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The Position of Victims in the Republic of Serbia

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RIGHTS OF VICTIMS OF HATE SPEECH AND CRIME — EUROPEAN STANDARDS

Abstract: The rights of victims of hate speech and hate crimes are part of the rights in the system of support for victims and witnesses of criminal acts according to domestic legislation and international and European standards. Directive 2012/29/EU foresees an obligation for member states (and candidates) to take measures to establish a protection system. Effective protection implies not only a normative framework but also real protection. The specifics of hate speech and hate crimes also conditioned the adoption of Directive CM/Rec (2022) 16, which foresees measures to combat hate speech. Some expressions of hate speech require a criminal law response, including obligations of a preventive nature on the part of public authorities. That is why encouraging individuals and groups to report hate speech and hate crimes and providing protection is part of an evolving legal culture. Victims should also be supported by the media, which in modern society often has a decisive role, through compliance with legal regulations and reporting in accordance with the rules of the profession. Social networks are an indispensable element in the policy of preventing and fighting against hate speech and hate crimes, and their role is becoming increasingly important.

Keywords: support for victims of hate speech and crimes, EU regulation, protection system, role of media and social networks.

INITIAL CONSIDERATION

Victims of criminal acts in the Republic of Serbia are still, to the greatest extent, excluded in the full sense from the proceedings conducted before the court between the authorized prosecutor and the suspect for the commission of the criminal act. The time of criminal proceedings where the victims of the crime were witnesses, and their role was out of the main focus is behind us, but the issue of the rights and protection of the victims' rights is still not adequately recognized both in the domestic and in the European criminal justice area. Criminal proceedings are mainly aimed at protecting the rights of the defendant in criminal proceedings and respecting the defendant's human rights. It is one of the indicators of the right to freedom and the result of all democratic changes that are inevitable. But what is even more important to that end is to strike a balance between the rights of the victims and the accused, without favoring anyone.

Although the development of victims' rights began about 80 years ago in our legal space, we can state that only in the last few decades have we talked about the rights of victims and the state's obligation towards victims. These rights include the right to protection, the right to participate in criminal proceedings, the right to legal aid and others. Assistance and support to victims is the obligation of the state to ensure that all these rights can be easily and efficiently realized.

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With Serbia's accession to European integration, certain obligations from international and European documents are accepted, including the creation of a support system for victims of all crimes. This could particularly apply to victims of hate speech crimes. In Serbia, support for victims is organized in two ways, through the institutions of the system, but also extra-institutionally, but the needs of victims, especially victims of hate speech and hate crimes, expect a protection system that would unite all of that. The consequences of hate speech can often be fatal, so a timely reaction is the only response to this crime. The role of public authorities and the non-governmental sector in protecting the rights of victims is indisputable. However, without precisely established procedures for certain forms of spreading hate speech, which concern social networks, there will be a lack of effectiveness in protecting the victims' right to protection from this form of discrimination. That is why determining the rules of all participants in the proceedings, as well as judicial protection at the end of the protection procedure, is a way to reach a fair solution for everyone.

Hate speech is a potentially dangerous social phenomenon. The usual way of expression and the general language style can also lead to changes in the behavior pattern. Some authors warn that hate speech creates an atmosphere in which violence and hatred become normal occurrences. In this way, moral dilemmas that would otherwise represent a block for violence are destroyed, and the moral sensibility of the public is reduced. But, on the other hand, it is potentially an equally dangerous (unjustified) encroachment on freedom of speech. Therefore, it is a matter of constantly searching for a balance between freedom of speech on the one hand, and individual rights with the requirement to preserve the integrity of the person to the fullest extent. We should not be mistaken that the criminalization of hate speech could lead to a significant increase in the number of criminal offenses for this offense. Criminal law is the *ultima ratio societatis* and there are other mechanisms that in most cases can represent an appropriate mechanism for protecting society and the rights of victims. This is precisely why the criminalization of hate speech and hate crimes does not only have a symbolic meaning, but rather points us to the values of a modern democratic society. Such values, which are in balance, must not be threatened, but must have the full support of everyone in society.

But let's start in order!

