INCITEMENT TO HATRED, HOSTILITY, DISCORD, VIOLENCE AND DISCRIMINATION

Proposals to Improve the Suppression of Hate Speech in Bosnia and Herzegovina

Darko Pandurević **Sarajevo Open Centre**Bosnia and Herzegovina

Content

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1. INTRODUCTION	3
2. LEGISLATIVE SOLUTIONS IN MONTENEGRO,	
CROATIA AND SERBIA	5
3. CURRENT LEGISLATION	
IN BOSNIA AND HERZEGOVINA	7
3.1 Criminal and Anti-Discrimination Legislation	
in Bosnia and Herzegovina	7
4. PROPOSAL TO IMPROVE THE LEGISLATION	
ON INCITEMENT TO HATRED, HOSTILITY,	
DISCORD, VIOLENCE AND DISCRIMINATION	
IN BOSNIA AND HERZEGOVINA	11
4.1 Improvements to the Criminal Legislation	
in Bosnia and Herzegovina	11
4.2 Improvements to the Anti-Discrimination Law	
in Bosnia and Herzegovina	13
About the authors	14
About Sarajevo Open Centre	15



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Authors: Darko Pandurević Editor: Vladana Vasić

BHS proofreading: Klaudija Mlakić Vuković

Translation: Aida Spahić Layout and design: Dina Vilić

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1. INTRODUCTION

For the past 20 years hate speech, as well as inciting, spreading and promoting hatred has been omnipresent in the public discourse, the Internet, online magazines and social networks in Bosnia and Herzegovina. Inciting, spreading and promoting hatred was regulated for the first time in 1945 when the Federal People's Republic of Yugoslavia adopted the Law Against Incitement to National, Racial and Religious Hatred and Discord. Soon after, the act of incitement to national, racial and religious hatred, hostility and discord was regulated by the Criminal Code of the Federal People's Republic of Yugoslavia. Introducing such legislation was made possible by recognising the pernicious effects of these types of crimes on the whole society and the need for official sanctioning by the state.

Following the dissolution of Yugoslavia, provisions against incitement to national, racial and religious hatred were carried over to the criminal codes of the newly formed countries. Specifically, in Bosnia and Herzegovina these offences have been regulated by the criminal codes of the two entities and Brčko District. Incitement to hatred, hostility and discord on a limited number of grounds (religion, race, nationality and ethnicity) is therefore prohibited by state-level legislation and the criminal codes of both entities and Brčko District.

By analysing the criminal legislation of European countries, especially those in the region (Serbia, Croatia and Montenegro), we have come to the conclusion that incitement to hatred discord and hostility is regulated through criminal codes or anti-discrimination laws in most countries. Most importantly, we have not found a single instance of regulating these crimes through a separate law.

The analysis of criminal legislation has led us to conclude that the existing criminal provisions satisfy the minimum standard of human rights protection and need to be upgraded in order to serve their purpose and provide comprehensive protection to all citizens, as is the case in most European countries, including the countries in the region that are featured here.

The existing regulation in BiH needs to be improved by:

- 1. <u>Clearly defining hate speech through amendments to the Anti-Discrimination Law in BiH.</u>
 - This amendment should be modelled after the Anti-Discrimination Law of the Republic of Serbia which provides a clear definition of hate speech and classifies it as a special form of discrimination.
- 2. Extending the list of grounds for incitement to hatred, hostility and discord in the criminal codes of the entities, Brčko District and BiH.
 - The criminal codes of the entities and Brčko District, as well as the Criminal Code of BiH, need to be changed and harmonised in order to provide a comprehensive solution to this problem. Since the existing legislation sanc-



tions incitement to hatred only on the grounds of nationality, religion and race, the list of prohibited grounds of discrimination should be extended so as to include all grounds mentioned in the Anti-Discrimination Law.



2. LEGISLATIVE SOLUTIONS IN MONTENEGRO, CROATIA AND SERBIA

Article 325 of the Criminal Code of the Republic of Croatia titled **Public Incitement to Violence and Hatred** prescribes measures to combat hatred and hostility on any ground:

