

STUDY

Requested by the LIBE committee



Hate speech and hate crime in the EU and the evaluation of online content regulation approaches



Policy Department for Citizens' Rights and Constitutional Affairs
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Hate speech and hate crime in the EU and the evaluation of online content regulation approaches

Abstract

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee. The study argues that hate speech and hate crimes poison societies by threatening individual rights, human dignity and equality, reinforcing tensions between social groups, disturbing public peace and public order, and jeopardising peaceful coexistence. The lack of adequate means of prevention and response violates values enshrined in Article 2 of the TEU. Member States have diverging rules, and national public administrations are torn by disagreement in values. Therefore, EU regulation is needed to reinforce the existing standards and take measures to counter hate speech and counter-act against hate speech and hate crime. The study – on the basis of a cross-country comparison conducted – proposes concrete, enforceable and systematic soft and hard law measures to counter hate speech and hate crimes EU-wide efficiently.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

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LIST OF ABBREVIATIONS

AVMSD	Audiovisual Media Services Directive
CoC	Code of Conduct countering illegal hate speech online
CJEU	Court of Justice of the European Union
CERD	Committee on the Elimination of Racial Discrimination
CoE	Council of Europe
CRPD	Convention on the Rights of Persons with Disabilities
DE	Germany
ECHR	European Convention on Human Rights or Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
FCNM	Framework Convention for the Protection of National Minorities
GCC	German Criminal Code
HCC	Hungarian Criminal Code
HRC	Human Rights Council
HU	Hungary
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
IT	Italy
ICC	Italian Criminal Code
LGBTI+	Lesbian, gay, bisexual, transgender, intersex and "plus", representing other sexual identities

MEP	Member of the European Parliament
MS	Member State
MCC	Maltese Criminal Code
MT	Malta
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
PCC	Polish Criminal Code
PL	Poland
RJ	Restorative justice
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNAOC	United Nation Alliance of Civilisations
UNESCO	United Nations Educational, Scientific and Cultural Organization

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EXECUTIVE SUMMARY

Hate speech and hate crimes poison societies by threatening individual rights, human dignity and equality, reinforcing tensions between social groups, disturbing public peace and public order, and jeopardising peaceful coexistence. They affect private lives, or in cases of violent bias crimes, even victims' life and limb. They stigmatise and terrify whole communities. They erode social cohesion, solidarity, and trust between members of society. Hate speech blocks rational public debate, without which no democracy can exist; it leads to an abuse of rights that endangers the rule of law.

Hate speech and hate crime have been steadily on the rise during the past decade. Most importantly, hate speech has also appeared at the highest level of the public administration of some Member States, where transformation into policy is just one step away. The liberal stance towards hate speech was built on the presumption that the state and the social majority would uphold democratic standards under all circumstances, and distance themselves from hate speakers, who would inevitably remain outcasts. But when state representatives remain silent or openly support hate speech and hate crimes, this assumption holds no longer. The non-organised, individual haters derive authority from the failure of the state to intervene.

No society is immune from the signs of hatred, but whether they get tamed or deepened, depends on the social measures that are applied vis-à-vis the phenomenon. Whether by speech, action or omission, the state's reaction creates norms, and informs society about the current acceptable standards. According to recent academic literature, counter-speech is crucial in the fight against racism and other forms of intolerance. Counter-speech should be backed up also by action: official policy on social inclusion, such as education, awareness-raising, and social programmes to level economic and other inequalities. Besides, counter-action is also recommended: strengthening the institutional system to combat hate speech and hate crime.

EU Member States (MSs) have diverging rules, and apply different standards to counter hate speech and hate crimes. In order to ensure that the representation of EU values is mainstreamed, EU regulation is needed to reinforce the existing standards and to encourage measures to counter-speech and counter-act against hate speech and hate crime. Primarily, the EU should declare that hate speech at the level of the public administration, government and governmental officials, authorities, schools and all public institutions deeply violates the basic values of the European Union and that MSs are obliged to use all legal means to eliminate this phenomenon, even in its forms which do not reach the criminal threshold. MSs – and the European institutions – should be obliged by EU law to withdraw funding provided to, and prohibit political coalition with political parties and other organisations whose members repeatedly represent views that are irreconcilable with the values of the European Union, provided that the party or other entity fails to sanction this.

In order to build social resilience, notice should be taken of the fears and concerns that make people susceptible to populist, discriminative or even racist views. Linguistic and psychological research could greatly contribute to yielding fresh knowledge about the intriguing success of hate speech and populism. Research to process and decode the 'hate narrative' and to define what is the real concern behind hate should be supported by the EU. Those concerns should be addressed and managed with adequate and substantial social policy, and also addressed with credible EU narratives which respond to the fears, inform citizens and reinforce the values of human rights, equality, tolerance and solidarity. Giving a narrative means to tell the story of Europe, the values and the choices that EU institutions make day by day.

It is recommended that the EU puts further resources in social programmes which directly improve awareness of the European culture and values, sensitisation to hate speech and discrimination, among others also through gamification and entertainment. Similarly, support is recommended for local governments and NGOs to organise local mediation and conflict solving sessions between majority and minority groups and to address matters of social injustice. Particular attention should be given to education programmes: European values, diversity and tolerance should be included in the curriculum. The EU should not tolerate school segregation in any MS. Student exchange programs across cultural boundaries are recommended to break students' social bubbles.

Beside soft measures that serve to build social resilience against hate speech, hard measures are also recommended to create a solid framework and institutional network to tackle hate speech and hate crime. Enforcement of legal prohibitions of hate crimes and hate speech should be more consequent on the level of investigation, prosecution and the judiciary.

A predominant part of hate speech incidents ought to be tackled by administrative law rather than criminal law, so as to employ the least intrusive measures when it comes to speech restrictions, but also in order to avoid that those engaging in hate speech present themselves as martyrs or victims of the justice system.

With regard to violent hate crimes, MSs are obliged to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such bias is taken into account by the courts when imposing penalties. Preferably states go beyond these obligations and adopt *sui generis* provisions or qualifying circumstances with regard to a wide range of bias motivation, to show their denouncement of the phenomenon, and to express state solidarity with the victims. States may consider a combination of *sui generis* provisions and penalty enhancements. Both closed and open lists of protected groups have advantages and disadvantages. Closed lists of protected groups mirror historical and/or existing social tensions and allow the legislator to take political responsibility for the choice of groups selected. However, certain individuals that fall victim to bias motivated crime might not be covered, and perpetrators may only be held liable for base crimes. An open list may cover an infinite number of potential victims that suffer due to the perpetrator's bias, but in this case, the symbolic nature of state denunciation of specific historical tragedies and social tensions might be lost.

Victims who are perceived by perpetrators – whether correctly or mistakenly – to be members of protected groups, and also persons affiliated with others belonging to protected groups should be covered by hate crime laws and provisions. Penalty enhancements in case of bias motivation should apply to the widest possible range of crimes.

Standards developed by the European Court of Human Rights on the obligations of national investigation authorities to show special vigilance to explore and unmask bias motives behind hate crimes are already binding all MSs, but a prospective EU Directive could incorporate and go beyond them.

Bias indicators, i.e. a pre-defined list of factors should be considered by the investigation authorities that might point to a bias motive. It is important to act promptly and consider bias indicators from the beginning of the investigation. Albeit they do not qualify as conclusive evidence to prove the motivation, bias indicators might also be revisited by the prosecution when establishing the motive in hate crime cases.

Hate crimes target people for their innate, unchangeable or other characteristics, which are part of their identity. These characteristics may be connected to marginalisation, vulnerability, sexuality or other sensitive aspects of life people do not wish to disclose or address at all, and certainly not in front of state authorities. The special needs of hate speech and hate crime victims in legal proceedings should

be acknowledged in line with the EU Victims Directive, and if needed, more specific laws and recommendations could be laid down. At the minimum their enforcement should be closely monitored.

In countries adhering to the principle of expediency (*Opportunitätsprinzip; le principe l'opportunité*), where prosecutors have a wider room of manoeuvre to decide whether to take a case to court or not, victims should have the possibility to represent the charges. Victims should also be given a chance to oppose the dropping of a case. Should the prosecutor decide to discontinue the case, the victim should be able to press on with the charges. If a court decides not to apply the *sui generis* provision or the enhanced penalty and the victim disagrees with this decision, the victim should have possibility to avail of a legal remedy which could lead to a revision of the court's decision by a higher court.

Courts should establish criminal responsibility in hate crimes and not just the base crimes, in case a criminal act was committed out of a bias motive. Bias indicators, albeit soft factors, are a good point of departure helping the prosecutor and the judge where to search for circumstantial evidence. Inferring motives – such as revenge, jealousy – from the words, actions and circumstances of the crime is an everyday practice in criminal proceedings. It should be no different with the bias motivation either. Courts should acknowledge bias motivations also in case motives are mixed.

Sanctions imposed by MSs should include the banning from public function those who committed hate speech, hate crimes or violated any rules of non-discrimination. For these purposes, the adoption of the Antidiscrimination Directive should be urged. Alternative punishments are recommended which promote social understanding and cohesion, rather than further deepen the problems of polarisation, stigmatisation and hostility. Along adequate victim protection measures and in parallel to ensuring voluntariness of all parties, victim-offender mediation or other forms of restorative justice could be introduced and applied.

A regular monitoring with regard to values the EU is based on and that MSs agreed to respect and promote should include a checklist whether the States have satisfied their obligations to fight against hate speech and hate crime. A special emphasis should be placed on the actual enforcement of black letter laws. Disregard of or disrespect for any EU law currently in force or the ones proposed in this study, should result in infringement proceedings, or if there are serious and persistent breaches by a MS of human dignity, equality, or the principle of non-discrimination, this should result in dissuasive EU responses, such as loss of privileges or the suspension of rights deriving from the application of the Treaties.

1. INTRODUCTION

Proving the interconnectedness of values enshrined in Article 2 of the Treaty on the European Union (TEU),¹ such as the rule of law, democracy, fundamental rights including the protection of minorities, hate speech and hate crimes threaten individual rights, social groups, and public peace and public order equally. They effect individuals' human dignity, private lives, or in cases of violent bias crimes, their life and limb. They prevent sensible democratic dialogue through accelerating social tensions and polarisation, and therefore they are detrimental to societies, and to democracy as a whole. Discrimination and hatred erode solidarity which is a cornerstone of European integration. The incited negative emotions fuel arbitrariness, and abuse of rights, which endanger the rule of law. No society is intact from the signs of hatred, but it depends primarily on the social measures that are applied to deal with this basic human instinct, whether it gets tamed or dispersed and strengthened.

Parallel with the worldwide decline concerning the trinity of the rule of law, democracy and fundamental rights during the past couple of years,² states not only seem to fail in addressing societal hatred, but some of them are instigating it. As the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has put it, political rhetoric, especially nationalist populist ideologies pose a threat to equality by fuelling discrimination and intolerance.³ Already last year, before the election to the European Parliament (EP) in May 2019, Members of the European Parliament (MEPs) felt the need to adopt a resolution on neo-fascist violence in Europe. It condemned "hate crime, hate speech and scapegoating by politicians and public officials as they directly normalise and reinforce hatred and violence in society."⁴ This is a problem that has already been there in pre-pandemic times, but has been aggravated by and became more visible during the Covid-19 pandemic.⁵

1.1. Covid-19 and the spread of hatred

This study was written partially during the outbreak of Covid-19 in the spring 2020. States derogated from constitutional checks, and limited rights and freedoms of their citizens, residents and foreigners. In this climate hostile towards democracy, dangerous with respect to the rule of law, human rights are also more prone to be infringed. A pandemic does not turn state agents and societies into human rights violators, but it shows more clearly their true colours, i.e. pre-existing problems and social tensions.

¹ Carrera, S., Guild, E., Hernanz, N., *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism*, CEPS, Brussels, 2013.

² "More countries declined than improved in overall rule of law performance for a third year in a row, continuing a negative slide toward weakening and stagnating rule of law around the world," available at <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020>. For the entire World Justice Project Rule of Law Index 2020, available at https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf.

³ United Nations (UN), General Assembly (2018), Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/73/305, 6 August 2018.

⁴ European Parliament, European Parliament Resolution of 25 October 2018 on the rise of neo-fascist violence in Europe (2018/2869(RSP)), P8_TA(2018)0428, Strasbourg, 2018. Interestingly the Hungarian translation mentions "scapegoating of" and not "scapegoating by" politicians. The present study relies on the English versions of EU texts.

⁵ Bárd, P., Carrera, S., 'Showing true illiberal colours – Rule of law vs Orbán's pandemic politics', *CEPS Policy Insights* 2020-10, April 2020, CEPS, Brussels, pp. 1-17.

Covid-19 is no exception. Not only did it take human lives, but it reinforced existing problems, and hit harder on otherwise vulnerable minorities.

Scapegoating during epidemics is nothing new. Historically medical doctors and nurses were blamed for being incapable of stopping the plague. Xenophobia and racial prejudice have been associated with infectious disease outbreaks in Europe and in Asia in the 1500s, when each affected country blamed their neighbouring countries or enemies for their outbreak.⁶ It is hard to accept, and fundamentally questions people's belief in a just world⁷ that there are a fair number of diseases the origins of which are untraceable, and against which scientists cannot find the cure. Conflicting pieces of scientific evidence are a characteristic of the post-modern world, but the insecurity arising from them coupled with information classified or withheld by states invites the virulence of rumours and, fake news, which cumulatively offer a fertile ground for scapegoating. Covid-19 exacerbated hatred, which spread globally. It gave rise to fantastic conspiracy theories about the responsibility of Jewish, Chinese, or American elites, and created new scapegoats such as the elderly or the sick.

From among the traditionally protected groups, the Jewish community should be mentioned first. During the medieval plague, pogroms were organized, based on the conspiracy theory that the disease was deliberately spread by Jews through well poisoning. Mirroring the absurd allegations of the middle ages, in 2020 conspiracy theories mushroomed about how Jews invented or spread the virus for financial interests. Demonstrations the main objective of which was supposedly protesting against government measures to take control of the pandemic, were abused by German radicals to display anti-Semitism, or their support for neo-Nazi ideology.⁸

People who were taken for having an Asian background were blamed for the breaking out of the pandemic and for spreading the virus.

Box 1: Racial hatred spreading during the Covid-19 pandemic

Several teenagers in Lukow, Poland attacked, threw garbage, and spit at a Vietnamese woman, while shouting racist slurs connecting the victim's origin to the virus. A famous Chinese chef living in Wrocław, Poland was also attacked.⁹ A person of Malaysian origin in Tallinn, Estonia was shouted at and blamed for bringing the virus into the country. She was scapegoated despite the fact that she did not endanger anyone, quite to the contrary, she was wearing a mask for her and the community's protection.¹⁰

⁶ Ng, E., 'The Pandemic of Hate is Giving COVID-19 a Helping Hand. Editorial', *Am. J. Trop. Med. Hyg.*, 102(6), 2020, pp. 1158–1159

⁷ Lerner, M. J., & Miller, D. T., 'Just world research and the attribution process: Looking back and ahead', *Psychological Bulletin*, 85(5), 1978, pp. 1030–1051.

⁸ Williamson, H., *In Germany, Anti-Semitism Creeps into Covid-19 Protests. Attacks Against Jews, Jewish Institutions Rose 13 Percent Last Year*, Human Rights Watch, 19 May 2020. Available at <https://www.hrw.org/news/2020/05/19/germany-anti-semitism-creeps-covid-19-protests>.

⁹ The European Network Against Racism (ENAR) collects data on the impact of COVID-19 on racialised group, along the following categories: healthcare, protective measures during work, access to basic services police brutality, racist speech and racist violence. Interactive map, available at <https://www.enar-eu.org/COVID-19-impact-on-racialised-communities-interactive-EU-wide-map>. This case was reported to ENAR by the NEVER AGAIN Association.

¹⁰ European Network Against Racism (ENAR), *Impact of COVID-19 on racialised communities: Key findings*, 2020. Available at https://www.enar-eu.org/IMG/pdf/key_findings_of_the_map.pdf.

Ethnic hatred also rose high in the face of Covid-19. . The Anti-Discrimination Office of Styria in Austria for example reported that according to their anti-hate speech app "Ban Hate", there was an increase in posts blaming refugees for the spread of the virus.¹¹

The LGBTI+ community was also disproportionately affected by the pandemic. Beyond many other non-hate speech or hate crime related problems, there is an increased likelihood for them to be harassed and assaulted. "Social distancing may be particularly difficult for those who have been rejected by their families, are not out with their families and now forced to be with them the whole time [...] This results in increased mental health difficulties among young LGBTI+ people who are closeted, or who are out and forced to quarantine with often unaccepting or abusive family members."¹²

As reported by the Finnish Association of People with Physical Disabilities, persons with disabilities were blamed in the context of the outbreak, for taking health care resources that are needed to tackle the pandemic.¹³

Minorities anyway suffering more from the pandemics than the average person, due to poverty, overcrowded accommodation, the lack of hygienic conditions, lack of equipment for distance learning, or domestic violence – such as ethnic minorities, prisoners, migrants, refugees, and also women – were further victimised by hate speech and crimes. It is often claimed that the Roma community presents a health threat, given their life style and lack of discipline.¹⁴

¹¹ 'Coronavirus pandemic in the EU -Fundamental rights implications', *European Union Agency for Fundamental Rights*, Bulletin 1, Publications Office of the European Union, Luxembourg, 2020, pp.33. Available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin_en.pdf, 2020, 33.

¹² ILGA Europe, COVID-19 and specific impact on LGBTI people and what authorities should be doing to mitigate impact, 2020. Available at <https://www.ilga-europe.org/sites/default/files/COVID19%20Impact%20LGBTI%20people.pdf>, 1.

¹³ 'Coronavirus pandemic in the EU -Fundamental rights implications', *European Union Agency for Fundamental Rights*, Bulletin 1, Publications Office of the European Union, Luxembourg, 2020, pp.33. Available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin_en.pdf

¹⁴ Holt E., 'COVID-19 lockdown of Roma settlements in Slovakia', *The Lancet Infectious Diseases* (2020) 20 (6), 2020, pp. 659.

Box 2: Selective confinement on the basis of ethnicity

Beyond hate speech targeting the Roma, the Council of Europe Commissioner for Human Rights was informed about politicians and some media referring to the Roma community as a threat to public health. These allegations were reinforced by some state measures: in order to overcome alleged health risks authorities have set up police checkpoints – and at one place even a fence – around Roma settlements with the objective to enforce quarantine measures. As the Commissioner underlined, confinement rules “cannot be selectively applied to people, neither fully nor partially, on the basis of ethnicity.”¹⁵ Such discriminatory measures may well fuel prejudices against vulnerable communities.

The ripple effect of speech is clearly visible at the times of the pandemic, where Romas are reporting to be assaulted, spat on, punched in the face or have been thrown garbage at them, while the perpetrators are shouting racist insults.¹⁶ The UN Special Rapporteur on minority issues, Fernand de Varennes, found the rise in hate speech against the Roma, and the blame put on them for allegedly not respecting protection measures, alarming.¹⁷ Only a combination of health, security, humanitarian, social, educational, and economic measures, coupled with an efficient fight against disinformation,¹⁸ but also a dissuasive countering of hate speech and a consequent enforcement of penal measures in relation to hate crimes can bring the necessary changes.

Journalists reporting on Covid-19 did not only have to face arrest or charges, restrictions on access to information and censorship, but they were also subjected to verbal and physical attacks while reporting about the pandemic.¹⁹

Other groups typically less subjected to bias crimes, also got blamed and victimised due to the health crisis.

The Latvian Centre for Human Rights reported a rise in hate speech against Latvians repatriating from abroad.²⁰ Another tension concerned the residents in the capital and the rest of Hungary. Whereas hostility had been present before the pandemic, the political narrative suggesting that the virus is spreading more in the capital, and people living in Budapest are undisciplined and are contaminating

¹⁵ Commissioner for Human Rights, Governments must ensure equal protection and care for Roma and Travellers during the COVID-19 crisis, 7 April 2020. Available at <https://www.coe.int/en/web/commissioner/-/governments-must-ensure-equal-protection-and-care-for-roma-and-travellers-during-the-covid-19-crisis>.

¹⁶ European Network Against Racism (ENAR), Impact of COVID-19 on racialised communities: Key findings, 2020. Available at https://www.enar-eu.org/IMG/pdf/key_findings_of_the_map.pdf.

¹⁷ International Roma Day, UN expert urges political action to promote equality and non-discrimination during the COVID-19 crisis, 8 April 2020. Available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25782&LangID=E>. See also the UN's Covid-19 guidance, <https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx>.

¹⁸ Open Society Foundations, Roma in the COVID-19 Crisis. An early warning from six EU member states. Available at <https://www.opensocietyfoundations.org/publications/roma-in-the-covid-19-crisis>. For a good practice see https://www.report-it.org.uk/covid_19_and_racis_hate_crime.

¹⁹ The International Press Institute reported 25 cases of attacks against journalists until the end of July 2020. International Press Institute, Resources to support quality journalism and defend the free flow of news during the coronavirus pandemic. Available at <https://ipi.media/covid19-media-freedom-monitoring/>.

²⁰ 'Coronavirus pandemic in the EU -Fundamental rights implications', European Union Agency for Fundamental Rights, Bulletin 1, Publications Office of the European Union, Luxembourg, 2020, pp.35. Available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin_en.pdf.

others when escaping to their weekend houses – mainly at the lake Balaton – contributed to the deepening of these tensions,

Box 3: Novel groups victimised during the Covid-19 pandemic

In Hungary persons under curfew have to stick a large red sign on their door in a rather stigmatising manner saying that entry is prohibited, except for official persons.²¹ A young man fell victim to hate crime by his neighbours, who wanted to beat him, and chased him away from his residence. Police intervention was needed to secure the house or the duration of the mandatory quarantine.²²

The hashtag movement #JeNeSuisPasUnVirus (I am not a virus)²³ reportedly starting in France and spreading across Europe and beyond, reflects the increasing frustration of minority citizens, who are the victims of the proliferation of prejudice, hate speech and bias crimes. Law should counteract these phenomena. A humanistic and rational state policy is capable of curbing revenge, cruelty, brutal instincts, and aggression resulting from a lack of knowledge. On a side note, it is also the right approach towards fighting the pandemic itself: "Clear, accessible, consistent, correct, and constant guidance, with officials leading by example, is essential [...]. This not only has the effect of tackling the spread of misinformation on the virus, but is also critical to ensure legal certainty and guarantee the transparency of government action. [...] transparent government action, paired with a strong sense of personal social responsibility based on clear and consistent expert advice, can lead to the most positive outcomes on average."²⁴ But at the minimum the state must not supply ammunition to intolerance.

1.2. Conceptual clarity and terminology

1.2.1. Hate speech

In this study, specific meanings are attached to both hate speech and hate crimes, and the two are clearly distinguished. The term "hate speech" is used inclusively according to its everyday meaning, covering all expressions and manifestations of racism, xenophobia, homophobia, etc., and for distinction of the legal category "criminal hate speech" or specifically "incitement to hatred" is used.

Hate speech has been a steadily growing social problem since the new millennium. The past five years have brought yet new challenges in Europe: a migration crisis, political upheaval due to populism, disinformation and the pandemic – processes which increase feelings of insecurity, and make the future unforeseeable. Populism is not only part of the problem but also a symptom.

²¹ The whole text reads: "A person under epidemiological surveillance lives here. ENTRY IS PROHIBITED. Only official persons are allowed to enter. The person under observation must not leave the apartment without official permission before the lockdown ends. This warning sheet may only be removed with the permission of the authority. Should the above rules be violated, criminal proceedings will be started."

²² Szekszárdon elszabadultak az indulatok egy házi karantén miatt [Emotions were running high in Szekszárd due to a home curfew], Infostart, 35 March 2020, available at <https://infostart.hu/belfold/2020/03/25/szekszardon-elszabadultak-az-indulatok-egy-hazi-karanten-miatt>.

²³ Coste, V., Amiel, S., Coronavirus: France faces 'epidemic' of anti-Asian racism, 3 February 2020. available at <https://www.euronews.com/2020/02/03/coronavirus-france-faces-epidemic-of-anti-asian-racism>.

²⁴ Grogan, J., States of Emergency, Verfassungsblog, 26 May 2020, available at <https://verfassungsblog.de/states-of-emergency/>

Hate speech is becoming especially prevalent in the social media where both political actors and citizens express their thoughts without inhibition. The attempts to regulate hate speech on social media so far have brought ambiguous effect (e.g. EU Code of Conduct to tackle hate speech, The Network Enforcement Act²⁵).

Freedom of speech is a cornerstone of democracies, and the threshold of criminal hate speech is high in most MSs. Decisions of ordinary and supreme courts have declared principles which protect freedom of expression. Indeed, the substantial body of extreme, intolerant and racist speech would not reach the threshold of criminal regulation, and yet they induce social changes: polarise the society, raise hostility between majorities and minorities and induce violent hate crimes. Views which are "perfectly legal" gain recognition, hate speakers gain parliamentary seats or even executive power, and the incriminate views threaten to turn into governmental policies. The rights of LGBTI+ minorities are getting more and more restricted in some states, school segregation, disregarding court decision which compensates a minority group, and street violence against minorities, politicians or whistle-blowers mark this process.

In theory, long-standing, prosperous and stable democracies should be able to battle hate with social instruments only and without criminal restriction: unambiguous representation of the values of tolerance and plurality in all public institutions, banning haters from resources which would lead to financial, political or media power and label them as an extreme and despicable minority themselves – whose rights to speak are however respected equally. This ideal situation is not what we are observing in Europe. On the contrary, haters are gaining media attention, gaining social influence, political power, and through their infiltration to politics, public institutions are unable to consequently represent tolerance and plurality any longer in several MSs.

And yet, lowering the threshold of criminal hate speech is not an option, and it would not provide a remedy. **The problem of hate speech and hate crime should be regarded as a complex social problem, and a symptomatic response given by societies to the challenges which have not been adequately managed.** The policy response should be similarly complex: addressing the underlying issues and the symptoms at the same time. While it may appear that populist politicians respond to the needs of their electorate, in reality they serve only a tiny but loud minority. But it should be noted that the underlying problems are more general problems of the wider majority, and that a political alternative should be provided which offers solution to the problem and communicates this, as well.

Nevertheless, legal – albeit not necessarily only criminal – prohibition is and remains one among the important symbolic messages and actions with which a state can express its values and set its standards.

²⁵ In the literature also known as Facebook Act, or by its German abbreviation NetzDG (Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken).

1.2.2. Hate crimes

"Hate crime" is a criminological concept, an umbrella term that refers to a group of crimes as defined by national criminal laws. Accordingly, a hate crime is not one particular offence, instead it can take many forms from damaging property to killing people.

According to the Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) hate crimes are "criminal offences committed with a bias motive".²⁶ This widely recognised definition is also the one used in this study.

The *first element* of a hate crime is an act that constitutes a crime under ordinary criminal law. The base offences may in theory include any criminal offence against persons or property, or the public peace, including manslaughter, assault, harassment, damage to property, hooliganism, etc. The gravity of the criminal offence is irrelevant: hate crimes can take the form of petty crimes, misdemeanours or serious offences equally. The spectrum of base crimes varies from jurisdiction to jurisdiction, as national substantive criminal law provisions show great differences in this regard.

Should there not be a base crime, only a bias motive, the act will not qualify as a hate crime. One such example is discrimination. It refers to a less favourable treatment of individuals in various areas (for example in employment, education, vocational training or access to goods and services) on the basis of certain protected characteristics. Discrimination may pave the way to hate crimes, but discrimination alone does not qualify as a hate crime, since typically discrimination is covered by civil or administrative law, and does not amount to a crime under the national criminal code. Another textbook example for bias motivated behaviour that does not amount to hate crime is hate speech. The human behaviour underlying hate speech is speech, which is obviously not a crime, quite to the contrary, it is a constitutionally protected human act. Lacking a base crime, these behaviours are not regarded as hate crimes, even when they are criminalised.²⁷ This does not mean that these manifestations can be left unanswered. Quite to the contrary, since both discrimination and also certain forms of hate speech might be the stepping stones to violent hate crimes, these behaviours must be addressed by the state, so as not to allow minor manifestations of hostility have a ripple effect and escalate into violent bias crimes.²⁸

The *second element* of a hate crime is that the criminal act is committed with a particular motive, a so-called bias. It is this element of bias motive that differentiates hate crimes from ordinary crimes. The bias motive is the perpetrator's prejudice towards the target: victims, premises, or the target of the offence are selected because of their real or perceived connection, attachment, affiliation, support, or membership with a protected group. Protected characteristic typically include race, national or ethnic

²⁶ Organization for Security and Co-operation in Europe, Ministerial Council, Decision No. 9/09 Combatting Hate Crimes, MC(17) Journal No. 2, Agenda item 8, 2 December 2009.

²⁷ This is the general rule. There is a minority of hate speech acts, where the speech itself is a criminal offence, regardless of the perpetrator's motivation, such as for example incitement to violence. In this case the same crime committed out of hatred against the group to which the victims belongs, will qualify as a hate crime.

²⁸ Perry, B., Alvi, S., 'We are all vulnerable: The *in terrorem* effects of hate crimes', *International Review of Victimology*, 18:1, 2012, pp. 57-71. Escalation of hostility is described by Gordon Allport's 'Scale of Discrimination and Prejudice', which differentiates between the following stages depending on the harm: the cause, starting with the least violent form: anti-locution, such as making jokes or expressing hateful opinions about a certain group and its members; avoidance leading to isolation and exclusion; discrimination. Allport later inserted at this point aggression, as an assumption of hierarchy of power; physical attacks, which are considered by law as hate crimes; and extermination. Allport also emphasized the importance of early intervention to prevent the escalation of hostility. Allport G., *The Nature of Prejudice*, Wesley Publishing, Cambridge, 1954.

origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, but the bias may be triggered also by other factors.

Hate is often the motive behind criminality (see crimes committed out of jealousy or revenge). In case of hate crimes however perpetration is fuelled by hatred against the group to which the victim belongs, and that is the sole or primary motivation behind the crime. Borrowing the words of André Frossard, French Academician: a hate crime occurs when one kills or assaults “someone under the pretext that he was born.”²⁹

Hate crimes have a considerably greater impact than ordinary crimes on direct victims, the victim’s community and society as a whole.

Since the victims of hate crimes are often targeted for an immutable, unchangeable characteristic, or one that is the core of one’s identity, the impact of the crime, the feeling of vulnerability, helplessness and hopelessness on the side of the direct victim may be especially grave.³⁰ The act also has a severe impact on the wider community, the targeted group, which typically is a historically disadvantaged one, or a minority in the sense of a powerlessness.³¹ Hate crimes may well erode societal cohesion, reinforce social tensions, and trigger retaliation that results in a vicious circle of violence and counter-violence. These special characteristics offer good enough reasons for addressing hate crimes differently than ordinary crimes, for example in the form of *sui generis* hate crime provisions incorporated into the criminal code or by making hate against the victim’s group a qualifying circumstance.

1.3. Structure and methodology

Chapter 2 explores the international obligations binding states to tackle hate speech and hate crime. The enumeration will start with UN norms. Council of Europe instruments, with a special focus to the ECHR and the related case-law will then be extensively analysed, with a special focus on balancing freedom of expression and its limitations, and state obligations derived from the Strasbourg jurisprudence with regard to tackling hate crimes respectively. This chapter will also explore the instruments adopted by the European Union (EU) lawmakers. The study highlights the current academic trends of the topic, and analyses the case law of the European Court of Human Rights. Finally, conclusions and recommendations are provided.

Chapters 3 is devoted to the comparative analysis of five selected jurisdictions’ legal responses to hate speech and hate crimes. They were selected so as to provide a balance as regards geographical coverage, size, GDP and so as to have a fair selection of the founding Member States of the European Communities and countries that acceded later. When conducting the comparative analyses, findings were based on desk research and responses by national experts to the questionnaires that were designed for the present project. The two questionnaires regarding hate speech and hate crimes are annexed to this study. A pool of national experts was compiled from among scholars and practitioners

²⁹ “A crime against humanity has been perpetrated when one kills someone under the pretext that he was born.” – said André Frossard at the Nazi war crime trial of Klaus Barbie. “Il y a crime contre l’humanité lorsqu’on tue quelqu’un sous le prétexte qu’il est né.” Frossard, A., *Le Crime contre l’humanité*, Robert Laffont, Paris, 1987, pp. 9.

³⁰ Iganski, P., ‘Hate Crimes Hurt More’, *American Behavioral Scientist* 45, no. 4, December 2001, pp. 626–638; Iganski, P., Lagou, S., The personal injuries of ‘hate crime’, in Hall, N., Corb, A., Giannasi, P., Grieve, J. G. D., Lawrence, N. (Eds.), *The Routledge International Handbook on Hate Crime*, Routledge, Abingdon, 2014.

³¹ Perry, B., ‘Exploring the community impacts of hate crime’, in Iganski, P., Lagou, S., The personal injuries of ‘hate crime’, in Hall, N., Corb, A., Giannasi, P., Grieve, J. G. D., Lawrence, N. (Eds.), *The Routledge International Handbook on Hate Crime*. Routledge, Abingdon, 2014.

who have extensive knowledge, previous research results and/or experience in the field and could help with the assessment of relevant national legal materials, case-law, and statistical data related to hate speech and hate crimes in Germany (DE), Hungary (HU), Italy (IT), Malta (MT), and Poland (PL). After having identified the first contacts, a snow-ball sampling method (non-probability sampling) was used to obtain a sufficient number of responses. In order to provide the highest number of responses with the widest possible geographical scope, further expert suggestions from were also accepted from the respondents. 86 experts from state authorities, non-governmental organisations, universities, research groups and institutions were contacted. National experts were approached between 25 March and 1 April 2020, and were invited to send back their responses until mid-May. Fully and partially filled questionnaires were accepted. All data provided was cross-checked with other sources to verify their accuracy and validity. Thanks to the efforts from researchers the number of responses reached 17 in the hate crime section and 18 in the hate speech section until the end of the project. Recommendations for qualitative research and the normative standards envisaged in social research in terms of disclosure, guarantee of anonymity, data protection and storage, right of withdrawal were respected during the data collection and processing.

Table 1: Number of experts contacted

MS	Number of experts contacted - hate speech	Number of experts contacted - hate crime
DE	8	14
HU	6	2
IT	6	18
MT	10	4
PL	11	7
Total	45	41

Table 2: Number of responses to the questionnaires

MS	Number of responses - hate speech	Number of responses - hate crime
DE	4	7
HU	4	2
IT	3	3
MT	4	3
PL	3	2
Total	17	18

The comparative element of this study is primarily descriptive, but also good practices and problems both with regard to codification and application of national laws were identified. Case studies illustrate the legal dilemmas and difficulties.

Finally, and building on the previous analysis, in Chapter 4 recommendations are formulated towards the EU legislator with a view to enhance the fight against intolerant behaviours that poison the peaceful social coexistence and diversity across Europe.

2. INTERNATIONAL LEGAL FRAMEWORK

There is a shared responsibility in a system of multi-level governance to tackle the issue of hate speech and hate crimes – an area on the border between human rights law and criminal justice. International law provides guidance on how to prevent and tackle the phenomena, but it is ultimately up to the states to implement measures that efficiently fight hate speech and hate crimes. In the national setting, a cooperation of the police, prosecutors' offices, judiciary, victims' services and civil society organizations is needed to achieve this aim.

2.1. UN documents addressing hate speech and hate crimes

Member states of the United Nations recognised by the adoption of the **Universal Declaration of Human Rights** (UDHR) in 1948 that all humans are born free and are equal in dignity and rights, without distinction of any kind, such as racial, ethnic origin, colour, religion, gender identity and sexual orientation or any other status.³² Even though the document fails to impose any specific legal obligations on states, it has become highly persuasive and provided a basis for more specific binding and justiciable international norms.

The first global human rights treaty specifically addressing the most heinous forms of bias is the **Convention on the Prevention and Punishment of the Crime of Genocide** which was adopted unanimously by the United Nations General Assembly in 1948. According to Article III.c. of this Convention, direct and public incitement to commit genocide shall be punishable as a crime under international law, and states undertook to prevent and punish such crimes. Genocide is defined narrowly: it requires the intention to destroy, in whole or in part, a national, ethnical, racial or religious group (Article II). Therefore, "incitement to genocide" could only be established in the most straightforward case of the Rwandan genocide, where radio broadcasts instigated the civil population against the minority ethnic group.

The Genocide Convention was in part built on the legal foundation of the International Military (Nuremberg) Tribunal, which convicted Julius Streicher, publisher of the anti-Semitic weekly "Der Stürmer", and subsequently Otto Dietrich, who controlled the press section in the propaganda ministry under Joseph Goebbels from 1938 until 1945.³³

The International Tribunal for Yugoslavia had also discussed Article III.c., but finally was unable to establish the cause and effect relationship between the expressions of Vojislav Šešelj – calling for the expulsion of the non-Serbian population – and the war crimes. Nevertheless, his responsibility was established for instigating deportation, forcible displacement, forcible transfers, and persecution as crimes against humanity and he was sentenced to 10 years imprisonment.³⁴

³² Universal Declaration of Human Rights, 1948, Articles 1 and 2.

³³ Timmermann, W. K., 'Incitement in international criminal law', *International Review of the Red Cross*, Vol. 88 No. 864, 2006, pp.1-30. See also: International Military Tribunal (ITM) (1947) Trial of the major war criminals. Available at https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

³⁴ UN International Residual Mechanism for Criminal Tribunals, MICT-16-99, Šešelj, Vojislav.

Albeit the literature differentiates genocide from hate crimes due to their different scale, and the former's systematic and state-mandated nature,³⁵ genocide can be understood as the most heinous manifestation of hatred against societal groups. The groups protected by the Genocide Convention – national, ethnical, racial and religious groups – also have a special status in relation to hate crimes addressed in most national criminal codes.

The **International Convention on the Elimination of All Forms of Racial Discrimination** (ICERD) of 1965 in Articles 4 and 6 prohibits discriminatory speech and action on a significantly broader scale. It obliges states to criminalize certain forms of hate speech and the commission of or incitement to acts of violence against any race, group of persons of another colour or ethnic group; furthermore, states must create the legal and institutional basis to provide effective protection and remedies against any acts of racial discrimination, and must provide for reparation and satisfaction for damages suffered as a result of discrimination.

