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Hate Crimes: The legality and Practicality of Punishing Bias—A Socio-Legal Appraisal

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Abstract
This paper assesses the extent to which enhancing a penalty for hate crimes is a necessity. It conducts its analysis by looking at the theoretical justifications for and against such enhancement and also the impact of hate crimes on their victims, their groups and society, in comparison to non-bias crimes. It recognizes the particularly damaging effect of hate crimes on these three levels (micro, meso and macro) but argues that care must be taken to ensure a high threshold framework and a clear vision in terms of protected characteristics. It argues that if penalty enhancements are to be any use, victims should be empowered to access the criminal justice system whilst the right to freedom of expression must be preserved. The paper commences with a definitional and conceptual framework of hate crimes, proceeds with the theoretical argumentations for and against hate crime legislation, conducts a legislative analysis of hate crimes, using examples from around the world as well as an assessment of the approach of the European Court of Human Rights to hate crime.

Keywords Hate crime · Hate speech · Aggravating factors · Freedom of expression

1 Introduction

When a victim is targeted, in whole or in part, because of his/her personal characteristics, such as perceived or actual sexual orientation, ethnic identity or religion or when a victim is attacked due to his/her association with such personal characteristics, the crime targets the very essence of the victim's person (or his/her association) and also targets the community which shares these characteristics. In this realm, hate crimes are message crimes. Hate crimes send the message that the victims are so repulsive to the perpetrators that they are not even worthy of the right to personal safety and integrity. The *message* element of such crimes has been reiterated by researchers in the field, such as Iganski [19] Lim [21, 22] and Weinstein

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[34]. The need to recognise hate crimes in their broader socio-political and economic context has grown with the rise of the far-right in recent years in Europe and beyond. Nativist constructions of identity, intolerant and prejudicial policies *vis-à-vis*, for example, migration and intolerant rhetoric that have infiltrated mainstream politics, are a hotbed for the rise of extremism, because a scapegoat is born. This was starkly manifested in, for example, post-Brexit Britain which saw more than 14,000 *recorded* hate crimes between July and September 2016 in England and Wales with three quarters of police forces reporting their highest ever hate crime levels during the same period [5]. In light of the above, hate crimes and, particularly, the role of law in tackling such crimes needs to be looked at afresh and in view of the current societal landscape in Europe and beyond. Thus far, there has been empirical research on the impact of hate crimes on the direct victim and his/her group [6] discussions on the problems in current responses to hate crime [7] work on the conceptual similarities and differences between hate crimes and terrorist activities [26] assessment of US, Canadian and Australian law *vis-à-vis* hate crime legislation, examination of homophobic crimes [6, 32] and the surrounding debates [30, 32] and theoretical analysis of hate crime legislation [29, 30, 32]. This paper seeks to contribute to existing research by focusing on the role of law in tackling hate crimes, on a practical and theoretical level, through a socio-legal approach.

1.1 Hate Crimes: Definitional and Conceptual Framework

Perry argues that a hate crime is 'a mechanism of power and oppression [27, 28, p.10] which 'attempts to re create simultaneously the threatened or imagined hegemony of the perpetrator's group and the appropriate subordinate identity of the victim's group' [27, 28, p.10]. These significant observations are necessary in order to understand that hate crimes are not isolated incidents detached from the broader fora of power structures and socio-institutional inequalities. Perry notes that the manner in which hate crimes have been understood by law demonstrates that they are 'individual responses to difference rather than violent acts that take place in the social and political context of structural inequality and hierarchies of power' [27, 28, p.10]. Illustrative of the importance of understanding the social context of such crimes is, as noted by Herek, the fact that homophobic crimes emanate from 'heterosexism that permeates societal institutions' [16: p.89].

Mills argues that there are two types of hate crime, defensive and retaliatory. Defensive hate crimes occur when perpetrators 'defend their turf' [26, p.1195] through a message crime to the victim or victims' community. Retaliatory hate crimes are those which occur as a response to a 'precipitating event.' [26, p.1195]. An example of this was the more than fifty per cent rise in hate crime following the brutal murder of Lee Rigby by Islamic extremists in London [32]. Several scholars, such as Mills and Deloughery, discuss what they perceive to be the similarities and differences between hate crimes and terrorist acts, with the latter arguing that a hate crime is a 'poor man's terrorist attack' [12, p.655]. Further, hate crimes involve less planning [26, p.1195] and have a lower risk of arrest, given the under-reporting [13] which is associated with hate crimes.

