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INCITEMENT OF NATIONAL, RACIAL AND RELIGIOUS HATE AND INTOLERANCE IN THE LIGHT OF THE RIGHT TO FREEDOM OF SPEECH

Abstract: This article examines the criminal offence of instigating national, racial and religious hatred and intolerance as defined in Art. 317 of the Criminal Code of the Republic of Serbia. The analysis will focus on the guarantees regarding freedom of speech, considering the fact that today, in comparative legal frameworks, criminal prosecution is used as one of the means to suppress hate speech. Admittedly, there are situations when it is necessary to prosecute those who speak of members of different national, racial and religious groups in derogatory or hostile terms. However, we must remember that limiting freedom of expression is not acceptable in a society based on the rule of law and democratic culture. The paper emphasizes the essential conclusions drawn from the practice of the European Court of Human Rights regarding the sanctioning of hate speech. Using normative-logical and comparative-legal methods, the aim of this paper is to examine to what extent the national positive legal solutions comply with internationally established standards.

Keywords: criminal offence, hate speech, freedom of expression

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1. Introduction

Today we are witnessing an ever-increasing array of possibilities for expressing different ideas, beliefs and life philosophies. With the expansion of social networks and the general availability of content creation and marketing tools, nearly anyone can talk about what they think and feel to anyone who is interested. Reporting local events and individual conflicts, which would otherwise likely go unnoticed, has become easier than ever, which increasse the risk of misinterpretation and resulting confrontation. On the other hand, we live in an era of glorification of human rights and freedoms, which insists that everyone has the right to personal dignity and no one should be denied rights and freedoms due to their personal characteristics. A logical question follows: how then to prevent the cacophony of voices, where the loudest could call for disrespect and discrimination against those they dislike or hold prejudice against? Freedom of speech should not suffer either, because the rule of law, as a crucial legacy of Western civilization, cannot rest on censorship and extensive bans.

A growing number of international universal and regional legislation demands that nations implement increasingly complex projects and tasks. related to guaranteeing human rights and freedoms, i.e. prohibiting discrimination. Some goverment agencies therefore have introduced criminal offenses that prohibit instigating discrimination, hatred and conflicts between members of different groups. At first glance, this approach seems like an effective and legitimate solution. However, if we scratch the surface, there are many challenges involved. We might ask ourselves, is it possible to have a set of objective criteria upon which to judge what and how it is permissible to speak? In other words, is criminal law is an adequate tool for suppressing hate speech and encouraging tolerance?

The criminal offense of instigating national, racial and religious hatred and intolerance from Art. 317 of the Criminal Code of the RS (2019, abbreviated: CC) belongs to the group of criminal offenses against the constitutional order and security of the Republic of Serbia. Indisputably, however, the essence of this criminal offense is the prejudice that motivate the perpetrators, which indirectly endangers personal rights and freedoms.

In order to understand the essence of this criminal offense, it is necessary to explain the concepts of hatred and intolerance. In the related literature, hatred is described as one of the most intense negative emotions, often intertwined with feelings such as anger, fury, contempt and disgust. It arises in situations where we judge the actions of others as dishonest, immoral and malicious (Fischer, Halperin, Canetti and Jasini, 2018, p. 310). Sternberg explains that hate is not actually one feeling; it contains several components that can manifest differently in different situations. Hate, therefore, can be expressed through the desire to distance oneself, or as fear and anger that cause the need for defense, and through the determination to continuously view and evaluate the hated individuals as inferior (Sternberg, 2003). All hatred is actually counter-hatred or a reaction to real or imaginary previous hatred, which implies that the one who hates perceives himself as a victim of the existence of the hated individual and believes that everything would be fine if the hated individual did not exist (Delić, 2015, p. 8). Intolerance has a lower negative potential than hatred (Stojanović, 2006, p. 689). Contempt, on the other hand, should not be equated with hatred and intolerance because it implies a negative attitude that involves ignoring, but not taking any actions (Stojanović, 2006, p. 690). In the Serbian positive criminal legislation, with amendments to the Criminal Code from 2012, a special mandatory aggravating circumstance was introduced that is assessed when determining the punishment: if the offence was committed out of hatred due to belonging to a certain race, religion, nationality, ethnicity, gender, sexual orientation or gender identity of another person (Art. 54a). This acknowledges the fact that certain criminal offenses are motivated by hatred based on prejudice. Unlike this solution, which introduces hate crimes into national law, the aim of instigating national, racial and religious hatred and intolerance is not to punish because a criminal offense, such as causing serious bodily injury, was committed against a member of a minority group due to hatred of the group. The purpose of this criminal offense (Art. 317 CC) is to prohibit any actions done with the intention to initiate or encourage negative feelings between members of different national, religious and racial groups. Therefore, in the case of a hate crime, the perpetrator manifests his or her own hatred towards a group of persons, while in the case of causing