- (1) Whoever publicly incites through the press, radio, television, computer system or network, at a public meeting or otherwise publicly incites or makes publicly available pamphlets, images or other material that calls for violence or hatred directed against a group of people or a member thereof because of their race, religion, national or ethnic affiliation, origin, colour, sex, sexual orientation, gender identity, disability or any other characteristic shall be punished by imprisonment of up to three years.
- (2) Whoever organises or leads a group of three or more persons to commit offences referred to in Paragraph 1 of this Article shall be punished by imprisonment of six months to five years.
- (3) Whoever participates in the association referred to in Paragraph 2 of this Article shall be punished by imprisonment of up to one year.
- (4) Punishment referred to in Paragraph 1 of this Article shall be imposed on anyone who publicly approves, denies or significantly diminishes genocide, aggression, crimes against humanity or war crimes directed against a group of people or a member thereof on the grounds of their race, religion, national or ethnic affiliation, origin or colour, in a manner that incites violence or hatred against such a group or a member thereof.
- (5) Anyone who attempts a criminal offence referred to in paragraphs 1 and 4 of this Article shall be punished.

The Criminal Code of the Republic of Serbia also prescribes sanctions for incitement to hatred, discrimination and violence and even goes a step further by sanctioning violations of human rights guaranteed by universally accepted rules of international law and treaties that Serbia has ratified. It also sanctions persecution of organisations and individuals for their commitment to equality. Article 387 titled **Racial and Other Discrimination** stipulates:

- (1) Whoever on grounds of race, colour, religion, nationality, ethnic origin or any other personal characteristic violates fundamental human rights and freedoms guaranteed by universally accepted rules of international law and international treaties ratified by Serbia shall be punished by imprisonment of six months to five years.
- (2) The penalty specified in Paragraph 1 of this Article shall be imposed on whoever persecutes organisations or individuals due to their commitment to the equality of people.
- (3) Whoever propagates ideas of superiority of one race over another or propagates racial hatred or instigates racial discrimination shall be punished by im-



- prisonment of three months to three years.
- (4) Whoever disseminates or otherwise makes publicly available texts, images, or any other representation of ideas or theories that support or incite hatred, discrimination or violence against any person or a group based on their race, skin colour, religious affiliation, nationality, ethnic origin, or some other personal characteristic shall be punished by imprisonment of three months to three years.
- (5) Whoever publicly threatens to commit a criminal offence punishable with imprisonment of more than four years against a person or a group because of their race, skin colour, religion, nationality, ethnic origin, or some other personal characteristic shall be punished by imprisonment of three months to three years.

The Criminal Code of Montenegro also sanctions incitement to hatred, discrimination and violence, as well as violations of human rights guaranteed by universally accepted rules of international law and ratified treaties and the persecution of members of organisations and individuals who are committed to equality. Articles 443 titled **Racial and Other Discrimination** stipulates:

- (1) Whoever on grounds of race, colour, nationality, ethnic origin or any other personal characteristic violates fundamental human rights and freedoms guaranteed by universally accepted rules of international law and international treaties ratified by Montenegro shall be punished by imprisonment of six months to five years.
- (2) The penalty specified in Paragraph 1 of this Article shall be imposed on whoever persecutes organisations or individuals due to their commitment to equality of people.
- (3) Whoever disseminates ideas of superiority of one race over another or propagates hatred or hostility on the grounds of race, sex, disability, sexual orientation, gender identity or other personal characteristic or incites to racial or other discrimination shall be punished by imprisonment of three months to three years.
- (4) Whoever commits acts referred to in paragraphs 1 to 3 of this Article by abusing his or her position or if these acts result in riots and violence, shall be punished for the acts referred to in paragraphs 1 and 2 of this Article by imprisonment of one to eight years, and for act referred to in Paragraph 3 of this Article by imprisonment of six months to five years.



3. CURRENT LEGISLATION IN BOSNIA AND HERZEGOVINA

3.1 Criminal and Anti-Discrimination Legislation in Bosnia and Herzegovina

The criminal codes of BiH, Republika Srpska, the Federation of BiH and Brčko District already criminalise incitement to hatred, hostility and discord, but on a limited **number of grounds**. All three criminal codes list nationality, race and religion as the only prohibited grounds. We find this to be an inadequate solution since incitement to hatred, discord and hostility are of much wider scope and do not affect people on these three grounds only. The legislation in BiH recognises many other protected characteristics. For example, Article 2 of the Anti-Discrimination Law of BiH defines discrimination as any different treatment including any exclusion, limitation or preference based on real or assumed grounds towards any person or group of persons or those related or otherwise associated with them on grounds of their race, skin colour, language, religion, ethnic affiliation, disability, age, national or social origin, connection to a national minority, political or any other persuasion, property, membership in a trade union or any other association, education, social status and sex, sexual orientation, gender identity, sexual characteristics or any other circumstance, with the purpose or the consequence of preventing or jeopardising equal recognition, enjoyment or realization of rights and freedoms in all areas of life.