The term hate crime has been used within the domains of policy and scholarship as a way of distinguishing forms of violence directed towards people on the basis of their identity 'difference' or perceived vulnerability. It has been used to promote awareness action and shared understanding among a range of different stakeholders within the criminal justice sector and beyond, including law-makers and civil society [7, p.388]. Regardless of the use of the term 'hate crime' in, for example, NGO reports[1] and policy documents,[2] this term has not actually been particularly prevalent in relevant legislation, with some exceptions discussed below. Potential difficulties in using the term 'hate crime' emanate from the fact that hate itself is an 'an emotive, elastic and conceptually ambiguous label [7: p.389]. However, the implications of finding the existence of a hate crime, which include, for example, enhanced sentencing, have severe ramifications on the rights and freedoms of offenders. As such, it is of paramount socio-legal significance properly to understand what a hate crime is.

A look at international, regional and national documents demonstrates that there is little to no use of the term 'hate crime' in relevant legislation, whilst lower threshold realities of, for example, prejudice and racism have infiltrated therein. On an international level, Article 4 of the International Convention on Racial Discrimination (ICERD), holds that States Parties should punish acts of violence that emanate from ideas of racial superiority or hatred. On a European Union level, Article 4 of the Framework Decision on Racism and Xenophobia refers to racist and xenophobic motivation as constituting an aggravating circumstance, with no reference to hate. Neither of those two documents makes reference to hate crime, per se, whereas hate is just one of the grounds of the ICERD provision.

The reference to bias motivation instead of hate crime is adopted on several national levels. For example, United States (US) law, namely, the Hate Crimes Statistics Act 1990, holds that a hate crime exists where an offender, while committing an underlying crime, 'manifests evidence of prejudice based on race, religion, disability, sexual orientation or ethnicity' [2, p.232]. Interestingly, although incorporated in the legislation's title, hate does not feature in the description of this crime. Instead, it settles for prejudice and the lower threshold attached thereto. In Canada, the characteristics are broader than in the US, with the country's Criminal Code including factors such as age, gender and language, whilst the motivation emanates from bias or prejudice rather than hate.[3] The limited reference to hate in the encapsulation of hate crimes is also reflected on an academic level. Most literature is 'consistent in referring to a broader range of factors than hate alone' [7, p.389] when seeking to describe the motive underlying such crimes [8]. Does the above demonstrate that hate is not centrifugal to a hate crime? Potentially yes. In fact, the crux of

[1] See, for example, ENAR Shadow Report on Racist Crime 2014-2018, 'Racist Crime and Institutional Racism in Europe' available at: <https://www.enar-eu.org/IMG/pdf/shadowreport2018_final-embargoed_12-09-2019.pdf>

[2] See, for example, HM Government, 'Policy Paper: Hate crime action plan 2016 to 2020' Available at: <https://www.gov.uk/government/publications/hate-crime-action-plan-2016>

[3] Section 718.2 (a) (i) Criminal Code RSC 1985 c c-46.

the above examples of hate crime lies in the particular emotions which the perpetrator has towards his/her/their victim because of the latter's identity, regardless of whether this (negative) emotion amounts to hate or not. As such, substitutes such as bias crimes or crimes of prejudice could be reflective of the current legislative and academic understanding. As extrapolated on below, this may cause concerns for free speech.

