

Discussion Paper

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JASNA PEĆANAC

**Hate Crimes and
Juveniles: Key
Problems in Regulation
and Processing**

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Key Problems in Regulation and Processing

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NORWEGIAN EMBASSY

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1.

Introduction

Bosnia and Herzegovina has seen an increase in significance assigned to combating hate crimes. These crimes have a particularly strong impact on our society due to the still present traces of war and the great importance accorded to ethnic, religious and national affiliation in our social and political life. Even though the international community used to devote most of its attention to war crimes, organised crime, corruption, money laundering and the like, in the past few years, the OSCE Mission in Bosnia and Herzegovina, in cooperation with civil society organisations, has taken on a leading role in an endeavour to ensure the application of international standards and obligations pertaining to hate crimes in Bosnia and Herzegovina (hereinafter: BiH). In these activities, special categories of perpetrators of these crimes, such as juvenile offenders, are quite justifiably, but still insufficiently, taken into account. Thus the 2009 Country Overview of Bias-Motivated Incidents in Bosnia and Herzegovina¹, among other things, points out hate crimes committed by juveniles and young adults. Five such cases are cited for the territory of the Federation of BiH (hereinafter: FBiH). However, in view of the general trend of insufficient and inadequate processing of criminal offences of this type in BiH general², we must conclude that their number is probably considerably higher.

In general, juvenile delinquency entails prohibited behaviour through which juveniles endanger and violate the rights and freedoms of others, cause physical and mental suffering to others, or damage another's property. The problems generally faced by the juvenile justice system in BiH certainly impact the efficiency of processing hate crimes committed by juveniles. However, given the specificity of the motivation and the consequences, processing juvenile perpetrators of hate crimes has (or should have) a series of specificities that arise from the nature of this type of crime. All bodies participating in proceedings involving juveniles should take into account these specificities in the interest of most fully achieving

¹ OSCE/ODIHR, *Hate Crimes in the OSCE Region-Incidents and Responses: Annual Report for 2008* (Warsaw: OSCE/ODIHR, 2009).

² OSCE Mission to Bosnia and Herzegovina, *Borba protiv krivičnih djela počinjenih iz mržnje: Analiza incidenata motiviranih predrasudama u Bosni i Hercegovini, sa preporukama* [Tackling Hate Crimes: An Analysis of Bias-motivated Incidents in Bosnia and Herzegovina with Recommendations], (Sarajevo: OSCE Mission to Bosnia and Herzegovina, 2012).

the aims of such proceedings – re-education, rehabilitation and reintegration of the juvenile in question.

Given the still insufficient level of commitment to preventing and combating this specific type of juvenile offending, which has been on the rise in the current socio-political situation in BiH, this paper will focus on dispelling dilemmas and quandaries about whether and to what extent the existing legal framework and basic procedural principles applicable to juveniles in conflict with the law can adequately be applied to hate crimes, with particular reference to the significance of preventive activities applied to juveniles in general, and in particular with respect to these types of criminal offences. Moreover, focusing on juveniles as a specific population, but also as potential perpetrators of hate crimes, which are specific by nature, this paper aims to point out possible problems in the practice of prosecuting juvenile perpetrators of hate crimes. This is, of course, another specific characteristic of combating juvenile offending as a whole and involves complex issues. Therefore, at the present stage of defining initial steps in processing hate crimes, this paper will not and cannot encompass all its aspects, but can hopefully contribute to drawing attention to this important topic in the Bosnian-Herzegovinian context.

2.

Hate Crimes and Juveniles

2.1 Legal framework and basic principles of criminal proceedings against juveniles

Due to the fragmentation of criminal legislation into four legislative levels (BiH, FBiH, Republika Srpska, and the Brčko District of BiH), and since the new codes came into force on different dates and provide diverse solutions in terms of the stipulated requirements for the application of individual institutes, juveniles in conflict with the law do not find themselves in the same position throughout the territory of our country. The juvenile justice system, which entails judicial treatment of juveniles in conflict with the law, is the final link in resolving the problem of juvenile delinquency. It must be set up as a fair system that protects the personalities and rights of juveniles, as well as their best interest, because these are young persons with special problems, but also their needs, desires and expectations. In Republika Srpska (hereinafter: RS) and in the Brčko District of BiH (hereinafter: BD BiH), the Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings (hereinafter: the Law on Juveniles)³ has been passed and has come into force, while the corresponding law in the Federation of Bosnia and Herzegovina (hereinafter: FBiH) is still in draft form and is currently in parliamentary procedure. This is why the FBiH Criminal Procedure Code and the FBiH Criminal Code are still applied in proceedings before judicial bodies in the territory of FBiH, while the applicable legislation for state-level proceedings is the BiH Criminal Procedure Code and the BiH Criminal Code (hereinafter: CPC and CC, respectively).⁴

³ “Zakon o zaštiti i postupanju sa djecom i maloljetnicima u krivičnom postupku Republike Srpske” [Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of Republika Srpska], *Official Gazette of Republika Srpska* 13/10; “Zakon o zaštiti i postupanju sa djecom i maloljetnicima u krivičnom postupku Brčko Distrikta Bosne i Hercegovine” [Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Brčko District of Bosnia and Herzegovina], *Official Gazette of the Brčko District of BiH* 44/11.

