



CENTER FOR RESEARCH AND POLICY MAKING
C R P M

THE STATUS OF “INCITEMENT OF ETHNIC,
RACIAL AND RELIGIOUS HATRED” OFFENSE
UNDER THE CRIMINAL CODE OF MACEDONIA
AFTER THE VRANISHKOVSKI CASE

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- a) Socio-economic Development of Municipalities;
- b) Macedonian Politics (pre and post election studies);
- c) Health Care (financing; quality assurance; rationalization of health services);
- d) Social Security (Pension Systems);
- e) Good governance (monitoring decentralization; sub national budget watch);
- f) Capacity building of NGOs in community based policy analysis;
- g) Youth policy;
- h) European Integration of Macedonia;
- i) Regulatory Impact Assessment

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CRPM’s experienced and multidisciplinary team is committed to provide policy makers with relevant and timely analysis anchored in political and institutional realities. The practicality of the organization’s recommendations is guaranteed by its close attention to empirical research. CRPM’s think-tank’s research is undertaken in the field by analysts with experience in participatory research and knowledge of the local languages. (Albanian, Macedonian, Serbian) Focusing on local research, its policy recommendations will be equally directed at international and domestic political actors. Seeking to develop a common vocabulary, CRPM promotes discussion and debate among the policy community. CRPM’s efforts depend on the contributions of governments, corporations and private individuals to fund its activities.

1) BRIEF INTRODUCTION

- a) The accused is declared guilty for inciting ethnic, racial, and religious hatred under Article 319 paragraph 1 of the Criminal Code.
- b) What follows from the legal description of the criminal offense is that it can be committed, inter alia, *in any other manner* that brings about incitement of national, racial, and religious hatred, discord, and intolerance.
- c) The court based its decision precisely on this clause.
 - i) *“...From the circumstances so ascertained, it follows that through his actions, the accused actually undertook the elements of the criminal offense “instigating or inflaming ethnic, racial hatred, discord and intolerance” under Art. 319, Para. 1 of the Criminal Code...This criminal offence, inter alia, can be committed in any other manner, whenever the concrete deed incites religious hatred, discord or intolerance...”¹*
 - ii) *“The very legal description of the aforesaid criminal offence clearly points to the conclusion that it can be also committed in any other way, by undertaking other activities instigating or inflaming ethnic, racial hatred, discord, and intolerance. In this particular case, as for the acts described in the wording of the first instance verdict, ..., the Court of First Instance has found correctly that they are acts of committing of one of the other forms of committing of the criminal offence being charged to the defendant and for which the defendant has been pronounced to be guilty.”²*
- d) The court’s opinion does not give an account on which those elements are, that is, what those other activities are and how they are to be undertaken nor does it specify what those other ways and forms of committing the crime are.

2) THE CURRENT STATUS

- a) The existence of this criminal offense is deemed acceptable in the European democracies,³ because of the need to:

¹ Decision of the Court of First Instance in Bitola, p. 18, [in Macedonian, author’s translation]; (Пресуда на Основниот Суд од Битола, стр. 18.)

² Decision of the Court of Appeals in Bitola, PA, no. 631/2004, p.4, [in English, POA’s translation]; (Пресуда на Апелациониот Суд во Битола КЖ. бр. 631/2004 со која се потврдува обвинителната пресуда на Основниот Суд од Битола по истиот случај, стр. 4.)

³ In the United States, on the contrary, this criminal offense is not likely to pass the constitutional muster. Namely, according to the constitutional jurisprudence of this country, any ban on hate speech comes down to an unconstitutional discrimination of viewpoints. R.A.V. v. City of St. Paul, 505 U.S. 377, (1992).

- i) prevent disorder and violence⁴
- ii) protect the rights and freedom of the others⁵

Nevertheless,

b) The “in any other manner” clause renders the criminal offence vague and contains elements of retroactivity.

- i) The clause “in any other manner” in Article 319 paragraph 1 of the Criminal Code stands for definition of the criminal offence of “incitement of ethnic, racial, and religious hatred, discord and intolerance” solely on the basis of behavioral consequences, which are never discernable before trial’s closing stages.
- ii) As such, it does not let a reasonable person anticipate which speech and/or conduct is prohibited. This, in turn, leads to legal uncertainty and may have a chilling effect on the citizens’ willingness to exercise their freedom of expression.
- iii) Such vagueness may trigger arbitrariness in the course of application of this legal provision. Arbitrariness in application, in turn, may be a ground for striking down the legal act or a part thereof, in accordance with the theory of severability.⁶

c) The court failed to establish standards of interpretation of the clause, with the object of clarifying the criminal offence and lessening its ex post facto effects.

- i) It is acceptable to counteract the arbitrariness that stems out of a vaguely defined criminal offense through making the latter contingent on a high degree of guilt or injury or by introducing judicial standards of interpretation.⁷
- ii) However, the sole inference from the Vraniskovski case is that if a person publishes religious calendars and leaflets, attends bishops’ ordination and performs religious rites on private premises, with the intention of dismantling a given religious institution, then he/she actually undertakes the elements of the above-mentioned criminal offense.