2 Recognising the Bias in a Crime: A Theoretical Framework

The use of criminal law is a vehicle through which 'attitudes of resentment, indignation, disapproval' can be expressed [30, p.318]. According to Wringe, the use of such a vehicle is 'required in order to demonstrate to the members of a given society that certain norms are the norms of that society' [25, p.85]. In the case of hate crimes, criminal law seeks to tell society that harming someone because of who they are is socially, ethically and legally unacceptable. Whilst criminal law should not be the only tool to tackle hate crimes but, rather, an element of a well-rounded approach which should include prevention and rehabilitation, it is relevant insofar as it has strong 'expressive and symbolic power' [23, p.39]. In brief, hate crime laws are 'public vindication of social values of tolerance, equality and respect' [23: p.293]. There are, however, those who oppose the creation of hate crime laws on the grounds of protecting the perpetrator's fundamental right to free speech. They argue that the perpetrator should be punished for his or her action without any reference or relevance to the punishment of his or her bias intention [2]. This stems from the very fact that hate is an 'elusive psychological concept' [2, p.235] which would essentially require the State to investigate the mind, mindset and ideology of the perpetrator, is a task which 'might be very difficult to do with any consistent reliability' [2, p.235]. Further, Swiffen professes concern with the causal link between hate and the crime. She gives the example of a robber, and questions whether, if someone commits a crime in order to take someone's money but chooses his/her victim because of his/her protected characteristics, then, is that a hate crime? She argues that, in such a case, targeting protected characteristics is of secondary significance in the perpetrator's approach and, as such, it is open to dispute whether or not this constitutes a hate crime [31, p.127]. Gellman, argue that, if sentence enhancement emanates from the recognition that bias is what underlies the perpetrator's motive, then such enhancements are, in fact, punishing thought. [6, p.99]. What proponents of hate crime legislation argue, however, is that such legislation is necessary, notwithstanding any potential curtailment of free thought, since such crimes have a more severe impact on victims, their groups and society as a whole. To this end, higher penalties should be imposed on crimes with a higher impact [18, 21, 34]. As underlined by Iganski, the perpetrator's motives are only of relevance in determining whether a crime leads to greater harm than if such motives were absent [20]. In fact, this was the position adopted by the US Supreme Court (bound by the First Amendment of the US Constitution) in Wisconsin v Mitchell [35] in which the court recognised the heightened possibility of hate crimes inflicting greater harm on victims and society and found that this reality subsequently justified enhanced sentencing. This case involved the

aggravated battery of a white youth by a group of black youths who, after watching the movie 'Mississippi Burning' were prompted by Mitchell to target a white person. In this case, the Supreme Court found a statute which enhanced sentencing from two to seven years, if a motivation of prejudice existed, to be constitutional.

Bakken argues that there exists no evidence demonstrating that hate crimes are more dangerous than other crimes [3, p.6]. However, research shows that victims of hate crimes suffer more psychological harm than victims of non-bias crimes. [4]. In the 1990s, Garnets, Herek and Levy found that victims of homophobic crimes may reconsider disclosing their sexual orientation [19], change their comportment, dress and places of socialisations to avoid re-victimisation [10]. Such consequences demonstrate that, beyond the direct physical and psychological harm, hate crime can impact its victims (but also their communities) on an existential level. Moreover, as well as impacting the direct victim, members of the victim's community, such as other lesbian women, often feel victimised themselves, with hate crimes, therefore, creating 'feelings of vulnerability, mistrust and fear among members of the community to which the victim belongs' [17]. Gilbert and Marchand found that hate crime victims suffer from, *inter alia,* abnormally high blood pressure, sleep disorders, stress, hypertension and psychosis [15, p.934]. For example, in 2001, Iganski studied the manner in which hate crime affects its victims more severely than crimes without the bias element. In this framework he identified five 'waves of harm' resulting from hate crimes, namely, harm to the direct victim, harm to the victim's group in the neighbourhood, harm to the victim's group beyond the neighbourhood, harm to other targeted communities and harm to societal norms [19]. This framework demonstrates the micro, meso and macro level of impact as well as the spatial elements of harm. Taking these three levels together, and the findings that exist on the psycho-social impact of hate crimes on a series of victims, could provide a framework through which the need for hate crime legislation is explained on both a theoretical and practical level.

However, what is the impact of punishment on perpetrator and victim? Let us take a look at the application of the 1965 British Race Relations Act. The first person prosecuted for the offence of incitement to racial hatred was a Black man, whilst several other Black citizens, including leaders of the Black Liberation Movement were prosecuted for anti-white hatred. It has been argued that punishing someone's bias has no impact on the elimination of that bias within the perpetrator. No punishment will turn a racist into an anti-racist [2, p.234]. Further, the question of whether 'minorities' who constitute the victims of such offences must be tackled. An example from the US is relevant to this discussion. In the framework of the Gender Expression Non-Discrimination Act (GENDA)—an anti-discrimination bill that would have incorporated gender identity and gender expression in hate crime and employment protection law in New York, US LGBTQ groups, namely the Audre Lorde Project, a grass roots organisation working for the rights of LGBTQ people of colour and the Sylvia Rivera Law Project, offering free legal advice to trans people who have limited financial means and/or are of colour strongly opposed the passing of this bill. Their rationale was that extending the use of criminal law would 'expose our communities to more danger from prejudicial institutions' that are 'far more powerful and pervasive than individual bigots' [31]. Therefore, the broader

