

**RACIST AND XENOPHOBIC MOTIVATION AS AN
AGGRAVATING CIRCUMSTANCE IN SENTENCING²***Abstract*

Based on certain international legal acts (Council Framework Decision 2008/913/JHA dated 28 November 2008), but without limiting it solely to racist and xenophobic motivation, the Criminal Code of the Republic of Serbia (SCC) introduced a new provision (effective of 1 January 2013) with a view to ensuring a more severe punishment for criminal offences committed against members of certain social groups out of hatred based on such membership. Despite the fact that the general principles of sentencing specified in the SCC foresee that the court will take into account, inter alia, the motives for committing the offence, this provision is of general nature and does not explicitly mention hate as an aggravating circumstance nor, indeed, does it foresee hate as a statutory aggravating circumstance. This might be seen as a justifiable reason for introducing such a provision, regardless of the fact that it implies departing from the general principles in meting out the punishment. This provision is the only mandatory aggravating circumstance in the SCC. However, it is primarily a criminological notion which does not constitute a precise criminal law category. Existing perceptions of “hate crimes” are quite diverse. Therefore, harsher punishment for such criminal offences provided for by foreseeing more serious forms of existing criminal offences would not be justifiable. The selection of these criminal offences per se would be arbitrary.

The provision of Art. 54a of the SCC stipulates also that hate shall not be considered as an aggravating circumstance in criminal offences

¹ Law Faculty, University of Belgrade, mail: zorans@ius.bg.ac.rs

² Ovaj rad predstavlja modifikovanu verziju referata koji je autor podneo na međunarodnom kongresu “Los retos del Principio de Igualdad en el Estado Social y Democrático de Derecho”, Sesión II: La protection penal de la igualdad održanom u Las Palmasu (Gran Canaria) 30. i 31. oktobra 2013. godine. Referat je kao materijal za učesnike kongresa preveden na španski („LA MOTIVACIÓN RACISTA Y XENÓFOBA COMO CIRCUNSTANCIA AGRAVANTE PARA LA DETERMINACIÓN DE LA PENA”).

for which hate as a motive is foreseen as a legal element. Although the SCC does not foresee any criminal offences explicitly associated with hate as a motive, this prohibition still refers to four criminal acts the legal descriptions of which include certain forms of hate. Taking into account also the general prohibition of double evaluation in determining the punishment as well as the nature and sense of such crimes, hate within the meaning of Art. 54a of the SCC should not be taken into account as an aggravating circumstance since the above four criminal acts are, indeed, based on it.

It is difficult to say now whether the solution opted for by the legislator in Serbia shall incite the pronouncement of more severe punishments for crimes committed out of hate on the above grounds. So far, there have been no studies done on whether and to what extent the said circumstance influenced sentencing. One can reasonably assume, however, that the courts did take it into account when assessing the motives underlying such criminal offences. In any case, this is a symbolic gesture on the part of the legislator which should be upheld as such, but if one should ask whether criminal law can suppress hate (against any person), no optimistic view could be based on realistic approach to limited capacities of criminal law.

Key words: *hate, xenophobia, racism, aggravating circumstance, sentencing, criminal law.*

1. Preliminary remarks

Numerous international law documents clearly imply the intention to provide special criminal law protection to certain social groups, i.e., to suppress certain forms of discrimination by means of criminal law as well. Rather than trying to address this complex and rather broad topic, this paper focuses only on one, relatively narrow segment, i.e., issue thereof. Namely, the special protection implies also its intensification reflected in more severe punishments prescribed for criminal offences committed to the detriment of members of such groups. Here, the main attention of this paper will be awarded to the following two questions: whether a more severe punishment is justifiable for any and all criminal offences perpetrated out of racist and xenophobic motives and whether a more severe punishment can raise the effectiveness of suppression of certain forms of discrimination.