The list of prohibited grounds in the abovementioned criminal codes needs to be extended and aligned with provisions of the Anti-Discrimination Law of BiH. According to the current legislation in BiH the criminal codes do not sanction hate speech and incitement to discord and hostility outside the three defined grounds.

Provisions sanctioning the criminal offence of incitement to discord and hostility need to be aligned with provisions sanctioning hate crimes, and the list of protected characteristics should be extended so as to match the characteristics protected by the criminal codes in cases of crimes motivated by hatred or prejudice. Regulating hate crimes and incitement to discord and hostility is governed by the same legal logic and the goal is to prohibit, sanction and prevent socially detrimental behaviour of the same or similar ilk.

Incitement to hostility and discord often results in crimes motivated by hatred or prejudice and both types of offences are a way for one social group to impose its will upon another social group. In BiH such crimes are certainly not committed exclusively on the grounds of nationality, race and religion. On the contrary, they are very much motivated by other characteristics of citizens of BiH such as sex, sexual orientation, gender identity, disability, affiliation with a national minority, social status, etc.



A telling example is the increasingly frequent incitement to discrimination and violence and instigation of hatred against LGBTI persons in public and the media. This

behaviour has resulted in a series of attacks against LGBTI individuals. The perpetrators have never been sanctioned. Attacks against returnees in BiH also reveal the connection between incitement to hatred and hate crimes. Reports from the media and non-governmental organisations clearly show a spike in attacks against returnees whenever there is increased hate speech and incitement to hatred and hostility in the political discourse, especially during election campaigns or commemorations of various historical or religious dates and holidays.

Although the Anti-Discrimination Law of BiH considers any incitement to discrimination a form of discrimination, incitement to hatred and discrimination needs to be clearly sanctioned by the criminal codes as well since it is an immensely important and threatening issue.

Article 145a of the Criminal Code of BiH titled **Incitement to National, Racial and Religious Hatred, Discord and Hostility** reads:

- (1) Whoever publicly incites and inflames national, racial or religious hatred, discord or hostility among constituent peoples and others, as well as those who live or reside in Bosnia and Herzegovina, shall be punished by imprisonment of three months to three years.
- (2) Whoever perpetrates the criminal offence referred to in Paragraph (1) of this Article by abusing his or her office or authority shall be punished by imprisonment of one to ten years.

Article 294a of the Criminal Code of Republika Srpska titled **Incitement to National, Racial and Religious Hatred and Hostility** reads:

- (1) Whoever incites or inflames national, racial or religious hatred, discord or hostility, or spreads ideas of superiority of one race or nation over another, shall be punished by a fine or imprisonment of up to two years.
- (2) Whoever commits the offence referred to in Paragraph 1 of this Article by employing coercion, abuse, jeopardising safety, exposing national, ethnic or religious symbols to derision, damaging other people's belongings, desecrating monuments, memorials or graves, shall be punished by imprisonment of six months to five years.
- (3) If the offence referred to in paragraphs 1 and 2 of this Article results in riots, violence or other grave consequences for the coexistence of the constituent peoples and others who live in Republika Srpska, the perpetrator shall be punished by imprisonment of one to eight years.
- (4) Materials and items containing messages referred to in Paragraph 1 of this Article and equipment for their production, reproduction and distribution shall be forfeited.

Article 160 of the Criminal Code of Brčko District titled **Incitement to National,** Racial and Religious Hatred, Discord and Hostility reads:



- (1) Whoever incites or inflames national, racial or religious hatred, discord or hostility among constituent peoples and others who live in Brčko District shall be punished by imprisonment of one to five years.
- (2) Whoever commits the offence referred to in Paragraph 1 of this Article by coercion, abuse, jeopardising safety, exposing national, ethnic or religious symbols to derision, damaging other people's belongings, desecrating monuments, memorials or graves shall be punished by imprisonment of one to eight years.
- (3) The punishment referred to in Paragraph 2 of this Article shall be imposed on whoever perpetrates the criminal offence referred to in Paragraph 1 of this Article by abusing his or her position or authority, or if the offence results in riots, violence or other grave consequences for the coexistence of constituent peoples and others living in Brčko District, in which case the perpetrator shall be punished by imprisonment of one to ten years.
- (4) Materials and items containing messages referred to in Paragraph 1 of this Article and equipment for their production, reproduction and distribution shall be forfeited.