Most provisions of the ICERD focus on prohibiting discriminatory action rather than speech. Article 4 of ICERD on the criminalization of certain types of speech is sometimes criticised by advocacy groups, such as Amnesty International, which urged the Committee on the Elimination of Racial Discrimination (CERD) to clarify the scope of the respective Article 4a),³⁶ in particular recommending to include the intent to achieve a prohibited result.

ICERD's monitoring body, CERD issued several general recommendations to address hate speech.³⁷ Recommendation No. 35. signals a new approach by CERD, as it emphasises the relevance and potential of alternative responses other than criminal sanctioning, including measures of educational, informational and cultural nature.³⁸ Importantly, it also draws attention to the "role of politicians and other public opinion-formers in contributing to the creation of a negative climate towards groups protected by the Convention".

The International Covenant on Civil and Political Rights (ICCPR) of 1966 (entered into force in 1976) especially its Article 20 – as interpreted together with Article 19 – is the most relevant international provision relating to "hate speech." Its definition is sufficiently narrowly defined: the list of protected characteristics is short and closed (national, racial or religious hatred), it requires "advocacy", that is, an intentional and public promotion of hatred; the advocated "hatred" is supposed to constitute incitement to discrimination, hostility or violence, i.e. illegal material actions.

The ICCPR also imposes obligations on the states to respect and to ensure rights enshrined in the document without distinction of any kind, such as race, colour, sex, language, religion, political or other

³⁵ OSCE/ODHIR, Prosecuting Hate Crimes: A Practical Guide, OSCE, Warsaw, 2014, pp. 24, available at <https://www.osce.org/odihr/prosecutorsguide>.

³⁶ Amnesty International, Written contribution to the thematic discussion on Racist Hate Speech and Freedom of Opinion and Expression organized by the UN CERD, 28 August 2012, available at <https://www.amnesty.org/download/Documents/24000/ior420022012en.pdf>. See ICERD 4(a): Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

³⁷ See Recommendations No. 7 (1985) relating to the implementation of article 4; No. 15 (1993) on article 4, which stressed the compatibility between article 4 and the right to freedom of expression; No. 25 (2000) on gender-related dimensions of racial discrimination; No. 27 (2000) on discrimination against Roma; No. 29 (2002) on descent; No. 30 (2004) on discrimination against non-citizens; No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system; No. 34 (2011) on racial discrimination against people of African descent, and No. 35. (2013) on combating racist hate speech, and currently No. 36. is in progress, on preventing and combating racial profiling.

³⁸ McGonagle, T., *The Council of Europe against online hate speech: Conundrums and challenges*, Expert Paper, Institute for Information Law (IViR), 2013, available at <https://rm.coe.int/16800c170f>.

opinion, national or social origin, property, birth or other status. States must ensure that victims of violations of ICCPR rights are provided with an effective remedy, whether the rights were violated by a state official or a private person. Article 6 and 7 of ICCPR on the right to life and the prohibition of torture or cruel, inhuman, degrading treatment, in conjunction with Article 26 on the prohibition of discrimination, impose obligations on state authorities to efficiently investigate the mentioned substantive rights without any distinction based on the victims' group belonging.

Whereas not listed among the traditional protected grounds, **the Convention on the Rights of Persons with Disabilities (CRPD)** of 2006 in its Article 16 obliges States Parties to take all appropriate measures to protect persons with disabilities, from all forms of exploitation, violence and abuse, including their gender-based aspects.

Beyond the above international treaties, in the UN framework various debates and programmes against hate speech deserve attention. One major disagreement in the 21st century was around the distinction of blasphemy and hate speech for religious identity.³⁹ UN Resolution 16/18 intended to solve this contradiction, and **the Rabat Plan of Action** was designed as a tool to guide its implementation. The Rabat Plan of Action clarified the relationship of Article 19 and Article 20(2) of ICCPR, and set out practical guidance to clarify the obligations of states under Article 20(2). Most importantly, the Rabat Plan of Action sets out a six-part threshold-test to help draw the line between objectionable and offensive, but not punishable expressions, and illegal hate speech. The six factors are: context, speaker, intent, content and form, reach or magnitude of the speech, and likelihood of the harm. The particular importance of the Rabat Plan of Action lies in its distinctive factors that are able to separate low-value online speech from speech, which is likely to have a higher social impact.

In 2018, the UN Secretary-General launched **the UN Strategy and Plan of Action on Hate Speech**. The initiative was to respond to a surge in global hate speech, which has moved into the mainstream, and started to threaten democratic values even in established democracies. The Plan identified 13 Key Commitments, which together represent a complex social and political strategy to fight against intolerance – without mentioning legal restrictions of speech at all. The strategic plan relies on searching for causes through research and data analysis, applying counter-speech in the form of spreading knowledge and strategic communication as well as advocacy. It aims to address hate speech through a coordinated response that tackles the root causes and drivers of hate speech, as well as its impact on victims and societies. From the European perspective, this approach is certainly more apt to tackle the problem of hate speech especially seen as the stepping stone of hate crimes in an era when the dripping of hatred through the myriads of communication channels is hardly controllable without turning off the tap.

The UN has also initiated several **civil society-based action plans** globally to prevent violent extremism, in particular with respect to the terrorism. Several of these programs are rooted in the United Nations Development Programme (UNDP), and support the design of regional, national and local strategies with a variety of tools and plans.⁴⁰ While their focus is more specific, their accumulated

³⁹ ICCPR, Article 18.

⁴⁰ For example: UNDP, How UNDP can help to prevent violent extremism, 2016,, available at <https://www.undp.org/content/dam/undp/library/Global%20Policy%20Centres/OGC/PVE%20special%20news%20update%20of%20GP%20cluster%20-%202016.pdf>.

knowledge and lessons learned are worth considering. UNESCO has published a comprehensive overview of the international legislative actions that addressed online hate speech and also the social responses by the IT industry (Gagliardone et al).⁴¹ The United Nation Alliance of Civilisations (UNAOC) launched an initiative #SpreadNoHate, to engage global media in a dialogue on hate speech and the sharing of best practices to promote counter narratives in media. UNAOC has a range of other projects to promote global solidarity and dialogues.

2.2. Organization for Security and Co-operation in Europe

The Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) gives a particular attention to hate crimes. OSCE ODIHR – together with National Points of Contact on Hate Crimes, civil society organisations and international organizations – helps participating States to draft legislation and design justice systems that effectively addresses hate crimes; it raises awareness of hate crimes among governmental officials, NGOs and international organizations; and supports civil society in monitoring and reporting hate crimes. OSCE's Hate Crime Reporting Website, its training programs against hate crime for law enforcement (TAHCLE), and for prosecutors (PAHCT), along TANDIS, the tolerance and non-discrimination information system, furthermore its practice-oriented papers and guides include vital issues such as the definition of hate crimes, bias indicators, or data collection and monitoring and are highly persuasive both at the national level and the European level.⁴²

The OSCE has initiated a program for the South-Eastern European states in 2018, to prevent and counter violent extremism and radicalisation that lead to terrorism.⁴³ These social outreach activities might also be considered when looking for best practices for tackling hate speech and hate crimes.

⁴¹ Gagliardone, I., Gal, D., Alves, Th., Martinez, G., 'Countering online hate speech', *UNESCO Series on Internet Freedom*, 2015.

⁴² In detail see Chapter 3.2.2. and 3.2.4. Cf. Strasbourg case-law, e.g. ECtHR, *Balázs v Hungary*, Application no. 15529/12, 20 October 2015.

⁴³ OSCE, 'The Role of Civil Society in Preventing and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Focus on South-Eastern Europe', *A Guidebook for South-Eastern Europe*. 4 July 2019, available at <https://www.osce.org/secretariat/400241>.

2.3. The Council of Europe

Both hate speech and hate crime have been tackled with a diverse set of tools by the Council of Europe (CoE) system.

Beyond the single most important human rights document for the European continent, the **European Convention on Human Rights** of 1950 (ECHR) that will be explored in detail *infra*, CoE countries adopted several other conventions with regard to specific protected grounds. The **Framework Convention for the Protection of National Minorities** of 1994 (FCNM) in its Article 4 prohibits discrimination and obliges Parties to guarantee persons belonging to national minorities the right of equality before the law and of equal protection of the law. In line with Article 6, Parties encourage intercultural dialogue and take appropriate measures to protect persons who are subject to threats or acts of discrimination, hostility or violence due to their ethnic, cultural, linguistic or religious identity. In Article 9 it also declares the freedom of expression and access to the media. The FCNM is one among those few instruments that not only seeks ways to fight back bias motivated behaviours, but also focuses on the prevention of hate speech in the media. The European Convention on Transfrontier Television of 1989 also mentions the need to respect human dignity and the prohibition of incitement to hatred in Article 7(1)b.

The **Additional Protocol to the Convention on Cybercrime** of 2003 aims to harmonise the criminalisation of acts of a racist and xenophobic nature committed through computer systems, such as dissemination of racist and xenophobic material, racist and xenophobic motivated threat, similarly insult, and denial, gross minimisation, approval or justification of genocide or crimes against humanity (Articles 3, 4, 5, 6), but nine member states⁴⁴ signed with reservations, and three more with declarations which narrow the interpretation of the text.

The CoE claims to be the first and only international intergovernmental organisation which has adopted an official definition of hate speech – which has otherwise no officially agreed definition in international human rights documents elsewhere. According to the **Committee of Ministers**, hate speech covers all forms of expressions that spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.⁴⁵

The Committee of Ministers of the CoE has repeatedly addressed hate speech, first in its Recommendation No. R (97) 20 on "Hate Speech", and on the same day, Recommendation No. R (97) 21 on the media and the promotion of a culture of tolerance. Principle 1 of Recommendation No. R (97) 20 points out that "governments of the member states, public authorities and public institutions at the national, regional and local levels, as well as officials, have a special responsibility to refrain from statements, in particular to the media, which may reasonably be understood as hate speech", adding that "such statements should be [...] publicly disavowed whenever they occur". It also refers to the

⁴⁴ Croatia, Denmark, Finland, France, Greece, Netherlands, Poland, Romania, Spain. See: Reservations and Declarations for Treaty No.189 - Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems Status as of 27/06/2020, available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/189/declarations?p_auth=PYNtF7OL.

⁴⁵ Appendix to Recommendation No. R (97) 20, available at <https://rm.coe.int/1680505d5b>.

diversity of legal tools that should be applied against hate speech (civil, criminal and administrative law provisions, Principle 2). Principle 3 mentions that "any limitation of, or interference with, freedom of expression must be subject to independent judicial control" which is particularly relevant in regard of social media regulation.

Recommendation No. R (97)21 aimed at suggesting good practices for the media industry actors, to address and avoid hate speech in the media. Importantly, this piece was primarily focusing on the prevention of engaging in hate speech, and practically did not even mention counter-speech.⁴⁶

Recommendation CM/Rec(2011)7 on a new notion of media contains a distant reference to social media, holding that it should be attentive to the use of biased expressions⁴⁷, and adding, that these actors may be required (by law) to report to the competent authorities criminal threats of violence based on racial, ethnic, religious, gender or other grounds that come to their attention.

Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity⁴⁸ also includes the obligation to combat inciting hatred or other forms of discrimination against LGBTI+ persons.

The CoE Parliamentary Assembly Recommendation 1805 (2007) attempted to separate religious freedom, blasphemy and hate speech, so as to call for the elimination and prohibition of incitement, as well as for the protection of religious freedom and freedom of expression.

The **European Commission for Democracy through Law** (Venice Commission) drew up a detailed analysis in the effort to distinguish blasphemy and incitement to religious hatred. It found that intentional or reckless incitement to religious hatred should be subject to criminal sanctions, however, simple insult to religious feelings without the element of incitement should not be penalised. It further recommended that the offence of blasphemy is abolished.⁴⁹

The **European Commission against Racism and Intolerance** (ECRI) established in 1993 is the CoE's independent human rights monitoring body. Its mandate is combating racism, racial discrimination,

⁴⁶ The only reference comparable to what is today understood under counter-speech is in the sixth bullet point of section "2. Media enterprises", saying: "alerting public opinion to the evils of intolerance". To see what is counter-speech: Strossen, N., Defining "Counter-Speech" and Fighting Hate Speech, YouTube Channel 'Oxford Academic', OUP, 3 minute watch, 2018. Available at <https://www.youtube.com/watch?v=G5C6rLGSrm8>.

⁴⁷ The text applies an open-ended list here, also including gender elements: "racist, xenophobic, anti-Semitic, misogynist, sexist (including as regards LGBTI+ people) or other bias".

⁴⁸ Member states should take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons. Such "hate speech" should be prohibited and publicly disavowed whenever it occurs. All measures should respect the fundamental right to freedom of expression in accordance with Article 10 of the Convention and the case law of the Court.

7. Member states should raise awareness among public authorities and public institutions at all levels of their responsibility to refrain from statements, in particular to the media, which may reasonably be understood as legitimising such hatred or discrimination.

8. Public officials and other state representatives should be encouraged to promote tolerance and respect for the human rights of lesbian, gay, bisexual and transgender persons whenever they engage in a dialogue with key representatives of the civil society, including media and sports organisations, political organisations and religious communities.

⁴⁹ Report on the Relationship between Freedom of Expression and Freedom of Religion: the Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, CDL- AD(2008)026, 23 October 2008.

xenophobia, antisemitism and intolerance in light of the ECHR, its additional protocols and the related Strasbourg case-law.

General Policy Recommendation No. 15 of 2015⁵⁰ is very reflective to the latest challenges of hate speech in the public discourse:" Although there have certainly been instances of political parties and other groups and organisations cultivating and disseminating racist, xenophobic and neo-Nazi ideas, the use of hate speech has not been limited to ones that are extremist and outside the mainstream. Thus, the employment of a rude tone in many parliaments and by state officials has been found to contribute to a public discourse that is increasingly offensive and intolerant. Such discourse has been exacerbated by some high-level politicians not being inhibited from using hate speech in their pronouncements."⁵¹

Besides the precise problem-description, also the remedies recommended by the ECRI Recommendation No. 15 are valuable,⁵² in particular the counter-speech, and the removing obstacles to redress.⁵³

ECRI adopted a number of recommendations on the criminal prosecution of hate crimes (see *infra*).

General Policy Recommendation No. 1 of 1996 on combating racism, xenophobia, antisemitism and intolerance⁵⁴ calls for the adoption of measures in various branches of laws, including criminal legislation, to counter racism, xenophobia, anti-Semitism and intolerance. The document calls upon states to ensure that racist and xenophobic acts are stringently punished. In order to achieve this, states should among others define common offences with a racist or xenophobic nature as specific offences; enable the perpetrator's racist or xenophobic motives to be specifically taken into account; prosecute such crimes *ex officio*; and combat racist organisations. In addition, the document underlines that the criminal prosecution of racist or xenophobic offences should be given a high priority, and accurate data and statistics should be collected and published on the number of racist and xenophobic offences. The recommendation also underlines that adequate legal remedies and assistance be available to the victims.

General Policy Recommendation No. 7 of 2002 on national legislation to combat racism and racial discrimination as amended in 2017⁵⁵ calls for the adoption of measures in various branches of laws, including criminal legislation. It recommends to criminalise the following acts – and instigating, aiding, abetting or attempting to commit these acts – whenever they are committed intentionally: a) public incitement to violence, hatred or discrimination; b) public insults and defamation; c) threats against a

⁵⁰ ECRI General Policy Recommendation N°15 on combating hate speech – adopted on 8 December 2015.

⁵¹ *Id.* at 23.

⁵² "It is important that no one stands by and allows hate speech of any kind to be used without challenging it. [...] All users of the media in any form should thus be encouraged to draw attention to instances in which hate speech is being used and to make clear their objection to such instances. However, while challenging the use of hate speech is the responsibility of everyone, public figures can make an especially important contribution in this regard because the esteem in which they are held gives their voice a considerable influence over others. It is, therefore, crucial that all public figures, notably politicians and religious and community leaders but also personalities in the arts, business and sport speak out when they hear or see hate speech being used as otherwise their silence can contribute to legitimising its use. [...] Such condemnation needs to be mainstreamed so that it is a much more general response by public figures rather than just a few lone voices. Such counter-speech might also take the form of withdrawing from activities and organisations in which persons using hate speech are actively involved." ECRI Rec. no. 15. at 98. "The importance of counter-speech".

⁵³ Chapters F, and G., Rec. no. 15.

⁵⁴ ECRI General Policy Recommendation N°1 on combating racism, xenophobia, antisemitism and intolerance, adopted by ECRI on 4 October 1996.

⁵⁵ ECRI General Policy Recommendation N°7 (revised) on national legislation to combat racism and racial discrimination - adopted on 13 December 2002 and revised on 7 December 2017.

person or a grouping of persons on the grounds of their protected characteristics; d) the public expression of an ideology which claims the superiority; e) the public denial, trivialisation, justification or condoning of genocide, crimes against humanity or war crimes; f) the public dissemination, distribution, production or storage of materials containing manifestations of the above crimes; g) the participation in, creation, support, or the leadership of a group which promotes the above ideas; and h) racial discrimination when exercising public office or occupation.

For all offences not specified above, racial animus should be an aggravating circumstance. The recommendation also discusses legal persons, who should also be held criminally liable for the above acts. Finally, states are called to draft laws that provide effective, proportionate and dissuasive sanctions for the above offences; also ancillary or alternative sanctions should be allowed to be imposed by the courts.

General Policy Recommendation No. 11 of 2007 on combating racism and racial discrimination in policing⁵⁶ discusses the role of the police in combating racist offences and monitoring racist incidents. It asks states to ensure that the police thoroughly investigate racist offences, fully taking the motivation into account. It also calls upon states to establish and operate a system for recording and monitoring racist incidents. The policy recommendation emphasizes a victim-friendly environment where victims and witnesses of racist incidents are willing to report to the police. In order to achieve the above aims, legislatures must adopt a broad definition of racist incident, such as “any incident which is perceived to be racist by the victim or any other person”.

The CoE also fosters initiatives to fight against hate speech at the level of **civil society actions**. For example, its “WE CAN!”⁵⁷ aims to combat the newly emerged forms of intolerance especially in the online environment and in the political discourse, by helping young people and educators confront, dismantle and replace hateful narratives. However, the manual is only worth as much as is transplanted from statements into action. It is applied by the national CoE contact points and it also has national Facebook pages.⁵⁸

2.3.1. The European Convention on Human Rights

The ECHR guarantees freedom of expression in Article 10, by also defining its limits – more on this will be analysed *infra* in Chapter 2.3.2. Here it is important to mention that hate speech is generally not protected by the European Court of Human Rights (ECtHR), and that applications – although not entirely consequently – are rejected with reference to Article 17, a classic abuse-of-rights prohibition.

The ECHR addresses the prohibition of discrimination in its Article 14 and Protocol 12. Since hate crimes are extreme manifestations of discrimination, this provision has a special importance in dealing with the phenomenon of bias crime. At the time of writing the present study, a minority of EU MSs, notably 10 of them ratified Protocol 12.⁵⁹ According to Article 14 ECHR “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with

⁵⁶ ECRI General Policy Recommendation N°11 on combating racism and racial discrimination in policing - adopted on 29 June 2007.

⁵⁷ Available at <https://www.coe.int/en/web/no-hate-campaign/we-can-alternatives>.

⁵⁸ Numbers of followers: 1986 (H), 22173 (6960 on Twitter) (D), 3586 (463 on Twitter) (I), 1348 (Slov), 6463 (1055 on Twitter) (PI).

⁵⁹ Protocol 12 is in force in relation to the – so far – 20 states including 10 EU Member States that have ratified it. Available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=TAckIFzJ.

a national minority, property, birth or other status." As is apparent from the wording, Article 14 can only be invoked in conjunction with another Convention right. The relevant cases dealing with the repression of hate crimes effect mainly Article 2 of the ECHR on the right to life, Article 3 on the prohibition of torture and inhuman or degrading treatment beyond Article 14. In relation to crimes, the ECtHR developed long ago the doctrine of states' positive obligation to conduct effective investigations. In the past 15 years, however, it also formulated additional obligations on state parties to have penalty enhancements for hate crimes in their criminal codes, to show special vigilance to explore and unmask bias motives behind crimes, and to acknowledge mixed motives and protect those who can be associated with someone having a protected characteristic.

2.3.2. European Court of Human Rights case law on hate speech

Freedom of expression – and especially freedom of political expression – is a cornerstone of democracies. Still it is not without limits. Deciding about restrictions needs careful balancing of the rights at stake on a case-by-case basis. The ECtHR has a clear and distinctive case-law with regard to various forms of speech restrictions, but for hate speech, there is still room for clarification of the guiding principles.

a. Balancing conflicting rights

The ECtHR has two basic approaches to hate speech cases. The first is the general route: balancing the expression based on the four-step-test: (1) whether there is a foreseeable law which prescribed the description (2) whether it aims at the protection of a legitimate goal, as listed in Article 10 (2) of ECHR, (3) whether the restriction is necessary in a democratic society, and (4) whether the restriction applied is proportionate to achieve the legitimate aim. The Court often applies reference to the early judgement in *Handyside v. UK*⁶⁰ where it declared that freedom of expression is "applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there would be no democratic society" (para. 49).

Balancing was applied in *Altıntaş v. Turkey, Sürek (no.1) v. Turkey, Özgür Gündem v. Turkey, Gündüz v. Turkey, Vejdeland and Others v. Sweden, Balsytė-Lideikienė v. Lithuania*.⁶¹

Altıntaş was editor of a monthly journal which published in 2007 that certain kidnappers who took three British hostages for political demands and executed them, but were themselves killed in a police gunfire were "still living idols of the youth" and represented them as having been "slaughtered". The Court found that a fine of 430 EUR was not disproportionate for justifying violence, with particular regard to the effect it might make on youth.

In *Gündüz*, the Court found the sentence of four years and two months' imprisonment and a fine was not disproportionate for the words "[a]ll that is needed now is for one brave man among the Muslims

⁶⁰ ECtHR, *Handyside v. the UK*, Application no.: 5493/72, 7 December 1976.

⁶¹ ECtHR, *Altıntaş v. Turkey*, Application no.: 50495/08, 10 March 2020. ECtHR, *Sürek (no.1) v. Turkey*, Application no.: 26682/95, 8 July, 1999. ECtHR, *Özgür Gündem v. Turkey*, Application no.: 23144/93, 16 March, 2000. ECtHR, *Gündüz v. Turkey*, Application no.: 59745/00, 13 November, 2003. ECtHR, *Vejdeland and Others v. Sweden*, Application no.: 1813/07, 9 February 2012. ECtHR, *Balsytė-Lideikienė v. Lithuania*, Application no.: 72596/01, 4 November 2008.

to plant a dagger in their soft underbelly and run them through twice with a bayonet to show just how empty they are." The speaker was a leader of an Islamic sect, talking about moderate Islamic intellectuals, mentioning one of them by name.

Vejdeland and his friends were convicted in Sweden for distributing in an upper secondary school homophobic leaflets, containing insults and falsities. This was the first case in Strasbourg relating to hate speech against LGBTI+ minorities. The Court declared that discrimination based on sexual orientation was as serious as discrimination based on race, origin or colour, and found the restriction as necessary in a democratic society.

In a second case relating to LGBTI+ minorities (*Beizaras and Levickas v. Lithuania*) the ECtHR also found violation of Article 14 (prohibition of discrimination) in the context of Article 8 (right to private life), and the violation of Article 13 (right to effective legal remedy) because the prosecution did not start investigations in relation to the hateful and threatening comments which the applicants received on Facebook when they posted a photo of a kiss of the same-sex couple. The national court reiterated the intolerant views of the conservative social majority, declaring that such "eccentric behaviour" attempted to deliberately shock individuals and encourage the posting of negative comments.⁶²

A publishing house owned by *Balsytė-Lideikienė*, published a calendar in which the entries insulted persons of Polish, Russian and Jewish origin. The applicant received an administrative fine and the copies were confiscated. The Court found that the national court acted within its margin of appreciation, taking into attention that issues concerning the territorial integrity and national minorities in Lithuania had been sensitive, and held that there was no violation of Article 10.

There are cases, when the Court, as the result of the balancing process, found a violation of Article 10 (*Fáber v. Hungary*, *Ibragim Ibragimov and Others v. Russia*, *Dink v. Turkey*, *Lehideux and Isorni v. France*, *Stomakhin v. Russia*, *Faruk Temel v. Turkey*).⁶³

Lehideux and Isorni opened a historical debate about Pétain Marshal and argued that he should be rehabilitated from his death sentence in 1945. The text did not negate or question the facts of the Holocaust, but it defended Marshal Pétain's role in collaboration. The Court found that the lapse of time makes it inappropriate to deal with the statements with the same severity as ten years previously (decision on 23/09/1998). The Court also found that publicly defending the crimes of collaboration should be addressed by civil remedies – not specifying who ought to make such claim.

For the purpose of this study, relevance is given to cases when the speaker's words attack the majority nation, or other representatives of power, such as a state official, the monarch, or the police (*Hösl-Daum and others v. Poland*⁶⁴ (inadmissible), *Dink v. Turkey* (violation of Article 10), *Otegi Mondragon v. Spain*⁶⁵, and *Stern Taulats v. Spain*⁶⁶ (both violation of article for being disproportionate), *Savva Terentyev v. Russia*⁶⁷ (insulting police, violation of Article 10)].

⁶² ECtHR, *Beizaras and Levickas v. Lithuania*, Application no.: 41288/15, 14 January 2020. para. 23.

⁶³ ECtHR, *Fáber v. Hungary*, Application no.: 40721/08, 24 July, 2012. ECtHR, *Ibragim Ibragimov and Others v. Russia*, Application no.: 1413/08 and 28621/11, 28 August, 2018. ECtHR, *Dink v. Turkey*, Application no.: 2668/07, 6102/08, 30079/08 et al., 14 September 2010. ECtHR, *Lehideux and Isorni v. France*, Application no.: 24662/94, 23 September, 1998. ECtHR, *Stomakhin v. Russia*, Application no.: 52273/07, 9 May, 2018. ECtHR, *Faruk Temel v. Turkey*, Application no.: 51962/12, 31 March 2015.

⁶⁴ ECtHR, *Hösl-Daum and Others v. Poland*, Application no.: 10613/07, 7 October 2014.

⁶⁵ ECtHR, *Otegi Mondragon v. Spain*, Application no. 2034/07, 15 March 2011.

⁶⁶ ECtHR, *Stern Taulats v. Spain*, Application no. 51168/15, 13 March 2018.

⁶⁷ ECtHR, *Savva Terentyev v. Russia*, Application no. 10692/09, 28 August 2018.

Firat Dink was a Turkish journalist of Armenian origin, publication director and editor-in-chief of a bilingual Turkish-Armenian weekly newspaper in Istanbul. He was found guilty for denigrating the Turkish identity, and he was murdered while his appeal was still pending. The relatives applied to the Court, alleging that the guilty verdict against him made him a target for the violence and caused his death. The Court found that Dink had merely been conveying his ideas and opinions on an issue of public concern in a democratic society, and held that there had been a violation of Article 10; and that the authorities did not take the reasonable measures to prevent an immediate risk to the journalist's life, therefore it found violation of Article 2 as well.

b. Rejecting for abuse of rights

The other approach of the Court is to find the application inadmissible, because the activity for which the applicant seeks protection aims at the destruction of a right set forth in the Convention (Article 17, abuse of rights). The Court held, that any remark directed against the Convention's underlying values would be removed from the protection of Article 10 by Article 17 (*Seurot v. France*⁶⁸), such as portraying Jews as the source of evil in Russia and calling for their exclusion from social life (*Pavel Ivanov v. Russia*⁶⁹), promoting a terrorist organisation on television broadcast (*Roj TV A/S v. Denmark*⁷⁰), denying facts of the Holocaust (*Garaudy v. France*⁷¹, *Honsik v. Austria*, *Marais v. France*, *Williamson v. Germany*, *Pastörs v. Germany*⁷²) or giving promotion to negationism through a controversial comedy (*M'Bala M'Bala v. France*⁷³), as well as promoting white supremacy (*Glimmerveen and Haagenbeek v. the Netherlands*⁷⁴), or religious hate (*Norwood v. UK*, *Belkacem v. Belgium*).⁷⁵

For denying protection from negation of the Holocaust and other crimes against humanity, the Court's reasoning relies on the following main arguments:

- denying clearly established historical facts does not constitute historical research akin to a quest for the truth,
- its real purpose was to rehabilitate the National Socialist regime,
- it implies the accusation of the victims themselves of falsifying history,
- represents one of the most serious forms of racial defamation of Jews and of incitement to hatred of them (*Garaudy v. France*⁷⁶).

Nevertheless, the Court's application of Article 17 cannot be held to be entirely consequent either. For example, in *Šimunić v. Croatia*⁷⁷ (see description of the case below under 2.3.5.1.), the Court did not find it necessary to address the applicability of Article 17 of the Convention, arguing that the complaint was inadmissible anyway as the interference was justified under Article 10(2). As if in other cases the

⁶⁸ ECtHR, *Seurot v. France*, Application no.: 57383/00, 18 May 2004.

⁶⁹ ECtHR, *Pavel Ivanov v. Russia*, Application no. 35222/04, 20 February 2007.

⁷⁰ ECtHR, *Roj TV A/S v. Denmark*, Application no. 24683/14, 24 May 2018.

⁷¹ ECtHR, *Garaudy v. France*, Application no. 65831/01, 25 March 2003.

⁷² ECtHR, *Honsik v. Austria*, Application no. 25062/94, 22 April 1998. ECtHR, *Marais v. France*, Application no.: 31159/96, 24 June, 1996. ECtHR, *Williamson v. Germany*, Application no. 64496/17, 8 January 2019. ECtHR, *Pastörs v. Germany*, Application no.: 55225/14, 3 October 2019.

⁷³ ECtHR, *M'Bala M'Bala v. France*, Application no.: 25239/13, 20 October 2015.

⁷⁴ ECtHR, *Glimmerveen and Haagenbeek v. the Netherlands*, Application nos.: 8348/78 & 8406/78, 11 October 1979.

⁷⁵ ECtHR, *Norwood v. UK*, Application no.: 23131/03, 16 November 2004. ECtHR, *Belkacem v. Belgium*, Application no.: 34367/14, 20 July 2017. For more discussion, see at https://www.echr.coe.int/Documents/Guide_Art_17_ENG.pdf.

⁷⁶ ECtHR, *Garaudy v. France*, Application no. 65831/01, 25 March 2003, para 23.

⁷⁷ ECtHR, *Šimunić v. Croatia*, Application no.: 20373/17, 22 January 2019.

interference would not be justified and Article 17 would be an additional tool, and not one to precede the balancing process.⁷⁸

In a few other cases, the Court held the case inadmissible on other grounds. Hans Nix was a disgruntled father who perceived his German-Nepalese daughter was pushed by the employment office – in a racist manner – into a low-paid job, and meant to give emphasis to his opinion with a picture of Himmler featuring a swastika on his uniform. Even though Nix did not intend to spread Nazi propaganda, but the Court accepted the domestic case-law as foreseeable enough, when demanding a clear and obvious opposition to Nazi ideology in order to exempt someone from criminal liability for "using symbols of unconstitutional organisations" (inadmissible for being manifestly ill-founded, *Nix v. Germany*⁷⁹).

2.3.3. The context and the speaker

In this subchapter the Court's case law will be discussed from two perspectives: the speaker and the context of hate speech. There are many more factors which could be taken as the basis for analysis, such as intent of the speaker, intensity of the expression, magnitude, and the likelihood of following action (following the logic of the Rabat Plan of Action). Nevertheless, speakers' role and the national context are factors which have been regularly – albeit not always consequently – discussed by the Court. The Court did not develop a coherent test to guide decisions in this respect. It may appear as if the Court refrained from creating clear categories in order to leave room for interpretation in future cases, and to maintain the case-by-case approach.⁸⁰

a. Speakers' role

When assessing the speakers' role, the Court found that politicians, teachers, or even famous footballers can be regarded as having a special duty or responsibility towards society. For example, in *Šimunić v. Croatia*, the court found that the Applicant, as a famous national football-player and a role-model for many football fans, should have been aware of the possible negative impact of his action of chanting a phrase used as a greeting by a totalitarian regime at a football match in front of the spectators to which the spectators replied, and he did so four times.

The speakers' role was addressed most explicitly in *Féret v. Belgium*⁸¹. Daniel Féret was chairman of the political party "Front National", editor in chief of the party's publications and a member of the Belgian House of Representatives, when leaflets and posters that were distributed by the Front National, led to complaints by individuals and associations for incitement of hatred, discrimination and violence. Féret's parliamentary immunity was waived at the request of the Public Prosecutor, and he was sentenced to community services and was disqualified from holding parliamentary offices for 10 years, for publicly inciting discrimination or hatred. The Court expressed that it was the "duty of politicians to refrain from using or advocating racial discrimination and recourse to words or attitudes which are

⁷⁸ *Id.*

⁷⁹ ECtHR, *Nix v. Germany*, Application no.: 35285/16, 5 April 2018.

⁸⁰ McGonagle, T (2013) The Council of Europe against online hate speech: Conundrums and challenges. IViR. Available at <https://rm.coe.int/16800c170f>, p. 10.

⁸¹ ECtHR, *Féret v. Belgium*, Application no.: 15615/07, 16 July 2009.

vexatious or humiliating because such behaviour risks fostering reactions among the public which are incompatible with a peaceful social climate and could erode confidence in democratic institutions".⁸²

In *Seurot v. France*,⁸³ the Court explicitly referred to the duties and responsibilities of the applicant in his capacity as a teacher - and found the case inadmissible on the basis of Article 17. Seurot was a history teacher whose article published in the school's newsletter contained insults towards North Africans.⁸⁴

However, in *Le Pen v. France*⁸⁵, the court did not refer to the political status of the applicant. Jean-Marie Le Pen was fined 10,000 euros for saying: "the day there are no longer 5 million but 25 million Muslims in France, they will be in charge". The case was found inadmissible because the statement presented the "Muslim community" as a whole in a disturbing light likely to give rise to feelings of rejection and hostility. The Court also held that the varying scale of the problems concerned required considerable latitude to be left to the State in assessing the need for interference with a person's freedom of expression.

In sum, the Court has employed the argument that persons of influence – politicians, party leaders, teachers or simply famous figures like a football player – owe a particular responsibility due to their enhanced influence on their followers. But the Court failed to give a definition or a test which could help to identify who could count as an influential figure on what conditions.

b. Context – the margin of appreciation

The Court often referred to the context, the social background of the statements.

Usually, this could be interpreted as applying the margin of appreciation by the Member States, relying on the assumption that the context is best known by the national courts (*Šimunić v. Croatia*, *Balsytė-Lideikienė v. Lithuania*, *Altıntaş v. Turkey*).⁸⁶

In the rather controversial case of *Perinçek v. Switzerland*,⁸⁷ the Court established the violation of Article 10 with reference to the context: applying a geographical, historical and time factor which - according to the Court - diminished the impact of the case. From the perspective of this study, the decision may be criticised because it gave way to statements which were made by a famous political figure, and were capable to raise ethnic hostility (even if internationally and not between majority and minority within one state). The international character of the case should be regarded as becoming less exceptional in the future, given the ubiquity of transborder media and information technology. The Court departed from its case law of applying Article 17 in the case of negation of genocide war crimes, and applied assessment – its reasons are set out below.

The Court found that the statements, which could have fuelled ethnic tensions in Turkey or in Armenia – did not have an inciting effect within Switzerland. Perinçek was the Chairman of the Turkish Workers' Party, and he made three separate public statements in Switzerland calling the Armenian genocide a

⁸² *Id.*; McGonagle citing *Féret v. Belgium* para. 77, in McGonagle's translation.

⁸³ ECtHR, *Seurot v. France*, Application no.: 57383/00, 18 May 2004.

⁸⁴ The Court added: "democratic citizenship education, which is essential to combat racism and xenophobia, implies the mobilization of responsible stakeholders, in particular teachers." Unofficial translation by Weber, A., *Manual on hate speech*, Council of Europe Publishing, Strasbourg, 2009. Available at http://icm.sk/subory/Manual_on_hate_speech.pdf.

⁸⁵ ECtHR, *Le Pen v. France*, Application no.: 18788/09, 7 May 2010.

⁸⁶ ECtHR, *Šimunić v. Croatia*, Application no.: 20373/17, 22 January 2019. ECtHR, *Balsytė-Lideikienė v. Lithuania*, Application no.: 72596/01, 4 November 2008. ECtHR, *Altıntaş v. Turkey*, Application no.: 50495/08, 10 March 2020.

⁸⁷ ECtHR, *Perinçek v. Switzerland*, Application No. 27510/08, 17 December 2013.

"lie". The Switzerland-Armenia Association brought a criminal complaint against him, relying on the Penal code's prohibition of denial of genocide and crimes against humanity. The court sentenced Perinçek to pay 3,000 Swiss francs, replaceable with 30 days' imprisonment, and 1,000 Swiss francs to the Switzerland-Armenia Association for its non-pecuniary damages.

Interestingly, the Court never balanced claims regarding the denial of Holocaust, but immediately rejected them based on Article 17, abuse of rights. However, in this judgment it merely held that "the denial of Holocaust can be particularly dangerous in countries that have experienced the Nazi horrors, which may demand special moral responsibility to outlaw such denial". But, it held, there was no direct link between Switzerland and the events happened in the Ottoman Empire in 1915-1917. The court would not think that "any hostility that exists towards the Armenian minority in Turkey is the product of [his] statements in Switzerland or that [his] criminal conviction in Switzerland protected that minority's rights in any real way or made it feel safer." The Court also considered that the lapse of time since this historical event made the speech less harmful, and that the need for such regulation is bound to recede with the passage of time. Also, the Court did not find the facts of the Armenian genocide as clearly proven as the Holocaust. Despite the several briefs amici curiae, and dissenting opinions, the majority accepted the said argumentation.

The court's argumentation to invoke geographical, historical and time factors would not be objectionable would it not relate to a crime where impact and intent are generally not subject to assessment. Denial of genocide and crimes against humanity would not normally require that the expressions violate public order, or directly threaten individual rights. Nevertheless, the Court found that the conviction neither amounted to a "pressing social need" nor "necessary in a democratic society."

The concurring opinion of Judge Raimondi and Sajó also pointed at the previous case-law of the Court in the context of Article 17, albeit maintaining the view that its application is inherently problematic because it leaves no opportunity to consider the freedom of expression aspects.