Although referring to some other criminal legislations, this issue shall be discussed on the example of the solution provided in the

Serbian Criminal Code (SCC) with the recently introduced provision on discriminatory motivation (on the grounds of race, religion, national or ethnic affiliation, sex and sexual orientation or gender identity) as a statutory aggravating circumstance. Serbian criminal legislation may prove to be interesting also due to the fact that the same idea (in a somewhat different form) was embodied therein as early as 1986, that is, even before the USA came up with the „hate crime“ concept and before it was foreseen as an obligation on the part of the states by some international acts.

2. Special circumstance for determination of sentence for hate crime

Motivation, indisputably, constitutes an important circumstance in meting out punishment. To that effect, motivation is given a serious attention since it is considered to be a psychological “driving force” behind the crime. Motives may be classified according to various criteria.³ Some of the divisions are based upon social and ethical valuation of motives, which is very important for establishing their role as a significant circumstance to be taken into account in sentencing (for inst. altruistic and egoistic, noble and lowly, etc.). Whether they will be considered a mitigating or aggravating circumstance depends precisely upon their evaluation using social and ethical criteria.⁴

The new provision of Art. 54a of SCC that came into force on 1 January 2013, is aimed at ensuring more severe punishment,⁵ thus strengthening up criminal law protection of specific, particularly vulnerable social groups whose members are often victims of various criminal offences committed out of hatred based on such membership. Hatred could be incited by belonging to a certain racial, religious, national or ethnic group but also on account of person’s sex, sexual orientation

³ G. Mantovani, *Diritto penale, Parte generale*, Settima edizione, CEDAM, 2011, 648-649.

⁴ Stree/Kinzig. In: Schönke/Schröder, *Strafgesetzbuch, Kommentar*, 28. Auflage, München, 2010, 752.

⁵ On the issue of punishment associated with xenophobic and racist motives explicitly clear is the Framework Decision of the of the European Union Council (Council Framework Decision) prescribing that member states shall take necessary measures to explicitly foresee these motives as an aggravating circumstance or, alternatively, that courts of law may take into account such motives in determining sentences (Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law - Art. 4). The amendments to Serbian CC went even further than the foregoing Framework Decision. On the one hand, the Decision is mandatory only for EU member states which Serbia is still not and on the other, the Decision associates hate as an aggravating circumstance only with the two mentioned manifestations thereof and allows member states to foresee the aggravating circumstance as a facultative one (as was the case in Serbia prior to introduction of Art. 54 into SCC.).

or gender identity.⁶ Although general sentencing rules of Art. 54 of the Criminal Code already foresee that the court shall take into account also the motives for committing the offence, this provision is of general nature without any explicit reference to hate as an aggravating circumstance (on the foregoing grounds), and neither does it prescribe hate as a mandatory aggravating circumstance the way it is foreseen in provision of Art. 54a of the Criminal code.

Hate frequently occurs as an underlying motive for committing a criminal offence. However, it would be unacceptable to take it into account as an aggravating circumstance always and in connection to each and every criminal offence. This might be seen as a justifiable reason for introducing the said provision, regardless of the fact that it implies, to a certain extent, departing from the general principles in meting out punishment. This provision is the only mandatory aggravating circumstance in Serbian CC (which is not the case with recidivism (repeat offence) that is also regulated in a separate article but only as a facultative aggravating circumstance). This is primarily a criminological notion,⁷ which does not constitute a precise criminal law category since the circumstance may “surface” in numerous, often quite different criminal acts. Existing perceptions of the so called “hate crimes” are quite diverse. They range from the views implying that even the slightest prejudice against certain social groups initiating a negative attitude towards members thereof would suffice all the way to the standings demanding a criminal offence to be perpetrated solely out of hatred, exclusive of any and all other factors.⁸ Therefore, implementing the obligation prescribed by international legal acts pertaining to harsher punishment for such criminal offences by foreseeing qualified forms of individual criminal offences would not

