# ANNALES

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# PROSECUTORIAL PRACTICE ON HATE SPEECH IN SLOVENIA: CONTEXT, TRENDS, AND ISSUES

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## *ABSTRACT*

This article aims to determine how public prosecution deals with criminal reports concerning Article 297 of the Slovenian Penal Code on hate speech and explores the influence of the 2019 Slovenian Supreme Court judgment on this practice. The analysis is based on 98 closed case files of the prosecution from 2019 to 2023. The main findings indicate that the number of indictments and convictions remains low; criminal prosecution of cases is inconsistent; there are regional differences in prosecutorial practice; the impact of the 2019 decision is low; and the quality of documents produced by the prosecutor's offices is deficient.

**Keywords:** Hate speech, incitement to hatred, criminal prosecution, protected groups, Penal Code, criminal law, Slovenia

# AZIONI PENALI RELATIVE AI DISCORSI D'ODIO IN SLOVENIA: CONTESTI, TENDENZE E PROBLEMATICHE

*SINTESI*

*Questo articolo mira a determinare come la pubblica accusa gestisce le denunce penali relative all'articolo 297 del Codice penale sloveno sull'incitamento all'odio e analizza l'influenza della sentenza della Corte suprema slovena del 2019 su questa pratica. L'analisi si basa su 98 fascicoli della Procura chiusi dal 2019 al 2023. I principali risultati indicano che il numero di incriminazioni e condanne rimane basso; l'azione penale nei vari casi è incoerente; vi sono differenze regionali nella prassi dell'azione penale; l'impatto della sentenza del 2019 è basso; e la qualità dei documenti prodotti dalle procure è carente.*

**Parole chiave:** discorso d'odio, incitamento all'odio, azione penale, gruppi protetti, Codice penale, diritto penale, Slovenia

## BACKGROUND TO THE TOPIC: LEGAL REGULATION OF HATE SPEECH IN SLOVENIA[1]

Hate speech[2] and issues pertaining to its criminal prosecution remain a notable socio-legal challenge in Slovenia. Several authors have already analyzed various legislative and judicial aspects of Article 297 of the Slovenian Penal Code, which criminalizes public incitement to hatred, violence, and intolerance (Završnik & Zrimšek, 2017; Završnik, 2017; Kogovšek Šalamon, 2015; 2018; Mitev, 2019; Varuh človekovih pravic, 2021). However, the aim of this article is to take a closer look at a specific stage of the criminal proceedings concerning hate speech, which has not often been analyzed, namely prosecutorial practice, i.e., the manner in which the public prosecutor's office deals with criminal reports concerning hate speech. Hence, this article does not try to define what should be prosecuted as legally impermissible hate speech (George, 2014), but to examine how the already adopted and legally valid criminal law provision is enforced in Slovenia in practice.

Since the paper is intended for a wider audience that might not be familiar with the specific features of the legal regulation of hate speech in Slovenia, we will briefly present its main characteristics. In the Slovenian criminal justice system, hate speech is criminalized under Article 297 of the Penal Code (Official Gazette of the Republic of Slovenia No. 50/12 – official consolidated text, as amended), which prohibits public incitement to hatred, violence, or intolerance. Therefore, only those forms of hate speech that contain all the necessary elements of a crime – the public nature of the statement, intent, motivational potential of the statement to influence others, and orientation against a certain social group defined by a specific personal circumstance – are criminalized. The incrimination from Article 297 of the Penal Code is, notably, one of the few cases in the Penal Code where the perpetrator could be convicted solely because of his or her written or spoken words. In this sense, this incrimination is an exception to freedom of expression as a constitutional category (Bleich, 2011). According to the current wording of the provision, speech must explicitly be accompanied by the threat to public order and peace to be prosecutable, or the act must be committed using threats, verbal abuse, or insults. The current wording of Article 297 is a result of the transposition of the *European 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*. As Završnik and Zrimšek (2017, 62) and Peršak (2022) point out, in addition to Slovenia, only Cyprus out of all the EU member states transposed the Framework Conclusion in such a narrow manner.[3]

In the context of hate speech prohibition, Slovenian legislation also prohibits denial of the Holocaust and genocide. Concerning this incrimination, there is an issue of inadequate criminalization that is not widely known. For the denial of the Holocaust and genocide, the same two conditions are required for these crimes to be prosecutable, namely, a) if they pose a threat to public order, or b) they are committed by use of threat, verbal abuse, or insult. It is questionable whether such narrowing down is in line with the International Convention on the Elimination of All Forms of Racial Discrimination.[4] As the prosecution usually does not find a statement denying the Holocaust to be threatening public order, criminal reports against deniers of the Holocaust are usually dismissed (as evident from the case file Kt/10154/2021/MA). Such an approach to the denial of the Holocaust or genocide seems to be in direct contradiction with the approaches taken in other EU member states that criminalize such acts *per se* (Pech, 2009). The European Court of Human Rights upholds sanctions issued by states for denial of the Holocaust and genocide. For example, in *Walendy v. Germany*, the ECHR stated that Holocaust denial is a "continuation of the former discrimination of the Jewish people" and "a serious threat to public order" and could not be considered as covered by freedom of expression under Article 10 of the ECHR (ECHR, 1995).

## PRACTICAL IMPLEMENTATION OF THE LEGISLATIVE FRAMEWORK

Despite the changes in the legal definitions limiting the scope of prosecutable speech, the state prosecutor's office still deemed the definition too broad. To further narrow the definition, in 2013 the Supreme Prosecutor's Office adopted *A Legal Position on the Prosecution of the Crime of Public Incitement of Hatred, Violence or Intolerance under Article 297 of the Penal Code-1*. In the *Legal Position* it is stated that a crime under Article 297 is not committed if the perpetrator's actions did not result in a concrete threat or actual disruption (violation) of public order and peace. Since the *Legal Position* does not have the power of the law but was used by the State Prosecutor's Office as a guideline to implement the law, it could be considered as an example of infra

1 This work was supported by the Slovenian Research Agency (ARIS) [grant number J5-3102 Hate Speech in Contemporary Conceptualizations of Nationalism, Racism, Gender and Migration; and P5-0413 Equality and Human Rights in Times of Global Governance].

2 Hate speech does not necessarily have to be speech. It can take, for example, any form of verbal or written expression, graffiti or a meme, or even a gesture.

3 For further analysis of the European Council Framework Decision 2008/913/JHA cf. Garman (2008).

4 For example, CERD states in Article 2(d): "Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any person, group or organization."

