

Pregledni rad

UDC 343.851

Primljeno: 21.07.2017.

Odobreno: 20.08.2017.

dr Dragana Randelović¹

dr Aleksandar Ivanović,²

RELATIONSHIP BETWEEN THE HATE CRIMES ON THE BASIS OF SEXUAL ORIENTATION AND DOMESTIC VIOLENCE - ANALYSIS OF THE SITUATION IN THE REPUBLIC OF SERBIA

Abstract

The authors deal with the issue of hate crimes on the basis of sexual orientation in connection with the issue of domestic violence. Namely, Article 54a of the Criminal Code of the Republic of Serbia stipulates that if a criminal offense is committed out of hatred, because, inter alia, of sexual orientation, this circumstance is judged by the court as aggravating circumstance when imposing a sentence, unless it is prescribed as a criminal offense. This provision was introduced into the criminal legislation of the Republic of Serbia in 2012, and until today there was not a single judgment in which this article was applied. As one of the most endangered groups in the area of hate crimes in the Republic of Serbia, besides the Roma population, members of the LGBT population appear. The authors point out the fact that members of the LGBT population in the Republic of Serbia in most cases suffer various types of violence from their family members. Although there is a huge dark figure, a certain number of these cases been reported. However, and that's when the problem arises, which is reflected that such cases criminal justice authorities in the Republic of Serbia generally treat only as domestic violence from article 194 of Criminal code, by failing to apply Article 54a, although it is a criminal act of hatred in which the victim is attacked because of his or her sexual orientation. In this regard, the authors addressing this problem, first

¹ dr Dragana Randelović, Assistant professor, Department of law sciences, International University of Novi Pazar.

² dr Aleksandar Ivanović, Assistant professor, Department of law sciences, International University of Novi Pazar.

defining the hate crime in accordance with the current legal regulation of the Republic of Serbia, pointing at the meaning of the term sexual orientation. After that, the authors of the paper point to criminal legal provisions concerning domestic violence, indicating also the types and types of violence that occur in practice. In the second part of the paper, the authors point to the problem of non-application of Article 54a, and not only the non-application by a member of the court, but also the failure to recognize such cases as so call hate crimes by the police and the prosecutor's office. At the end of the work authors offering certain recommendations and guidelines in order to change this situation in practice in the future.

Key words: hate crime, sexual orientation, violence, domestic violence, victim protection.

INTRODUCTION

Domestic violence is a specific, complex and very widespread form of crime with severe, lasting and far-reaching consequences on the individual and social level. It directly affects a family member who is a victim, however, it also attacks and breaks a family values of great social significance.³ The devastating fact that violence occurs in a family, which as a basic cell of society should provide to all its members protection and where solidarity and connectivity should be the strongest, irrefutably points to the weight of the consequences it leaves.

For a very long time, there was no official statistical data on the extent and prevalence of domestic violence, which on the one hand prevented the exact dimension of this phenomenon from being revealed, and on the other hand influenced on the formation of the wrong attitude that violence is not a serious social problem.⁴ Domestic violence is one of those social and pathological phenomena that our society has been marginalized and ignored for decades.⁵ Until the end of the 1960s, domestic violence was considered as a private matter of a family in which the state

³ Škulić Milan, "Krivično delo nasilja u porodici", *Nasilje u porodici*, Pravni fakultet Univerzitet u Beogradu, 2012, pp. 71.

⁴ Konstantinović-Vilić Slobodanka, "Predrasude i stereotipi o nasilju u porodici", *Zbornik radova-Pravom protiv nasilja u porodici*, Ženski istraživački centar za edukaciju i komunikaciju, Niš, 2002, pp. 28.

⁵ Petrušić Nevena, Konstantinović-Vilić Slobodanka, *Vodič kroz sistem porodičnopravne zaštite od nasilja u porodici*, Autonomni ženski centar, Belgrade, 2012, pp. 21.

should not interfere.⁶ Domestic violence was treated as a less significant private family problem that should be resolved beyond the framework of the criminal justice response, while the existing prejudices about the relationship between men and women in the family and society, and the acceptance of physical punishment as acceptable and efficient educational techniques, additionally complicated the attitude of professionals towards this phenomenon, leaving the victim unprotected.⁷

Also, for a long time it was considered that domestic violence is very rare.

It is precisely because of the complexity of family relations and the influence of the environment that this crime is one of those with a large dark figure.

In recent years, domestic violence has been actualized as a serious social phenomenon and a form of crime that is a common subject of social and scientific interest. However, domestic violence should never be treated as an exhaustive topic that has been sufficiently investigated by the scientific and professional public and on which has been given the ultimate judgment.

1. DOMESTIC VIOLENCE AS A CRIMINAL ACT - ARTICLE 194 OF THE CRIMINAL CODE

Domestic violence is introduced into criminal legislation by the entry into force of the Law on Amendments to the Criminal Code of the Republic of Serbia of 9 March 2002. In this law, the criminal act of domestic violence was placed in a thirteenth head in a group of criminal acts against marriage and family. An article who edited this area, 118a, read: "Whoever, using a force or serious threat to attack a life or body, hurts or endangers the physical or mental integrity of a member of the family, shall be punished by a fine or by imprisonment of up to three years."