reality of the criminal justice system not accommodating for the rights of vulnerable groups constitutes the reason why some groups themselves are in antithesis with the enhanced role of criminal law *vis-à-vis* hate crimes. As summed up by Swiffen 'they oppose hate crime legislation not because they do not see hate crime as a problem but rather because they see the criminal legal system itself as being a significant source of that problem' [31, p.131]. Within this ambit, researchers, such as Delegado and Stefanic, Levin and McDevitt and Matuda, argue that hate crime laws allow for structured anti-hate standards to be embedded, thereby, contributing to the fall in discrimination [11, 20, 24]. This observation recognises the institutional elements involved in the existence of hate crimes and the need to standardise responses so as, once again, to denote, symbolically and expressively, that bias and prejudice are unacceptable. This approach would, therefore, allow for the reversal of the narrative and the development of structures, such as the criminal justice system, as realms through which anti-hate symbolism is established. However, for this to be effective in practice, the criminal justice system itself needs to be open to vulnerable groups who wish to report hate crimes and receive support throughout the process. However, for this to be effective in practice, the criminal justice system itself needs to be open to vulnerable groups who wish to report hate crimes and receive support throughout the process. Unfortunately, in the pan-European Hate Crime shadow report, released in September 2019 by the European Network against Racism, this does not seem to be the case and an array of improvements will need to occur before the criminal justice system ceases to be marred by structural obstacles, preventing it from being an accessible tool for victims. Reflective of this is the report's finding that, across the European Union 'there are policies and guidance in place but there is 'institutional indifference' (ENAR Shadow Report, 2014–2018: 29) to the impact of racial violence and at times denial about its existence' (ENAR Shadow Report, 2014–2018).

In addition, the overly-broad provisions of new developments in tackling hate crime such as the Scottish hate crime law have the potential to 'perpetuate and entrench the values of the dominant in-groups and further marginalize out-groups.' They may also lead to a complication of ties between different marginalized groups. Examples could include members of religious communities who are contrary to the development of gender identity issues or vice versa. Although there are provisions on freedom of expression protection in relation to religion and sexual minorities incorporated in the Scottish law, we cannot be sure that this Law will not be used to silence minorities. To exemplify this, and the greater ramifications of the Act on minority groups, is the 2017 Glasgow Pride example where two LGBTQ activists were arrested for 'breaching the peace with homophobic aggravation.'[4] Their actions were holding up a place cards with words 'These faggots fight fascists' which, by any reasonable standard, sought to empower rather than threaten or abuse the LGBTQ community.

[4] https://www.glasgowlive.co.uk/news/glasgow-news/two-arrested-breach-peace-with-13503452

3 Hate Crimes: Legislative Framework

Most hate crime laws around the world come in the form of sentence enhancement. The motive of targeting protected characteristics constitutes an aggravation. In some cases, such as that of Canada, there are laws which punish hate crimes as a crime in themselves. Section 320 (4.1) of its Criminal Code creates an offence of mischief against religious property which carries a higher penalty than for ordinary mischief. In 2021, Scotland passed the Hate Crime and Public Order Act which includes problematic provisions such as the criminalization of 'aggravation of offences by prejudice' if, before, during or after the offence, the perpetrator 'demonstrates malice and ill-will towards the victim' based on his/her actual or presumed membership of a group.' Free speech concerns are raised from this given that a higher threshold was not attached to aggravation and that the above broad terms, including mediocre negative emotions such as 'ill-will' are incorporated. Further, ill-will does not need to constitute part of the perpetrator's intent, he or she may have 'felt' them post-offence. Also, the law provides for a low evidential requirement to demonstrate the perpetrator's mindset and/or emotion, since just one single source is sufficient. Further, part 4 on 'stirring up hatred' prohibits not only threatening and abusive behaviour or material but also insulting. In this ambit, the law endorses a much lower threshold than what is set out at an international and European level. Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' The 2012 Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression underlined that 'the threshold of the types of expression that would fall under the provisions of Article 20(2) should be high and solid.'[5] In antithesis with the ICCPR, the Scottish Bill prohibits speech which, in relation to race, colour, nationality or ethnic or national origins, is not only threatening and abusive but also *insulting*. This lowers the threshold of acceptable speech to a dangerous level. Further, the fact that the term *insulting* is only reserved for the certain characteristics (race, colour, nationality or ethnic or national origins) whereas for the other characteristics (age, disability, religion, sexual orientation, transgender identity, variations in sex characteristics), the speech must be threatening or abusive (but *not insulting*), means that the Bill has already established a structural hierarchy of some characteristics receiving more 'protection than others.'