INSTRUMENTS FOR THE PROTECTION OF VICTIMS' RIGHTS IN GENERAL

In the catalog of instruments on victims' rights, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power dated November 29, 1985 stands out first.¹ This document has two parts. The first defines the issues of access to justice, restitution, compensation and assistance to the victim. The second part defines the concept of victim, as well as the rights of victims of all criminal acts of abuse of power, even if it is not incriminated as a criminal act. The declaration is abbreviated *Magna Carta for Victims*.

If we were to compare the first part of the Declaration with positive legislation, we could state that most of these rights already exist. We have similar documents at the UN level included in the legislation in the Republic of Serbia, starting with the UN Convention on the Rights of the Child, Conventions dedicated to anti-discriminatory measures, the fight against terrorism, and the like.

¹ <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse>

In parallel with the Declaration from 1985 and other UN documents, work was also done in the European framework, adopting documents of importance for the rights of victims. The Council of Europe adopted the first general document on the rights of victims through Recommendation No. R (85) 11 on the position of the victim in criminal proceedings.² These Recommendations emphasize the need to protect the victim and the victim's privacy, the obligation to provide information about the course of the procedure, and more.

When it comes to compensatory expectations of the victim, the first document was Resolution (77) 27 on compensation for victims of criminal offenses from 1977.³ The European Convention on Compensation for Victims of Violent Crimes from 1983 is a significant normative document, which establishes the state's obligations to compensate the victim.⁴

The beginning of the 21st century is marked by the activities of the European Union in the development of victims' rights, as well as the creation of standards for their protection. Adoption of Directives is the process by which EU member states and candidate countries undertake to include them in their legislation. In the field of protection of victims' rights, the first document in the EU was the Council's Framework Decision 2001/220/PUP on the position of victims in criminal proceedings.⁵ A framework decision, although it was aimed at protecting victims of cross-border crimes, and then indirectly at the rights of victims within national frameworks. Although with good intentions, this Framework Decision did not have a major impact in the member countries, because its provisions are not directly applicable. This influenced the adoption of Directive 2012/29/EU in the European Union, which replaced the original Framework Decision.⁶ According to its content, the Directive marks the broadest legal document in the area of protection of victims' rights and has led to certain changes, which marked a good basis for improving the rights and protection of victims in general. However, the fact is that there is still a lack of harmonization in the realization of victims' rights. Progress in the field of legislation is not precise enough to be able to talk about special progress in practical application..⁷

Based on that, a decision was made to approach the revision of the Directive from 2012, on the basis of which Recommendation Rec (2023) 2 on rights, services and support for victims of criminal acts was adopted.⁸

Such a short summary of the protection of victims' rights cannot be completed without two additional notes: the first relates to the organized provision of support to victims, and experience in the Republic of Serbia. The provision of support to victims in exercising their rights is implemented even before the adoption of this regulation on victims' rights. The start-up of victim support services had several problems at the very beginning. There were no professional and trained personnel for that. Everything happened without established standards,

² <https://rm.coe.int/16804dcca>

³ Resolution (77) 27 on the compensation of victims of crime (Adopted by the Committee of Ministers on 28 September 1977 - <https://rm.coe.int/16804f3e59>)

⁴ European Convention on the Compensation of Victims of Violent Crimes, Eur. T. S. No. 116, 1983.

⁵ <https://rm.coe.int/cdpc-2021-1-proposal-for-an-updated-coe-recommendation-on-victim-right/1680a17d66>

⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029>

⁷ https://commission.europa.eu/system/files/2022-06/swd_2022_179_evaluation_rep_en.pdf

⁸ <https://rm.coe.int/cm-rec-2023-2e-eng-recommendation-trafficking/1680ab4922>

procedures, and there were no educational contents that would provide basic knowledge to those who work with victims of crimes.

In the meantime, special services have been created within the social protection services, courts and other bodies, which help victims in the recovery process. Also, special support societies for women victims of violence, children and others are being created and starting to work. Various models have been created, they exist at the level of civil society organizations, but also at the level of state bodies, and now it is necessary to combine their activities into a system for the protection of victims' rights.