In addition to the basic shape, three heavier shapes were also provided. Of course, even before that, domestic violence was sanctioned, but through the provisions of the Criminal Code that criminalize acts against life and bodies and through misdemeanor liability by applying the Law on Public Order and Peace. In addition to incriminating domestic violence as a special criminal offense, the significance of

⁶ Simić Dragana, "Krivičnopravna zaštita od nasilja u porodici", *Kultura polisa*, 2015, pp. 523.

⁷ Jovanović Sladana, Simeunović-Patić Biljana, Macanović Vanja, *Krivičnopravni odgovor na nasilje u porodici u Vojvodini*, Novi Sad, 2012, pp. 13.

this law is reflected in the transfer of the focus of the prosecution from the victim to the public prosecutor and the introduction of another criminal offense - rape in marriage.

The disadvantage that this legal provision has shown in practice is a narrow interpretation of a family member. Namely, the lack of authentic interpretation led to a restrictive and discretionary interpretation of the victim of domestic violence, which is why a small number of cases are qualified as domestic violence under Article 18a CC.⁸ The current criminal protection is provided in Article 194 of the CC: “Whoever by use of violence, threat of attacks against life or body, insolent or ruthless behaviour endangers the tranquillity, physical integrity or mental condition of a member of his family, shall be punished with imprisonment of three months to three years”.

The basic form of this part, Article 194, paragraph 1 of the CC, has several elements to which attention should be paid: the action, the way of performing the work, especially the characteristic of the passive subject (victim) and the consequence of the work.⁹

The action consists in compromising tranquility, physical integrity or mental state. Endangering means creating a real, concrete danger, or a close possibility of violating the physical or mental integrity of a family member.¹⁰ Criminological concepts include objective and subjective criteria of violence: the use of force and the threat of force (objective behavior), but also every act that is perceived or perceived as an intention to hurt another person (the subjective experience of the manifestation of the act), which would include circumstances that are influenced on such experience.¹¹

However, it can be seen much wider, through the concept of domination, abuse of power and coercion (intimidation and manipulation) in order to achieve the control. Any imbalance in family power and partnership relationship is the potential

⁸ Jovanović Slađana, *Pravna zaštita od nasilja u porodici*, Institut za kriminološka i sociološka istraživanja, Belgrade, 2010, pp. 163.

⁹ Jovanović Slađana, Lukić Marija, *Nasilje u porodici: nova inkriminacija*, Autonomni ženski centar, Belgrade, 2003, pp. 16.

¹⁰ Matijašević-Obradović Jelena, Stefanović Nenad, “Nasilje u porodici u svetlu Porodičnog zakona, Krivičnog zakonika i Zakona o sprečavanju nasilja u porodici”, *Pravo-teorija i praksa*, 4-6, 2017, pp. 22.

¹¹ Lukić Miroslav, *Kriminološka analiza nasilja u porodici*, Pravni fakultet u Nišu, Niš, 2003, pp.6.

situation of its abuse, and whether it will result in violence depends on a number of factors.¹²

According to Article 112, paragraph 28 of the CC, a family member shall mean spouses, their children, spouses' progenitors in the direct line, common law partners and their children, adoptive parents and adopted children, foster parents and foster children. A family member shall also mean siblings, their spouses and children, former spouses, their children and parents of the former spouses if they live in the same household, as well as persons who have a child together or who have conceived a child even though they have never lived together in the same household.

This precise legal formulation excludes the need for interpretation, which removed the lack of the previous law. However, although precise, this definition is not comprehensive.

The negligible number of persons in close personal relationships has been denied the right to protection based on the criminal act of "domestic violence". It is necessary to harmonize with the Family Law and the Council of Europe Convention on the Prevention and Combating Violence against Women and Domestic Violence which do not prescribe as a condition the present or former common place of residence. The characteristic of domestic violence is not that the victim and the perpetrator of violence have a common place of residence, but a family relationship and a specific personal relationship that exists between them.

The criminal act of domestic violence is completed by the appearance of a consequence which is required by law, or when the goods in question are endangered. A verbal form that has a certain effect (endangering rather than compromising) leads to difficulty in practical application, as it raises the question of whether only one previous action is required or a continuous activity is required. Judicial practice is divided on this issue. Thus, certain courts consider that for the existence of a criminal offense, it is enough that it is only endangered once, for example, body integrity of a family member (decision OCB, Kж. 218/05). However, there are also judgments in which the opposite view is taken, that endangering, in the context of this criminal offense, signifies ongoing and continuous actions that take place

¹² Ignjatović Tamara, *Nasilje prema ženama u intimnom partnerskom odnosu: model koordiniranog odgovora zajednice*, Rekonstrukcija Ženski fond, Novi Sad, 2011, pp. 21.

during the marriage period (BCC, КЖ. 1137/04). Different authors, this dilemma, the meaning of the word endangering, interpret in various ways.

