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Institut za kriminološka i sociološka istraživanja

Za izdavača:

Prof. dr Zoran Pavlović, Pokrajinski zaštitnik građana - ombudsman
Dr Ivana Stevanović, Institut za kriminološka i sociološka istraživanja

Urednici:

Prof. dr Zoran Pavlović, Pokrajinski zaštitnik građana – ombudsman
Prof. dr Milana Ljubičić, Filozofski fakultet, Univerzitet u Beogradu

Recenzenti:

Dr Ivana Stevanović, Institut za kriminološka i sociološka istraživanja
Prof. dr Slađana Jovanović, Pravni fakultet, Univerzitet Union - Beograd

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Zoran Pavlović*

HATE SPEECH, VIOLENCE AND DISSEMINATING OF FALSE NEWS ON THE GLOBAL SOCIAL NETWORKING HIGHWAY

Abstract: Mass use of the Internet and social networks, along with radio, television and other e - portals, has led in modern times to a completely different perception of freedom of expression as one of the basic human rights. Rapid exchange of information with all its advantages gains special weight when social networks are turned into a means of exchanging or displaying content inappropriate for (un) public communication, which commits various (un) punishable acts and disturbs the public. Spreading hate speech, inciting violence and spreading false news on social networks, thanks to incomplete or uneven legal regulations, but also jurisprudence, sometimes leads to a lack of adequate social reaction to them. Without special incrimination for acts of execution through the global highway of social networks, it is not possible to sanction abuses of freedom of speech or hate speech through these media. Social media users are expected to refrain from hate speech, and social networks are expected to refrain from posting illegal user content on their platforms. Determining the identity of persons who spread hate speech and providing evidence for the purpose of criminal proceedings is a special challenge for all those responsible in the system of providing legal protection. The aim of this paper is to investigate the need for a different setting of responsibilities of social networks with existing or new regulations, for hate speech, violence and spreading of false news by users.

Keywords: freedom of expression, hate speech, responsibility of social networks and their users.

* Zoran Pavlović, PhD, full professor at the Faculty of Law, University of Business Academy Novi Sad and Provincial Protector of Citizens

Considerations on freedom of expression and the challenges of the new age

At the very top of the pyramid of human rights values that have long been the subject of international legal protection, equal to the right to life, the right to security, the right to privacy, etc. there is also the right to freedom of expression. Victims, remembered by the 20th century history, as a consequence of crimes against humanity and other goods protected by international (Hague, Geneva, etc.) law from World War I and II, Holocaust or aggression remembered by contemporaries, demanded the construction of a new order and legal human rights regulations. The UN Universal Declaration of Human Rights of December 10th, 1948 is therefore considered a basic international legal instrument dealing with (and) the regulation of the human right to freedom of expression. Article 19 of the Declaration states *that everyone has the right to freedom of opinion and expression, including the right not to be disturbed because of his own opinion, and the right to seek, receive and impart information and ideas through any means and regardless of borders.* Following the ideas of Valtazar Bogišić from the beginning of the 20th century from the General Property Code for the Principality of Montenegro, that we cannot use our right only to others in misfortune or trouble, the authors of the Universal Declaration restricted freedom of expression by Article 30, stating that *no provision it may be construed as the right for any State, group or person to engage in any activity or to perform any act aimed at violating the rights and freedoms contained therein.*

Accompanying Article 10 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms of November 4th, 1950, similarly to the Universal Declaration, freedom of expression is defined as the right of everyone. *This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.* At the same time, it *does not prevent states from requiring licenses for television, radio and cinema companies.* As the using of these freedoms entails duties and responsibilities, *it may be subject to formalities, conditions, restrictions or penalties based on respect for and application of the principle of legality, in the interests of national security, territorial integrity or public security, to prevent disorder or crime, to protect health. or morals, the protection of the reputation or rights of others, the prevention of disclosure of information obtained in confidence, or the preservation of the authority and impartiality of the judiciary.* A similar right to freedom of expression and the limits of its restriction are determined by the International Covenant on Civil and Political Rights of 1966, which was certainly a good premise for the creation of a constitutional framework establishing the right to freedom of expression and framework for its limitation. These restrictions

must always be based on the law, have a legitimate aim and be necessary. But these are all standards that most democracies adhere to.

