

CRIMINAL OFFENSE OF INCITING NATIONAL, RACIAL, AND RELIGIOUS HATRED AND INTOLERANCE

ABSTRACT: In our region, multi-ethnicity, multi-confessionalism, and multilingualism are common phenomena, and therefore the challenges they face are not exceptions. With the emancipation and transition of countries in the region, accession to the European Union, states have brought new legislative frameworks in which they have recognized long-standing personal characteristics of their citizens, provided protection for these characteristics, and criminalized attacks based on these personal characteristics, as well as incitement of hatred and intolerance based on the same. This paper presents the criminal offense of inciting national, racial, and religious hatred and intolerance, within the framework of constitutional and particularly criminal law. Special attention is paid to the analysis of the legal framework and the provision of the offense in the legislation of the Republic of Serbia, the actions and methods of committing this criminal offense. Additionally, attention is given to the analysis of motives and reasons, as well as the consequences of committing this offense, questions of causality and possibilities of concurrence with other criminal offenses. Some important characteristics of this criminal offense are also discussed, such as: place, object, time, perpetrator, and form of guilt for the execution of the crime.

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1. Introduction

Taking into consideration the territory we inhabit, the series of events that happened in the 20th century, technological development, fluctuation and an easy access to information, it is beyond necessary to regulate and stipulate the prohibition of inciting national, racial and religious hatreds and intolerance, if not in criminal laws, then certainly in other ones. Such prohibition is a necessity, because there is a fine line between emotions, attitude or opinion of another, and hatred and intolerance towards the other. If an absolute freedom of speech existed, without any restrictions, such speech, as history has shown many times before, could very easily turn into hate speech, and hate speech into hate crime, thus, the repetition and multiplication of such criminal offences committed and motivated by hatred, may lead to war conflicts, crimes against humanity, war crimes and genocide.

Given its character, the criminal offence of “inciting ethnic, racial and religious intolerance” is generally classified in the group of criminal offences against the constitutional order and security, in many states, as well as in the Republic of Serbia. Furthermore, classifying this criminal offence in the group together with other criminal offences “against the state” says a lot about the significance the state and society assign to the protection of fundamental human rights and values, starting from their violation on the grounds of any type of difference among citizens (Joksić, 2011, p. 321).

A specific form of manifesting hate speech in the Serbian criminal legislation is stipulated in the Criminal Code, Chapter 28, entitled “Criminal Offences against the Constitutional Order and Security of the Republic of Serbia”. Hence, a criminal offence of this type was systematised in Article 317 of the Criminal Code among the so-called “political” criminal offences, in fact the criminal offence of “Inciting ethnic, racial and religious hatred and intolerance”. This was the way to provide for an enhanced criminal and legal protection of the constitutional principle of prohibition of inciting ethnic, racial and religious hatred or intolerance.

2. Stipulation of the criminal offence in regulations

Legal systems of modern democratic states stipulate prohibition to incite ethnic, racial and religious hatred and intolerance. In this region, the stipulation of prohibition has existed for decades, in criminal codes and other

regulations. Moreover, a special Law on the Prohibition of Inciting National, Racial and Religious Hatred and Discord was passed in 1946 (Law on the Prohibition of Inciting National, Racial and Religious Hatred and Discord, 1946). In that respect, nowadays even the Constitution of the Republic of Serbia principally stipulates the prohibition of inciting hatred and intolerance on any grounds related to personal feature, towards any person (Constitution of the Republic of Serbia, 2006). Pursuant to Article 49 of the Constitution, any inciting or encouraging of racial, ethnic, religious or other inequality, hatred or intolerance shall be prohibited and punishable. At the core of prohibited activities are inciting and encouraging, which could imply that this prohibition is violated by both the occurrence of the consequence, or developing the hatred and intolerance, as well as by performing the acts that could cause such consequences. The consequence of this constitutional prohibition does not need to be embodied only in the racial, ethnic and religious, but in any other inequality, hatred and intolerance as well (Đurić & Manojlović, 2007, p. 651). In the Republic of Serbia, however, inciting ethnic, racial and religious hatred and intolerance is stipulated, directly or indirectly, in several legal documents, in addition to the Constitution. In that respect, the Law on the Prohibition of Discrimination (Law on the Prohibition of Discrimination, 2009) and Law on the Prevention of Violence and Misbehaviour at Sport Events are of great importance (Law on the Prevention of Violence and Misbehaviour at Sport Events are of great importance, 2003).

