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Security as a prerequisite of freedom - (not)efficiency of criminal law protection

Zorica Mršević*

The paper presents an analysis of recent cases of publicly and privately committed homophobic and transphobic violence against LGBT people in Serbia, resulting in essential limitation of personal security, and consequently, reduced freedom and basic rights of the members of this population. Physical violence against persons of non-traditional sexual orientation and non-binary gender identity, as well as hate speech in public discourse, and on the other hand, the impunity of those who committed these acts are the main reasons why a large number of LGBT people live in fear for personal safety, significantly reduced movements, communications, educations and professional aspirations, while conducting a "double" life, and fearing of further victimization, does not report hate crimes cases. Although the Criminal Code contains Article 54a stipulating hate speech and hate crime as aggravating circumstances, to date there has been no one sentenced with a call to that provision.

Key words: Personal safety, reduced freedom, hate motivated crime, hate speech, impunity of perpetrators, nobody sentenced

*Senior research fellow, Institute of Social Sciences, Belgrade

Human security, from a human rights' perspective, has been defined as a life sustaining environment, the meeting of essential physical needs, respect for the identity and dignity of persons and groups, protection from avoidable harm and expectations of remedy from them. (Reardon, Hans, 2010)

1.Introduction

The European Commission against Racism and Intolerance (ECRI), a human rights body of the Council of Europe in its latest report on combating racism and intolerance for Serbia, launched on 16 May 2017, concluded that much needs to be done to address the continued rise in hate speech, fight racism among sport fans, protect LGBT persons (ECRI, 2017). Constant negative public reactions to protection of rights of sexual minorities that are still

dominant in the public discourse in Serbia, which still contribute to justification of violence as the acceptable means of fighting the unacceptable “other”. In the publicly present homophobic discourse, the same-sex love is forbidden or taboo and the people’s representatives sometimes do not hesitate to animate their voters through hate speech, making use of the fact that they are protected by their parliamentary immunity (Mršević, 2014a). Therefore, as one negative development noted by ECRI is the continued rise in hate speech in Serbian political discourse. The use of inflammatory language is reminiscent to the situation before the recent wars in the region. More decisive action is needed to combat hate speech from racist organizations and, in particular, from football fan groups. According to the experts “this issue is of particular importance, given the role that racist and violent football fan groups played in the outbreak of the recent wars in the region” the report stresses.

Threats, street violence, intimidation, attacks and inappropriate comments regarding LGBTI individuals are still a big part of everyday life in Serbia. Up to this day, no final verdict was brought declaring guilt for a crime motivated by hate based on sexual orientation or gender identity. Although legal and strategic platforms of protection exist, the reaction of the institutions in charge regarding attacks motivated by homophobia and transphobia are often lacking (Đan, 2016, 10). Sports clubs and associations, and the sporting arenas are still particular venues of undisturbed public display of high-intensity homophobia and transphobia that occurs as a “normal” addition to sporting duels, fan groups and chants. Legal regulations and other policies in this domain are still insufficient as the sportsmen and the audience are unprotected against discrimination based on sexual orientation and gender identity. As if nothing had changed, the start of the football season 2017 was also marked by penalties given to the best Serbian clubs due to fan incidents. Namely, UEFA punished the Red Star, the Serbian Vice-Champion, by closing the northern part of its stadium at the next European play and by fine of eight thousand Euros due

to fan banner, "... we will not let Serbia be a country of faggots", highlighted at the match against Florian (Mozart sport, 2017: 10.07).

Every second citizen in Serbia believes that homosexuality is a disease, and every tenth believes that the "wrong" sexual orientation is to be cured by beatings (Đorđević, 2014: 03.05). Still is a greater shame that somebody's child is a gay, than a criminal, even a murderer (Jovanović, Mihajlović, 2014). The youth have repeatedly expressed their attitude that they regard violence against LGBT as justified. In public debates about the LGBT population, that they are perceived as a provocation and a threat to the Serbian society (Pančić, 2012). In this social atmosphere, it is often the case that the victims of the violence are blamed to have caused violent outbursts without any activity, only by their appearance and existence, in fact by what is seen as their "provocations".