⁴ “Zakon o krivičnom postupku Federacije Bosne i Hercegovine” [Criminal Procedure Code of the Federation of Bosnia and Herzegovina], *Official Gazette of the Federation of Bosnia and Herzegovina* 35/03, 37/03 and 56/03, Chapter XXVII; “Krivični zakon Federacije Bosne i Hercegovine” [Criminal Code of the Federation of Bosnia and Herzegovina], *Official Gazette of the Federation of Bosnia and Herzegovina* 36/03, Chapter X; “Zakon o krivičnom postupku Bosne i Hercegovine” [Criminal Procedure Code of Bosnia and Herzegovina], *Official Gazette of Bosnia and Herzegovina* 36/03, Chapter XXV; “Krivični zakon Bosne i Hercegovine” [Criminal Code of Bosnia and Herzegovina], *Official Gazette of Bosnia and Herzegovina* 37/03, Chapter X.

The Law on Juveniles that brings together aspects of procedural, substantive, and executive law in this area has incorporated all relevant international standards.⁵ The starting point is a basic principle dictating that in responding to juvenile offending there should be a progression from less to more severe measures. So, the first to be applied are extra-judicial modalities and minor formal responses of the prosecutor's office and police – so-called deterrence– while criminal sanctions are the final measure to be applied in procedures against juveniles. When imposing criminal sanctions, the competent prosecutor must ensure “graduality”, and if he does not apply the principle of opportunity or an educational recommendation, warning and guidance measures shall always have priority, followed by increased surveillance, custodial measures, and ultimately, as the most severe measure, the sentence of juvenile imprisonment.

The adopted legislation of RS and BD BiH, and the proposed draft law of FBiH stipulate different conditions, i.e. foresee different sanctions for criminal offences to which certain institutes of alternative treatment can be applied, such as those of police warning,⁶ educational recommendations⁷, and the principle of opportunity,⁸ as well as different maximum juvenile imprisonment sentences.⁹ Thus, it is possible that in the RS, the stipulated procedure for juveniles enables access to alternative solutions for a greater number of criminal offences than in FBiH or BD BiH. On the other hand, the same criminal offence in the same legal situation in the territory of

⁵ United Nations Convention on the Rights of the Child (1989) accepted and ratified by SFRY in 1990 (Official Gazette - International Treaties No. 15/90), and transferred by the notification on succession on 23 November 1993 (Official Gazette of RBiH No. 25/93). The UN Standard Minimum Rules for the Administration of Juvenile Justice - the Beijing Rules (1985), UN Guidelines for the Prevention of Juvenile Delinquency - the Riyadh Guidelines (1990), the UN Rules for the Protection of Juveniles Deprived of their Liberty - JDL (1990), Guidelines on the Administration of Juvenile Justice - the Vienna Guidelines (1997), Standard Minimum Rules for the Treatment of Prisoners (1995), UN Standard Minimum Rules for Non-Custodial Measures - the Tokyo Rules (1990).

⁶ “Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of Republika Srpska”; “Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Brčko District of Bosnia and Herzegovina”; “Zakon o zaštiti i postupanju sa djecom i maloljetnicima u krivičnom postupku Bosne i Hercegovine” [Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of Bosnia and Herzegovina], *Official Gazette of Bosnia and Herzegovina* 37/4, Article 22; “Zakon o zaštiti i postupanju sa djecom i maloljetnicima u krivičnom postupku Federacije Bosne i Hercegovine” [Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Federation of Bosnia and Herzegovina], *Official Gazette of the Federation of Bosnia and Herzegovina*, December 16, 2013, Article 23.

⁷ “Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of Republika Srpska”; “Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Brčko District of Bosnia and Herzegovina,” Article 24; “Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Federation of Bosnia and Herzegovina,” Article 24.

⁸ Ibid, Article 89.

⁹ Ibid, Article 51.

RS and BD BiH, if the necessary conditions are fulfilled, could lead to a sentence of juvenile imprisonment for the maximum term of five years, while the proposed amendment in the Draft Law on Juveniles of FBiH foresees a maximum sentence of ten years. Therefore, apart from the urgent need to adopt the Law on Juveniles in FBiH, legislation also needs to be harmonised at the entity and BD BiH level.

2.2 Treatment of juveniles and hate crimes

In the treatment of juveniles in the context of hate crimes, the first thing that must be determined is the decisive fact of whether the juvenile, especially if the matter concerns juveniles in the 14 to 16 age group, could have been acting consciously and intentionally during the commission of the hate crime. Neither the current criminal legislation, nor the special criminal legislation for juveniles contains a single provision to exempt juveniles or exclude the possibility of their criminal prosecution for hate crimes. This does not mean, however, that various questions and dilemmas will not arise in theory and practice. Namely, for the processing of this type of criminal offence, even with adult perpetrators, the primary concern should be the bias motivation, which is a very complex and serious issue because it entails a specific subjective attitude of the perpetrator.

Furthermore, the lack of uniformity of relevant legal provisions in positive substantive criminal laws in BiH can additionally encumber the processing and proving of these crimes in cases involving juveniles, especially in terms of the (lack of) definition of the notion of hatred, the number of criminal offences that can be committed out of hatred and the ways in which bias or hatred as the motive is stipulated in each criminal code (qualifying or aggravating circumstance). There is also a lack of harmonised standards of proof for important elements of certain criminal offences, especially those of inciting national, racial or religious hatred, discord or hostility.

