social origin, property or other personal characteristic, or pursuant to such difference grants other privileges or benefits. Qualified form of the offence is defined

based on the position of the perpetrator as an official. The basic form stipulates the prison sentence of up to three years, and qualified in duration from three months to five years.

The issue is that in case of this offence there is no differentiation between affirmative measure which may appear as privilege or benefit of particularly vulnerable groups in practice (for example: setting lower quotas for the members of Roma national minority for enrollment in faculties), so that affirmative action undertaken in order to prevent systemic discrimination may also constitute the action of the offence.

Hatred due to certain personal characteristics of the victim may appear as the motive in various criminal offences, including those not directed only at the personality of the victim, but also her/his property. In 2012, the legislator introduced the motive of hatred as mandatory aggravating circumstance when determining sentence for certain criminal offence. This provision is as follows: ***If a criminal offence is committed from hate based on race or religion, national or ethnic affiliation, sex, sexual orientation or gender identity of another, the court shall consider such circumstance as aggravating except when it is not stipulated as a feature of the criminal offence.***<sup>9</sup> This is also the only mandatory aggravating circumstance in our criminal legislation.

Based on such formulation of the provision, we observe that the Article 54a cannot be applied to above listed criminal offences, because they contain the motive of hatred in their name, i.e. discriminatory actions. However, it will apply to all other criminal offences which may be committed with the motive of hate, and this presents a very broad scope of offences: starting from criminal offences directed at life and body, through criminal offences against property to criminal offences against gender freedom or marriage and family.

The application of Article 54a is made difficult due to imprecise legal formulation. Also, the Article, as well as aggravating and mitigating circumstances, have been included in the general section of the Criminal Code, and it has not been specifically defined in any other additional provision. Having in mind Article 68, paragraph 1, item 10 of the CPC<sup>10</sup> of the Republic of Serbia which stipulates ***that the defendant is entitled to state his/her position in relation to all the facts and evidence against him/her***, there have been numerous justified questions in practice:

- Which institution is bound by Article 54a of the Criminal Code to apply mandatory aggravating circumstance, court of Public Prosecutor's Office? On one hand, until introduction of this Article, general aggravating or mitigating circumstances were only binding for the court when determining the sentence, and the Public Prosecutor's Office only used to refer to them in the closing statements. In this specific case, since aggravating circumstance is mandatory, and in case the court referred to it, and it is not contained in the indictment document there is a risk of violation of the right to defense of the defendant, since he/she was not provided with the opportunity to respond to all the statements and evidence against him/her. Unfortunately, the practice has still not given a response to this issue, since there have been no judgments referring to this Article during five years as of which the Criminal Code was adopted.

9 Article 54a of the *Criminal Procedure Code of the RS*, "Official Gazette of the RS", no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014

10 *Criminal Procedure Code of the RS*, "Official Gazette of the RS", no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014

# Hate speech and hate crime in the European Union *Acquis*

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In respect of the European Union *Acquis*, the principles and legal norms which prohibit hate crime and hate speech are included in all the sources of the law, starting from the association agreements, that is, primary legislation (European Union Association Agreement, Treaty on the Functioning of the European Union and all additional protocols and annexes, Charter of Fundamental Freedoms of the European Union, Treaty Establishing the European Atomic Energy Community, Treaty of Lisbon of 2007) through international agreements and General legal principles of the EU, as well as binding acts of secondary legislation (regulations, decisions, directives).

From the very establishing of the EU, the law of the European Union has been defined through the values proclaimed in the Maastricht Treaty. Thus, Article 10 of the Treaty on the Functioning of the European Union (TFEU), states that in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Article 2 of the Treaty on European Union (TEU) regulates that *the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*<sup>11</sup>

The EU Charter guarantees fundamental rights and terms under which they are exercised, and it contains the main principles and required minimum of the legal order of every European country when regulating the areas included in the Charter.

Certain provisions of the Charter apply to the rights which may be significant in respect of hate speech and hate crime. Those rights are: human dignity is inviolable (Article 1), prohibition of torture and inhuman or degrading treatment or punishment (Article 3), protection of personal data (Article 8), freedom of thought, conscience and religion (Article 10) and freedom of expression (Article 11). The exercising of all stated and other rights and freedoms from the Charter is enabled for all the citizens of the EU under equal conditions and without discrimination (Article 20) and (Article 21). Articles 53 and 54 stipulate the level of protection and prohibit abuse of rights.