Article 163 of the Criminal Code of the Federation of BiH titled **Incitement to National, Racial or Religious Hatred, Discord or Hostility** reads:

- (1) Whoever publicly incites and inflames national, racial or religious hatred, discord or hostility among constituent peoples and others who live in the Federation, shall be punished by imprisonment of three months to three years.
- (2) Whoever perpetrates the criminal offence referred to in Paragraph 1 of this Article by coercion, abuse, jeopardising safety, exposing national, ethnic or religious symbols to derision, damaging the symbols of others, desecrating monuments, memorials or graves, shall be punished by imprisonment of one to eight years.
- (3) Whoever perpetrates the criminal offence referred to in Paragraph (1) of this Article by abusing his or her position or authority shall be punished by imprisonment of one to ten years.
- (4) Whoever perpetrates the criminal offence referred to in Paragraph (2) of this Article by abusing his or her position or authority, or if the offence results in riots, violence or other grave consequences for the coexistence of constituent peoples and others living in the Federation shall be punished by imprisonment of one to ten years.
- (5) Whoever perpetrates the criminal offence referred to in Paragraph (1) of this Article by publicly disputing and denying genocide, crimes against humanity or war crimes recognised by the final judgments of the International Court of Justice, International Criminal Tribunal for the Former Yugoslavia or a domestic court shall be punished by imprisonment of three months to three years.

Article 4 of the Anti-Discrimination Law of BiH titled **Other Forms of Discrimination** prohibits incitement to discrimination. The law entered into force in 2009 and was amended in 2016. Paragraph (5) now states that any incitement to discrimination represents a form of discrimination, marking an improvement from the previ-



ous provision that defined incitement to discrimination exclusively as instigation of racial, national or religious hatred. The amended Article 4 reads:

- (1) Harassment shall include any form of unwanted behaviour related to one of the grounds referred to in Article 2 Paragraph (1) of this Law, the aim or the effect of which is harming a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive atmosphere.
- (2) Sexual harassment shall include any form of unwanted verbal, non-verbal or physical behaviour of a sexual nature, the aim or the effect of which is harming the dignity of a person, especially when it creates an intimidating, hostile, degrading, humiliating or offensive atmosphere.
- (3) Mobbing shall include any form of non-physical harassment at the work place that entails repetitive actions that have a humiliating effect on the victim, with the aim or the consequence of degrading the employee's working conditions or professional status.
- (4) Segregation shall be an act by which a (natural or legal) person separates other persons on one of the grounds referred to in Article 2 of this Law, in accordance with the definition of discrimination provided in Article 2 of this Law.
- (5) Instructing others to discriminate, assisting others in discrimination, incitement to discrimination shall be considered a form of discrimination.
- (6) Discrimination against a person based on multiple grounds referred to in Article 2 Paragraph 1 of this Law (multiple discrimination), discrimination occurring several times (repeated discrimination) and discrimination lasting for a longer period (protracted discrimination) shall be considered grave forms of discrimination.



4. PROPOSAL TO IMPROVE THE LEGISLATION ON INCITEMENT TO HATRED, HOSTILITY, DISCORD, VIOLENCE AND DISCRIMINATION IN BOSNIA AND HERZEGOVINA

4.1 Improvements to the Criminal Legislation in Bosnia and Herzegovina

The above articles of the criminal codes of BiH, the entities and Brčko District should be amended as follows:

Article 145a (1) of the Criminal Code of Bosnia and Herzegovina should be amended to read:

(1) Whoever publicly incites and inflames hatred, discord or hostility on the ground of race, skin colour, language, religion, ethnic affiliation, disability, age, national or social origin, connection to a national minority, political or any other persuasion, property, membership in a trade union or any other association, education, social status and sex, sexual orientation, gender identity, sexual characteristics or any other feature of one or several persons, or propagates ideas of superiority of one race, nation or group of citizens over another shall be punished by imprisonment of three months to three years.

A new paragraph (3) should be added after paragraph (2) to read:

(3) Materials and items containing messages referred to in Paragraph 1 of this Article and equipment for their production, reproduction and distribution shall be forfeited.

Article 163 (1) of the Criminal Code of the Federation BiH should be amended to read:

(1) Whoever incites and inflames hatred, discord or hostility on the ground of race, skin colour, language, religion, ethnic affiliation, disability, age, national or social origin, connection to a national minority, political or any other persuasion, property, membership in a trade union or any other association, education, social status and sex, sexual orientation, gender identity, sexual characteristics or any other feature of one or several persons, or propagates ideas of superiority of one race, nation or group of citizens over another shall be punished by imprisonment of three months to three years.