This simply gives rise to the question of whether a juvenile, given his mental and physical development and age, can realistically understand bias towards difference, or rather its notion and meaning in the context of motivation for the perpetration of hate crimes. Does a juvenile commit a hate crime in order to appear “cool” to his surroundings, or is he in some way being “used” by others? Is he acting in pursuit of the aims of the group he belongs to or identifies with, or is everything the result of in/direct influence of his online environment and social networks, for instance, or even the media? Whatever the cause of the bias, it is certain that juveniles are capable of having discriminatory motivation for the commission of certain criminal offences. Special attention should, therefore, be devoted in each individual case to determining the discriminatory motive in view of both the characteristics of the criminal offence in question and the characteristics and specificities of juveniles as a group.

However, judging by the data on the number of reported hate crimes in the Sarajevo Canton, one gets the impression that prosecuting authorities have not devoted enough attention to identifying and establishing discriminatory motives. Namely, according to the data of the Cantonal Prosecutor's Office of the Sarajevo Canton¹⁰, in the past five years, only three cases of inciting national, racial or religious hatred, discord or hostility from Article 163, paragraph 1 of CC FBiH (hereinafter: inciting hatred) committed by juveniles have been reported. This justifiably begs the question of whether there truly had not been more such cases or whether prosecution bodies failed to adequately react.

2.3 The specificity of current legal provisions and problems in practice

A series of problems and dilemmas arise in the prosecution of juveniles for hate crimes. Namely, in line with the current legal provisions, the drafting and contents of pronouncements and justifications of final prosecutors' decisions and of their submissions to the court, as well as the decisions of judges sentencing juveniles are not identical in form and content to orders on cancellation and termination of procedure, indictments and judicial decisions in cases involving adult perpetrators. The law decisively stipulates what each part of certain decisions of judges sentencing juveniles shall contain¹¹, but the same is not fully detailed for prosecutors' decisions. The pronouncement of judicial decisions ordering an educational measure shall not determine criminal responsibility of the juvenile, while the justification shall contain a description of the offence and the circumstances in support of applying the imposed measure. It is also stipulated that the decision to terminate the procedure shall not contain reasons that may adversely affect the education of the juvenile.

Only a judgement imposing the sentence of juvenile imprisonment must take the form stipulated by CPC FBiH as per the judgement convicting the accused. Accordingly, when imposing a juvenile imprisonment sentence, the court shall take into account all the mitigating and aggravating circumstances bearing on the sentence provided by the general sentencing rules. It is important to note that one of the relevant circumstances is the motive, especially given the level of

¹⁰ Cantonal Prosecutor's Office of the Sarajevo Canton, Report No. A-672/13 June 21, 2013, with appendices.

¹¹ "Criminal Procedure Code of the Federation of Bosnia and Herzegovina," Article 389; "Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of Republika Srpska," Article 113; "Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Brčko District of Bosnia and Herzegovina," Article 113; "Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Federation of Bosnia and Herzegovina," Article 113.

mental development of the juvenile and the time needed for his re-education and vocational training. However, given the legal limitations and conditions for imposing this type of sanction on juveniles,¹² and in view of the stipulated sentences for certain hate crimes, it is likely that it will be only rarely imposed. Namely, neither the purpose of sanctioning a juvenile should not be neglected, nor the fact that a juvenile imprisonment sentence can be imposed exceptionally and only in the case of an older juvenile found guilty of a criminal offence where the stipulated prison sentence exceeds five years (e.g. murder, robbery and aggravated robbery using a dangerous instrument or within a group or with intentionally causing grievous bodily harm, or rape of a juvenile) and where due to grievous consequences of the offence and the degree of guilt it would be unjustifiable to impose an educational measure.

Insight into the contents of final prosecutorial and judicial decisions in the previously mentioned recorded cases confirms that they were compiled in line with the legal provisions. In one case, the report concerned a criminally reckless child and two juveniles against whom there were no grounds for suspicion that the criminal offence of inciting hatred had been committed, and the acting prosecutor consequently issued an order not to initiate preliminary proceedings. In another case, a report was filed against two juveniles, and in relation to one of them the court ruled that, at the proposal of the prosecutor, the juvenile was to be referred to a disciplinary centre under an educational measure. In the third case, two juveniles were reported for the criminal offence of inciting hatred, and the competent court, at the proposal of the prosecutor, ruled to terminate proceedings, however, for another type of criminal offence – disturbing the peace of the deceased from Article 379 of CC FBiH.

What is conspicuous in the above decisions is that none of them stated the reasons from which it unequivocally followed that there were no grounds for suspicion that the criminal offence of inciting hatred had been committed, nor did they state the reasons that were decisive for the prosecutor in the case at hand that the criminal offence in question was not one of inciting hatred, but something other than that. This approach not only fails to contribute to creating adequate case law, but also to establishing unique standards of procedure in this area. Hence, in the interest of proper and consistent upholding of legal provisions, understanding the seriousness and sensitivity of hate crimes, their effective processing, and taking into account all the stipulated modalities of the commission of these crimes while not disregarding the fact that a procedure against a juvenile must always be

¹² “Criminal Code of the Federation of Bosnia and Herzegovina,” Article 99 and 100; “Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of Republika Srpska,” Article 50 and 51; “Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Brčko District of Bosnia and Herzegovina,” Article 50 and 51; “Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Federation of Bosnia and Herzegovina,” Article 50 and 51.

resolved in the best interest of the juvenile, judges and prosecutors should find a certain balance in their final decisions when it comes to justifying their decisions in cases of hate crimes. A balanced approach would not allow for “skimming” over the determination of decisive facts from which the final decisions about the perpetrator and the offence necessarily follow.