***Table 1: Number of criminal reports filed to the prosecutor's offices, number of indictments, and the number of different outcomes of the criminal procedures (Advocate of the Principle of Equality, 2023–2024, 101).***

| Year | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 | 2023 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Criminal reports received | 21 | 8 | 21 | 63 | 83 | 34 | 13 | 20 | 37 | 13 | 32 | 26 | 38 | 73 | 37 | 33 |
| Conclusion on prosecutor's dismissal of criminal report | 22 | 5 | 6 | 29 | 37 | 36 | 13 | 30 | 19 | 19 | 15 | 24 | 32 | 68 | 41 | 24 |
| Indictments filed by the prosecution | 1 | 3 | 5 | 5 | 26 | 15 | 1 | 2 | 1 | 2 | 6 | 2 | 7 | 3 | 3 | 2 |
| Court convictions | / | / | 4 | 4 | 3 | 9 | 4 | 2 | / | 1 | / | / | 3 | 0 | 4 | 0 |
| Penalty order convictions | / | / | 1 | 3 | 13 | / | 2 | / | 1 | / | 1 | 2 | 3 | 2 | 1 | 1 |
| Acquittals | 2 | / | / | 1 | / | / | / | / | 1 | / | 1 | / | 1 | 1 | 0 | 0 |
| Rejections | / | / | 3 | / | / | 2 | / | / | / | / | / | 3 | / | 0 | 0 | 0 |

law. Infra law is defined as a bylaw that forces those state officials implementing the law to adopt certain decisions in a manner inconsistent with the legal act that they otherwise should follow (Žgur, 2025). It is clear from the prosecution's *Legal Position* that it significantly changes the meaning of Article 297 of the Penal Code and thus enables the unlawful application of the provision. The wording of the article, as written in the law, does not require an actual threat or disturbance of public order and peace, but rather that the act must be done in such a way that it *may* threaten or disturb public order and peace. This wording does not in any way require that public order and peace are already threatened or disturbed; on the contrary, it is sufficient to state that, given the objective circumstances of the case (e.g., the role of the perpetrator in society, method of execution, ability to mobilize others, the social context of the act, etc.) it could potentially be disturbed or endangered. An abstract threat to public order and peace suffices (Čeferin et al., 2019). Furthermore, the Penal Code also criminalizes acts of inciting hatred, violence, and intolerance which are committed using threats, verbal abuse, or insults, and not only those that could threaten or disturb public order and peace. The legal provision hence consists of two alternative manners of committing this criminal act, whereby in the case of the second manner – using threats, verbal abuse, or insults – there is no requirement for the act to be prosecutable such that there must also be a disturbance of public order and peace at the same time. With the legal position of the prosecution, therefore, an additional condition, which is not written in the Penal Code, was impermissibly added by the prosecution itself (Čeferin et al., 2019).

These developments led to a decrease in the number of prosecutorial and court cases of hate speech. The number of cases and their outcomes per year can be seen in Table 1.[5] The table shows that the number of reports, indictments, and convictions had been increasing until 2013. However, the *Legal Position* of the Supreme Prosecutor's Office had a significant impact on the number of indictments and consequently, also convictions.

The adoption and the application of the 2013 *Legal Position* of the Supreme Prosecutor's Office and the consequently low number of indictments and convictions sparked academic criticism concerning the criminal prosecution of hate speech in Slovenia (Završnik & Zrimšek, 2017; Završnik, 2017; Kogovšek Šalamon, 2015; 2018; Mitev, 2019; Varuh človekovih pravic, 2021) as well as criticism from international monitoring bodies (ECRI, 2019, 12). The matter was addressed by the Supreme Court of the Republic of Slovenia, which in 2019 issued a landmark decision on this issue (Supreme Court of the Republic of Slovenia, 2019). It clarified two aspects of the interpretation of the law: i) the question of whether the two conditions for prosecution of hate speech (a. threat to public order and b. existence of threat, verbal abuse or insult) are cumulative or alternative, and ii) the question of whether the threat to public order must be concrete or if it can remain abstract for the act to be prosecutable. In its judgment, the Supreme

5 The data is presented in the table as provided for in the source. Note that / and 0 have the same meaning, i.e., that there were no such cases in that year. The data is presented from 2008 on, as in 2008 the currently valid Penal Code (Penal Code, 2008) was adopted.

Court clarified, first, that the two conditions are alternative and not cumulative (Peršak, 2022). This means that when the prosecution establishes that hate speech was exercised by threat, verbal abuse, or insult, it should be prosecuted even if it did not endanger public order and peace. The position of the Supreme Court hence directly contradicted the 2013 *Legal Position* of the Supreme Prosecutor's Office, which raises several serious legal questions of the constitutionality of case dismissals of the prosecutor's office that have been adopted based on the interpretation of the law taken by the 2013 *Legal Position*, as well as questions of responsibility and accountability for the unlawful application of the statutory provisions between 2013 and 2019.

The second aspect that the Supreme Court clarified was that in cases when hate speech is not exercised using threats, verbal abuse or insults, it must be examined whether the statements posed a threat to public order; however, that threat does not have to be *concrete*, but *abstract* with the *potential* to endanger public order. This means that the speech does not need to have concrete consequences yet to be prosecutable, but must contain the potential for the threat to emerge. Thus, it can be assessed that the Slovenian legal framework aims to enact laws that limit expressions of racism and other types of intolerance without being overly inimical to freedom of expression and opinion, which is what hate speech legislation generally strives for (Bleich, 2011). In fact, it could be argued that until the 2019 Supreme Court decision, the Slovenian approach to hate speech very much followed the approach of the United States, where only instances of hate speech that cause a *clear and present danger* were prosecuted (Cohen, 2014, 245; Rosenfeld, 2003). The 2019 Slovenian Supreme Court judgment is an attempt to depart from such an approach, which is also in line with the other European jurisdictions' approach (Cohen, 2014, 238).

## METHODOLOGY: STATE PROSECUTORS' CASE FILES ANALYSIS

The main purpose of this article is first, to analyze the prosecutorial practice concerning hate speech, and second, to explore whether the 2019 Supreme Court judgment no. VSRS I Ips 65803/2012 impacted the prosecutorial practice in this field.[6] Related to the latter we hypothesized that the number of indictments and convictions increased because of the Supreme Court decision. We tested this hypothesis by asking the Supreme State Prosecutor's Office for access to all prosecution case files concerning Article 297 of the Penal Code from 2019 to 2023.[7] We gained access to 157 prosecution case files, out of which 98 files were closed, while in 59 cases the prosecution was ongoing.[8] Hence, further in-depth analysis was done based on 98 closed files, focusing on both the quantitative as well as qualitative aspects. For qualitative analysis, we prepared a manual coding system[9] that enabled us to focus on issues defined in advance, such as:

- whether the suspect was a public figure;
- the personal grounds of the group targeted by hate speech;
- who filed a criminal report to the prosecutor's office or the police;
- where the alleged crime was committed;
- the outcome of the case at the prosecutorial stage;
- how relevant the content of the criminal report was for hate speech;
- the length and the content of the prosecution's argumentation on the elements of the crime;
- if the criminal report was dismissed by the prosecution what reasons were given for the decision;
- specifics concerning online hate speech;
- how the prosecution determined the intent of the suspect;
- the impact of the 2019 Supreme Court judgment on the prosecutor's argumentation;
- the outcome of the case in the judicial stage, if an indictment was filed; and
- possible sanctions.

The analysis was partially inspired by an analysis done by the Human Rights Ombudsman of the Republic of Slovenia for the period up until 2018 (Varuh človekovih pravic, 2021). Based on its analysis, the Human Rights Ombudsman found that only a quarter of all complaints under Article 297 of the Penal Code from 2008 to 2018 resulted in sanctions (Varuh človekovih pravic, 2021). This data will be compared to the data gathered in our analysis.