In respect of the secondary legislation of the EU in this field, there are following sources of the law which directly or indirectly apply to hate crime and hate speech:

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11 *European Parliament Resolution* of 14 March 2013 on strengthening the fight against racism, xenophobia and hate crime (2013/2543(RSP)), site: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013IP0090&rid=2>

## 1.

### Directive on Electronic Commerce 2000/31/EC

This Directive was the source of law in the case before the European Court of Human Rights *Delfi AS. v. Estonia*. This was *the first case in which the Court had to examine a complaint concerning user-generated expressive activity on the Internet*, and in that respect in presents a precedent. In this case the applicant company referred to the violation of Article 10 of the European Convention on Human Rights on the freedom of expression because it was sued as being responsible for the offensive comments posted by the readers of its news portal. *The impugned comments constitute hate speech on the Internet*, which was also confirmed by the court in this case, and established that there was a responsibility of the applicant company.<sup>12</sup>

On the Internet, the hate speech is most frequently expressed by violation of prohibition of abuse of rights, specifically, abuse of the freedom of expression on the Internet portals and social networks which are responsible for the contents and maintenance of its pages (which is precisely what this Directive regulates), so the Directive also applies to hate speech. In the above mentioned decision the Court states: *Therefore, the scope of examination of the case was limited to the assessment of the “duties and responsibilities” of Internet news portals, when they provided for economic purposes a platform for user-generated comments on previously published content and some users engaged in clearly unlawful forms of speech. The free movement of information on social networks and Internet portals and pages of the providers of information society services can in many cases be a specific reflection of the freedom of expression as enshrined in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Member States must ensure that this activity on the networks may be engaged in freely in the light of this Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46 (1).*

## 2.

### Framework decision 2008/913/JHA on racism and xenophobia

Currently law of the EU does not require its Member States to recognize sexual orientation, gender identity and/or gender expression as a bias motivating factor in criminal law. The EU only recognizes racism and xenophobia in its 2008 Framework decision on combating racism and xenophobia by means of criminal law.<sup>13</sup> However, since the Framework decision does not include limitative list of these criteria, it is envisaged that the Member States may include other differentiation criteria of certain social groups.<sup>14</sup>

.....  
12 Case ***Delfi AS v. Estonia*** - 64569/09, European Court of Human Rights, site: [https://hudoc.echr.coe.int/eng#{"itemid":\["002-10636"\]}](https://hudoc.echr.coe.int/eng#{), accessed on December 25, 2017.

13 Site: <https://www.ilga-europe.org/what-we-do/our-advocacy-work/hate-crime-hate-speech>, accessed on: December 25, 2017.

14 Acts adopted under Title VI of the EU Treaty Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, site: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:en:PDF>, accessed on December 26, 2017.

This Decision also contains the statement that racism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States.<sup>15</sup>

The essence of the Framework decision is to impose the obligation of being concrete and precise when incriminating hate speech and harmonize criminal legislation of the Member States of the European Union. Thus, the EU Member States must have joint approach towards speech crime in order to ensure that the same behavior constitutes an offence in all Member States. However, the decision states that complete harmonization is practically impossible due to the differences of legal systems of the EU Member States. Since harmonization can be better achieved at the higher level, it is possible for the European Union to adopt measures for harmonization, but in accordance with the principle of subsidiarity.<sup>16</sup>

Furthermore, the Decision confirms that it is line with the Treaty on European Union, in particular Articles 10 and 11 of the ECHR (freedom of expression and freedom of association), which are also incorporated in the Charter of Fundamental Rights of the European Union.

Article 1 of the Framework Decision defines four forms of offences in respect of racism and xenophobia. The first one is public inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to religion, nationality, race and origin. The second is dissemination or distribution of materials which incite violence and hatred from the first form. The third is: public condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, religion, nationality or ethnic origin when the act is carried out in a manner likely to incite to violence or hatred. The only difference in the fourth form is that the crimes the action refers to are defined by another act, i.e. by Article 6 of the Charter of the International Military Tribunal appended to the London Agreement. Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.<sup>17</sup>

Article 2 of the Decision regulates penalties for instigation, aiding and abetting of the offence.

Article 3 of the Decision regulates that the penalty shall be effective, proportionate and dissuasive. Maximum sentence is one to three years of imprisonment.