national, racial and religious hatred and intolerance, he or she tries to incite conflicts and damage more or less harmonious relations. Such illegal behavior undermines the very foundations of the social and legal order, which, according to the RS Constitution (2006), is based on the rule of law, protection of national minorities, inalienability of human and minority rights, preservation of human dignity and prohibition of discrimination.

The concepts of race and religion do not require additional explanations. Nationality, however, has a more complex definition. Thus, the Western European approach equates nationality with citizenship, defining the nation as a set of individuals united under a common law and a common assembly, while the Central European approach does not consider the state and the nation to be the same, but finds that the nation is a community of language, culture and history, which does not necessarily coincide with the framework of the state (Lukić, Košutić and Mitrović, 1999, p. 108).

2. International Documents, Criminal Offenses of Discrimination and Hate Speech

Indisputably, international legal documents stipulate that nations are obliged to suppress hatred based on national, racial, or religious identity and other similar grounds, and prohibit behavior that inflames hatred and intolerance. Article 4 of the UN International Convention on the Elimination of All Forms of Racial Discrimination (1965) stipulates that states condemn all propaganda and all organizations that are guided by ideas or theories based on the superiority of one race or group of persons of a certain skin color or of a certain ethnic origin over another. States are obliged to punish as a criminal offense any instance of dissemination of ideas based on superiority or racial hatred, instigating racial discrimination, and all acts of violence or incitement to violence on discriminatory grounds. States must also suppress racial discrimination as any instance of discriminating or limiting freedoms of individuals or prioritizing the rights and freedoms of one group based on racial identity and background (Article 1, Item 1).

The Recommendation No. R (97) 20 of the Committee of Ministers to member states on "hate speech" (1997) adopted by the Council of Europe is particularly significant in this respect. The adoption was motivated by the desire to suppress all forms of expression which incite racial hatred, xenophobia, anti-Semitism and all forms of intolerance, since they undermine democratic security, cultural cohesion and pluralism. Principle no. 2 stipulates 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 for human dignity and the protection of the reputation or the rights of others. To this end, governments of member states should examine ways and means to review the existing legal framework in order to ensure that it applies in an adequate manner to the various new media and communications services and networks.

General Policy Recommendation no. 7 of the European Commission against Racism and Intolerance on national legislation to combat racism and racial discrimination, adopted on December 13, 2002, is another important document. The recommendation contains an overview of the key components on which the policy of combating racism and racial discrimination should be based. Although the title of the recommendation mentions racism, the text specifies that the proposed measures do not only refer to racism and racial discrimination, but also to any belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons. The state law should penalise the following acts when committed intentionally public incitement to violence, hatred or discrimination, public insults and defamation or threats against a person or a group of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin, when committed intentionally. The law should provide for effective, proportionate and dissuasive sanctions for the abovementioned offences, as well as for ancillary or alternative sanctions.