The Court interpreted the statements as apt to participate in a scholarly debate, and did not assess the fact that Perinçek was a political party leader, even though Perinçek declared that he was a follower of Talaat Pasha (para. 53), and that he would never accept and never change his position, even if a neutral panel should one day conclude that the Armenian genocide did indeed take place – statements which were interpreted by the Swiss court (and which clearly show that his opinion lacked the contemplative openness that is the character of a scholarly debate).

The Court evaluated positively that he had never before been prosecuted or convicted for hate speech, ignoring the fact that the official Turkish position is not far from the impugned statements in an international conflict between neighbouring states.

2.3.4. European Court of Human Rights case law on hate crimes

The numerous state legal obligations to tackle hate crimes that can be derived from the ECHR and the related case-law deserve special attention.

As mentioned earlier, the ECHR laid down certain important principles with regard to the investigations of crimes in general. Article 2 ECHR on the right to life and Article 3 on the prohibition of torture and inhuman or degrading treatment are the primarily relevant provisions, whereas Article 8 has also been invoked in hate crimes cases. As it can be derived from the ECtHR case-law, rights enshrined in these articles trigger both negative but also positive obligations on states, i.e. they must not only refrain from

interference, but they have the “obligation to do something”.⁸⁸ Positive obligations have both a substantive and a procedural prong. Positive obligations can be derived from the actual wording of the respective provisions. For example, Article 2 of the ECHR expressly calls states to protect the right to life. Positive state obligations can be derived from the substantive provision if they are read in conjunction with Article 1 of the ECHR to have everyone's rights and freedoms within the contracting states' jurisdiction secured. This reading implies that “States Parties are answerable for any violation of the protected rights and freedoms of anyone within their ‘jurisdiction’ – or competence – at the time of the violation”.⁸⁹

Depending on the requirement of what the state is exactly required to do procedural and substantive state obligations can be distinguished. Substantive obligations concern the introduction of measures for the full enjoyment of the rights guaranteed, whereas procedural obligations concern national procedures that ensure the right to efficient investigation and to have sufficient remedies for rights violations awarded. These rights read in conjunction with Article 14 of the ECHR led to a case-law in the past one and a half decades, which is highest relevance to the tackling of hate crimes. The following state obligations can be derived from the ECtHR's jurisprudence: (i) to insert penalty enhancements for hate crimes in national criminal codes; (ii) to show special vigilance to explore and unmask racist motives behind crimes; (iii) to explore bias motives behind crimes committed by private parties; (iv) to unmask other bias motives behind crimes; (v) to acknowledge mixed motives and (vi) to protect those who can be associated with someone having a protected characteristic.

a. Special provisions or penalty enhancements for hate crimes in the national criminal codes

The Strasbourg case-law lays down obligations for both the legislature and also those who apply the law including the investigative authorities and the courts. As to the former aspect, the state has positive obligations to protect against Article 2 and Article 3 ECHR violations. It is established case-law that the absence of any direct state responsibility, i.e. even if the state or the state agent is not the violator of fundamental rights, does not exclude liability under the Convention.⁹⁰ States must take all necessary measures to safeguard the lives of those within their jurisdiction. This also entails the duty to adopt criminal law provisions in order to deter the commission of offences and also the obligation to ensure that an efficient justice system ensures the criminal accountability of the perpetrators. Hate crimes require special regulation. Albeit in theory courts could attach greater consequences to bias crimes even without specific corresponding legal provisions – according to the case-law lawmakers preferably insert special provisions or penalty enhancements for hate crimes into their criminal codes. This invitation be derived from *Angelova and Iliev*.⁹¹ The case concerned Angel Dimitrov Iliev, a man of Roma origin who was lethally attacked due to his ethnicity by several teenagers. The ECtHR assessed whether the Bulgarian legal order provided adequate protection against racially motivated offences. In this regard, it stated that the national criminal code “did not separately criminalise racially motivated

⁸⁸ Akandji-Kombe, J-F., ‘Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights’, *Human rights handbooks*, No. 7, Council of Europe, Strasbourg, 2007, available at [https://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-07\(2007\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-07(2007).pdf).

⁸⁹ ECtHR, *Assanidze v. Georgia*, Application no.: 71503/01, 8 April 2004.

⁹⁰ This typically is to be decided in the merits phase. See ECtHR, *Loizidou v. Turkey* (Preliminary Objections), Application no. 15318/89, 23 March 1995, paras. 61 and 64. See also ECtHR, *Assanidze v. Georgia*, Application no. 71503/01, 8 April 2004, paras. 144, 146 and 147.

⁹¹ ECtHR, *Angelova and Iliev v. Bulgaria*, Application no.: 55523/00, 26 July 2007.

murder or serious bodily injury [...] nor did it contain explicit penalty-enhancing provisions relating to such offences if they were motivated by racism.”⁹² In the given case, instead of hate crimes the suspects were charged with hooliganism and hooliganism of exceptional cynicism and impudence. Let us emphasize that the ECtHR does not impose unequivocal obligations on states to have special provisions on hate crimes, instead it considers that other means may also be employed to enhance punishment of perpetrators who have racist motives. In this regard, EU legal rules are clearer: Article 4 of the EU framework decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia obliges Member States to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or that such motivation is taken into consideration by the judiciary when imposing penalties.

b. Efficient investigations and special vigilance to explore bias motives behind crimes

As the ECtHR stated in *Alex Menson and Others v. the United Kingdom*,⁹³ 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 racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.”⁹⁴ The state obligation however is not absolute. In line with this, the application was declared inadmissible, since all four perpetrators who attacked and set the victim on fire, for no apparent reason other than his skin color, were convicted and received heavy prison sentences. Additional obligations to explore bias motives have not yet been mentioned in this judgment.

In the lead case *Nachova and Others v. Bulgaria*⁹⁵ the ECtHR applied a higher standard, emphasized the positive state obligations to conduct efficient investigations and the obligation to fully explore the alleged bias motivation behind manslaughter.⁹⁶ The two victims of Roma origin were fugitives from the army’s Construction Force. They were arrested for being repeatedly absent without leave and they were sentenced to imprisonment. They fled to the grandmother of one of the victims. The officers chasing them were carrying handguns and rifles, the victims were not armed. The victims noticed the officers’ arrival to the grandmother’s home, and tried to escape. After a number of verbal warnings and shots into the air, the victims were shot by an automatic rifle and died in the ambulance. Racist words were uttered by one of the officers at one of the witnesses. The case reached both the Chamber and the Grand Chamber of the ECtHR. The Chamber emphasized that state authorities are obliged to take all reasonable steps to unmask any racist motive of a crime, involving the use of force by law enforcement. Despite evidence pointing to racist verbal abuse by the police, authorities did not investigate the hate motive. “Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific

⁹² *Id.* at para. 104.

⁹³ ECtHR, *Alex Menson and Others v. the United Kingdom* (inadmissibility decision), Application no 47916/99, 6 May 2003.

⁹⁴ *Id.*

⁹⁵ ECtHR, *Nachova and Others v. Bulgaria*, Application nos.: 43577/98 and 43579/98, 26 February 2004; ECtHR (Grand Chamber), *Nachova and Others v. Bulgaria*, Application nos.: 43577/98 and 43579/98, 6 July 2005.

⁹⁶ On the extent of state obligations see ECtHR, *Bekos and Koutropoulos v. Greece*, Application no.: 15250/02, 13 December 2005; ECtHR, *Ognyanova and Choban v. Bulgaria*, Application no.: 46317/99, 23 February 2006. Albeit the ECtHR found that Bulgaria had violated the obligation under Article 2 ECHR to conduct an effective investigation into the Roma Applicant’s death, who fell from a third floor window at the Kazanluk police station while in custody, it was not convinced that the authorities had enough information to trigger an investigation into possible racist motivation.

nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention."⁹⁷

The Grand Chamber assumed that the obligation on states to secure the enjoyment of the rights under the Convention without discrimination – just like Articles 2 and 3 of the ECHR also – entails a right to effective investigations into racist motives behind crimes. The Grand Chamber confirmed that the state failed to comply with its obligations under Article 2 of the ECHR, also because they failed to apply a prompt and effective response in investigating the use of lethal force, which may undermine the public confidence in the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

In *Stoica v. Romania*⁹⁸ the ECtHR emphasized the long-established principle that the Convention requires that there should be an effective official investigation with regard to Article 2 or Article 3 ECHR violations. Effective means that the investigation “should be capable of leading to the identification and punishment of those responsible [otherwise] it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.”⁹⁹ The subject of the debate was a conflict between a group of villagers of Roma origin and the Romanian authorities. The Applicant contended that the village’s deputy mayor asked the police officers and the public guards to teach the Roma “a lesson”. A police officer was beating and kicking the Roma victim on his head, even though the victim told him that he had just undergone head surgery and the assault could endanger his life. The beatings continued nevertheless until the Applicant lost consciousness. The authorities left without calling the ambulance. In contrast, the Government contended that customers of the bar provoked the authorities and became aggressive. The police officers surrounded the deputy mayor so as to protect him, but did not use any force. Quite to the contrary, the locals attacked the deputy mayor’s car with bats. The prosecution services terminated the case on the ground that no violence had been inflicted on persons of Roma origin. The ECtHR took into consideration the fact that the locals were not asked to testify during the investigation, which casts doubt on the vigilance of the police investigations. What is more, the Military Prosecutor discarded the statements of the locals as being biased, and ignored the remarks referring to potential racist motives. The reasons beyond terminating the case were solely based on the statements of the police officers. As a result, the ECtHR concluded that the authorities failed to conduct a proper investigation concerning the Applicant’s alleged ill-treatment. In *Stoica*, the ECtHR reiterated – beyond the state obligation to identify bias motives,¹⁰⁰ that investigation authorities themselves must not be biased, and have to conduct the investigation irrespectively of the group-belonging of victims and witnesses.¹⁰¹

In *Fedorchenko and Lozenko v. Ukraine*,¹⁰² five Roma persons, including three children, died in an arson attack after the perpetrators – among others allegedly a police major – deliberately set their house on fire and then barred the door. The ECtHR held that “despite the heinous nature of the incident, in which small children were burned alive, it appears that State authorities limited the investigation to some basic procedural steps.”⁴⁴ None of the at least six suspects have been found, and there was no evidence

⁹⁷ See para. 158 of the Chamber judgment.

⁹⁸ ECtHR, *Stoica v. Romania*, Application no.: 42722/02, 4 March 2008.

⁹⁹ *Id.* at para. 67.

¹⁰⁰ *Stoica*, at para. 119.

¹⁰¹ *Id.* at paras. 72-76, 121-124.

¹⁰² ECtHR, *Fedorchenko and Lozenko v. Ukraine*, Application no. 387/03, 20 September 2012.

of procedural steps taken to find them. The ECtHR found that the investigation had not been effective, and it violated the procedural limb of Article 2 of the ECHR. The failure to establish whether there were racist motives behind the attack also resulted in a violation of Article 14 of the ECHR.

In *Ciorcan and Others v. Romania*¹⁰³ the Applicants were thirty-seven Romanian nationals of Roma origin. Two of the Applicants had a quarrel with a policeman, and the latter filed a criminal complaint. In the framework of the investigation the chief police officer gave the order for several policepersons to summon the mentioned Applicants before the prosecutor. Several hundreds of people blocked the way armed with bats, axes and scythes, so the police chief also requested the help of officers from the local special forces police.

The Applicants and the government presented the facts differently. According to the Applicants, women and children – including the Applicants themselves – started gathering in the street to see what happened. In order to disperse the crowd, the special forces officers threw tear gas grenades among them, which resulted in panic, pushing and people running around. At that point the police officers shot into the crowd, and left. According to the government, the locals started gathering and a fight broke out between them, about a hundred locals attacked the officers with bats, empty bottles and stones, and so they were forced to use their weapons. The special forces officers submitted that they initially used tear gas sprays, but the crowd just got more aggressive throwing stones and bricks at them. Then the officers shot into the air, but they were attacked, at which point the rubber bullets were fired into the crowd. During the incident six state agents suffered injuries, and more than twenty-five Roma persons were reportedly injured and/or shot. Some of them had medical certificates confirming their injuries.

The ECtHR was not satisfied by the explanations to justify the request for the support of the special forces unit and their intervention. Also the state agents could not claim that they were taken by surprise, since as it appears from the file they were well aware that it was usual in the particular neighbourhoods to gather in the street out of curiosity. The operation was not urgent, so nothing justified the absence of proper preparation on the side of state agents. The state agents also made contradictory statements regarding the reasons justifying the use of arms.

As to the procedural aspects, the ECtHR reminded that state authorities “have an additional duty to take all reasonable steps to unmask any racist motives and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Treating racially-induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. Failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention”.

In the present case a violation of Articles 2 and 3 of the ECHR due to applicants’ ill-treatment by state agents and the subsequent failure to conduct an effective investigation was the determined. The ECtHR also found a violation of Article 14 of the ECHR in conjunction with the above-mentioned substantive Convention provision, on account of the state authorities’ failure to take all possible steps to investigate whether or not discrimination may have been the motive behind the events.

¹⁰³ ECtHR, *Ciorcan and Others v. Romania*, Applications nos. 29414/09 and 44841/09, 27 January 2015.

In the *M.F. v. Hungary* case¹⁰⁴ the Applicant of Roma origin contended that he had been ill-treated by the police and that no effective investigation was conducted in relation to the complaint. The ECtHR found a violation of Article 3 of the ECHR, since the authorities did not provide any plausible explanation for the origin of the Applicant's injuries. The ECtHR also found that the authorities failed to investigate possible racist motives and they did not carry out any examination of the bias behind the ill-treatment. The ECtHR therefore found a violation of Article 14 together with Article 3 of the ECHR in its procedural aspect, too.

c. Special vigilance to explore bias motives behind crimes committed by private parties

In *Šečić v. Croatia*¹⁰⁵, the investigation authorities had information about the Skinhead identity of the suspects. The attackers of Mr. Šečić who was collecting scrap metal at the time of the crime, also shouted racist slurs. Nevertheless, the state authorities did not explore the potentially racial motivation behind the crime. According to the judgment, treating bias crimes as ordinary base crimes has detrimental effects from a human rights perspective, and at the same time it amounts to a violation of the ECHR. When investigating violent incidents, national authorities have the duty to make genuine efforts and take all necessary and reasonable steps, or, in short, have to show special vigilance to unmask any racist motive. The fact that hate crimes are particularly destructive from a fundamental rights viewpoint must be taken into account. Should the state fail to ensure this, as it happened in this case, it will be liable for a violation of Article 14 of the ECHR with the procedural aspect of Article 3 of the ECHR.

The above referenced *Angelova and Iliev* case is relevant also with regard to the state obligation to conduct efficient investigations in case of crimes against life by including exploration of the alleged bias motive behind killings. In *Angelova*, the preliminary phase of the proceeding lasted for more than 11 years, which resulted in the expiration of the statute of limitations in respect of the majority of the suspects. Even though suspects were identified at an early stage of the proceeding, nobody was brought before trial. Despite the suspicion on racism behind the crime (the suspects admitted during police interviews that they hated "Blacks, Gypsies, Turks, all foreigners"¹⁰⁶), the bias motive was not investigated.

In *R.B. v. Hungary*¹⁰⁷ the ECtHR explored the anti-Roma rally organised by several right-wing paramilitary groups in Gyöngyöspata. During the incident, several men yelled racist slurs to the Applicant, who was in her garden with her child and some friends, and they threatened her with an axe. Albeit the Applicant filed a criminal complaint, the ensuing investigations were discontinued. The crime did not reach the threshold necessary for the establishment of an Article 3 ECHR violation, but since the insults and threats of the Applicant were directed against her due to her Roma origin, this conduct necessarily affected her private life, in the sense of ethnic identity, within the meaning of Article 8 of the ECHR. The investigation authorities failed to unmask the racist motive behind the crime, despite the fact that the police possessed strong bias indicators, such as the fact that the insults were committed by members of a racist radical group against a member of the Roma community. The ECtHR also pointed out that

¹⁰⁴ ECtHR, *M.F. v. Hungary*, Application no. 45855/12, 31 October 2017.

¹⁰⁵ ECtHR, *Šečić v. Croatia*, Application no. 40116/02, 31 May 2007.

¹⁰⁶ *Id.* at para. 13.

¹⁰⁷ ECtHR, *R.B. v. Hungary*, Application no. 64602/12, 12 April 2016.

the national legal system failed to implement criminal law mechanisms correctly in the given case so as to provide for avenues for having harassment committed out of bias recognised as a hate crime.

In the case of *Király and Dömötör v. Hungary*,¹⁰⁸ the ECtHR had to decide on whether the rights of the Applicants who are of Roma origin have been violated when the police failed to protect them from racial abuse during a right wing radical demonstration, and to thoroughly investigate the matter. The ECtHR found the investigations into the incident limited. The context of the abuse, including racist speeches made during the demonstration were not considered. "The cumulative effect of those shortcomings in the investigations, especially the lack of a comprehensive law enforcement approach into the events, was that an openly racist demonstration, with sporadic acts of violence [...] remained virtually without legal consequences and the applicants were not provided with the required protection of their right to psychological integrity. They could not benefit of the implementation of a legal framework affording effective protection against an openly anti-Roma demonstration, the aim of which was no less than the organised intimidation of the Roma community, including the applicants, by means of a paramilitary parade, verbal threats and speeches advocating a policy of racial segregation. The Court is concerned that the general public might have perceived such practice as legitimisation and/or tolerance of such events by the State."¹⁰⁹ Therefore the ECtHR again established the violation of Article 8 of the ECHR on the right to respect for private and family life.

d. State obligation to unmask other than racial or ethnic bias behind crimes

Special vigilance to unmask bias behind criminality is not only true for crimes committed out of racial or ethnic hatred, but also for those committed out of religious intolerance, prejudice against persons with disabilities, or bias in relation to political views.

In the case of *Milanović v. Serbia*¹¹⁰ the victim, Mr. Života Milanović was a leader of the Vaishnava Hindu, otherwise known as the Hare Krishna religious community. Throughout years he received anonymous telephone threats and four times he was physically assaulted, which included a case of stabbing, and a case of scratching a crucifix on his head.

On each occasion, the Applicant reported the attacks to the police, and informed them that the attackers probably belonged to the extremist organisations such as Srpski vitezovi, and provided the police with description of one of the perpetrators. The police made attempts to identify the perpetrators, but could not obtain any useful information. At the same time, they engaged in victim blaming advising Mr. Milanović not to go out in the evenings, since this could provoke others, referred to his "strange appearance" and referenced his religion as a "religious sect".

The Court held that the police failed to take the victim's case seriously, even though there was a clear bias indicator, i.e. he was always targeted around religious holidays. The Court found unanimously that there had been a violation of Article 3 of the ECHR, since the Applicant's injuries were sufficiently serious to meet the threshold of ill-treatment. In conjunction with the procedural aspect of Article 3 of the ECHR a violation of Article 14 of the ECHR has also been determined for a failure to comply with the state obligation to unmask anti-religious motivations. It was unacceptable that many years after the

¹⁰⁸ ECtHR, *Király and Dömötör v. Hungary*, Application no. 10851/13, 17 January 2017.

¹⁰⁹ *Id.* at. para. 80.

¹¹⁰ ECtHR, *Milanović v. Serbia*, Application no. 44614/07, 14 December 2010.

attacks, the state failed to identify and prosecute the perpetrators; that the police were biased; and that authorities did not go much beyond pro forma investigation. The Court made clear that – similarly to racially motivated attacks – in crimes involving bias on the grounds of religion, state authorities will have a duty to unmask religious motives.

In the case of *Đorđević v. Croatia*¹¹¹ a Serbian mother and her disabled son were subjected to persistent harassment by pupils from a school in their neighbourhood over a period of five years. The incidents escalated from verbal abuse and other forms of anti-social behaviour, such as making noise, and drawing insulting messages on the pavement, to physical attacks against the boy, spitting at him and burning his hands with cigarettes. The pupils ruined the Applicants' balcony, they urinated in front of the Applicants' door. Albeit the mother reported the harassment to the social services, the police, the ombudsperson and the school authorities, the harassment continued. The ECtHR found that the authorities failed to take sufficient steps to explore the extent of the problem and to prevent future abuse, which was real and foreseeable. This resulted in a violation of Article 3 of the ECHR in respect of the boy with disability and a violation of Article 8 of the ECHR in respect of the mother.

*Virabyan v. Armenia*¹¹² concerned the allegation of torture during police custody, which was motivated by the Applicant's political opinion. Relying on its established case law with regard to other biases, the ECtHR held that state authorities must "take all reasonable steps to unmask any political motive and to establish whether or not intolerance towards a dissenting political opinion may have played a role in the events".¹¹³

In the case of *Begheluri and Others v. Georgia*¹¹⁴ Applicants, with one exception, were Jehovah's Witnesses. They suffered harassment at two events.

One meeting held with the participation of 700 Jehovah's Witnesses, was disrupted by the police and locals, who inflicted physical and verbal assaults on the participants. The second instance occurred in the courtroom at a trial of two Jehovah's Witnesses, when a large group of Orthodox believers attacked some of the Applicants, journalists and observers with wooden crosses as weapons.

The state authorities failed to conduct prompt and efficient investigations; they failed to question victims and alleged perpetrators; medical examinations were not ordered, and in some cases no investigation whatsoever was conducted. Albeit the Applicants explicitly referred in their reports to religious bias on the side of their attackers, no efforts were made to discover this motive. This made the ECtHR conclude that "there was a systematic practice on the part of the Georgian authorities of refusing to adequately and effectively investigate acts of violence against Jehovah's Witnesses. Not a single investigative body or institution, including the courts, proved to be effective and accessible to the applicants. The Court thus finds a violation of Article 3 of the Convention under its procedural head with respect to the applicants concerned."¹¹⁵

The Applicants of *Identoba and Others v. Georgia*¹¹⁶ were an NGO and several individuals who participated at a peaceful demonstration on the International Day against Homophobia in Tbilisi. Counter demonstrators – members of two religious groups – uttered homophobic slogans, were ripping LGBTI+ flags and assaulted the Applicants. Albeit the police were informed about possible

¹¹¹ ECtHR, *Đorđević v. Croatia*, Application no. 41526/10, 24 July 2012.

¹¹² ECtHR, *Virabyan v. Armenia*, Application no. 40094/05, 2 October 2012.

¹¹³ *Id.* at para. 218.

¹¹⁴ ECtHR, *Begheluri and Others v. Georgia*, Application no. 28490/02, 7 October 2014.

¹¹⁵ *Id.* at para. 144.

¹¹⁶ ECtHR, *Identoba and Others v. Georgia*, Application no. 73235/12, 12 May 2015.

violence, instead of focusing on restraining the violent counter-demonstrators, they arrested the peaceful demonstrators, the victims that they were supposed to protect, allegedly in their own interest, so that they could be evacuated.

Despite the existence of a number of bias indicators, the state authorities limited their investigation considerably and assessed only two specific injuries of two victims, but even these procedures resulted in minor administrative fines. The ECtHR held that sexual orientation and gender identity are protected characteristics, and bias crimes against the LGBTI+ community amounts to an aggravating circumstance, therefore the hate behind the crime should have been unmasked even according to national law. The obviously hostile attitude of the perpetrators and the homophobic expressions should have triggered an investigation into the bias motive. The Respondent violated its positive obligations under Article 3 of the ECHR by failing to protect demonstrators from homophobic violence and also by not launching an effective investigation. A violation of Article 14 of the ECHR was also determined in conjunction with Article 3.¹¹⁷

e. Mixed motives

In *Balázs v. Hungary*¹¹⁸ the ECtHR had to address the question again, whether the authorities conducted efficient investigations with regard to the bias motive behind the crime.

The Applicant and his girlfriend were harassed by the perpetrators in front of a night club, uttering racist slurs referring to the Applicant's visible Roma ethnicity. The harassment turned into a fight. The next day one of the perpetrators boasted about the crime on social media, uttering again racist statements. Right after the assault, the authorities were informed, and the victims and the perpetrator using physical violence were all taken to the police station. Albeit both the Applicant and his girlfriend had visible injuries, only the girlfriend was medically examined. The Applicant had to go to his doctor the next day in order to have an official confirmation of his injuries. An investigation was started, but for hooliganism instead of hate crimes. The Applicant lodged a criminal report with the prosecutor's office for a hate crime, but the investigations for hate crimes were halted after some time, since the authorities could not determine the bias motive. Co-perpetrators were not heard. According to the prosecution office, racism might have been the motivation behind the crime, but they could not establish this fact beyond reasonable doubt, therefore the case for hate crime was dropped. The perpetrator was sentenced for hooliganism.

The ECtHR noted that the prosecuting authorities' insistence on identifying an *exclusively* racist motive, their unwillingness to link social media posts to the crime, as well as the failure to identify the racist motive, despite the existence of clear bias indicators, are irreconcilable with the state obligation to conduct vigorous investigations into the case that could potentially have been qualified as hate crime, which resulted in a violation of Article 14 read in conjunction with Article 3 of the ECHR.¹¹⁹

¹¹⁷ See also the very similar case ECtHR, *M.C. and A.C. v. Romania*, Application no. 12060/12, 12 July 2016.

¹¹⁸ ECtHR, *Balázs v. Hungary*, Application no. 15529/12, 20 October 2015.

¹¹⁹ *Id.* at 75-76.

f. Protection by association

In case *Škorjanec v. Croatia*¹²⁰ the ECtHR held that a victim may suffer from bias crime by association, i.e. even in the lack of a protected characteristic, if they can be associated with someone who is protected by the criminal code's hate crime provision.

Two men abused the Applicant's partner due to his Roma origin, attacked and chased both the Applicant and her partner. The perpetrators uttered racist slurs. Albeit the Applicant is not of Roma origin – as reported by her partner – the attackers referred to his Roma origin also when attacking the Applicant.

The perpetrators were convicted for hate crimes against the Applicant's partner. However, the Applicant herself was not considered to be the victim of a hate crime, despite her complaint, on the ground that the authorities could not find an indication that the perpetrators attacked her because of bias against the Roma, as she is not of Roma origin. The Applicant believed that the authorities failed to give an effective procedural response to the racially motivated act she suffered.

According to the judgment, a person may be a victim of a violent hate crime not only when attacked because he or she belongs to a certain group, but also when attacked due to an actual or presumed association with another person, who has or is perceived to have a protected characteristic. The same threshold for investigation to unmask bias motives applies, since this obligation "concerns not only acts of violence based on a victim's actual or perceived personal status or 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 characteristic."¹²¹

Since in this case the national authorities failed to take the necessary care in identifying the bias behind the violence against the Applicant, they violated Article 3 of the ECHR under its procedural aspect in conjunction with Article 14 of the ECHR.

2.4. European Union

2.4.1. Primary sources of EU law

The European Union is based on a set of values enshrined in **Article 2 of the TEU** which MSs undertook to respect and promote (see Articles 2 and 3(1) of the TEU). These are human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. The Lisbon Treaty's point of departure is the presumption that these values are common to the MSs, where pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.¹²²

According to **Article 10 of the Treaty on the Functioning of the European Union** (TFEU) when defining and implementing its policies and activities, the EU must aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. **Article 19 of the**

¹²⁰ ECtHR, *Škorjanec v. Croatia*, Application no. 25536/14, 26 March 2017.

¹²¹ *Id.* at para. 56.

¹²² The presumption is increasingly being questioned. See European Commission Reasoned Proposal in Accordance with Article 7(1) of the Treaty 1162 on European Union Regarding the Rule of Law in Poland – Proposal for a Council Decision on 1163 the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of 1164 Law COM(2017)835 final; European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

TFEU authorises the EU “to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. **Article 67(3) of the TFEU** states that the EU must “ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters”. In order to achieve this goal, the EU may adopt measures to approximate criminal laws.

Historically speaking, albeit the EU’s predecessors placed an emphasis on economic integration, early on stakeholders faced the problem arising out of the lack of a human rights protection mechanism.¹²³ Apart from the substantive problems stemming from the lack of the human rights paradigm, procedural problems affecting the body of the *acquis communautaire* also arose, i.e. questioning the supremacy doctrine with a view of an insufficient fundamental rights protection mechanism on the side of the European Communities.¹²⁴ From the early 1970s the European Court of Justice stated that the European Community and the European Court of Justice (ECJ) protect human rights as “general principles of law”, and the Community court extended the protection to those rights which arise from the “constitutional traditions common to the Member States.”¹²⁵ When defining these common constitutional traditions, the ECJ drew inspiration from the international conventions signed by all the MSs, and regarded the ECHR as the main common source. The ECJ acknowledged the rights laid down in the ECHR from case to case and the same method has been applied with regard to limitations, too.¹²⁶ Once fundamental rights had entered black letter law, and got incorporated into the Preamble of the Single European Act, Article F(2) of the Maastricht Treaty, later Article 6 (1)-(2) of the Treaty of Amsterdam, and currently Article 6 TEU and the Charter of Fundamental Rights, the ECHR continued to play an important role. Most importantly all substantive ECHR provisions have been incorporated into the Charter, and according to Article 52(3) as far as the Charter contains rights which correspond to rights enshrined in the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. The EU may grant a higher level of protection to the said rights.

The guidelines annexed to the Warsaw Declaration of 2005 urge a “greater complementarity between EU and CoE legal texts. The European Union shall strive to transpose those aspects of CoE Conventions within its competence into European Union Law”.¹²⁷

The Lisbon Treaty in **Article 6(3) of the TEU** states that “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the MSs, shall constitute general principles of the

¹²³ ECJ, Case 29/69 *Stauder v Stadt Ulm* [1969] ECR 419.

¹²⁴ See German Federal Constitutional Court (Bundesverfassungsgericht), *Solange I* BVerfGE 37, 271 (1974) refined by *Solange II* BVerfGE 73, 339 (1986) and subsequent decisions by numerous national constitutional courts, such as for example Decision of the Hungarian Constitutional Court (Alkotmánybíróság), 17/2004 (V. 25.) AB decision, on the unconstitutionality of a national law implementing EU legislation on agricultural surplus stocks, or more to the point, the challenges against the European Arrest Warrant, such as in the case of decision of the Polish Constitutional Tribunal (Trybunał Konstytucyjny), P 1/05 of 27 April 2005.

¹²⁵ ECJ, Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

¹²⁶ ECJ, Case 4/73 *Nold v Commission* [1974] ECR 491.; Case 36/75 *Rutili v Ministre de l'intérieur* [1975] ECR 1219; Kirk case (Case 63/83 *Regina v Kent Kirk* [1984] ECR 2689; Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651.); Case 288/89 *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media* [1991] ECR I-4007.

¹²⁷ Council of Europe, Ministers’ Deputies CM Documents, Action Plan, CM(2005)80 final 17 May 2005, Appendix I, Guideline 5.

Union's law." Another connection point is **Article 6(2) of the TEU** obliging the EU to accede to the ECHR, and accordingly follow the obligations flowing from the Convention and the related case-law.¹²⁸

The **Charter of Fundamental Rights of the European Union** expressly protects human dignity in Article 1, and lays down the non-discrimination principle in Article 21. The Charter has an open list of protected grounds, but it expressly mentions sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age and sexual orientation, and nationality. Certain protected grounds are singled out in other Charter provisions, too, such as Article 22 on the respect for cultural, religious and linguistic diversity; Article 23 on the equality between women and men; Article 24 on the rights of the child; Article 25 on the rights of the elderly; and Article 26 on the integration of persons with disabilities.

The positive state obligations derived from the various rights enshrined in the Charter, from which the right to life enshrined in Article 2, the prohibition of torture and inhuman or degrading treatment or punishment in Article 4, and the respect for private and family life incorporated into Article 7 stand out, are of special relevance for the substantive and procedural aspects of the fight against hate crimes. In this relation the case-law of the ECtHR, as discussed in Chapter 2.3.6., is instructive – with special regard to the fact that the meaning and scope of those rights mentioned both in the ECHR and the Charter, shall be the same – unless they are interpreted more broadly – as those laid down by the ECHR (see Article 52(3) of the Charter of Fundamental Rights).

2.4.2. Secondary sources of EU law

Moving beyond primary sources of EU law to more specific legislation on our topic, the European Union stepped up long ago against discrimination, albeit several of these documents primarily focus on the employment and related sectors.¹²⁹ The EU adopted its first law against hate speech already back in 1996, through its Joint action to combat racism and xenophobia,¹³⁰ which was then replaced by **Framework Decision 2008/913/JHA** of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

This document in Article 4 calls upon MSs to take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such bias is taken into account by the courts when imposing penalties. Even though for the purposes of the Framework Decision "hatred" means hatred based on race, colour, religion, descent or national or ethnic origin, MSs may of course adopt laws extending the scope of protection to other groups as well.

While this document is clearly a huge step towards eliminating intolerance and discrimination, it is also criticised for being overly restrictive with regard to freedom of expression. One critical observation is that it focuses specifically on criminal law, disregarding other instruments and measures that could be

¹²⁸ The process temporarily came to a halt after the ECtHR expressed its worries about the agreed details of the EU's accession to the ECHR. See ECtHR, Opinion 2/13, ECLI:EU:C:2014:2454.

¹²⁹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and woman in the access to and supply of goods and services; Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation - Recast and Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

¹³⁰ Joint action/96/443/JHA of 15 July 1996.

equally, or even more effective without reverting to criminalisation. Further, its definition of hate speech is claimed not to be in line with the ICCPR's Articles 19 and 20(2), as the latter orders the prohibition of incitement to *violence, discrimination and hostility*, whereas the Framework Decision prescribes the prohibition of incitement to *hatred*. According to the NGO Article 19,¹³¹ hatred is not in itself a proscribed outcome, and not an imminent and likely risk of a manifested action but an emotional state or opinion – therefore the Framework Decision's standard does not meet the pressing social need.¹³²

The EU Fundamental Rights Agency adopted an action plan with the aim to implement the framework decision more efficiently.¹³³ The document among others encouraged EU MSs to review that in whether in case of bias motivated offences, the police, prosecution services and courts acknowledge and pay proper attention to the discriminatory nature of the crime. It formulates a number of recommendations concerning awareness raising and data collection. In light of the FRA's action plan, the Council of the European Union called upon MSs to fully transpose the Framework Decision; consider good practices from other MSs with regard to extending within their criminal legislation the scope of punishable hate crimes and the inclusion of other bias motivations; ensure prompt and effective investigation and prosecution of hate crimes unmasking bias motives; facilitate the reporting of hate crimes; collect and publish comprehensive and comparable hate crime data. It also invites MSs that preventive measures are introduced in education, such as Holocaust remembrance, and that the Additional Protocol to the CoE Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems is ratified by all MSs.¹³⁴

The EU Commission published its first Implementation Report¹³⁵ on the Framework Decision in 2014. It pointed to a number of transposition gaps in several MSs, including on incitement to racist and xenophobic violence and hatred; and the racist and xenophobic motivation of crimes. Since then, the Commission conducted bilateral talk with MSs to ensure the full and correct legal transposition of the law.¹³⁶ The Implementation Report introduces a definitional and conceptional clarity distinguishing between hate speech as enshrined in Article 1 in the Framework Decision¹³⁷ offences, and hate crimes as mentioned in Article 4.¹³⁸

The Implementation Report emphasizes the need for practical tools and skills to be established so that investigation and prosecution are efficient. Authorities must have sufficient knowledge of relevant legislation and clear guidelines.

¹³¹ Available at <https://www.article19.org/>.

¹³² It should be noted that "hatred" for the purposes of Article 20(2) of the ICCPR has a different meaning than "hatred" in the context of "hate crimes" where the term is used to denote a bias motivation. See more in Article 19 (2016) European Commission's Code of Conduct for Countering Illegal Hate Speech Online and the Framework Decision. Available at <https://www.article19.org/data/files/medialibrary/38430/EU-Code-of-conduct-analysis-FINAL.pdf>.

¹³³ European Union Fundamental Rights Agency (FRA) Opinion – 02/2013, Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime, 15 October 2013, available at http://fra.europa.eu/sites/default/files/fra-opinion-2-2013-framework-decision-racism-xenophobia_en.pdf.

¹³⁴ Council conclusions on combating hate crime in the European Union – Justice and Home Affairs Council meeting, Brüssel, 2013. December 5–6., available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/139949.pdf.

¹³⁵ Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, COM(2014)27 final.

¹³⁶ Commission Staff Working Document, Countering racism and xenophobia in the EU: fostering a society where pluralism, tolerance and non-discrimination prevail, Brussels, 15.3.2019 SWD(2019) 110 final, 4.

¹³⁷ Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, COM(2014)27 final, 3-6.

¹³⁸ *Id.* at 6-7.

With regard to online hate, the Implementation report underlines the special demands on law enforcement and judicial authorities in terms of expertise, resources and the need for cross-border cooperation. It also highlights the need for reliable, comparable and systematically collected data, which can contribute to a more effective implementation of the Framework Decision.

Acknowledging the serious issue of underreporting, the Implementation Report urges authorities to always register crimes, as well as their case history and calls for a speedy implementation of the Victims' Directive discussed *infra*.

The 2015 establishment of a High Level Group on non-discrimination, equality and diversity, and the 2016 establishment of a High Level Group on combating racism, xenophobia and other forms of intolerance provide a platform for discussion about and contribute to the prevention of prejudices and biases against certain minorities.

In 2018 the latter High Level Group issued an important Guidance Note on the practical application of the Framework Decision so that MSs have a common understanding of the provisions, and with a view to the effective implementation of the law.¹³⁹ Upon the invitation of the High Level Group the FRA leads a Working Group on hate crime recording, data collection and reporting (2019-2021).¹⁴⁰

To tackle hate speech in the media, already the **Television Without Frontier Directive** 89/552/EEC required MSs to prohibit incitement to hatred in television programmes on the basis of race, sex, religion or ethnicity (Article 22), and this rule was retained in all subsequent amendments of the Directive, including the Audiovisual Media Services Directive.

Finally, **Directive 2012/29/EU** of the European Parliament and the Council on establishing minimum standards on the rights, support and protection of victims of crime should be addressed.¹⁴¹ In Article 22 it obliges MSs to ensure that victims' specific protection needs are identified, and that they determine how victims would benefit from special measures foreseen in the directive, during criminal procedures, with special regard to victims' particular vulnerability to secondary and repeated victimisation, to intimidation and to retaliation. The individual assessment must as the minimum take into account, the victim's personal characteristics, and the type and circumstances of the crime, with special regard to "victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics".¹⁴² In line with Article 11 of the Victim's Rights Directive, and as mentioned by the FRA's action plan, MSs are to respect the right of victims of hate crimes to have "a review of a decision not to prosecute" or to discontinue proceedings "in accordance with their role in the relevant criminal justice system".¹⁴³ In a similar vein, the Council of the European Union invited MSs to ensure that victims of hate crime are assisted, supported and protected; and a case-by-case assessment of their needs is conducted; furthermore that practitioners receive the requisite training to respect victims' rights.¹⁴⁴

¹³⁹ Guidance Note on the practical application of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, available at https://ec.europa.eu/newsroom/just/document.cfm?doc_id=55607.