Both freedom of expression and challenges related to the restriction of this human right, today encounter dilemmas and questions that the authors of the Universal Declaration could not even imagine, while at the time of writing the current Constitution of the Republic of Serbia in 2006 they could only guess. The Republic of Serbia is a member of the Council of Europe and, as a legally regulated state, has the obligation to answer a number of questions related to the content that is presented on social networks. This is especially true when it comes to protecting a child's rights and safety on social media.

If we were to call the Internet a virtual and global highway for communication, then social networks could be labeled as fast lanes on that highway. This means that users of social networks share their thoughts, beliefs or ideas very easily and quickly with other users, whom they know but also do not know. Therefore, the use of social networks can lead to its other extreme, the abuse of the right to freedom of expression, directly contrary to the values of public order which guarantee the rights of others.

Therefore, due to the relative anonymity of users of social networks on the Internet, the issue of regulating (abusing) freedom of expression, which often leads to hate speech, violence and spreading false news, is a serious task for decision makers and those who practice legal protection of the injured on the, so called, global highway of social networks.

Although the definition of the phenomenon of hate speech has been doctrinally debated for a long time, it has not yet been precisely determined what it would actually represent. According to Beneš, *hate speech* (Benesch, S., 2014) is a prohibited form of speech, which restricts 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 encourages hatred, aggression and hostility. It can be said that hate speech is a special evil/ire/malice for minorities.

The European Commission's General Recommendation against Racism and Intolerance (ECRI) more specifically defines hate speech as (ECRI, Policy Recommendation No. 15, December 8th, 2016) the use of one or more specific forms of expression - advocating, promoting or encouraging defamation, hatred or defamation of a person or group of persons, as well as any harassment, insults, negative stereotypes, stigmatization or threats against such person or group of persons, as well as justification of all the above forms of

expression - based on an exhaustive list of personal characteristics or status including race , skin color, language, religion or belief, nationality or ethnicity, as well as origin, age, disability, gender, gender, gender identity and sexual orientation.

The European Court of Human Rights (ECtHR) itself applies a case-by-case approach. For the purposes of this paper, we will consider hate speech as speech that through various types of expression (scientific, commercial, political, etc., orally, in writing, digitally, etc.), recipients of messages (adults, children, etc.) and intent to provoke hatred) spreads, encourages, promotes and justifies hatred, discrimination and victimization of particularly vulnerable groups in society.

Although the number of Internet and social network users is growing today, that number has further increased as one of the consequences of the pandemic, caused by the SARS CoV2 virus from 2020. But the violation of the right to privacy through hate speech on the Internet appears before the European Court of Human Rights in the case of *Delphi v. Estonia* (2015). The Grand Chamber of the European Court of Human Rights handed down a judgment on June 19th, 2015 in the case of *Delfi AS v. Estonia* ([2015] ECHR 586) after the case was transferred to it, following a decision by the First Chamber ECHR in October 2013 ([2014] ECHR 941). The newspaper (internet) portal Delfi A as a publisher has been declared responsible for the speech against the honour and reputation published by NN commentators on their pages.

The Estonian Supreme Court confirmed the company's determined responsibility to the applicant for certain anonymous comments which were, provisionally, published via its news portal. The comments were made in response to a *public interest story* published by the applicants (concerning the destruction of ice roads) and were incendiary, occasionally threatening and, on one occasion, vaguely anti-Semitic. They were not registered by the technology available to the applicants, which would detect and filter comments of offensive content, nor were they removed immediately after they were published; rather, they remained on the applicant's news portal until the citizen who was the target of the comments lodged a complaint - although they were removed on the same day as the complaint was lodged. Finally, the amount of damages awarded by the Estonian Supreme Court (€ 320) was inappropriately small, although the applicants' argument was, of course, that the greater impact of the Estonian Supreme Court's decision was the extent to which it would cool business, its activities as an entity that allowed the simultaneous posting of comments by anonymous post writers.

The Chamber of the European Court of Human Rights (ECHR) found no violation of Article 10 (freedom of expression) of the Convention, arguing (a) that priority should not be given between Article 10 and Article 8 (right to privacy) (b) that there was no reality that the injured party's right to privacy was justified by allowing him to file a civil lawsuit against anonymous post writers and (c) that the impact of the Estonian Supreme Court's decision could be measured by the minimum amount of damages awarded, and that this was a proportionate response, the need to protect the rights and reputation of that party.