Violence against LGBT persons as the main source of their personal insecurity has been documented as such mainly in the records of the group for the protection of the rights of LGBT persons (Mršević, 2015: 296). For example, research on violence, which did "Labris" for the period 2006/2010 indicates that 90% of respondents were informed of such cases against persons of different sexual orientation other than heterosexual, and 60% of the respondents had personally experienced violence because different sexual orientation other than heterosexual. In two out of ten families in Serbia a homosexual child suffers violence, with the threat of eviction (even murder), as "not to ashamed family," in six family members try to convince them that they are not normal and should be submitted to medical treatment, only one out of ten families accept such child, or at least, ignore the child's sexual orientation (which can take a lifetime) (Pašić, 2012: 30.11).

2. Hate crime in the Criminal Code

Hate crime was firstly codified in domestic criminal legislation in January 1, 2013, as an aggravating circumstance. Special circumstances for determining the penalty for a criminal offense committed by hatred by the Article 54a: “If a criminal offense is committed by hatred due to race or religion, national or ethnic origin, gender, sexual orientation or gender identity of another person, this circumstance will be judged by the court as an aggravating circumstance, unless it is prescribed as a feature of a criminal offense.”

Since then, the authorities have not adequately dealt with crimes that had hatred for the motive, and there has not been a judicial epilogue to date, in which the authorities called on that Criminal Code provision. Unfortunately, until now we have no conviction that refers to that legal provision, and we can assume that the reason is the lack of training of the holders of judicial functions. According to that statement, prosecution employees need to be empowered to be the first in their prosecutor's office to indict the member in the indictment or to be the first judges to invoke Article 54a. (Nenadović, 2017, 11.02).

Complete number of recorded cases in period from 1 August 2016 to 1 August 2017 is 79. Methodology used by Association Da Se Zna! (*Make It Known*) to record cases of discrimination and violence against LGBTIQ+ people is developed to list the cases in two different categories: Hate speech, 56 cases, hate crime, 22 cases (Da se zna – *Make it known*, 2017). That’s why it may be concluded that the legislation in Serbia is relatively good, but the implementation in practice is another story. Therefore, the main answer to question, how to protect personal security, still is primarily in the consistent and strict obedience of current laws¹ including their enforcement, stipulated prosecution and punishment of offenders. Necessary are also education, refraining from the use of hate speech, affirmative statements

¹ Laws which explicitly stipulate sexual orientation and / or gender identity as a generally protected ground against discrimination are the Labor Law, the Law on Higher Education, the Law on Public Information, the Broadcasting Law, the Youth Law, amendments to the Law on Health Insurance Law on Social Protection and the Law on Amendments and Supplements to the Criminal Law. However, these laws are not applied nor regularly neither properly.

of the most responsible, and continuously changing curricula in primary secondary schools and colleges (RTS, 2013: 02.02).

3. Underreporting the hate crime as a threat to group and personal security

The latest ECRI report also notes that homophobic and transphobic violence is heavily underreported: in 2015, the authorities registered only 33 racist, homo and transphobic hate crimes in the whole country, whereas in a survey of the same year, 23% of Serbian LGBT persons said that they had suffered physical violence in the past; frequently from family members.

Institutions do not implement laws. One of the best examples of avoidance of applying this article, is the case of a father who beat his son when he learned that he is a gay. But instead this fact to be used as aggravating moment, as stipulated by the Criminal Code, it is used as a relief in defense. Namely, the violent father in front of all institutions, e.g. the Center for Social Work, the Prosecutor's Office and the Civil Court, were repeatedly stating, "I beat him, but I did not beat him until I found out he was gay." This case illustrates that for all institutions during any legal procedures, openly expressed homophobia still is not a relevant fact for implementation the article 54a.

Victims' fear. Another reason, this one on the victims' side, is lack of victims' reports on hate motivated crime. LGBT people live in fear, remain without support in the family, at work and in the institutions that should protect them. Violence in the family motivated by sexual orientation, hate speech on the streets, graffiti with the message "kill faggot" and, on the other hand, the impunity of those who are participants in such activities, argues the president of the association "Make it known!" Dragoslava Barzut, are the main reasons why a large number of LGBT people do not report hate crimes.

Impunity of violence perpetrators. There is also the third reason. Namely, in Serbia, here and while implemented is noticed the practice, not to punish the perpetrators of various forms of violence, from private, domestic, to publicly committed. That is exactly the reason why their behavior is encouraged: because by that institutional lack of reaction, they get a message that their hate motivated deeds are allowed and legitimate!