¹⁴⁰ Available at <https://fra.europa.eu/en/project/2017/working-group-hate-crime-recording-data-collection-and-encouraging-reporting>.

¹⁴¹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

¹⁴² *Id.* at Article 22(3).

¹⁴³ European Union Fundamental Rights Agency: FRA Opinion – 02/2013, Opinion of the European Union Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime, 15 October 2013, available at http://fra.europa.eu/sites/default/files/fra-opinion-2-2013-framework-decision-racism-xenophobia_en.pdf.

¹⁴⁴ Council conclusions on combating hate crime in the European Union – Justice and Home Affairs Council meeting, Brüssel, 2013. December 5–6. available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/139949.pdf.

2.4.3. Soft EU laws

Moving beyond hard laws, in June 2016, the European Commission launched the High Level Group on combating Racism, Xenophobia and other forms of Intolerance, which addresses both hate speech and hate crime. A guidance note issued by the High Level Group to help practical application of the Framework Decision emphasises the importance of freedom of expression, but does not solve the mentioned contradiction with ICCPR – instead it refers to the ECtHR case law and the ECHR itself, as which should be observed by the MSs.

The emergence of online media, especially that of social media created a new situation and new challenges, the response to which is still to be polished. Initially, the Commission agreed with the major social media platform providers on signing a **Code of Conduct on countering illegal hate speech online** in May 2016. After the fourth years' monitoring cycle, some grounded conclusions can be drawn on the achievements of this instrument (see below). After this, the Commission issued a **Communication on tackling illegal content online, presenting guidelines and principles for online platforms**.¹⁴⁵ This was soon followed by a Commission Recommendation on measures to effectively tackle illegal content online.¹⁴⁶ At the same time, disinformation – which can be a vehicle to hate speech – was specifically addressed through the Communication "Tackling online disinformation: a European approach"¹⁴⁷ and the **Code of Practice on Disinformation**¹⁴⁸ which was signed by online platforms, advertisers and other stakeholders.

2.4.4. Observations regarding the Code of Conduct on countering illegal hate speech online

Today, the most debated and perhaps the most influential European instrument is the Code of Conduct countering illegal hate speech online (CoC). It is an instrument first of its type, named when the European Commission has induced a not-so-voluntary industry 'self-regulation' (albeit similar initiatives could be observed for a self-regulation for a Better Internet for Kids). The level of interference with the market is comparable to that of a directive, but without the need to operationalise the legislative process of the EU, or that of the MSs. The voluntary mechanism represents a less intrusive interference with freedom of expression, but it also lacks the constitutional safeguards for the protection of the same.

The CoC has been evaluated in four rounds already – with the collaboration of certain NGOs, and its success has been expressed in many instances by the European Commission.¹⁴⁹ But not all NGOs are so enthusiastic. The Transatlantic Working Group, in cooperation with Article 19, expressed criticism about the drafting process, the broad definition of illegal hate speech, and the lack of procedural safeguards. While civil society was not sufficiently involved in the drafting procedure, NGOs are involved in the testing of the system, in form of flagging illegal content, and providing data to the

¹⁴⁵ COM(2017) 555 final, 28.9.2017., Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions - Tackling Illegal Content Online.

¹⁴⁶ Commission Recommendation (EU) 2018/334 of 1.3.2018 on measures to effectively tackle illegal content online (C(2018) 1177)

¹⁴⁷ COM/2018/236 final.

¹⁴⁸ Available at https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=54454.

¹⁴⁹ Information note - Progress on combating hate speech online through the EU Code of conduct 2016-2019. Available at <https://data.consilium.europa.eu/doc/document/ST-12522-2019-INIT/en/pdf>.

European Commission about the fulfilment of their requests. These 'trusted reporters' are primarily NGOs active in the field of anti-discrimination and equality, whereas freedom of expression NGOs are not typically part of the process.¹⁵⁰

A further concern objects that authorities can pressure private companies to remove content which the authorities would not be authorised to remove (because it is below the threshold of illegality). It is also suspected that the practice induces individuals who want to engage in hate speech to migrate to other, less-regulated platforms. The representative of Article 19 accuses the EU with preferring censorship to tackling the root causes of hate speech and the social problems at issue.¹⁵¹

The systematic monitoring rounds signal that every year, companies react more swiftly to the flagging, and remove a larger amount of the flagged content. However, there is no qualitative study on what is behind the numbers: the reports do not reveal the aspects of decisions taken by the platform. Perhaps it is the flagging NGOs which improve their flagging practice? This is highly possible also because the social media companies hold regular trainings to the flagger NGO's employees.¹⁵² No data is given about the content which is not removed, or whether there are false positives among the flagged content. The methodology of the monitoring is not published so that researchers or academics could closely examine the process. What is known is that certain NGOs test the social media platforms' systems by flagging and notifying illegal hate speech for six weeks each year. These are not blind tests, because even if the social media companies do not have prior knowledge about the monitoring exercise, they can easily find out as the number of reports suddenly increases. In fact, the monitoring rounds signal nothing more than the increasing harmony of cooperation between social media companies and the flagging NGOs.

The author of the removed content does not get the possibility to defend their content, even if they get notified – this is not required by the Commission, and is not part of the monitoring exercise. Also a significant proportion of the notices do not receive feedback.¹⁵³ The Commission has also noted that the lack of systematic feedback to users remains one of the most important issues for improvement for IT companies (expressed after the third monitoring round, and it has only deteriorated in the fourth, maintained in the fifth monitoring exercise).¹⁵⁴

The fourth monitoring declares that there are no signs of over-removal, based on the observation that "more serious" categories of content get removed in a higher rate (85.5%) than insulting content (58.5%). However, this information alone does not prove the lack of over-removal, which should be tested by counter-testing (notifying some false positives and checking the reaction).

¹⁵⁰ Available at https://ec.europa.eu/info/sites/info/files/code_of_conduct_factsheet_7_web.pdf.

¹⁵¹ Bukovská, B. 'The European Commission's Code of Conduct for Countering Illegal Hate Speech Online. An analysis of freedom of expression implications', *Transatlantic High Level Working Group on Content Moderation Online and Freedom of Expression*, Article 19, The Netherlands, 2019. Available at <https://www.ivir.nl/publicaties/download/Bukovska.pdf>.

¹⁵² Fact sheet on the 3rd round of monitoring: available at http://ec.europa.eu/newsroom/just/document.cfm?doc_id=49286.

¹⁵³ Bayer, J., 'Between Anarchy and Censorship. Public discourse and the duties of social media', *CEPS Policy Brief*, No. 2019-03, May 2019, CEPS, Brussels, 2019. Available at https://www.ceps.eu/wp-content/uploads/2019/05/LSE2019-03_Between-Anarchy-and-Censorship.pdf.

¹⁵⁴ Fourth monitoring exercise Fact Sheet: available at https://ec.europa.eu/info/sites/info/files/code_of_conduct_factsheet_7_web.pdf.
Fifth monitoring exercise Fact Sheet: available at https://ec.europa.eu/info/sites/info/files/codeofconduct_2020_factsheet_12.pdf.

The Commission has published Fact Sheets on the monitoring exercises,¹⁵⁵ as well as press releases¹⁵⁶ which provide a concise summary of the findings in accessible language to the general public and the press. However, background information on the methodology and further details are missing, which would allow the opportunity to academics and other NGOs to study the process and form their opinion.

An important part of the process could be the alleged establishment of partnerships between civil society organisations, national authorities and the IT platforms on awareness raising and education activities, with the purpose to promote positive narratives of tolerance and pluralism.

In sum, the practice of the CoC has some positive features:

- - it is still closer to voluntary self-regulation than to governmental speech restriction;
- - it is reactive and removes only content that is notified by the internet community;
- - it respects immunity of the platform providers for third party content.

However, it also has significant drawbacks:

- - it does not respect procedural fairness, particularly in relation to authors, but also to notifiers ;
- - being untransparent, it does not deliver us a clear information about the volume and impact of hate speech;
- - it could contribute to pushing the social problem over to more obscure applications.

All in all, it could create the false impression of having done well in the fight against hate speech whereas the roots and the real impact of hate speech remain untouched.

2.5. Recent philosophical argumentations on hate speech

2.5.1. What makes hate speech harmful?

In recent decades, a vigorous academic discussion has evolved around hate speech. Partly it addressed whether restriction of hate speech is necessary at all, as a debate in particular between the United States' exceptional liberal approach, and the continental, more restrictive approach.¹⁵⁷ For the purposes of this study, this line is left untouched. The other line of the debate which is more informative for the EU MSs would be: what exactly is the harm caused by hate speech?

An earlier line of the debate discussed that while hate speech may insult and offend persons belonging to minority groups, that alone would not justify its restriction, because a democratic public discourse must put up with offending statements. However, a speech that is likely to cause harm in individual rights, and lead to violence, discrimination or hostility, can be restricted. This philosophy is reflected in

¹⁵⁵ Available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en.

¹⁵⁶ Available at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_805_and https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1134.

¹⁵⁷ See e.g. Heinze, E., *Hate speech and democratic citizenship*, Oxford University Press, Oxford, 2016; Waldron, J., 'Protecting Dignity or Protection from Offense?' In *The Harm in Hate Speech*, Harvard University Press, Cambridge, Massachusetts, London, England, 2012, pp. 105-143. Retrieved June 17, 2020, from www.jstor.org/stable/j.ctt2jbrjd.7; Kahn, R.A. 'Why Do Europeans Ban Hate Speech? A Debate Between Karl Loewenstein and Robert Post' *Hofstra Law Review*, Vol. 41. No. 3, 2013. Available at <http://scholarlycommons.law.hofstra.edu/hlr/vol41/iss3/2>.

Article 20 of ICCPR and in several of the national regulations, such as Germany, Hungary, Italy, and several more (see also in Chapter 3). In legal practice, however, defining the likelihood is an arduous exercise – it needs a causal connection between the speech and hypothetical future events, which leaves courts into a vicious circle: if the speech occurred and no violence followed, then apparently the likelihood was insufficiently high and thus, most hate speakers get away from responsibility.

According to a discourse that recently emerged – although rooted in the last century – the most important harm is caused to the *equal status* of the attacked group of persons, as hate speech damages their *dignity*. Hate speech can *cause* subordination but can also *constitute* subordination. The difference is that the latter creates subordination without regard to the subjective effect caused in individuals. This is based on the *speech act* theory¹⁵⁸ which holds that speech is not merely a cause of action but is an action itself. Speech, in this concept, can constitute subordination by *constructing social reality* for the subordinated group.¹⁵⁹ This is done by constituting norms that determine: a) the (relative) social status of the subordinated group; b) what rights and powers members of the group possess; and c) what counts as acceptable behaviour towards those members.¹⁶⁰

The new concept here is that hate speech is harmful to democracy without having to examine the actual causal relationship to illegal behaviour of others, or the level of likelihood that it exercises on its audience, and also without regard to the insult caused to individual members of the minority group. According to this, hate speech can be regarded as harmful because it undermines the social equality, and shakes the trust that members of the minority should have in the state and within society that they would not suffer discrimination; and consequently it robs their dignity, an inalienable fundamental human right.¹⁶¹

The concept is widely debated and discussed, but doubtlessly very influential in academic discourse and may inform legislation.¹⁶²

2.5.2. Political hate speech

Another line of the hate speech agenda in the recent decades has been the dichotomy of speakers: hate speech can be expressed by ordinary persons or by state agents, public figures and other influential persons.¹⁶³ There is a disturbing contradiction between the elevated freedom of political speech and the harms caused by hate speech expressed by politicians, and other persons of influence. Hate speech does not foster rational discussion of alternative options for which political debate originally is meant to enjoy the said freedom.¹⁶⁴

¹⁵⁸ Austin, J., *How To Do Things With Words*, Harvard University Press, Cambridge, London, 1975; Langton R., 'Speech acts and unspeakable acts', *Philosophy and Public Affairs*, Vol. 22, No. 4, Princeton University Press, 1993, pp.293–330.

¹⁵⁹ Maitra, I., 'Subordinating Speech I', in: Maitra, I. - McGowan, M. K. (eds), *Speech and Harm: Controversies Over Free Speech*, Oxford Scholarship Online, 2012, pp. 5.

¹⁶⁰ *Id.*

¹⁶¹ Waldron, J., 'Protecting Dignity or Protection from Offense?' In *The Harm in Hate Speech*, Harvard University Press, Cambridge, Massachusetts, London, England, 2012, pp. 105-143. Retrieved June 17, 2020, from www.jstor.org/stable/j.ctt2jbrjd.7.

¹⁶² For debate, see: Barendt, E., 'What Is the Harm of Hate Speech?' *Ethic Theory Moral Practice*, No 22, 2019, pp. 539–553; and Heinze E., *Hate speech and democratic citizenship*, Oxford University Press, Oxford, 2016.

¹⁶³ Speakers may make biased statements on one occasion, or repeatedly and consequently representing the biased viewpoint. Distinction has not yet been known to be made on this basis, but it would be worth considering, because the impact of the speech may depend on this.

¹⁶⁴ Mill, J. S., *On Liberty*, Ticknor and Fields. Boston, 1863.

These concerns have been addressed also by legal instruments, such as the Rabat Plan of Action, ECRI's Declaration on the use of racist, anti-Semitic and xenophobic elements in political discourse, ECRI's No. 15. Recommendation, and several decisions of ECtHR.¹⁶⁵ The Rabat Plan of Action's most substantial delivery is its six-part test which should be used to establish whether a statement amounts to criminal offence. For the purpose of this study it is important to emphasise the first two points of this test: the context and the speaker. As to the first, the context can change whether an expression is likely to incite discrimination, hostility or violence against the target group, in a given social and political context. The threshold should be used based on the particular social tensions and the most vulnerable minorities in the given society. As to the second: the speaker's position or status may largely define how the message is received and what impact it exercises. Regrettably, racist, anti-Semitic and xenophobic political statements are increasingly expressed by political figures of the highest standing, which makes these statements very powerful in societies, and induce negative social processes, while at the same time, these political figures can be the least controlled or influenced with national laws, self-regulation or moral norms, due to their high status. Ideally, a high political office should be furnished with the highest moral responsibility for the public good. This should be regarded as a "trade-off between strong protection for political expression and attending to the duties and responsibilities that accompany that protection".¹⁶⁶

The transforming informational environment brought about a hyper-plurality of all opinions: everything can be published and accessed on interactive online platforms. The ranking factors in this new information ecosystem are radically different from the "classic" media system which applied social filtering by way of entry barriers: owners, publishers and editors filtered all content before it reached the public. In retrospect, it is now clear that that was an elitist system which enforced the moral values of the upper-middle-class white males, with the downsides of being exclusive of social minorities. However, in lack of this social filtering, racism, homophobia, etc., are not only published, but are becoming part of the mainstream. The marketplace of ideas gives room to all kinds of ideas, however, just like normal marketplaces, the demand can be influenced by marketing campaigns. The new niche in the political market was recognised by populists who embraced the rhetoric, and gained cheap votes in a race to the bottom, fuelling the fears and instincts of people. Their political success appears to legitimise the intolerant views and further blow their popularity. Even if their speech does not reach the threshold of criminality, it desensitises the audience and legitimises hate speech.

2.5.3. Populism and hate speech

Populistic leaders leverage their direct access to the electorate through social media. Without the filtering and the criticism of the independent press, they can freely develop alternative narratives of reality.

¹⁶⁵ ECRI General Policy Recommendation No. 15 on Combating Hate Speech (2015); ECRI Declaration on the use of racist, antisemitic and xenophobic elements in political discourse (2005), the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence; and case law of the ECtHR, *Féret v. Belgium*, *id.*, ECtHR, *Seurot v. France*, Application no.: 57383/00, 18 May 2004).

¹⁶⁶ McGonagle, T., *The Council of Europe against online hate speech: Conundrums and challenges*, Expert Paper, Institute for Information Law (IViR), 2013.

Social cultures are built upon narratives: stories told about history, values, and choices that people made in various situations.¹⁶⁷ Both popular and high culture are built on these stories which are to a large extent mediated through various channels. Populistic leaders do a great effort to **define and change the social narrative**, through their own social media presence, distortion of facts (disinformation), propaganda and other forms of political marketing. Populistic politicians appear to 'reveal the truth' – as opposed to the political correctness which is stressed by a 'hypocritical elite' – and offer the audience to perceive themselves as a majority of 'pure people'. This process has been also described by Francis Fukuyama,¹⁶⁸ and Cas Mudde,¹⁶⁹ among others.

Narratives can have greater influence on opinions than rational argumentation. For example, the Hungarian public service television's internal decree prohibited the showing of refugee children on screen – to avoid raising sympathy for them.¹⁷⁰ Xenophobia is found to be stronger in communities which have no direct relationship with the despised minority, because those who have, develop their own stories based on their real-life experiences.

Populistic rhetoric typically defines an "outgroup" as opposed to the "ingroup" and raises hostility against the outgroup, whereas the politician identifies himself as the inherent leader of the ingroup.¹⁷¹ This carries in itself the inclination to discrimination, and the rhetoric is typically on the verge of hate speech, as signalled also by the annual ECRI reports which consecutively express concern for a steady rise of 'hate speech and xenophobic populism'.¹⁷²

If states leaders engage in hate speech, their authority and perceived trustworthiness makes hate speech more acceptable. Frequently repeated authoritative messages have the potential of demolishing moral barriers and of giving a free ticket to racial violence. Even the liberal freedom of expression scholar, Eric Barendt acknowledged that governments' actions have a higher impact on the individual rights of people.¹⁷³

Hate speech expressed during political campaign, with all the rhetorical tools of persuasion may have such an exceptionally high power that it justifies applying the "precautionary principle" which presumes the harmful effect.¹⁷⁴

Moreover, a regular disregard of the rules by the political elite erodes the force of the law and creates **a rule of law deficiency**. In that case, enforcement of law is hindered also for practical reasons: a) speech gets institutionalised – for example, through billboards and public service television – and cannot be linked to one individual perpetrator – while public bodies cannot be subject to criminal procedures; b) law-enforcement agencies might be loyal to the government. This climate is also

¹⁶⁷ Fisher, W. R., 'The Narrative Paradigm: In the Beginning', *Journal of Communication*, Volume 35, Issue 4, December 1985, pp. 74–89.

¹⁶⁸ Fukuyama, F., *Identity: The Demand for Dignity and the Politics of Resentment*, Farrar, Straus and Giroux, 2018.

¹⁶⁹ Mudde, C., 'Government and Opposition', *Cambridge University Press*, Vol. 39, No. 4, Autumn 2004, pp. 541–563.

¹⁷⁰ 444.hu (2015) Belső szerkesztői utasításra nem szerepelhetnek gyerekek a közszolgálati tévé menekültes anyagaiban. Available at <https://444.hu/2015/08/25/belso-szerkeszttoi-utasitasra-nem-szerepelhetnek-gyerekek-a-kozszoalati-teve-menekultes-anyagaiban/>.

¹⁷¹ Bos, L., Schemer, C. Corbu, N., Hameleers, M., Andreadis, I., Schulz, A., Schmuck, D., Reinemann, C., Fawzi, N., 'The effects of populism as a social identity frame on persuasion and mobilisation: Evidence from a 15-country experiment', *European Journal of Political Research* 59: 3–24, 2020 pp.3. Available at <https://ejpr.onlinelibrary.wiley.com/doi/pdf/10.1111/1475-6765.12334>

¹⁷² ECRI (2019) ECRI- Hate speech and xenophobic populism remained major concerns in Europe in 2018, 11 June 2019, Available at <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/-/hate-speech-and-xenophobic-populism-remained-major-concerns-in-europe-in-2018>.

¹⁷³ Barendt, E., 'What Is the Harm of Hate Speech?', *Ethical Theory and Moral Practice* 22, 2019, pp. 539–553.

¹⁷⁴ Reid, A., 'Buses and Breaking Point: Freedom of Expression and the 'Brexit' Campaign', *Ethical Theory Moral Prac* 22, 2019, pp. 623–637..

encouraging for individuals to confidently engage in hate speech without the fear of getting prosecuted. Hate speech is more powerful when "backed by power, authority, or threat".¹⁷⁵

2.5.4. Active obligation of the state

The state agents' responsibility extends beyond refraining from hate speech. The state has a commitment to the equality of all citizens, as the foundation of the legitimacy of the state. "When confronted by hateful expression, the legitimate state cannot be neutral in its own speech."¹⁷⁶ In other words, if the state and its official representatives do not consistently and pro-actively defend the equality of all humans against hate speech, that leads to a violation of the rule of law. Brettschneider argues that "non-discrimination and toleration are non-neutral viewpoints that the state should advance through its own speech."¹⁷⁷ The silence of the state legitimises the spreading of ideas which incite to hatred,¹⁷⁸ in which case the authority of the state is transferred on the speaker.¹⁷⁹

In other words, **counter-speech and counter-action** by the authorities and political leaders, and protection provided by institutions would be an important step in the fight against hatred.¹⁸⁰ It could **be even more important than legislative prohibition**, partly because it respects freedom of the speech more, and partly because it is more effective in achieving an inclusive social culture.

Long-standing, prosperous and stable democracies¹⁸¹, are alleged to better afford themselves the risk of hate speech, as they have "sufficient legal, institutional, educational, and material resources to admit all viewpoints into the public discourse, and yet remain adequately equipped to protect vulnerable groups from violence or discrimination".¹⁸² One pre-condition of this would be robust counter-speech, as well as scrutiny of hate speakers and groups. Naturally, all levels of education, and all other state representations must promote unambiguously the values of pluralism and tolerance. Such an ideal situation would allow that the state permits "others" to express their discriminative views. However, this presupposes that hate speakers never get into public office, including teaching, or when they get there, immediately change their mind. Such a robust "social censorship" may have existed in the times of legacy media, and of more rigid social structures, when hate speakers were prevented from getting funding, offices, airtime and other resources necessary for political success. This world has been swept away by the hyper-democratic communication technology which connects all citizens at an equal level and where uncensored direct dialogues changed the tone of discussion, criticised "political correctness" and challenged the most basic values of our societies.

As regards the importance of online platforms, hate speech is especially prevalent in these fora. However, ordinary people's racist views shared on social media are less likely to generate discrimination or racial violence than popular political figures doing the same. And, while large resources are moved

¹⁷⁵ Delgado, R., and Stefancic, J., 'Four Observations about Hate Speech', 44 *Wake Forest Law Review*, 2009, pp. 353-370, at 361. See also: Delgado R. and Stefancic, J., *Understanding Words That Wound*, Westview Press, Boulder, Colorado, 2004, pp. 11-12.

¹⁷⁶ Brettschneider, C., 'Democratic Persuasion and Freedom of Speech. A response to four critics and two allies', *Brooklyn Law Review*, Vol. 79, No. 3, 2014, pp. 7.

¹⁷⁷ *Id.* at p. 4. He also compares a liberal democracy with widespread illiberal beliefs to the Weimar Germany where democracy was not supported by the wide endorsement of democratic principles. (p. 8).

¹⁷⁸ Whitten, S., 'Recognition, Authority Relations, and Rejecting Hate Speech', *Ethic Theory Moral Prac* 22, 2019, 555-571. pp. 569.

¹⁷⁹ Maitra, I. 'Subordinating Speech I' in: Maitra, I. - McGowan, M. K. (eds), *Speech and Harm: Controversies Over Free Speech*, Oxford Scholarship Online, 2012, p. 11.

¹⁸⁰ Whitten, S. (2019), Recognition, Authority Relations, and Rejecting Hate Speech. *Ethic Theory Moral Prac* 22, 555-571, p. 567, 569.

¹⁸¹ Heinze E., *Hate speech and democratic citizenship*, Oxford University Press, Oxford, 2016

¹⁸² *Id.* at p. 44.

to control the illegal hate speech imparted through social media by ordinary people, no action is taken against the – albeit not illegal, but more harmful – hate speech expressed by politicians.

In sum, **hate speech is dangerous mainly when exercised by a state agent: and that is exactly when it cannot be controlled on the national level.** Only pre-established international norms could have an effect, if any. The threshold of restricted hate speech should be lower for people of power and authority, and this should be supervised and enforced by the international community. Clearly, the rules still need to be narrow: legitimate discussion about ethnic tensions, migration and other social issues should not be suppressed.

It must be noted that political power which disrespects human rights would also be likely to ignore the values of the international community as well, including their judgements. Such an international standard would be – and has been earlier in history – unable to prevent genocide. But, at the least, it could give strong signals about the moral standards for the rest of the states.

If only the exact tipping point could be known, where freedom of political expression is no longer for the benefit of pluralism, but turns into limiting others' rights. Using computational statistical methods of political communication analysis and following voter behaviour and opinion polls is a potential way of future research. Exactly this is done by large marketing firms to predict consumer behaviour, and yet democratic governments appear to resign to using the science of big data for such good purposes so as to advance the case of democracy. Such research would rely on statistical data and does not necessarily interfere with rights to privacy and personal data.

Until science gives an answer to this pressing question, the limit between hate speech and free political expression needs to be defined by the Court, whose meticulous attention to elucidate this issue would be utmost helpful. For the European Union and its MSs it would be highly beneficial in this respect if the Court would engage with this issue, beyond how it has already been tackled by the CoE.

3. COMPARATIVE ANALYSIS OF SELECTED MEMBER STATES

3.1. Hate speech

3.1.1. Codification techniques

a. Branch of law

Criminal law

Criminal sanction is the strongest instrument of the state. The criminal procedure requires enormous resources even to get started, moves slowly, and is very high stakes. It can result either in acquittal, and the speaker can register a victory: gain fame and regain authority; or the speaker is convicted which is damaging to their freedom, social status and through stigmatisation, further destructs their loyalty to society. In short, criminal hate speech creates a lose-lose situation for the community and contributes to maintaining hostility and yields even more conflict.

All the examined states had hate speech prohibitions in their criminal law. Similarly, all states' specific regulations for broadcasting and the mass media included some provisions to protect human dignity and prohibit hate speech, as it is required by the Audiovisual Media Services Directive (see Chapter 2.4.2. above).

Table 3: Regulatory branch

MS	Criminal law	Civil law	Media law	Press self-regulation
DE	yes	yes ¹⁸³	yes	yes
HU	yes	yes	yes	yes
IT	yes	yes	yes	yes
MT	yes	-	yes	-
PL	yes	yes	yes	yes

Source: Authors, based on the country reports.

Civil law

Civil lawsuits against insults based on racial, ethnic, national or religious (etc.) belonging is possible in several states (DE, HU, IT, PL), although in some states only the individual personally targeted may

¹⁸³ Only individually targeted and affected victims can sue.

initiate proceedings (PL). In Malta, the injured party may participate in the criminal proceeding, but no specific civil law provision exists.

Research shows that victims rarely bring civil law actions, and it is assumed that courts may be reluctant to apply anti-discrimination legislation in hate speech cases. Victims might also be deterred by the costs and burden of litigation.¹⁸⁴

Other

All MSs have implemented the Equal Treatment Directive¹⁸⁵, but not all of them apply it with the same scope.¹⁸⁶ Two country experts mentioned this law as a tool against hate speech (HU, PL), being the most meaningful and frequently invoked protective instrument against discrimination in Hungary, while it was "very rarely applied" in Poland. On the negative side: the relatively progressive decisions of the Hungarian Equal Treatment Authority on racist hate speech have sometimes been overturned by the courts.¹⁸⁷

Although the law's scope is primarily discriminative *actions*, but 'harassment' can also include verbal attacks, with the motivation or effect to create an intimidating, hostile, humiliating, degrading or offensive environment. Thus, the protected value is the objective environment of the victim, rather than their feelings, therefore it can be interpreted in the context of hate speech.

Self-regulation

Most states also had provisions in their voluntary self-regulatory press codes (HU, IT, PL), except for Germany, where the Press Code does not explicitly address hate speech, only discrimination and the protection of personal honour, but in Germany, the hate speech committed through established press is regarded as not prevalent. In most of those states which have hate speech provisions in their press codes, their effect was reported as unsatisfactory (HU, IT, PL). The Maltese Code of Journalistic Ethics does not include prohibitions of hate speech, but the Institute of Maltese Journalists has adopted the Global Charter of Ethics for Journalists (2019) which sets out in Article 9 that 'journalists shall ensure that the dissemination of information or opinion does not contribute to hatred and prejudice....'.

¹⁸⁴ See the report of Article 19 (2018). Responding to 'hate speech': Comparative overview of six EU countries. Available at https://www.article19.org/wp-content/uploads/2018/03/ECA-hate-speech-compilation-report_March-2018.pdf.

¹⁸⁵ See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin. Available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32000L0043>.

¹⁸⁶ See more in „Implementation of EU anti-discrimination law in the Member States: a comparative approach" (2011), available at http://www.era-comm.eu/oldoku/Adiskri/01_Overview/2011_04%20Chopin_EN.pdf.

¹⁸⁷ Report about the Implementation of the Council of Europe Recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (CM/Rec(2010)5) in Hungary Prepared by Háttér Society Hungarian LGBT Alliance Transvanilla Transgender Association. Available at <https://hatter.hu/sites/default/files/dokumentum/kiadvany/hatter-cmrec2010-5-report2018.pdf>.

Table 4: Self-regulation

MS	Is there journalistic self-regulation?	Is it regarded as effective, and why?
DE	not on hate speech	effective: no hate speech is prevalent
HU	yes	ineffective: membership not compulsory, sanctions not withholding
IT	yes	partly
MT	not on hate speech	n.a.
PL	yes, more	limited public awareness about the existence of ethical codes of conduct and related sanctions regimes

Source: Authors, based on the country reports.

b. Is the list of protected characteristics exhaustive, or open-ended?

The list of protected grounds in **criminal** law can be exhaustive (IT, MT, PL) or open ended (DE, HU).

The Hungarian criminal code protects first of all the "Hungarian nation", then "any nation, ethnic, racial, religious group", and thirdly gives an open-ended definition of "certain groups of the population" but in particular with regard to disability, gender identity, sexual orientation.

In Poland and Malta, the closed list of protected grounds is rather limited, lacking age, gender identity, sexual orientation, disability, refugee status, and many more. Several of the "missing" characteristics are frequently, very frequently or sometimes attacked by hate speech (see Table 2) in these states as well.

In Poland, attempts by NGOs as well as the UN Human Rights Council and the UN Committee against Torture called for extending the list of protected characteristics, in particular to include sex, gender identity and sexual orientation which are frequently targeted features. Even though an amendment was initiated by a group of MPs, it was rejected in the Parliament.

Table 2 shows those protected characteristics which are attacked most frequently in the examined countries, based on the report of our country experts. The responses are based on subjective assessments by the academic experts and NGOs who are experts of the field in the specific countries. The responses show the tendencies and problem areas: unanimous responses pointed out that ethnic origin, race or racial origin, colour, and migrant or refugee status are attacked frequently or very frequently. On the other end of the spectrum, age is very rarely or never subject to hate speech attacks.

Table 5: Protected characteristics most frequently attacked in the examined countries

	Frequently or very frequently	Sometimes	Very rarely
Nationality	DE, IT, MT, PL	HU	
Ethnic origin	DE, HU, IT, MT, PL		
Religion	DE, HU, IT, MT	PL	
Other belief	PL	DE, IT, MT	HU
Race or racial origin	DE, HU, IT, MT, PL		
Colour	DE, HU, IT, MT, PL		
Language		MT, PL	DE, HU, IT
Age			DE, HU, IT, MT, PL
Gender identity	HU, MT, PL	IT	
Sexual orientation	DE, HU, IT, PL	MT	
Disability		DE, IT, MT, PL	HU
Homelessness		DE, HU, PL, MT	DE, IT, PL
Migrant, refugee status	DE, HU, IT, MT, PL		
Lifestyle		DE,	HU, IT, MT, PL
Subculture (e.g. emos, goths)		DE, PL	HU, IT, MT
Political opinion	DE, MT	HU, PL	IT
Other (gender, poverty)		DE	

Source: Authors, based on the country reports.

c. Does the legal provision protect only minorities or also majorities?

In some states, the neutral formulation of the law allows both interpretations (DE, MT, IT, PL). In some states the law explicitly protects the majority nation (HU, PL), and several cases illustrate that courts are taking this literally: in Hungary, primarily in incitement to hatred and in hate crime cases.¹⁸⁸

In Poland, religious defamation is regularly applied to silence minority opinions critical of the Catholic belief. With the pretext of transposing the Framework Decision, an amendment of Article 55a of the Act on the Institute of National Remembrance (which already prohibited negation of Holocaust) was to criminalise whoever *accused Poland or the Polish people with complicity in the Holocaust*; another amending article (2a) was to protect Polish majority against Ukrainian national minority. Both were found to be unconstitutional, but the former provision has been retained in form of a civil offense/misdemeanour.

It is still a criminal offence in Poland to publicly insult the Polish nation and threatened with imprisonment up to three years (§133 Penal Code) - note that *insult* is significantly wider than *incitement*.

¹⁸⁸ Fővárosi Törvényszék 70.P.22.286/2016/13., Fővárosi Ítéletábla 2.Pf.20.151/2017/3/II., but overturned by Kúria Pfv.IV.21.163/2018/4, 28 May 2020. (Irony or blasphemy in a demonstration related to the prohibition of abortion in Poland.) See also: Jovánovics, E., Pap, A.L. 'Kollektív bűnösség a XXI. század Magyarországon: magyarellenesség vádja cigányokkal szemben két emblemikus perben', *Fundamentum* 2013/4, 2013, pp. 153-157. See also: Balogh, L., Dinók, H., Pap, A.L. 'A jog által láthatatlan? A gyűlölet-bűncselekmények szabályozási kérdései és gyakorlati problémái' *Fundamentum* 2012/4, 2012, pp. 91-98.

In Germany the law is interpreted restrictively. In Malta, no signs of the extended interpretation were found.

d. Does law require a higher level of responsibility from persons of authority to refrain from hate speech?

Some states have imposed restrictions on the extreme political activity of civil servants (MT, DE, IT). In Malta, it is a crime for public officers or public servants to create or assume leadership of a group which promotes violence or racial hatred and is punishable with imprisonment 1-5 years. In Germany, law requires civil servants to show self-restraint in their political activity both during and outside their service, (although it is not prohibited to make political statements when they are out of service).¹⁸⁹ In Italy, it is an aggravating circumstance if the perpetrator is a 'public official' or a minister of religion (art. 61. 1-9), or abused their authority.

It is unclear whether these restrictions can apply to members of the government as well. Also, MPs enjoy immunity for their speech generally in all democracies, which is also regarded as a basic condition for their democratic function.

In Poland, the logic is to the contrary: public officials and the President enjoy enhanced legal protection from insult, and assault .

In some states, courts take the publicity and influence of the public figure as a factor which increases the potential effect of hate speech (MT).

Other states' legal regulations make no reference to the role of the speaker (HU, PL).

e. Whether insult based on protected characteristics is a crime?

According to Article 20 of the ICCPR, only incitement to an illegal action should be prohibited as a crime. Several MSs have a lower threshold of prohibition, by also criminalising insult based on the protected characteristics (PL), provided there is an intent to stir violence or hatred (MT), or simply by court interpretation, since the new millennium (IT).¹⁹⁰ Broadcasting laws generally have a lower threshold (HU, MT), even though AVMSD provides for only a narrow prohibition (incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter;) both in its article 6 and 28b, b).

In Germany, prohibition to insult in general (§185 GCC) is often applied against racial insult. This is also supported by §194(1) second sentence, which lifts the necessity of the private claim if the following, conjunctive conditions are given: the offence has been committed publicly (e.g. through electronic publications or in a gathering), the victim is member of a group that has been persecuted during the Nazi or any other despotic rule, this group is a section of the population and the insult is related to this persecution – however, if the victim has dissented to the investigation, then the state cannot prosecute (§194 (1) third sentence GCC). In addition, defamation of religion is also a crime when it is capable of disturbing the peace (§166 GCC).

¹⁸⁹ "Mäßigungsgebot", sec. 60 (2) German Federal Civil Service Act.

¹⁹⁰ Italian Supreme Court of Cassation (Corte Suprema di Cassazione), No. 37581/2008 and No. 36906/2015.

The Hungarian Constitutional Court, in a landmark judgment, abolished the prohibition of racial insult in 1992 in Hungary, and upheld 'incitement to hatred', narrowing its interpretation so that to include the direct threat that a violation of individual rights will occur. The latter element has caused difficulty in the court implementation which practically prevented legal prosecution of hate speech in Hungary. (See more below.)

The Polish Penal Code criminalises insult against a group of people or an individual person based on the protected characteristics, against the Polish nation, against the Polish President, insult of the religious feelings (profaning the subject of religious worship or place), insult of a monument or other public place decorated to commemorate historical events or honour individuals. This extensive list of insults may exercise a chilling effect on the expression of political opinion, or opinion in matters of public interest, including historical matters.

f. Is 'motivation' or 'result' required to establish the hate speech crime, either by law or jurisprudence?

To establish the crime of incitement to hatred, expressions must affect the public order, and threaten concrete rights (HU, IT, MT), although Italian courts appear to have lowered the threshold since the new millennium, and also apply the hate speech crimes when dignity of minorities is injured.¹⁹¹

Box 4: Acquittal for lack of intention

The Italian Court of Cassation acquitted a politician from incitement of hatred, who distributed campaigning leaflets saying "No more money lenders – no more foreigners", depicting a Muslim wearing a suicide belt. The court held that the intention was not to stigmatise all foreigners.¹⁹²

Some states' legal provision on hate speech also requires a *purpose* to influence the behaviour of people or to convince another person to apply discrimination, or to stir up violence or racial or religious hatred (IT, MT, PL). The expressions do not need to reach the intended *effect* in these states. In Malta, the difficulty of proving the intent of the perpetrator has often prevented conviction.¹⁹³

In other states, such purpose is not required (DE, HU), but an *effect* is required (theoretically a high likelihood of violence occurring). In Italy an effect (real danger) is required to establish the denial of Holocaust and other genocide (contrary to usual legislative patterns, see below).