⁶ The grounds set forth in provision of Art. 54a of Serbian CC are more numerous than those foreseen as mandatory in the Council Framework Decision 2008/913/JHA. Santana Vega points out as particularly unclear why the Council Framework Decision excludes from the reach of criminal law protection gender and sexual orientation despite of the still high incidence of homophobic assaults in the EU states. She finds a possible explanation in the fact that there was no consent on the issue as indicated also by the provision of the Council Framework Decision which states that the decision should not prevent members states from extending criminal law protection to groups formed according to other criteria in their respective national legislations. See D. M. Santana Vega, “Strafrechtliche Aspekte der diskriminierenden Meinungsfreiheit: Eine europäische Perspektive“, *Strafrecht als Scientia Universalis*, FS für C. Roxin zum 80. Geburtstag, Band 2, Berlin-New York, 2011, 1541-1542.

⁷ Đ. Ignjatović, *Kriminologija*, 10th ed., Beograd, 2010, 104.

⁸ In that sense, Hall, who compares statistical data on hate crimes committed in New York and London which are very different primarily because of different perception of this notion. N. Hall, “Making Sense of Numbers: The Social Construction of Hate Crime in London and New York City”, *Hate Crime* (J. Goodey, K. Aromaa, eds), Helsinki, 2008, 29-39.

be justifiable.⁹ Even selecting such criminal offences per se would be arbitrary. Numerous criminal offences could be committed out of hatred based on some of the above-mentioned grounds. True, it was possible to foresee statutory harsher punishment by a general provision, for instance by prescribing that perpetrating the offence out of such motives shall increase the prescribed punishment range to a certain degree or by excluding the possibility of pronouncing certain criminal sanctions such as suspended sentence, etc. However, this would significantly disrupt the system of the general part of SCC and would probably cause serious problems in implementation. If hate generated by discrimination of some sort is to be given a special status in criminal law, the solution opted for by Serbian and some other European legislators, empowering the court to assess, in each concrete case, whether and to what extent hatred led to perpetration of the criminal offence appears to be a better one. This precisely should be the basic criterion. Although it is possible for hate to exist in combination with some other type of motivation (greed (gain), for inst.), taking it into account as an aggravating circumstance should require hate, in addition to its discrimination-based origin, to be the basic motivating factor which actually led to the commission of the criminal offence.

As a rule, discriminatory hate is based on certain prejudices and convictions. However, this, per se, does not justify criminal law intervention. Existence of a criminal act should not depend primarily upon someone's views and convictions (regardless of how wrong, prejudicial or misguided they may be). As long as such hate is not manifested in the form of (mis)conduct which harms or seriously endangers the most important goods and values possessed by an individual or the society as a whole, it remains irrelevant from the criminal law point of view. Hate may only be subject to moral condemnation or serve as a spark to ignite some other form of social response.¹⁰ This should be beyond dispute nowadays. In any case, this is an issue more related to the question of criminalization of the so called hate speech which is not the topic of this paper. Still, evaluating and taking into account offender's convictions and views can prove to be problematic (aside from the problems associated with determining and proving them) even when such actions are undertaken for the purpose of imposing upon a perpetrator a more severe punishment than what his offence would otherwise objectively deserve without taking into account his convictions. Only if there exists certainty that his offence gains in

⁹ See also, D. Kolarić, "Mržnja kao otežavajuća okolnost" Nova rešenja u kaznenom zakonodavstvu Srbije i njihova praktična primena, Zlatibor-Beograd, 2013, 418.