The specificity of the procedure of providing assistance to victims has so far been reflected to the greatest extent in the work with victims of criminal acts committed by close persons. The rights of victims from crimes classified as domestic violence, or crimes against sexual freedom, have been established in most European countries. However, the development of technique and technology has led to the appearance of new criminal acts, where hate speech and hate crime appear as a cause or as a consequence. Supporting these victims requires a completely different approach compared to the already developed mechanisms. But let's start in order!

VICTIMS OF HATE SPEECH AND HATE CRIMES

We can draw a parallel between hate speech and hate crimes. Namely, hate speech implies public expression, i.e. creation of hatred towards a group or an individual due to some of its determinations for the purpose of creating intolerance, discord, discrimination and violence and/or inciting already existing hatred with the fact that it develops, strengthens and deepens through public speech. If the issue of hate speech is not addressed, it can lead to violence and conflict. In this sense, hate speech is an extreme form of intolerance that contributes to hate crime.

In this sense, we can also interpret the issue of protecting the victims' right to protection, whenever any of their rights to respect for private and family life (Article 8 ECHR), the right to freedom of expression (Article 10 ECHR), the right to non-discrimination are violated or jeopardized. with regard to the rights protected by the Convention (Article 14 ECHR).⁹

Given that hate speech is a multi-dimensional phenomenon that can spread quickly on the Internet both when the user is offline and when the user is online, any suspicion of hate speech should be reacted to immediately. The spread of hate speech, incitement to violence and the spread of fake news on social networks thanks to incomplete or uneven regulation and jurisprudence sometimes leads to the absence of social reaction to all this (Pavlović 2022:163).

Hate speech in the victim can cause fear and cause humiliation in the persons against whom it is directed, and those persons and groups need special protection, without harming the rights of other persons or groups. The right to respect for private life and the right to non-discrimination, which are essential for the protection of the human dignity of those targeted by hate speech, represent the need to protect the right to freedom of expression, which is one of the foundations of a democratic and pluralistic society, as guaranteed by Article 10. of the Convention, which protects freedom of opinion and receiving and communicating information and ideas, without anyone's interference.

The rights that are protected in this way must take into account different ways of understanding hate speech and hate crimes at the level of each country individually, at the regional and European level.

⁹ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a67955

Measures to combat hate speech have several answers, one of them is the answer of civil or administrative law, some measures are extralegal types such as education and awareness raising, and only finally can we talk about measures of criminal law protection. For all these measures and the protection of the integrity of individuals or groups, the role of the media, journalists and other controllers of that type, which influence hate speech, its criticism and condemnation, emphasizing social pluralism and the freedom to express thoughts and ideas, without infringing the rights of others, is crucial.

Things set in this way led in 2022 to the adoption of the cited Recommendation CM/Rec (2022) 16, with the idea of standardizing actions, from the obligations of the state and public authorities, to the hosts of social networks and their users.

OBLIGATIONS OF PUBLIC AUTHORITIES IN RELATION TO HATE SPEECH

The adopted Directive insists on the cooperation of all participants in the public space, with an emphasis on the communication of public institutions and private and non-governmental entities, in determining and implementing measures to prevent and fight against hate speech.

In order to be able to help those who are victims of hate speech in exercising their rights, according to the authors of the Directive, it is necessary to work on a culture of involvement of victims in the procedures for solving open issues. From the existing agreements of the Council of Europe and other instruments that set standards, and especially based on the relevant jurisprudence of the European Court of Human Rights and the findings and recommendations of the monitoring body of the Council of Europe, Recommendation Rec(97)20 of the Committee of Ministers to member states on “hate speech”, Recommendations Rec(97) 21 of the Committee of Ministers to member states on the media and promoting a culture of tolerance and General Policy Recommendations no. 15 of the European Commission for Combating Racism and Intolerance on Suppressing Hate Speech, conditions are created for establishing adequate regulations at the national level.

Through familiarization with international and European standards for the protection of human rights in order to provide guidance to all who are faced with the complex tasks of preventing and fighting against hate speech, including in the Internet environment, certain measures are recommended to the governments of the member states.