Thus, some authors consider that there are several reasons to accept the attitude of the VSS, but it would be more complete to resolve this dilemma in the course of some of the following changes to the CC.¹³ This is a permanent act of execution (endangering), but the criminal offense of domestic violence exists even if the act of execution towards the same passive subject is only taken once. If the action is taken several times there will be an extended criminal offense. Also, the repetition of the act of execution constitutes an aggravating circumstance that affects the sentencing, in terms of imposing a more severe sentence.¹⁴

Recent case-law has taken on the view that it is enough that once only the serenity, physical integrity or mental state of the family member is endangered, that it is not necessary an element of sustainability or multiplicity of the acts of execution.¹⁵

By adopting the Law on the Prevention of Domestic Violence, this dilemma has been resolved because domestic violence within the meaning of Article 3, paragraph 3 of this law is act of physical, sexual, psychological or economic violence of the perpetrator towards the person with whom the perpetrator is in the present, earlier marital, extra-marital, partnership relationship or the person with whom the blood relative is in the right line, and in the lateral line to the second degree or with whom a relative of a mother-in-law up to the second degree or to whom the adoptive parent, adoptive parent, feeder or foster parent, or another person with whom she lives or has lived in a common household, is adopted. Because of this formulation, in the foreground, is no longer a consequence, but an act of execution that can also consist of one act.

Also, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence emphasizes that “domestic violence refers to any act of physical, sexual, psychological or economic violence that occurs in the family or family community, or between former or the current spouse or part-

¹³ Stojanović Zoran, Perić Obrad, *Krivično pravo-posebni deo*, Pravni fakultet Univerziteta u Beogradu, 2006, pp.129.

¹⁴ Simonović Dragoljub, *Krivična dela u srpskoj legislativi*, Službeni glasnik R. Srbije, Belgrade, 2009, pp. 334.

¹⁵ Stojanović Zoran, Delić Nataša, *Krivično pravo posebni deo*, Pravna knjiga, Belgrade, 2013, pp. 110.

ner, regardless of whether the perpetrator shares or has shared the same dwelling as the victim. “

The severe form is defined in paragraph 2.: “If in committing the offence specified in paragraph 1 of this Article weapons, dangerous implements or other means suitable to inflict serious injury to body or seriously impair health are used, the offender shall be punished with imprisonment from six months to five years”. This form differs from the basic only in the means by which the work from paragraph 1 has been performed. These are the means that are capable to seriously injure the body or severely damage the health, although this did not happen. If the health was really seriously disturbed or the person was seriously injured by the use of these means, the crimes referred to in paragraphs 3. and 4 would apply. The punishment for this form is from six months to five years. As the basic form, this form is possible only with an intent. The second heavier form is defined in paragraph 3.: “If the offence specified in paragraphs 1. and 2. of this Article results in grievous bodily harm or serious health impairment or if committed against a minor, the offender shall be punished with imprisonment from two to ten years”.

A qualitative circumstance in this form is that a serious bodily injury or serious health damage to a person has occurred, or the passive subject is a minor person, i.e. a person who has not turned 18 years of age. The notions of serious bodily injury and serious health damage should be interpreted in the sense of the appropriate criminal offense referred to in Article 121 of the CC. The perception of this form must exist with the perpetrator in relation to the capacity of the minor, and in relation to the severe consequence, a negligence is required.^a

The heaviest form is defined in paragraph 3.: “If the offence specified in paragraphs 1., 2. and 3. of this Article results in death of a family member, the offender shall be punished with imprisonment from three to fifteen years”. In this form, the severity of the consequences should be the result of negligence.

In Article 194, paragraph 5, a special form of this criminal act is prescribed: “Whoever violates a measure against domestic violence that was imposed on them by the court in accordance with the law shall be punished with imprisonment from three months to three years and a fine”.

Criminal prosecution for all forms of work is undertaken solely *ex officio*.

The Article 114 CC which introduced a new form of a serious murder - the murder of a family member who was previously abused is also new: “Whoever causes death of a member of his family whom he previously abused shall be punished with imprisonment from thirty to forty years“.

2. TYPES OF DOMESTIC VIOLENCE

Domestic violence is manifested through the following forms:

1. Physical violence means the use of parts of a body or weapon for the purpose of threatening, punishing, dominating, preventing, controlling or injuring another person; It involves beating, kicking on the head and body, scratching hair, injuries by sharp objects, kicking, strangling, throwing on the floor or against the wall, applying burns and similarly. This violence accounts for 70% of the total share of violence in statistics;
2. Psychic violence refers to constant intimidation, criticism, underestimation, emotional blackmail, emotional reservation, emotional threats and accusations, creating insecurity, fear and confusion in the victim, abuse of trust, harassment, mistreatment, denial and guilt, isolation, verbal abuse, use of mental strategies, manipulation;
3. Sexual violence is the use of forced sexual acts by which another person is dominated, manipulated, threatened and hurt. It implies a violation of sexual freedom and morale, forcing sexual intercourse, humiliation on a sexual basis;
4. Economic violence is manifested by the use of money or other things related to finance for the purpose of dominance, threat or control. It can be recognized by the violent seizure of money and valuable things, forbidding a family member to dispose of his own income, failure to fulfill the obligation to support, prohibit a member of the family from recruiting, earning money, and other;¹⁶
5. Endangering the tranquility implies wailing, hurting, hiding, ejecting, tearing, splitting and destroying objects, causing harm to household appliances, and others.