¹⁰ See Z. Stojanović, *Krivično pravo, Opšti deo*, 20th ed., Beograd, 2013, 14.

intensity and danger because of his convictions, could they be taken into account as an aggravating circumstance in sentencing.¹¹ Although this is precisely the case with racial and xenophobic motivation, such motivation is not always easy to establish. Especially nowadays when, in addition to the primitive, there are various forms of subtle racism associated with certain convictions that may be of either political or ideological nature,¹² we find ourselves walking down a very sensitive path one can easily slip away from right into the so called *Gesinnungstrafrecht*. Still, racial motive per se is a lowly one and as such should have the weight of an aggravating circumstance.¹³ In any case, one of the advantages of the solutions explicitly prescribing racist and xenophobic motives as a statutory aggravating circumstance is also reflected in the fact that these solutions eliminate any and all dilemmas in this respect, when it comes to implementation of criminal law.¹⁴

3. Discriminatory motivation and sentencing

The new provision of Serbian CC clearly implies that hate as discriminatory motivation is a mandatory aggravating circumstance. The question is though, whether hate on the above grounds has a stronger effect than “ordinary” hate, i.e., whether it merits a more severe punishment than when a crime has been committed out of hatred based on some other grounds. Does, for example a great bodily injury inflicted out of hatred against a person belonging to one of the above groups merit a more severe punishment than a great bodily injury caused out of hatred to a rival who stole the perpetrator’s girlfriend? If our starting

¹¹ In that sense, Kühl who is of the opinion that this is hardly imaginable. K. Kühl, *Die Bedeutung der Rechtsphilosophie für das Strafrecht*, Baden-Baden, 2001, 41.

¹² For contemporary manifestations of racism which assumes subtle forms, See, *Handbook for training security forces in identifying and recording racist or xenophobic incidents*, Spanish Observatory on Racism and Xenophobia, Madrid, 2012, 6-7. However, some of these forms of racism have no clear contours and they readily cross the line and spread across the sphere of ideology and even politics which, besides raising the objection that criminal law should not protect or suppress certain political or ideological views, also results in losing clear conceptual boundaries which is, from the aspect of *lex certa* postulates, unacceptable in criminal law.

¹³ Thus Stree/Kinzig, 752.

¹⁴ There are, of course, different opinions. Thus, in connection to the suggestion that racial and xenophobic motives should be entered into German CC expressly in terms of circumstances for meting out punishment (see footnote 13) it is stated that it would be superfluous since jurisprudence should indisputably use these motives as an aggravating circumstance anyway and therefore this proposal should be viewed as a political initiative rather than something that would bring a true novelty into German criminal law. Moreover, the very intention that criminal law should create and uphold open democratic climate could have dysfunctional reflexes. There is also a reference to the point of view frequently expressed particularly in American scientific literature to the effect that an anti hate crime legislation can, through constantly assigning guilt, deepen the conflict between social groups. Cf. D. Dienstbühl, M. Abou-Taam, “Hasskriminalität: Eine Herausforderung an die moderne Gesellschaft”, *Die Kriminalpolizei* Nr. 3/2012, 7.

point is that the rationale behind this provision is to provide stronger criminal law protection to certain social groups from discrimination then the associated hatred should rightfully have a stronger impact as an aggravating circumstance i.e., it should be given more credit for the sake of pronouncing more severe punishments towards the special maximum penalty than “ordinary” hate. In fact, hate per se should not always even be considered as an aggravating circumstance. This, in turn, means that hate based on discrimination is differentiated from other types of hate in two ways. First, according to provision of Article 54 of Serbian CC it is always an aggravated circumstance and secondly, its effect (although it depends upon each concrete case) should be stronger in terms of its influence upon meting out the sentence reflected in “pushing” it towards upper limit of the maximum penalty prescribed for the given criminal offence.

Disputable is also the question of how much weight and significance should be assigned to this circumstance, relative to other circumstances in determining the sentence and how they would all these circumstances interact? First of all, does discriminatory motivation have any influence upon the level of guilt and degree of non-law. One might say that discriminatory motivation increases the level of guilt, particularly in light of the fact that nowadays guilt is not “screened” only from the aspect of psychology – indeed, some normative elements are attributed to it now as well which imply certain evaluations. Asserting that an act per se objectively gains in weight because due to such a motivation certain values are endangered to a higher extent would not be unfounded either. Thus, in the rationale of the draft Law on Amendments to the Criminal Code submitted by Bundesrat to Bundestag for adoption it is asserted that the so called hate crimes contain a higher degree of non-law compared to other criminal acts of violence and that criminal law must pay more attention to this fact than before. Further to the point, it is also stated that criminality of hate is particularly “convenient” for disturbing social peace.¹⁵