The Criminal Code stipulated two criminal offences that sanction the violation of equality (Article 128 of the Criminal Code) and prohibition of inciting ethnic, racial and religious hatred and intolerance (Article 317 of the Criminal Code). On the one hand, while it is clear that the normative regulation of a criminal offence of violation of equality complies in all matters, with the constitutional requirements established under Article 49 and the systemic interpretation of the Constitution, in terms of the prohibition of inciting inequality, as it sanctions all forms of violation of equality according to the prohibited grounds of discrimination, it remains unclear whether encouraging such violation is criminally and legally sanctioned, unless the constitutional term “encouraging” is to be made equal with the criminal and legal term of “instigating”. The criminal offence of prohibition of inciting ethnic, racial and religious hatred and intolerance under Article 317 of the CC, does not fully comply with the requirements under Article 49 of the Constitution, not only because it incriminates inciting and inflaming of only ethnic, racial and religious hatred and intolerance, and the Constitution expressly refers to other types of hatred and intolerance as well, but also because that criminal offence

is reduced only to the type of hatred and intolerance existing between the peoples and ethnic communities living in Serbia (Đurić & Manojlović, 2007, p. 656).

The Criminal Code of the Republic of Serbia (Criminal Code of the Republic of Serbia, 2005) in the chapter establishing the offences against the constitutional order and security of the Republic of Serbia, thus, stipulates, a separate criminal offence in Article 317, that of Inciting ethnic, racial and religious hatred and intolerance. The Criminal Code stipulates other criminal offences as well, which to a greater or lesser extent, address inciting and inflaming of hatred and intolerance, in fact, Article 344a stipulates the criminal offence of violent behaviour at sports events or public gatherings. Furthermore, Article 387 of the CC stipulates the criminal offence of Racial and Other Discrimination in the substance that also comprises Hate Speech.

In addition to the specified laws, the Law on Public Information and Media (Law on Public Information and Media, 2023), prohibits hate speech in Article 86, adding that ideas, opinions or information published in the media shall not encourage discrimination, hate or violence against an individual or a group of individuals on the grounds of their belonging or not belonging to particular race, religion or nationality. In the Law on Prohibition of Manifestations of Neo-Nazi and Fascist Organisations and Prohibition of the Use of Neo-Nazi and Fascist Symbols and Marks (Law on Prohibition of Manifestations of Neo-Nazi and Fascist Organisations and Prohibition of the Use of Neo-Nazi and Fascist Symbols and Marks, 2009), it is prohibited to produce, copy, store, present, praise or in any other way disseminate the propaganda material, symbols and marks that incite, encourage or spread hatred or intolerance towards free affiliations of citizens, racial, ethnic or religious hatred or intolerance. The Law on Public Assembly (Law on Public Assembly, 2016), stipulates in Article 8 that assembly shall not be permitted if the purposes of the assembly are directed, among other things, towards inciting or encouraging racial, ethnic, religious or other form of inequality, hatred and intolerance. Pursuant to the Law on Political Parties (Law on Political Parties, 2009) activities of a political party shall not be aimed, among other things, at incitement or encouragement of racial, ethnic or religious hatred.

3. Act of criminal offence

In the applicable Criminal Code of the Republic of Serbia, the act of committing an offence is stipulated alternatively, and may be performed mainly by commission. Accordingly, in the criminal legislation of the Republic

of Serbia, the act of criminal offence of Inciting ethnic, racial and religious hatred and intolerance, has been described as follows:

- 1) “Whoever incites and inflames national, racial or religious hatred or intolerance among the peoples and ethnic communities living in Serbia, shall be punished by imprisonment of six months to five years.
- 2) If the offence referred to in Paragraph 1 of this Article is committed by coercion, maltreatment, compromising security, exposure to derision of national, ethnic or religious symbols, damage to other persons’ goods, desecration of monuments, memorials or tombs, the offender shall be punished by imprisonment of one to eight years.
- 3) Whoever commits the offence referred to in Paragraph 1 and 2 of this Article by abuse of position or authority, or if these offences result in riots, violence or other serious consequences to co-existence of peoples, national minorities or ethnic groups living in Serbia, shall be punished for the offence referred to in Paragraph 1 of this Article by imprisonment of one to eight years, and for the offence referred to in Paragraph 2 by imprisonment of two to ten years.”