The decision of the Grand Chamber confirmed the decision of the First Chamber in the statement that there was no violation of Article 10. Perhaps the three most important topics arising from this decision (due to the future of such publishing) are that hate speech must first pay attention to what kind of speech and the rights are violated by its publication. The applicants admitted that the Supreme Court's decision had served a legitimate purpose, namely to protect the rights and reputations of others. Moreover, the ECHR spoke about the right to privacy (whose reputation can be a component) and pointed out the fact that there should be no automatic prioritization between Articles 8 and 10 (paragraph 139 of the Decision). Likewise, it is possible to suggest that, while the First Chamber largely understood this fact and focused entirely on the potential violation that occurred, the Grand Chamber was much more concerned about the moral quality of the speech in question. What was at stake was hate speech, or violence-threatening speech, or indeed, speech that could be characterized as anti-Semitic (see paragraphs 117 and 159). For this reason, the Court noted that speech incompatible with the values of the Convention was not protected by Article 10 as a result of Article 17 (paragraph 136).

Second, the Internet portal for user comments cannot claim that it is not the publisher (with responsibility) of messages anonymously posted on its web portal and over which it maintains a certain measure of control and that, in future, there is no violation of the right to freedom of expression when such an active mediator is asked to remove offensive comments after having a constructive knowledge of their existence. Last but not least, it indicates that the normal rules regarding the balance between freedom of expression and the right to privacy or reputation may need to be significantly changed (certainly in their application) when it comes to online publications (portals).

The decision of the European Court of Human Rights in this case simply continues the tendency to increase the protection afforded to integrity and privacy rights in general (and perhaps to increase available controls for extremely unacceptable speech) as a barrier against expanded opportunities to exercise *de facto freedom of expression*, provided by the internet.

Unlike news (as in the case of Delphi AS), radio and TV portals, social networks are not treated as publishers, but as intermediaries. In other words, the increasing use of Android phones results in the content of news being downloaded via so-called smart phones from digital platforms and social networks. In this way, regulations are created at the European level that will lead to new obligations of social networks.

The importance of social networks as intermediaries in communication

Social networks, in accordance with their role today as *intermediaries* in communication, can influence the content they publish. This impact is reflected in the fact that the data is controlled, or not controlled. In that way, the misuse of (personal) data can be very easily prevented or enabled. Regarding the presentation of data, possessed by social networks in the last few years, the following stand out as actions related to the information that *Facebook* (FB) has about its users, which have been misused in various ways in different situations.

The beginning of the detection of the abuse of this social network is connected with the use of data from FB users in 2016 in the 2016 Trump campaign. But it was not until 2021 that the testimony of whistleblower F. Haugen revealed to the US Senate how dangerous the abuse of social networks is, because FB and Instagram used their network as intermediaries to deceive the public, endanger children's safety, and incite violence and much more. The content, which includes hate speech on these two networks, according to an internal research that has not been published in public, shows that Instagram, which is owned by Facebook, negatively affects even the mental health of teenagers. In other words, instead of protecting users, social networks have shown that they do not show the true state of affairs when it comes to the fight against hatred, violence and misinformation.

¹ In her testimony, Haugen also made serious accusations due to the riots in the American Capitol on January 6th, 2021, claiming that Facebook helped incite violence, through hate speech.

This event was, by applying international human rights standards, the basis for the reaction of the FB Supervisory Board for moderating content, by making a decision on the permanent suspension of the profile of D. Trump's users due to announcements of

¹https://www.b92.net/info/vesti/index.php?yyyy=2021&mm=10&dd=05&nav_category=78&nav_id=193268
4 visited on April 1st, 2022.

riots in Parliament. However, according to Vukčević (Vukčević, I. 2021/1, 301), the decision itself clearly lacks Facebook's will to form a unified way to treat the profiles of political leaders, as well as the company's resistance to tackling the way its business model potentially contributed to the violent events, including the riots on Capitol Hill, on January 6th, 2021.

How dangerous social networks really are can be seen through the phenomenon of *fake news*, which can affect the lives of individuals, certain groups and the state as a whole. One example is the impact of fake news on election results.