4. Prohibition of double evaluation of discriminatory motivation

Provision of Article 54a of SCC foresees, inter alia, that hate shall not be considered as an aggravating circumstance in criminal offences

¹⁵ See “Entwurf eines ...Gesetzes zur Änderung des Strafgesetzbuchs - Aufnahme menschenverachtender Tatmotive als besondere Umstände der Strafzumessung”, Drucksache 17/9345, 18.04.2012. It was proposed that in § 46 prescribing basic rules for sentencing, in paragraph 2 after the words motives and aims the following wording should be added “besonders auch rassistische, fremdfeindliche oder sonstige menschenverachtende”. However this draft law was rejected in Bundestag by a majority vote on 18 October 2012, by which act Germany failed to join some other states (including Spain) which explicitly foresee racist and other type of discriminatory motive as an aggravating circumstance in sentencing.

for which hate as a motive is already foreseen as a legal element. This is to emphasize and explicitly prohibit double evaluation which is already provided for within the general rules of sentencing. However, SCC does not foresee any criminal offences explicitly associated with hate in general as a motive (not even on the foregoing grounds) so the question is whether this prohibition is of any significance with respect to prescribed criminal offences. Although hate as a motive is not explicitly associated with any criminal act, in some way it is included in legal descriptions relating to four criminal offences. The first is murder “out of other lowly motives”. Although it does not refer to hate only, particularly not to hate based on specific grounds, the offence description undoubtedly encompasses it and if, in a concrete case, it is taken as the basis for establishing the existence of this qualified circumstance, it could not be taken into account again as an aggravating circumstance. The second criminal offence (Art. 317), instigating national racial and religious hatred and intolerance, does not include hate as a motive but it is nevertheless the central element of this crime. The entire act foreseen in Art. 317 of the SCC is based on national, racial or religious hatred, i.e., it is the reason for the very existence thereof, so the prohibition of double evaluation in sentencing should apply to this offence as well. The third criminal offence which is, as a rule, committed out of hate is the one foreseen in Art. 387 para. 4 of the SCC. It exists when a person publicly threatens to commit a criminal offence punishable by imprisonment for a term of more than 4 years against any person or a group based on their race, skin color, religious affiliation, nationality, ethnic origin, or some other personal characteristic. This, too, would not justify taking hate on the said grounds into account as an aggravating circumstance for determination of sentence since the public threat of committing a crime against a person belonging to a certain group is an obvious manifestation of hate as motivation (although, hypothetically, other motives are possible as well). Finally, with one of the forms of crime against humanity (persecution on political, religious, racial, national and other grounds - Art. 371. of the SCC), hatred based on racism or xenophobia should also be excluded as an aggravating circumstance since the act per se is based on it. Also, it is implicitly implied that this motive could not be considered as an aggravating circumstance in case of the criminal offence of genocide either, due to its essential legal elements and nature.

Taking also into account the general prohibition of double evaluation, in the cases of forgoing criminal offences, hate, within the meaning of Article 54a of the SCC should not be considered as an aggravating circumstance since it is already contained in the legal

elements of these criminal offences although not explicitly mentioned as a motive in the legal description thereof. This does not apply to the criminal offence of violation of equality foreseen by Art. 128 SCC. This is a discrimination-related offence of general nature (denying rights a person is entitled to or awarding preferential treatment or privileges a person is not entitled to) on various grounds listed in the legal description (nationality or ethnicity, political conviction, social status, etc.). Since the act can be committed out of various motives, prohibition against double valuation would not apply to this criminal offence in particular. Therefore, if, in a concrete case, it was committed out of hatred on one of the grounds listed in Art. 54a SCC, this shall be considered as an aggravating circumstance in meting out the punishment.