6 We requested access to all closed prosecutorial files between 2019 and 2023, which was granted by the Supreme State Prosecutor's Office of the Republic of Slovenia. It provided the research team with a list of all closed cases, not only a sample. The research was conducted in person at local state prosecutors' offices, carried out by one researcher based on prior arrangement, and included a physical examination of the case files. This access allowed for viewing, taking notes of relevant documents, and photocopying them, all under the obligation to protect personal data and the restriction of using the acquired information only for the purpose of the research conducted.

7 This research and article were prepared within the research project "Hate speech in contemporary conceptualizations of nationalism, racism, gender and migration" (J5-3102), coordinated by Dr. Veronika Bajt, and the research program "Equality and human rights in times of global governance" (P5-0413), coordinated by Dr. Mojca Pajnik, both funded by the Slovenian Research and Innovation Agency (ARIS).

8 We have analyzed only closed files of final cases, i.e., a total of 98 cases, that were closed between 2019 and 2023.

9 An analytical coding tool in Word and Excel was provided for the field researcher who had to fill in the data for each case, including the data on the main issues that we wanted to record. The issues were the same as those presented in this article.

## RESEARCH FINDINGS

### Quantitative analysis

The results of the quantitative analysis provide an interesting insight into the content of the cases. In 70 cases out of 98 the suspect was not a public figure, while in 28 cases the suspect was a public figure, for example a member of parliament, a prime minister, a state secretary, a mayor, mayoral candidates, a municipal or city council member, a director of a public agency, TV show anchor, several journalists, columnists, media editors, entertainers, activists, and protest organizers.

Out of 98 cases dealt with by the prosecution, 57 hate speech incidents were committed online (in the form of a statement or commentary on a social media platform, as a commentary under a news article, as a commentary in an online forum, or as a post on a video-sharing platform). Most of these posts were published on Facebook (22), followed by Twitter, now X (16 posts). Out of 98 cases, 30 refer to in-person events (not online), while 11 cases are related to publications in traditional media (TV, radio, magazines, or internet news portals). The data shows that most of the problematic speech that is reported is from online content, mostly from social media.

Concerning the outcomes, we found that in 14 cases out of 98 (14 percent) an indictment was filed in the court by the prosecutor's office, while in 84 cases out of 98 (86 percent) the criminal report was dismissed by the prosecutor's office (cf. Chart 1). Four of the dismissed cases related to so-called deferred prosecution, which means that the indictment was not filed under the condition that the accused does something in the public interest, e.g., pay a certain financial allowance to a charitable organization.

In the 14 cases in which the prosecutor's office filed an indictment to the court, the courts convicted the accused in five cases (Kt/23361/2020/AJ, Kt/17734/2020/IŠ, Kt/21186/2019/BB, Kt/3723/2020/IŠ and Kt/24009/2016/AB), while in four cases a penalty order was issued (Kt/4036/2019/NČ, Kt/10302/2020/NVI, Kt/24599/2019/LM and Kt/3603/2022/LM).[10] In three cases the accused was acquitted (Kt/18841/2016/EE, Kt/4231/2018/KP and Kt/21877/2019/NČ/dč) while in one case the indictment was rejected by the court (Kt/9197/2016/AN).[11] This set of data is presented in Chart 2.

As far as sanctions are concerned, in only one case was a financial penalty imposed upon the convicted person, while in all other cases a sanction of a suspended prison sentence was imposed by the court, ranging from

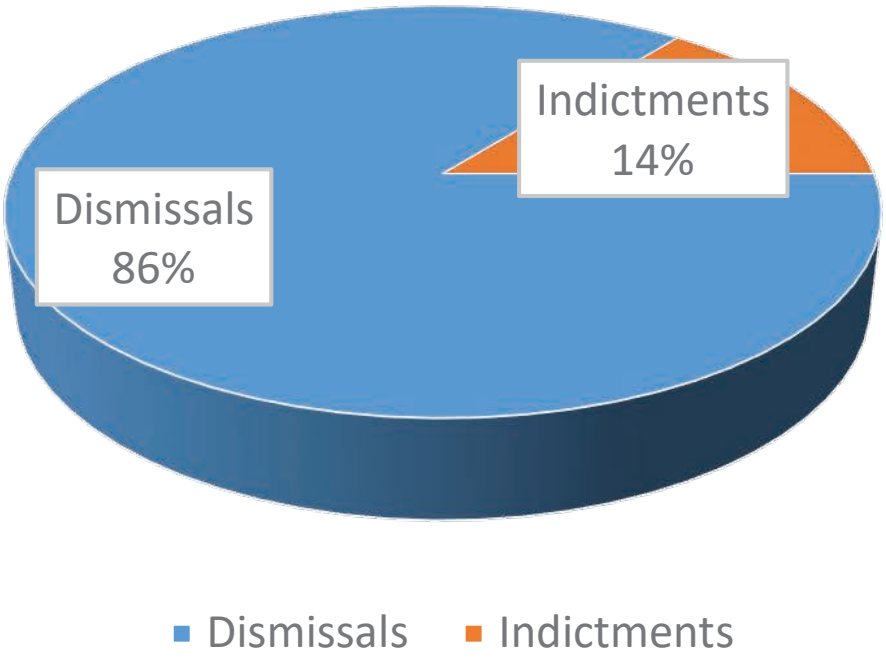


***Chart 1: Outcomes of 98 cases in the prosecutorial stage (N = 98).***

10 Under Article 445.a in relation to Article 25 of the Criminal Proceedings Act, a prosecutor may propose to the court to issue a penalty order without conducting a public hearing for crimes that are in the competence of the county courts, i.e., crimes for which the law prescribes a financial sanction or a sanction of imprisonment for up to three years.