Hungarian courts, prosecution and police tend to apply a restrictive approach which practically prevents the establishment of hate speech in court, because of 'incitement against a community' is deemed to be committed only if the danger created by an expression is not merely a hypothetical one but involves a direct possibility of a violent act. Courts often interpret 'incitement' as content which contains explicit instigation, encouragement to commit violent behaviour,¹⁹⁴ or dismiss the case because no violent behaviour followed the statement. Because of this restrictive interpretation, cases

¹⁹¹ Italian Supreme Court of Cassation (Corte Suprema di Cassazione), No.37581/2008.

¹⁹² Italian Supreme Court of Cassation (Corte Suprema di Cassazione), Judgement No. 36906/2015.

¹⁹³ Muskat, V., *EMORE Monitoring and reporting online hate speech in Europe*, SOS Malta, National Report on Hate Speech and Hate Crime in Malta, 2016, p. 50.

¹⁹⁴ Hungarian Supreme Court, 5/1999. EBH. Available at <https://kuria-birosag.hu/hu/elvhat/51999-szamu-bunteto-elvi-hatarozat>.

are not pursued by the police and stuck in the early phase of the procedure. Repeated – and various – legislative interventions to broaden the law have been struck down by the Constitutional Court in five consecutive decisions¹⁹⁵ and generated considerable scholarly discussion and controversy. Besides Hungarian NGOs,¹⁹⁶ the ECRI has also expressed its concern because of the very high threshold of the Hungarian criminal hate speech, pointing out that it has led to "a situation of impunity and could explain why various forms of hate speech continue to occur".¹⁹⁷ ECRI strongly recommended that a less restrictive approach is taken to the criminal law provisions against incitement to hatred to allow for due prosecution and punishment of hate speech.¹⁹⁸

Box 5: Very high judicial threshold of incitement to hatred

As it has been reported by the media, the head of the openly racist "Betyársereg" (approximate translation: Rascal-troop)¹⁹⁹ said in front of a large audience the following: "We have to reach the point when someone can pull the trigger of the submachine gun, if probably he sees a different skin colour. [...] The war of races rages on, we must get to the level where we again become aggressive, violent, [...] almost animals. [...] Will we have it in us to be brave enough to shoot a rotten, lousy Jew?" The police closed investigation, with the argument that the realistic possibility of the occurrence of violence should be needed as a consequence of incitement. As the speech happened in 2011, after a series of racist murders against Roma families, the argumentation appeared weak. The Hungarian Helsinki Committee complained at the prosecutors' office, which rejected the case - no further appeal was possible.²⁰⁰

Peculiarities:

- In Germany, courts and prevalent scholarly opinion reject the idea to demand a specific criminal result in order to establish the crime of incitement to hatred ('Volksverhetzung', literally translated as "incitement of the masses" or "instigation of the people").
- In Hungary, a realistic possibility of the occurrence of violence is needed to establish incitement to hatred, which practically never is held by the courts.
- Italy requires the effect of real danger to establish both incitement and the denial of Holocaust and other genocide.
- In Malta, the hatred must be directed against a person or group of persons who are in Malta and not elsewhere.

¹⁹⁵ Hungarian Constitutional Court (Alkotmánybíróság), 95/2008 (VII. 3.) AB decision; 96/2008. (VII. 3.) AB decision; 18/2004. (V. 25.) AB decision; 12/1999. (V. 21.) AB decision; 30/1992. AB decision.

¹⁹⁶ Working Group against Hate Crimes (GYEM): Submission to the UN Universal Periodic Review of Hungary, September 2015. Available at <http://gyuleletellen.hu/sites/default/files/gyemupr2016.pdf>.

¹⁹⁷ ECRI (European Commission against Racism and Intolerance) Report on Hungary, 2015, para 37. Available at <https://rm.coe.int/fifth-report-on-hungary/16808b57e8>.

¹⁹⁸ *Id.* at para. 38.

¹⁹⁹ Átlátszó (2014) Vecsesi hagyományörző egyesület mögött szervezkedik a betyársereg. 19 March 2014. Available at <https://atlatszo.hu/2014/03/19/vecsesi-hagyomanyorzo-egyesulet-mogott-szervezkedik-a-betyarsereg/>.

²⁰⁰ Hungarian Helsinki Committee (2012) Nyomozni kell... Website of the HHC. Available at <https://www.helsinki.hu/folytassak-le-a-nyomozast-a-magyar-szigeten-elhangzott-gyuleletbeszed-ugyeben/>.

- In Poland, court ruled that religious insult can be committed even without direct intent,²⁰¹ even though the motivation and negative consequences should be generally taken into attention by the courts.²⁰²

g. Is there a specific rule to combat *online* hate speech - whether in social media, press or other?

In all of the examined states, online journals and online media outlets are covered by the scope of media regulation, however, social media platforms are not (DE, HU, IT, MT, PL).

The criminal and civil provisions of hate speech and harassment are not narrowed to certain media types or offline actions, therefore the online publishing is covered by these.

The E-Commerce Directive is applicable in all MSs, and often used to argue that intermediaries are exempted from liability for third party content, however, its interpretation is ambiguous since the Delfi judgement which was related to hate speech.²⁰³ In *MTE and Index v. Hungary*, the ECtHR found that the intermediaries had no liability, but the case was other than hate speech.²⁰⁴

The German Network Enforcement Act has been unique among the MSs until recently, when France passed a similar bill to oblige platforms and search engines to remove hate speech within 24 hours under the risk of a fine.²⁰⁵ The German rule obliges social media platforms to establish a procedure to respond to notifications and remove or block certain illegal hate speech posts within 24 hours. Recent assessments criticise the law for being *ineffective* (as opposed to be overcensoring, as feared originally). Earlier criticism has found that the law's scope is too broad, its sanctions are asymmetric and with the short timing, encourage overblocking, and provides insufficient redress to the authors.²⁰⁶ After the right-radical terror attack in Halle in October 2019, the German Parliament decided on a legal reform package to tackle hate speech and hate crime.²⁰⁷ Among other restrictions, social media platforms will be obliged to report to the law enforcement the criminally relevant content which they remove.²⁰⁸

German law enforcement also struggles with a vast number of administrative and court proceedings concerning online hate speech, therefore the Prosecutors' Offices have established special departments, due to special personnel resources and expertise (see cases below). The French law similarly, creates special public prosecution authority to specialise in hate speech or cyberbullying.²⁰⁹

²⁰¹ Supreme Court of Poland (Sąd Najwyższy), The case of Adam Darski, 2012.

²⁰² Article 53 §2 PCC.

²⁰³ ECtHR, *Delfi v. Estonia*, Application no. 64569/09, 10 October 2013.

²⁰⁴ ECtHR, *MTE and Index v. Hungary*, Application no. 22947/13, 2 February 2016.

²⁰⁵ The Local (2020), "French Parliament adopts controversial online hate speech bill", 13 May 2020, available at <https://www.thelocal.fr/20200513/french-parliament-adopts-controversial-online-hate-speech-bill>.

²⁰⁶ De Streel, A. et al., *Online Platforms' Moderation of Illegal Content Online*, Study for the committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020, p.89.

²⁰⁷ BMJV website, *Gesetzespaket gegen Rechtsextremismus und Hasskriminalität*. Website of the Bundesministerium der Justiz und für Verbraucherschutz, 19 Februar 2020. Available at https://www.bmjbv.de/SharedDocs/Artikel/DE/2020/021920_Kabinett_Bekaempfung_Rechtsextremismus_Hasskriminalitaet.html.

²⁰⁸ Entwurf eines Gesetzes zur Bekämpfung des Rechtsextremismus und der Hasskriminalität, 21 February 2020. Available at https://www.bundesrat.de/SharedDocs/drucksachen/2020/0001-0100/87-20.pdf?__blob=publicationFile&v=1.

²⁰⁹ The Local, 'What you should know about France's new online hate speech bill', 1 July 2019, <https://www.thelocal.fr/20190701/what-does-frances-proposed-new-hate-speech-law-mean-for-social-media>.

However, the French law does not appear to introduce the detailed reporting system about the notifications and removals as the German does.

Other states did not report about a significant number of legal procedures relating to online hate speech (HU, IT, MT, PL).

In Poland, the Commissioner for Human Rights together with an NGO set up a website for reporting online hate speech, where the NGO analyses the reported cases and makes the necessary steps.

In Italy, the Communication Authority issued a Regulation to require that self-regulation procedures for removal of online hate speech need to be created and have approved by the Authority. The Regulation appears not to address social media.²¹⁰

Box 6: Hate speech cases on social media platforms and websites

1. As reported by the media, social media posts of the deputy leader of the AfD's parliamentary group, which included "barbaric, gang-raping hordes of Muslim men", were blocked from both Twitter and Facebook on the first day after NetzDG stepped into effect.²¹¹
2. After a riot in a Maltese refugee centre, a slur of online comments followed which explicitly called for violence against the migrants. "Men, women, or children, shoot to kill all of them", "If I were in charge, I'd set all of them on fire, Hitler style" read some of the more than hundred comments.²¹² The cases had been reported to the police, but no information from any prosecution is known.
3. A Maltese prison warden was prosecuted for incitement of racial hatred, but then acquitted because the targeted group needs to be present in Malta at the time of the offence. The offence was sharing an article about arson attack of an asylum facility in Sweden, adding: "I hope it's burning with them inside".²¹³
4. Stormfront website's four branch operators in Italy were sentenced to imprisonment for instigation to racial hatred, praise of neo-Nazism and defamatory messages. In correlation with this procedure, 25 other persons were convicted to a prison (between 1 year and 3 year and 10 months)²¹⁴ for hate crime, and racial and aggravated defamation.

²¹⁰ Regulation of the Communication Authority approved on May 19, 2019. Article 9, §1.

²¹¹ DW News, 'AfD politician 'censored' under new German hate speech law for anti-Muslim tweet', 2 January 2018, available at <https://www.dw.com/en/afd-politician-censored-under-new-german-hate-speech-law-for-anti-muslim-tweet/a-41992679>.

²¹² Times of Malta National (2019), "Riot exposes Malta's hate speech problem", 22 October 2019, available at <https://timesofmalta.com/articles/view/riot-exposes-maltas-hate-speech-problem.743829>, Malta Today News/Court & Police (2019), "Police car damaged, three other vehicles burnt as migrants protest in Hal Far", 21 October 2019, available at https://www.maltatoday.com.mt/news/court_and_police/98133/police_cars_set_on_fire_as_migrants_protest_at_hal_far_centre#XuMbFp4zZE5.

²¹³ Independent (2016) Prison warden acquitted of racist comment charges due to outdated law, 13 May 2016, available at: <https://www.independent.com.mt/articles/2016-05-13/local-news/Prison-warder-acquitted-of-racist-comment-charges-due-to-outdated-law-6736157791>.

²¹⁴ Italian Supreme Court of Cassation (Corte Suprema di Cassazione), No. 34713/2016, First Criminal Section, of 16 February 2016.

h. Transposition of the Framework decision and implementation of AVMSD

All states have transposed the Framework Decision Article 1 c) and d) on denial of genocide, although some states did so more broadly (DE, HU, PL) and others more narrowly (IT).²¹⁵ In Italy, ECRI has objected against that denial, gross trivialization or condoning of the Holocaust, or the crimes of genocide, are only aggravating circumstances if otherwise an incitement to hatred can be established, and not a standalone crime.

In Poland, although there had been a prohibition to negate the Holocaust before, a new amendment was to widen its scope to punish whoever *accused Poland or the Polish people with complicity in the Holocaust*; and insert a reference that the war crimes committed by Ukrainian nationalists in the second world war shall be regarded as crimes committed in collaboration with the Third Reich, and against the Polish citizens inclusive of the Jewish population – thereby denying all responsibility for the crimes by Poland. Both were found to be unconstitutional, but the former provision has been retained in form of a civil offense/misdemeanour.

In all states, Article 28b, b) of the AVMSD either has been implemented (HU) or is currently in progress (DE, IT, MT, PL) (implementation deadline is on 19 September 2020).

3.1.2. Institutions to fight racism and other discrimination

The examined countries all have various specific bodies to tackle hate speech or discrimination. In particular, the following bodies perform this task:

Media and broadcasting authorities (DE, HU, IT, MT, PL), ombudspersons (HU, PL, IT, DE)²¹⁶ and the Equal Treatment Authority (DE²¹⁷, HU, IT,²¹⁸ MT²¹⁹, PL).

Some states have specific ombudspersons for various duties (HU DE, IT), such as Ombudsman for the Rights of National Minorities (HU), or the Federal Government Commissioner for Jewish life in Germany and the fight against Anti-Semitism, the Federal Government Commissioner for the Concerns of Victims and Survivors of Terrorist Crimes in Germany; the Federal Government Commissioner for the Interests of People with Disabilities; the Central Councils of the Jews/ the Muslims / the Sinti and Roma / the African community in Germany (DE).

In Italy, in December 2019 a new extraordinary parliamentary commissioner's position was created, to combat intolerance, racism, antisemitism and the instigation to hatred and violence.²²⁰

Some states have specific units in their police or Ministry for Home Affairs, responsible for hate speech and hate crime (DE, IT, MT).

²¹⁵ Cf. Pech, L., 'The Law of Holocaust Denial in Europe. Toward a (qualified) EU-wide Criminal Prohibition' In: L. Hennebel, T. Hochmann (eds.), *Genocide Denials and the Law*, Oxford University Press, Oxford, 2011, pp. 185-234.

²¹⁶ There is an ombudsman in Malta, but his duty is more general and hate speech is not explicitly included.

²¹⁷ See the website of Antidiskriminierungsstelle des Bundes, available at <https://www.antidiskriminierungsstelle.de/>.

²¹⁸ See the website of the Italian Office Against Racial Discrimination/L'Ufficio Nazionale Discriminazione Razziale, available at <http://www.unar.it/>.

²¹⁹ See the governmental website of Equality and Reforms of Malta, available at <https://equalityandreforms.gov.mt>.

²²⁰ Osservatorio Antisemitismo (2019), "Istituita la Commissione per il contrasto dei fenomeni di intolleranza, razzismo, antisemitismo e istigazione all'odio e alla violenza proposta dalla senatrice a vita Liliana Segre", 31 October 2019, available at <https://www.osservatorioantisemitismo.it/articoli/istituita-la-commissione-per-il-contrasto-dei-fenomeni-di-intolleranza-razzismo-antisemitismo-e-istigazione-allodio-e-alla-violenza-proposta-dalla-senatrice-a-vita-liliana-segre/>.

All examined states have several non-governmental bodies which fight against racism, discrimination, or generally protect human rights.

The representatives of these bodies, including party politicians who are pro-refugee or pro-LGBTI+ receive personal threats and assaults (for the latter hate crimes, see below).

Box 7: Whistle-blowers, activists and female politicians attacked

1. On the page of the Maltese anti-immigration political party "Patrijotti Maltin", the founder of the #RedefiningUs movement – a 21-year-old, politically active Muslim student, also a commissioner of the National Youth Council in Malta – received threats and racial insults. The court of second instance convicted a man for using threatening or abusive language with the intention of instigating violence or racial hatred. The law was criticised by professor Kevin Aquilina for being overly broad and vague.²²¹ The comments appeared to be on the margin of the threshold of criminality, but the acquitting decision of the court of first instance raised social disapproval, especially the court's statement that: "the comments showed a strong concern that this country and the EU faced great challenges posed by uncontrolled illegal immigration and that the efforts made so far have not succeeded in tackling the issue." Several NGOs condemned the decision in a joint statement "the court's decision gives a message that it is not only an acceptable, but also a legitimate exercise of the right to freedom of expression".²²²
2. Roberta Metsola, a Maltese politician and MEP, received repeated graphic death threats; at least one person was convicted.²²³
3. People belonging to the Maltese LGBTI+ minority often receive hateful comments for their gender and sexual orientation, especially if they express their political opinion. Angela Coleiro, a radio and TV presenter received hateful comments for her political opinion on Facebook, but the comments targeted the gender identity of the transgender woman. The police started investigation upon her announcement (June 2020).²²⁴
4. Renate Künast, the Greens party member of the Parliament received dozens of degrading and misogynist comments which were acknowledged as insult by the court (at second instance). The case also clarified that in order to get the personal data of the speakers, the court needs to decide whether the speech was a crime; Facebook is not entitled to reveal personal data without such a judicial order.²²⁵
5. Claudia Roth, a leading German politician of the Greens, is one of those female politicians who are regularly harassed, threatened and insulted for their political opinion on refugee policy, and for her

²²¹ Malta Independent Home Local News (2019), "Freedom of Speech case: Article of Criminal Code runs counter to legal principle – Dean of Law", 31 January 2019, available at <https://www.independent.com.mt/articles/2019-01-31/local-news/Freedom-of-Speech-case-Article-of-Criminal-Code-runs-counter-to-legal-principle-Dean-of-Law-6736202874?fbclid=IwAR3ZmjrCFrM1At1q15jhut2fMmR5ipB7-4o0NpdNW-iZmfxENxHMJcKm8us>.

²²² Vella, M., "15 Human Rights NGOs Say Ezabe Hate Speech Acquittal 'Condones Anti-Migrant' Sentiment", *Malta Today*, 1 February 2018, available at https://www.maltatoday.com.mt/news/national/84179/15_human_rights_ngos_say_ezabe_hate_speech_acquittal_condones_antimigrant_sentiment-.Xvi2Fi3_5hE.

²²³ Times of Malta National (2018), "Man who threatened to burn Metsola alive given suspended jail term", 15 June 2018, available at <https://timesofmalta.com/articles/view/man-who-threatened-to-burn-metsola-alive-given-suspended-jail-term.681837>.

²²⁴ Times of Malta National (2020), "Malta's first trans TV and radio presenter files hate crime report", 3 June 2020, available at <https://timesofmalta.com/articles/view/maltas-first-trans-tv-and-radio-presenter-files-hate-crime-report.796155>.

²²⁵ Der Tagesspiegel Berlin, "Onlinehetze vor Gericht. Renata Künast gewinnt erneut in Hate-Speech Verfahren", 25 March 2020. Available at <https://www.tagesspiegel.de/berlin/onlinehetze-vor-gericht-renate-kuenast-gewinnt-erneut-in-hate-speech-verfahren/25677150.html>.

gender.²²⁶ An man was convicted to pay 4800 EUR for calling out on Facebook that she should be hanged.²²⁷

6. 89-year-old Auschwitz survivor Liliana Segre, who serves as Senator for Life in the Italian Parliament, has received countless death threats via social media after proposing a national commission to battle hatred and bigotry. As a result, local authorities assigned two policemen to protect her full-time.²²⁸

3.1.3. Underreporting and other issues with the legal procedures to combat hate speech

a. Underreporting

Table 6: Reasons for underreporting in the investigation phase

	DE	HU	IT	MT	PL
Distrust in police	yes	yes	-	yes	yes
Fear from re-victimisation, secondary victimisation	yes	yes	-	yes	yes
Fear from coming out, vulnerability of victim	-	yes	yes	yes	yes
Lack of expert technological knowledge	yes	yes	no	yes	yes
Institutional discrimination	no	yes	no	yes	yes
Unclarity of the new technology rules on responsibility	yes	-	no	yes	yes

Source: Authors, based on the country reports.

The country experts and NGOs participating in this study responded unanimously that hate speech is underreported in their countries.²²⁹

Police officers were reported to have a low capacity to recognize hate speech crimes (HU, PL).

With online hate speech, the situation is even more difficult: policemen are not trained to combat internet-related issues (HU, MT, PL), police experience major difficulties to obtain IT evidence from states where hate speech is not a crime (HU, IT).

²²⁶ Reintke, T., video "Hate Slam mit Claudia Roth", Terry Reintke and Ricarda Lang, 8 March 2019. Available at <https://www.facebook.com/watch/?v=2145111855607754>.

²²⁷ DW News, "Facebook user fined thousands of euros for hate speech against German politician", 11 April 2017. Available at <https://www.dw.com/en/facebook-user-fined-thousands-of-euros-for-hate-speech-against-german-politician/a-38390379>.

²²⁸ The Guardian, "Italian Holocaust survivor given police escort after far-right threats" (by Giuffrida, A.) 7 November 2019. Available at <https://www.theguardian.com/world/2019/nov/07/italian-holocaust-survivor-given-police-escort-after-far-right-threats>.

²²⁹ The questionnaire on the causes of underreporting and the difficulties of the procedure to pursue hate speech relied on the expertise and experience of country experts and NGOs.

Distrust in the police by vulnerable minorities is a cause for serious concern for the rule of law in democracies. Not only citizens do not trust that authorities could tackle the incident, but they have a major distrust in the police force, renowned to be racist or sexist (HU, MT, PL). In Hungary, discriminatory views among police students show alarming heights.²³⁰

In some states, police do not investigate or follow-up the case, even when reported (HU, MT²³¹, PL)²³², research shows that certain groups are discriminated against by the police and other authorities; despite announcement, the police would often not investigate the case (MT).

Migrants in all states face language and cultural barriers.

Lack of coordination between different authorities was also reported (PL).

The apathy of the victims is manifested in several forms: they see their case as "insignificant", occurring too often²³³, and they lack information about support structures (HU, MT).

b. Other hindrances to the procedures

Computer literacy is a need in all phases: - whether for investigators, prosecutors or judges – is reported as a deficiency in two Member States (HU, PL).

Online intermediaries and website administrators try to "bury their heads in the sand" to avoid liability for third party comments (PL).

In the prosecutorial phase, the lack of consistency in decision-making hinders the procedure.

In some states, prosecution appears to be hostile to the idea of prosecuting hate speech (HU, PL), which is demonstrated by the prosecutor appealing in favour of the perpetrator in case of a condemning judgment (PL).²³⁴

In Germany, the Appeal Court of Karlsruhe ordered that the prosecution is obliged to start investigation in case there is doubt whether an expression reaches the criminal threshold or not. In other words, it ordered to use the "precautionary principle", and err on the side of caution.²³⁵

Few cases reach **the judicial phase**, because of the problems described above in relation to investigation and prosecution (HU, MT).

²³⁰ 7% thinks homosexuals, 10% thinks Roma should not be protected by the police at all. Based on: Fleck Z., Krémer F., Navrátil, S. - Uszkiewicz E., *Technika vagy érték a jogállam? A jogállami értékek átadása és az előítéletek csökkentése a jogászok és rendőrtisztek képzésében*, L'Harmattan Kiadó, Budapest, 2012.

²³¹ Lovinmalta, "Prosecute Offenders Now: Malta Is Not Enforcing Its Hate Speech Laws", NGO Warns, December 6 2019. Available at <https://lovinmalta.com/news/prosecute-offenders-now-malta-is-not-enforcing-its-hate-speech-laws-ngo-warns>.

²³² In 2006, the Jan Karski Association complained that a broadcast on a catholic radio station defamed the Jewish people and violated Article 257 of the Criminal Code. Prosecutors refused to pursue the matter.

²³³ The Speak Out survey found the following reasons of not reporting in Hungary: Happens too often to tell anyone about it 47%; Did not want to disclose my sexual orientation or gender identity (28%); Just wanted to forget about it and move on (25%); Afraid that responding would make it worse (22%); Not sure if it was a hate crime (21%); Did not want to be judged for the context it took place in (e.g. a dating site) (7%).

²³⁴ In the case when a political figure burned a puppet bearing the typical characteristics of an orthodox Jew, and was sentenced to 10 months of imprisonment, the prosecutor appealed in his favour. See: Article 19 (2018) Poland: Responding to hate speech. Country Report. p. 20. available at <https://www.article19.org/wp-content/uploads/2018/04/Poland-Hate-Speech.pdf>.

²³⁵ Legal Tribune Online, „Im Zweifel Muss die Staatsanwaltschaft gegen Hass ermitteln“, 6 March 2020. Available at <https://www.lto.de/recht/justiz/j/olg-karlsruhe-1ws28519-hass-kriminalitaet-volksverhetzung-gericht-zwingt-sta-ermittlungen-juden-israel/>.

In the judicial phase, it can be established that the jurisprudence of lower courts often appears inconsistent (PL).

Ethnic and racial prejudice has also been observed in the judiciary (HU, MT).

In the judicial phase, the difficulty in proving the elements of the crime (such as motives and effects) are reported as a problem even in jurisdictions which otherwise do not appear to struggle with systemic problems (DE, IT, MT), or which did not report institutional discrimination (DE, IT, PL).

3.1.4. Prevalence of hate speech in the public discourse and the media

The experts asked questions about the prevalence of hate speech in the private, as well as the public service media. The answers were very diverse in some cases (PL).

Hate speech is seen as apparent among the political elite in almost all of the examined states (HU, IT, MT, PL) except for Germany where this is only applicable for the extreme oppositional party AfD.²³⁶

It must be noted that the hate speech imparted by the political elite would often not reach the threshold of criminal law, but signals a clear tendency by which governments feed racist sentiments through their policies, in particular in relation to asylum seekers and foreign people in general (HU, IT, MT), but also in relation to ethnic (HU) or sexual minorities (HU, PL).

This problem has been particularly grave in Hungary and in Poland, especially since 2015, targeting primarily migrants, racial and ethnic minorities, and LGBTI+ people, and represented by the public media as an instrument for political propaganda (HU, PL)²³⁷ (see more details below). In Hungary, the Ombudsman for Citizens' Rights has published two reports in 2012 on the prevalence of prejudice in media, and the relating passive and inadequate position of the Media Council.²³⁸

In three states, public service broadcasters were perceived as to refrain (DE, IT) or largely refrain (MT) from imparting hate speech, and more-or less also private broadcasters do so, too (DE, IT, MT), but they typically do not engage in counter-speech (DE, MT).

Hate speech is seen as prevalent in the written press (online included, but not social media) in HU, not prevalent (DE, MT), or ambiguous (IT, PL)²³⁹. In social media, hate speech is growing (DE, IT), or already very prevalent (MT).

²³⁶ This is also evidenced in the NPD, the far-right and ultranationalist party of Germany, which could never reach the 5% threshold to get a seat within the Parliament.

²³⁷ See also for example: Report about the Implementation of the Council of Europe Recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (CM/Rec(2010)5) in Hungary Prepared by Háttér Society Hungarian LGBT Alliance Transvanilla Transgender Association, available at <https://hatter.hu/sites/default/files/dokumentum/kiadvany/hatter-cmrec2010-5-report2018.pdf>.

²³⁸ See the following reports: "Az alapvető jogok biztosának jelentése az AJB-3395/2012. számú ügyben" (2012), available at <http://www.ajbh.hu/documents/10180/143994/201203395.rtf/0e48d72f-a888-4eda-806c-3a3bed6573de>, and "Az alapvető jogok biztosának jelentése az AJB-3739/2012. számú ügyben" (2012), available at http://mediajogfigyelo.hu/uploads/files/0_Az_alapveto%CC%8B_jogok_biztosa%CC%81nak_jelente%CC%81se_2013_03_13.pdf.

²³⁹ In certain titles, yes, but not generally prevalent.

Table 7: Is hate speech prevalent in the public discourse and in the media?

	Prevalent in the political elite	Prevalent in public broadcasting	Prevalent in private broadcasting	Prevalent in the written press
DE	AFD only	no	no	no
HU	yes	yes	somewhat	yes
IT	yes	no	somewhat	n.a.
MT	yes	somewhat	somewhat	somewhat
PL	yes	somewhat	somewhat	somewhat

Source: Authors, based on the country reports.

a. Counter-speech: the role of institutions and NGOs

Even though there are several institutions in all states which fight against hate speech and racism (see section 3.1.2) they do not appear to get involved in counter-speech actions.

The public service broadcaster and also the government make an effort to engage in counter-speech (IT), but in most states, counter-speech is noticeable mainly (DE) or only in the civil society (HU, MT, PL).

In Hungary, counter-speech is very limited and mainly employed by civil society and oppositional political parties. The authorities remain silent, even if called up for counter-speech.²⁴⁰

In Malta, dozens of projects have addressed the issue of hate speech and hate crime, and a growing body of publications engage in counter-speech (beyond merely reporting about hate speech incidents).²⁴¹

In Germany, as a meaningful new initiative, an NGO '*ichbinhier*' is specialised for counter-speech, comprising appx. 30,000 members who are helping to talk back on social media. The originally Swedish idea has been embraced in the UK as well. Other active counter-speech initiatives are Antonio Amadeo Stiftung, „Das NETTZ - Vernetzungsstelle gegen Hate Speech" (DE).

²⁴⁰ ECRI (European Commission against Racism and Intolerance) Report on Hungary (2015), p. 9., available at <https://rm.coe.int/fifth-report-on-hungary/16808b57e8>.

²⁴¹ Muskat, V., *EMORE Monitoring and reporting online hate speech in Europe*, SOS Malta, National Report on Hate Speech and Hate Crime in Malta, 2016, p. 56.

Table 8: Is counter-speech notice-able in society?

	Counter-speech by the government/PSM notice-able	Counter-speech by civil society, NGOs
DE	somewhat	yes
HU	no	limited
IT	yes	n.a.
MT	no	yes
PL	no	yes

Source: Authors, based on the country reports.

b. Political campaigns and hate speech

While the hate speech expressed by political figures is usually not punishable, it can contribute to a general atmosphere of hostility, encourage ordinary citizens to express their racial bias, and desensitise others. More importantly, such expressions are often seen as tolerating, mitigating, or condoning hate crimes - like giving a free ticket to engage in hate speech for others. Consequently, judicial procedures were expected to function in an environment when the spirit of the law is not respected by the highest level of public administration and role models of society. This derogates the legitimacy and credibility of the judiciary and of the rule of law itself.

Naturally, a state is not homogeneous: several political parties and figures express different opinions, and most of those who show bias and prejudice are not members of the government, but of opposition parties, or outside the Parliament. However, considering the hierarchical structure of the state, the higher authority is capable to overrule other actors and thereby deny their authority and weaken their speech actions. Thus, even simple rhetorical actions are very important to society, because these (too) have a constitutive effect: a rhetorical speech by a state leader constitutes social norms.

Germany

Hate speech is not applied among members of the ruling government, but according to media reports, it appears frequently in the social media channels of the far-right AfD party, which is now the largest opposition party in the federal parliament.²⁴² As reported by the media, AfD is a nationalist party, in which openly xenophobic, islamophobic and homophobic members have gained influence.²⁴³ An MP

²⁴² "Hassrede wird von der AfD in Sozialen Netzwerken zum einen eingesetzt, um politische Gegner*innen zu demoralisieren oder zum Schweigen zu bringen, zum anderen, um Hetze gegen Gruppen von Menschen zu normalisieren." AAS (2019) Demokratie in Gefahr. Handlungsempfehlungen zum Umgang mit der AfD. https://www.amadeu-antonio-stiftung.de/wp-content/uploads/2019/08/AFD_Handreichung_web.pdf.

²⁴³ Koepf, P. H. (2019), The intolerance and hate shown by AfD representatives in the Bundestag is by no means commonplace in Germany. The German Times, available at <http://www.german-times.com/the-intolerance-and-hate-shown-by-afd-representatives-in-the-bundestag-is-by-no-means-commonplace-in-germany/>. See also: BBC, (2020), Germany's AfD: How right-wing is nationalist Alternative for Germany? 11 February 2020. <https://www.bbc.com/news/world-europe-37274201>.

of AfD was accused of trivialising Holocaust.²⁴⁴ AfD presented a bill to the Parliament to protect the majority – include German ethnicity among the protected characteristics (although the current wording does not exclude this interpretation, which is not applied by courts, however).²⁴⁵ AfD has been accused of fuelling hate, in relation to the mass shooting for racist motivation in Hanau.²⁴⁶

Exemplary acts of counter-speech were expressed both by the representatives of the local government and by civil society as a reaction to the racist mass shooting in Hanau. The victims of the racist crime were posthumously awarded the highest golden honour badge from the community in a symbolic move by the mayor and the city representatives.²⁴⁷ Civil society activists – wearing T-Shirts which read: "#SayTheirNames" – painted a 27 meter long graffiti under the Peace Bridge in Frankfurt am Main depicting the faces of the nine victims and the words "Racism kills – Never forget".²⁴⁸ (The graffiti is depicted on the cover page of this study).

The official reactions of the political leaders unambiguously condemn hate speech and hate crime which gives a clear message to the society. But still, counter-speech was perceived as not sufficiently prevalent in Germany, neither in the public service media nor in governmental fora.

It should be noted, that the German state has consistent policies in place to address those situations which can create the social tensions that fuel hatred, such as social gaps, minority issues and education.

Hungary

Xenophobic, anti-migrant and anti-refugee state sponsored campaigns were started by the Hungarian government in 2015 with billboards, and have continued by political direct marketing tools (called 'national consultation'). Research found that the anti-migration communication campaign, in a context of limited political and media pluralism, exerted a significant impact on public opinion and political behaviour.²⁴⁹

Anti-migrant rhetoric has been a central element of the governmental politics.²⁵⁰

²⁴⁴ Independent, "German MP denies trivialising Hitler and the Nazis, after comments that trivialised Hitler and the Nazis", The Independent, 4 June 2018. Available at <https://www.independent.co.uk/news/world/europe/alexander-gauland-hitler-nazis-holocaust-comments-response-germany-mp-afd-a8383051.html>.

²⁴⁵ DW News, "AfD tries to redefine German hate speech laws", 27 April 2018. Available at <https://www.dw.com/en/afd-tries-to-redefine-german-hate-speech-laws/a-43563462nũ>.

²⁴⁶ The Guardian, "German far-right party AfD accused of fuelling hate after Hanau attack", 21 February 2020. Available at <https://www.theguardian.com/world/2020/feb/21/german-far-right-party-afd-hanau-attack>.

²⁴⁷ T-online.de (2020), Opfer des Hanauer Anschlags erhalten höchste Stadt-Ehrung 16.06.2020, Available at: https://www.t-online.de/region/id_88067090/opfer-des-hanauer-anschlags-erhalten-hoechste-stadt-ehrung.html.

²⁴⁸ RTL Hessen (2020), Frankfurter Friedensbrücke: 27 Meter Gedenk-Graffiti. 19.06.2020. Available at: <https://rtl-hessen.de/beitrag/frankfurt-graffiti-hanau-opfer-friedensbruecke>.

²⁴⁹ Bajomi-Lázár, P. (2019). An anti-migration campaign and its impact on public opinion: The Hungarian case. *European Journal of Communication*, 34(6), 619–628. ;Bernáth, G., Messing, V., 'Bedarálva. A menekültekkel kapcsolatos kormányzati kampány és a töle független megszólalás terepei' [Broken. The government campaign on migrants and the public for a for speech], *Médiakutató* 16(4), 2015, pp. 7–17. ; Messing, V., Ságvári, B., *Still divided, but more open: Mapping European attitudes towards migration before and after the migration crisis*, Friedrich-Ebert-Stiftung Regional project "Flight, Migration, Integration in Europe", 2019. Available at <http://library.fes.de/pdf-files/bueros/budapest/15322.pdf>.

²⁵⁰ Feischmidt, M., Hervik, P., 'Mainstreaming the extreme: Intersecting challenges from the far right in Europe'. *Intersections. East European Journal of Society and Politics*, Vol. 1, no 1, 2015. Available at <http://intersections.tk.mta.hu/index.php/intersections/article/view/80>.

As reported by the media, bias against the Roma is regularly expressed by high-level representatives of the government, and the Prime Minister himself.²⁵¹ The Speaker of the House compared gay marriage and adoption to paedophilia.²⁵²

Beyond making discriminatory statements, members of the ruling government also regularly support, trivialise hate speech incidents, or ignore hate crimes in cases where their reaction is expected. Hate speech which is thought to reach the criminal threshold²⁵³ is regularly published by persons and media outlets which explicitly enjoy the trust and support of the Prime Minister. See for example the boxed text below.

As reported by the media, the Prime Minister praised violent attackers: 'I fully understand them and it is very right that they have expressed their opinion so resolutely, so loudly and clearly.'²⁵⁴ This case also illustrates how governmental policy – with law and rhetoric – tries to disrupt civil society initiatives for tolerance, culminating into a legal and financial vexation of civil society organisations.²⁵⁵

ECRI found in 2018 that Hungary did not implement the recommendations made in 2015. This supports the observation that intolerance and ethno-nationalism have become part of the political system in Hungary, and are applied as a political ideology.²⁵⁶ "Hungary's official propaganda [...] is nationalist, populist, and exclusivist. Not just in the sense that it excludes the "historical other", namely Islam: it started to exclude Europe, too".²⁵⁷

²⁵¹ Bayer, L., "Orbán under fire over school segregation comments", Politico European Edition, 10 January 2020. Available at <https://www.politico.eu/article/viktor-orban-under-fire-over-school-segregation-comments/>

²⁵² 444 Politika (2019), "Kövé a pedofiliához hasonlította a követelést, hogy a homoszexuálisok is házasodhassanak és fogadhassanak örökbe", 15 May 2019. Available at <https://444.hu/2019/05/15/kover-a-pedofiliahoz-hasonlitotta-a-kovetelest-hogy-a-homoszexualisok-is-hazasodhassanak-es-fogadhassanak-orokbe>

²⁵³ But no procedures are started or no convictions reached due to the legal and procedural issues described above.

²⁵⁴ The reason for the protests were that the locals did not want the refugees to spend time in their village. A guesthouse owner in Őcsény offered to allow a free stay for a weekend for two (recognized) refugee families with children - followed by a violent row, which culminated into death threats and an attack on the person's vehicle. See the details at the Hungarian Helsinki Committee website, at <https://www.helsinki.hu/wp-content/uploads/HHC-submission-to-CERD-2019.pdf>.

²⁵⁵ EU Agency for Fundamental Rights (FRA), "Standing and operational space of NGOs in contributing to respecting and promoting fundamental rights in EU Member States", Hungary 2017. Available at https://fra.europa.eu/sites/default/files/fra_uploads/hungary-civil-space_en.pdf see also: Amnesty International (2018) Civil society is under attack in Hungary. <https://www.amnesty.org/en/latest/campaigns/2018/02/civil-society-is-under-attack-in-hungary/>.

²⁵⁶ Wilkin, P., 'The Rise of 'Illiberal' Democracy: The Orbánization of Hungarian Political Culture', *Journal of World-Systems Research*, 24(1), 2018, pp. 5-42.

²⁵⁷ Demeter, M. 'Propaganda against the West in the Heart of Europe: A masked official state campaign in Hungary', *Central European Journal of Communication* 11(2), 2018, pp. 177-197.