This does not mean, however, that when processing hate crimes and issuing final decisions about juveniles, there should be a standard form or common and identical formulae of procedure and justification of final judicial and prosecutorial decisions. Furthermore, since every case of this type of crime is additionally specific, at a certain stage – regardless of whether the proceedings are classical or alternative – in addition to a case history from social services, the competent prosecutors and judges would surely have to seek a professional and detailed opinion of a psychologist. This is necessary for the purpose of determining the degree of maturity of the juvenile- that is, his psychological development, because this will most certainly be decisive in the final ruling on whether in the case at hand he acted with/without intention. In any case, if the juvenile is not aware of his bias as the motive for the perpetration of the hate crime, then an important element of that criminal offence is missing.

In order to achieve all this, it is necessary to conduct continuous and adequate specialised training and education programmes of the police and prosecutors in order to prepare them for undertaking such complex, sensitive and detailed investigations. This is important primarily in the interest of recognising the indicator of bias as a motive for hate crimes in all the legally stipulated modalities, and awareness of it on the part of the juvenile, as well as in terms of the contact with and treatment of the victim (who may often also be a juvenile, e.g. in cases of peer violence) in the interest of providing the victim with comprehensive protection. Also, if juveniles are tried for hate crimes, judges sentencing juveniles will have to receive additional education and training in order to be able to take all these things into account when making their final decisions.

3.

Alternative Models of Treatment of Juveniles in Hate Crimes Cases

3.1 The importance of alternative measures

The intention of the legislator is to increasingly depart from traditional responses to juvenile delinquency, primarily in the sense of not applying the classical procedure. When processing juveniles in conflict with the law, the emphasis is not on criminal procedure; and if criminal proceedings are initiated, the focus cannot be exclusively and only on establishing which criminal offence was committed and in what way, nor is evidence gathered solely for this purpose. The purpose of alternative procedure is to re-direct through diversion or deflection in order to actively involve the juvenile in the process where he can take responsibility for his actions and come to understand the consequences of unacceptable behaviour in order to be deterred from such actions in the future. Apart from actively involving the victim in the procedure, the community and competent institutions and bodies are given enough room to take the proper position in relation to the juvenile and seek the most appropriate measure. That is, a measure suited to the juvenile's personality and degree of mental and physical development and one which would facilitate adequate social reintegration by providing the juvenile with the possibility of returning to society as its useful member following re-education. In this, the tendency is to apply mechanisms that entail not just the mere imposition of sanctions, but that insist on and ensure that every response towards the juvenile is always in his best interest and in proportion to his wrongdoing.

However, these progressive tendencies of the legislator have not been accompanied by adequate activities to create the preconditions for their implementation in practice. This primarily pertains to the lack of infrastructure for the application and implementation of alternative measures, especially educational recommendations, lack of specialised training for all the participants in the procedure, and complicated procedures for their application and imposition stipulated in various bylaws. The 2009 Report of the OSCE Mission in BiH¹³ supports these claims when it states that the problem in processing crimes committed by juveniles is the lack of an institutional framework and systematic work on rehabilitating young offenders, and that if during the proceedings, the juvenile is found responsible and educational

¹³ OSCE/ODIHR, *Hate Crimes in the OSCE Region - Incidents and Responses*.

measures are imposed, or if an alternative procedure is used, there are no institutions to enforce or implement such alternatives. These problems were recognised and analysed particularly in relation to FBiH in the general recommendations and high priority recommendations of the Plan and Programme of Activities to be undertaken in reforming the institutional treatment of juveniles in conflict with the law, with special reference to the reform of institutions for the care of juveniles in the Federation of BiH.¹⁴ In that respect, the Government of FBiH – in coordination with relevant departments – is yet to undertake concrete activities to achieve the adopted recommendations mentioned above.

Since the focus is on a juvenile's personality and best interest in all types of procedures involving juveniles, we should also discuss the reasons why alternative solutions to these procedures, especially those involving the application of educational recommendations, would be entirely applicable and acceptable in the case of hate crimes. When it comes to hate crimes, even when they involve adult perpetrators, apart from the complex examination of the motive, it is necessary to gather all the facts and establish all the circumstances needed to assess the personality of the perpetrator in order to ensure a many-sided examination of the case and establish the complete and correct factual situation. This is a legal obligation in procedures involving juveniles, irrespective of the criminal offence in question, which means that according to new laws, before initiating preliminary proceedings in each individual case, the prosecutor must obtain information on the age, maturity and other personal characteristics of the juvenile, as well as the environment and the circumstances in which the juvenile lives (social history) from the competent social welfare body.¹⁵ This needs to be done so that the prosecutor can have all the necessary elements to decide whether to apply an educational recommendation or the principle of opportunity,¹⁶ whether to suspend the procedure or issue an order to initiate preliminary proceedings in the case at hand. At the same time, this helps determine the behaviour of the juvenile in the past, his habits and notions, his beliefs and opinions in relation to his maturity and age, which is very important in order to establish the existence of the bias motive for the hate crime.

If the process has been initiated, and a diversionary mode taken, the proper approach of competent bodies, especially judges and prosecutors, along with the selection of an appropriate educational recommendation, can enable the joint

¹⁴ Adopted by the FBiH Government at its session held on September 5, 2012 at the proposal of the Working Group appointed by the FBiH Government Decision to appoint Working Group V, No. 1258/2011 of November 17, 2011 and the Decision to change and amend the Decision to appoint members to Working Group V No. 318/2012 of March 15, 2012.

¹⁵ Up to now, this has been an obligation of the court, while the prosecutor merely informed the relevant guardianship authority about the application to initiate proceedings against the juvenile.