¹⁶ Randelović Dragana, Grujić Maja, Rakić Jelena, Miljković Julijana, “Kliničko pravno obrazovanje – doprinos kriminalističko-kriminološkim istraživanjima krivičnog dela nasilja u porodici”, u *Zborniku radova – Kriminalističko-kriminološka istraživanja – stanje i perspektive (Ur. Mile Matijević)*, Internacionalna asocijacija kriminalista, Banja Luka, 2015, pp. 181.

3. PREVENTION OF DOMESTIC VIOLENCE

It is illusory to expect that criminal law can provide effective protection against domestic violence.¹⁷ However, by passing precise legal solutions that are in line with the demands and recommendations of the international community, a clear message that the state has begun to change its attitude towards domestic violence is sent. The perpetrators of violence will be punished more severely, the victims will be better protected and the perpetrators of this crime will be more effectively prosecuted.

Criminal law norms can not solve serious social problems such as domestic violence, however this does not mean that they should not be constantly improved in order to increase efficiency.¹⁸

The basic function of criminal law norms is punishment, both individual and general prevention, and that is precisely the contribution that criminal law can give to effective protection against domestic violence. However, can this goal be achieved consistently with a mild penal policy? Is it necessary to change the awareness of judges, as well as employees in other state bodies with whom the victims come into contact, and not just the awareness of the victims?

The number of criminal charges that some police administrations and stations submit to the competent prosecutor's offices due to violence against women is ten times less than the number of cases reported to the police; the work on prevention of domestic violence ends with the introduction of warning measures in three quarters, and even more cases; the prosecution dismiss one quarter of the criminal reports submitted for domestic violence, and in 15.2% of cases apply the institute of delaying prosecution, mainly through the obligation to pay money for humanitarian purposes; only 25% of criminal charges filed with prosecutors' offices due to the criminal offense of domestic violence reach the stage of the indictment and the main trial.

An adequate and effective fight against domestic violence, where prevention will be in the foreground, requires a complementary concept of protection through the criminal-legal and family-legal aspect.

¹⁷ Jovanović Slađana, *Pravna zaštita od nasilja u porodici*, Institut za kriminološka i sociološka istraživanja, Belgrade, 2010, pp. 10.

¹⁸ *Ibidem*, pp. 158.

What is necessary is the construction of the accompanying mechanisms of protection and prevention, whose legislative framework is set by the adoption of the new Law on the Prevention of Domestic Violence. The Special Protocol on the Treatment of Police Officers in Violence Against Women in Family and in Partnership Relations and the Special Protocol on the Treatment of Centers for Social Work - the guardianship body in cases of domestic violence and women in partnership relations are of great importance. They were adopted in order to standardize the procedures of officers in cases of domestic violence, the specialization of certain officials, all with the aim of recognizing violence and rapid and effective protection of victims.

Research has shown that officials insufficiently recognize and understand the situation of women who suffer from violence in a family and partner relationships, the imbalance of power between the victim and the perpetrator of violence, the cyclical dynamics of violence and its consequences for the victim. The personal attitude of the police officers is often based on the patriarchal model of marital and family relations, which ranges from minimizing the social danger of family violence to its complete justification.¹⁹

From the misunderstanding and non-recognition of violence and the reaction of victims to violence, there are also inadequate beliefs and expectations from the competent authorities, inadequate decision by the authorities and inadequate choice of measures for the protection of women against violence. The first-time violence is accepted as a family or partnership conflict that does not require the reaction of the authorities, except for advisory work or warning.. It is noteworthy that the violence that has happened only once requires the immediate reaction of the competent authorities in accordance with the law and that the killing of women in the family or partnership relations is often the final outcome of long-term violence against the victim.

According to the UN, the first cause of death or disability among women aged 15-45 is not illness or traffic accidents, but violence, and the most dangerous place for a woman is her own home. Prevention of domestic violence should act on different social levels: at the level of the state, the community and the individual. Prevention includes three categories: primary, secondary and tertiary prevention of domestic violence.

¹⁹ Đurđić Vojislav, *Uloga policije u borbi protiv nasilja u porodici*, Pravna zaštita od nasilja u porodici, Ženski istraživački centar za edukaciju i komunikaciju, Niš, 1999, pp. 122.

Primary prevention means preventing the emergence of violence by raising awareness, campaigning, human rights education, educational materials for children and adolescents. When it comes to providing assistance and working with victims of violence, special education preparation of experts is required.

There are different concepts of work with victims of trauma and violence, but it is important to create a relationship between an aide and a client in which a person will feel safe. Psychological assistance to victims of violence is reflected through many types of individual to group work, through various therapies offered by a team of experts.