Article 4 of the Decision stipulates that racist and xenophobic motivation should be considered an aggravating circumstance, or, alternatively, that such motivation may be taken into consideration by the courts in the determination of the penalties.

Article 5 stipulates that both natural persons and legal entities shall be liable, and Article 6 defines specifics related with liability of legal entities and special sanctions for them.

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15 *Ibidem.*

16 *Ibidem.*

17 *Ibidem.*

Article 7 stipulates that this Decision and its rules shall not have the effect on fundamental human rights and freedoms, constitutional principles and general legal principles, including freedom of expression and association.

Apart from general principles of judicial jurisdiction on the basis of nationality, Article 9 of this Decision also defines obligation of the Member State to extend its jurisdiction when a natural person conducts an offence in its territory, or alternately when the offence is conducted via platform or the system located in that Member State, regardless where the person committing the offence though the platform is located.

Other articles stipulate implementation, withdrawal of the previous Joint Action 96/443/JHA by adoption of this Decision, and territorial application of the Decision.<sup>18</sup>

### 3.

#### **Code of conduct on countering illegal hate speech on the Internet**

Code of Conduct refers to the Framework Decision of 2008 and adopts its definition of hate crime, so it only refers to racism and xenophobia. The Code emphasizes primary obligation for the Framework decision the Code refers to should be adequately implemented, i.e. that Member States must primarily incriminate hate crime. Furthermore, the Code proclaims the obligation of the IT companies, European Commission and civil society organizations to promote the idea of tolerance, respect and non-discrimination though actions intended for raising awareness in the society.<sup>19</sup>

EU and its Member States are obligated to act so that the Internet does not become the place for illegal hate speech and violence. With signing of the Code of Conduct, the IT companies have confirmed dedication to reviewing of justified and valid complaints about hate speech during less than 24 hours and removal or disabling access to such contents. The Code has also emphasizes the need for further discussion about promotion of transparency and encouraging of critical standpoints and discussions on that subject. Although the Code is not a formally binding act and is considered as soft law, it contains generally accepted binding principles and references to the binding Framework because it concretizes its contents, it could be said that based on its contents or at least its function (for the purpose of concretizing of the Decision) it is a binding act.<sup>20</sup>

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18 *Ibidem*.

19 *Code of conduct on countering illegal hate speech on the Internet*, site: [http://ec.europa.eu/justice/fundamental-rights/files/hate\\_speech\\_code\\_of\\_conduct\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf), accessed on December 26, 2017.

20 *Ibidem*

## 4.

**Directive 2012/29/EU of the European Parliament and of the Council on establishing minimum standards on the rights, support and protection of victims of crime**

The Directive directly regulates status of the victims of crime, and its more important provisions dealing with special protection of particularly vulnerable categories explicitly refer to hate speech. In its introductory section which describes objectives and the subject of regulation, the Directive already specifically refers to hate crime, precisely due to specificity of the object of protection that is being regulated, which is different from the Framework Decision which does not make such distinction in terms of specificity.

Paragraph 2 of Article 22 (individual assessment of victims to identify specific protection needs) lists certain crimes which show certain patterns exhibited in terms of repeat victimization (repeating the same crime against the same person), retaliation or intimidation as a goal or consequence, and hate crime is listed among such crimes. Such patterns lead to specific position of the victim, so the Directive further states that, precisely for this reason, personal characteristics of the hate crime victim should be especially taken into account and that such victim is considered a victim under special protection.<sup>21</sup>

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21 *Official Journal of the European Union*, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, site:<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029&rid=1>

# Hate crime and hate speech in the Action Plan for Chapter 23

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In the process of negotiations on the accession to the European Union, at the Government session in April 2016, Serbia adopted the Action Plan for Chapter 23 – judiciary and fundamental rights, undertaking series of vital changes not only in judiciary, but also in implementation of the law. The changes refer to judiciary reform, fight against corruption and fundamental rights. The Action Plan contains numerous recommendations focusing specifically on hate speech and hate crime, including the results of applied recommendations and impact indicators:

- Enhance professional conduct of journalists considering the EU best practices, through training in the field of human rights, media ethics, hate speech;
- Conduct effective investigation and sanctioning of inter-ethnic incidents, particularly those characterized by the elements of the criminal offence of racial, national and religious hatred and intolerance;
- Ensure that the criminal justice system adequately addresses hate crimes and intensify efforts to raise the awareness of all relevant actors of the criminal justice system as to the importance of prosecuting hate-motivated offences as such;
- Ensure adequate prosecution of perpetrators of hate crime. Monitor the effects of the implementation of the strategy (2013-2018) for combating violence and misbehavior at sport events and take corrective measures where needed;
- Conduct joint training of the judges, prosecutors and deputy prosecutors and police officers to advance their knowledge and skills for efficient suppression of hate crime;
- Raise awareness on elimination of hate crime through: development and distribution of educational material, organization of annual roundtables, active media campaign;

In its report of November 2017, and based on reports from the state institutions, the European Commission assessed most of the recommendations as being in the process of successful implementation or already implemented. It was confirmed that the recommendation regarding professional conduct of journalists was partially implemented, since the report was submitted only by the Regulatory Body for Electronic Media, but not by other responsible authorities, especially in terms of the data on conducted trainings.

Moreover, the fact is that the report of the European Commission was written based on the available data, and that hate crime and hate speech cases were missing from the records since they remained unreported by the victims, which is the consequence of lack of trust in institutions of the system and fear of further victimization.

In cooperation with the OSCE Mission in Serbia, the Office for Human and Minority Rights of the Government of Serbia established the Working Group with the representatives of the civil society organizations, and it holds periodic meetings where civil society organizations have an opportunity to present their experiences to the representatives of the Public Prosecutor's Office and judges. The objective is to develop the Guidelines, that is, a Guide for Criminal Prosecution of Hate Crimes, which is a very significant improvement in cooperation between civil society organizations and the representatives of judiciary and possible answer to dilemmas arising from the existing legal regulations.

At the same time, first steps towards implementation of the measures from the Action Plan for Chapter 23 are also visible in the system of hate crime monitoring. Namely, in December 2015, the State Prosecutorial Council adopted a mandatory directive ordering all prosecutors' offices to keep a register of these cases.

Numerous obligations related to fight against hate crime that the state has committed to in Chapter 23 are still to be implemented. Active monitoring and representation of victims by civil society organizations can be an additional stimulus to judiciary and prosecutors to improve situation in this area. The media still need to improve the campaign in order to protect those targeted by these attacks.

# Relevant practice of the European Court of Human Rights – hate crime

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Even though the European Convention for the Protection of Human Rights and Fundamental Freedoms does not contain any article directly referring to hate crime or hate speech, they are recognized primarily through prohibition of torture or inhuman or degrading treatment or punishment (Article 3 of the Convention), as well as general prohibition of discrimination (Article 14 of the Convention), and also in connection with other rights guaranteed by the Convention, such as the right to respect for private and family life (Article 8 of the Convention) or the right to freedom of assembly and association (Article 11). Therefore, all the judgments of the European Court of Human Rights on whether the signatory state efficiently investigated a hate crime, also examine violation of Article 14 of the Convention.

## **Case of Milanović v. Serbia, Application number 44614/07, Judgment of December 14, 2010 – inefficient conducting of investigation**

Života Milanović, as an active member of minority religious community Hare Krishna in Serbia, was subjected to a series of threats and physical attacks in the period between 2001 and 2007. Although he regularly reported these crimes to the police stating that he suspected the members of extremist organizations, his attackers remained unknown, and the police, except for several members of the “skinheads” group, mostly interrogated the victim, focusing on his religious affiliation, “unusual appearance” and possibility that the knife wounds were self-inflicted. The police noticed that most of the attacks against the applicant had been reported around Vidovdan, major Orthodox religious holiday. The applicant was not informed about the course of investigation, and was not given an opportunity to personally see and identify potential assailants among certain number of witnesses.

The European Court of Human Rights found unanimously that there had been a violation of Articles 3 and 14 of the Convention, concluding that the state authorities had not adequately investigated or indeed prevented the repeated ill-treatment of the applicant which should have been expected, considering the circumstances. From the court decision:

*The Court considers that, just like in respect of racially motivated attacks, when investigating violent incidents State authorities have the additional duty to take all reasonable steps to unmask any religious motive and to establish whether or not religious hatred or prejudice may have played a role in the events. Admittedly,*

*proving such motivation may be difficult in practice. The respondent State's obligation to investigate possible religious overtones to a violent act is thus an obligation to use best endeavors and is not absolute; the authorities must do what is reasonable in the circumstances of the case. The Court further considers it unacceptable that, being aware that the attacks in question had most probably been motivated by religious hatred, the respondent State's authorities allowed the investigation to last for many years without taking adequate action with a view to identifying or prosecuting the perpetrators.*

With this, the European Court of Human Rights defined the existing problem in processing of hate crimes– failure to conduct all available investigative actions, duration of investigation and refusal to examine the hate motive as special circumstance of importance for committing of the criminal offence.