However, despite these radical examples of abuse of social networks, the right to freedom of expression should still be perceived as one of the basic human rights, which must be a condition for establishing additional control obligations towards social networks (Roksandić Vidlička, S., Mamić, K., 2018).

On the one hand, social networks allow us to access quickly and easily, with minimal costs, the necessary information and to communicate with remote users who can be located anywhere, even on the other side of the globe. In this way, an individual can promptly access most of the information that before the digital age, one could not have imagined that one could receive at the moment. On the other hand, this information can be very easily checked and even corrected, that is, it can be reached through social networks. This means that restricting the availability and transmission of information through social networks would also lead to restrictions on freedom of expression. This is a border that needs to be carefully set, but at the same time it is a signal that there is a possibility of endangering all rights that are protected by norms of public order and mandatory norms.

This would lead to the conclusion that freedom of expression on social networks could / should be limited to incriminations in criminal (criminal and misdemeanour) legislation, which the Republic of Serbia has done. The restrictions set by the legislator are in line with the restrictions prescribed by the ECHR. However, if we start processing social networks for user content in accordance with the rules on liability in criminal law, without changing all other regulations (such as the Law on Electronic Commerce), we will probably question the application of the principle of legality. The issue of *de lege ferenda* deserves special treatment, but we also have room for intervention under the existing criminal law regulations.

Relevant legal regulations on hate speech in the Republic of Serbia

In the Republic of Serbia, the constitutional text nowhere directly mentions hate speech, but apart from strategic documents, there are several legal mechanisms for protection against hate speech, which are based on two legal frameworks: the Law on Protection against Discrimination and the Law on Information and Media. If hate speech incites violence and hatred, the Criminal Code is applied. However, the relatively modest jurisprudence in the field of hate speech (especially on social networks) also points to the fact that it is still necessary to work on creating a protection system in this area and that many available mechanisms are not effective, proportionate and dissuasive. In future amendments to the relevant regulations, a strict distinction should be made between hate speech and harassment and degrading treatment, which overlap in practice. Also, prosecutors very often do not recognize hate speech and do not act on criminal charges. Judicial practice is also very problematic, as judges in some cases have not recognized hate speech, and often recognize freedom of expression as an inviolable value. The right to freedom of expression is an element of any democracy and is protected even if the information can shock and disturb, it must be limited when a speech is considered hate speech (Krstić, I., 2020, 60). This is of particular importance in multicultural societies, which are in transition, with a difficult past and which have an underdeveloped level of human rights culture and media literacy. That is why we must work, similar to zero tolerance for violence, and the rule of zero tolerance for hate speech.

Hate speech itself was introduced for the first time in our legislation in the Law on Prohibition of Discrimination, which prohibits hate speech, and can be called an example of good practice and providing legal protection to particularly vulnerable groups and individuals in society.

The advanced solutions from this law (Article 11) certainly deserve every praise, for giving the definition of hate speech, but we must emphasize that it is not in line with the definition from the ECRI Recommendation no. 15, and second, does not differentiate between harassment and degrading treatment. Hate speech defined as *the expression of ideas, information and opinions that incite discrimination, hatred or violence against a person or group of persons because of their personal characteristics, in **public media and other publications**, at gatherings and places accessible to the public, writing and displaying messages or symbols and in another way, for the purpose of acting towards third parties, and is encouraged by expressing ideas and opinions that lead to discrimination, hatred or violence* .

The very definition of hate speech lacked social networks, which was certainly not noticeable at the time the law was written, and real-life examples show the necessity of either setting a more general definition or introducing social networks as places of execution.

In the Criminal Code, criminal law has ²directly or indirectly incriminated hate speech to criminalize crimes against freedoms and rights of man and citizen (Violation of equality (Article 128), Violation of the right to use language and script (Article 129), Violation of freedom of expression or ethnicity (Article 130), Violation of freedom of religion and belief (Article 131), Extortion of testimony (Article 136), Abuse and torture (Article 137)), crimes against honor and reputation (Violation of reputation due to racial, religious, national or other affiliations (Article 174), criminal offenses against the constitutional order and security of the Republic of Serbia (Incitement to national, racial and religious hatred and intolerance (Article 317)), criminal offenses against public order and peace (Violent behaviour at a sporting event or public gathering) Article 344a)), crimes against humanity and other goods protected by international law (Racial and other discrimination (Article 387)).