Those measures imply the full inclusion of the rules of this Directive in the domestic legislation. By taking measures to support independent and regulatory bodies for human rights, the work of commissioners for the protection of equality, civil society organizations, the media and other mediators, it is possible to achieve a more correct application of all the proposed measures.

The executive power is faced with the challenge of protecting human rights and fundamental freedoms in the digital environment, including cooperation with online intermediaries in accordance with Recommendation CM/Rec(2018)2 on the roles and responsibilities of online intermediaries and other applicable standards of the Council of Europe. It is impossible to achieve the protection of human rights and freedoms in the digital environment without the actual adoption of these recommendations at the state level, within the dialogue of all participants.

The member states have the obligation to make the translation of the recommendations from the Directive available to everyone, in the national language. The Republic of Serbia, as well as other CE member countries, also have the obligation to regularly assess the state of

implementation of this recommendation in order to strengthen its impact, and to inform the Committee of Ministers about the measures taken by the member states and other actors, the progress achieved, as well as all open issues.

RECOMMENDATION CM/REC (2022) 16 AND CRIMINAL LAW

Although the definition of the phenomenon of hate speech has been doctrinally discussed for a long time, it has not yet been precisely determined what it actually represents. According to Benes, hate speech (Benesch, S., 2014) is a prohibited form of speech, which limits freedom of expression because, instead of contributing to the debate in a democratic society, this dangerous speech discriminates against certain vulnerable groups in society and incites hatred, aggression and hostility. Following Pavlović's statements, it can be said that hate speech is especially bad for minorities (Pavlović 2022:158).

The European Commission's General Recommendation against Racism and Intolerance (ECRI) more specifically defines hate speech as (ECRI, General Policy Recommendation No. 15, December 8, 2016) the use of one or more specific forms of expression - advocacy, promotion or incitement of vilification, hatred or defamation of a person or group of persons, as well as any harassment, insult, negative stereotypes, stigmatization or threats in relation to such a person or group of persons, as well as justifying all the aforementioned forms of expression - based on a non-exhaustive list of personal characteristics or statuses that include race, skin color, language, religion or belief, national or ethnic origin, as well as origin, age, disability, sex, gender, gender identity and sexual orientation.

Recommendation CM/Rec (2022) 16 also tried to define hate speech in its appendices, so that the prevention and fight against hate speech and crimes could be effectively acted upon. Thus, hate speech is defined as any type of expression that incites, promotes, spreads or justifies violence, hatred or discrimination against a person or group of persons or that disparages them because of real or attributed personal characteristics such as "race", color, language, religion, citizenship, national or ethnic origin, age, disability, gender, gender identity and sexual orientation. The authors of the Recommendations insist that hate speech includes several expressions of hatred, the gravity and damage they cause must always be specified, in accordance with the ECHR and the judicial practice of the European Court of Human Rights.

What is important to point out is that not all hate speech has to be prohibited under criminal law, but if it does not have that weight for criminal liability, the jurisdiction of administrative or civil law must always be recognized. The speech does not have to be recognized as hate speech, but it can have an offensive and harmful expression that affects the other party. This requires alternative responses, which can be promoted through social networks, media, education, awareness raising and more.

Everyone who acts in cases related to hate speech and hate crimes can recognize in the document itself guidelines that can help in their work, in relation to the principles of the ECHR and the practice of the Court. In each specific case, the content of the expression, the political and social context at the time of use of the expression should be appreciated (because the time of execution is extremely important); the intention of the person using the expression; the role and status in society of the person using the expression; the manner in which the expression is spread or multiplied; the capacity of the expression to cause harmful consequences, including the necessity of those consequences; the nature and size of the audience, and the characteristics of the target group.

The effectiveness of the protection of victims' rights is reflected in the creation of a system of protection in order to prevent and fight against hate speech in the digital world and outside it, with a constant note that criminal law should only be at the end of that protection. This system of protection implies that within the framework of existing institutions or by creating a new institution, a court battle against hate speech will also begin. All those who are the target of hate speech would thus have their representatives before the court who could initiate lawsuits (or criminal charges) for hate speech.