⁴ Refah Partisi v. Turkey, 37 Eur. H.R. Rep. 1 (2003).

⁵ Jersild v. Denmark, 19 Eur. H.R. Rep. 1 (1994); Wingrove v. United Kingdom, 24 Eur. H.R. Rep. 1 (1996); Otto-Preminger Institute v. Austria, 19 Eur. H.R. Rep. 34 (1994). Otherwise, both justifications are an integral part of Article 10 para. 2 of the European Convention, that is, the list of conditions and restrictions that rationalize limitation on freedom of expression, laid down in the same article. Furthermore, Article 17 of the European Convention stipulates that no person may invoke a convention right to engage in an act aiming at destruction other rights and freedoms set forth in the Convention. See Council of Europe, Convention for Protection of Human Rights and Fundamental Freedoms.

⁶ Ass'n Ekin v. France, 35 Eur. H.R. Rep. 35, 1127-28 (2002).

⁷ Wingrove v. United Kingdom, 24 Eur. H.R. Rep. 1 (1996).

iii) The decision's tenor and structure do not point to the conclusion that these statements and activities stand for a comprehensive judicial definition of the clause "in any other manner."

iv) In view of that, the criminal offense remains vague and with elements of retroactivity.

3) RECOMMENDATIONS

With a view to overcoming the actual state of affairs and avoiding prospective harmful consequences from the application of Article 319 Paragraph 1 of the Criminal Code, the Centre for Research and Policy Making (CRPM) recommends the following measures:

- a) Define the criminal offence of "incitement of ethnic, racial, and religious hatred, discord, and intolerance" exclusively with reference to conduct proscribed in advance, not on the basis of behavioral consequences, ascertainable only afterwards, in the course of court's proceedings.
- b) In the case of religious hatred, define conduct proscribed in advance with reference to a personal injury, not affronts to religious doctrine.
 - i) The opposite may entangle the courts into debate on insults to religious principles they are unfamiliar with.
- c) Permit defense on the basis of negligence, scienter, i.e., lack of awareness that:
 - i) Somebody outside may have heard the speech of the accused and/or
 - ii) His/her speech and conduct may have been capable of instigating ethnic, racial, and religious hatred, discord, or intolerance.⁸
- d) Enable the genuine political criticism to remain protected speech, even when it contains a component of religious slander.
 - i) One should be mindful of the fact that the above-mentioned criminal offence may easily turn into a tool for suffocating the political debate.⁹

Or,

- e) Establish judicial standards of interpretation of the "in any other way" clause. To this end, CRPM suggests three possibilities:

⁸ Public Order Act of England, 1986, c. 64, pt. III, § 18(2)-(5).

⁹ Ceylan v. Turkey, 30 Eur. H.R. Rep. 73, 87 (2000).

- i) Clear and present danger
 - (1) The “in any other way” clause should refer only to the cases where the speech and conduct of the accused aim at inducing immediate violence that cannot be prevented by the law enforcement organs and store in themselves a real potential of bringing about such an unlawful situation.¹⁰
- ii) Gravity of evil
 - (1) Set the judicial scrutiny of the ways that cause ethnic, racial and religious hatred within the inquiry into whether the magnitude of evil that may rise from the speech and conduct of the accused, discounted by its (im)probability of occurrence, justifies curtailment of the freedoms of the accused.¹¹
 - (a) The “in any other way” clause should refer only to the instances where the product of the evil’s magnitude and probability of occurrence is so sufficiently high as to ordain curtailment of the free speech and conduct of the accused and his sentencing, proportionally and to the extent necessary for restoring the original state of affairs.
- iii) Balancing (between the freedom of expression of the accused and the freedom of religious belief of the others)
 - (1) The “in any other way” clause should cover the cases where the court determines that the accused consciously uttered:
 - (a) False statements of facts;
 - (b) True statements of facts on matters that penetrate the personal sphere of the concerned citizens;
 - (c) Opinion that denotes a serious affront to the dignity of the concerned.
 - (2) On the contrary, where it determines that the accused consciously uttered:
 - (a) False statements of facts, but only after he/she invested efforts to verify the factual situation;
 - (b) True statements of facts on matters that, beside the personal sphere of the concerned, implicate public life;

¹⁰ Brandenburg v. Ohio, 395 U.S. 444, (1969).

¹¹ Dennis v. United States, 341 U.S. 494 (1951).

(c) Opinion that inflicts only a slight damage to the reputation of the concerned;¹²

the court, before resolving whether to subsume a given instance under the “in any other way” clause, should engage into balancing between the freedom of expression of the accused and the freedom of religious belief of the others.

¹² This is actually a summary assessment of the German Constitutional Court’s treatment of free speech claims. See Lueth, (BverfGE 7, 198 (1958)), Holocaust Denial, (90 BVerfGE 241 (1994)); Historical Fabrication, (90 BVerfGE 1 (1994)), Tucholsky I and II, (21 EuGRZ 463-65 (1994)).