Secondary prevention refers to the identification of risk factors and risk groups, providing assistance to such families, opening a SOS telephone, legal counseling.

Tertiary prevention refers to the prevention of further violence; direct assistance to victims of violence, opening of shelters, effective police intervention, court procedures, work with perpetrators and others. Crisis management of victims is the first stage in cases of severe abuse. Victims of violence are provided with medical, psychological and legal assistance. If it is necessary, the victims are placed in the so-called. safe house, where they are given all the help they need. However, the victims are also facing new problems here. Victims of violence can not stay for a longer period of time in safe houses, they can not be provided with adequate financial assistance to become independent, this often leads to a return to the family and the repeated suffering of violence, or re-victimization. It is necessary to foresee special programs of longer-lasting financial assistance to ensure the existence of an independent autonomy for the victims. Also, one of the problems is the insufficient number of safe houses, their absence in some of the municipalities of Serbia, including Novi Pazar.

4. HATE CRIMES AT CRIMINAL LEGISLATION OF REPUBLIC OF SERBIA

Hate crime is a term which mostly understanding as a crime where the offender targets the victim because of who they are or what they believe. This targeting of a victim makes the crime more insidious and the limited available research would suggest that it takes a victim much longer to recover than from a comparable crime. This is just one reason why hate crime needs to have an enhanced response from the police, prosecutors and the judiciary. Such crimes adversely affect the confidence of the community and damage community cohesion.²⁰

Hate crimes are criminal acts motivated by bias or prejudice towards particular groups of people. This definition is offered by the Organization for Security and Co-operation in Europe (OSCE) through its Office of Democratic Institutions and Human Rights (ODIHR). Historical circumstances, social context and national legislation will determine which of the many individual/identity characteristics shall be further protected through a nation's hate crime legislation.²¹

According to Barbara Perry "Hate crime ... involves acts of violence and intimidation, usually directed towards an already stigmatized and marginalized group. As such, it is a mechanism of power and oppression, intended to reaffirm the precarious hierarchies that characterize a given social order. It attempts to re-create simultaneously the threatened (real or imagined) hegemony of the perpetrator's group and the "appropriate" subordinate identity of the victim's group. It is a means of marking both the Self and the Other in such a way as to re-establish their "proper" relative position, as given and reproduced by broader ideologies and patterns of social and political inequality".²²

Congress of United States of America has defined a hate crime as a "criminal offense committed against a person or property that is motivated in whole or in part by the offender's bias against a race, religion, ethnic/national origin group or

²⁰ Soltvedt Lars Petter, Ivanović R. Aleksandar, (2017), *Impact of the economic crisis on occurrence of criminal offences of hate crimes on the territory of countries of former Yugoslavia*, Conference proceedings: Conference Hate-crimes in South-East Europe, Sarajevo, November 8th, 2016., Faculty of Criminal Justice, Criminology and Security Studies, Sarajevo, pp.73-87.

²¹ Jokanović, J. (2018) *Hate crime victims in Serbia: A case study of context and social perceptions*. International Journal for Crime, Justice and Social Democracy 7(2): 22.

²² Chakraborti, N., Garland, J. (2009) *Hate crime: impact, causes and responses*, London: SAGE Publications Ltd, pp. 5.

sexual orientation group”. In short, hate crimes are directed against member of a specific group largely because of their membership in that particular group.²³

One should notice that even the term “hate“ has generally been accepted in the name of this sort of crime, the offender needs not actually „hate“ his or her victim in order to have committed a „hate crime“. „Hate“ has instead been conceptualised by most to mean „prejudice“. Understanding hate in this way has ignited further debate as to how prejudice should be defined and whether such a phenomenon can be attached to the *means rea* element of a criminal act. According to Gordon Allport „ethnic prejudice“ is defined as, „antipathy based upon a faulty and inflexible generalisation. It may be felt or expressed. It may be directed towards a group as a whole, or towards an individual because he is a member of that group“. ²⁴ Under this definition of prejudice a person must feel or express animosity toward a whole group based on generalisations made about its members. Such generalisations are often the result of stereotyping.

Regarding to fundamental human rights such as equality and non-discrimination hate crimes represents criminal behavior that affects the very core of the principle of contemporary democracy and fundamental human rights. Because of this large number of countries, by incriminating hate crimes in their criminal legislation, are trying to make these crimes more visible and to punish their perpetrators through appropriate sanctions.

Regarding everything above mentioned we can conclude that hate crimes are criminal acts motivated by bias or prejudice. Accordingly, every hate crime has two elements. First, that it is committed criminal offence which is prescribed as criminal act by national criminal law. Second element is that perpetrator of the offence has intentionally chose victim which possess protected characteristics. Protected characteristic is common for some group such as race, religion, ethnic or national belonging, citizenship, gender identity, sexual orientation or some other common element. The OSCE/ODIHR advocates that, when developing hate crimes legisla-

²³ Altschiller, D. (2015) *Hate Crimes: a reference handbook*, Third edition, Contemporary World Issues: ABC-CLIO, pp. 4.