11 In one case the outcome of the case in the judicial stage was not yet known.

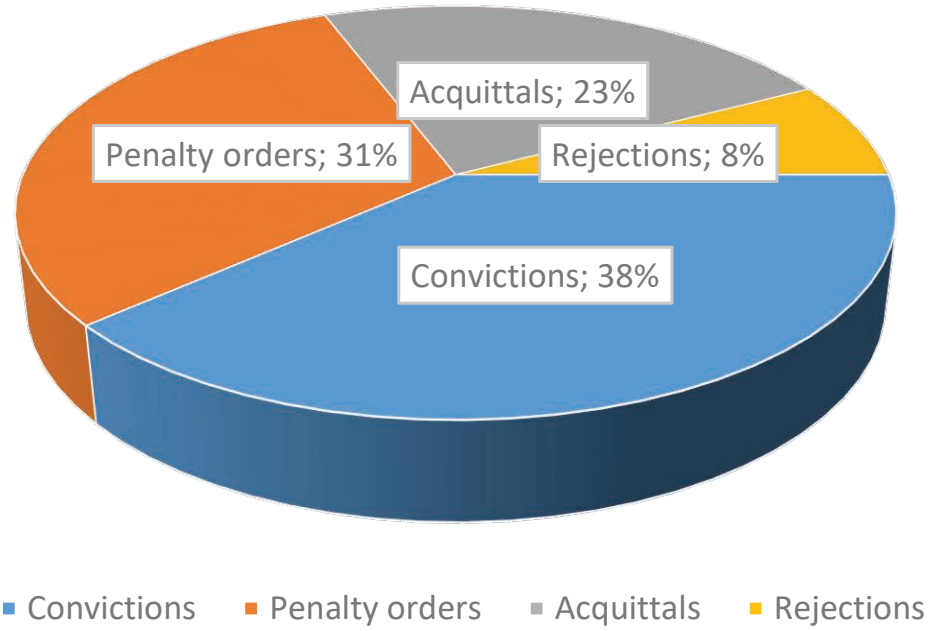


***Chart 2: Outcomes of cases in the judicial stage (N = 14).***

one month to seven months imprisonment.[12] This means that a negligible number of people were sanctioned for hate speech in Slovenia in the analyzed period. As evident from the quantitative analysis, the number of indictments (14) and convictions (nine if we consider both convictions and penalty orders) over a period of five years remains very low, indicating that the prosecution practice remains benevolent towards the reported hate speech incidents. In the qualitative analysis that follows, we will explore the reasons why this is the case.

If we compare this to the findings of the Human Rights Ombudsman for the period from 2008 to 2018, which found that a quarter of all complaints under Article 297 of the Penal Code from 2008 to 2018 resulted in sanctions, we find that in the period from 2019 to 2023, 13 cases (nine convictions and penalty orders and four deferred prosecutions) out of 98 resulted in sanctions, which is a bit over 13 percent and proportionally half of what was found by the Ombudsman.

## Qualitative analysis

### *Proving the crime*

In this part, we present the outcomes of different issues concerning the content of the case files. The starting point of any assessment of a case at the prosecutorial stage is verifying whether there is evidence available to prove the crime. There can be obstacles to proving online comments: for example, in one of the cases, a criminal report was submitted by an NGO that attached a print screen to its criminal report and a summary of the user's comment on the online news article. When the prosecution tried to obtain further proof of the existence of the comment from the media company, it turned out that the comment had been deleted, and thus, the media outlet could not provide it. Consequently, the criminal report was dismissed (Kt/23429/2019/IŠ).

In general, one of the primary challenges in identifying the IP address and subsequently identifying the perpetrator is embedded within the legislative and regulatory framework governing the processing of personal data. Specifically, telecommunication service providers and media outlets are permitted to retain user data for a limited duration, which frequently falls short of the time frame required for prosecutors to procure an IP address from the relevant servers.[13] In another case where the criminal report against an online comment was filed by an NGO based on a complaint lodged by an anonymous applicant, the latter provided the name of the author of the comment, date and time of the publication of the comment, and the content of the comment. However, since the comment could no longer be found online by the prosecution, even though the police established the IP number of the perpetrator

12 In the case of a suspended sentence, the court determines the punishment for the offender, which is not imposed if the offender does not commit a new offense during the probation period set by the court (paragraph 1 of Article 57 of the Penal Code).

13 This discussion is not related to the statutes of limitation for the prosecution of crimes.

and identified him, he denied publishing the comment and the criminal report was dismissed (Kt/3713/2021/MK/AZ). It needs to be noted, however, that such issues reflect the challenges of the prosecution of online hate speech that are present globally due to the anonymity and mobility afforded by the internet (Banks, 2010).

### *Elements of a crime: Public nature of the act*

Hate speech must be public to be prosecutable. This element is more easily established in classic cases of hate speech that take place offline. For example, in one case, the criminal report was dismissed as the incitement to hatred was not committed publicly, but in a work environment in private correspondence among individuals (Kt/17605/2020/ME/tj). Analysis of the public nature is different in the case of online incidents involving posts on social media accounts. In one case, the criminal report was dismissed since the post was published on a personal Twitter (now X) account of a user and was only visible to the user's "accepted" followers, but not publicly (Kt/1925/2020/ME/kh).

### *Elements of a crime: Incitement to and spreading of hatred*

When assessing whether the act amounts to criminally prosecutable hate speech, the prosecution determines whether the statement expressed by the perpetrator contained an element of fueling and fanning of hate among other people, or whether the statement was an expression of one's belief without any potential to influence others. In this sense, the prosecution determines whether the perpetrator spreads a situation which is already dangerous or if he or she exacerbates such a situation. This assessment can be quite subjective and dependent on the individual prosecutor, and not everyone may agree with the result of such an assessment.

For instance, in a case of an extremely offensive social media post against a transgender person the prosecutor's office assessed that the perpetrators were only expressing their opinion and outrage concerning the expectations of transgender people to be accepted and for their rights to be recognized, and believed that the element of incitement was missing (Kt/5189/2023/ME/nn). In another case when the perpetrator called migrants Neanderthals who still live in tribal communities and doubted whether they should have minority rights and the right to work, the prosecution concluded that the perpetrator expressed his opinion and provided arguments for it and that the statement was not directed to the general public to incite hatred, violence, or intolerance. Hence, the prosecution dismissed the criminal report (Kt/8082/2018/PVZ/LK). In another case, the perpetrator opposed the autopsy of a deceased migrant, called for throwing the deceased into a cave, and called for the provision of weapons to the local population. Despite the severity of the case, the prosecution dismissed the criminal report with the reasoning that the statement falls within the scope of the freedom of expression and does not pose a threat to public order (Kt/3382/2020/MA). These three cases showcase the high tolerance that the prosecution exercises towards instances of highly problematic online discourse.

Furthermore, we observed that there are regional differences among various prosecutors' offices in how strictly they assess the elements of the crime. The research has shown that, for example, the prosecutor's office in the city of Slovenj Gradec was much stricter towards the perpetrators compared to, for example, the prosecutor's office in the city of Koper. The latter was looking for clear indications that the aim of the perpetrator was to potentiate an existing dangerous situation, while for the former, it sufficed that the statements were hateful.

It can be observed that in these assessments the prosecution was looking for explicit words that would express incitement, but it neglected the fact that the comments overall had a dehumanizing effect (cf. Posselt, 2017, 19) as well as that public outrage against a protected group very often has a motivating effect on others to commit more serious crimes, as numerous examples from the past have shown (e.g., studies show how hate speech has incited the most egregious crimes, including genocide; cf. Kellow & Steeves, 2006; Schabas, 2007; Mafeza, 2016; Messanga, 2021).

### *Severity threshold*

The case files show that the prosecution assesses whether the threat to public order is real and serious, so there is usually a threshold that needs to be met. For example, in the case of a prosecution of a threatening statement the threat needs to be serious and must, for example, make reference to weapons (which however, does not mean that the sole mentioning of weapons suffices for criminal conviction), shooting, or extermination (Kt/24599/2019/LM/LM/nm; Court judgment No. II K 16255/2020. Cf. also case number Kt/14299/2018 and Kt/702/2021/NVI). The threats, verbal abuse, or insults should also be in the plural to be prosecutable, as the linguistic analysis of the criminal law provision, in the opinion of the prosecution, requires more than one threat or insult (Kt/14374/2023/ME/nn). Metaphors that someone should be removed or annihilated do not suffice for prosecution; it seems that the manner in which this would be done needs to be described more concretely in the statements to be considered prosecutable (Kt/10913/2021/NVI). The criminal report was also dismissed when filed against an individual who used TikTok to exhibit her swastika tattoos and proclaimed herself a racist. In the opinion of the prosecution, the severity threshold had not been met in this case (Kt 21366/2020/5/KP-sš).