¹⁶ Conditions are stipulated in "Law on the Protection and Treatment of Children and Juveniles in the Criminal Proceedings of the Federation of Bosnia and Herzegovina," Articles 24 and 89.

determination of causes that gave rise to the hate crime and help find ways to remove them. A special personal apology to the aggrieved gives the juvenile an opportunity to decide to directly – “face to face” with the victim – express his personal view, remorse and apology, whereby he becomes completely aware of the meaning and consequences of the hate crime for the victim. In this way, the juvenile will additionally express his readiness to remove the problem, or at least to mitigate its negative effects. Namely, hate crimes, given their name, nature and severity, as well as their specificity and significance in a given area, can have a different order of consequences, that is to say, a more powerful effect on the victims than other “ordinary” criminal offences. Besides, an active role of the juvenile in the implementation of educational recommendations avoids classical procedure. This procedure is in and of itself traumatic for the juvenile, whatever the criminal offence in question, and leads to the stigmatisation of the juvenile. It is merely the beginning of a process of labelling and stigmatisation that can have far-reaching negative effects in the future, contrary to those that can be achieved through the re-socialisation of the juvenile. Additionally, in the case of hate crimes, given their specific nature and consequences, as well as their significance, especially in smaller communities, the juvenile may be additionally stigmatised, particularly in view of his age and mental and physical condition. This may predetermine his social status at an early stage of his life. In the worst case scenario, stigmatisation may be an incentive for a new expression of the same or similar deviant behaviours, which depends also on the social environment the juvenile comes from. This may be particularly problematic in our society due to its legacy of war and the vast importance of ethnic, national, religious, or minority belonging in social and political life.

3.2 The potential and significance of special sensitivity towards victims

When it comes to hate crimes, special attention must be devoted to the victim,¹⁷ which makes the victim’s active role in the application of educational recommendations all the more important. The victim is certainly one of the most important indicators of bias, and the victim’s experience of the incriminated act can provide indications about the decisive fact of whether the act was motivated

¹⁷ A victim in a hate crime is defined through protected characteristics... attached to one or more persons, to property related to the group sharing the protected characteristics about which the perpetrator has certain stereotypical preconceptions. OSCE/ODIHR, *Razumijevanje krivičnih djela počinjenih iz mržnje: Priručnik za Bosnu i Hercegovinu* [Understanding Hate Crimes: A Handbook for Bosnia and Herzegovina], (Warsaw: OSCE/ODIHR, 2010), p. 7.

by bias or not. This is particularly true if the victim is also the only witness to the criminal offence, which makes establishing proof considerably more difficult.

If the victim is a juvenile, this will require additional attention and efforts by all participants in the process. Namely, victims who are juveniles have the right to special treatment and protection in criminal proceedings. Taking into account the importance and sensitivity of this category, when its members are the aggrieved parties, the Law on Juveniles contains a separate chapter on criminal offences against children. This chapter exhaustively lists 27 criminal offences in FBiH, and 26 criminal offences in RS and BD BiH, and among them criminal offences with qualified forms if they are committed out of hatred (murder, aggravated assault, rape in FBiH, RS and BD BiH, and robbery and aggravated theft in RS and BD BiH), to which special procedures apply. Namely, in conducting certain procedural activities in such cases, particular caution is necessary, and hearings take place with the aid of audio and video equipment, with the assistance of a pedagogue, psychologist and other professionals, at the most twice during proceedings. The same provisions apply if the child or juvenile is an eyewitness. In this way, procedures for questioning children and juveniles have been developed that had hitherto not been adapted to their age and mental and physical development, so that there was almost no difference between questioning juveniles and adult witnesses, while even the mandatory presence of parents/ guardians or guardianship authorities was often neglected. Hearings would be conducted a number of times, which was stressful and traumatic for the children and affected the quality of their statements, and ultimately impeded the process of establishing proof. However, in order for this new solution to take root in practice, especially in cases when a juvenile commits a hate crime against a victim who is also a juvenile, all the stakeholders in the process must be sensitised and specially trained. The right choice of modality for this type of procedure and the right approach can be the key to their successful resolution, because they would at the same time achieve the appropriate effect on the perpetrator and the desired satisfaction for the aggrieved party.

In order to apply educational recommendations, legally prescribed conditions must be fulfilled.¹⁸ For the educational recommendations of “personal apology to the aggrieved” and “compensation of damages to the aggrieved”,¹⁹ one of the preconditions is the consent of the victim to resolve the proceedings in this manner, and another is the active participation of the victim during the mediation process where the guardianship authority mediates between the victim and the perpetrator. With hate crimes, resolving the procedure in this manner will mean taking the victim more seriously, especially if the victim is a juvenile, because he will not be treated merely as a witness. Furthermore, the victim can be enabled to speak freely

¹⁸ “Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Federation of Bosnia and Herzegovina,” Article 24.

¹⁹ Ibid, Article 26.

about his fears, feelings, expectations and clearly expressed interests. In such a painful and uncomfortable situation, as the aggrieved party, the victim may even get an opportunity to express his anger and resignation. At the same time, the victim is familiarised with their rights and the way to compensate damages, as well as who to contact for professional psychological counselling.