The ECRI Recommendation also emphasizes that the exercise of freedom of expression, may only be restricted with a view of combating and suppression of hate speech. Principle no. 3 stipulates that states should ensure that interference with freedom of expression is restricted, and that the restrictions are applied in a lawful and non-arbitrary manner and on the basis of objective criteria. Also, in the spirit of the rule of law, in the case of limiting or preventing the freedom of speech on certain topics, independent judicial control must be enabled. It is extremely important to achieve a balance between guaranteeing freedom of expression and respecting human dignity, i.e., protecting the reputation or rights of others. Principle no. 4 foresees that the national legislation and practice of the member states should provide such a context in which the courts will really be able to assess whether the manifested cases of alleged hate speech are so offensive to individuals or groups that they do not deserve the scope of protection otherwise guaranteed by the relevant international documents. Principle no. 2 stipulates that an order to perform community service should be added to the list of possible criminal sanctions. The explanation of the recommendation states that practice indicates that the imposition of a prison sentence or a fine on a person convicted of hate speech in many cases does not actually result in a change of attitudes and ideas. On the other hand, community work can be adapted to the specific offense, and can include work in the immediate interest of a group of persons whose rights the offender threatened or violated.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950, abbreviated: ECHR) is an essential document both for guaranteeing freedom of expression and protecting the rights and freedoms of citizens. Art. 10 of the ECHR stipulates that everyone has the right to freedom of expression, which includes freedom of opinion and freedom to receive and transmit information and ideas, without interference by public authorities. On the other hand, Art. 10 establishes that freedom of expression simultaneously includes corresponding obligations and responsibilities, and that it can be subjected to formal conditions, restrictions or sanctions provided by law and which are necessary in a democratic society in the interest of national security, territorial integrity or public safety, in order to prevent

disorder or crimes, protecting health and morals, reputation or rights of others, preventing the dissemination of confidential information or in the interest of preserving the authority and impartiality of the judiciary.

Pursuant to Art. 14 of the ECHR, citizens enjoy all the rights without discrimination on any basis, such as: gender, race, skin color, language, religion, political or other opinion, national or social origin, connection with a national minority, property status, birth or other status. But Article 17 of the ECHR also provides for the prohibition of the abuse of these rights, so the text of the ECHR should be interpreted to imply the right of any state, group or person to engage in actions aimed at nullifying any of the rights and freedoms or restricting them to a greater extent than stipulated by the ECHR.

3. Criminal Offense of Instigating National, Racial and Religious Hatred in Positive Law of the Republic of Serbia

The basic form of the criminal offense is instigating national, racial and religious hatred and intolerance from Art. 317 of the CC is committed by the person who causes or incites national, racial or religious hatred or intolerance among peoples or ethnic communities in Serbia. Thus type of offense is punishable by imprisonment from six months to five years. It should be noted that the basis for criminalizing this act is actually given in the Constitution of the RS (2022). Article 49 of the Constitution stipulates that it is forbidden and punishable both to cause and to incite racial, national, religious or other inequality, hatred and intolerance. The Act on Prohibition of Discrimination of the RS (2021) prohibits hate speech, i.e., expressing ideas, information and opinions that incite discrimination, hatred or violence against a person or group of persons because of their personal characteristics (Art. 11).

Therefore, the action of the criminal offense consists either in provoking or inciting hatred and intolerance on a national, racial or religious basis. At the same time, provoking implies an action that initially creates negative feelings that were previously absent, while inciting includes encouraging and strengthening already existing negative feelings. The action is determined alternatively, which means that the act will exist either to create discord among groups that were otherwise not prone

to it, or to act in order to incite already existing tensions. It is important that hatred and intolerance are created or fueled among peoples or ethnic communities living in Serbia. With regard to ethnic communities in Serbia, the Law on the Protection of the Rights and Freedoms of National Minorities (2018) should be consulted. According to Art. 2 of this law, a national minority is any group of citizens of the Republic of Serbia that is sufficiently representative in terms of numbers, and belongs to one of the population groups that have a long-term and strong relationship with the territory of the Republic of Serbia and possess characteristics such as language, culture, national or ethnic affiliation, origin or religion by which they differ from the majority of the population and whose members are distinguished by their concern to maintain their common identity, including culture, tradition, language or religion. The same law specifies that all groups of citizens who are called or defined as peoples, national and ethnic communities, national and ethnic groups, and meet the requirements regarding representativeness and specific common characteristics are considered national minorities (Art. 2 para. 2).