The criminal offence under Article 317 of the CC has a basic form (Paragraph 1) and two more serious forms (Para 2 and 3). The act of the basic form is defined alternatively, either as (1) inciting or (2) inflaming of ethnic, racial or religious hatred or intolerance. Inciting means any activity directed towards creation of ethnic, racial or religious hatred or intolerance, which means that before it was committed, there had been no hate or intolerance among the peoples or ethnic communities living in Serbia. On the other hand, inflaming refers to any activity of strengthening (intensifying, deepening) of hatred and/or intolerance, which means that hate or intolerance had existed among the peoples or ethnic communities living in Serbia before the act was committed, but as a sort of latent state or of a lower intensity (Atanacković, 1985, p. 19; Lazarević, 2006, p. 782). Therefore, the act consists of: a) inciting – creation, producing, causing, “inception” of hatred and intolerance where these phenomena had not existed before, or b) inflaming – increasing, deepening, strengthening, intensifying, inflating, developing, enhancing or broadening the already “incited, created” hatred and intolerance, where such phenomena had already existed to a lesser extent, hence adding fuel to them (Đorđević & Đorđević, 2020, p. 200). According to one school of thought, for a criminal offence to be completed, during the former act, it is not required that the actual creation of hatred or intolerance occurred, or during the latter act, that their strengthening/intensifying actually happened. What matters is

that such actions could produce such kind of consequences (Judgment by the Supreme Court of Cassation Kžm 88/2009 dated 08/06/2009). Hence, this criminal offence could be regarded as the criminal offence of abstract danger (Bavkon, Bele, Kobe & Pavčnik, 1988, p. 229). Another school of thought believes that creation or deepening of hatred or intolerance represents the consequence of this criminal offence (Lazarević, 1995, p. 65). If this other opinion is accepted, the completion of criminal offence would require the occurrence of the said consequence, which means that, in case such consequence does not occur, and the offender intended to cause it, it would be regarded as an attempt which would, under general rules, be punishable, due to the prescribed penalty. The first school of thought seems more justifiable. In fact, in Paragraph 1 of this Article, imperfective verb forms are used (incites, inflames), which means that these actions are directed towards a particular goal, towards creating or deepening hatred or intolerance. However, it does not arise from the formulation of the said provision, that it is required that hatred or intolerance actually occurred. If the legislator chose the perfective verb forms (incited, inflamed), it would be clearly the consequence of the criminal offence. Therefore, it may be concluded that, in the basic form of this criminal offence, there are actions (inciting or instigating) which are in their nature, directed towards a particular goal – i.e. the creation or strengthening of hatred or intolerance among peoples and ethnic communities living in Serbia (Ćorović, et al, 2020, p. 95). The action in the first form of criminal offence is defined as inciting of hatred – creation of the previously non-existing hatred, or instigating it – developing and deepening the already existing feelings, which may be achieved by insulting, mocking or derogating ethnic, racial or religious feelings, exposing symbols to derision, disrespecting historical, cultural and other values (Lazarević, 2006, p. 782). The criminal offence exists only if the listed activities are directed towards ethnic, religious or racial affiliation, bearing in mind that the number of persons against whom the actions are taken is not relevant – the offence will exist even if it is committed against only one person. The text of the law does not contain the ways of inciting or instigating hatred or intolerance. Most frequently they refers to relevant verbal or propaganda activities (Miladinović-Stefanović, 2015, p. 447). “In addition to verbal actions, i.e. spoken or written words, there are other possibilities as well, such as various images, caricatures graffiti, concludent actions and so on. Concrete examples of activities of inciting or instigating hatred or intolerance may take the form of insulting, mocking or derogating persons belonging to protected groups and/or their ethnic, racial or religious feelings, as well as exposing their symbols to derision. Considering