5. Conclusion

It is difficult to say now whether the solution opted for by the legislator in Serbia (as well as in some other countries) shall incite the pronouncement of more severe punishments for crimes committed out of hate on the above grounds. Still, one can reasonably expect such an outcome, although this solution does not directly encroach upon the prescribed punishments. No data are available on whether and to what extent this circumstance had influenced judges in the process of meting out sentences before it was adopted as a special, statutory aggravating circumstance.¹⁶ One can reasonably assume, however, that the courts did take it into account when assessing the motives underlying such criminal offences. In any case, this is a symbolic gesture on the part of the legislator which should be upheld as such, but if one asks whether criminal law can suppress hate (against any person or group), the obvious, albeit skeptical answer comes to mind, reasonably founded on limitations of criminal law and specific nature of its operation.

Apart from the general reasons attributed to the nature and limitations of criminal law, Serbia is faced with an additional reason associated with the unsuccessful attempt to use criminal law in resolving this complex social and political problem. Namely, in order to address the inter-ethnic problems that existed in Kosovo at the time, Serbian

¹⁶ Only several isolated cases of grave criminal offences are known where it was a relevant circumstance for legal qualification. Thus, Kolarić points out the case of murder of a Roma boy committed by a Skinhead. Because the boy belonged to a certain ethnic group, the court treated the act as aggravated murder committed out of lowly motives. *Ibid.*, 417.

criminal law¹⁷ was supplemented with provisions which prescribed, for a large number of criminal offences (ranging from pollution of drinking water to rape and murder¹⁸) considerably more severe punishment when the criminal offence is carried out in a manner or under circumstances provoking or that could provoke a sense of insecurity or inequality among national or ethnic groups or members thereof. Save for the criticism this move on the part of the legislator provoked in jurisprudence¹⁹ it produced no practical results which is obvious having in mind that the inter-ethnic conflict in Kosovo ended up the way it did with criminal law playing no part in it. One might argue that the failure was also a reflection of certain social and political climate but this experience should not be entirely overlooked even nowadays when we ask ourselves what is to be expected from the new provision of Criminal law. In eight years of effectiveness of the Kosovo-related provisions,²⁰ although they were designed to have a stronger effect than the provision of Art. 54a of the SCC, since they explicitly provided for more severe sentencing and were not foreseen just as aggravating circumstances the courts were supposed to consider in meting out sentences within the scope of prescribed punishments, they proved to be of no significance in suppressing ethnic discrimination, i.e., commission of criminal offences based on such motivation.

Finally, in order to avoid ending this discussion solely on a skeptical note with respect to possibilities and boundaries of criminal law, particularly when relying primarily on harsher punishment, let me say that I believe that, in this particular area, just like in all other areas where criminal law plays a role, as Beccaria noted long time ago, the very threat of harsher punishment is not as important as to ensure that criminal law is implemented efficiently and with certainty. Of course, what is even more important is that this undoubtedly harmful and unacceptable

¹⁷ Serbia and all other republics (even provinces) within former Yugoslavia had their own, separate, criminal legislations (federal criminal legislation regulated matter belonging to the general part and only some criminal offences of importance for the country as a whole). These provisions were entered into Serbian Criminal Code in 1986 - Službeni glasnik SRS" No.39/86

¹⁸ For a murder of this type which instigated or could have instigated inter-ethnic conflicts death penalty was one of the foreseen punishments.

¹⁹ Ćirić points out that some of those who criticized the solution, even ridiculed it ("rape on ethnic grounds"), where precisely those who later themselves used that phrase in connection with armed conflicts in the former SFRY. However, some of the objections used at the time still have certain weight. One of the objections of general nature points to the possibility of political misuse and another, practical objection, is that hate and other motives are very difficult to establish and prove unless explicitly manifested. See J. Ćirić, "Zločini mržnje - američko i balkansko iskustvo", Temida December 2011, 28. The same author emphasizes that while in the USA preparations for introducing legal solutions to deal with the so called hate crimes were still underway, Serbian legislator was already in the process of discontinuing such incriminations which, in the opinion of that author, were the "forerunners" of "hate crimes". Ibid., 29.