These assessments are quite subjective and depend on the region where the prosecution is based. In the case files, there were several hate speech incidents that were highly abusive but did not have any effect on public order, so there was no prosecution (Kt/5259/2021/NČ and Kt/21366/2020/KP). However, there were also cases when perpetrators were prosecuted in comparable incidents by other prosecution offices and were also convicted by the court (Kt/21186/2019/BB). Such cases raise issues of consistency of criminal prosecution for comparable crimes within the state jurisdiction, and hence raise issues of equality before the law as enshrined in Article 14 of the Constitution, depending on the perpetrator's place of residence.

### *The prohibition of the supremacy of one race over another*

As explained in the theoretical part of this paper, paragraph 2 of Article 297 of the Penal Code prohibits public spreading of ideas about the superiority of one race over another or providing any assistance in racist activity, or denying, diminishing the importance of, approving, justifying, ridiculing or defending genocide, holocaust, crimes against humanity, war crimes, aggression or other crimes against humanity. Based on this provision, one indictment was filed by the prosecution in the court, and the court found the perpetrator guilty of this crime. The case concerned the author of a column in a conservative alt-right weekly called *Demokracija*. The column argued that it was no coincidence that Jesus was white, and that God would create a virus that would attack only migrants but would protect the white race from extinction. The prosecution assessed that all the elements of the crime from paragraph 2 of Article 297 of the Penal Code were present. The prosecution also assessed the impact of the column by examining the scope of the reaction to the column as well as the number of sold copies of the magazine (Kt/23361/2020/AJ).

### *Assessing intent*

One of the key elements that needs to be proven in criminal prosecution is intent to commit a crime. In the context of this incrimination, the main question discussed by the prosecution in its assessment was: should there be intent to say the words or the intent to cause hatred? In those reasons of the prosecution that dealt with this issue, the position has been taken that there has to be intent to cause hatred. We interpret that the prosecution took a position that there has to be a direct intent or perhaps even a specific intent to spread hatred and intolerance or even provoke violence (*dolus coloratus*), as opposed to eventual intent, which does not seem to be sufficient for the prosecution. However, this is not the language used in the indictments and case dismissals, as intent is generally modestly analyzed, so it is difficult to assess what kind of intent the prosecution is looking for to file an indictment. At times, the indictments discuss whether the perpetrator really wanted to say such words and knew what they meant and what their effect might be, but do not qualify the type of intent they are looking for. Often there is relativization in the reasoning when the prosecution is discussing intent, in the sense that the perpetrator was only expressing his/her opinion but was not serious about the threats and did not mean to incite hatred (Kt/137/2023/ME and Kt/14299/2018). However, it is not clear whether this might mean that eventual intent is not sufficient for the prosecution. In this context, we find useful guidance in a judgment issued by the County Court in Črnomelj (a town in Slovenia) in relation to a hate speech case:

> *A criminal offense according to the indictment [for the crime under Article 297 of the Penal Code] can only be committed with direct intent, which means that the perpetrator must have the intention of spreading or inciting hatred, violence or intolerance against a certain protected group of people, as well as [the perpetrator must have] the awareness of the possibility that his actions may cause danger or disruption of public order and peace.* (Court judgment No. I K 18267/2020)

### *Protected group*

The indictments and the prosecution's conclusions on dismissal of criminal reports unanimously state that the purpose of Article 297 of the Penal Code is to shield protected vulnerable groups that are marked by one of the personal grounds – gender, race, ethnicity, religion, sexual orientation, and others. The first consequence of this position is that when hateful words, even if they are based on personal grounds, are directed towards individuals, this cannot be a crime of incitement to hatred, as the legal provision is protecting groups, not individuals. This excluded prosecution against a prime minister (Kt/10966/2020/NVI) and a mayor (Kt/7726/2021/LM/LM/ss), but also against a trans person (Kt/5189/2023/ME).

Further, if the statement is directed towards a group, the prosecution then usually checks whether this is a protected group as defined by Article 297 of the Penal Code. Groups that were not considered protected groups were participants in a public event (Kt/14299/2018/NVI); doctors (Kt/14374/2023/ME and Kt/14374/2023/ME/nn); and political activists ( Kt/17958/2022/ME/sž). However, not all case files are consistent on this issue, as in another case concerning the same group of political activists, the latter was recognized by the prosecution as a protected group;

the prosecution lodged an indictment against the perpetrator who exercised hate speech against them (Kt/3603/2022/LM). In this case, the court even issued a penalty order against the perpetrator; however, the element of personal grounds that supposedly defines this group of activists was not explained either by the prosecutor or by the court.

The next group of cases are related to the specifics of Slovenia's socio-political environment concerning the attempts of a historical revisionism aimed at rehabilitating those Slovenians who collaborated with Nazi Germany as an occupying power during the Second World War. Quite often, this issue stirs debates as to who was on the right side of history, the resistance (Partisans) or the Home Guard (domobranci). Consequently, these debates also stir massive amounts of hate speech towards both groups. So far, the prosecution has always stated that these are not protected groups, as perhaps they existed in the past, but that is no longer the case (Kt/18208/2021/MI-tp and Kt 702/2021/NVI). It seems that hate speech indictments are never filed concerning this issue. There were also no convictions for war crimes denial concerning the deeds of one group or the other, as in these cases, the prosecution always concludes that the threats to public order were not sufficiently grave.14

### *The context of the hateful statement*

In certain cases, it is notable that the prosecution considers the socio-political context in which the problematic statement was published. For example, in one of the cases, the perpetrator published a comment under a news article on lockdown and other protective measures aimed at preventing the spread of infection. The perpetrator opposed the measures and mentioned threats and weapons in his comment. The prosecution considered that the comment was written in an undoubtedly conflicting societal atmosphere, in a time of economic and consequent social uncertainty following the lockdowns. The prosecution considered that the perpetrator's sharp reaction to the news piece was completely understandable (Kt/10913/2021/NVI). In another case related to the annual performance by an artist known for consistently using the red star as a symbol, the prosecution dismissed a criminal report against an author who made a hateful commentary. The prosecution argued that, given the political polarization in Slovenian society, it is understandable that the red star polarizes and raises outrage among certain people. It also noted that the statement did not cause prohibited consequences among readers (Kt/14299/2018).