Following the footsteps of the Directive itself, CE member states are required to specify in their criminal legislation and precisely specify which expressions of hate speech are subject to criminal liability. These are certainly public incitement to genocide, crimes against humanity or war crimes, i.e. goods protected by international law. Hate speech should also be criminalized when it involves incitement to hatred, violence or discrimination.

Criminalization of racist, xenophobic or sexist and LGBTI insults (public insults), provided that the conditions for insults on the Internet in the Additional Protocol to the Convention on Cybercrime regarding the criminalization of acts of a racist and xenophobic nature committed via computer systems are met (ETS No. 189). Public denial, trivialization and approval of criminal acts against humanity and other goods protected by international law can also in the appropriate context be hate speech that should be sanctioned, including ideas based on racial superiority or hatred.

The basic idea of the author of Recommendation CM/Rec (2022) 16 is that all hate speech on and off the Internet must be removed as soon as possible from the Internet form of means of communication, the rules of civil, administrative and, finally, criminal law. In order to be able to act in this way, it is necessary to determine the role and responsibilities of internet mediators, as well as all state and non-state participants engaged in solving the issue of hate speech on the Internet.

It is indisputable that at this moment there are no transparent rules for cooperation between public authorities and civil society organizations, i.e. internet mediators for solving the issue of hate speech on the internet (in the Republic of Serbia). In this way, the effectiveness of the assessment and investigation of hate speech prohibited under the rules of criminal, civil or administrative law is lost.

Although insufficiently precise, the recommendation CM/Rec (2022) 16 states that the Law on the Prevention and Prohibition of Hate Speech should also be passed (either as a separate law or within the framework of the existing ones), so that online intermediaries can be insisted on respecting human rights of all participants. Rules for processing criminal reports (misdemeanor reports) for reporting cases of hate speech must be established for state bodies. Procedures for removing the content of hate speech must be transparent, clear and predictable, with an appeal procedure as a two-step principle and the possibility of an independent judicial examination, which is not the case now.

Internet intermediaries must, according to the law to be adopted, take effective measures to fulfill their duties and obligations so that hate speech prohibited by criminal, civil or administrative law is not made available or disseminated. In order to realize this, it is necessary to have procedures for the quick processing of reports of hate speech, its immediate removal, compliance with requirements regarding privacy and data protection, securing evidence related to hate speech prohibited by criminal law (Kranjčec - Mamula 2023:546).

Reporting hate speech to the authorities and efficient collection of evidence related to criminal hate speech, based on the order issued by the competent authority, is a step without which it is difficult to get a reaction from the criminal authorities. In detecting hate speech,

the role of self-regulatory or co-regulatory institutions and bodies is indisputable. However, in disputed situations, the possibility of adopting temporary measures in complex or unclear situations should be foreseen.

Although Internet intermediaries often disclaim responsibility for comments on various posts or collaborative pages on Internet platforms, such situations must also be regulated, and in case of doubt, the dissatisfied should always be left with the possibility of verification through court proceedings.

SOCIETY'S RESPONSE TO HATE SPEECH AND HATE CRIMES

Following the solutions from the Directive, we could say that the reaction of the public authorities takes place on two levels. The first would be judicial protection of victims of hate speech and hate crimes. The second level would be the reaction of media public services that work on national frequencies, but also the work of the media and journalists, who should promote a culture of tolerance and understanding.

The promotion of dialogue and understanding between groups, and the avoidance of stereotypes and prejudices are one of the appropriate reactions of society to hate speech. Issues of public interest should be resolved within the framework of systems and institutions, and the capacities of independent institutions should also be used.

The role of civil society organizations can be beneficial for everyone, by entrusting them with coordination among all actors who implement policies to prevent and combat hate speech. Part of the trainings and workshops can be conducted through them. Effective strategies, which can be implemented in practice, have the task of eliminating misinformation, negative stereotypes and stigmatization of persons or groups.

Education about human rights, education for media and information literacy that deal with the topic of hate speech on and off the Internet should become part of plans and programs of general education.