²⁰ The provisions were abolished in 1994.

occurrence should be confronted by other mechanisms of social control, more focused on causes and roots thereof and less on its consequential forms. Criminal law, too, has its role in suppressing the problem but overestimating its role is an indication of weakness and helplessness of modern age societies in efficient suppression of the socially unacceptable motivations by other means.

Prof. Dr. Zoran Stojanović

Pravni fakultet, Univerzitet u Beogradu

RASISTIČKA I KSENOFOBIČNA MOTIVACIJA KAO OTEŽAVAJUĆA OKOLNOST KOD ODMERAVANJA KAZNE

Rezime

Polazeći od određenih međunarodnopravnih akata (Council Framework Decision 2008/913/JHA od 28. 11. 2008. - Art. 4), ali ne ograničavajući se samo na rasističku i ksenofobičnu motivaciju, u Krivični zakonik Srbije je uneta nova odredba (stupila na snagu 1. januara 2013) čiji je cilj strože kažnjavanje krivičnih dela učinjenih prema pripadnicima određenih društvenih grupa iz mržnje zbog te pripadnosti. Iako KZ Srbije u okviru opštih pravila o odmeravanju kazne predviđa da će sud u obzir uzeti i pobude iz kojih je delo učinjeno, ta odredba je uopštena i ne govori eksplicitno o mržnji kao otežavajućoj okolnosti, niti je propisuje kao obaveznu otežavajuću okolnost. U tome se može videti opravdanje unošenja ove odredbe iako ona znači odstupanje od opštih pravila o odmeravanju kazne. Ona je jedina obavezna otežavajuća okolnost u KZ Srbije. Strože kažnjavanje određenih krivičnih dela učinjenih iz mržnje ("hate crimes") predviđanjem njihovih težih oblika bilo bi lošije rešenje. Sam izbor tih krivičnih dela bi bio arbitreran. I sam pojam "hate crimes" je kriminološki pojam koji se različito shvata i koji ne predstavlja preciznu krivičnopravnu kategoriju.

Odredba člana 54a KZ predviđa i to da mržnja neće biti otežavajuća okolnost kod onih krivičnih dela kod kojih je mržnja kao pobuda predviđena kao zakonsko obeležje. Iako u KZ Srbije ne postoje krivična dela kod kojih je mržnja eksplicitno propisana kao pobuda

kod osnovnog ili kvalifikovanog oblika, ova zabrana se ipak odnosi na četiri krivična dela kod kojih mržnja na određeni način ulazi u njihov zakonski opis tako da kod njih, imajući u vidu i opštu zabranu dvostrukog vrednovanja prilikom odmeravanja kazne, mržnju u smislu člana 54a KZ ne bi trebalo uzimati kao otežavajuću okolnost.

Teško je predvideti da li će unošenje posebne odredbe u KZ Srbije dovesti do izricanja strožih kazni kada su u pitanju krivična dela učinjena iz mržnje po navedenim osnovima. I do sada je iz opštih pravila o odmeravanju kazne proizlazilo da je to trebalo uzimati kao otežavajuću okolnost. Istraživanja o tome da li je i u kojoj meri ta okolnost uticala na odmeravanje kazne, nisu vršena. Osnovana je pretpostavka da su je sudovi uzimali u obzir ocenjujući pobude iz kojih je delo učinjeno. U svakom slučaju, ovo je simboličan gest zakonodavca koji kao takav treba podržati, ali kada se upitamo da li se krivičnim pravom može suzbijati mržnja (prema bilo kome), optimistički stav ne bi bio zasnovan na stvarnim mogućnostima krivičnog prava.

Ključne reči: mržnja, ksenofobija, rasizam, otežavajuća okolnost, odmeravanje kazne, krivično pravo