the fact that the legal provision uses imperfective verb forms, the criminal offence has been committed, pursuant to Article 112 Paragraph 30 of the CC, if the act was committed either once or more than once. The prescribed acts of commission should primarily affect emotions, as well as the intellect of persons belonging to particular nationality or ethnic group, in relation to which there is an attempt to create or strengthen (deepen, intensify) hatred and/or intolerance. Acts of commission in this case, are taken in relation to: a) hatred which is understood in different ways in the legal theory. Thus, hatred is considered a hostile feeling towards someone. It is a psychological basis for creating conflict situations and taking certain actions that may cause major disturbances in relations among citizens, depending on their nationality, race or confession, frequently followed by other grave consequences (Lazarević, 1993, p. 34). Additionally, the acts of commission in this case, are also taken in relation to: b) intolerance which is also defined differently in the legal theory. Intolerance is, to a certain degree, a less severe form of relations among citizens, denoting the state of distrust, sense of bigotry and repulsion (Lazarević, 1993, p. 34). Also, in its negative potential, intolerance is of a lower intensity than hatred, but it could also lead to taking certain activities which express intolerance and which may contain elements of certain criminal offences. It is manifested as a lack of tolerance (all the way to repulsion). It is disputable whether scorn (a negative attitude) for a particular nationality or ethnic community could have a character of intolerance (Stojanović & Delić, 2013, p. 270). Intolerance denotes “a state of distrust, sense of bigotry and repulsion” (Lazarević, 1999, p. 288) and “in its negative potential, it is of a lower intensity than hatred”. The act is, thus, completed at the very moment of taking a legally prescribed action, irrespective of whether hatred or intolerance had actually been incited or increased in that particular case. Our legislator does not require the prescribed actions of the basic form be taken publicly (contrary to that, the criminal codes of Montenegro and Bosnia and Herzegovina require that the action be taken publicly).

In addition to the basic form of manifestation, the criminal offence under Article 317 of the Criminal Code of Serbia may take two more severe, qualified forms of manifestation. The first more severe form of offence (Paragraph 2), for which imprisonment of one to eight years is stipulated, exists if the act of commission was taken in a specific way, where the very method of committing the offence, is a qualifying circumstance. This offence exists if the act of commission – inciting or inflaming hatred or intolerance – was committed by: a) coercion – use of force (absolute or compulsive, direct or indirect coercion in terms of pressuring the will of other person) or threat (direct or indirect

possibility of occurrence, announcement – verbal, written or symbolic, use of force against other person, b) abuse – acting in relation to another person's body by inflicting pain, suffering, fear or discomfort, either physical or mental, c) compromising security – causing fear for another person's personal or property security, d) exposure to derision of national, ethnic or religious symbols – by violating the reputation of those symbols, d) causing damage to other person's goods and d) desecration of monuments, memorials or tombs. Eventually, the most severe form of this criminal offence (Paragraph 3) is qualified by the following two circumstances: a) the method of committing the offence – by abuse of position or power and b) the type, extent and intensity of the caused consequence—the occurrence of riots, violence or other severe consequences affecting the co-existence of peoples, national minorities or ethnic groups living in Serbia. If the basic form of offence is qualified according to the specified circumstances or consequence, the punishment prescribed for offenders shall be imprisonment of one to eight years. On the other hand, if the first more severe form of offence is committed in a legally prescribed way or if it caused the more severe consequence specified, as a result of the act of commission in the manner stipulated, the offender shall be punished by imprisonment of two to ten years. This form exists if the basic form of offence is committed in one of the ways, or if relevant consequences have been caused, stipulated in the provision of Paragraph 2 Article 317 of the Criminal Code. The legislator will use the so-called “referring provision” (“if the offence under Paragraph 1”), hence, all that is specified for the previous, basic form, except the qualifying circumstances, also applies to the more severe form. It is evident that qualifying circumstances in their very title, indicate other criminal offences, thus they should be construed in accordance with their substances, which refers to the fact that there is no joinder of offences (Stojanović, 2009, p. 696).

The constitutional term of encouraging could not be made equal to the criminal and legal term of instigating, because according to the criminal and legal term, instigating is always conducted in relation to a particular criminal offence, and the instigator has to be aware of the causal relation between the act of instigating and decision to commit a criminal offence, as well as of all relevant features of that offence (Stojanović, 2006, p. 245). The constitutional term of encouraging could perhaps be associated with the term of propaganda. The propaganda comprises stating or spreading certain facts (either false or true) or ideas for the purpose of making an impact on other persons to accept those ideas as well, and possibly, take certain actions that may be required for the purpose of achieving the propaganda goals, which, in their character,

may also constitute criminal offences. If the propaganda contains agitation (pushing for) to commit criminal offences, then it closely resembles the criminal and legal term of instigating. However, it differs from it in the way that instigating is, therefore, directed towards a particular criminal offence, which is not the case with the propaganda (Jovičić, 2007, p. 228). Obviously, there is a clear distinction in this context as well, that hatred and intolerance alone, do not constitute criminal offences (Lazarević, 2006, p. 783). The term “inciting” either, was not left devoid of certain dilemmas in the criminal and legal literature, in particular when it comes to the issue whether inciting could indirectly be carried out by “manifesting” (Ćirić, 2008, p. 153).