### *The impact of the author's statement on others*

The prosecution usually also assesses whether the statement had an impact on others. For example, in one case concerning a hateful comment, the prosecution noted that no one else ever commented on that comment, hence the comment itself could not have had any impact on other people (Kt/10913/2021/NVI). In another case, the prosecution in another region considered that the fact that two other Facebook users hatefully commented on the original hateful post concerning migrants shows that the post had a mobilizing effect on other people (Kt/21186/2019/BB). However, the assessment of the prosecution concerning this issue is again relatively subjective and dependent on the prosecutor's office from different regions, as is visible from other cases. For instance, in another case, a hateful post against migrants received 33 likes, which, however, did not convince the prosecution to issue an indictment (Kt/3382/2020/MA). In any event, in cases concerning social media posts and reactions to them, the prosecution also examines the nature of these reactions. If the reactions do not express agreement with any kind of incitement to hatred, but rather express opinions, an indictment is not filed (Kt/18208/2021/MI-tp and Kt 18208/2021/MI-tp).

### *Political speech and freedom of expression*

The prosecution dealt with several instances of political speech, but noted that such speech enjoys high protection of the freedom of expression under Article 10 of the European Convention on Human Rights and Fundamental Freedoms.[15] For instance, in a case concerning political party posters hung during the election campaign, which explicitly called for the protection of children from the threat of LGBT adoptions, the prosecution dismissed the criminal report against the party. It bizarrely stated that the aim of the posters was not to incite others to form an opinion, but to inform the public about the opinion of the party. As stated in the reasoning of the prosecution's decision, the opinion of the prosecution was based on the protection of the freedom of expression as a constitutional category. It stated that this constitutional provision:

14 The prosecution often notes that in case of discriminatory and hateful threats targeting individuals, when Article 297, which protects groups, cannot be applied, the deed could be prosecuted on the basis of other provisions, for instance the crime of threat defined in Article 135 of the Penal Code (Kt/702/2021/NVI) or the crime of insult defined in Article 158 of the Penal Code (Kt/16788/2021/NČ/ar, Kt/10966/2020/NVI, Kt/17958/2022/ME/sž, Kt/18069/2020/ME/kh, Kt/18277/2020/AJ).

15 It would be interesting to assess in which Slovenian cases dealt with by the prosecution, if there was a conviction, the European Court of Human Rights would, based on its case law, likely confirm that the interference by the state (in the form of a criminal conviction for hate speech) was in line with paragraph 2 of Article 10 of the European Convention on Human Rights and Fundamental Freedoms. However, such analysis exceeds the scope of this article.

> *guarantees freedom of expression of thought, speech, public speaking, press, and other forms of public information and expression. Everyone can freely collect, accept, and spread news and opinions, regardless of their correctness or reality, and the Constitution also protects those messages and statements that are not accepted with approval or that may be disturbing to individuals or groups.*[16] *What has just been said means that in Slovenia, political speech and political discussion are fully legally permissible and protected, even if they are harsh, provocative or even obviously unjustified opinion or criticism of either the current or past authorities, whereby the individual has the right to express such an opinion in a way and in the form that promises the strongest effect and widest reach (publicity).* (Kt/17440/2020/UL; cf. Kt/5168/2020/ME/sm)

The instances of provocative political speech are not the only ones in which the prosecution gives weight to freedom of expression. This is, in fact, the starting point for all assessments of the criminal reports within the realm of Article 297 of the Penal Code. For example, when the prosecution recognizes that a statement represents a harsh criticism of the authorities or a certain political ideology in aggravated social conditions it takes this fact into account as a mitigating circumstance and dismisses the criminal report (Kt/10966/2020/NVI). Harsh political criticism enjoys wide protection of the freedom of expression; the prosecution noted that any kind of restriction is justified only in exceptional cases (Kt 702/2021/NVI). This brings us back to the beginning of this paper, where it is explained that the prevailing approach to prosecuting speech in Slovenia is more similar to the one in the United States than to those in other European countries (Cohen, 2014, 245; Rosenfeld, 2003).

## THE EFFECT OF THE 2019 SUPREME COURT JUDGMENT

As noted above, the 2019 Supreme Court judgment quashed the wrongful interpretation of Article 297 that had been prevalent for years due to the 2013 *Legal Position* adopted by the Supreme State Prosecution. In our analysis, we encountered one case in which the influence of this *Legal Position* was clearly traceable:

> *The objects of criminal law protection are public order and peace, as the conduct of the perpetrator threatens public order and peace and prepares a quality transition from words to actions. A specific threat must be given* [for criminal prosecution]*, which must manifest itself in immediate danger, interference with the physical or mental integrity of individuals, obstruction of the exercise of rights or duties of people, state bodies, bodies of self-governing local communities, and holders of public authority in a public place. Acts of incitement and spread of hatred must be of such a nature that, in the environment and conditions in which they are committed, they do not lead to a breach of public order and peace only because the competent authorities or individual participants intervened in time,* […] *or because of the timely cessation of hate speech. The increased danger of such expression should be visible from the wording in which it was given* [to be prosecutable]*, in circumstances due to which the perpetrator does not want or cannot control the further course of events by himself, because it is no longer dependent on his will. When assessing the nature of the illegal speech, it is necessary to consider the degree of probability,* [type of] *danger and scope* [of danger]*, as well as the consequences of specific actions that may follow hate speech. The use of threats, verbal abuse or insults must also be more serious, or these actions must threaten and harm peace, tolerance, and coexistence between people more widely.* (Kt/25452/2017/AJ)

The case concerned a billboard hung on the outer house wall of a member of parliament, which stated "Migrants should get out of the country".[17] As is visible from the reasoning of the prosecution, the indictment against the perpetrator was not filed as the prosecution did not find a concrete threat to public order, which, according to them, was not caused by the billboard statement *per se*. This kind of reasoning has been expressly rejected by the 2019 Supreme Court judgment.

In this context, it is relevant to assess to what extent the State Prosecutor's Office is bound by the Supreme Court's decision in the Slovenian legal system. According to the first paragraph of Article 3 of the State Prosecutor's Office Act (Official Gazette of the Republic of Slovenia No. 58/11, as amended), the State Prosecutor is independent in the performance of his duties and is bound by the Constitution and the law. Per the Constitution, they are also bound by the general principles of international law and ratified and published international treaties. The second paragraph of the same article adds that

16 In this wording we can trace the position of the European Court of Human Rights case law (ECHR, 1976).

17 In Slovenian the original statement read: "*Migrante ven iz države*". For further reading on the consequences of hate speech prosecution against the politicians cf. Askola (2015) and Jacobs and van Spanje (2006).

it is not permitted to interfere with the decisions of the State Prosecutor in individual cases, except by giving general instructions and taking over the case in the manner established by this law. However, according to the hierarchy of legal norms in the Republic of Slovenia, general instructions cannot take precedence over the law. The Supreme Court is the authoritative interpreter of Slovenian legislation, as it is the highest instance of regular Slovenian legal proceedings. Through its decisions, the Supreme Court ensures uniform interpretation and application of laws, which contributes to legal certainty and the predictability of judicial decisions. In continental legal systems, the courts' decisions are not a formal legal source. Although case law is not formally binding in the Slovenian legal system, in practice, the decisions of the Supreme Court are often taken into account, especially general legal opinions that are important for the uniform application of laws.[18] A constitutional right to equality before the law demands that like cases should be decided alike; hence, a case law becomes an important legal source also in modern continental legal systems, similarly to a precedent in a *stare decisis* doctrine (Galič, 2003; Štajnpihler, 2010; Kerševan, 2012).