A new paragraph (6) should be added after paragraph (5) to read:

(6) Materials and items containing messages referred to in Paragraph 1 of this Article and equipment for their production, reproduction and distribution shall



be forfeited.

Article 160 (1) of the Criminal Code of Brčko District should be amended to read:

(1) Whoever incites and inflames hatred, discord or hostility on the ground of race, skin colour, language, religion, ethnic affiliation, disability, age, national or social origin, connection to a national minority, political or any other persuasion, property, membership in a trade union or any other association, education, social status and sex, sexual orientation, gender identity, sexual characteristics or any other feature of one or several persons, or propagates ideas of superiority of one race, nation or group of citizens over another shall be punished by imprisonment of one to five years.

Article 294a (1) of the Criminal Code of Republika Srpska should be amended to read:

(1) Whoever incites and inflames hatred, discord or hostility on the ground of race, skin colour, language, religion, ethnic affiliation, disability, age, national or social origin, connection to a national minority, political or any other persuasion, property, membership in a trade union or any other association, education, social status and sex, sexual orientation, gender identity, sexual characteristics or any other feature of one or several persons, or propagates ideas of superiority of one race, nation or group of citizens over another shall be punished by a fine or imprisonment of up to two years.

Regulating such form of expression is not just necessary - it is mandatory according to several conventions and treaties that BiH signed and ratified. By doing so, BiH shall legally meet its commitments of supressing hate speech and respecting the right to freedom of expression, as well as supressing and appropriately regulating hate crime. In order to send a clear message that incitement to discord, hostility, hatred and discrimination is not allowed in Bosnia and Herzegovina on any ground and to provide protection to all its citizens, Bosnia and Herzegovina, as a member of the Council of Europe, should also harmonise its criminal codes with the conventions forming an integral part of Annex I of the Constitution of BiH, particularly the 1965 International Convention on Elimination of all Forms of Racial Discrimination. Also, the positions of the European Court of Human Rights should be taken into account with regard to inadequate regulation or prosecution of hate speech and hate crime, as well as the Council of Europe Recommendation on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity. Article 10 of the European Convention on Human Rights and Fundamental Freedoms guarantees the freedom of speech for all but stipulates the condition that the exercise of this freedom depends on compliance with necessary restrictions, inter alia, necessary for the protection of the reputation or rights of others. Article 4(a) of the International Convention on Elimination of all Forms of Racial Discrimination obliges all signatory states to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, while Article 20 of the International Covenant on Civil



and Political Rights stipulates that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. The Recommendation of the CoE Committee of Ministers on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity, adopted in 2010, lists specific measures that every state should implement in order to adequately regulate and supress incitement to hatred, discrimination or violence motivated by sexual orientation or gender identity.

The above amendments of the existing articles of entity, Brčko district and BiH criminal codes also constitute harmonisation with the Anti-Discrimination Law of Bosnia and Herzegovina which prohibits incitement to discrimination in Article 4 and in Article 2 prohibits any discrimination based on real or assumed grounds towards any person or group of persons or those related or otherwise associated with them on grounds of their race, skin colour, language, religion, ethnic affiliation, disability, age, national or social origin, connection to a national minority, political or any other persuasion, property, membership in a trade union or any other association, education, social status and sex, sexual orientation, gender identity, sexual characteristics or any other circumstance, with the purpose or the consequence of preventing or jeopardising equal recognition, enjoyment or realization of rights and freedoms in all areas of life.

4.2 Improvements to the Anti-Discrimination Law in Bosnia and Herzegovina

The Anti-Discrimination Law of BiH should be amended, specifically its Article 4 **Other Forms of Discrimination**, and a new form of discrimination should be introduced – *hate speech*. Paragraph (7) should be added to Article 4 to read:

(7) Hate speech means any expression of ideas, information or opinion in the media or in publications, at gatherings or places accessible to the public, and any writing or display of messages or symbols inciting to hatred or violence against persons or groups of persons on the ground of their personal characteristic or any other ground referred to in Article 2 (2) of this Law.

The Anti-Discrimination Law of BiH defines six (6) other forms of discrimination: harassment, sexual harassment, mobbing, segregation, instructing others to discriminate, and incitement to discrimination. Paragraph (7) introduces a new form of discrimination: hate speech, modelled on the definition of Article 11 of the Anti-Discrimination Law of the Republic of Serbia. The provision proved to be very efficient in suppressing hate speech against minorities, which is also confirmed in reports and recommendations of the Commissioner for the Protection of Equality of the Republic of Serbia.