4. Motive, cause and consequences of committing a criminal offence

The most common motives, or grounds encountered in the practice of committing the criminal offence of grave desecration include: hatred (the OSCE; 2011, p. 8.) toward particular ethnic and/or religious community, anti-Semitic and extremist, ideological-political motives, spread of fear, vandalism etc. In this criminal offence, hatred, aversion, stereotypes, prejudices and ignorance are certainly a type of motive, or grounds for its commission.

Causes of committing this criminal offence largely depend on education, historical background, general atmosphere in the society, but also on impunity for the harsh rhetoric and on the very messages –conveyed by politicians, as well as other segments of the society, which give rise to attitudes that encourage incitement and occurrence of hate speech, promoting the already existing stereotypes. Causes that may lead to hate crimes include poor economic situation of perpetrators and the society in general (Iganski, 2014, p. 164.), presence and promotion of stereotypes concerning a particular group in movies and on TV, political campaigns spreading hatred and prejudices, unpleasant experience perpetrators have in company of persons belonging to the same group as the victim and tensions among neighbouring countries, particularly the post-conflict countries. Causes may be found in the influence of the family and immediate surrounding (Kovačević, 2009, p. 97), the acquired “permissibility” of hatred and intolerance that later produces intolerance, exclusion, verbal expressions of hatred in the public and private life, as well as in the acts of open violence and aggression. “The permitted” hatred, therefore, originates as an educational and psychological phenomenon, but its fruits may well outgrow the age of children and one’s personal psychology, becoming present as a social phenomenon, publicly manifested through the

hate speech. The reasons for the occurrence of these phenomena may be found in the deeply rooted opinion existing in a particular community that persons belonging to certain minority groups do not deserve to be treated as equal, as well as in the authorities refusing to actually provide equal protection and rights to all citizens in the society.

The consequence of this criminal offence includes the violation of ethnic, racial or religious feelings of people belonging to those groups, as well as creation or deepening of hatred or intolerance among communities, either majority or minority ones. The offence has an impact on people – which may be either psychological or emotional, leaving consequences on the identity and self-esteem of the victim. It also intensifies the level of violence and hatred. A direct (immediate) victim may experience a severe psychological violation and an increased feeling of threat, because he or she is unable to change the feature that made him or her the victim. Criminal offences committed out of hatred have a much more profound psychological effect on their victims, resulting in feelings of depression and anxiety. The commission of a criminal offence produces the effect on the target groups. The community that shares the same feature with the victim could also experience fear and intimidation. Other persons belonging to the target group could not only feel at risk of any future assault, but could also experience the assault on the victim as they were victims themselves. These effects could be multiply increased if experienced by the community that has been the victim of discrimination throughout its history. The offence has an impact on other vulnerable groups, in particular those that identify with the target groups, especially when hatred is based on certain ideology which is simultaneously directed against several groups. This type of criminal offences undermine the ideal of equality among people belonging to a society, causing harm to the fundamental principle of human rights and freedoms.

5. Levels of culpability of a criminal offence

When speaking about the level of culpability, this criminal offence can only be committed with intent, which means that the perpetrator is certainly aware of the fact that their actions/lack of actions incite/inflame hatred/intolerance, that they are doing it specifically on a religious, ethnic or racial basis, and that it is exactly what they want, that is, agree to do. The widely held view, both in theory and in practice, is that it could be a matter of both direct as well as potential intent, bearing in mind that the perpetrator must be highly aware of the fact that their actions undertaken may incite or inflame ethnic, racial or religious hatred (verdict of the Court of Appeal in Kragujevac, Kž

1 829/2014(2) from 19 August, 2014). In addition to this, in order to have an offence, it is not necessary to have the intention of the perpetrator to cause or incite hatred towards peoples or ethnic communities (Čejović, 2008, p. 795).¹ However, there are opinions (which represent the minority) that this criminal offence can only be committed with direct intent and that, regardless of the fact that the law does not explicitly require any “specific intention”, it arises from the nature of the offence itself and the actual entry under which this criminal offence was classified (the chapter or group’s object of protection) (Bavkon, et al. 1988, p. 229). If the substance of this criminal offence is analysed, the intention was not really given in its description, which indicates the propriety of the first mentioned view (that no intention is required). However, the action of this criminal offence is determined so that it is directed towards a specific objective, which indicates “increased culpability, i.e. awareness and will” in the perpetrator. In other words, it alludes to direct intent. Still, potential intent should not be excluded as a level of culpability in this criminal offence since it is possible that a person is aware of the fact that their actions could incite hatred (objective) and thus agrees to it. Therefore, it may be concluded that the existence of a possible intent is sufficient enough.