As opposed to the above where a hate crime law exists in itself, most of what we see is an incorporation of sentence enhancement into laws and criminal codes. For example, following the 2009 amendment to the Victorian Sentencing Act 1991 (Australia), subsection 5.2, therein, provides that, during sentencing, the Court should consider whether the crime was motivated in whole or in part by prejudice 'against a group of people with common characteristics with which the victim is associated or with which the offender believed the victim was associated.' This conceptualisation

[5] https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf

of prejudice is interesting in that it is broad, making no reference to the type of characteristics to be included such as ethnicity, religion or sexual orientation and also integrates the element of perceived characteristics rather than actual characteristics. On a federal level, in the US, sentencing enhancement is provided by the Hate Crime Sentencing Enhancement Act, passed in 1994. This provides for enhanced sentencing for federal crimes motivated by prejudice based on race, colour, religion, national origin, ethnicity or gene. With the passing of the Matthew Shepard and James Byrd Jr Hate Crimes Prevention Act 2009, the protected characteristics were expanded to include sexual orientation, gender identity and disability. Today, the relevant text provides enhanced sentencing where the 'defendant intentionally selected any victim or any property…because of the actual or perceived race, color, national origin, ethnicity, gender, disability or sexual orientation of any person.' This is different from the Australian example in that it defines the protected characteristics but is the same in the way that perception of a particular characteristic is also incorporated in the law. In the US, most States also have their own State hate crime legislation [29, p.124]. On a European level, the Framework Decision on Racism and Xenophobia adopts the enhancement model at the sentencing stage rather than seeking the criminalisation of hate crime as a crime in itself throughout the process. More particularly, Article 4, therein, entitled 'racist and xenophobic motivation' provides that:

> Member States shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties.

What stands out in the European example is the lack of reference to protected characteristics, such as sexual orientation and gender identity. In fact, the European Union chose to incorporate the only hate crime provision in its toolbox in a Framework Decision on *Racism* and *Xenophobia.* This has led to what can be described as a hierarchy of hate in the European spectrum, where some protected characteristics are viewed as simply more important than others [1]. This is not an issue that has tainted the legislative reality of the European level only. Whilst in the US, for example, the situation is better, since most States do, for example, include sexual orientation, whilst the federal laws also include characteristics beyond ethnicity and religion, sexual orientation has been the contested category [14]. Characteristics, such as sexual orientation, gender identity and disability, have, as such, been called the 'less established bias categories' [36, p.1607]. To this end, lobbying and advocacy has been required for these to be incorporated into State laws [36, p.1607]. Although better than the EU example, where these less established bias categories are entirely absent from the law, the fact that not *all* States in the US include, for example, sexual orientation, is, needless to say, worrying and reflects the more general hierarchy of protecting grounds such as ethnicity and religion before looking at others. Specifically, thirty out of fourty-five States have hate crime laws which incorporate sexual orientation [33]. Notwithstanding the disregard for protected characteristics, such as sexual orientation, many Member States have gone beyond the limited realm of the Framework Decision. Indicative of this is the Cypriot Criminal Code 1960

amended in 2017. Article 35A, therein, provides that during sentencing the Court 'may take into account as an aggravating factor the motivation of prejudice against a group of persons or a member of such a group of persons on the basis of race, colour, national or ethnic origin, religion or other belief, descent, sexual orientation or gender identity.' Chapter 24(2) of the Swedish Criminal Code provides that during sentencing, special consideration shall be given to whether 'a motive of the offence was to insult a person, an ethnic group or another such group of people by reason of their race, skin colour, national or ethnic origin, creed, sexual orientation or other similar circumstance.'