The basic form of this criminal offense can be committed by any person, regardless of the minority or majority group affiliation, social position, etc. The act is completed by taking one of the alternatively defined actions, since it is not necessary that hatred and intolerance are actually caused or additionally ignited. It is enough that the actions are capable of causing such feelings among members of the people and ethnic communities in Serbia. Then the question arises: how to assess the suitability of an action to cause or incite hatred and intolerance? It seems that sometimes pejorative expressions about individual members of national, racial and religious groups are considered sufficient for the existence of a criminal offense. Although insulting a person on national, racial and religious grounds is without a doubt unacceptable, we should not lose sight of the fact that there are other incriminations that could include various inappropriate expressions such as verbal abude or endangerment of safety, if the object of abuse fears for their personal safety. Therefore, one should be careful and look at a given event in its overall context so that certain personal conflicts are not given a wider importance than the one they actually have. We should bear in mind that any action containing elements of provocation should not be equat-

ed with the criminal offense of inciting national, racial and religious hatred and intolerance. Criminal law is used as the last available means for the protection of the most important social values, as well as that criminal acts are the most dangerous possible offenses in the penal system. Thus, the Ministry of Internal Affairs of Serbia (2021) informed the public that it would file a criminal complaint against a North Macedonia citizen because while driving in a car, in the territory of Nis, he lowered the window from the passenger seat and showed the symbol of the double-headed eagle with his hands, thereby "alluding to nationalist symbols". The question is whether the described event contains the elements of a criminal offense which is punishable by the sentence of up to five years. It is clear that this event is fundamentally different from the one for which, for example, the Police Department in Sombor filed a criminal complaint for inciting national, racial and religious hatred and intolerance against two young men who were suspected of writing graffiti and messages on two occasions of hatred in the Jewish Municipality and Roma houses in Sombor (MUP, 2011). The situation becomes significantly more complex when this offence is committed via social networks, which is becoming a widespread problem. Here, too, the law should take care as to whether the action can really provoke and incite hatred and intolerance. The limited or unlimited availability of the post, the status, influence and popularity of the poster, the immediate topic in question, should be taken into account. as well as the current social circumstances in which certain content is marketed.

As for the form of guilt, the offense implies direct intent and premeditation. We are of the opinion that eventual intent is also sufficient, i.e., that the offense exists even when the perpetrator is aware that their actions may contribute to disharmonious relations, and they still agree to it. Indirect motives, which motivate the perpetrator, and the reasons for which they harbor negative feelings towards members of certain groups are not of particular importance.

A more serious form of offense includes the offense committed by coercion, abuse, endangerment of safety, desecration of national, ethnic or religious symbols, damage to other people's property, and desecration of monuments, memorials or graves. In that case, the perpetrator will be punished with imprisonment from one to eight years. The concepts

of coercion, abuse and endangerment of safety should be understood as defined by the CC, which also applies to other ways of committing a criminal offense. Jurisprudence and life experience provide sufficiently clear criteria for recognizing exposure to the desecration of certain symbols, just as it is clear what damage to property and desecration of objects that are kept with special piety entails. In contrast to the basic form of the criminal offense, which primarily involves verbal or symbolic expression, this qualified form should entail fewer problems in practical implementation.

The most serious form of offense exists when the basic or qualified form of the offense is committed through abuse of position or authority, i.e., if the offense resulted in disorder, violence or other serious consequences for the life of citizens, national minorities or ethnic groups living in Serbia. The perpetrator will be punished with imprisonment from one to eight years, or from two to up to ten years.