6. Subject and object of the criminal offence

With regard to the perpetrator of the criminal offence, the active subject of the criminal offence, it is clear that it can only be committed by a human being (any person), one or more of them in some form of complicity. No special characteristic is required for the perpetrator, so the perpetrator can be any criminally responsible person. However, if the perpetrator is a person who abuses authority and position, the possibility of stricter punishment shall be envisaged (Article 317, Paragraph 3). In practice, cases including actions of vandals, chauvinists, extremists, members of sects, hooligans, politicians, journalists, fans and others were recorded. Therefore, in principle, any person, whether a domestic citizen or a foreigner, may be a perpetrator. However, some questions can be raised here. Firstly, if there are members

¹ In this sense, see the decision of the former Supreme Court of Croatia Kž. No. 896/52 from 27 June, 1952 which reads: “With regard to the subjective aspect of the criminal offence of inciting ethnic hatred or intolerance, the first instance court, as it arises from the challenged verdict, improperly considers that the existence of this criminal offence requires that the perpetrator has the intention to incite or inflame ethnic hatred or intolerance. According to the law, such an intention is not required for the commission of this criminal offence, but it is sufficient for the perpetrator to have an intent.”

of different confessions within the same nation, that is, national minority or ethnic community, can they commit this criminal offence against one another based on religion? The law, among other things, covers religious hatred and intolerance, but it does not recognise religious groups as passive subjects, as it does with other criminal offences (Articles 174, 370, 387 of the Criminal Code). This is probably a consequence of earlier legislation, when the difference between belonging to a certain people or national/ethnic group and belonging to a certain religion was not taken into account. Today, it is necessary to make a distinction between belonging to a nation (ethnos), on the one hand, and belonging to certain religious communities, on the other hand. Therefore, it would be necessary to specify Article 317 of the Criminal Code, in such manner as to clearly define the protected groups. Another question referring to the active subject of this criminal offence is whether it is necessary for its substance that the perpetrator and the passive subject belong to different national or ethnic communities? This would be an atypical situation, but it is conceivable that a member of a nation or ethnic group incites or inflames hatred/intolerance towards their own group. In this case, a single person incites or inflames hatred or intolerance towards their own community by their actions, but in such manner that there is an attempt to create hatred or intolerance one feels towards that (their) group, among other peoples, national minorities or ethnic communities. It seems that in this situation, the existence of this criminal offence would not be excluded, considering its object of protection (Ćorović et al., 2020, p. 95).

A passive subject is an entity (natural/legal entity) that is the subject of a criminal offence by becoming a victim. Actions, that is, acts that form an integral part of the substance of this criminal offence, may be undertaken by the perpetrators against one or more persons, but it is important that those are carried out depending on their ethnic, racial or religious affiliation. Therefore, it is important for the existence of this offence that ethnic, racial or religious hatred or intolerance occurs or spreads among peoples or ethnic communities living in the territory of Serbia and not in some other countries. This indicates that the feature of the passive subject is a constitutive element of this offence. The passive subject in this criminal offence are the peoples and ethnic communities living in the Republic of Serbia. If peoples and ethnic communities do not live in our country, this criminal offence will not exist. However, a national minority, as part of the people who do not live in their home country, should also be included here. We note this since, most likely, there was an omission to include the term “national minorities” in Paragraph 1, as was done in Paragraph 3. Therefore, there is a noticeable inconsistency