Based on these theoretical premises, it is reasonable to expect that the prosecutor's office would follow the 2019 Supreme Court judgment in each case where the issues clarified by the court were central to the assessment. This would exclude cases where the evidence for the crime was not secured or where intent was not confirmed, but it should be relevant in the rest of the cases. However, in our analysis, we found only three cases where the prosecution explicitly or implicitly relied upon the 2019 Supreme Court judgment. For example, in the already mentioned case concerning a magazine column with supremacist statements the indictment lodged by the prosecution states that the 2019 Supreme Court judgment demands that it be verified if there is an abstract-concrete endangerment of the public order, hence that it needs to be examined whether the deeds of the perpetrator could threaten the public order. The prosecutor assessed that it could, as the magazine column provoked wide reactions in the public sphere, the public was concerned and worried, and called upon the state authorities to act. Considering the negative societal atmosphere towards migrants, the prosecution concluded that the magazine column could endanger public order. Specifically, the perpetrator was already calling for violent actions against members of other races, and could no longer prevent the actions of others, as this would no longer depend on the perpetrator's will (Kt/23361/2020/AJ).

In another case, there is no explicit reference to the 2019 Supreme Court decision; however, the reasoning used by the prosecution indicates that the office of the prosecutor did consult the Supreme Court judgment when assessing the case. Specifically, the reasoning states:

> *It follows from the legal definition of the alleged crime that there must be a potential possibility of endangering or disturbing public order and peace. This means that the act, by its content, nature, place, and the circumstances in which it was committed, is capable of causing concrete danger, which manifests itself in endangering or disturbing public order and peace.* (Kt/16687/2020/NM/vc)

This wording directly reflects the position taken by the Supreme Court, where it clarified the scope in which public order must already be (or not) endangered by public incitement to hatred.

In another case that concerned four social media posts against the LGBT community, the prosecution discussed that the act was committed by using threats, verbal abuse, and insults, but it did not refer to the condition of endangering public order (Kt/12680/2023/BH/KG). It is likely that it omitted the discussion of the second condition based on the clarified position of the Supreme Court.

Compared to the findings of the Human Rights Ombudsman, according to which 10 out of 39 case dismissals were based on the narrow approach dictated by the 2013 *Legal Position*, we can confirm that relying explicitly or implicitly on the 2013 *Legal Position* is no longer a common practice in criminal prosecution of hate crime. On the other hand, our research did not show that the 2019 Supreme Court decision had a traceable and widespread impact, at least not in such a way that the judgment was cited and referred to by the prosecutors in individual case assessments. In conclusion, our analysis could not confirm that the 2019 Supreme Court judgment had a significant impact on prosecutorial practice, as it was not even cited in cases where this would be relevant (e.g., the three cases prosecuted in Slovenj Gradec). The reasons for this remain unknown. One possible explanation could be that the prosecutors are not aware of the judgment, which is unlikely due to the hierarchical structure of the prosecution, or are not paying attention to it. Another possible explanation could be related to the question of the (possible lack of) motivation to ensure high quality of the indictments and case dismissals. For definitive responses to

18 A more detailed discussion of the binding nature of court decisions for state bodies exceeds the scope of this article, which aims only to examine whether the Supreme Court's ruling on hate speech has influenced prosecution by the State Prosecution's Office, rather than to make value judgments about whether and how this affects the Slovenian legal order.

these questions further socio-legal research involving several different methods, including anonymized interviews, is needed.

## PROBLEMS OF QUALITY OF INDICTMENTS AND CASE DISMISSALS

The analysis has shown that the quality of the indictments and case dismissals produced by the prosecutor's offices is poor. We cannot help but observe that the quality of indictments often needs improvement. There are examples of "promising" cases in the case files where the prosecution failed before courts because the indictment was so poorly reasoned. The most notable deficiency was a lack of assessment of all the legal elements of a crime, most often intent. Instead, a mere reference to the content of Article 297 of the Penal Code is given in the assessment without applying it to the facts of the case.

In one particular case, the prosecution provided better reasoning in the appeal against the first instance judgment (Court judgment No. I K 18267/2020) after unsuccessful prosecution before the first instance court, but it was too late. The case concerned vigilantes who were inciting other residents close to the state border to join them and protect the border with weapons from migrants, thus preventing their entry. Only in the complaint against the first instance decision did the prosecution refer more specifically to the 2019 Supreme Court judgment, noting that it explicitly requires only potential danger to public order, and emphasized that such danger does not have to be concrete yet. Only in the appeal did the prosecution state factual circumstances of the case based on which it drew conclusions on such potential danger or perhaps even concrete danger. The higher court that adjudicated upon the prosecution's appeal stated that such reasoning ought to have been stated in the description of the facts in the indictment filed before the first instance court. When examining the indictment (Kt/21877/2019/NČ/dč), we observed that it is poorly reasoned, with double-spaced text of only two and a half pages, with ample empty space at the beginning and the end of the document. Furthermore, not all the elements of the crimes were assessed in the indictment, meaning that the court had no other option but to acquit the accused. The court hence penalized the sloppy work of the prosecution by finding that not all the elements of the crime were substantiated, as the indictment contained only:

> *an abstract statement that the defendant's acts were such that they could cause reactions with her sympathizers and threaten the public order. Such conclusion, without concretely stating the circumstances that would lead to a justified conclusion that the acts could cause danger to public order is so deficient that the court, in the framework of the evidentiary procedure, cannot successfully try and assess, while on the other hand the defendant cannot present a successful defense, and cannot be even required to do so.* (Court judgment No. I K 18267/2020)

It should be stressed that occasionally poorly reasoned indictments do not necessarily lead to a dismissal of the court. At times the criminal procedures end with convictions even if the indictment is modest in terms of its quality, e.g., if it is inappropriately short (1-2 pages of light text), poorly reasoned, and lacking arguments that would justify the existence of all the elements of the crime (cf., for example, cases from Slovenj Gradec, i.e. cases number Kt/17734/2020/IŠ, Kt/21186/2019/BB, Kt/3723/2020/IŠ). Similarly, to the outcomes of the Ombudsman's research, our research showed that the justification of the prosecution's acts was also poor. In contrast to the Ombudsman's research, our analysis has shown regional differences between various State Prosecutor's Offices regarding the prosecution of hate speech, which the Ombudsman did not point out.

## CONCLUSIONS

The main findings of our research on hate speech prosecution in Slovenia indicate that the number of indictments and convictions remains low. Out of 98 cases, 14 indictments were filed in courts, resulting in nine convictions between 2018 and 2023. In only one case was a financial penalty imposed on the convicted person, while in all other cases, a sanction of a suspended prison sentence was imposed by the court. In four dismissed cases, the prosecution was deferred as the accused paid financial allowances to charity organizations. In 13 cases the criminal report resulted in some kind of sanction for the accused. This shows a lower share of cases resulting in sanctions compared to the 25 percent share noted by a similar prior Human Rights Obmudsman's study done for the period 2008–2018.