Box 8: Hate speech being rewarded

As reported by the media, an infamous publicist and TV personality, who has a long track-record of hate-inciting articles against the Roma, Jews, migrants and liberals,²⁵⁸ was awarded with the Hungarian Award of Merit (Magyar Érdemrend) of the Knight's Cross, one of the highest awards of the republic in 2016. This triggered significant protest (more than 60 famous people returned their own Award received earlier). His publisher is occasionally fined by the Media Authority for his regular and violent writings which incite upon "annihilation" of members belonging to minority ethnic groups.²⁵⁹ The prosecution has rejected investigation even in a case which received the most domestic and international attention.²⁶⁰ Hungarian NGOs called upon private companies to not advertise in the paper and five companies declared boycott. EC commissioner Viviane Reding also expressed her condemnation.²⁶¹

COVID-related hate speech in Hungary

During the COVID-19 lockdown, hate speech, especially anti-Semitic speech, became prevalent in the online fora. The attacks also targeted at, and blamed foreigners for importing the virus, the elderly for the safety measures, and urban inhabitants of the capital for spreading the virus in the countryside. The state, rather than apply counter-speech, contributed to blaming the foreigners, accusing illegal migration as a cause of importing the virus to Hungary, and the urban population of Budapest for being a hotspot for the virus. Like in many other states globally, this rhetoric was exploited by the government to pursue their anti-immigration agenda.²⁶² One of the first steps after the introduction of the state of danger was the passing of a bill to deprive transsexual persons from having their preferred gender and corresponding name registered on official documents after transitioning. Not only was this move entirely unrelated to the fight against the pandemic, but it contributed to the hostility and stigmatisation of transgender people.²⁶³ (See also above Chapter 1.1.)

²⁵⁸ A collection of his most appalling writings is here (in Hungarian), at https://b1.blog.hu/2016/08/18/10_idezet_amelyekert_bayer_kulon-kulon_is_megerdemelte_volna_a_nyilas_horog_lovagkeresztet.

²⁵⁹ Decisions of the Hungarian Media Authority: 551/2016. (V. 17.), 802/2013. (V. 8.), available at <http://nmhh.hu/dokumentum/160197/m080220130508.pdf>

²⁶⁰ Among many others, in a 2013 op-ed he wrote the following: "part of the Gypsy population are animals [...] The animals should not exist. In any way. This is what we must take care of – immediately and through any means!" See for example: Der Standard, „Öffentlicher Rassismus in Ungarn: Orbán am Zug“, 9 January 2013, Available at <https://www.derstandard.at/story/1356427220939/oeffentlicher-rassismus-in-ungarn--orban-am-zug>

²⁶¹ Index „Az Európai Bizottság is elítélte Bayer cikkét“, www.index.hu 10 January 2013. Available at https://index.hu/kulfold/2013/01/10/az_europai_bizottsag_is_elitelte_bayer_cikket/

²⁶² Ng, E., 'The Pandemic of Hate is Giving COVID-19 a Helping Hand', Editorial. *Am. J. Trop. Med. Hyg.*, 102(6), 2020, pp. 1158–1159

²⁶³ Euractiv, "Hungary seeks to clamp down on transgender rights, sparking EU protests", 3 April 2020. Available at <https://www.euractiv.com/section/justice-home-affairs/news/hungary-seeks-to-clamp-down-on-transgender-rights-sparking-eu-protests/>. On 20 May 2020 the law was passed. Available at <https://www.euronews.com/2020/05/20/hungary-passes-bill-ending-legal-gender-recognition-for-trans-citizens>.

Box 9: Foreign, muslim students as culprits for the pandemics

The first persons diagnosed with COVID-19 in Hungary were Iranian university students resident in Hungary, who spent holiday in Iran and tested positive when they returned to Hungary. The virus is said to have spread on a birthday party where several Iranian students attended.

As reported widely by the Hungarian media, the Prime Minister declared: "there is obvious connection between *illegal* migration and coronavirus epidemics, because several migrants arrive from Iran or through Iran."²⁶⁴

The students were quarantined and some of them did not follow the instructions of the staff, and police intervened. Later fifteen Iranian students were prosecuted, expelled, banned from entry into the Schengen area for three years, and their immediate deportation was ordered, even though most of the students had fully cooperated with the authorities and some voluntarily reported and asked for testing. One of the students who had lived in Hungary for nine years, asked the legal aid of the Hungarian Helsinki Committee which appealed against the expulsion. She had tested negative, did not violate any quarantine rules, and the decision was taken before the police investigation was closed. Upon appeal, court found that the Immigration Authority is incapable to reject the police's request to expel, and did not accept the non-refoulment objection either.²⁶⁵ The students were deported to Iran in April.

Box 10: Anti-Semitism at highest level

According to media reports, the Prime Minister of Hungary made a not-so-covert anti-Semitic statement in a radio interview: reacting to the news that George Soros might finance a 1 trillion EUR coronavirus recovery fund, Orbán reacted: "they really love interest", where the context clearly reflects on the Hungarian stereotype for Jewish people. Orbán called the recovery fund a "second Soros plan" and built a conspiracy theory that Soros wanted to force European nations into "debt slavery".²⁶⁶

Beyond the rhetoric, legislative measurements have been reported to exacerbate the rule of law deficiency in Hungary.²⁶⁷

²⁶⁴ Magyar Nemzet, "Orbán Viktor: Kapcsolat van a migráció és a koronavírus-járvány között", 10 March, 2020. Available at <https://magyarnemzet.hu/belfold/orban-viktor-egvertelmuen-kapcsolat-van-a-migracio-es-a-koronavirus-jarvany-kozott-7872191/>.

²⁶⁵ Hungarian Helsinki Committee, 'The Rule of Law Quarantined in the Case of the Iranian Student', 15 April, 2020. Available at <https://www.helsinki.hu/en/the-rule-of-law-quarantined-in-the-case-of-the-iranian-student/>. See also: Teczár, Sz. "Kafkai eljárás végén utasították ki Magyarországról a 33 éves iráni orvostanhallgató lányt", Magyar Narancs, 9 April 2020. Available at <https://magyarnarancs.hu/belpol/kafkai-eljaras-vegen-utasitottak-ki-magyarorszagrol-a-33-eves-irani-orvostanhallgato-lanyt-128655>.

²⁶⁶ InsightHungary, "When the Prime Minister Said, 'They Really Love Interest', Everyone in Hungary Knew Who He Meant", June 16, 2020. Available at <https://insighthungary.444.hu/2020/06/16/when-the-prime-minister-said-they-really-love-interest-everyone-in-hungary-knew-who-he-meant>.

²⁶⁷ Bárd, P., Carrera, S., 'Showing true illiberal colours - Rule of law vs Orbán's pandemic politics', CEPS, Policy Insights No 2020-10, April 2020, CEPS, Brussels, 2020. Available at https://www.ceps.eu/wp-content/uploads/2020/04/PI2020-10_PBSC_true-illiberal-colours.pdf.

Italy

In a media monitoring programme organised by Amnesty International in Italy during the 2019 election campaign, 787 hate speech incidents were reported in 23 days, of which 43,5% were attributable to leaders, 50% to parliamentary candidates. Among these, 51% to League candidates. 91% of the messages targeted migrants and immigrants.²⁶⁸

In a similar survey during the election campaign in 2018, Amnesty International identified more than 200 hateful or discriminatory posts or comments within two weeks, made by political leaders and candidates. Practically all were attributable to the centre-right alliance, and more than half to The League (led by Salvini). The development shows a growing tendency.

According to Freedom House, online hate speech has not subsided after the elections. Italian female politicians and journalists face online harassment and gender-based insults and threats.²⁶⁹

The scope of privilege which gives immunity to members of Parliament is regarded as overly wide, and courts may take hate speech cases too lightly. *"When influential political figures seem able to engage in unlawful hate speech without criminal convictions holding back their political ambitions, it sends a symbolic message that Italian authorities do not take the problem of hate speech very seriously."*²⁷⁰ While Italian politicians occasionally get a suspended prison sentence, they are not banned from taking public office and continue their political activity without interruption.

There have been efforts made by the Italian state to fight racism, demonstrated by the National Action Plan against Racism, Xenophobia and Intolerance (2013-2016), and other positive actions – which were acknowledged by OSCE and ECRI –, however, in political and public debates, even from the members of the ruling Government, hate speech is still trivialised and xenophobic acts are tolerated.²⁷¹

Malta

According to an Eurobarometer survey, Malta had the highest level of online hate speech among European MSs in 2018.²⁷² Statements by members of the political elite and senior members of the public administration are often biased and fuel racist sentiments, in particular relating to migrants and foreigners in general.

Especially those politicians and public figures are attacked in Malta who stand up for minorities, whether foreigners or LGBTI+. The overwhelming majority of hate speech appears to be expressed on social media.

The court's viewpoint shows this trend from a different angle: "The court is tired of this and has already drawn the attention to the lack of education when it comes to the use of media and social networking.

²⁶⁸ See Amnesty International Italy, "Un Osservatorio Sui Discorsi D'Odio in Campagna Elettorale", 2020, available at <https://www.amnesty.it/barometro-odio/>.

²⁶⁹ See Freedom House report on the Internet freedom in Italy, 2019, available at <https://freedomhouse.org/country/italy/freedom-net/2019>.

²⁷⁰ Brown, A., Sinclair, A., *The Politics of Hate Speech Laws*, Routledge, 2019.

²⁷¹ Bruno, G. C., "Implementation of OSCE Human Dimension Commitments by Italy: Racism, Xenophobia and Anti-Semitism", Security and Human Right Monitor, 2019, Available at <https://www.shrmonitor.org/preventing-racism-and-xenophobia/>

²⁷² Eurobarometer, "Illegal content online. June 2018", September 2018. Available at <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/83669>

It notes, on a daily basis, that even people with responsibility are uploading posts before thinking and do not even realise they have a responsibility, especially when they represent certain institutions."²⁷³

As a relatively stand-alone case, far-right Maltese politician Norman Lowell has been charged with hate speech related offences on several occasions, for xenophobic views, white supremacy and he was convicted once in 2008.

Poland

Polarisation has been steeply growing in Poland since 2015. Hate speech is consciously applied even by the highest political elite – in particular the anti-migrant rhetoric – as a tool to raise emotional support for the governing party, and to discredit opposition. Events of threats and harassment based on political opinion, sexual orientation are frequent and left without consequences. The government remains silent in case of violent attacks against minorities.²⁷⁴

As part of the fight against independent judiciary, President Andrzej Duda expressed that "judges are irresponsible" and that they "should be eliminated", and that Poland needs to be "purified". The largest association of Polish judges, Iustitia called this an example of hate speech which can lead to violence against individual judges.²⁷⁵ When a judge expressed his condemnation in a tweet, a few hours later in the night he was subject to an investigation for insulting the President, a crime under Polish criminal law.

As a specific cause for concern, authorities and politicians have been undermining the efforts of the Ombudsperson, intimidating him and envisaged budgetary reduction; prosecution has interfered in procedures in favour of the perpetrator.²⁷⁶

²⁷³ Times of Malta National, "Policeman hit-and-run Facebook hate messages land three in trouble", 18 May 2018,. Available at <https://timesofmalta.com/articles/view/social-media-posts-should-be-most-prudent-magistrate.679361>.

²⁷⁴ See the report of Article 19, „Respond to hate speech – Poland”, 2018, p.8. Available at <https://www.article19.org/wp-content/uploads/2018/04/Poland-Hate-Speech.pdf>.

²⁷⁵ Rule of Law Latest, "Duda shocks with hate speech attack on Polish judges", 24 January 2020, available at <https://ruleoflaw.pl/duda-shocks-with-hate-speech-attack-on-polish-judges/>

²⁷⁶ Article 19, "Poland: Responding to hate speech", 2018, p. 32. Available at <https://www.article19.org/wp-content/uploads/2018/04/Poland-Hate-Speech.pdf>.

Box 11: Homophobia in symbolic state actions

As widely reported by the media, homophobia has become central issue of the presidential campaign of Andrzej Duda in June 2020, with the President's campaign message to protect children from "LGBT ideology".²⁷⁷

A group has distributed stickers showing "LGBT-free zones", and appx. 80 towns in Poland that have declared themselves "LGBT-free zones" or "free from LGBT ideology".²⁷⁸ Several Polish politicians have explicitly encouraged the "LGBT-free" declarations, even a candidate for the European elections. The commissioner for human rights Adam Bodnar said that the government is increasing homophobic sentiments with their expressions on the margins of hate speech.

The campaign has been scaled down as a result of the widespread criticism - which shows the importance of counter-speech.²⁷⁹

Institutional discrimination shows other minor signs: the Constitutional Tribunal in 2019 June found no violation of law by a printer who refused to provide services for an LGBTI+ foundation;²⁸⁰ the justice minister ordered an investigation against Ikea which fired an employee who posted citations from the Bible which call upon killing gays, and other homophobic views on the intranet website of the firm. The prosecution held that the employee's right to exercise his religion was violated.²⁸¹

²⁷⁷ Reuters, „Polish president says he would ban LGBT teaching in schools”, 10 June, 2020, available at <https://www.reuters.com/article/us-poland-election-lgbt/polish-president-says-he-would-ban-lgbt-teaching-in-schools-idUSKBN23H2BU?il=0>.

²⁷⁸ The Guardian World/Europe, “Polish president issues campaign pledge to fight 'LGBT ideology'”, 12 June 2020, available at <https://www.theguardian.com/world/2020/jun/12/polish-president-issues-campaign-pledge-to-fight-lgbt-ideology>.

²⁷⁹ The Guardian, “Polish president scales down homophobic rhetoric as election nears”, 19 June 2020. Available at <https://www.theguardian.com/world/2020/jun/19/polish-president-scales-down-homophobic-rhetoric-poland-election-nears-andrzej-duda>.

²⁸⁰ The Independent News/World/Europe, “Polish cities and provinces declare ‘LGBT-free zones’ as government ramps up ‘hate speech’”, 20 July 2019. Available at <https://www.independent.co.uk/news/world/europe/poland-lgbt-free-zones-homophobia-hate-speech-law-justice-party-a9013551.html>.

²⁸¹ Moore, “Polish IKEA manager could face jail after firing homophobic employee”, 30 May 2020. Available at <https://www.gaytimes.co.uk/community/136461/polish-ikea-manager-could-face-jail-after-firing-homophobic-employee/>.

Box 12: Explicitly right-extremist parties with repeated accounts of hate speech

1. According to media reports, a leading right-wing extremist political figure in Poland had repeated clashes with the hate speech prohibitions. He was sentenced to 3 months in prison at the second instance for saying that all Jews must leave Poland and head back to Israel. He placed a sign on his hostel which said: "Polish House - No entry for Jews and other thieves and traitors of Poland".²⁸² No intervention followed for months, because the banner hung on "private property". The cheap hostel is also used by guest workers from Ukraine.²⁸³ In 2015, on an anti-Muslim demonstration, the politician burned up an effigy (puppet) of an Orthodox Jew which was meant to represent George Soros.²⁸⁴ He received a prison sentence which was changed to electronic custody. However, after he, in a demonstration on 11 November (Poland's Independence Day) in 2017, he preached anti-Semitic statements, and called for aggression against people with different political views, his electronic custody was changed to back to prison, and two other anti-Semitic expressive actions were also added to the charges.²⁸⁵ On this same demonstration – where 60,000 people were reported to march – many expressed racist sentiments and waved banners reading "Europe Must Be White" and "Clean Blood."²⁸⁶

He holds himself as an anti-Communist nationalistic, and sued Marta Lempart, leader of the National Women Strike movement who called him a neo-fascist and a bandit. Ms. Lempart did not retract her statement, saying: "I absolutely think it is necessary to name things by their names".²⁸⁷

2. According to media reports, a prominent anti-Semitic politician in Poland called Jews a "cancer" who had "swept Poland". He was charged for this statement and some other earlier statements inciting hatred against Jews and Holocaust denial, in February 2020.²⁸⁸ In 2017 he was refused entry to Britain, where he wanted to make a speech at a "Britain First" rally, against Islam.²⁸⁹ According to anti-racist group Hope not Hate a number of Polish far-right groups had become active in the UK, and the city where Miedlar was invited, has at least 2,000 Polish speaking inhabitants. The group feared that the person could radicalise some of the 830,000 Poles living in the UK.²⁹⁰

²⁸² The Yeshiva World Headlines & Breaking News, „Antisemitic Sign Prohibiting Jews Seen Outside Polish Hotel”, 24 November 2017. Available at <https://www.theyeshivaworld.com/news/general/1410274/anti-semitic-sign-prohibiting-jews-seen-outside-polish-hotel.html>.

²⁸³ Na Temat Dzieje Sie, "Hotel zakazuje wstępu "Żydom I zrdajcom". Mieszkaja w nim Ukraincy, a nalezy do antysemy Piotra Rybaka", 21 November 2017. Available at <https://natemat.pl/223389.dom-polski-z-bannerem-zakaz-wstępu-dla-żydów-komunistów-to-własność-piotra-rybaka#>.

²⁸⁴ JTA (2017), Polish court sentences man in burning of a Jew in effigy, 14 April, 2017, available at <https://www.timesofisrael.com/polish-court-sentences-man-in-burning-of-a-jew-in-effigy/>.

²⁸⁵ Na Temat Dzieje Sie, "Jeszcze w sobote krzyczal o "lewackich sadach" teraz trafi za kratki. Podpalacz kukły Żyda idzie do więzienia", 15 November 2017, available at <https://natemat.pl/222963.jeszcze-w-sobote-krzyczal-o-lewackich-sadach-teraz-trafi-za-kratki-podpalacz-kukły-żyda-idzie-do-wiezienia>.

²⁸⁶ See the annual report of the "2017 Top Ten Worst Global Anti-Semitic/Ant-Israel incidents of the Simon Wiesenthal Center, p. 6, available at <http://www.wiesenthal.com/about/news/top-10/top-ten-2017.pdf>.

²⁸⁷ Wyborcza Wrocław, "Piotr Rybak pozwał Martę Lempart za nazwanie go neofaszystą i bandytą. Chce przeprosin i pieniędzy", 11 February 2020. Available at <https://wroclaw.wyborcza.pl/wroclaw/7,35771,25686652,piotr-rybak-pozwal-marte-lempart-za-nazwanie-go-neofaszysta.html>.

²⁸⁸ The Times of Israel Current Top Stories, "Polish former priest indicted for hate speech and Holocaust denial", 20 February 2020, available at <https://www.timesofisrael.com/polish-former-priest-indicted-for-hate-speech-and-holocaust-denial/>.

²⁸⁹ The Guardian World/Europe "Far-right Polish priest detained at Stansted airport", 25 February 2017. Available at <https://www.theguardian.com/world/2017/feb/25/far-right-polish-priest-jacek-miedlar-detained-at-stansted-airport>.

²⁹⁰ *Id.*

Summary: political campaigns and hate speech in the examined states

In some states, the political rhetoric exploits the emotions that can be raised through hate speech and does not shy away from exacerbating ethnic and social tensions (HU, IT, MT, PL).

Generally, the statements made by the high-level members of public administration do not reach the criminal threshold, but express their support hate speech and hate crimes by others; they are capable to fuel bias and prejudice both with their expressions and with their silence (HU, IT, MT, PL).

On the positive side, in all states, civil society groups have been actively protecting minorities, organising campaigns and providing support to the vulnerable groups (DE, HU, IT, MT, PL).

In some states, considerable governmental involvement in these supporting activities can be observed (DE, IT).

In other states, civil society groups are harassed by government (HU, PL).

This is especially great cause for concern when state-supported social policies are also missing such as to foster equal education and level economic differences, or to tackle discrimination (HU, PL). The political rhetoric must be interpreted together with the existence or lack of such policies.

In Germany, the official political rhetoric along with governmental policies works in the direction of equality and non-discrimination, albeit the far-right group AfD is growing in popularity.

3.2. Hate crimes**3.2.1. Codification techniques****a. Transposition of the Article 4 of the Framework Decision**

Article 4 of 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 obliges MSs to “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.” The provision was transposed in all the five countries analysed (DE, HU, IT, MT, PL).²⁹¹

The state obligation enshrined in the framework decision reflects the fact discussed in the introductory chapter that social hatred not only affects individuals’ human dignity, private lives, but might also escalate into violent acts and ultimately endanger people’s lives, too.²⁹² Hate crimes have a greater impact on direct victims, the victim’s community and society as a whole, than ordinary crimes. This extremely grave impact becomes most obvious in the case of the most serious bias crimes, which are on the borderline, or could be classified as crimes against the state or terrorism.

²⁹¹ As one of the Polish respondents pointed out, Article 53 PCC was enacted in 1997 and since then the provision has been amended just once. Some scholars and experts contend that Poland did not technically transpose Article 4 of the framework decision, because the Polish legislation had already been in compliance with these requirements. Positive legislative steps (e.g. by adding to bias motivation to aggravating factors) have never been taken.

²⁹² As MEP Magdalena Adamowicz succinctly formulated: “Hate speech cannot only misinform people, but it can kill.” Deutsches Institut für Menschenrechte, Conference on “Safeguarding the Rule of Law in Europe”, 25 June 2020. Available at: <https://www.institut-fuer-menschenrechte.de/aktuell/live-streams-von-veranstaltungen/>

Box 13: Roma serial killings in Hungary

Perhaps the gravest crime in post-transition Hungary happened in 2008-2009, when a group of Neo-Nazis murdered six Roma persons and wounded many others out of racial hatred. The perpetrators used guns, grenades and petrol bombs. They deliberately chose their victims from among the respected members of the community, and also a small child was tragically killed at one of the crime scenes. In the testimony given by the serial killers of Roma victims, the perpetrators claimed that they had wanted to spark off a civil war between the Roma and the non-Roma population.²⁹³

In this light they could have been charged with crimes against humanity or terrorism, but ultimately they were sentenced for murder prompted by base motives, which includes racism and ethnic hatred. A different classification of the killings would have been important symbolically, since the outcome of the case could not have been harsher: three perpetrators were sentenced to real life imprisonment, and a fourth member of the group was sentenced to 13 years in prison.

Some other cases cannot be classified as hate crimes at all, but clearly show the ties between bias motivated crimes, radicalisation and terrorism.²⁹⁴

Box 14: German right-wing radical army officer

A lieutenant general of the German Armed Forces will be tried for preparation of right wing radical terrorism. He led a double life for many months. The suspect from Hesse, Germany claimed to be a Christian refugee from Syria under the name David Benjamin and applied for and got an asylum status. He spoke French with the authorities, pretending that he stems from a small French-speaking community in Damascus.

The investigation authorities presume that the soldier planned assassinations against German politicians and then to divert the suspicion to refugees. He possessed a copy of Hitler's *Mein Kampf* and several CDs with national-socialist records. The authorities also found notes where he wrote "Hitler is above all".

The case reached the German Federal Supreme Court, when the lower court refused to conduct a proceeding for right-wing terrorism,²⁹⁵ and the prosecution appealed against that decision. The German Federal Supreme Court held that the suspect must be tried for terrorism.²⁹⁶

The procedure was suspended against another suspect in the case, who now works for an AfD member of the Bundestag.

²⁹³ Verseck, K., "Justice in Hungary Neo-Nazis Get Life for Roma Murder Spree", 6 August 2013, available at <https://www.spiegel.de/international/europe/neo-nazis-in-hungary-receive-life-sentences-for-roma-murder-spree-a-915163.html>.

²⁹⁴ On the interconnections between polarisation, radicalization, extremism and hate crimes see the findings of the BRaVE project, available at <http://brave-h2020.eu/>, especially Vidra, Zs., Zeller, M., 'Assessing policies of preventing polarisation and building resilience towards extremism', *BRaVE Policy Paper*, in print. .

²⁹⁵ Article 89a GCC.

²⁹⁶ German Federal Court of Justice (Bundesgerichtshof), StB 17/18, 22 August 2019.

Criminal justice in hate crime cases plays only one and not necessarily the most important role among the many reactions that a state can apply towards intolerance. Hate crimes are not created in a vacuum, neither do they develop suddenly. The occurrence of violent bias crimes proves that other tools of condemnation to earlier forms of prejudice failed, the state was unable to ease social tensions or what is more, state agents actively contributed to the escalation of hostility.

Box 15: The murder of Walter Lübcke

German politician Walter Lübcke was shot dead in front of his own house by a right-extremist perpetrator, whose racist and xenophobic attitude was founded on an ethnic-nationalism that motivated his act, according to prosecutors. A causal relationship can be drawn between hate speech including posts on social media, targeting specifically Lübcke and the murder,²⁹⁷ even though it is not entirely clear whether the suspect himself published the comments which amounted to public incitement to commit crimes and endorsing crimes, or others did so and he acted upon their influence. In any case, he was an active supporter of the extreme right wing political party AfD.²⁹⁸

The case raised a heated debate in Germany as to whether the spreading of hate speech and specifically the AfD, or the ignorance against and tolerance of the right wing radical party's growing popularity by the mainstream made moderate parties also complicit in the violence against public officials. Lübcke was the not the first politician to be attacked for his refugee policy, following German mayor Andreas Hollstein who survived being stabbed in his neck, while his attacker gave voice to his critical opinion of Hollstein's liberal stance towards asylum seekers. Cologne's mayor Henriette Reker was attacked by knife in October 2015 by an extremist critical of her refugee policy.²⁹⁹ Joachim Kebschull, the mayor of the town of Oersdorf in Schleswig-Holstein, who was about to settle refugees in the city, was brutally assaulted in 2016.³⁰⁰

²⁹⁷ ZDF Heute Nachrichten, "Hate speech im Fall Lübcke: Hass hinter Pseudonymen", 6 June 2019, available at <https://www.zdf.de/nachrichten/heute/fall-luebcke-hass-im-internet-hate-speech-100.html>; ZDF Heute Nachrichten, „In 13 Bundesländern - Durchsuchungen wegen Hasspostings“, 2019. Available at <https://www.zdf.de/nachrichten/heute/in-13-bundeslaendern-durchsuchungen-wegen-hasspostings-100.html>.

²⁹⁸ Tagesschau Investigativ, "Stephan E. war offenbar für AfD aktiv", 21 January 2020. Available at <https://www.tagesschau.de/investigativ/ndr/stephan-e-afd-101.html>.

²⁹⁹ The Guardian World/Europe, "German mayor rejects idea of police protection despite knife attack", 28 November 2017. Available at <https://www.theguardian.com/world/2017/nov/28/german-pro-refugee-mayor-andreas-hollstein-attacked-by-man-with-knife>.

³⁰⁰ Ulrich Exner (2016), "Nach Fremdenhass-Attacke. Bürgermeister von Oersdorf gibt nicht auf" [After a xenophobic attack. The mayor of Oersdorf does not give up] 6 October 2016. Available at <https://www.welt.de/politik/deutschland/article158594991/Buergermeister-von-Oersdorf-gibt-nicht-auf.html>.

Box 16: The assassination of Paweł Adamowicz, the Mayor of Gdańsk

The mayor of Gdańsk, Paweł Adamowicz, was stabbed three times on stage at a charity event. During the murder, the perpetrator shouted political slogans against courts and the party of which Adamowicz was a member. The next day, the mayor died.

Albeit the mental health of the perpetrator is still debated, the crime clearly had political motives against the mayor, who was a progressive politician, among others supporting sex education in schools, LGBTI+ rights, tolerance for minorities, and intended to bring injured refugee children to Gdańsk for treatment, an initiative blocked by the government.

The tragedy triggered a debate about the limits of free speech and the phenomenon of hate speech being spread by pro-government media outlets.

Hate speech was part of everyday life long before the assassination. Two years before the murder, the right radical All-Polish Youth group published a fake symbolic death certificate for Adamowicz.³⁰¹ It was not classified as hate speech by the prosecution. Similar threats happened, when nationalists hung photos of six Polish MEPs on symbolic gallows in Katowice.³⁰²

Public media added to the polarisation in Polish society, which triggered harsh criticism. The public television company threatened with civil and criminal cases people blaming them for having contributed to the politically motivated crime. Albeit courts dismissed the cases, they certainly have a chilling effect on individuals wishing to discuss media's and public figures' responsibility in disseminating hate speech that might contribute to a climate where hate crimes occur.

This silencing of dissenting view is problematic so much the more, as incitements to assassinate mayors of other Polish cities or opposition politicians started to spread.³⁰³ As Bogusław Chrabota, editor-in-chief of the Rzeczpospolita wrote: "The assassination of the mayor of Gdansk shows that we have crossed the Rubicon as a society... If there is no systematic fight against hatred we will all have blood on our hands."³⁰⁴

b. Codification techniques

All legal systems analysed recognise that bias motivated crimes target vulnerable victims or victims in vulnerable situations, that they are increasingly detrimental to the direct victim's social group, that they cause greater harm to common values such as equality, and therefore should result in heavier criminal penalties.

³⁰¹ Cienski, J., "Murder of Gdańsk mayor highlights Poland's polarization. The government's backers and opponents live in largely separate worlds", 19 April 2019. Available at <https://www.politico.eu/article/gdansk-mayor-pawel-adamowicz-killing-highlights-poland-deep-divisions/>.

³⁰² Wyborcza Katowice, "Śledztwo w sprawie szubienic dla posłów PO przedłużone. 'Obawiamy się o nasze zdrowie i życie'", 2 March 2019, available at <https://katowice.wyborcza.pl/katowice/7,35063,24510103,sladztwo-w-sprawie-szubienic-dla-poslow-po-przedluzone-obawiamy.html?disableRedirects=true>, and see also: EURACTIV News/Global Europe/Central Europe, "Poland probes pictures of MEPs 'on gallows' at far-right demonstration", 28 November 2017. Available at <https://www.euractiv.com/section/central-europe/news/poland-probes-pictures-of-meps-on-gallows-at-far-right-demonstration/>.

³⁰³ Melnychenko, N., *How Hate Kills. Hate Crimes in Poland in 2019*, Report, Open Dialogue Foundation, Warsaw, 2020. Available at https://odfoundation.eu/content/uploads/2020/06/8.06.2020_odf_how-hate-kills_eng2.pdf.

³⁰⁴ Cited in English by Easton, A., Adamowicz, P., "Murder on stage stuns a divided Poland", 16 January 2019. Available at <https://www.bbc.com/news/world-europe-46878325>

Having a *sui generis* legal classification for hate crimes is fundamentally symbolic. It is so for numerous reasons. Picking out a certain criminal motive by giving it an individual name is in itself a symbolic act. When they want to express a negative value judgment more emphatically, legislators – instead of leaving the assessment of the motive exclusively in the hands of the judiciary, who could use their discretion in individual trials to assess it either as an aggravating factor or as a generic qualifying circumstance – have the option of singling out certain criminal motives by giving them concrete names, which is typically done in the form of qualifying circumstances. But to make the state's denouncement of the crime even more symbolic, legislators can elevate the motive to a *sui generis* legal classification. Many jurisdictions combine the different models in their criminal codes.

(i) Sui generis hate crime provisions

Sui generis hate crime provisions are rather rare (HU, PL from among the scrutinised jurisdictions). An example is Article 216 of the Hungarian Criminal Code³⁰⁵ (hereinafter: HCC) on violence against a member of the community criminalising the display of an apparently anti-social behavior against others for being part, whether in fact or under presumption, of various protected groups, of aiming to cause panic or to frighten others. It is also a crime to assault another person for being part, whether in fact or under presumption, of various protected groups, or to compel such a victim by force or by threat of force to do, not to do, or to endure something. The penalty is enhanced, if the hate crime is committed: a) by displaying a deadly weapon; b) by carrying a deadly weapon; c) by causing a significant injury of interest; d) by tormenting the aggrieved party; e) in a gang; or f) in criminal association with accomplices. Preparation for the use of force with a bias motive is also a crime. The HCC orders to punish bias motivation also via other techniques to be discussed *infra*.

Similarly, the Polish Criminal Code³⁰⁶ (PCC) contains references to hate crimes in Article 119, which that makes it a crime to use violence or unlawful threats towards a group of persons or a particular individual because of their national, ethnic, political or religious affiliation, or because of their lack of religious beliefs. Article 257 makes it a crime to publicly insult a group within the population or a particular person because of their national, ethnic, race or religious affiliation or because of their lack of any religious denomination. Also the breach of personal inviolability of another individual is to be punished as a crime.

(ii) Hate embedded into a more general qualifying circumstance

According to one of the Hungarian codification techniques related to bias crimes, a so-called base or malicious motive is a qualifying circumstance in the case of the following crimes: homicide, battery, violation of personal freedom, defamation, unlawful detention section, insult of subordinate.³⁰⁷ This a qualifying circumstance, among many other motives, also includes acts motivated by racist hatred. The penalty is enhanced, whenever this circumstance applies to the crime.

³⁰⁵ Act C of 2012 on the Hungarian Criminal Code.

³⁰⁶ Act of 6 June 1997 promulgating the Polish Criminal Code.

³⁰⁷ Homicide, Article 160(2)(c) HCC; Battery, Article 164(4)(a) and Article 164(6)(a) HCC; Violation of Personal Freedom, Article 194(2)(b) HCC; Defamation, Article 226(2)(a) HCC; Unlawful Detention Section, Article 304(2)(a) HCC; Insult of Subordinate, Article 449(2)(a) HCC.

(iii) Hate as a specific qualifying circumstance

A specific qualifying circumstance increases the penalty for a base crime if committed with a bias motive. The penalty enhancement may be general or specific.

A general 'aggravating circumstance' can typically be found in the general part and applies to all crimes enshrined in the criminal code. In Italy, according to Article 604-ter of the Italian Criminal Code³⁰⁸ (ICC) ethnic, national, racial and religious motivation shall be considered an aggravating circumstance with regard to all crimes. The penalty should be increased by up to a half of the sentence for crimes punishable with a penalty other than life imprisonment committed for purposes of discrimination or ethnic, national, racial or religious hatred, or to facilitate the activities of organizations, associations, movements or groups having said purpose. In Malta Articles 83B, 222A, 251D and 325A of the Maltese Criminal Code³⁰⁹ (MCC) provide general aggravating circumstances for any crime when the offence is motivated by discrimination. According to Article 83B, the punishment for any offence shall be increased by one to two degrees when the offence is aggravated or motivated, wholly or in part by hatred against a person or a group, on the grounds of gender, gender identity, sexual orientation, race, colour, language, national or ethnic origin, citizenship, religion or belief or political or other opinion. Article 82A MCC criminalises the use of any threatening, abusive or insulting words or behaviour, with the intent to stir up violence on the grounds of a discriminatory motive.³¹⁰ Article 83C³¹¹ specifies that the offence committed for the benefit, in part or in whole, of a body corporate, may be subject to specific sentences, such as the exclusion from entitlement to public benefits, the suspension or cancellation of any licence, etc.

³⁰⁸ Codice Penale, Testo coordinato ed aggiornato del Regio Decreto, 19 October 1930, no. 1398.

³⁰⁹ Criminal Code, CAP. 9., 10 June 1854.

³¹⁰ Article 82A.

Section 1 Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up violence or racial or religious hatred against another person or group on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion or whereby such violence or racial or religious hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months.

Section 2 For the purposes of the foregoing sub-article "violence or racial or religious hatred" means violence or racial or religious hatred against a person or against a group of persons in Malta defined by reference to gender, gender identity, sexual orientation, race, colour, language, national or ethnic origin, citizenship, religion or belief or political or other opinion.

³¹¹ Article 83C.

Whenever an offence is committed for the benefit, in part or in whole, of a body corporate by a person who has the power of representation of the body corporate, authority to take decisions on behalf of the body corporate, or authority to exercise control of the body corporate, without prejudice to any other punishment to which the body corporate may be liable under any other provision of this Code or of any other law, the said body corporate may be subject to:

- (a) exclusion from entitlement to public benefits or aid;
- (b) the suspension or cancellation of any licence, permit or other authority to engage in any trade, business or other commercial activity;
- (c) placing under judicial supervision;
- (d) the compulsory winding up of the body corporate; or
- (e) the temporary or permanent closure of any establishment which may have been used for the commission of the offence:

Provided that the provisions of this article shall not apply where the punishment mentioned in this article is already provided for under this Code or any other law.

Alternatively, bias as an aggravating circumstance might be incorporated into a separate provision next to the base offence it applies to (DE³¹², HU³¹³ and PL³¹⁴).

(iv) General sentencing provisions

MSs without any express provision on bias motivation behind the crime may still address the problem by using general sentencing principles so as to impose a sentence that is proportionate to the crime in question. According to Article 46(2) of the German Criminal Code³¹⁵ (GCC) on the Principles of sentencing, according to which the court shall weigh the circumstances in favour of and against the offender. While doing so, consideration shall in particular be given to the motives and objectives of the offender”, in particular including racist, xenophobic or other motives evidencing contempt for humanity.

The HCC’s Article 80(1) is rather general – it states that sanctions are to be imposed by having in mind their intended objective: they must be consistent with the severity of the criminal offense, with the degree of culpability, the danger the perpetrator represents to society, and with other aggravating and mitigating circumstances. The Criminal Department of the Supreme Court³¹⁶ laid down guidelines on how and which aspects of the crime are to be taken into account during sentencing as aggravating or mitigating circumstances, and it does not list bias motivation. But in Hungary, the hate motive can be taken into consideration along the above-mentioned provisions. The PCC’s provisions on sentencing don’t specifically mention bias either, but indirectly it can be read into the respective provision.³¹⁷

On the output side – in other words for the purpose of sentencing – it makes little to no difference what codification logic has been used by a state. When there are no substantial differences, the only justification for introducing a separate legal classification for hate crimes is the symbolic expression of denouncement, which may have first a public educational and informational function to all the citizens, but most notably to potential offenders, while second, it can also show the state’s solidarity with the victims of such crimes. Thirdly, the state symbolically acknowledges that it has been unable to resolve the existing social tensions and anyone – including members of the majority group – can fall victim to such acts merely through a group identity beyond their control.

³¹² See Article 130 GCC on incitement of masses; Article 185 GCC on insult; Article 211 GCC on murder under specific aggravating circumstances.

³¹³ See above under general qualifying circumstances.

³¹⁴ *Id.*

³¹⁵ German Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I, p. 3322), as last amended by Article 2 of the Act of 19 June 2019 (Federal Law Gazette I, p. 844).

³¹⁶ Hungarian Supreme Court, 56. BK Opinion on the factors that can be assessed while imposing sanctions.