## Case

### **of Škorijanec v. Croatia, Application no. 25536/March 14, 2017 – who can be a victim of hate crime**

The applicant suffered light bodily injuries when she intervened in a racially motivated attack on her husband by two perpetrators and tried to help him. The attack was undoubtedly racially motivated, which is indicated by the insults and curse words perpetrators used during the attack, directed not only at the applicant, calling her a “Roma bitch”, but also at her husband. The application of the applicant's husband was processed as a hate crime and the perpetrators were convicted. However, when it comes to the applicant, her application was rejected because the prosecutor's office did not find elements of hate crime against her even though it was the same event, since she was not of Roma origin.

In its decision, the Court emphasized importance of the hate motive in these criminal acts stating that: ***Treating racially motivated violence and brutality on an equal footing with cases lacking any racist overtones would be tantamount to turning a blind eye to the specific nature of acts which are particularly destructive of fundamental human rights.*** A failure to make a distinction in the way in which situations which are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (prohibition of discrimination). This judgment of the European Court is extremely important because of the fact that hate crimes are not only those offences where the motive is based on the victim's actual or presumed feature or characteristic, but also those acts of violence based on the victim's actual or presumed association or connection to another person who actually or presumably has a certain status or a protected characteristic. Even though the Croatian legal system prescribes adequate legal mechanisms, state authorities interpreted the term of the victim of hate crime in much narrower sense than the European Court, which led to lack of protection of the applicant who was attacked precisely because she was connected to, that is, married to a member of Roma national minority. The Court established violations of Articles 3 and 14 of the European Convention and awarded the applicant reimbursement of non-pecuniary damage.

## **Case of Identoba and Others v. Georgia, Application 73235/12 – violation of rights to freedom of peaceful assembly and hate crime**

In this case, the applicant is a non-governmental organization from Georgia set up to protect rights of LGBT persons, as well as 14 individuals who participated in a public event organized by the said NGO in March 2012, that is, in a march to mark International Day Against Homophobia. The organization reported the gathering in timely manner (9 days before the scheduled event) and left sufficient time for local authorities to provide adequate protection for the event, given that social climate towards LGBT persons is very unfavorable and that harsh reactions could have been expected. There were around 30 participants at the march, 13 applicants included. The march was interrupted by a larger group of counter-demonstrators, members of two religious groups. They first encircled the marchers and then attacked them, shouting out pejorative and homophobic slogans and causing serious and light physical injuries of the attendants. Those attacked lodged criminal complaints, but the police took only two cases into consideration and two years later the criminal investigations were still pending. The submitted Application included claims of violation of Articles 3, 14, 11 and 10 of the European Convention.

In this case, the Court specifically took into consideration extremely unfavorable position of LGBT population in Georgia, as well as the fact that the event was timely announced and that the local authorities and the police could have anticipated possible consequences, but they failed to take sufficient measures to prevent such consequences, thus violating their obligation to ensure the right to freedom of peaceful assembly. Moreover, despite being aware of the risk for the participants of the event, they failed to provide sufficient number of police officers to secure the gathering. Since the Georgian legislation stipulates that the motive of hate is deemed as a specific aggravating circumstance, the Court concluded that the state authorities were obligated to thoroughly investigate all circumstances of the case, especially the motive for committing the criminal act, which led to violation of Articles 3, 14 and 11 of the Convention. The Court deemed that the state authorities had an obligation to do everything in their power to prevent violence and ensure peaceful public gathering, including issuing public notices calling for tolerance and warning citizens that violations of laws would be punished.