Accordingly, it would be efficient and useful to apply the above educational recommendations, given their contents and aim. Apart from the fact that the juvenile who committed the criminal offence will get an opportunity to express his view and take responsibility for his actions, they also give a certain degree of satisfaction to the victim and provide them an opportunity to express their feelings and be afforded adequate protection. A similar effect is achieved by applying the educational recommendation of compensating for damages. However, if due to his material situation, the juvenile is unable to compensate for the damages, which is the case in most situations, and if the victim of the hate crime is not one person, or more people, but the damage was done to property (e.g. graffiti or desecration of religious buildings), the appropriate measure would be the educational recommendation of “involvement in unpaid work, humanitarian organisations, or social, local or environmental activities”. Since this type of educational recommendation is intended for the re-/education of the juvenile in order for him to properly understand the adopted system of social values, it would seem that the personal work and engagement of the juvenile for the benefit of an organisation or community is the best solution to hate crimes. Working for the benefit of something and/or someone previously damaged in order to “repair” or compensate for the damage is a way to re-establish balance in a society that had been disrupted by the juvenile’s antisocial or criminal behaviour and all this is done without the long-lasting classical procedure. This option is foreseen as a type of special obligation, grouped under measures of warning and guidance in line with the new legal provisions.²⁰

If formal procedure is initiated, and if following the preliminary proceedings it is determined that the juvenile committed a hate crime, the court may impose this type of special obligation for the above reasons, and especially if the sanction foreseen for the criminal offence in question makes it impossible to apply an educational recommendation. During the preliminary proceedings, the juvenile may only be a mute observer, making his role entirely different from the active role he has in the proceedings to apply an educational recommendation, through which the purpose of applying these proceedings is achieved. Still, in order for educational recommendations to be successfully applied in practice, and especially in cases of hate crimes, guardianship authorities involved in the mediation process and the process of implementing, mediating and monitoring the enforcement of educational

²⁰ Before, the court had the possibility of determining one or more special obligations when imposing an educational measure of increased surveillance.

recommendations must be fully equipped with the necessary staff and resources. It is very important for the staff to be sensitised and specially trained for these rather specific and complex situations.

3.3 The importance of an adequate response from prosecution authorities

Due to evident problems in the practice of applying educational recommendations, prosecutors prefer to apply the principle of opportunity. Applying the principle of opportunity is another alternative approach. It entails the prosecutor deciding not to initiate criminal proceedings, even though there is evidence that the juvenile committed the criminal offence, if the prosecutor believes it would not be opportune to conduct proceedings against the juvenile given the nature of the criminal offence and the circumstances under which it was committed, given the previous behaviour of the juvenile and his personal characteristics, or in cases where a sanction or educational measure is already being enforced.²¹ Almost identical legal conditions apply to educational recommendations and the principle of opportunity.

However, as opposed to the previously described active participation of the juvenile in the application of educational recommendations, the juvenile has no role in the application of the principle of opportunity, because it is at the sole discretion of the acting prosecutor. The application of educational recommendations has been negligible since adequate conditions and the appropriate infrastructure have not been secured. According to the data of the RS Prosecutor's Office, in 2012, competent district prosecutors applied the principle of opportunity to 195 persons, while only one educational recommendation (as per the new law) was imposed and enforced.²² In the Federation of BiH, according to the FBiH Prosecutor's Office, the principle of opportunity was applied to 173 persons in line with the current CPC FBiH, in cases of criminal offences for which the foreseen sanction is a monetary fine or up to three years of imprisonment. Educational recommendations as per the current CC FBiH and CPC FBiH were imposed on juveniles in only three cases

²¹ "Law on the Protection and Treatment of Children and Juveniles in Criminal Proceedings of the Federation of Bosnia and Herzegovina," Article 89; "Criminal Procedure Code of the Federation of Bosnia and Herzegovina," Article 373.

²² Republičko tužilaštvo Republike Srpske [Republic Prosecutor's Office of Republika Srpska], *Zbirni izvještaj Republičkog tužilaštva RS o radu okružnih tužilaštava u RS za 2012. godinu* [Summary Report of the RS Prosecutor's Office on the Work of District Prosecutor's Offices in RS for 2012], (Author's archives).

by the competent prosecutor and in only two cases by the competent judge.²³ The reason, among other things, is that the consistent application of educational recommendations requires fundamental reorganisation and staff and material resources for guardianship authorities that are to conduct mediation, as well as provide special education for all the actors involved in this process, none of which has been secured to date.

Before the Regulation on the Application of Educational Recommendations in FBiH²⁴ was passed as a bylaw, not applying educational recommendations in practice was justified by the fact of there being no bylaw to that effect. Following the adoption of the Regulation, the failure to apply educational recommendations is explained by the foreseen complicated, overly formal and relatively long-lasting procedure.²⁵ These procedures were not simplified even in the new Rules on the Application of Educational Recommendations to Juvenile Offenders in RS.²⁶ The successful implementation of educational recommendations in practice requires continuous training and specialised education programmes for the police, prosecutors, judges, social welfare bodies, especially on the application of educational recommendations, which in turn requires adequate infrastructure, staff and resources for all bodies involved, and efforts to raise awareness among the public about this important mechanism for responding to juvenile offending.

An example from the Republic of Croatia shows that it is possible to apply alternative sanctions for hate crimes in practice. Namely, the Higher Court for Juveniles, acting on an appeal filed by the parents of the aggrieved against the decision of the prosecutor to terminate proceedings against three juveniles who in 2008 committed a hate crime when they physically assaulted a juvenile girl and juvenile boy because they were “different”, i.e. “belonged to different subcultural groups and had a different world view”, imposed 100 hours of community service over a period of six months under the supervision of the Social Welfare Centre, and issued a warning that if this obligation was not fulfilled, the juvenile offenders would be referred to the Correctional Centre. It was important for the perpetrators

²³ Federalno tužilaštvo Federacije Bosne i Hercegovine [Federal Prosecutor’s Office of the Federation Bosnia and Herzegovina], *Zbirni izvještaj Federalnog tužilaštva FBiH o radu kantonalnih tužilaštava u FBiH za 2012. godinu* [Summary Report of the FBiH Prosecutor’s Office on the Work of Cantonal Prosecutor’s Offices in FBiH for 2012], (Author’s archives).