4. The most recent hate motivated crime committed in Serbia reported by media

Sombor, Trans woman Ivana Kuharic (28) raped a driver of a Bulgarian truck. March 10th (Informer, 2015: 10.03). „He held his knife under my neck and raped me“. Police from Sombor arrested a Bulgarian citizen V. Ž. (49) because of the suspicion that on Saturday, sometime after midnight, with a threat of a knife, he raped a transsexual woman Ivana Kuharić (28). Bulgarian man was arrested the same night and detained. „Before I left the truck, he told me, „I do not stand trans scums and I like to rape them. You are not the first one," said Ivana.

Novi Sad, Physical attack on a transsexual woman in Jevrejska Street in Novi Sad, July 30th (Naše Novine, 2015: 30.07). Transgender woman Diana Pospis was threatened in July 2015. in Jewish Street, in the center of Novi Sad. A large man, about two meters tall, who was known to the victims since earlier, attacked Diana shouting: "I will kill you, you dirty faggot! I will slaughter you! "- Diana managed to escape from the attackers and immediately called the police.

Smederevo, An androgin model was beaten on the public concert, September 11th: “He pointed his finger at me and said - He is the one, and then hit me with a fist”(Kurir, 2015: 30.09). A model Igor Ivanović (21) was beaten in Smederevo. He said that a hooligan hit him with his fists in the head and kicked him in the butt while his girl friends also got hit by trying to defend him. “The attacker then shouted that he would kill me because I can not

be alive because of my appearance. Then he pulled me and started threatening me. He did not have enough of it, so he ran to my girl friend and staggered her around the neck, and hit her with fists. The victim says that thanks to the police's quick intervention, the guy who attacked him was detained and a lawsuit for violent behavior will be filed against him.

Belgrade, An (allegedly) unprofessional police response to an attack on a trans person? May 2th (N1, 2017: 02.05). Five men beat and kicked trans woman Leona in Saturday April 30th in downtown Belgrade. They hit her by a belt buckle, shot at her concrete blocks, cursed and insulted her. The victim was left alone on the streets by a taxi driver who did not want to give her a lift. He allegedly said – “We do not drive transvestites, fagots and bleeding people”, although as a public transport service they were obliged to drive passengers. Upon receipt in the Emergency Center, she was diagnosed with a broken finger bone and several cuts on the face and body. After the necessary help was provided, Leona returned to the police station to report the attack, when the duty inspector told her: "Now are the holidays and during these days we will not work on the applications. And Kennedy was killed, and also there was no one found guilty."

5. The most recent hate motivated crime committed in Serbia, recorded and reported by activists of human rights groups.

Hate speech to LGBT in Nis: 01/07/2017 (Da se zna – Make it known, 2017:01.07).

Members of the right wing organizations “Obraz” and the “Serbian sabor zavetnici” from Nis were sticking a leaflet in front of the Labeerint Club in which the Nis Pride Week was taking place. In the leaflet, the LGBT community was insulted and blamed for the destruction of the family, and ridiculing the dignity people. Incident was motivated by homo / transfobia. The

Constitutional Court of Serbia banned "Obraz" in 2012. This violated the following rights: the right to freedom and security of personality and the freedom of peaceful assembly

Inflicted bodily injury in Belgrade: 08/05/2017(Da se zna – *Make it known*, 2017:08.05). L. and her friends, an unknown young man aged 20 to 23 years old, attacked on Monday, May 8, about 3.45 in the "Trg" pizzeria on the Republic Square in Belgrade while they were buying a pizza. Two men came, one of them spoke: "I can not believe the transcum stands next to me and buys a pizza." At the moment when Lela paid the pizza, an unknown man approached her from the back and began hitting her with fists in the head and cheek area, and then with her legs. Lela fell under the blows to the corner of the pizzeria next to the cabin and hit one of them chin, broke his tooth and struck the other in the body.