Based on the presented judgments, we can see that the European Court of Human Rights observed obligations of signatory states of the European Convention for the Protection of Human Rights and Fundamental Freedoms in a very wide manner. Thus, Article 3 stipulating prohibition of torture, inhuman or degrading treatment or punishment, obligates member states not only to abstain from violating this right of an individual, but also to actively act, that is, to protect an individual from the treatment by state bodies and private persons that could be interpreted as torture, inhuman or degrading treatment. Furthermore, besides immediate protection, in case of the criminal offence that has already happened, the state is obligated to conduct efficient investigation and do everything in its power to identify perpetrators. In the context of hate crime and in relation to Article 14 of the Convention which stipulates prohibition of discrimination, this means that the signatory state is obligated to particularly pay attention to the hate motive of a criminal offence, which due to protected personal characteristics such as gender, race, skin color, religion, political or other opinion, national or social origin, connection to a national minority, property, birth or other status, may have quite far-reaching consequences not only for an individual, but also for the entire society.

# Relevant practice of the European Court of Human Rights – hate speech

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Unlike hate crimes where the Court was determining violation of Article 14 in relation to Articles 3, 8, 11 or other rights guaranteed by the Convention, in cases where the European Court was determining existence of hate speech, most often asked initial question was whether the signatory state had violated Article 10 of the European Convention. Thus, in most of the cases, applicants were the individuals claiming that certain state had violated their right to freedom of expression<sup>22</sup>.

## Case

### **of Norwood v. Great Britain, Application no. 23131/03 – hate speech towards members of certain religion**

The applicant was a member of extreme right wing organization who displayed a poster with a photograph of the Twin Towers in flame with the words – *Islam out of Britain, Protect the British People* in the window of his ground-floor flat. The poster was removed by the police following a complaint from a member of the public. The applicant was charged as per the Public Order Act, for incitement of racial and religious hatred. In his application, he complained of violation of Article 10 of the Convention, stating that the poster referred to Islamic extremism was not insulting, and that the Great Britain violated his right to freedom of expression. In his argument, he stated that free speech included not only the inoffensive but also the irritating, contentious, eccentric, heretical, unwelcome and provocative speech, provided that it does not tend to provoke violence and that criticism of a religion is not to be equated with an attack upon its followers.

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22 Article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*: “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

In this case, the Court found that there was no violation of the right to freedom of expression, referring to Article 17 of the Convention which stipulates prohibition of abuse of rights: *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.* General purpose of this article is to prevent individuals or groups with totalitarian aims from exploiting the principles stipulated by the Convention for their own interest. In this particular case, such a general statement linking the religious group as a whole with grave act of terrorism is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance and non-discrimination, therefore the application was declared inadmissible.

### **Case of Jersild v. Denmark, Application no. 15890/89 – documentary showing hate speech**

The applicant is a journalist who created a documentary film about members of extremist group the “Green Jackets” who made abusive and derogatory remarks in the interview about immigrants and ethnic groups in Denmark. The interviewed members declared themselves as racists and stated their opinion that only the Danish should live in Denmark and that the institution of slavery should be restored, but they also talked about the criminal activities they started being involved in even as juveniles. The author was charged with and convicted of aiding and abetting the three youths in expressing their racist opinions. In his defense, he stated that he had no intention of supporting these opinions, but, on the contrary, he wanted to provide a realistic picture of a social problem, stating that the public had an interest in being informed of such socially dangerous and bad attitudes, no matter how unpleasant.

In its deliberation whether there was violation of Article 10 of the Convention, the Court made a clear distinction between the words of the interviewed youths who expressed openly racist opinions and the applicant who wanted to show, analyze and explain this group that posed a specific social problem. In its decision, the Court states that *freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. Whilst the press must not overstep the bounds set, inter alia, in the interest of “the protection of the reputation or rights of others”, it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog” (ibid.). Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media.* The assessment of the Court was that in this particular case there was a violation of Article 10 of the Convention, since the punishment of a journalist for assisting in dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.

## Case of *Vejdeland and Others v. Sweden*, Application no.1813/07

The applicants were punished with suspended sentence and fines after they had gone to a secondary school and distributed around 100 leaflets containing numerous homophobic statements. Among other things, the leaflets connected homosexuals with pedophiles and “sexually deviant” people and accused them of spreading HIV. Their defense was based on their claim that they had not intended to express contempt for homosexuals but to start a debate about the lack of objectivity in Swedish educational system. Their application claimed violation of Article 10 of the Convention.