²⁴ Walters, A. M. (2011) *A General theories of Hate Crime? Strain, Doing Difference and Self Control*, Critical Criminology, 19 (4), pp 315.

tion, protected characteristics should be limited to those which function as a maker of group identity and those that have been the basis for past and recent incidents.²⁵

Legal institute of hate crimes in criminal law of Republic of Serbia is introduced 2012 by the Amendments to the Criminal Code²⁶, on the way, that this law prescribed article 54a as a special circumstances in sentencing for criminal offences committed out of hatred.

Article 54a of this Code stipulates that committing a crime out of hatred will be taken into account as a separate, aggravating circumstance when meting out the sentence. It also prescribes that a criminal offence will be considered a hate crime if committed because of race, religion, nationality or ethnicity, sex, sexual orientation or gender identity of another person, unless it is prescribed as the element of a criminal offence. Starting from relevant international documents, the aim of the provision. Article 54a of the Criminal Code is to provide for stricter penalties, a thereby reinforcing criminal protection in relation to particular ones vulnerable social groups whose members are victims of various criminal act of hatred done because of this affiliation. Criminal acts from hate crimes are criminal offenses in which the perpetrator to attack because of her real or supposed affiliation to a certain one social group.²⁷

So we can see from the provision of 54a that as protective characteristics are recognized: a) national or ethnic affiliation, b) race, c) religion, d) nationality or ethnicity, e) sex, f) sexual orientation and g) gender identity. Other personal characteristics for example citizenship, political beliefs, financial status, marital and family status, age and etc. which also could be object of hatred in the commission of a criminal offense cannot be consider as aggravated circumstances under the provisions of Article 54a and therefore means that in such cases Article 54a cannot be applied. Also on the base of provisions of Article 54a we can conclude that it is obligatory for court to consider hate as an aggravating circumstance, unless prescribed as an element of the criminal offense, which means that the legislator

²⁵ Jokanović, Jelena (2018) *Hate crime victims in Serbia: A case study of context and social perceptions*. International Journal for Crime, Justice and Social Democracy 7(2), pp. 22.

²⁶ Amendments to the Criminal Code of Republic of Serbia. Official Gazette of Republic of Serbia, no 121/12, from 2012.

²⁷ Stojanović Zoran, Kolarić Dragana, (2012) Nova rešenja u Krivičnom zakoniku Republike Srbije, Bezbednost 3/2012, Ministarstvo unutrašnjih poslova Republike Srbije, Belgrade, str. 13.

has accepted a prohibition of double valuation in relation to this provision.²⁸ Such example with where hate is prescribed as an element of criminal offence exists in the Criminal Code of Republic of Serbia for the criminal offence of Violent behaviour at a sports event or a public gathering (Article 344a, Paragraph 1 CCRS). Article 344a Paragraph 1 of Criminal Code of Republic of Serbia stipulates: *“Whoever physically attacks or physically chlas with the participants of a sports event or a public event, violates or damages property of greater value when arriving or leaving the sports event or public event, entering a sports facility or throwing it to the sports field, among viewers or participants in the public event objects , pyrotechnic articles or other explosive, flammable or harmful substances that can cause bodily harm or endanger the health of participants in a sporting event or a public event, unauthorized entry into a sports court or part of a theater intended for opposing fans and causes violence, damages a sports facility, its equipment, devices and installations, by their behavior or slogans at a sports event or public gathering, cause national, racial, religious or other hatred or intolerance based on a discriminatory basis, resulting in violence or physical account with the participants, shall be punished by imprisonment of six months to five years and a fine.”*. In this case there is no possibility for implementing article 54a, if violent behavior based on the hatred on national, racial, religious or other discriminatoy basis because hatred is already consist as element of this criminal offence.

5. HATE CRIMES ON THE BASIS OF SEXUAL ORIENTATION AND DOMESTIC VIOLENCE SITUATION IN THE PRACTICE

When is the relation of hate crimes on the basis of sexual orientation, or implementation of provision 54a of Criminal code of Republic of Serbia, is in the case of criminal attack where the perpetrators of crime are members of the family of the victim situation is as follows.

LGBT persons are often attacked on the basis of sexual orientation or gender identity from known persons or family members. These victims do not find support in the family, they are often rejected, convicted, restricted in movement, psychological and / or physical punishment by parents and the closest relatives is present. Certainly the biggest problem here is family violence, which for everyone, regardless of sexual orientation or gender identity, leaves deep and long-term

²⁸ Ćorović Emir, Sistem krivičnih sankcija Republike Srbije, Sven, Niš, 2015. str. 149.

consequences. But problem is even deeper, because non-recognition of LGBT identity and hate motiv by the state authorities which are in charge for investigation, prosecution and sentencing.

Namely, although the number of reported cases of domestic violence increases, that is, the dark figure is decreases, it is also important to point out that sex orjentation or gender-based domestic violence is not a private matter. In this regard, it is very important that the perpetrators are adequately punished. The processing of such cases as a misdemeanour or domestic violence, when there is a hate crime based on sexual orientation or gender identity, does not provide an adequate punishment to perpetrators nor the appropriate and adequate protection of the members of these groups.