³¹⁷ Article 53(2) PCC: In imposing the penalty, the court shall above all take into account the motivation and the manner of conduct of the perpetrator, committing the offence together with a minor, the type and degree of transgression against obligations imposed on the perpetrator, the type and dimension of any adverse consequences of the offence, the characteristics and personal conditions of perpetrator, his way of life prior to the commission of the offence and his conduct thereafter, and particularly his efforts to redress the damage or to compensate the public perception of justice in another form. The court shall also consider the behaviour of the injured person.

C. Base crimes

Most hate crimes target persons or property. They can cover a very wide range of crimes from hooliganism to homicide. Some countries single out specific base crimes where the bias motive may be considered, others allow to take hatred into consideration with regard to all crimes enshrined in the criminal code.

According to some countries' legislation (IT, MT), racist and xenophobic motivation can be considered as an aggravating circumstance with regard to any crime. In Italy, Article 604-ter ICC on ethnic, national, racial and religious hatred is applicable to all crimes punishable with a penalty other than life imprisonment (obviously penalty enhancement cannot be applied to the strictest form of criminal sanction).³¹⁸ In Malta Act No. XI of 2009 added a new heading and a new article to the MCC, in order to provide a general provision applicable to any offence which is racially aggravated or motivated by xenophobia. Racist or xenophobic motivation is considered as an aggravating circumstance with regard to *certain* (often violent) crimes in several jurisdictions (DE,³¹⁹ HU,³²⁰ PL³²¹).

d. Protected groups

(i) *The scope of protected groups*

The precondition of fulfilling the state goals behind hate crime laws – education of citizens; solidarity with the victims; message in relation to existing social tensions – is the selection of protected groups worthy of the extra protection. The selection is usually based on extra-legal criteria, taking into consideration either the lessons of history or disadvantages including social marginalisation suffered by certain groups at the time of codification.

The legislators could rely on several sources in determining the groups to be protected on considerations of past history. First, they can make references to international law, where certain groups enjoy increased protection in view of atrocities suffered earlier. Traditionally, the national, ethnic, racial or religious groups fall into this category. Criminal responsibility for genocide, which is the gravest form of hate crime, can be established only in connection with these groups.³²² The circle of protection can be extended further by taking into account the social tensions of the present. To that effect, the legislators can, as a second step, rely on the regulations of other legal branches, the constitution and legal documents relating to equality and anti-discrimination.³²³ The third option, ideal

³¹⁸ Since 1993, Act No.205/1993, the so called "Mancino Act".

Decree-Law No. 122 of 26 April 1993 converted into Act No. 205 of 25 June 1993 referred to as the "Mancino Law".

Article 3 - Aggravating circumstances

1. Anyone who commits offences punishable with a penalty other than life imprisonment for discrimination or ethnic, national, racial or religious hatred purposes, or with a view to encouraging the activities of organizations, associations, movements or groups pursuing the same purposes, shall be liable to a penalty increased up to one half.

2. Any mitigating circumstance, other than the one provided for by Article 98 of the Criminal Code, concurrent with the aggravating circumstance referred to under paragraph 1, may not be deemed equivalent or prevailing to the latter and any penalty reduction shall refer to the increased penalty resulting from the application of the above mentioned aggravating circumstance.

³¹⁹ See Article 130 GCC on incitement of masses; Article 185 GCC on insult; Article 211 GCC on murder under specific aggravating circumstances.

³²⁰ See above under general qualifying circumstances.

³²¹ *Id.*

³²² The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9 December 1948.

³²³ In order to ensure the internal coherence of the legal system, it is recommended to rely on already existing enumerations of protected group characteristics constitutionally embedded or enshrined in the equal treatment law.

from the viewpoint of democracy and the rule of law, yet somewhat risky from a political perspective, is that the legislator faces up to the past of the given state, as well as to the existing, unresolved social tensions, and openly acknowledges the crimes committed by the state against its own citizens prior to the time of codification, along with the disadvantages recently introduced, applied and sanctioned against them, generating a public debate and assuming political responsibility for the choice of the groups selected. In this way, the number of groups named in the criminal code will probably be somewhere between the numbers of groups to be protected according to the first and the second options.

Protected characteristics are typically – albeit not necessarily – immutable, unchangeable, or reflect a fundamental aspect of one's identity. Often they are apparent or easily noticeable to others. Most terms used when listing protected characteristics are clear, however some may require clarification by the national law, or in the lack of it, one may revert to international norms. Ultimately it is up to the courts to provide a clear definition.

The formulations in the national criminal codes are neutral, however it might make sense for statistical data collection to single out certain groups that are typical targets of hate crime in a given jurisdiction (e.g. the national criminal code might address hate crimes committed based on the ethnic origin or the religion of the victim, but the data collection might specify the Roma community or Muslims.)

(ii) Closed or open lists of characteristics protected

States might opt for a closed list of protected characteristics, specifically and exhaustively listing them, or for an open list, adding "such as" before the list, or "and other characteristics" or "and other societal groups" after it.

Both codification techniques have advantages and disadvantages. By drawing up a closed list the law-maker takes political responsibility for its selection, and such a method also adds to legal certainty. A closed list – as opposed to the protection of any group, where the symbolic message that the state tries to transmit becomes meaningless – corresponds to the state aims mentioned above to express solidarity with historically or currently disadvantaged groups, and an acknowledgment of the past and present disadvantages.

An open list in turn will protect earlier unforeseen social tensions. This was very relevant during the Covid-19 pandemic, when hostility arose against social groups, such as the sick and the elderly, or people wearing masks, that had not been victims of hate crimes before. However, the symbolic message of solidarity is diluted by extending extra protection to a wide variety of groups. In order to save the provision, it would be possible to argue that a hate crime (against any group) is a felony more serious than any other criminal act, and the motive of hatred is the most contemptible qualifying circumstance. Then, instead of showing solidarity with a few chosen groups (the minorities), or with the victims of violence resulting from certain social conflicts (both minorities and the majority), the legislators would focus on a motive, independent of any victimized group, saying that this was socially so damaging as to justify the introduction of a *sui generis* provision or a qualifying circumstance. Even if the codifiers considered this possibility, in the interest of the internal coherence of criminal law it would be worth to think it through whether the physical abuse of a member of a socially powerful group, which had never in the past suffered any disadvantages (for example, beating up lawyers out of hatred for lawyers) was equally detrimental for the individual society than assaulting a member of the Jewish community out of anti-semitic motives. Through appropriate historical, contextual and teleological interpretation, the judiciary could remedy the shortcomings of the drawbacks of this

codification technique. The judiciary could interpret the term “certain groups of the population” as a minority without a power base; completely or almost completely unable to assert its interests; historically discriminated against and/or currently being in a vulnerable and helpless state; branded with an incommutable group-forming quality. Taking into consideration the constitutional minimum requirement, whereby the state cannot, under any circumstance, provide increased and symbolic protection to groups, whose primary group-forming identity is hatred against other groups (especially, when the common quality of the hated group is an unchangeable characteristic) is an unassailable narrowing interpretation. To put it differently, those who deny the basic values of democratic government based on the rule of the law, for example, the principles of equality and the right to equal dignity, are not entitled to increased and symbolic protection. Alternately, those who nurture hatred cumulated in violence against people against whom (or against whose group-forming identities) the state itself is fighting, cannot receive increased and symbolic sentences.³²⁴

Box 17: The Hungarian Sajóbáony case

The Hungarian judiciary not only employed the instruments originally created for the protection of minorities so as to protect the majority against the minority, but – through an even more twisted logic – presented the racists, i.e. the group attacking the minority originally meant to be protected, as the one that was vulnerable in case of the Sajóbáony incident.

The men of Sajóbáony's Roma population rallied to defend themselves against a march organised by the right wing radical Jobbik party and a paramilitary organisation. The latter group's aim was to strike fear in the local Gypsy population. The Roma people organised to defend themselves. On the day following the event, groups of racist men, all fired up by the news of the formation of Roma defense groups, set out to visit Sajóbáony. In the atmosphere of the resulting civil unrest, a group of Roma roughed up with sticks one of the cars cruising along Gypsy Row, causing minor injuries to two of its passengers.

During the confrontation a number of threats were uttered, of which the expression “You bloody Hungarians!” has a particular relevance from the viewpoint of the present analysis. The court found the perpetrators guilty in the crime of violence against members of a group, namely the group of Hungarians, which was interpreted in the case as the non-Roma. But what the Roma perpetrators meant, was to shout at and attack the right wing radical group.

The court failed to consider the origins of the emotional charge of the threats had originated from. In the words of the Hungarian Civil Liberties Union's representative, “The essence of the hate crime of violence against a member of a group is that the perpetrator is prejudiced against a group, whose members he or she considers of an inferior order, and this feeling of superiority drives him or her to commit the criminal act”.³²⁵ This is important, because the heightened emotional state in which the Roma committed the criminal acts was not out of feeling superior, but out of fear. The criminal act these Roma men committed was not a hate crime, but a “fear crime”. The judges obviously felt that they

³²⁴ This closely resembles the opinion of the Hungarian Helsinki Committee, which believes that “The law cannot afford special protection to members of groups bound by ideas that violate human dignity and stand opposed to the constitution.” Available at <http://helsinki.hu/hvg.hu/2012/03/28/pofon/>.

³²⁵ Társaság a Szabadságjogokért [Hungarian Civil Liberties Union], “Másodfokon rasszisták a gárdistákra támadó sajóbáonyi romák [The Roma of Sajóbáony attacking the Guardists are Racists, according to the Court of Second instance]”. October 1, 2013. Available at <http://tasz.hu/node/3773>.

would engage in an interpretation *in fraudem legis*, if they extended the protective shield of hate-crime legislation to racists, and so they created a faulty group-definition equating “Hungarians” with racists. They first confirmed the racist notion that a Roma cannot be Hungarian and that everyone who isn’t a Roma must be a racist; and second they reinforced the neo-Nazi rhetoric, whereby they acted on behalf of the entire population of non-Roma Hungarians.³²⁶

The case-law is not unified. In another procedure, the Supreme Court held that a member of the Hungarian Guard, a right wing radical paramilitary organisation, who was assaulted due to his group belonging does not deserve the extra protection of criminal law. As the court stated, “members of a group (which may be an association, movement, etc.) that is based on a community of ideas [...] may enjoy privileged criminal protection only if the organization operates within the legal framework, respecting the principles enshrined in the Constitution. Members of an organization that was set up against national, ethnic, racial, religious or other societal groups, obviously in violation of the law, – especially when that organisation has already been dissolved by the court – can logically not enjoy the enhanced protection of criminal law, since in that case, the principle of the unity of the rule of law would be seriously impaired.”³²⁷ In other words crimes against the members of the dissolved organisation are qualified as base crimes, but do not deserve the special protection of hate crime provisions.

Table 9: Open and closed lists of protected characteristics

Open-ended list	Exhaustive list
DE: open-ended list, using the term "other motives evidencing contempt for humanity"	IT: exhaustive list and limited to ethnic, national, racial or religious motives.
HU: open-ended list, using the term "a certain societal group, in particular..." with examples (disability, gender identity and sexual orientation)	MT: exhaustive list (the MCC talks about political or <i>other</i> opinion, but it means that it is only open to other opinions rather than to other characteristics more broadly.)
	PL: exhaustive list

Source: Authors, based on the country reports.

³²⁶ Supreme Court of Hungary, Bfv.II.576/2014/13, 17 December 2014. For a more extensive analysis see Danko, A., ‘Rossz helyen lenni rossz időben, avagy mit üzennek a gyűlölet-bűncselekmények?’ [To be at the wrong place at the wrong time, or what is the message of hate crimes?] *Föld-rész*, 2009/3–4, 2009, pp. 92–96.

³²⁷ Supreme Court, Bfv. III.87/2011/5., 3 May 2011. For an analysis of the diverging case-law see Bárd, P., ‘A gyűlölet-bűncselekmények büntetőjogi üldözésének jogszabályi és társadalmi feltételrendszere [The legal and social prerequisites for the effective fight against hate crimes]’, *Kriminológiai Közlemények* 75, 2015, pp. 93–154.

Table 10: Protected characteristics

Protected characteristics	DE	IT	HU	MT	PL
Nationality	X	X	X	X	X
Ethnic origin	X	X	X	X	X
Religion	X	X	X	X	X
Other belief	(X)			X	
Race or racial origin	X	X	X	X	X
Colour		X		X	
Language		X		X	
Age				(X)	
Gender identity		(X)	X	X	
Sexual orientation		(X)	X	X	
Disability		X	X	(X)	(X)
Homelessness					
Migrant, refugee status		X			
Lifestyle					
Subculture (e.g. punks, emos, goths)					
Political opinion				X	X
Other	X other motives evidencing contempt for humanity		X certain societal groups	X other opinion	

Source: Authors, based on the country reports.

e. Minority protection instrument or does it cut both ways

The analysed countries' (DE³²⁸, HU, IT, MT,³²⁹ PL) pieces of hate crime legislation do not limit the scope of protection to minority victims – whether in the sense of power or a numerical sense. This goes against the symbolic nature of hate crime provision to express solidarity with historically disadvantaged groups, and puts the social hatred into the focus as a motivation that is more harmful than others, irrespectively of the vulnerability of the victim. Alternatively, as the Hungarian Supreme Court put it, the decisive factor might be, who is in a minority in the given situation, and not according to social reality.

Box 18: Majority protection

In a case that is known in the literature and the media by a reference to its location, Tavaszmező street, in Budapest, on 23 September 2009, after a verbal conflict several persons of Roma origin attacked a non-Roma victim for no apparent reason, other than walking down a street inhabited by the Roma community. One of the perpetrators also had a knife. The Hungarian Supreme Court as last instance court sentenced the perpetrators for violence against a member of the community committed by carrying a weapon and in a gang, and imposed prison sentences on the defendants ranged from 2 to 4 years and 6 months. Some of the sentences were cumulative sentences due to other acts committed earlier, and one of the defendants was a recidivist.

In its reasoning the Supreme Court stated that hate crimes “protect human dignity, and more specifically the various minorities; it primarily protects against violence against national, ethnic, racial, religious or other groups. [...] The protected legal subject is: the social value of discrimination-free co-existence. Its aim is to ensure that nobody is subjected to assault or battery due to his or her group belonging. [...] it is relative, and is always dependent on the specific situation who is to be regarded as a member of the majority or the minority.”³³⁰

f. Hostility model versus discriminatory selection model

According to the hostility model, hatred or animosity needs to be proven on the side of the perpetrator against the group the victim belongs to. An important factor is that victims are interchangeable, they are seen as a faceless representative of a social group the perpetrator has prejudices against. According to the discriminatory selection model however, the perpetrator's selection of a victim based on a prejudice against the group to which the victim belongs is decisive (hate crimes are also referenced in some jurisdiction as prejudicial crimes). In the case of the bias model, the emotional state of the defendant has to be proven, whereas according to the latter model, the act is criminalised as a hate crime, if the victim was selected due to his or her membership in a group, which places a lesser burden on the prosecution to prove.

³²⁸ As some of the respondents highlighted, although there are individual elements of crime which make the punishment of criminal acts against minorities more severe, the principle of the rule of law actually applies and therefore everyone must be punished/treated equally.

³²⁹ As several respondents highlighted, the Maltese law doesn't specifically protect minorities, rather it protects specific characteristics (such as ethnicity and colour, but also gender and political opinion) without referring to minorities.

³³⁰ Kúria, Bfv.II.590/2012/18., 7 February 2013.

As confirmed by the respondents, most countries (DE, HU, IT,³³¹ MT) follow the bias model, while PL adheres to the discriminatory selection model.

3.2.2. Official and NGO data

The official statistics show a small number of hate crimes if compared with victim surveys.³³² As the FRA formulated, "[r]acist harassment and violence are common occurrences in the EU that remain invisible in official statistics, and Member States lack the tools and skills to record hate crime properly and systematically."³³³

Somewhat counterintuitively, an increase in reported crimes is a positive sign, and might well reflect growing confidence in state authorities and a growing rights conscious attitude on the side of victims.

Beside the mentioned victims' surveys, civil society groups might also contribute to gathering more information about hate crimes, so a fuller picture about the phenomenon can be gained. Alternatively, the establishment of online anonymous hate crime reporting systems could contribute to the assessment of the scale of hate crimes.³³⁴

Table 11: Official and non-official data on hate crimes

MSs	Official data	NGO data
DE	Federal Ministry of the Interior, Building and Community	Amadeu Antonio Stiftung
	OSCE-ODIHR Hate Crime Reporting	Human Rights Watch
		MANEO (Berlin-based gay anti-violence project)
		Research and Information Centre for Anti-Semitism (RIAS)
		VBRG, the Association of Counseling Centers for Victims of Right-wing, Racist and Anti-Semitic Violence in Germany
HU	The Unified System of Criminal Statistics of the Investigative Authorities and of Public Prosecution (ENYÜBS)	None.

³³¹ Based on the information provided by OSCAD, the prosecutor has to prove the discriminatory/hatred motivation of the perpetrator.

³³² Victim surveys help assess risks of crime and the burden of victimisation across countries and regions.

³³³ FRA, Fundamental Rights Report 2019, Luxembourg: Publications Office of the European Union, 2019, 100.; FRA Experiences and perceptions of antisemitism – second survey on discrimination and hate crime against Jews in the EU, Luxembourg, Publications Office, 2018; European Union Fundamental Rights Agency, Hate crime recording and data collection practice across the EU, Luxembourg, Publications Office, 2018.

³³⁴ For an example see the United Kingdom's "Reporting online", Stop Hate Crime website, True Vision. Available at <https://www.report-it.org.uk/your-police-force>.

	OSCE-ODIHR Hate Crime Reporting	
IT	National Office for Racial Discrimination (UNAR)	Osservatorio per la sicurezza contro gli atti discriminatori (OSCAD)
	OSCE-ODIHR Hate Crime Reporting,	Lunaria
MT	Malta did not have a data collection system for recording hate crimes (and hate speech), nor did its police have specific guidance documents that would enable them to identify bias motivated acts. This serious statistical lack was addressed by OSCE-ODIHR as well. However the system to record hate crime was changed in 2018. When a victim reports a crime, the police uses one generic form in which the type of crime is specified. Currently, the system automatically asks whether it is a 'Hate-related offense' (yes /no) and if the answer is 'yes' a drop-down menu appears to choose the specific bias. Contrary to the previous system, it provides for an automatic flagging of hate crime.	The National Report on Hate Speech and Hate Crime in Malta from SOS Malta provides non-official statistics by means of a survey analysing illustrated general trends of hate crime and hate speech in Malta.
		The People for Change Foundation has an online mechanism to report racist incidents.
PL	National Prosecutor Office annual statistics. In 2011-2017 the Office published the excerpt dedicated specifically to hate crimes data.	Scattered unofficial data is partial and incomplete, according to respondents.
	Official hate crimes data (except Article 119 and not including years 2017-2019) is comprised in the police statistics that refer to specific PCC provisions	
	OSCE-ODIHR Hate Crime Reporti	

Source: Authors, based on the country reports.

3.2.3. Application of hate crime provisions

a. Investigation authorities

In all countries (DE: doubts expressed³³⁵; HU³³⁶; IT³³⁷; MT: officially yes³³⁸, but practically no³³⁹; PL³⁴⁰) police forces are obliged to take the enhanced penalty into account when conducting investigations and reporting to public prosecution. In Germany cases where a hate motive is assumed are given to / treated by the State Offices of Criminal Investigation's "Political Motivated Crimes" Units. The units are divided the following way: Right Wing, Left Wing, Foreign Ideology, Religious Ideology.

According to the information provided by OSCAD in Italy at provincial level National Police Headquarters (Questure) and Carabinieri Headquarters have dedicated provisions to attend particularly vulnerable victims (among them victims of hate crimes) and properly investigate such cases.

In Hungary since 2011, every county police department has a professional hate crime expert who is supposed to pay attention to criminal cases where there is possibility that a hate crime has occurred. As a progressive initiative the National Chief of Police order no. 30/2019.³⁴¹ (hate crime protocol) was issued. This order includes a list of bias indicators (including some new ones) that could be applied in hate crime cases, and can contribute raising the standard of investigations and criminal procedures.³⁴² In Malta the Police Vice-Squad³⁴³ provided informal assistance to any police station that is faced with a case regarding a hate element. In October 2019, the new Hate Crime and Speech Unit was inaugurated³⁴⁴, which will be specialising in fighting against hate speech and hate crime.³⁴⁵ The relevance and importance of the Victim Support Unit within the Malta Police Force should also be

³³⁵ In the light of the principle of legality, police have to take into account every factor that could be relevant to criminal liability and the resulting penalty. However, this is a general rule, which applies to all investigations and does not depend on the penalty *per se*.

³³⁶ Article 384 (3) Act No XC of 2017 on Criminal Proceedings.

³³⁷ Since the Mancino Act racist bias is an aggravating circumstance in connection with any offence, which stimulates a general obligation for police officers as well.

³³⁸ According to article 346 (1) it is the duty of the Police to preserve public order and peace, to prevent and to detect and investigate offences, to collect evidence, whether against or in favour of the person suspected of having committed that offence, and to bring the offenders, whether principals or accomplices, before the judicial authorities.

³³⁹ As a Maltese respondent to the questionnaire noted, in Malta there is no official policy or guidelines addressing hate crime and providing written guidance for police officers in charge of investigation these crimes. However, the wording of Article 83B is quite explicit. The decision on what crimes to charge with will be made by the police in practice, and whilst a decision not to prosecute can be challenged, but this is not something common in the country.

³⁴⁰ As Polish partner pointed out fundamental directives and instructions addressed to public prosecutors (and, implicitly, to the police) are included in The Guidelines of the General Prosecutor on the Investigations in Hate Crimes Cases, issued by the (former) General Prosecutor on 26 February 2014.

³⁴¹ National Chief of Police order no. 30/2019. (VII. 18.) on the tasks of the police in relation to responding to hate crimes.

³⁴² Furthermore, according to the protocol, a so-called 'mentor' must be appointed at each police station who helps to detect hate crimes; members of law enforcement and criminal personnel should be trained in bias indicators; and county hate crime experts and the National Police Headquarters' line manager should monitor the ongoing criminal proceedings, media coverage related to hate crimes and the activities of organized hate groups and their members. The order also talks about the professional trainings of Hungarian police officers, the annual meeting of hate crime specialists, the relevance and importance of victim support system and the importance of objective, victim-friendly communication. Significant progress has been made with the adoption of the protocol, its practical application and results of should be continuously monitored by researchers and police officers in the future.

³⁴³ Available at <https://pulizija.gov.mt/en/police-force/police-sections/Pages/The-Vice-Squad.aspx>.

³⁴⁴ Independent, "New Hate Crime and Speech Unit inaugurated", 24 October 2019. Available at <https://www.independent.com.mt/Articles/2019-10-24/local-news/New-Hate-Crime-and-Speech-Unit-inaugurated-6736215235>.

³⁴⁵ The project is financed by the EU in partnership with the Ministry for Home Affairs and National Security, the Malta Police Force, the Academy for Disciplined Forces, the Agency for Protection of Persons Seeking Asylum (AWAS), the Director for Integration and Equality, the Commission for the Rights of Disabled Persons and Victims Support Europe.

highlighted,³⁴⁶ which tries to handle hate crime cases with accuracy. In Poland with one exception there is no special police unit related to hate crimes.³⁴⁷

b. Problems with reporting and investigation

Once one compares the official data of hate crimes with victims' rights surveys it becomes obvious that latency must be extremely high. This can be explained by a number of factors.

In the reporting phase many cases are already "lost", i.e. victims don't turn to the police, or reports are withdrawn. Reasons for this phenomenon are numerous, and include lack of knowledge how to report; lack of knowledge that the crime was a hate crime; distrust in the police; self-blame for the attack; fear of re-victimisation, such as retaliation by perpetrators if they report the crime; fear of secondary victimisation during the criminal justice process; feelings of shame about being victimised; unwillingness to come out as a member of the LGBTI+ community before state authorities; language barriers; fear of being deported in case of undocumented people; disabled people's weak position in representing their own interests, etc. In the investigation phase, lack of understanding of what constitutes a hate crime; inadequate recognition of the different victim groups that may be targeted; lack of training in how to interview victims of hate crimes; failure of witnesses to come forward; and institutional discrimination may lead to impunity of perpetrators. The use of efficiency indicators may lead to prosecutors only charging suspects with the base crime that is easier to be proven.

Our research in all the selected jurisdictions (DE, HU, IT, MT, PL) prove the above points. In Germany in 2017, more than 30.000 people over 16 years of age were interviewed by state agencies as part of a representative "dark field study". 3,5 out of 1.000 participants stated that they had been physically attacked because of their skin colour, i.e. for racist motives. This means that in 2017 there might have been at least 248,500 racist acts of violence (based on skin colour alone) in Germany. 0,1% of all assault victims above the age of 16 had been physically attacked because of their sexual orientation. Projected for the year 2017, this results in 7.100 homophobic and trans-hostile acts of violence nationwide.³⁴⁸ Summarizing the structural problems, Human Rights Watch stated that: "Justice ministries in some of the key states and the Federal authorities argue that hate motivation is taken into account as a factor in sentencing when appropriate. While this might be the case, victims of hate crimes, victim support groups and criminal lawyers suggest that it is often left to the lawyers acting for the crime victim to call for this factor to be taken into account if evidence of hate motivation emerges at trial. Prosecutors cannot be relied upon consistently to make this call themselves. The same sources also indicate that judges have a mixed record of taking hate motivation into account as a factor in sentencing even when it is raised."³⁴⁹

In Hungary under-reporting and under-qualifying are also serious problems. According to the organizations active on the field extremely few hate crime cases come to the attention of law

³⁴⁶ Available at <https://pulizija.gov.mt/en/police-force/police-sections/Pages/Victim-Support-Unit.aspx>.

³⁴⁷ Investigations concerning hate crimes committed in cyberspace may be conducted by the cybercrime divisions in regional police headquarters and/or police officers who graduated from special training of trainers in hate crimes prevention and counteracting.

³⁴⁸ Available at https://pure.mpg.de/rest/items/item_3039765/component/file_3039766/content.

³⁴⁹ Human Rights Watch, "The State Response to 'Hate Crimes' in Germany", *A Human Rights Watch Briefing Paper*, 9 December 2011. Available at <https://www.hrw.org/news/2011/12/09/state-response-hate-crimes-germany>.

enforcement authorities in the country³⁵⁰, however victims' surveys provide a more detailed picture on the seriousness of hate crimes.³⁵¹ The general problems in the reporting and investigation phase listed above are all part of this complex problem. In addition, a strong statistical approach both on the side of the police and the prosecution is another severe problem.³⁵²

In Italy official data are affected by both under-reporting and under-recording. Comparing Italian official statistics with those of other countries, Italian ones are extremely low, which suggests a high latency, according to experts interviewed. Another serious factor is that base crime is usually applied, while the aggravating circumstance is less often requested by the prosecutor and is therefore rarely applied.

As national experts from Malta emphasized, the most highly discriminated minority groups in the country - asylum seekers, refugees and third-country nationals in general – seem to be at the highest risk of becoming victims of hate crimes, but their extreme vulnerability and often defencelessness alone create huge obstacles in the way of effectively addressing hate crimes committed against them and convicting the perpetrators. Distrust towards the police and that “it is not worthwhile to report” experienced by the migrant community and other vulnerable groups is also mentioned. Under-qualifying is also a serious problem, that's why interviewed national experts think that Maltese official statistics do not reflect the phenomenon and frequency of hate crimes. After a racially motivated killing in 2019 by off-duty soldier³⁵³ the general distrust towards authorities increased. Victims are often not aware of their rights and there is also a lack of awareness of hate crimes in the general public. Furthermore, the police force is generally not sensitised to the issue of hate crimes. Civil rights advocates have frequently felt that either reports filed by persons belonging to a particular group are not taken seriously or followed-up. Research has shown that certain groups are discriminated against by police itself and/or by other authorities.

In Poland hate crimes are also underreported for the very same reasons as crimes. The distrust in the police, public prosecutors and the judiciary are amplified by the victim's status, making him or her much more vulnerable to any misconduct or abuse. A general problem in the attitude of the police towards the victims is institutional inclination to discourage any victim to report a case.

³⁵⁰ Subjective Values Foundation, *National Hate Crime Report: Hungary*, Report for the project Tackling hate Crime and Hate Speech, 7 July, 2017. Available at http://www.szubjektiv.org/wp-content/uploads/2017/11/National_Hate_Crime_Report_Hungary_07-07-2017.pdf.

³⁵¹ In the Hate No More (LGBTI+) sample in 2015, there were 168 Hungarian respondents. 37% of the respondents were victims of homophobic or transphobic incidents during the previous 5 years, while the reporting rate was only 23%; and just 17% in case of the most serious incident of homophobic or transphobic violence or harassment. In the Uni-form (LGBTI+) sample in 2016, 348 Hungarian respondents answered. 46% of the respondents have been already victims or witnesses of hate crimes because of sexual orientation or gender identity. 20% of the victims suffered physical violence and only 10% of Hungarian respondents experiencing or witnessing homophobic or transphobic hate crimes or online hate speech reported it to the authorities.

³⁵² "Investigators and public prosecutors are not motivated to dwell into cases which require complicated proving when their professional performance is judged solely on the basis of how quick a policeman can efficiently close a case or how effectively a public prosecutor can represent the charge before a judge. Such a system of evaluation prompts police officers to focus on cases that can be proved more easily, and to neglect the hate motivation of a crime and conduct investigation only into the basic crime, which requires no proving of bias motive. Public prosecutors are then motivated to stay on the safe side and press charges in respect of the basic crimes." Available at <http://en.hatter.hu/sites/default/files/dokumentum/kiadvany/hatecrimes2014-en.pdf>.

³⁵³ Times of Malta National, "Two soldiers believed to be behind migrants drive by murder", 18 May 2019. Available at <https://timesofmalta.com/Articles/view/two-soldiers-believed-to-be-behind-migrants-drive-by-murder.710302>.

C. Prosecution of hate crimes

Albeit there are no clear systems adhering to one or another principle, the countries scrutinized (DE³⁵⁴, HU,³⁵⁵ IT³⁵⁶, MT,³⁵⁷ PT³⁵⁸) mostly apply the legality principle as opposed to expediency (*Opportunitätsprinzip; le principe l'opportunité*), which obliges the prosecuting authority to bring charges when "there is a case".

In several countries (HU, IT, MT) there are no specific prosecutors tasked with prosecuting hate crimes. In Poland according to the General Prosecutor Deputy statement (January 2019) a list of 105 public prosecutors tasked with prosecuting hate crimes has been issued. However, according to a respondent to the questionnaire, the latest official information at the Polish National Police official website including the names of such prosecutors is dated November 2014.

In Germany in response to the Halle synagogue shooting in October 2019³⁵⁹ and the Hanau shootings in February 2020,³⁶⁰ when nine people were killed and five others injured in a racism motivated terrorist shooting by a far-right extremist, a "Central Office for Hate Crime" is set up in the German capital.³⁶¹

In some countries (DE,³⁶² HU³⁶³, IT³⁶⁴) victims can oppose the dropping of a case. In Malta victims cannot oppose to dropping a case. In Poland they can oppose dropping of cases with respect to proceedings concerning motion/application-based crimes (none of the hate crimes enshrined in the PCC).

³⁵⁴ Article 152 German Code of Criminal Procedure.

³⁵⁵ The main rule of legality can be derived from Article 4 of the Hungarian Code of Criminal Procedure. Albeit it regulates *ex officio* procedures, the legality principle can be derived from the wording, which states in the affirmative that prosecutors start (and not 'may start') the proceeding *ex officio*. There are many exceptions to the legality principle in Hungarian criminal procedural law.

³⁵⁶ Under the Article 112 of the Constitution prosecution office must start the prosecution.

³⁵⁷ Preliminary Provisions of the MCC, 2, 3 and 4.

³⁵⁸ Act of 6 June 1997 on the Polish Code of Criminal Procedure

Article 4:

Agencies in charge of criminal proceedings shall be obligated to inquire into, and duly consider the circumstances both in favour and to the prejudice of the accused.

Article 303

If there is good reason to suspect that an offence has been committed, an order on instituting an investigation or inquiry shall be issued, either or upon receiving a notice of an offence, describing the act in question and setting forth its legal classification.

³⁵⁹ For a description of the crime itself see Der Spiegel Staff, "Deadly Attack Exposes Lapses in German Security Apparatus", 11 October 2019. Available at <https://www.spiegel.de/international/germany/far-right-terrorism-in-germany-shooting-exposes-lapses-in-security-apparatus-a-1291075.html>

³⁶⁰ Case referenced earlier in Chapter 3.1.4. This heinous attack is another illustration of the intersections between terrorism and hate crimes. Der Spiegel Staff, "When Far-Right Hatred Turns Into Terrorism", 21 February 2020. Available at <https://www.spiegel.de/international/germany/when-far-right-hatred-turns-into-terrorism-a-e58ac378-bc7c-442e-a024-c801296d2b9c>.

³⁶¹ Legal Tribune Online, „Zentralstelle Hasskriminalität bei der Staatsanwaltschaft“, 11 March 2020. Available at <https://www.lto.de/recht/nachrichten/n/staatsanwaltschaft-berlin-zentralstelle-hasskriminalitaet-rassismus-strafverfolgung/>.

³⁶² Article 172 of the German Code of Criminal Procedure.

³⁶³ According to Article 58 of the Hungarian Code of Criminal Procedure, the person reporting the crime can object against the discontinuation of the investigations, but once the case reaches the court, the victim cannot oppose the dropping of the charges. He or she can take over the case from the prosecutor though.

³⁶⁴ Article 410 of the Italian Code of Criminal Procedure. Moreover, Article 90-bis of the legislative decree 212/2015 establishes that victims must clearly understand their role in the criminal proceeding and receive information concerning the legal proceeding. This information makes victims more aware of the right to oppose the prosecutor's decision to discontinue the case. Article 90-bis (Informazioni alla persona offesa; information to the victim) of the Legislative decree 212/2015 implementing the EU Victims' Rights Directive.

According to Article 90-bis of the Italian Code of Criminal Procedure, law enforcement professionals have to inform the victims immediately (in a language they can understand) about: how to file a report, how the procedure will develop after reporting, the victim's rights in the judicial proceedings (including the right to legal assistance and the right to an interpreter), and the available supporting services (including healthcare services, anti-violence centres, foster homes, and shelters). The following provisions of the Italian Code of Criminal Procedure are the most crucial ones related to the Ppolice: 90ter (information about the escape/release from prison of the perpetrator); 134-4 and 351-1-ter (about interviewing the particularly vulnerable victims). Article 90-quater of the Italian Code of Criminal

If a prosecutor decides to discontinue the case, the victim presses on with the charges in several countries (DE,³⁶⁵ HU,³⁶⁶ IT³⁶⁷), whereas in Malta this is not possible. In Poland the subsidiary prosecutor's institution³⁶⁸ and the rights of the injured party³⁶⁹ are regulated in the Polish Code of Criminal Procedure, which provides certain types of rights to the victim.

If a court decides not to apply the *sui generis* provision or the enhanced penalty and the victim disagrees with this decision, in some countries (IT, MT as part of the general court appeal, PL)) the victim has the possibility to avail of a legal remedy which could lead to a revision of the court's decision by a higher court. In Hungary there is no such a possibility. In Germany according to the explanatory memorandum to the law not only a contestation regarding the statement of legal consequences or an individual point within the statement of legal consequences is inadmissible, but also any appeal - even if it is lodged comprehensively - which cannot have or seeks to have any effect on the guilty verdict, but exclusively on the statement of legal consequences.³⁷⁰

d. Problems in the trial phase

Beyond common problems that the police and prosecutorial services share with the police, such as institutional discrimination,³⁷¹ there are some specific legal issues that emerge in front of courts in the trial phase.

Facts in criminal proceedings have to be proven beyond a reasonable doubt, the prosecution must present objective evidence of bias motivation. Courts and prosecutors often "play safe" and establish criminal responsibility in base crimes, but do not accept evidence that point to the motive behind the act. Bias indicators,³⁷² such as for example the different group identity of the victim and the suspect, or the nature of the property targeted are important for the investigation authorities to explore the potential bias motive behind the commission of a crime. Without efficiently investigating the bias motive the prosecution of hate crimes is impossible. Since hate crimes are message crimes, perpetrators tend to deliberately utter hateful words, or leave graffiti at the crime scene. If they don't, they often take pride in the crime and boast about it on social media, internet forums or among their peers. If none of this applies to a given case, bias indicators might be taken into account. They are soft factors, and for guilt to be proven, more solid pieces of evidence need to be identified. Nevertheless bias indicators are a good point of departure helping the prosecutor where to search for circumstantial evidence. Inferring other factors – such as intent or negligence –, but also other motives – such as revenge, jealousy – from the words, actions and circumstances of the crime is an everyday practice in

Procedure establishes the specific cases in which the victim may qualify as vulnerable. It includes the scenario when the crime is motivated by racial hatred or committed with discriminatory intent.

³⁶⁵ Article 374 of the German Code of Criminal Procedure.

³⁶⁶ Article 787 of the Hungarian Code of Criminal Procedure.

³⁶⁷ Article 410 of the Italian Code of Criminal Procedure.

³⁶⁸ Article 54(1) Polish Code of Criminal Procedure.

³⁶⁹ Article 330(1) Polish Code of Criminal Procedure.

³⁷⁰ Article 400 German Code of Criminal Procedure.

³⁷¹ Cf. the open letter signed by more than 150 organisations across Europe on addressed the European Commission President Ursula von der Leyen to raise concerns regarding the lack of reaction of EU leaders on police brutality against people of colour and institutional and structural racism. See Open Letter: The European Commission must prioritise addressing police violence and structural racism in the EU, 12 June 2020, available at <https://www.enar-eu.org/Open-letter-The-European-Commission-must-prioritise-addressing-police-violence>.

³⁷² OSCE, ODIHR, „Preventing and responding to hate crimes: A resource guide for NGO's in the OSCE region", OSCE, ODIHR, Warsaw, , 2009, pp. 22–26.

criminal proceedings. Still, when it comes to hate crimes, a certain reluctance can be observed on the side of courts to acknowledge the motivation behind bias crimes – unless there is evidence of verbal or written slurs. At best, an other aggravating motive is applied instead. Even if there are clear racist statements accompanying violent crimes, courts are often reluctant to qualify the crime as a hate crime if motives are mixed – an approach that goes against the ECHR as explained above in Chapter 2.3.6.5.