In this case, the Court applied so-called “three-part test” to determine whether interference with their freedom of speech was prescribed by law, whether it pursued one or more of the legitimate aims set out in Article 10, paragraph 2 of the Convention, and finally, whether it was necessary in a democratic society. After it had determined that Swedish law acknowledged such interference, the Court stated *that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favor combating racist speech in the face of freedom of expression exercised in an irresponsible manner.* The Court particularly took in consideration the fact that the leaflets were distributed in a school, to young people whose critical thinking had not fully developed yet. Since the interference with their freedom of speech was necessary in a democratic society for the protection of rights of others, the Court decided that in this particular case Sweden did not violate Article 10 of the Convention.

# Conclusion

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Having in mind the importance hate crime and hate speech have in terms of respect of fundamental human rights in a society and the attitude of the international community towards these social phenomena, with special consideration of their place in European *Acquis*, as well as long-term practice of the Lawyers' Committee for Human Rights – YUCOM in representing the hate crime victims, and everything mentioned in this publication, it can be concluded that it is necessary to focus domestic legislative framework towards better protection of victims. Also, it is necessary to concretize the existing legal norms, primarily Article 54a of the Criminal Code of the Republic of Serbia, in order for it to finally become applicable and fulfill its purpose in the legal system besides its mere existence in the legal text.

Current legislative framework in Serbia provides very poor protection for the victims of criminal acts. Application of the principle of opportunity is not excluded when it comes to hate crimes regardless of their danger to the society, and the court practice in this field is very limited, almost nonexistent. Having in mind that all these issues are thoroughly regulated by the Action Plan for Chapter 23, it is necessary to implement this plan meticulously and in detail, not only as a formal condition for Serbia's accession to the European Union, but also as measures of vital importance for improving the position of the citizens of Serbia.

Besides amendments to the existing legislative framework in terms of more precise definition of procedural aspects of hate crime and broadening the set of rights related to victims (who are in the current legal text still referred to as – “the injured party”, without existing legal definition of a victim), special attention should be given to training of assigned prosecutors, deputy prosecutors, as well as judges and police officers in identifying and proving hate crimes.

In the practice of victim representation, predominant general impression is that there is a lack of understanding of the term of hate crime and its significance not only for the victim itself, but also for the entire vulnerable group the victim belongs to or was targeted because of assumed affiliation. Often, victims would suffer permanent psychological consequences after the endured hate crime, and in most of the cases, perpetrators remained unknown. The victim would not even get moral satisfaction in terms of criminal conviction or material satisfaction through civil lawsuit since there was no one to file such lawsuit against. Lack of legal remedy and inefficient legal remedy, inefficient conducting of investigation, failure to examine motive of committed criminal act, postponement of criminal prosecution, duration of investigation are just some of the problems the victims face. It should be also noted that there is no efficient system for registering reported hate crimes, so at the moment of writing of this publication, there is no official data on the number of hate crimes reported to the state authorities. Furthermore, judicial institutions do not keep special registry of hate speech cases either.

Therefore, besides necessary amendments to the law, it is of key importance to implement systematic social campaign that would include all layers of society and all its factors with the ultimate objective of raising awareness of harmfulness and consequences of hate crime and hate speech. Special focus should be placed on the fact

that these acts do not endanger just an individual or a minority group, but the society as a whole.

Rich practice of independent institutions in Serbia – the Commissioner for the Protection of Equality, the Ombudsman, as well as the Press Council as self-regulatory body monitoring the observance of the journalists' Code of Ethics shows that the citizens have much more trust in these institutions than in judiciary, where they often face manifold victimizations and remain without answers. Administrative offices of these institutions could be of great assistance to the state bodies in such campaign. Law as an ethical minimum prescribed by the Constitution and the law provides sanctions which are necessary in fight against criminality, but fails to provide much needed prevention of these acts. In the spirit of the Constitution and ratified international agreements, as well as Serbian policy which is unequivocally directed towards the European Union, legal sanction is not a sufficient guarantee of equality and non-discrimination in society, especially having in mind that very often in commenting on these acts we reach for the term "political will". Therefore, the fight against hate crime and hate speech does not belong only to legal professionals, lawyers, judges and prosecutors. It is fought in the sectors of education, healthcare, media, and institutions of social and family protection, at workplace, in every corner of the society. In this fight, the right provides us only with the basic framework for the protection of individuals and minority groups.