This physical attack violates the following rights: the right to life, the right to liberty and security of personality, freedom of movement and choice of place of residence

Attack on Trans young men in Vlasotince: October 13, 2016 (Da se zna – *Make it known*, 2017:13.10). Vanja, in the night between Tuesday and Wednesday, sometime after midnight, went out to a bakery located in the immediate vicinity of his house which worked all night. As soon as he came out of the house on the street, he was surrounded by three men who began to disturb him. The attackers started hitting him. One hit him in the right eye area. "I just covered my head. Then they shot me down and started kicking and insulting me that I was a trans-person, V. said. One of the attackers hit Vanja in the nose and bled him. They shouted to him: "Dirty woman, what you have is a cunt, but you want to get sew to you a dick! You have already been told to stay calm!" V. loudly appealed for help during the attack, but the people who were in the bakery just watched motionless what was happening. At one point, two police officers appeared in gray car, but they instead of taking all the actions necessary to catch the perpetrators, started to laugh at V. The policemen did not take information, but suddenly went going to catch the attackers. After that, the police never

contacted the victim. These physical attacks, psychological abuse, threats and discrimination violated the following rights: the right to freedom and security of the person, freedom of movement and choice of place of residence

Physical attack on an activist in Belgrade: August 22, 2016 ((Da se zna – *Make it known*, 2017, 22:08). One of the organizers of Belgrade Pride, B.S., spoke on the phone when one from the group of attackers started to shout: "Here's the gay guy!", then he hit a strong blow in the upper arm area and continued to shout insults on his face, based on sexual orientation. This physical attack violated the rights: the right to life, the right to freedom and security of the person, and caused physical injuries and psychological abuse

The latest case of a court's avoidance to implement hate crime provisions (13. October, 2017). D.P. from Valjevo was physically attacked, when the attacker openly said that he was "irritated" by the fact that the victim "dressed as a woman". The court did not apply Article 54a of the Criminal Code stipulating aggravating circumstances as a ground to more severe punishment for a crime motivated by hatred. The attacker was sentenced only for a one-year probation (suspended sentence). This was the reason for activists' initiative addressed to Republic Prosecutor's Office to file a request for protection of legality, while awaiting the decision of the Supreme Court of Cassation against this case verdict issued by the Basic Court in Valjevo.

6. LGBT people personal security

Violence against LGBT persons falls into the category of so-called hate crimes because such acts are the result of mechanisms of homophobia. Such acts are regularly followed by the elevated rate of underreporting, invisibility and even denial of the existence or at least, tries to reduce its the frequency, severity and consequences (Vlada, 2013: 42-52).

Almost all LGBT respondents indicate that they are victims of long-term emotional violence as the most common form of violence against the LGBT persons. Psychological violence consists in stigmatizing, avoiding, jeers, stereotyping, condemnation, provocation, rejection, devaluation, ignorance, deny, threats, intimidation, blackmailing, feigned courtship and provocation in the school, workplace, sports club, humiliation, open accusations that they all promiscuity, sick and sexual deviants.

Physical violence against LGBT persons includes pushing, slapping, hitting, kicking, beating, group attacks, obstructing work of clubs and cafes in which gather members of the LGBT community, attacking on the offices of the group for LGBT rights, attacking on LGBT cultural events such as, art exhibitions, panel discussions, film screenings, etc.

Existential violence is very prevalent form of violence especially against young LGBT persons. It includes fully/partially denial of the usual parental support and rejection by family, denial of funds, expulsion away from homes, death threats, job loss, confiscation of valuable property especially housing, disinheritance, forced medical treatment in and out of mental disorder institutions, and the like (Mirković, Mikašinović, 2013: 31-08).

Sexual violence against LGBT persons includes rape and attempted rape by an individual or group of rapists, incitement to prostitution, trafficking, exploitation of sexuality in pornography, sexual harassment involving physical contact, sexual harassment that does not involve physical contact, indecent assault, exhibitionism, voyeurism (Mršević, 2015: 297).

Peer violence or bullying of LGBT persons because of their actual or perceived LGBT orientation is a particular problem: 65% feel unsafe in school, 58% suffer forced dispossession of personal belongings in schools, they are five times more absences from school, 28% drop out of school (Puača, 2009:250).