²⁴ “Uredba o primjeni odgojnih preporuka prema maloljetnicima” [Regulation on Application of Educational Recommendations to Minors], *Official Gazette of the Federation of Bosnia and Herzegovina* 6/09, January 21, 2009.

²⁵ This procedure entails holding a number of hearings, both at the prosecutor’s office and court, and in social welfare bodies, and especially in relation to the educational recommendations of personal apology and compensation of damages to the aggrieved party.

²⁶ “Pravilnik o primjeni vaspitnih preporuka prema maloljetnim učiniocima krivičnih djela” [Rules on the Application of Educational Recommendations to Juvenile Offenders], *Official Gazette of Republika Srpska* 101/10.

not to admit that they were “violent skinheads” as they had been labelled. Experts were of the opinion that imposing such a lenient measure may have caused dissatisfaction among part of the public, but they pointed out that experience to date has mostly been positive and that the majority of juvenile offenders had successfully re-integrated into society. Experts believe that community service is a way for juveniles to pay their debt to society, because the aim is not imprisonment, but education and socialisation of young people, that is, their return to society and giving them a second chance. An important fact worth mentioning is that “the parents of the victims were satisfied with the judgement, even though they had experienced hellish fears with their children, with the disheartening feeling of helplessness due to the initial refusal to prosecute”. Therefore, the proper selection of alternative procedures in the case of hate crimes, and the selection of the most appropriate option in each case where both the perpetrators and the victims are juveniles can lead to a degree of satisfaction for the victims, but also provide the perpetrators with an opportunity to do something concrete for the benefit of society while at the same time preventing their further stigmatisation.²⁷

²⁷ Ljiljana Pavlina, “Za zločin iz mržnje kažnjeni sa 100 sati društvenog rada” [100 Hours of Community Service for Committing a Hate Crime], *Jutarnji list*, January 11, 2010.

4.

The Importance of Prevention

In order to reduce the rate of juvenile offending, a pronounced problem due to the passivity of society towards a systemic and long-term solution, prevention must be of primary importance. At a time of powerful social transformation, evident high unemployment bringing into question the livelihoods of thousands of families, as well as a sweeping erosion of traditional and moral values, juveniles are joining the ranks of offending adults, exhibiting unacceptable forms of behaviour. Therefore, in order to combat this deviant behaviour and violations of criminal law provisions, adequate instruments must be found as the key to long-term crime prevention in society in general. In that respect, it is indispensable to determine the main causes of such behaviour and then undertake measures to prevent it.

Although prevention was foreseen in the Strategy against Juvenile Offending for Bosnia and Herzegovina (2006 - 2010) as a separate strategic aim,²⁸ and even though at the state level, activities have been continuously undertaken to adopt a Programme of Prevention, this has never been realised. The new Draft Strategy “Children in Conflict with the Law in Bosnia and Herzegovina (2011 - 2014) - Strategically Guided Activities”, that had foreseen prevention as a separate aim, was never adopted. Although this preventive activity does not pertain to individual, specific criminal offences, and thus not to hate crimes either, certain activities could be applicable precisely to this type of crime. Such are, for instance, the activities related to raising public awareness through video campaigns aimed at children, parents, and the wider public, as well as research, especially the method of “self-reporting”;²⁹

²⁸ “Strategija protiv maloljetničkog prestupništva u Bosni i Hercegovini” [Strategy against Juvenile Offending for Bosnia and Herzegovina (2006-2010)], adopted on July 27, 2006 by a Decision of the Council of Ministers of BiH, published in the *Official Gazette of Bosnia and Herzegovina* 14/08.

²⁹ “Apart from victimisation studies and measuring fear of crime, the method of “self-reporting” in modern criminology is an important method to evaluate the so-called “dark figure” of crime, that is, the scope and structure of offending behaviours that remain outside official records of formal social control. Criminological studies of self-reporting have been applied around the world for decades. Small, but representative samples of respondents, usually juveniles, are asked questions about antisocial and deviant trends among young people that constitute pre-delinquent patterns of behaviour. Questions are asked about unregistered criminal offences committed, and their frequency, however, this is a secondary effect of self-reporting studies in criminology. These studies can be conducted through interviews or questionnaires. The acquired knowledge has tremendous importance for the creation of a concrete strategy to combat crime, because the strategy must be based on data on the real extent and distribution of criminality through the various social strata.” E. Muratbegović, *Metode aproksimacije tamne brojke kriminaliteta* [Approximation Methods for the Dark Figure of Crime], (Sarajevo: Pravna misao, 2004).

building capacities of staff at educational institutions for a proactive approach to pre-offending and offending, and especially the activity of adopting and implementing a violence prevention programme in schools. However, since there is an implicit position that the state level has no need of a strategy in this area, or an adequate prevention programme, these should most urgently be developed at the level of the entities and BD BiH. Given the specific nature of hate crimes, prevention should be primarily aimed at combating prejudice, whatever its form; and whatever level of government adopts the strategy, this should not hold back competent institutions from developing and adopting their own documents in the form of either strategies or action plans pertaining to hate crimes.