4. European Court of Human Rights Practices and Hate Speech

The European Court of Human Rights (abbreviated: ECtHR) has produced a very rich practice in the matter of sanctioning hate speech while respecting freedom of expression, and an insight into cases from the practice of this institution can be obtained by accessing the HUDOC database (https://hudoc.echr.coe.int). As a rule, the ECtHR does not at all go into issues related to the definition of the nature of criminal acts that directly or indirectly incriminate hate speech, given that incrimination is within the sovereign competence of national authorities. It deals with the issue of the proportional relationship between the protection of legitimate interests which could be threatened by hate speech, on the one hand, and the guarantee of freedom of expression, on the other hand. According to the provisions of the ECHR, it is indisputable that freedom of expression must be respected just as it is indisputable that it can be limited if the basis for the restriction is precisely prescribed by law and if it serves to protect certain very important interests. Freedom of expression is not limited only to expressing opinions on issues on which there is a general consensus but includes expressing views on

disturbing and even shocking topics which may cause public anxiety (Gunduz v. Turkey, application no. 35071/97, decision of June 14, 2004, §37). On the other hand, there must be an awareness that freedom of expression is not unlimited and that it cannot be used in a way that calls into question the realization of general interests and respect for the rights of other persons. In doing so, the ECtHR does not evaluate how a specific state will determine the reasons that make it legitimate to restrict freedom of speech, but also how it assesses whether the state in limiting freedoms and rights has gone too far by unjustifiably denying or narrowing rights and freedoms (Gunduz v. Turkey, §38-41). Thus, in the case of Gunduz v. Turkey, where the applicant was sentenced to two years in prison – because, as a representative of a specific Islamic religious group, he expressed views opposed to the principles of democratic culture, the ECtHR concluded that the state ignored the obligation to respect freedom of expression. Gunduz debated with other interlocutors in a television show, which lasted for four hours, concluding that the Turkish state system is basically aimed at sacrilege and that anyone who respects democratic values is an infidel. The ECtHR established that the topic of the show was aimed at discussing and presenting conflicting ideas, and that the applicant's presentation could not cause particularly significant consequences for the state and social order, nor for the rights and freedoms of citizens, just as it was not aimed at gross insult to any individualized group. The fact that the speaker pointed out that he hopes that the time will come when Turkey will not be a secular and democratic state does not imply a speech aimed at causing disorder, because at no point did he propagate the violent overthrow of the existing order. As it was a television content, designed as a debate between representatives of different political philosophies, the imposition of a sentence of two years, due to alleged hate speech, represents a violation of guaranteed freedoms.

Support for similar postulates can also be found in the decision made in the case of Jersild v. Denmark (application no. 15890/89, decision of September 23, 1994), where it was ruled that the state acted contrary to the guarantees of freedom of expression by declaring a journalist guilty of a criminal offense containing hate speech and that because he interviewed young members of a gang gathered around racist

ideas and then prepared an item for a television show. In the multi-hour television program, the young men, among other things, expressed their opinion about migrants, as the root cause of various social problems in Denmark. They used very rude and insulting expressions. The show was dedicated to the current phenomenon of xenophobia. The ECtHR took the position that the Danish court had justified the conviction of the members of the gang for hate speech, but that in the case of the journalist, the criminal conviction was directly opposed to the freedom of expression promulgated in international documents. The media should deal with different topics and attitudes, and in this case the journalist did not in any way support the racist attitudes that were expressed, but, in accordance with his call, participated in informing the audience (Jersild v. Denmark, §26 -31). Exposure of different opinions, including prejudices, was necessary in order to get acquainted with social problems such as criminal behavior of young people and xenophobia, so that the journalist actually contributed to the views of members of certain groups coming to light, and even to exposing their senselessness and groundlessness.