This does not end the catalogue of criminal acts in which criminal acts with elements of hate speech are found, but these are the ones in which it most often appears as a possible act of execution. We must draw attention to the fact that these are not criminal acts - hate crimes, but criminal acts resulting from hate speech. The difference is discrete, but it exists. Namely, the phenomenology of hate speech requires us to have mechanisms that enable an adequate social reaction to hate speech, especially when it is done through social networks. Prosecuting social networks, as well as individuals for hate speech, is therefore not an easy task, and implies appropriate changes in legislation, but also a change in the attitudes of prosecutors and courts in the prosecution and trial of such crimes. We will single out the incriminations from Articles 387 and 317 of the Criminal Code as an example.

Article 387 criminalizes **racial discrimination** that exists when a person violates basic human rights on the basis of difference in race, colour, religion, nationality, ethnic origin or other personal characteristic, punishable by six months to five years in prison. Persecution of organizations or individuals for their commitment to equality is also punishable. It is also punishable to spread the idea of the superiority of one race over

² Criminal Code of the Republic of Serbia „Official Gazette of the RS“, No. 85/2005, 88/2005 (correction), 107/2005 (correction), 72/2009, 111/2009, 121/2012, 104/2013, 108 / 2014, 94/2016, 35/2019)

another or to propagate racial hatred or incite racial discrimination. In addition, it is criminalized to disseminate and make publicly available texts, images or any other representation of ideas or theories that advocate or incite hatred, discrimination or violence against any person or group of persons based on race, colour, religion, nationality, ethnic origin or some other personal characteristic. Finally, a public threat to commit a criminal offense against a person or group of persons for belonging to a particular race, colour, religion, nationality, ethnic origin or other personal characteristic will be punishable by imprisonment for more than four years. The threatened imprisonment for these three forms of crime is from three months to three years. It is important to note that the last two forms of committing this crime provide broader protection due to the use of the word „and some other personal characteristic“, which means that they do not refer only to racial discrimination. Article 317 of the Criminal Code criminalizes **inciting national, racial and religious hatred and intolerance**, for which a prison sentence of between six months and five years is threatened. If this act is committed by coercion, abuse, endangering security, exposing national, ethnic or religious symbols, damaging other people's property, desecrating monuments, memorials or graves, the perpetrator will be sentenced to one to eight years in prison. Also, if the act was committed by abuse of position or authority or if as a result of these acts there were riots, violence or other serious consequences for the common life of peoples, national minorities or ethnic groups living in Serbia, the perpetrator shall be punished by imprisonment for one to eight years, or imprisonment from two to ten years.

Penal provisions on hate speech include regulations other than the Criminal Code, the Law on Prohibition of Discrimination and the Law on Public Information and Media, as well as other media laws containing criminal provisions.

Regardless of the legal framework for sanctioning hate speech, there is still no unified data on which crimes are in question and before which courts, and a number of cases can be identified through reports on the work of independent institutions. However, the relatively small number of processed reports or verdicts shows not that there was no hate speech, but that the authorized persons still do not show a sufficient level of sensitivity for this act of execution, and therefore do not work on these life events.

Instead of a conclusion - where to go next/further

The right to freedom of expression as one of the basic human rights is found as such in the most important international and regional documents. National legislation in the Republic of Serbia has recognized the right of citizens to the right to freedom of

expression, by incorporating it into the basic legal act in the country - the Constitution of the Republic of Serbia, but also in numerous strategic documents, laws and bylaws. The issue of exercising this human right gained its new, different dimension only with the ubiquitous use of the Internet, which requires special attention to be implemented in full in the new reality, the so-called. a virtual highway that knows no borders, time and space, but also leads to much simpler ways of abuse that are manifested through a special form - hate speech. The issue of abuse gets an additional problem with using of social networks in everyday life, because the use of social networks obviously has not only its advantages, but also the present disadvantages, sometimes with unforeseeable consequences. Traditional legislation written at a time when the Internet and social networks have not yet played such a role in public and private life today requires adaptation to new circumstances.