in the use of the terms in Article 317, since Paragraph 1 speaks about peoples and ethnic communities while Paragraph 3 speaks about peoples, national minorities and ethnic groups. Anyway, it should be borne in mind that the passive subject in this criminal offence are the peoples, national minorities and ethnic communities living in Serbia (Stojanović, 2009, p. 696). The term “peoples” refers to citizens of the Serbian nationality, as the majority population in the Republic of Serbia, while the term “national minorities and ethnic communities” refers to citizens of the Republic of Serbia who live in its territory and do not belong to the majority nation. The commission of these actions against national or ethnic groups that do not live in the territory of the Republic of Serbia cannot be considered this criminal offence, but possibly another (e.g. some form of criminal offence referred to in Article 387 of the CC). Migrant national/ethnic groups cannot fall under the notion of national minority. Therefore, regardless of the linguistic meaning of these terms, the aforementioned migrant groups cannot be passive subjects of the criminal offence referred to in Article 317 of the Criminal Code, i.e. national and ethnic communities (minorities, groups) living in the territory of Serbia. In order to be the subject of protection under this incrimination, they must be citizens of the Republic of Serbia. This is because the given criminal offence is included in the group of criminal offences against the constitutional order and security of Serbia. According to the case law, this criminal offence may also be committed against one person, provided that the action taken may incite national hatred between “members of the ethnic group of the victim and the ethnic group of the perpetrator” (verdict of the Supreme Court of Serbia, Kž I-518/85 from 10 September, 1985). The same would apply to the act of inflaming. This view is acceptable since taking action against an individual person may lead to the generation of hatred, that is, the strengthening of intolerance against the corresponding national/ethnic group. However, this criminal offence will be non-existent if the perpetrator was not aiming to achieve this goal (verdicts of the Higher Court in Belgrade, K 794/2013 from 13 November, 2013 and the Court of Appeal in Kragujevac Kž 1 829/2014(1) from 19 August, 2014).

With regard to the object of the criminal offence, that is, general and individual goods and values that are violated or threatened by the commission of this criminal offence, it could be said that this offence violates parity, equality, the sense of belonging, safety and security (Đurić & Manojlović, 2007, p. 651). In this case, the constitutional principle (notion) of the prohibition of ethnic, racial or religious discrimination emerges as an object of protection (Turković, et al., 2013, p. 400). In other words, it is the tranquillity (feeling) of citizens regardless of their differences due to national, racial, religious or ethnic affiliation.

7. Time and place of commission of the criminal offence

With regard to the place of commission of this criminal offence, it can be anywhere, both in the place of the action taken and the place of the consequences. However, in the case of this criminal offence, the action was often taken in one place and the consequences occurred in another, thus this criminal offence falls under the category of distance criminal offences and it could be said that in this case, the theory of unity applies (the place of commission/omission and the occurrence of the consequence). Given that this criminal offence may be committed as an extended criminal offence, the place of execution is then considered to be any place where the perpetrator committed the criminal offence and any place where the consequences occurred.

What is very common and frequent with the development of information technologies is the so-called cyber crime. Among others, the articles of the Criminal Code referring to cybercrime include Article 317, i.e. the criminal offence of Inciting ethnic, racial and religious hatred and intolerance. Therefore, this offence is increasingly being committed via the Internet (social networks), media (electronic and written), but also “live” at political rallies, sports events, at and in the vicinity of religious buildings, cemeteries, meetings of (extremist) organisations and other places. Abuse of the Internet is a very convenient tool for inciting ethnic, racial and religious hatred. Perpetrators of this offence may, at a small cost, create a website or a blog, free of charge, where, without any limitation, they express racist attitudes, insult or ridicule other peoples and ethnic communities, which may result in inciting or inflaming hatred. Through the Internet, such views may reach an unlimited number of people, which makes their actions particularly dangerous. The offence could be committed by just one person, but today it is mainly committed by various associations and organisations, the aim of which is to create ethnic, racial and religious hatred and intolerance. When defining such categories, one must also be very careful because there are thin and porous lines between the freedom to express one’s own opinion and hate speech (Ivanović & Čudan, 2019, p. 127). Therefore, it may be concluded that the Internet and social networks are a very suitable tool for inciting ethnic, racial and religious hatred. Insulting, mocking, underestimating ethnic, racial or religious feelings and other forms of hate speech on websites/blogs are conveyed to an unlimited number of people, which contributes to inciting or inflaming hatred. The Criminal Code of the Republic of Serbia does not stipulate hate speech on the Internet and social networks as a separate criminal offence.