When racist and xenophobic ideas are expressed in a way that cannot be related to an appropriate debate and drawing attention to pressing issues, the ECtHR determines that such expression exceeds the scope provided by Art. 10 ECHR. Thus, in the case of Kilin v. Russia (application no. 10271/12, decision of May 11, 2021), the ECtHR found that there was no violation of the right to freedom of speech in the case where the applicant was sentenced to 18 months in prison for posting on a social network a video in which he speaks pejoratively about Azerbaijanis and the alleged need for the Russians to oppose them. Although the applicant claimed, among other things, that the recording was intended for an artistic presentation of the topic and for a limited number of viewers on the social network, the court determined that such expression could primarily serve to cause hatred and conflict between members of different nations, and that as such requires penalization. In addition, a conditional sentence of 18 months in prison does not represent an overly severe sanction for a crime of such a level of social danger.

The ECtHR also emphasizes that, regarding the violation of Art. 10 of the ECHR, one should especially consider the context in which certain content is placed, i.e. the overall social circumstances in which

there are or are not tensions between members of different groups (Arslan v. Turkey, application no. 23462/94, decision of July 8, 1999, §44). If tensions already exist in the current circumstances within the specific national framework, then the national authorities can value and restrict freedom of expression more rigidly in order to protect other important, social values.

However, we should note that the ECHR may not be completely consistent in its decisions in some situations. In the case of Arslan v. Turkey, the ECtHR stated that although the literary works of the applicant highlighted certain dominantly negative ideas about a nation and its culture, this, in itself, may not be of particular importance in light of the complex political circumstances in Turkey, and that expression via books as a rule fails to reach large audiences, compared to various forms of expression via mass media (§48). In line with this decision, if the ECHR determines that expressing xenophobic ideas via a social network profile not owned by a popular figure, as in the case of Kilin v. Russia, can constitute an attack on harmonious inter-ethnic relations, it seems that that institution it may not have adequate criteria for evaluating situations in which freedom of expression is violated. It should be emphasized that in the Terentiev v. Russia case (application no. 10692/09, decision of August 28, 2018) the ECtHR points out that the content published by an individual on a blog unknown to the general public with a limited number of users does not have the same weight as publications on popular websites, and that states should only react to more serious cases of incitement to hatred.

5. Concluding Remarks

Serbia respects the obligations laid down in international documents regarding the prevention of hate speech. In this respect, positive criminal legislation includes the criminal offense of inciting national, racial and religious hatred and intolerance. The incrimination itself is adequately designed. However, in practice, one should not start from the assumption that any form of inappropriate and prejudice-based expression is automatically sufficient to cause and incite hatred between peoples and ethnic communities in Serbia. Regarding the above, it should

be borne in mind that the number of convictions for criminal offenses arising from Art. 317 of the Criminal Code is significantly lower than the number of filed criminal reports related to the given incrimination. According to the data of the Republic Institute of Statistics of Serbia, in 2020 criminal charges were filed against 28 persons, while only eight persons were found guilty of inciting national, racial and religious hatred and intolerance. This could mean that the courts carefully assess which actions are likely to cause or inflame hatred and intolerance. At the same time, there are no data to show whether alternative sanctions are applied, although international standards strongly support their application. Alternative sanctions would be helpful in developing a more tolerant conduct among offenders. We should not lose sight of the fact that discriminatory behavior can be punished by applying means from the other branches of positive law.

Finally, it is especially important to keep in mind the limited applicability and effectiveness of criminal law in suppressing discriminatory behavior and preventing conflicts among different groups of citizens. Criminal law is not a suitable tool for spreading tolerance, mutual understanding, and respect for diversity in the broadest sense. These topics require a strategic, complex and carefully designed approach, as well as the long-term engagement of many social institutions, including the education system, the media and federal and local governments. Criminal law should used only in case of drastic endangerment and violation of crucial social values, i.e., when criminal law remains the only available weapon in the arsenal.

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