4 Jurisprudence of the European Court of Human Rights

This section will consider how bias and prejudice in the realm of criminal activity has been dealt with by the highest regional human rights court of Europe, namely, the European Court of Human Rights. The Court's jurisprudence on the matter started in the 1990s with a case against the United Kingdom. In 1997, Michael Menson, a black man, was killed as a result of being set on fire during a racist attack committed by four white youths. The applicants complained, inter alia, under Article 2 of the ECHR, maintaining that, amongst other things, the authorities failed to comply with their positive obligation to carry out a proper and comprehensive investigation into Menson's killing.

The Court highlighted that 'where the attack is racially motivated, it is particularly important that the investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of minorities in the ability of the authorities to protect them from the threat of racial violence.' The Court's position is, therefore, clear: a message response to such message crimes is of centrifugal symbolic and expressive significance. This has been reiterated time and again in each case involving hateful motives. Against the backdrop established in *Menson and Others v the United Kingdom*, the case of *Nachova and Others v Bulgaria* further developed the approach of the Court to hate crimes. In this case, Angelov and Petkov, two Bulgarian men of Roma origin, were shot and killed by a military police officer who was trying to arrest them following their escape from detention. Here, the Chamber (and subsequently the Grand Chamber) underlined that 'authorities had the additional duty to take all reasonable steps to unmask any racist motive in an incident involving the use of force by law enforcement agents.' The necessity to unmask racist motive extends, in other cases discussed below, to crimes committed by private individuals. In this case, the Court also started to delineate the triggering factors which should give rise to an investigation into possible racist motives, such as racist abuse, a list which was extended in subsequent cases discussed below. In *Lakatošová and Lakatoš v. Slovakia,* the Court underlined that racist crimes are a 'particular affront to human dignity.' In this case, the applicants argued that the authorities failed to consider properly the alleged racial overtones of the crime committed against them and their family members. This claim resulted from an attack which was carried out in 2012 by an off-duty municipal officer who shot their family members who were standing in the front garden of the house. The

first applicant was seriously injured. The Court reiterated that authorities have the 'additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.' In addition, it underlined, as with the other hate crime jurisprudence, that treating hate crimes as any other crimes may 'constitute unjustified treatment irreconcilable with Article 14 of the Convention.' The authorities' duty to investigate the possible link between racism and violence is 'part of the procedural leg of Article 2 but also implicit in Article 14. Therefore, the ECtHR imposes a *positive obligation* on States to examine possible hateful motivations in the ambit of crimes which, if the States fail to do so, may trigger a question of discrimination. This demonstrates the high threshold the Court imposes on the discovery and subsequent punishment of hate. In light of the case's facts, the Court considered the investigation ineffective because of the insufficient investigation of the racist element of the crime. The Court underlined that any information which could suggest a racist crime is sufficient to open an investigation into the possible link between racism and the crime. The examples it gave for such information included verbal abuse, affiliation of attackers to an extremist or racist group or generalised prejudice against a particular group, in this case, the Roma.

In *Milanović v Serbia*, the applicant was a member of a religious minority suffering several years of verbal and physical abuse. For example, he allegedly received anonymous calls saying that he would be 'burned for spreading his Gypsy faith, and had been attacked physically by unidentified persons which he believed probably belonged to Srpski Vitezovi, a local branch of a far-right organisation called Obraz. The applicant argued that his Article 3 rights had been violated in conjunction with Article 14. The Court recognised that the scope of positive obligations under Article 3 of the ECHR must be framed within three realities, namely, the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices in terms of priorities and resources. However, it noted that, in this case, the authorities should have known that the applicant was being systematically targeted and that future attacks were likely to follow, particularly around major religious holidays. The Court condemned the authorities for not taking any measures to prevent such attacks. In the framework of Article 14, the Court noted that, just as with racially motivated crimes, States have the 'additional duty to take all reasonable steps to unmask any religious motive.' The Court noted that proving such a motivation may be 'difficult in practice' and, as such, the obligation is not absolute. The Court also extended its established differentiation in the treatment of hate crimes in comparison to other crimes by noting that 'treating religiously motivated violence and brutality on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.' It also reiterated the positive obligation in cases of religiously fuelled hate crimes, set out in some of the cases above, namely, that if a State does not make a distinction in the treatment of hate crimes, this may constituted unjustified treatment, contrary to Article 14 of the Convention. In light of this positive obligation to investigate, the Court condemned the fact that, although the authorities were aware of the attacks against the applicant which had been going on for several years and which were most probably motivated by religious hate, the investigation