Today, the criminal law framework in the Republic of Serbia aimed at punishing hate speech, violence and false news is mostly phenomenologically connected with hate speech on online news, radio and television portals as publishers for user comments and social networks as intermediaries.

The rules set in this way have the purpose of punishing individuals as perpetrators, but if they delve into the existing judicial and prosecutorial practice on the one hand and the registered hate speech situation on the other, the question of the existence of that purpose is still unrealized. Social media users are expected to refrain from hate speech, and social networks are expected to refrain from posting illegal user content on their platforms. Namely, the experience of the CoV19 pandemic, spreading false news and other challenges in the second decade of this century show that a successful social response to hate speech and its consequences is possible only by creating a protection system in the world of multiple competencies, technological achievements and technical solutions, in the world created by using the global highway of the Internet and social networks.

The importance of social networks in the realization of the right to freedom of expression, but also the protection of the rights of individuals, is indisputable. Our criminal law has recognized the criminal responsibility of legal entities for criminal acts, but this is not precise enough at this time until criminal responsibility or obligations of the social network for the content contained in them are foreseen.

If there is no specified obligation and responsibility to monitor and remove content, then existing criminal law solutions may not be sufficient to prosecute social networks for user

content implying hate speech. It is precisely in order to protect freedom of expression that this responsibility must be established.

In order to achieve better results preventively, it is necessary to harmonize the existing definition of hate speech and international standards and the ECRI Recommendation No. 15, which would lead to prediction in the distinction between the hate speech and the harassment and the degrading treatment. Mandatory training programs should include not only participants in the Judicial Academy, but also current judges and prosecutors - to introduce education for those who work on hate speech, with special reference to social networks. In other words, in addition to drafting a national strategy for combating hate speech on the Internet and social networks, it is necessary to work on harmonizing legal texts based on such a strategy, which should use the experience gained by independent bodies in RS.

Citizens who use but also those who do not use the Internet and social networks (as a global highway) have the right to enjoy in these public places - *online* the full legal protection they have *offline*, which is in line with UN Human Rights Council Resolution No. 20 / 08 from 2012, therefore to be protected from hate speech, violence and false news.

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Zoran Pavlović*

GOVOR MRŽNJE, NASILJE I ŠIRENJE LAŽNIH VESTI NA GLOBALNOM AUTOPUTU DRUŠTVENIH MREŽA

Apstrakt: Masovno korišćenje interneta i društvenih mreža, uz radio, televizijske i druge e-portale dovelo je u savremenom dobu do potpuno drugačije percepcije slobode izražavanja kao jednog od osnovnih ljudskih prava. Brza razmena informacija sa svim svojim prednostima dobija posebnu težinu kada se društvene mreže pretvaraju u sredstvo za razmenjivanje ili prikazivanje sadržaja neprimerenih (ne)javnoj komunikaciji kojima se izvršavaju različita (ne)kažnjiva dela i vrši uznemiravanje javnosti. Širenje govora mržnje, podsticanje na nasilje i širenje lažnih vesti na društvenim mrežama zahvaljujući nepotpunoj ili neujednačenoj pravnoj regulativi ali i judikaturi dovodi ponekad do izostanka adekvatne društvene reakcije na njih. Bez posebne inkriminacije za radnje izvršenja kroz globalni autoput društvenih mreža nije moguće ni sankcionisati zloupotrebe slobode govora odnosno govora mržnje kroz ove medije. Od korisnika društvenih mreža se očekuje da se suzdržavaju od komunikacija kojima bi širili govor mržnje, a od društvenih mreža odgovornost za objave nezakonitog sadržaja korisnika na njihovim platformama. Utvrđivanje identiteta lica koja šire govor mržnje i obezbeđivanje dokaza u svrhu krivičnog postupka poseban su izazov za sve odgovorne u sistemu pružanja pravne zaštite. Cilj rada je da se istraži potreba za drugačijom postavkom odgovornosti društvenih mreža sa postojećom ili novom regulativom, za govor mržnje, nasilje i širenje lažnih vesti od strane korisnika.

Ključne reči: sloboda izražavanja, govor mržnje, odgovornost društvenih mreža i korisnika.

* Dr Zoran Pavlović, redovni profesor Pravnog fakulteta Univerziteta Privredna akademija Novi Sad i Pokrajinski zaštitnik građana

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