As for the time of the commission of this criminal offence, it is not a constitutive element of this criminal offence. This criminal offence can be committed at any time. It is characterised by the fact that the time of taking the action does not always coincide with the time of the occurrence of the consequences, so this offence is the so-called temporal criminal offence (temporal crime). In our criminal legislation, the so-called Action Theory is accepted regarding the determination of the time of commission of the offence (the time when the perpetrator was acting or was obliged to act, regardless of the time the consequence of the offence occurred). This criminal offence can also be characterised as a permanent criminal offence. When determining the motive and the perpetrators of the criminal offence themselves, it is helpful to determine the circumstances related to the time of the commission of the criminal offence, e.g. the offence was committed during a national or religious holiday, i.e. a date that is important for a certain social group (Dečković, 2021, p. 186). The commission of this criminal offence does not have a clear specific time dimension, so it may occur both in wartime and peacetime conditions. What is noticeable in practice in this area is the increased intensity of the commission of this criminal offence in the period immediately after the end of the war, most often by the desecration of graves, especially in the territory of Bosnia and Herzegovina, the Republic of Croatia and the territory of Kosovo and Metohija.

8. Conclusion

With the criminal offence of inciting ethnic, racial and religious hatred and intolerance, one can observe its constant presence in our society, as well as fluctuations in intensity, scope, consumption, joinder and absorption with other criminal offences, but also the far-reaching and serious consequences it can lead to. This offence is also an act of high-tech criminality, which can be carried out in many ways, in various places (physical and virtual) by various actors, against one or an unlimited number and circle of people. The commission of this offence is the result of the existence of an already suitable social environment, discourse, narrative, education, lack of punishment, difficulty in proving hatred/intolerance and other reasons. It may be a consequence of war events, and it can also be the cause of them. Therefore, it is an epilogue, but it can also be a prelude to hate crimes. In terms of possible strategies for prevention, it was observed that important criminogenic factors represent the low level of education of the majority of perpetrators and their unfavourable socioeconomic status, which gives the basis for the assumption

that with timely educational work and provision of conditions for improving material status, significant results could be achieved in the domain of both general and special prevention, especially in terms of the observed most risky categories of potential perpetrators (recidivists, illiterate persons, persons without primary education and persons in a state of severe social vulnerability) (Matković, 2021, p. 76).

If we are looking for an answer regarding the manner of prevention of the commission of this offence, naturally prevention would be most suitable, and to have a more expedient restorative approach of criminal reaction instead of a retributive approach. The entire society, both the state and individuals, should build and promote the spirit of community, mutual respect, familiarisation and coexistence of all citizens living in the same area. Such values should be instilled in every individual from birth as a way of thinking and acting. It is undeniable that a stable economic standard also attributes to such an idea of well-being. However, history teaches us that even in economically developed countries, these offences indeed existed. Also, we ourselves have witnessed the destruction and suffering that the act of inciting ethnic, racial and religious hatred and intolerance may lead to. Therefore, this offence should be approached extremely seriously and comprehensively, without delay, for it may lead to far-reaching social disturbances and devastating consequences.

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KRIVIČNO DELO IZAZIVANJE NACIONALNE, RASNE I VERSKE MRŽNJE I NETRPELJIVOSTI

APSTRAKT: U našem regionu multietničnost, multikonfesionalnost i višejezičnost, predstavljaju uobičajene pojave, te stoga i izazovi sa kojima se one susreću nisu izuzeci. Samom emancipacijom i tranzicijom zemalja u regionu, pristupanjem Evropskoj uniji, države su donele nove zakonodavne okvire u kojima su prepoznale davno postojeća lična svojstva svojih državljana, pružale su zaštitu tim svojstvima i inkriminisale napade zbog

tih ličnih svojstava, ali i izazivanje mržnje i netrpeljivosti zbog istih. U ovom radu prikazano je krivično delo izazivanje nacionalne, rasne i verske mržnje i netrpeljivosti, u delu ustavnog, a posebno krivičnog prava. Posebna pažnja je posvećena analizi pravnog okvira i predviđenosti dela u propisima Republike Srbije, radnji i načinima izvršenja ovog krivičnog dela. Takođe, pažnja je posvećena i tome šta je pobuda, koji je uzrok izvršenja ovih dela, šta je posledica, da li postoji povezanost i sticaj sa drugim krivičnim delima. Kao bitno obeležje ovog krivičnih dela obrađeno je pitanje mesta, objekta, vremena, učinioca i oblika krivice za izvršavanje dela.

Ključne reči: *mržnja, Republika Srbija, netrpeljivost, krivično zakonodavstvo, krivično delo.*

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