Another important outcome of our research is related to the consistency and quality of the prosecutorial assessment of cases. We observed that the criminal prosecution of cases is inconsistent and somewhat prone to subjective assessment, dependent on the individual prosecutor's office or even an individual prosecutor. Another observation is related to the level of quality of the indictments and case dismissals, as they are often poorly reasoned and at times do not contain an assessment of all the elements of the crime. This is particularly notable concerning the element of intent to commit a crime, as it is often not discussed, it is discussed incorrectly (whether the perpetrator had the intent to say the word or to cause hatred and spread intolerance), while none of the cases contained a discussion on the type of the intent that would be needed for criminal prosecution – direct, eventual or specific (*dolus coloratus*). We also found that there are regional differences in prosecutorial practice, meaning that some

types of hate speech will result in criminal prosecution in one region (and potentially also a conviction) but not in another, which raises concerns from the perspective of constitutional guarantees on equality before the law and legal certainty. In one case, the deficiencies of the indictment very clearly resulted in an acquittal, and when the prosecution tried to amend the mistake in the procedure with an appeal that was substantially better reasoned than the indictment, it was too late, as clearly noted also by the court of appeals. While the prior research conducted by the Ombudsman's office did not highlight regional differences, it did find similar problems with insufficient reasoning and assessment of elements of the crime of hate speech in the indictments and case dismissals.

Specific conclusions can be drawn considering the impact of the 2019 Supreme Court judgment. Findings show that the impact of the judgment seems to be low or at least not visible, apart from rare exceptions, from the indictments and case dismissals. In only one case file can an explicit reference be found to the judgment, while based on the content of two other cases, it can be assumed that the judgment was considered based on the reasoning that followed the logic of the Supreme Court judgment. The reasons for such limited impact should be further explored in the future by using a different empirical research methodology (e.g. anonymized semi-structured interviews with prosecutors); however, academic discussions provided by other authors suggest that the reasons for the limited impact of apex court decisions might be related to prosecutorial independence, internal policy inertia, and selective implementation of apex court decisions. While prosecutorial independence is an indispensable element of the rule of law (Council of Europe, 2016; Gutmann & Voigt, 2019; Voigt & Wulf, 2019), in combination with the other two factors it might also be a hurdle blocking or delaying the implementation of apex court decisions if the latter are applied selectively. Indeed, it is not possible to accurately assess whether more cases would lead to a conviction by a court of law if the 2019 Supreme Court decision were more often relied on and referred to, since the result of the judicial procedure depends on several factors, as we have shown. However, it is necessary to improve the quality of both the indictments and case dismissals solely for reasons of the rule of law requirements.

Several steps could be taken to address the identified problems. There seems to be a need to strengthen case-building support, perhaps by nominating additional specialized prosecutors to focus on specific needs required for the prosecution of hate speech, particularly online hate speech, which requires information technology-related knowledge. Steps should be taken to ensure that evidence of online hate speech can be preserved and used for prosecution. There is also a need to improve inter-agency cooperation between the police, the prosecutors, and other stakeholders to ensure timely and well-documented prosecution of cases. It would also be useful to introduce performance monitoring aimed at tracking and evaluating case outcomes systematically, using clear benchmarks for indictments and convictions to identify bottlenecks or weak points. Regional differences in prosecution approaches also need to be dealt with, for example, by developing prosecutorial manuals to standardize legal thresholds, discretion use, and decision-making. The poor quality of several indictments and case dismissals indicates that there is a need for strengthening supervisory mechanisms to ensure objectivity and consistency. Since this is a complex topic not frequently encountered during normal legal education, specialized advanced legal training on legal standards and recent jurisprudence, including Supreme Court decisions in the field, should be provided.

As one of the problems identified was that some elements of the crime were not discussed in several of the indictments and case dismissals, one of the measures that could be taken is the preparation of standardized templates for indictments or case dismissals, to ensure all legal elements of crimes are addressed. Peer review and mentorship could further increase the quality and comprehensiveness of the indictments and case dismissals, and could be particularly helpful for newer prosecutors to improve their legal reasoning and documents produced. Activities that could be undertaken to address the problem of regional differences are, for example, better national coordination that would ensure harmonization of practices, secondments or short-term exchanges of prosecutors between regions to foster consistency and share best practices, as well as regular case law database updates.

To facilitate faster and more notable implementation of the 2019 Supreme Court judgment, nationally focused case-based training and guidance on how to apply the judgment in practice should be provided. The information about the decision should be included in internal circulars, which, however, should not contradict the law. A tracking system could also be set up to monitor how often and how well the ruling is cited or used in indictments and dismissals, with feedback loops to the relevant offices.

Most of the identified challenges do not require significant resources in order to be addressed, as, for example, with some attention to these matters, provision of in-house training and coordination, and preparation of checklists it could be ensured that all elements of the crime are addressed in each case,19 that the definition of protected groups is consistently applied, and that the 2019 Supreme Court decision is consulted in each relevant case.

19 Consistent examination of all elements of the crime could be ensured by the use of checklists or even with the assistance of machine learning mechanisms, the design of which could be inspired by the work of linguists in computer sciences (Zufall et al., 2022).

# TOŽILSKA PRAKSA NA PODROČJU SOVRAŽNEGA GOVORA V SLOVENIJI: KONTEKST, TRENDI IN PROBLEMI

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*POVZETEK*

*Članek si prizadeva ugotoviti, kako državno tožilstvo obravnava kazenske ovadbe v zvezi s 297. členom Kazenskega zakonika Republike Slovenije, ki inkriminira sovražni govor oziroma javno spodbujanje k sovraštvu, nasilju in nestrpnosti, ter raziskati vpliv sodbe Vrhovnega sodišča RS št. VSRS I Ips 65803/2012 iz leta 2019 na tožilsko prakso na tem področju. Analiza, ki je podlaga za članek, je zajela 98 zaključenih spisov državnega tožilstva iz obdobja 2019–2023. Članek obravnava nastanek inkriminacije sovražnega govora v Sloveniji ter predstavlja statistične podatke o rezultatih kazenskega pregona na tem področju od leta 2008 dalje. Nadalje so predstavljeni rezultati kvantitativne in kvalitativne analize in razprava o različnih vidikih presoje zakonskih znakov kaznivega dejanja, kot so: prag resnosti; presoja naklepa za storitev kaznivega dejanja; pomen opredelitve zaščitene skupine; vpliv, ki ga lahko ima izjava storilca na druge; vloga političnega govora v okviru svobode izražanja; ter učinki sodbe Vrhovnega sodišča iz leta 2019 na tožilsko prakso. Glavne ugotovitve raziskave kažejo, da število vloženih obtožnic in obsodilnih sodb ostaja nizko; kazenski pregon primerov je nedosleden; obstajajo regionalne razlike v tožilski praksi; vpliv sodbe iz leta 2019 je majhen; kakovost dokumentov, ki jih pripravljajo državna tožilstva, pa je pomanjkljiva.*

**Ključne besede:** sovražni govor, spodbujanje sovraštva, kazenski pregon, zaščitene skupine, kazenski zakonik, kazensko pravo, Slovenija

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