In any case, in the upcoming period, special attention should be devoted to prevention that, among other things, entails intensifying and institutionalising the education of school children and young people through programmes aimed at adequately responding to prejudice and diversity education, as well as implementing similar civil society projects and campaigns. This will also require a unique method of gathering data and the creation of a unique database. Namely, this is one of the most important means of efficient prevention and response to the problem and correct predictions, as well as planning and determining a realistic and sustainable response policy, both in terms of the phenomenon of hate crimes and with respect to juvenile offending as a whole. A state-level government department must be designated to host the central database on hate crimes, as well as all criminal offences committed by juveniles. The various modalities of preventive work with juveniles and raising their awareness must be specially focused on new ways of everyday communication, including (ab)use of the Internet, Facebook and other social networks, because these media have tremendous influence on the minds of juveniles.

Efforts must be made to find adequate ways of properly educating and guiding all young people, whose personalities are as yet unformed and who have specific bio-psychological and social characteristics, and these methods should take into account their age and degree of maturity. One of the most important segments of the entire education process, and a responsibility of all links in society, should be to develop juveniles' awareness so as to enable them to acquire adequate knowledge and recognise negative aspects in society and unacceptable behaviours. Although certain efforts have been made in the context of preventive work with children and young people, mostly implemented by non-governmental organisations, they are on the whole negligible, because these are sporadic activities, often limited to the duration of the project.³⁰

³⁰ See, for example, Human Rights Office Tuzla, *Analiza realizacije Strategije protiv maloljetničkog prestupništva za Bosnu i Hercegovinu 2006-2010. godina* [Analysis of the Implementation of the Strategy against Juvenile Offending for Bosnia and Herzegovina 2006-2010], (Tuzla: Human Rights Office Tuzla, 2009).

5.

Conclusion

Given the specific nature of hate crimes and the specificity of legal provisions with respect to juveniles, it is certain that the current legislation for juveniles offers a number of possibilities for successful processing of hate crimes, notwithstanding the discussed issues and dilemmas and the lack of relevant research and experience in this area. The adequate selection and application of these legal solutions can surely achieve the aims of both special and general deterrence, and ensure the protection of guaranteed basic human rights. Moreover, if in the near future the application of alternative models in our practice should yield positive examples of resolved procedures involving juveniles who had committed hate crimes, it can be assumed that similar procedures could then be successfully applied to adults who commit hate crimes, provided certain changes are made primarily to current substantive criminal legislation in BiH in terms of stipulating the possibility of alternative sanctions.

However, the primary and most important step is the adoption of the Law on Juveniles in FBiH. At the same time, in order to avoid legal inequality in treatment across BiH, procedures must be harmonised at the entity and BD BiH levels, and substantive criminal legislation pertaining to hate crimes must be harmonised at the BiH level. At the same time, prevention must be given special importance in both areas, and this will be ensured primarily through implementing adequate research and adopting the appropriate strategies and action plans, along with the development of a unique database and raising awareness among the general public.

Specialised education and training for all participants in the procedure is needed, both with respect to juvenile offending as a whole and in relation to hate crimes in particular, and this primarily pertains to prosecuting authorities. Namely, there is a general impression that in the past, prosecuting authorities have not adequately responded and “recognised” all the important elements of these crimes. During reporting and/or processing, hate crimes were subsumed under legal elements of other “less severe criminal offences”, either by neglecting the bias motive and avoiding its complex investigation in order to simplify the procedure, or by being unable to identify a bias motive as such.

Finally, it is particularly important to emphasise something that should, in fact, be the first and key step. Namely, in the education of juveniles in general, and therefore also in the context of preventive work and combating hate crimes, it should be stressed that the religious and national diversity of our society is our greatest wealth, and that prejudice – not just based on religion and nationality,

but also on sex, race, language, sexual orientation, disability, and other forms of prejudice – is the greatest enemy of co-existence. This approach would ensure that the juvenile does not adopt a negative and hostile attitude towards everything which is different - that is, this approach would not inflame hatred or incite juveniles to engage in unacceptable behaviour.

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Jasna Pećanac holds a Bachelor of Law from the Law Faculty at the University of Sarajevo (1984). In 2003 she was appointed to the position of Deputy Chief Cantonal Prosecutor of the Sarajevo Canton. She stayed in the role until 2008, when she was appointed Federal Prosecutor with the Federal Prosecutor's Office of the Federation of Bosnia and Herzegovina (FBiH). Between 2002-2007 she continuously worked with the non-government organization Save the Children UK. In cooperation with the working group and the OSCE Mission to BiH, she co-authored the draft Regulations on the implementation of educational measures in FBiH. She was a member of the working group for the development and adoption of the Strategy on juvenile delinquency for BiH in 2006-2010. From mid-2008 until 2010 she was a working group expert on the implementation of alternative educational measures with the Coordinating body for monitoring the implementation of the activities named in the Action Plan of the aforementioned strategy. She was part of the expert group which, together with the Department of Human Rights and Refugees of BiH and UNICEF BiH, developed the draft of the strategic document "Children in Conflict with the Law in BiH 2011-2014" (Strategic guidance of activities). In the first half of 2012, she was a member of the working group of the FBiH Government on reform of the institutional treatment of minors in conflict with the law. She has authored a host of papers on juvenile delinquency and participated in numerous seminars and round tables. She is an instructor in this field at training seminars of judges and prosecutors organized by CEST FBiH.



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