Initiatives that have in their plan the strengthening of awareness among children and young people, parents, guardians and others, must be financed in a planned and long-term way. Training programs that mean strengthening the capacity of the police, security structures, prosecutor's offices, courts and health workers in recognizing and reacting to hate speech are an important part of prevention, and in strengthening the protection system against the consequences of hate speech. From the aspect of human rights, it is necessary to conduct trainings with members of minority communities in order to strengthen their capacity in developing and fostering dialogue.

Although it is mainly about supporting victims of hate speech and hate crimes, it is also necessary to work on strengthening the capacities of those who work with victims of these crimes. We are talking about mechanisms that serve to create appropriate independent and expert bodies. In order to help the victim of crime and hate speech, there must be systematically resolved answers to the questions of free legal aid, provided housing costs for victims of violence, because not everything can be saved by moving the abuser, especially if there are no conditions for that. All measures must be simple, taking into account that they must also be linguistically accessible.

Effective protection mechanisms and removal of obstacles for recognizing hate speech should be part of the system of protection against all negative consequences of filing a lawsuit, as well as imposing sanctions on the perpetrators of these punishable acts.

CONCLUDING REVIEW

The development of the area of protection of the rights of victims of hate speech and hate crimes is conditioned not only within the framework of criminal, civil or administrative proceedings, but also by the obligations of the state. The victim, who was a marginalized subject for a long time, in contemporary conditions comes into the focus of doctrine, but also of practice. Supported by research in the field of victimology, but also by the wider movement for human rights, contemporary legal thought of the 21st century is focused on ensuring the rights, support, protection and dignity of the victim in proceedings before public authorities, where criminal law is the *ultima ratio* last instrument in protection from hate speech.

A whole series of legal instruments have been adopted within the European Union to date, which in a normative sense provided the basis for the construction of a system for the protection of victims of hate speech and hate crimes, a system that will be sensitive to the needs of the victim and in which the state will assume responsibility for its protection. Directive 2012/29/EU on the minimum rights of victims and CM/Rec (2022) 16 - Recommendation of the Committee of Ministers to the Member States on the fight against hate speech are the most important current European documents in this area and provide not only systematic support for victims, but also determine the obligations of public authorities in that procedure. The Directive on the minimum rights of victims and the Recommendation are mostly implemented with their solutions in the legal system in the Republic of Serbia.

However, following what is happening in public discourse shows that there are many practical challenges in realizing the right to protect victims of hate speech and hate crimes.

Existing solutions have not been fully implemented in practice. Support and assistance to victims is carried out by various authorities, often as a result of the received projects, and not as a permanent activity of state authorities. The recommendation also includes the involvement of civil society organizations. We must note that such a dichotomy of the support system, in our opinion, is not optimal because it can make the coordination of those bodies difficult. An additional problem is the fact that those services do not have a publicly available database of statistical indicators that could serve as a guideline for policy makers, but also as a control mechanism for the effectiveness of the Recommendation's implementation.

Insufficiently well distributed number of employees of the appropriate profession in the police and prosecutor's office (there are not enough psychologists and employed social workers), a small number of employees in social protection services, shortcomings in the regulation of procedures in the detection and prevention of hate speech on social networks or the Internet, are just a few from problems where Prepourka makes suggestions, but they have not been implemented in domestic legislation.

Following the principle of equality, which here would mean equal treatment of victims in all places in the RS in the case of hate speech, we notice that there are not enough professional services and developed procedures that could implement this.

In the case of the protection of victims of hate speech, the protection mechanisms against revictimization are not sufficiently developed, which is certainly a question of procedural nature, as well as the question of who is the coordinator of all activities. To conclude, the normative activity and solutions adopted by the Directive and the Recommendation in the area of the rights of victims of hate speech are still not a sufficient guarantee that protection will be realized in full capacity in practice.

It is certain that appropriate research should be carried out in the coming period, in order to establish how the system works in all places, not only in the main centers of the country, because the legal solutions are generally good, but in implementation we have a lot of room to make things even better.

It is commendable that the victim of hate speech and hate crime has received the normative recognition it deserves, but a complete and effective support system will require the necessary improvements in practice, followed by a more precise legal text in the protection system that needs to be established.

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