Due to all said, as well as because of the lack of support, psycho-social assistance, adequate reaction of institutions, LGBT persons, particularly the younger ones in the adolescent age, are three times more prone to suicide than their heterosexual peers. Actually, they belong to the group that is the most exposed to the risk of suicide, such as persons suffering from depression or incurable diseases (Mršević, 2015: 287). Only 10% of respondents reported the experienced acts of violence to the police. As the reason for their reluctance to report, they regularly mention their lack of trust in institutions, fear of continued torture and fear of disclosing their sexual orientation to family, school and workplace colleagues.

Attacks on LGBT rights activists are specific forms of violence against LGBT persons. Under this term are included publicly committed attacks on individuals known as defendants of human rights, acts of violence and life threats against activists in places of their private residence, attacks on official premises the LGBT groups, attacks on LGBT cultural manifestations of creativity, such was the attack on "Queer Beograd" festival, in September 2008, etc (Mršević, 2015: 295).

Young LGBT suffer multiple (intersectional) discrimination: because of their sexual orientation/gender identity (when usually share the fate of the entire LGBT groups (Živanović, 2013:4), further combined with increased denial of the right to self-determination), if they are lesbians as women (when exposed to typical forms of discrimination against women, misogyny and male violence, further combined by their parents' rejection and family violence (Devor, 1997), but also because of their youthhood (when they suffer all forms of marginalization typical for young persons, further combined with the interruption of studies, the aggravated conditions in the labour market and finding a job).

All of this makes Fukuyama's question whether we are poor because of the economic situation or because of our "dysfunctional social habits" all the more applicable. These are

the deeply rooted habits that would be at work even if the economic situation were better and that lead us in the direction opposite of progress (Fukuyama, 1997: 20). These dysfunctional social habits include intolerance, accepting discriminative behaviour as norm, rejection of young LGBT by their parental families and their exposure to the manifold risk of violence, homelessness and extreme poverty.

7. Conclusion: no institution can not do it all alone

Lives of the LGBT people are under strong influence of misogyny, homophobia and transphobia of the social environment (Califia, 1997). Safety is the main priority for lesbians and the LGBT population of all generations in general and their situations cannot be further improved without it (Strategija, 2013). The fundamental right of all citizens is the protection of their personal safety and the basic duty of each country is to ensure it (Pleck, 1987). When mistreated as the members of national and religious minorities by the general public, they are still accepted within their families and communities and are in a specific way protected by their language, culture, religion, unconditional parental love and support. This micro-social acceptance is more emphasized as the external rejection grows. Only LGBT is the minority that are additionally rejected by the members of their own parental families, by those closest to them, those whose support should be given unconditionally at all times. Many authors (e.g. Stacey 1996), report that even the best families do not always serve the interests of their LGBT members, considering the prevalence of family violence, against them. Violence, hate speech, and intolerance are all parts of a clear public homophobia that the state has so far not reacted to in a prompt, efficient and adequate manner.

Preventing the development of a normal, innate sexuality is dangerous for children and adolescents. Rejection, mistreatment, violence and discrimination from their families, peers, and schools make the process of their maturation much more difficult and cause psychological crises, desperation, and suicidal moods. As the identity is formed by inherited (nature) and upbringing (nurture), the clash between nature and nurture brings forth an

interiorized homophobia that leads to self-hatred and self-loathing (Gelles, 1995). Because of this attitude of the families, the warnings about the risk of homeless LGBT, especially younger ones, are becoming more common and this is even more dramatic in a time of high unemployment and the general crisis. Reproduction of homophobia is, among other things, realized through authoritative promotion of non-scientific attitudes and prejudice in the media space in the attempt to protect the “traditional Serbian values”, both religious and moral, so parents are often called out to be the actors of protection of these “right” values.

Every new generation leaves school ready for violence towards different minorities, LGBT persons in particular. A possibility to pave the way for a better society for generations to come is not being used here. No measures have been taken to increase the level of information and awareness among the people, the youth, the media, the public figures, the political decision-makers, and the educational system in general that lesbianism is not a disease but a variety of normal human sexuality; that there is no danger of spreading homosexuality by publicly talking about the topic and without any prejudice, by holding pride parades or other public events, or by giving legal acknowledgement to same-sex communities.