lasted for many years without any adequate action being taken to identify or prosecute the perpetrators.

In Š*korjaneć*, *v Croatia,* the Court dealt with the violent targeting of protected characteristics by association. Here, the Court reiterated its position that racist crimes should be dealt with in a different way to regular crimes given that they are particularly destructive to human rights. Importantly, it also underlined that the crime in question does not have to be based solely on the motive to target particular characteristics but could also include mixed motives. It noted that Article 14 protection extends to cases where an individual is 'treated less favourably on the basis of another person's status or protected characteristics.' To this end, and within the framework of racist crimes, responsibilities arising from Article 3 in conjunction with Article 14 concerns:

> 'not only acts of violence based on a victim's actual or perceived personal status of characteristics but also acts of violence based on a victim's actual or presumed association or affiliation with another person who actually or presumably possesses a particular status or protected characteristics.'

In this case, the authorities investigated the racist element of the attack against the applicant's husband with no consideration of the attack against the applicant who was not a Roma but, rather associated herself with her Roma husband. As a result, she was treated 'merely as a witness, although she had also sustained injuries in the course of the same attack while in his company.'

In light of the above, the ECtHR has clearly stated that States have the positive duty to investigate possible hateful motives and that, if hate crimes are treated as regular crimes, then possible violations of Article 14, the non-discrimination clause, in conjunction with other articles such as Article 2 or 3, may arise. The ECtHR is also clear in that hate crime should receive greater punishments than other crimes due to the particular damage such crimes cause to human rights and due to the importance of sending a clear message to communities and societies, more generally, that such crimes are completely intolerable.

5 Conclusion

In conclusion, crimes which target the very fundaments of the human existence are an anathema to the functioning of a society. The important question, however, is whether the enhanced penalties that come with the finding of a hateful motive are justifiable. The answer is not straightforward. Although cognizant of the fact that hate crimes have the potential to have severe impact on the victims as well as their groups and society as a whole (due to rupture of community cohesion), problems may arise with hate crime legislation. Firstly, newer legislation such as that in Scotland is going beyond physical harm to the punishment of even insulting expression, deteriorating free speech and civic space. Secondly, for hate crime legislation/sentence enhancement provisions to be effective, the criminal justice system must function effectively and equitably. The police and public prosecutorial bodies in each national context must ensure that the bias element is recorded from the onset and

that it is not diluted throughout the process, otherwise the case collapses. Unfortunately, the latest shadow report on hate crime, published by the European Network against Racism, also referred to above, found that 'the lack of attention that the police and prosecution place on uncovering racial motivation of hate crimes is an institutional approach' Further, challenges do arise with the access of victims to the criminal justice system and prejudices that exist therein. Governments must take into account the issue of under-reporting by marginalized groups and institutional bias and/or perceived institutional bias which could avert groups from approaching the criminal justice system and/or from allowing the criminal route to function well. Moreover, States must avoid legislation such as the Scottish law which is vague and broad, establishing hierarchies amongst certain groups in terms of what protection they are offered and integrating speech and violence together, without adequate thought given to the ramifications on the freedom of expression.

To this end, the safest method to adopt in ascertaining whether hate is punishable is to consider motives only if these lead to greater harm than if such motives were absent [20]. Relevant legislation must be robust, with high thresholds and a well-defined framework of protected characteristics based on the contextual reality of each nation. At the same time, legislation must pay due attention to free speech issues and international standards such as the Rabat Plan of Action. In conjunction with this, the government should invest in tackling conscious and unconscious biases and power structures which are subsequently manifested in speech and acts. Such measures could include awareness raising, education, inter-group dialogue and positive measures for the empowerment of minorities.

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