VRHOVNI SUD
REPUBLIKE HRVATSKE

VISOKI PREKRŠAJNI SUD
REPUBLIKE HRVATSKE

Projekt „IRIS – Unapređenje borbe protiv nesnošljivosti kroz istraživanje, izradu preporuka i obuku“ provodi Hrvatski pravni centar u partnerstvu s Državnim odvjetništvom Republike Hrvatske, Policijskom akademijom i Uredom za ljudska prava i prava nacionalnih manjina Vlade Republike Hrvatske.
Projekt se provodi u suradnji s Vrhovnim sudom Republike Hrvatske i Visokim prekršajnim sudom Republike Hrvatske.

RECOMMENDATIONS FOR THE IMPROVEMENT OF RESPONSE TO HATE CRIME

HATE CRIMES – CRIMINAL OFFENCES

- The research shows that in a large number of cases involving hate crimes (HC) where hatred is not a qualifying but an aggravating circumstance, the courts, despite an express statutory obligation under Art. 87, para. 21 of the Criminal Code (CC), do not consider hatred as an aggravating circumstance.
  In such situations, the courts should always explicitly cite hatred as an aggravating circumstance leading to a harsher sanction.

  When the courts fail to do so, the state attorneys (SA) should file an appeal.

- The research shows that too little attention is paid to establishing and explaining hatred as a feature of the act or as a legally relevant fact that affects the sentencing (*ex lege* aggravating circumstance). **In the indictment, the SA should elaborate on the circumstances from which a founded suspicion is derived that an offence is a hate crime. Also, hatred as a feature of the act or an aggravating circumstance should be especially emphasized in the closing speech at the hearing.**

  In their statement of reasons of the judgment, whenever the judgment must contain such statement by the law, the courts should give the reasons why, if hatred is a disputable fact, they have considered it proven or unproven.

- The research shows that in acts where hatred is not a qualifying but an aggravating circumstance, the legal designation of the act does not always state that the act was committed in connection with Art. 87, paragraph 21 of the CC. Such a practice is nomotechnically wrong, and also makes it difficult to monitor HC. **In such situations, the qualification should always be linked to Art. 87**

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para. 21 of the CC because such practice is nomotechnically correct and facilitates the monitoring of HC.

- In part of the analysed judgments it is not specified which protected characteristic is involved. While it can mainly be concluded from the statement of facts which protected characteristic is involved, **we still hold that this should always be clearly specified both in the statement of facts and in the statement of reasons.** Regarding legal description of cases, the practice is found to be inconsistent – as a rule, it is only stated that the offence is committed “out of hatred”, but sometimes the legal descriptions of offences already contain the determination of a protected group (e.g. “inflicted bodily injury to another person and the offence was committed out of hatred because of racial affiliation and the skin colour of another person”), which would constitute an integral and a correct legal description of the case. **Specifying the protected characteristics would also facilitate the tracking of this aspect of the phenomenon of HC in conformity with international standards. In this connection, it should be specified in the statement or reasons of the indictment/judgment which concrete group or groups are involved within the individual protected characteristics, and protected characteristics should be clearly distinguished.**

- The research highlights inconsistent practice regarding the interpretation of the provision of Art. 87, para. 21 CC, i.e. what indicates that the offence is a HC, or that it is committed “on account of” one of the listed characteristics of another person. While some courts require the existence of an exclusive HC motive, some that such a motive is dominant, some that it is only one of the motives, while some courts do not even expressly deal with these issues, but it arises from the facts of the case that in the background of a criminal offence there is a long-lasting conflict or some immediate quarrels in combination with verbalised bias. Bearing in mind the consequences of a determination that a HC is involved, such inconsistent practice puts into question the equality of citizens before the law. **When aligning the case law, it is desirable to take into consideration the standards resulting from the case law of the ECtHR, according to which hatred or bias do not need to be the only motive but only just one of a whole variety of motives.**

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- The analysis of criminal law sanctions imposed on the perpetrators of HC reveals that in two thirds (67.7%) of the cases a suspended sentence was imposed, and no special obligations were imposed in addition to the suspended sentence in any of the cases. At the same time, in the case of minors and young adults to whom the Juvenile Courts Act has been applied, there is often a waiver of persecution conditioned by the fulfilment of one or more special obligations. **We believe, especially with regard to the profile of HC perpetrators (very young perpetrators, with average age of 23 years), that state attorneys should propose more often, and the courts should impose special obligations with a suspended sentence for convicted HC perpetrators.**

HATE CRIMES – MISDEMEANOURS

- Misdemeanour legislation does not expressly contain the concept of HC, i.e. hate misdemeanour, but both at the level of public policy and in international documents there is a recognition that, provided all the prerequisites are fulfilled, misdemeanours may and should be characterised as HC. **To be able to consistently implement such a characterisation in case law, it is essential to include in misdemeanour legislation, a definition of misdemeanour committed out of hatred analogous to Art. 87, para. 21 CC, at the same time taking into account the differences between misdemeanour and criminal legislation.**

- The research shoes that hate has not been stated as an aggravated circumstance in any of the analysed cases. **Despite the fact that there is no provision expressly providing for hatred as an aggravating circumstance in the context of misdemeanours, the courts should use the opportunity, provided by Art. 36, para. 2 of the Misdemeanour Act, and when meting out the punishment, they should treat hatred as an aggravating circumstance and as a motive out of which a misdemeanour has been committed, except in relation to Art. 25 of the Anti-discrimination Act (ADA).**