About the authors

Darko Pandurević has been a volunteer of Sarajevo Open Centre since September 2014 in the LGBTI Rights Programme where he assists in organising advocacy and training activities on LGBTI rights for state institutions, capacity building of the LGBTI movement, monitoring of violations of LGBTI human rights in BiH and research of various aspects of LGBTI human rights, as well as in the monitoring of the EU Integration process in BiH. He is the author of the publication Recommendations for Improving the Position of Trans* People in BiH – Concrete Guidelines (2014), and he co-authored the publication Political Parties and the Human Rights of LGBT People: Monitoring of the General Election (2014) and the second edition of the Guide for Police Officers in Cases of Violation of Human Rights of Lesbian, Gay, Bisexual, Trans* and Intersex Persons (2016). He is currently completing his studies at the Faculty of Law of the University of Sarajevo.

Contact: darko@soc.ba

Vladana Vasić (Sarajevo, 1990) completed legal studies at the University of Sarajevo. She has been working at Sarajevo Open Centre since April 2012 on issues of advocacy, legal counselling, and monitoring of the work of public institutions. She is the (co)author of different legislative and policy proposals addressed to the BiH institutions. Her focus is on the issues related to hate crime and discrimination. Vladana is a member of the European Commission for Sexual Orientation Law.

Contact: vladana@soc.ba



About Sarajevo Open Centre

Sarajevo Open Centre (SOC) advocates full respect of human rights and social inclusion of LGBTI persons and women. Sarajevo Open Centre is an independent, feminist civil society organisation which strives to empower LGBTI (lesbian, gay, bisexual, trans* and intersex) persons and women by strengthening the community and building the activist movement. SOC also promotes human rights of LGBTI persons and women and it advocates the improvement of public policies in Bosnia and Herzegovina at the State, European and international levels.

Here, we will only mention some of the achievements made in terms of equality of LGBTI people. In addition to psychosocial and legal counselling we also continued running the only LGBTI media outlet in the state – a web portal www.lgbt.ba. We organized trainings for the police, the prosecutor's offices and the courts and we worked intensely with journalists and young lawyers, as well as other future professionals. In 2016, several of our legislative and policy initiatives have been submitted to governmental or parliamentary procedures. We also started working with the local level institutions – the level most important for LGBTI persons. Our advocacy focuses on anti-discrimination regulation, as well as regulations relevant for the protection of LGBTI person from violence. We intend to continue working on matters important for trans* people, same-sex partnerships, social inclusion, but also the position of LGBTI persons in education, health, labour and employment. Over the recent years, we had media campaigns that have reached over a million of BiH citizens and we organised the LGBTI film festival Merlinka.

You can find out more about our work at: www.soc.ba.



This publication is a part of Sarajevo Open Centre's Human Rights Papers Series. In the Human Rights Papers Series we publish general or thematic reports on the state of human rights in BiH, as well as other publications relevant for our advocacy towards the BH and international institutions and bodies.

Other publications covering the topics of bias motivated crimes, discrimination and hate speech are:

Inela Hadžić, Vladana Vasić, Saša Gavrić, Goran Selanec, Adrijana Hanušić, Emina Bošnjak and Samra Filipović-Hadžiabdić (authors): Towards more efficient protection from discrimination: proposed amendments to the BiH Law on prohibition of discrimination, Joint proposal of the Agency for Gender Equality of BIH and Sarajevo Open Centre, Sarajevo: Sarajevo Open Centre, 2015. Available on: http://soc.ba/en/proposed-amendments-to-the-bih-law-on-prohibition-of-discrimination/.

Vladana Vasić (author): Criminalisation of hate crimes under the Criminal code of the Federation of Bosnia and Herzegovina, Sarajevo: Sarajevo Open Centre, Heinrich Boell Foundation, 2015. Available on: http://soc.ba/en/criminalisation-of-hate-crimes-under-the-criminal-code-of-the-federation-of-bosnia-and-herzegovina/.

Tena Šimonović Einwalter and Goran Selanec (authors): Alignment of the Law on Prohibition of Discrimination with the EU acquis - Expert Analysis on Alignment, Sarajevo: Sarajevo Open Centre, 2015. Available on: http://soc.ba/en/alignment-of-the-law-on-prohibition-of-discrimination-with-the-eu-acquis-expert-analysis-on-alignment/.