One of the recommendations of the Commissioner for the Protection of Equality directed to the Ministry of Education and Science, the National Council for Education, and the Institute for Improvement of Education is to undertake urgent measures to ensure the introduction of affirmative and correct depictions of same-sex sexually-emotive orientations, transgenderism, transsexualism, and intersexualism in all school books (for both social and natural sciences), including the examples of LGBT individuals as a part of the historic and contemporary democratic societies. The attitude that no child or young person should be afraid for his or her own personal safety in their family or school has been adopted a while ago, but that does not seem to apply to lesbian and transgender girls, which is why postponing, especially if it is endless, is not a solution for the problem at hand. Non-discriminative education is one of the assets for the development and the current situation represents an obstacle as it is dominated by unscientific, discriminating attitudes towards almost every “other”, the lesbians in particular. This is why it is important to examine the possibilities of non-discriminatory education as the necessary tool in the battle against intolerance, discrimination and readiness for violence against everyone that is perceived as the “other” or the “different”. These attitudes of the youth are acquired from and supported by the educational system so the changes should be made primarily in the field of education (Mršević, 2013).

Therefore there must be cooperation between institutions, independent bodies, non-governmental sector, education and media, as well as the necessary institutional synergy against extremism. It must be monitored and adequately documented cases of violence and discrimination. It is necessary to educate staff who works in institutions. Institutional procedures are underused due to the high level of distrust of LGBT persons in their work, their effectiveness, readiness to act, one to understand the specifics of LGBT existence and discretion (Mršević, 2013: 71) and changes in family perception of LGBT youth. Family together must find a way to deal with discrimination and prejudice.

It is necessary to permanently analyse all possible moments of discrimination of the present system of education, since the school system still openly expressed intolerance, and proposals for changes still sound even as utopian. It is recommended as necessary (Commissioner, 2013), that the teaching materials, teachers and their teaching practices and ways of working with male / female pupils foster awareness about diversity, promote non-violent culture, equality and non-discriminatory practices, as truly and necessary postulates of a democratic society based on respect for human rights; raising awareness of diversity, intercultural relations and common values through the presentation of famous persons of different ethnic and religious groups and cultures, etc; teaching contents and teaching materials should present different family models in contemporary society (single parents, foster families, families without children, same-sex partners families, etc.); elimination of stereotyping of gender roles / profession and encouraging varieties; insist on the multiplicity and complexity of human identity, value individuality, creativity and solidarity, regardless of gender (Mršević, 2014b: 141).

At last, but not the least, there should be mentioned that the new concepts of sex and gender identity clearly indicate damages as resulting of the rigid division of gender roles if strictly and forcibly applied. The rigid binary division of gender roles prevents LGBT girls

and boys, women and men, to develop their full potential and individuality if and when expose them to rigid and violent forms of “normalization” (Mršević, 2017: 21). There even is a movement to enabling children to have acceptable interim period of gender neutrality, in development their own gender identity (which is increasingly gained popularity during the eighties and nineties) (Coltrane, 1997:109). Maybe it is perhaps one of the possible ways to mitigate rejection of LGBT people in Serbia.

Required are awareness raising training of police, as the recently implemented ones, aiming to the improved relation of police officers towards LGBT community and how to exercise full cooperation with the community in order to ensure safety. These trainings are aimed to primarily reduce violence and homophobia, but also to provide the conditions in which police services is to become a place of trust in which LGBT persons feel protected from violence, abuse and discrimination (Labris, 2014).

Among top priorities ECRI recommends the Serbian Parliament and Government to adopt codes of conduct which prohibit the use of hate speech. Violence, hate speech and intolerance as forms of publicly expressed homophobia have obviously not yet being met by a timely, efficient and adequate institutional response. It should be noted that when talking about discrimination, it is often the discrimination of that intensity that literally leads to life jeopardy. The state must denounce the negative effects of discrimination, violence and intolerance towards the “others” and the “different” ones instead of ignoring or even supporting them. It should not miss a chance to open the door to new generations of significantly better society. Any discriminatory policy is dangerous. The only reasonable goal, the only honourable goal is to fight for each and every citizen is to be treated as citizens with full rights, no matter what its origin (Maluf, 2003:116). Everything related to basic human rights, can not be denied to any citizen under the pretext of maintaining our beliefs, traditions, customs. We also know that the driving force behind some of the possible ways

and directions of changes may not be exclusively motivated by material well-being. Thus, we are all, and each of us, and not just the state authorities and or politicians, obliged to take responsibility for our future (Kamps, 2007:6).

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