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- When dealing with misdemeanours out of hatred, in the context of the current legislation *de lege lata*, the only possibility to express a discriminatory character of an offence is to characterize it as a misdemeanour regulated by Art. 25 of the ADA, under the condition that all the prerequisites have been fulfilled. However, the current practice of the police and state attorneys as authorised prosecutors are not consistent in that respect. **If a misdemeanour against public order and peace is involved (Arts 6 and 13 AMPOP), the offence should be qualified in concurrence with Art. 25 ADA.**

- The current case law of the courts is not harmonised in terms of whether it is a real or apparent concurrence between the offenses under Art. 6 and 13 of the Act on Misdemeanours Against Public Order and Peace (AMPOP) and misdemeanours under Art. 25. ADA, and the equality of citizens before the law is thus endangered. **We believe it is not a deceptive concurrence and consumption, in favour of misdemeanours against public order and peace, as some misdemeanour courts wrongly interpret it, but rather a real concurrence with Art. 25 ADA.**

- In general, this recommendation applies equally to misdemeanours and criminal offences, but the problem is documented in the research only for misdemeanour cases, as follows: a discriminatory motive is sometimes not considered because the victim is objectively not a member of a particular group and no account is taken of the fact that it is sufficient that the perpetrator only supposes such affiliation. **The current practice should be harmonised so that the discriminatory motive is taken into account in the qualification also in cases when the perpetrator only assumes that the victim belongs to a certain group.**

POLICE OPERATION

- The research shows that the police records of possible HC cases do not comply with the legislative framework because they contain some categories not laid down in Art. 87, para. 21 CC (e.g. police

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officers, regional affiliation) which may lead to inconsistencies in HC monitoring. **We recommend the alignment of police HC records with the legislative framework.**

- The research found that in factually very similar cases there was a different form of persecution - in some cases misdemeanour proceedings were initiated, and in others criminal proceedings. In relation to some defendants, the criminal complaint was dismissed or the rejection verdict was issued due to the application of the *ne bis in idem* principle because a misdemeanour procedure was conducted, even though the characteristics of a hate crime criminal offense were existent. Judicial bodies and the police have already developed certain mechanisms aimed at avoiding the problems described above (instructions for the conduct of SA offices, informal consultations between individual police officers and SAs). **We recommend that effective mechanisms for cooperation and timely exchange of information between all competent authorities[1] be selected and that they be systematically applied in order to avoid misdemeanour prosecution of events that contain all the elements of the criminal offense of HC.**

VICTIMS' RIGHTS

- The analysis of case files shows that a large number of victims were not given the instructions on their rights, or at least the fact was not registered in the case file. **Because of the importance of this instruction, it is essential to give it to all victims and to register it in writing.**

- Given the period covered by our analysis, only in a small number of cases, the police and the judiciary actions started after the introduction of the obligation to conduct an individual assessment of victim's needs. Therefore, the sample of cases where the implementation of this obligation was assessed was too small and insufficient for any generalisation. Nevertheless, it seems that there is significant room for progress in this regard. Even in cases where an individual

[1] In the process of drafting the recommendations, the opinion was expressed by some that these mechanisms of cooperation and exchange of information should apply only to authorized prosecutors.

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assessment was implemented, no need for protection was established for any HC victims and thus no additional rights based on individual assessments were exercised. **Because of the fact that HC victims are emphasized in the Victims' Rights Directive and in the Criminal Procedure Act (CPA) as a particularly vulnerable group of victims, we recommend that all the bodies seriously consider their possible needs in terms of protection and support.**

TERMINOLOGICAL RECOMMENDATION

- **In regard to the fact that on the basis the statutory definition of HC referred to in Art. 87, para. 21 CC, as well as on the basis of international recommendations it is not necessary to prove the existence of the perpetrator's personal hatred or animosity but it is rather sufficient that the perpetrator has chosen his or her victim because of real or presumed affiliation with a particular protected group, we recommend that *de lege ferenda*, the concept of HC be replaced by the concept 'bias crime'.**

HATE CRIME MONITORING

- Inconsistency of legal qualifications in terms of linking to Art. 87 para. 21 of the CC leads to difficulties in HC monitoring. **We believe that a technical solution should be found that would enable consistent marking and monitoring of all HCs, regardless of whether the legal qualification states the link to Art. 87 para. 21 CC or not. In that sense, as one of the possibilities, we propose the introduction of an explicit obligation to record the HCs in the Rulebook on work with e-files.**

- Official HC statistics currently show only the total numbers of HC criminal offenses and misdemeanours by type of offense. Data for criminal offenses include: the number of cases registered by the Ministry of the Interior, the number of cases acted upon by the competent state attorney's offices and the number of final convictions, without separating HC from hate speech (criminal offense of Public Incitement to Violence and Hatred under Article 325 of the CC). Data

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for misdemeanours include: the number of misdemeanour offenses and the number of final convictions in misdemeanour proceedings. **We recommend that the new Protocol on Procedure in Hate Crime Cases regulate the monitoring of cases from the moment the crime is committed to the final decision, so that the course and outcome of each case can be monitored (in relation to each defendant), which is not the case now, and that hate speech and HC be monitored separately.**

- The current official statistics do not allow for the prevalence of individual protected characteristics to be determined. **The protected characteristic must be registered in the statistical data published by the Office for Human Rights and Rights of National Minorities to be able to monitor which protected groups are particularly endangered in the Republic of Croatia.**

EDUCATION AND TRAINING

- **We recommend continuous education and training of police officers, state attorneys and judges as one of the efficient models for the integration of these recommendations into the work of all relevant stakeholders. With regard to the nature of some problems identified in the course of our research activities, it is preferable that education be organised across sectors, i.e. jointly for police officers, state attorneys and judges and implemented in the form of workshops.**

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