In practice, it often happens that when victims report to the police that they are attacked by their family members because of their sexual orientation or gender identity, the police identify such criminal acts and continues to inform the prosecution of this as classical family violence. The prosecution continues to investigate and prosecute such criminal acts, also as a domestic violence by failing to investigate the motive of hatred based on sexual orientation or gender identity. Consequently, the application of Article 54a in the indictment as mandatory aggravating circumstances is not demand by public prosecutor. In the end, the application of this article by the court is absent when pronouncing a judgment in such cases. All this leaves a bad message for victims of domestic violence, who are attacked for sexual orientation or gender identity. Sexual orientation is a term that is a related on emotional, sexual, and other attraction according to the people of the different or the same sex and gender. Most commonly, three forms of sexual orientation: heterosexual, bisexual and homosexual. The gender identity is defining as a personal experience of the genus that can and does not have to coincide with the sex of person.²⁹

So, when we have the situation that the victim of domestic violence has become a victim because of its sexual orientation or gender identity, in practice it often happens that members of state bodies in charge of investigating, prosecuting and sentencing such things, act like a family violence consumes of so-called hate crime. What can hardly be the case, because the law is precise in the application of Article 54a, which stipulates in the criminal legislation of the Republic of Serbia

²⁹ Gajin Saša, (2010) Pojam, oblici i slučajevi diskriminacije, U: Antidiskriminacioni zakon, Centar za unapređenje pravnih studija, Belgrade.

of so-called criminal offenses of hatred. Article 54a prescribed that if a criminal offence is committed from hate based on race or religion, national or ethnic affiliation, sex, sexual orientation or gender identity of another, the court shall consider such circumstance as aggravating except when it is not stipulated as a feature of the criminal offence. This means that if in the case of domestic violence there is some of the aforementioned hatred motive, then implementation of 54a is obligatory.

CONCLUSION

From this we can conclude that if a person was the victim of an attack by members of his family on the basis of sexual orientation or gender identity, then the legal qualification of this criminal manifestation only as a domestic violence without applying Article 54a does not provide full legal protection for these categories of people and gives a poor message to potential victims. Namely, if state authorities do not investigate with special attention possible motives of hate, and if there is no implementation of obligatory aggravated circumstances during sentencing, then we are sending messages to other possible offenders of this sort of criminal act, that their committing of criminal offence will not be punished with a severe form of punishment. And also, other members of this group will feel more fear because of its vulnerability. So because of all of this it is very important to recognize the existence of hate motives in the cases of domestic violence when the victim is intentionally chosen because of its sexual orientation or gender identity.

In order to improve the situation in this field, it is necessary to do the following:

- Increase knowledge of police, prosecutors and judges regarding hate crimes generally;
- Educate police, prosecutors and judges how to recognize hate motives;
- Educate police and prosecutors how to investigate possible motives of hate;
- Develop special manuals for investigation of hate crimes;
- Advocate implementation of Article 54a.

LITERATURE

- 1) Amendments to the Criminal Code of Republic of Serbia. Official Gazette of Republic of Serbia, no 121/12, from 2012.
- 2) Ćorović Emir, Sistem krivičnih sankcija Republike Srbije, Sven, Niš, 2015.
- 3) Đurđić Vojislav, *Uloga policije u borbi protiv nasilja u porodici*, Pravna zaštita od nasilja u porodici, Ženski istraživački centar za edukaciju i komunikaciju, Niš, 1999.
- 4) Ignjatović Tamara, *Nasilje prema ženama u intimnom partnerskom odnosu: model koordiniranog odgovora zajednice*, Rekonstrukcija Ženski fond, Novi Sad, 2011.
- 5) Jokanović, J. (2018) *Hate crime victims in Serbia: A case study of context and social perceptions*. International Journal for Crime, Justice and Social Democracy 7(2): 21-37. DOI:10.5204/ijcjsd.v7i2.518.
- 6) Jovanović Slađana, Lukić Marija, *Nasilje u porodici: nova inkriminacija*, Autonomni ženski centar, Belgrade, 2003.
- 7) Jovanović Slađana, *Pravna zaštita od nasilja u porodici*, Institut za Kriminološka i sociološka istraživanja, Belgrade, 2010.
- 8) Jovanović Slađana, Simeunović-Patić Biljana, Macanović Vanja, *Krivično-pravni odgovor na nasilje u porodici u Vojvodini*, Novi Sad, 2012.
- 9) Konstantinović-Vilić, Slobodanka Petrušić Nevena, *Krivično delo nasilja u porodici: pravna praksa u Republici Srbiji*, Ženski istraživački centar za edukaciju i komunikaciju, Niš, 2004.
- 10) Konstantinović-Vilić, Slobodanka, "Predrasude i stereotipi o nasilju u porodici", u *Zborniku radova-Pravom protiv nasilja u porodici*, Ženski istraživački centar za edukaciju i komunikaciju, Niš, 2002.
- 11) Lukić Miroslav, *Kriminološka analiza nasilje u porodici*, magistarska teza, Pravni fakultet u Nišu, Niš, 2003.
- 12) Matijašević-Obradović Jelena, Stefanović Nenad, "Nasilje u porodici u svetlu Porodičnog zakona, Krivičnog zakonika i Zakona o sprečavanju nasilja u porodici", *Pravo-teorija i praksa*, 4-6, Novi Sad, 2017.
- 13) Petrušić Nevena, Konstantinović-Vilić Slobodanka, *Vodič kroz sistem porodičnopravne zaštite od nasilja u porodici*, Autonomni ženski centar, Belgrade, 2012.

- 14) Randelović Dragana, Grujić Maja, Rakić Jelena, Miljković Julijana, “Kliničko pravno obrazovanje – doprinos kriminalističko-kriminološkim istraživanjima krivičnog dela nasilja u porodici”, u *Zborniku radova – Kriminalističko-kriminološka istraživanja – stanje i perspektive, Internacionalna asocijacija kriminalista (ur: Mile Matijević)*, Banja Luka, 2016.
- 15) Simić Dragana, “Krivičnopravna zaštita od nasilja u porodici”, *Kultura polisa*, Novi Sad, 2015.
- 16) Simonović Dragoljub, *Krivična dela u srpskoj legislativi*, Službeni glasnik R. Srbije, Belgrade, 2009.
- 17) Soltvedt Lars Petter, Ivanović R. Aleksandar, (2017), *Impact of the economic crisis on occurrence of criminal offences of hate crimes on the territory of countries of former Yugoslavia*, Conference proceedings: Conference Hate-crimes in South-East Europe, Sarajevo, November 8th, 2016., Faculty of Criminal Justice, Criminology and Security Studies, Sarajevo, pp. 73-87.
- 18) Stojanović Zoran i Kolarić Dragana, (2012) Nova rešenja u Krivičnom zakoniku Republike Srbije, *Bezbednost 3/2012*, Ministarstvo unutrašnjih poslova Republike Srbije, Belgrade, str. 7-32.
- 19) Stojanović Zoran, Delić Nataša, *Krivično pravo posebni deo*, Pravna knjiga, Belgrade, 2013.
- 20) Stojanović Zoran, Perić Obrad, *Krivično pravo-posebni deo*, Pravni fakultet Univerziteta u Beogradu, Belgrade, 2006.
- 21) Stojanović Zoran, Perić Obrad, *Krivično pravo-posebni deo*, Pravni fakultet Univerziteta u Beogradu, Belgrade, 2006.
- 22) Škulić Milan, *Krivično delo nasilja u porodici, Nasilje u porodici*, Pravni fakultet Univerzitet u Beogradu, Belgrade, 2012.

ODNOS IZMEĐU ZLOČINA MRŽNJE NA OSNOVU SEKSUALNE ORIJENTACIJE I NASILJA U DOMU - ANALIZA STANJA U REPUBLICI SRBIJI

Apstrakt

Autori se bave pitanjem zločina iz mržnje na osnovu seksualne orijentacije, a u vezi sa pitanjem nasilja u porodici. Naime, članom 54a Krivičnog zakona Republike Srbije propisano je da ako je krivično delo počinjeno iz mržnje, uz postojanje činjenice da je žrtva druge seksualne orijentacije, sud tu okolnost ocenjuje kao otežavajuću okolnost prilikom izricanja kazne. Ova odredba je uvedena u krivično zakonodavstvo Republike Srbije 2012. godine i do danas nije postojala nijedna presuda u kojoj se ovaj član primenjuje. Kao jedna od najugroženijih grupa u oblasti zločina iz mržnje u Republici Srbiji, pored romske populacije, pojavljuju se pripadnici LGBT populacije.

Autori ističu da pripadnici LGBT populacije u Republici Srbiji u većini slučajeva trpe različite vrste nasilja od članova porodice. Iako postoji kao ogromna tamna brojka, izvestan broj ovih slučajeva je prijavljen. Međutim, i tada nastaje problem, koji se ogleda u tome da ovakve slučajeve krivičnopravni organi u Republici Srbiji uglavnom tretiraju samo kao nasilje u porodici iz člana 194 Krivičnog zakonika, ne primenjujući član 54a. U tom smislu, autori koji se bave ovim problemom, prvo definišu zločin iz mržnje u skladu sa važećom zakonskom regulativom Republike Srbije, ukazujući na značenje pojma seksualne orijentacije. Nakon toga, autori rada ukazuju na krivičnopravne odredbe koje se odnose na nasilje u porodici, navodeći i vrste i vrste nasilja koje se dešavaju u praksi. U drugom delu rada, autori ukazuju na problem neprimene člana 54a, ne samo od strane suda, već i policije i tužilaštva. Na kraju rada autori nude određene preporuke i smernice kako bi ovu situaciju u budućnosti promenili u praksi.

Ključne riječi: zločin iz mržnje, seksualna orijentacija, nasilje, nasilje u porodici, zaštita žrtava.