Box 19: Italy opting for other aggravating circumstances instead of the bias motive³⁷³

In 2008 in Milan an Italian store-owner and his father clubbed to death an Italian teenager of colour after he and his two friends stole from them some cookies and two chocolate bars. While committing the murder, they were shouting clearly racist words.³⁷⁴ They were charged with murder, however the public prosecutor refrained from including the racist motives into the charges. Instead the perpetrators were charged for an aggravated crime for futile motives. As a consequence, the penalty was not increased by half, but by one third. The prosecutor must have relied on a narrow interpretation of the Article 3 of Statute No. 205/1993 requiring that the crime be committed for the purpose of racial hatred and not just being motivated by racism. The term “for the purpose of” was interpreted as “for the sole purpose of” thereby excluding the possibility that crimes committed out of mixed motives may also constitute hate crimes. This interpretation was previously followed by the Italian Supreme Court which held that the mentioned provision can solely be invoked if the crime was “motivated exclusively by the consideration that the victim belongs to a different race.”³⁷⁵ Since however in the case at hand there were other motives included (retaliation for example), the public prosecutor did not find that the definitional elements of hate crime as interpreted by the judiciary were present.

As Möschel explains, the perpetrators of racist crimes – if the bias is not taken into account – are “‘whitewashed’ by the judges who ultimately side and sympathize with the perpetrator.”³⁷⁶ In this case, first, the perpetrators benefited from mitigating circumstances due to their good behaviour during trial, whereas they never expressed apology or remorse. Second, instead of acknowledging racist motives, the court itself used an exclusionist view by explaining the perpetrators’ rage by having been ridiculed by “foreigners” – whereas the victims themselves were of Italian citizenship. What is more, when the case reached the Italian Supreme Court, they referred to the victims as “young Moroccans”, “which is more generally an offensive reference to foreign, third country nationals from Africa”.³⁷⁷ This denomination was also factually wrong, since none of the victims were Moroccans. Third, the court narrowed the concept of racism considerably when explaining the crime had “its roots in a conservative vision of one’s own cultural and territorial integrity rather than in a theorized and discriminatory racial supremacy.”³⁷⁸ Fourth, the court insisted on a symmetrical reading between racist insults and insults against majority Italians when it stated that “the more openly racial epithet [...] must be read like any other insult”.³⁷⁹

³⁷³ For the details see Möschel, M., *Law, Lawyers and Race: Critical Race Theory from the US to Europe*, Milton Park, Adingdon, Oxon; New York, NY, Routledge, 2014, pp. 131–133.

³⁷⁴ Milan Trial Court (Tribunale di Milano), Decision no. 1586, 16 July 2009.

³⁷⁵ Italian Supreme Court (Corte di Cassazione, Sezione V Penale), Decision no. 38217, 12 June 2008, *Id.*, 131.

³⁷⁶ *Id.*, 132.

³⁷⁷ *Id.*

³⁷⁸ The lower court’s findings were summarized by the Italian Supreme Court (Corte di Cassazione), Decision no. 31454, 1 August 2012. I am grateful to Mathias Möschel for the English translation.

³⁷⁹ *Id.*

As explained in Chapter 2.3.6.6. according to ECtHR case-law, a victim may suffer a bias crime by association, i.e. even in the lack of a protected characteristic. Malta took the lead with regard to this interpretation in front of national courts.

Box 20: Attacking the neighbour helping people of colour

In this case the person charged, a Swedish resident in Malta was heard shouting and swearing and kicking the car of his neighbours, while uttering racist slurs. He claimed that the crime was motivated by a previous event that had occurred three weeks before the crime, when people whom he described as Africans, stabbed him before his house and stole his laptop. When at the time of the incident, he noticed another person of dark skin colour, he lost control. Only later did he learn that the person was a refuse collector. The court gave more credibility to the version as presented by the complainants, who heard bad language and threats to the refuse collector, a person of colour. The complainant, i.e. the perpetrator's neighbour helped the refuse collector to carry some bulky cardboard boxes, when the man stepped in using again racist language and pushed the collector to the ground. He also swore at the neighbour for helping people of colour. He was sentenced under Article 82A MCC referenced above.³⁸⁰

3.2.4. Good practices

There are a set of established good practices to overcome the difficulties in establishing trust in the authorities, encouraging reporting, unmasking bias motives, and preventing further harms on the victim due to secondary victimisation.

a. Bias indicators

Bias indicators are a list of factors to be considered by the investigation authorities that might point to a bias motive. An indicator itself does not prove that a hate crime occurred, but should lead the police or prosecutors to consider this possibility and engage into an effective investigation into the matter. It is important to act promptly and consider bias indicators from the beginning of the investigation, since the pieces of evidence pointing to the motivation might soon vanish making it close to impossible for the prosecution to prove the bias behind the crime. Bias indicators might also be revisited by the prosecution when establishing the evidence in hate crime cases.

These include the perception of victims and witnesses of the crime as a hate crime; verbal comments, written statements, gestures or graffiti showing the perpetrators' prejudice; ethnic, religious or cultural differences between the perpetrator and the victim; involvement of an organized hate group in the crime; location and timing of the act (e.g. an area frequented by a minority, or during religious worship); patterns or frequency of previous hate crimes; the nature of the attack, such as dehumanisation of victims; or the lack of other motives.³⁸¹

³⁸⁰ Court of Criminal Appeal, Malta, Appeal No. 353/2014, *The Police (Inspector Trevor Micallef) v Nicklas Ronald Sturk*, 29 November 2018.

³⁸¹ OSCE ODIHR, "Using Bias Indicators: A Practical Tool for Police", 2019, available at https://www.osce.org/files/f/documents/8/9/419897_0.pdf.

b. Prevention of secondary victimisation

Hate crimes target people for their innate, unchangeable or other characteristics, which are part of their identity. These characteristics may be connected to marginalisation, vulnerability, sexuality or other sensitive aspects of life people do not wish to disclose or address at all, and certainly not in front of state authorities. The police and other segments of the justice system need to be aware that for some victims even the first step, i.e. reporting a crime, getting into contact and presenting their case with state authorities may be a challenge.

In several ECtHR cases, where the Strasbourg court held states responsible for a lack of efficient investigation, especially into the bias motive, the police and prosecutors had a stereotypical view of the victims and witnesses, which not only violated victims' dignity and equal treatment, but it also contributed to the breach of the ECHR with regard to the efficiency of unmasking racist or other bias motives.³⁸² When asking about good practices to overcome these hindrances to an efficient and victim-friendly investigation, the following answers were given by respondents to the questionnaire.

In most countries (DE,^{383,384} HU,³⁸⁵ IT,³⁸⁶ MT³⁸⁷) there are measures in place to prevent secondary victimisation of hate crime victims during the criminal proceeding. However, there is no such a regulation in Poland.

In Germany two of the national experts referred to the General Equal Treatment Act³⁸⁸, albeit the focus of this piece of legislation is not hate crime and/or the criminal procedure. There are however general provisions to protect the personal honour of victims. In Hungary there are provisions that prohibit discriminatory and/or harassing behaviour towards victims belonging to certain social groups generally, but not with a specific hate crime focus. The National Chief of Police order no. 30/2019. (VII.

³⁸² ECtHR, *Stoica v. Romania*, Application no.: 42722/02, 4 March 2008; ECtHR, *Milanović v. Serbia*, Application no.: 44614/07, 14 December 2010.

³⁸³ Article 48(3) of the German Code of Criminal Procedure: If the witness is also the aggrieved person, then account shall be taken at all times of his or her particular vulnerability throughout hearings, examinations and other investigatory acts concerning him or her. Special rules may apply to the hearing of the witness separately, audiovisual recording, the exclusion of the public, furthermore non-essential questions concerning the witness's personal sphere of life may be excluded.

³⁸⁴ There is the possibility to make use of civil law protection options in addition to or instead of criminal measures. Protection orders can be applied for. With these orders the contact between offender and victim can be prevented. The regulations can be found in the Protection against Violence Act (Act on Civil Law Protection against Violent Acts and Stalking), which primarily benefits people affected by domestic violence and stalking. However, it also generally refers to people who have become victims of violence or threats of violence. The protection order prohibits the violent person from approaching the victim's home within a radius to be determined by the court, from staying in places where the victim regularly stays (including the workplace, kindergarten or school of the victim's children, but also recreational facilities used by the victim), to make contact with the injured person (this applies to all types of contact, including by telephone, fax, letter or e-mail), to meet the victim (should it nevertheless happen, the violent person must remove himself/herself immediately). Depending on the individual case, other protection orders can also be applied for. The protection orders should be designed so comprehensively that they take into account the many different situations of danger and threat to the respective victims.

³⁸⁵ In Hungary the Act No XC of 2017 on Criminal Proceedings (the new Hungarian Code of Criminal Procedure) regulates the special vulnerability of victim (Article 81(1)); the possibility of the support person being present during the interviews and strengthens the role of NGOs and victim representatives.

³⁸⁶ Some police headquarters at provincial level, have realized specific help desks for victim support (Questure). Several "Memorandum of Understanding" (in particular, in 2019, in Bari, Palermo and Milan), have been signed among Police Headquarters, local authorities, CSOs and judicial authorities to establish "Victims support help desk and restorative justice". For instance, in Milan, thanks to the cooperation with the local Bar Association, a legal support/guidance to victims within the criminal proceeding is offered. Some standards have been strengthened with the implementation of the Law 69/2019 (so called "Red Code" law).

³⁸⁷ In Malta under the Victims of Crime Act protection measures are identified during the individual assessment (carried out for all victims to determine whether the risk of secondary or repeat victimisation) and can include protection orders, restraining orders, personal guarantee, bail conditions and accommodation in a shelter.

³⁸⁸ Available at https://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Wegweiser/agg_wegweiser_engl_guide_to_the_general_equal_treatment_act.html.

18.) emphasizes the relevance of victim-friendly communication and prohibits the victim blaming on behalf of police. The Hungarian Code of Criminal Proceedings contains general principles as well, but not hate crime specific ones. In several countries (IT, MT, PL)³⁸⁹ no relevant regulations could be identified.

As to the specific issue of victim blaming, most countries have no specific rules (DE, MT, PL). In Hungary the new hate crime protocol is taking some steps towards this direction. In this regard Italy has a well-developed regulation.³⁹⁰

C. Restorative justice and alternative sanctions

Restorative justice (RJ) techniques could be employed to deal with hate crimes, with special regard to the fact that there are deep rooted social conflicts behind these actions. It is insufficient to focus only on the actual crime. In addition to establishing individual responsibility, the tensions between communities shall be addressed, and RJ the goal of which is restoring social justice,³⁹¹ could be an ideal tool. Whereas there is a growing scholarship on applying RJ techniques to hate crimes,³⁹² there is also some suspicion towards the interlinkage of the two.³⁹³ On the one hand this can be explained by the fact that states wish to respond to bias crimes with sufficiently severe sanctions, and the outcome of RJ is typically not considered to be a strong and efficient condemnation by the state,³⁹⁴ and on the other hand, experts emphasize the imbalance between the parties, which may make mediation and other RJ techniques difficult.³⁹⁵

In addition or in parallel to restorative procedures, alternative sanctions, such as visiting concentration camps, memorial centres or museums or reading academic literature on history and writing book diaries could be introduced to increase the efficiency of traditional criminal sanctions. Community-based sanctions may enable a dialogue between the various social groups, and the active personal relation while serving the punishment may add to building bridges and understanding the consequences of bias crimes on society. In Germany³⁹⁶ the victim-offender mediation is regulated by general rules, not hate crime specific ones³⁹⁷, however the possibility is provided, just like in Poland. In

³⁸⁹ There are no any measures designed to protect specifically hate crimes victims (in terms of e.g. rules prohibiting multiple interviews of a witness only the minors and the victims of sexual abuse are protected).

³⁹⁰ Article 351 HCC imposes to the police to interview the victim with the support of a psychologist or a psychiatric. In any case, as a best practice, hate crime victims are normally interviewed by officers from the above-mentioned specialized sections.

³⁹¹ Braithwaite, J., *Restorative Justice and Responsive Regulation*, Oxford University Press, Oxford, 2002.

³⁹² Chakraborti, N., *Hate Crime: concepts, policy, future directions*, Willan Publishing, Devon, 2010; Walters, M., 'Hate crime in the UK: promoting the values of dignity and respect through restorative justice', In: T. Gavrielides (ed.) *Rights and Restoration Within Youth Justice*, de Sitter Publications, Canada, 2012.

³⁹³ Walters, M., & Hoyle, C., 'Healing harms and engendering tolerance: The promise of restorative justice for hate crime', In N. Chakraborti (Ed.), *Hate crime: Concepts, policy, future directions*, Willan, Cullompton, UK, 201, pp. 288-249..

³⁹⁴ . Pavlich, G., 'What are the Dangers As Well As the Promises of Community Involvement?' In: Zehr, H., Toews, B. (eds.), *Critical Issues in Restorative Justice*, Criminal Justice Press and Willan Publishing, Monsey, New York, 2004, pp. 173-183.

³⁹⁵ Walters, M., & Hoyle, C., 'Healing harms and engendering tolerance: The promise of restorative justice for hate crime', In N. Chakraborti (Ed.), *Hate crime: Concepts, policy, future directions*, Willan, Cullompton, UK, 201, pp. 288-249.; Willis, R., 'Let's talk about is': Why social class matters to restorative justice', *Criminology and Criminal Justice* 1-20. 2018.

³⁹⁶ Victim-offender mediation: Article 46(2) sentence 2, Article 46a, Article 56(2) sentence 2 GCC, and Articles 153a, 153b, 155a and 155b German Code of Criminal Procedure.

³⁹⁷ As one of our interviewees explained, victim-offender mediation usually takes place on the initiative of the public prosecutor's office, with the involvement of a body responsible for victim-offender mediation, essentially the juvenile court or judicial assistance service or a specialized body. The latter examines whether the case is suitable, whether victims and offenders are prepared to enter into

Malta under the Victims of Crime Act restorative justice measures can generally be exercised subject to certain conditions, but there are no specific conditions required in case of a hate crime victim. In Hungary the black letter law does grant a possibility for victim-offender mediation, however according to the prosecution office, mediation between the parties should not be permitted in hate crime cases to express state condemnation to the fullest.³⁹⁸ In Italy this theme was marked as a highly underdeveloped one.

d. Education and trainings

In Germany – as reported by the interviewees, police academies are offering hate crime courses, especially the Deutsche Hochschule der Polizei (Münster). As a good example the Bavarian Police Force Trainings were mentioned as well, which aim to improve cross-cultural competencies and train the state security division officers regarding right-wing extremism. Prevention strategies and criminal prevention methods were recalled, too.³⁹⁹

In Hungary the Working Group Against Hate Crimes (in Hungarian: Gyűlölet Ellen Munkacsoport, GYEM) was mentioned as a best practice by the Fundamental Rights Agency⁴⁰⁰ and its member organizations (including Amnesty International Hungary, Háttér Society, Hungarian Helsinki Committee and the Hungarian Civil Liberties Union), work together with the police when tackling hate crimes. These NGOs and the Subjective Values Foundation offer continuously various trainings for police officers and judicial staff. The HELP/ODIHR course on Hate Crime was launched in 2016 in cooperation with the Office of the Prosecutor General of Hungary for a first pilot group of 31 prosecutors and judges.⁴⁰¹ Since 2012, the National University of Public Service has rapidly developed police curricula on hate crimes. NUPS has also achieved success in implementing online learning for police in 2018-2019, securing

compensation talks, conducts the talks, records the result, monitors the progress of the concrete compensation efforts and informs the public prosecutor's office or the court of success or failure.

There is no independent recording of the offender-victim mediation process in official statistics. There are, however, nationwide statistics on victim-offender mediation, which are maintained by a research group with funding from the Federal Ministry of Justice and Consumer Protection. Since participation in the statistics is voluntary, the results reported in the statistics do not cover all compensation facilities and all cases treated in Germany. The current report, presented in 2018, covers the years 2015 and 2016 and includes a comprehensive statistical review of the years 1993 to 2014. After only twelve institutions had participated in 2007, the number of participating institutions has again reached the peak of 1997 with 72 in 2016. The increase in the number of reported cases is even more significant reaching new record levels in 2015 with more than 8,000 and in 2016 with more than 7,500 evaluated cases.

The report has also a special focus: In a separate section, it devotes itself to victim-offender mediation in crimes against life and shows that its application to serious crimes is quite possible but is used rather cautiously in practice. Victim-offender mediation, either alone or in conjunction with compensation for damages, is still not really established throughout Germany. The public opinion, but also members of the judiciary and lawyers still have both restrained and open reservations. This means that cases of victim-offender mediation still account for only a modest proportion of all cases settled in the course of criminal prosecution and sentencing in any given year.

³⁹⁸ According to the prosecutors' office victim-offender mediation in hate crime cases does not serve the purposes of punishment expressed in the HCC. See Circular Letter of No. 4/2013 (VI. 30.) of the Deputy Prosecutor General for Criminal Law.

³⁹⁹ Deutsches Forum für Kriminalprävention, "Materialsammlung: Hasskriminalität: Ein Überblick aus kriminologischer Sicht". Available at https://www.kriminalpraevention.de/files/DFK/dfk-publikationen/2003_hass-kriminologische_sicht.pdf.

⁴⁰⁰ European Union Fundamental Rights Agency, "Tools. Promising practices: hate crime: Specialised unit within the police and its multi-agency partnerships (cooperation with NGOs and authorities)". Available at <https://fra.europa.eu/en/promising-practices/specialised-unit-within-police-and-its-multi-agency-partnerships-cooperation>.

⁴⁰¹ Launch of the HELP/ODIHR course on Hate Crime in Hungary. Available at https://www.coe.int/en/web/help/all-news/-/asset_publisher/yrjzZOoXlJb2/content/launch-of-the-help-course-on-hate-crime-in-hungary. Organised by Council of Europe, HELP focus point Petra Bárd and Zsannett Tóth, prosecutor at the Office of the General Prosecutor. See <http://help.elearning.ext.coe.int/course/index.php?categoryid=100>.

agreement from the Ministry of Interior for the participation of 550 police officers in its pilot phase, as part of the Facing all the Facts project.⁴⁰²

- In Italy, experts pointed at different trainings for police officers. For example since 2012 OSCAD trained more than 11.000 cadets/officers; 7000 cadets/officers were trained by trainers specialized by OSCAD (training of trainers) and 11.000 officers were trained with OSCAD online modules. Other police trainings were performed under the auspices of
- OSCE-ODIHR, 'Facing All The Facts' project;
- 'Come Forward: Empowering and Supporting Victims of Anti-LGBT Hate Crimes' project;⁴⁰³
- 'PRISM - Preventing, Redressing and Inhibiting hate speech in new Media' project;⁴⁰⁴
- the 'Policing Hate Crime against LGBTI persons: Training for a Professional Police Response (2017)' project by Council of Europe;⁴⁰⁵
- and the National LGBTI Strategy in co-operation with Turin municipality.

As a good practice from Italy strong efforts have been made in order to improve the data collection mechanism and to solve technical problems and communicative gaps among stakeholders. OSCAD cooperated with the non-governmental organization CEJI, in the EU project "Facing all the Facts" in which context the first comprehensive survey of the Italian monitoring and collecting system was realized. The entire hate crime data collection system was mapped from the very first moment (the moment the victim or witness reports the case to the police), until the final decision, especially in order to highlight gaps between stakeholders.⁴⁰⁶

In respect of Malta numerous police trainings were mentioned as good examples:

- the OSCE-ODIHR office signed an agreement with the Maltese authorities on 2 February 2017 to implement ODIHR's Training against Hate Crimes for Law Enforcement (TAHCLE) program, which is designed to improve police skills in recognizing, understanding and investigating hate crimes,⁴⁰⁷
- in 2017, the 'Reporting Hate. Creating an On-line Network, monitoring Team and phone App to Counter hate crime Tactics' (C.O.N.T.A.C.T.) project implemented by the People for Change Foundation offered training on hate crimes for police officers,⁴⁰⁸

⁴⁰² Perry, J., Dombas, T. & Kozáry, A., *Connecting on hate crime data in Hungary*, Facing all the fact's Project Report, CEJI, Brussels, 2019. Available at <https://www.facingfacts.eu/wp-content/uploads/sites/4/2020/05/Facing-Facts-Country-Report-Hungary-with-Self-Assessment-271119b.pdf>.

⁴⁰³ Available at <http://www.lgbthatecrime.eu/trainings/italy>.

⁴⁰⁴ "Hate Crime and Hate Speech in Europe: Comprehensive Analysis of International Law Principles, EU-wide Study and National Assessments", PRISM project's Report, available at http://www.unicri.it/special_topics/hate_crimes/Hate_Crime_and_Hate_Speech_in_Europe_Comprehensive_Analysis_of_International_Law_Principles_EU-wide_Study_and_National_Assessments.pdf.

⁴⁰⁵ Perry J., and Franey, P., *Policing Hate Crime against LGBTI persons: Training for a Professional Police Response*, Council of Europe, May 2017, available at <https://rm.coe.int/prems-030717-gbr-2575-hate-crimes-against-lgbti-web-a4/1680723b1d>.

⁴⁰⁶ Perry, J., *Connecting on hate crime data in Italy*, Facing all the fact's Project Report, CEJI, Brussels, 2019, available at <https://www.facingfacts.eu/wp-content/uploads/sites/4/2020/05/Facing-Facts-Country-Report-Italy-with-Self-Assessment-271119b.pdf>.

⁴⁰⁷ Malta to implement OSCE/ODIHR hate crime training programme for law enforcement, available at <https://www.osce.org/odihr/297026>.

⁴⁰⁸ Creating an On-line Network, monitoring Team and phone App to Counter hate crime Tactics, available at <http://reportinghate.eu/en/>.

- the LGBTIQ Action Plan 2015-2017 also included undertakings to ensure that the police are adequately trained for the specific cases of violence, discrimination, bullying and ill-treatment of LGBTI+ members^{409, 410}
- courses were delivered by the Academy for Disciplined Forces.⁴¹¹

In Poland there are previous examples and experiences of training the police (training of trainers in hate crimes prevention and counteracting; practical aspects of hate crimes counteracting in cyberspace), the judiciary (investigating hate crimes organized by the National School of Judiciary and Public Prosecution), lawyers (hate motivated crimes organized by the Commissioner for Human Rights). In addition, numerous awareness raising programs were organized by the Commissioner for Human Rights, NGOs, universities and the police.

⁴⁰⁹ LGBTIQ Action Plan 2015 – 2017, available at <https://meae.gov.mt/en/documents/lgbtiq%20action%20plan/lgbti%20action%20plan%20lo%20res.pdf>.

⁴¹⁰ LGBTIQ Equality Strategy & Action Plan 2018-2022 highlights the importance of reviewing police training curricula to ensure that police officers are adequately trained to respond to reports of hate crime and hate speech by LGBTIQ victims and gathering statistical information regarding the reported cases of hate crime and hate speech, and publish annual information about such forms of LGBTIQ-phobic hatred.

⁴¹¹ Information gained through interviews, conducted by the People for Change Foundation in 2019.

4. CONCLUSIONS

4.1. The international standards

There is a global consensus that incitement to hatred needs to be prohibited by criminal law. Specific human rights bodies like CERD have a wider scope perspective of hate speech which they recommend to prohibit, although their focus is primarily on discriminative actions. ECRI has issued several meaningful recommendations on specific aspects of hate speech and how to combat it.

Recent actions and soft law instruments by the international bodies have expressed concern for the growing level of hate speech in particular in the mainstream political discourse.⁴¹² In particular, ECRI General Policy Recommendation No. 15 called attention to the responsibility of parliamentary representatives and state officials in letting extremism and intolerance infiltrate into the highest level of public administration.

"employment of a rude tone in many parliaments and by state officials has been found to contribute to a public discourse that is increasingly offensive and intolerant. Such discourse has been exacerbated by some high-level politicians not being inhibited from using hate speech in their pronouncements."⁴¹³

The ECtHR, in its case law on hate speech, paid particular attention to the factors of the speaker and the context of the speech. It repeatedly declared that persons who are role models in a society, such as a football player, a teacher or a politician, owe an enhanced duty to refrain from using or advocating racial discrimination (*Féret v. Belgium*⁴¹⁴). Regarding the context of the speech, the Court found that the underlying social context would largely define the potential impact of the speech, its threat on human rights. Thus, it accepted a more restrictive approach, that is, a lower threshold of hate speech restriction, in states with more intense social tensions surrounding the discussed phenomenon (*Perinçek v. Switzerland*⁴¹⁵).

In legal philosophy, discourse is taking place about the boundaries of freedom of expression in the light of hate speech. One alternative view is that hate speech should be regarded as harmful without examination of its potential effect; because it abstractly undermines the dignity of the targeted persons, and damages social equality, cohesion and mutual trust in society.⁴¹⁶ Another meaningful idea is that in a long-standing, prosperous, stable democracy hate speech should be fought against with genuine social actions, because they possess ample "legal, institutional, educational, and material resources to admit all viewpoints into the public discourse, and yet remain adequately equipped to protect vulnerable groups from violence or discrimination"⁴¹⁷ and such a natural shield would make criminal hate speech provisions superfluous. The results of the study however, do not support the

⁴¹² ECRI General Policy Recommendation No. 15 on Combating Hate Speech (2015); ECRI Declaration on the use of racist, antisemitic and xenophobic elements in political discourse (2005), the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence; and case law of the ECtHR (*Féret v. Belgium*, *Seurot v. France*).

⁴¹³ ECRI General Policy Recommendation N°15 on combating hate speech – adopted on 8 December 2015

⁴¹⁴ ECtHR, *Féret v. Belgium*, Application no.: 15615/07, 16 July 2009.

⁴¹⁵ ECtHR, *Perinçek v. Switzerland*, Application no.: 27510/08, 17 December 2013.

⁴¹⁶ Waldron, J., 'Protecting Dignity or Protection from Offense?', In *The Harm in Hate Speech*, Harvard University Press, Cambridge, Massachusetts; London, England, 2012, pp. 105-143. Retrieved June 17, 2020, available at www.jstor.org/stable/j.ctt2jbrjd.7.

⁴¹⁷ *Id.* p. 44.

assumption that EU MSs would all belong in this blessed group of countries, as hate speakers are witnessed to hold and acquire important political, economic and media power.

It has now been widely accepted that hate speech expressed by politicians, public figures, other persons of authority and by role models has a higher chance to make an impact than that expressed by ordinary members of society.⁴¹⁸ The realistic chance of impact is very relevant in judicial procedures where it needs to be decided whether the speech reached the threshold of criminal law.

However, these figures of authority have a responsibility even beyond controlling their own speech actions and refraining from expressing hate speech. Their passive behaviour when confronted with the hate speech and discrimination, or even endorsement of the hate speech and hate crimes that are committed by ordinary members of the society furnish those members with authority.⁴¹⁹

The study examined the roles of narratives in political communication. It was found that narratives form part of our lives without us noticing it, and convey important values especially in our age of 'identity politics'.

Liberal political movements take an emotional distance from their topics: they argue with facts, figures and address the ratio of the mind. However, freedom, equality and the rule of law can also be represented through emotional stories, and stories should not be undervalued as a tool to forge social cohesion. In order to disperse false beliefs and fears of minorities, one method is telling credible stories which address the fears and the concerns behind the hate.

4.2. Hate speech specific conclusions

The comparative research in this study found that all examined states had criminal and media provisions against hate speech, and a majority had civil law claims, as well as administrative tools, and self-regulation. However, self-regulation was unanimously reported to be ineffective for various reasons. Apart from this, the specific details of regulation are divergent.

The list of protected characteristics is different in the examined states. Where the lists are closed, they are rather limited (PL, MT), missing some features which are frequently basis of biased speech or action, such as sexual orientation and migrant or refugee status.

Poland and Hungary provide explicit protection to their national and religious majorities, which is beyond the purpose of hate speech limitations. It is also these two states which do not require higher duty from their public officials to refrain from hate speech in their official capacity. In three other examined states (DE, IT, MT) public officials have a higher threshold of duty to refrain from extreme political activity, and racism, either as part of the law governing their status (DE), or as a separate crime (MT) or as an aggravating circumstance of incitement to hatred (IT). Besides, Maltese courts take 'influence of the speaker' as a factor which increases the potential effect of the speech.

⁴¹⁸ ECRI General Policy Recommendation No. 15 on Combating Hate Speech (2015); ECRI Declaration on the use of racist, antisemitic and xenophobic elements in political discourse (2005), the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence; and case law of the ECtHR (*Féret v. Belgium*, *Seurot v. France*, Application no.: 57383/00, 18 May 2004).

⁴¹⁹ Maitra, I., 'Subordinating Speech I', in: Maitra, I. - McGowan, M. K. (eds), *Speech and Harm: Controversies Over Free Speech*, Oxford Scholarship Online, 2012, pp. 4-11.

Racial insult generally is not criminalised, except for Poland (where racial, religious insult and insult of the President are all crimes), and in Germany where the general insult provision can be applied against insult with racial motive.

States required also either an intent or an effect to establish the crime of incitement to hatred. Courts in all states were conscious about the free speech protection, and interpreted hate speech provisions narrowly.

Social media is not subject to regulation except in Germany (and France). The actors and courts rely on the E-Commerce directive, and the responsiveness to online hate speech is generally low.

Underreporting is a general problem in all the examined countries, and also known from the literature. Beyond underreporting, various obstacles hinder the successful completion of the procedures in all stages of the criminal procedure. For online hate speech, the insufficient level of digital literacy may play a role. Inconsistency of the case law, misinterpretations of the appropriate threshold, and racial prejudice, or even institutional discrimination were further mentioned as problems.

When examining the prevalence of hate speech at certain instances of the public sphere, it can be concluded that hate speech is more prevalent in the political sphere than in the mainstream media, but it usually wouldn't amount to criminal hate speech. The narrow notion of criminal hate speech can be observed mainly in social media and online comments, and sometimes in politicians' oral expressions. Migrants and sexual minorities are the most hardly hit by the discriminative political rhetoric, and partly also ethnic minorities. Where public service media has been captured by the state, it is also weaponised in the propagation of biased political communication, and so are those private media outlets in Hungary which are dominated by the government. In some states, this has become a central element of the governmental political ideology (HU, PL), and also in some other states, politicians build on biased speech to better engage their constituency.

MP's immunity is sometimes regarded as an obstacle to make them responsible for their statements.

Examining the efficiency rate of criminal procedures, it must be concluded that the social instrument must also be relied on.

Counter-speech was reported to be present primarily in the civil sector, thanks to NGOs. In Germany and Italy, these are supported by the government and official inclusion policy, in Poland and Hungary, however, NGOs are hindered or even harassed.

Germany has some good practices developed by civil society: the "ichbinhier" project was developed originally in Sweden, and currently engages 30,000 citizens in Germany who volunteered to talk back against racism in social media.

Unfortunately, civil activism is often attacked verbally or even physically. A typical pattern can be observed which shows that whistle-blowers, politicians (especially females) are often subject to verbal and physical assaults for their political opinion. When such attacks are left without consequences, either by law enforcement, or by political rhetoric which ignores or even endorses/justifies the act, a spiral of silence is created. Such threats exercise a chilling effect on social participation, and the violent minority becomes even more visible.

4.3. Hate crime specific conclusions

What emerges from an overview of national pieces of legislation and their application is that hate crime laws provide a relatively narrow protection for victims of hate crimes.⁴²⁰ The study shows the limits of law, and in particular criminal law in tackling severe societal problems.

The overview also suggests that for hate crime laws or provisions to work, states have to reach a certain level of maturity from the viewpoint of democracy and the rule of law.

The first issue is law-making. One should always be careful not to have too high expectations in criminal law to solve social tensions. Modifying the Criminal Code is obviously cheaper, simpler and quicker, than surveying the sociological, economic and historical causes of social tensions and taking effective steps to remedy them. The codification of hate crimes however poses further challenges: the legislative is requested to protect unpopular minorities and it is very much doubtful whether a majoritarian branch of government was in the position to draft meaningful laws in that regard. Out of fear for loss of public support, it may downplay the problem, it may insist on equalizing majority and minority protection – in the sense of power – or for the same reasons it may draft an open-ended list of protected groups. As the legal cases under study have shown, in an immature society the legislators are not in the position to find a sensible way to regulate the unpopular issue of minority protection.

This is where the second issue, the responsibility of the judiciary emerges. In theory, the counter-majoritarian judicial branch could patch up the weak points of the law, but in a situation where the provision does not even have the minimum of social acceptance and the judiciary is found to be contaminated by exclusionist ideas, all that the state ultimately achieves through such judicial decisions is giving impunity to perpetrators and normalising, if not legitimizing abhorrent views. In a state without a minimum acceptance for hate crime instruments at least within the justice system, the judiciary will not exercise its corrective function to remedy the mistakes of the lawmaker.

In a country that is experiencing radicalization and is poisoned by racism, xenophobia, anti-Semitism, sexism and homophobia, hate crime laws or provisions may either remain unused or even backfire. The counterproductive effect of the first scenario is that instead of giving unpopular, historically oppressed and vulnerable groups heightened symbolic and effective protection, the state legally denies the everyday existence of racism, Anti-Semitism, xenophobia, religious intolerance and homophobia reduce the victims' experiences to non-existence or irrelevance.⁴²¹ It is sufficient to take a look at the statistics, which only mirrors a small segment of actual hate crimes, giving the false semblance that the phenomenon hardly exists. The second scenario is even worse: this is when courts will invoke the provision in favour of groups denying foundational state values, such as the rule of law, equality and human dignity, against the groups that the provision was supposed to protect in the first place. Absurdly, by way of a judicial interpretation that might amount to abuse of rights,⁴²² the state will express its sympathy with those attacking and undermining its foundational values.

⁴²⁰ Schabas, W. 'International criminal law and tribunals and human rights', in: Sheeran, S., Sir Rodley, N. (eds.), *Routledge Handbook of International Human Rights Law*, Routledge, Abingdon, 2013, pp. 215–230; Tonry, M.H., Farrington, D. P. (eds.), *Building a Safer Society – Strategic Approaches to Crime Prevention*, Chicago University Press, Chicago, 1995

⁴²¹ Möschel, M., "Race in mainland European legal analysis: Towards a European Critical Race Theory", *Ethnic and Racial Studies*, volume 34, number 10, 2011, pp. 1648–1664.

⁴²² In the meaning of Article 17 of the European Convention on Human Rights.

Institutions, efficient procedures, and a human rights friendly social climate are as important for the realisation of the effective fight against hate crimes as a well codified black letter law. The former can only be achieved if the above recommendations with regard to counter-speech are realised. *Ex post facto* responses, such as the application of hate crime provisions and penalty enhancements must go hand-in-hand with the proactive promotion of openness to diversity and tolerance.

5. RECOMMENDATIONS

The European Union as a community based on values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (Article 2 TEU) needs to **speak against** hate speech and also to **act against** hate speech and hate crime.

The fight against bias motivated acts can be grouped respectively in two categories: **counter-speech and counteraction**. Both take note of the fact that hate speech and hate crime are social phenomena and that legal regulation and law enforcement touches only the tip of the iceberg.

For long-term and solid improvement, the underlying factors need to be adjusted, which are:

- - social insecurity, inequality and poverty⁴²³;
- - various fears in our risk-based society;
- - unequal education;
- - weakness of the law enforcement system;
- - populist political communication.

5.1. Speak against: taking counter-speech seriously

It is the constitutional duty of the state to protect equally all persons within its jurisdiction. Failure to provide protection against discrimination, racism, and hate speech is also a demonstrative behaviour, which – by omission rather than by action – generates a social norm.

When **a state does not claim its authority to oppose racism** and intolerance with all its means, then it gives a **licence** to other actors to engage in racist and intolerant actions.

It should be noted that prejudice is likely to stay with humanity in the long-term. What needs to be prevented that they turn into policy, or that they actively disrupt the rule of law, through institutional discrimination.

Real fears and concerns make people susceptible to populist, discriminative or even racist views. Further research should be supported to **process and decode** the 'hate narrative' and identify its core content and define what is **the real concern behind hate**. Those real problems need to be addressed by **substantial economic and social policy** changes. Nevertheless, substantial policy measurements cannot always bring a quick solution in times like a pandemic, climate change, or a migration crisis. Therefore, the role of narratives should not be underestimated.

The following measurements aim at building social resilience against discriminative ideas, some are soft measures but some require hard laws.

⁴²³ Recent research supports that relative deprivation makes recipients more susceptible to the mobilising impact of the populist identity frames. See: Bos, L., Schemer, C., Corbu, N., Hamelers, M., Andreadis, I., Schulz, A., Schmuck, D., Reinemann, C., Fawzi, N., 'The effects of populism as a social identity frame on persuasion and mobilisation: Evidence from a 15-country experiment', *European Journal of Political Research* 59: 3–24, 2020 3. Available at <https://ejpr.onlinelibrary.wiley.com/doi/pdf/10.1111/1475-6765.12334>

5.1.1. To counter populist political communication

All persons of authority shall have a duty to not only refrain from discriminative or biased expressions, but also counter-speak every time they encounter such. This has been expressed in numerous documents by international bodies and also by legal philosophy (see Chapter 2.5.2.).

(i) The EU should declare that hate speech and also hate crimes at the level of the public administration, government and governmental officials, authorities, schools and all public institutions deeply violates the basic values of the European Union and that MSs are obliged to use all legal means to eliminate this phenomenon, even in its forms which do not reach the criminal threshold.

(ii) All institutes of public administration, government and governmental officials, authorities, schools and all public institutions are obliged to engage in counter-speech whenever they encounter hate speech and hate crime, and represent the values of the European Union and the United Nations, as common principles of all civilised nations in the world.

5.1.2. Make democratic institutions defensive against populism

Demarcation, confrontation and co-optation are usual political strategies to limit extremist parties' institutional power. Belgium has constituted a *cordon sanitaire* around its radical right party which prohibits any political coalition with the party. Other states have no official *cordon sanitaire*, but practice demarcation, including Germany, France, Netherlands and Sweden – but these unofficial cordons show cracks particularly among local and regional politicians.⁴²⁴ In order to build a political resilience of democratic institutions, certain limits must be in place both within the EP and national institutions. The EP's earlier Rules of Procedure provided for exclusion of funding if "a political party at European level has ceased to observe the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law."⁴²⁵ This rule has been deleted since, but it is highly necessary to re-introduce, along with further restrictions – this would also be in line with ECRI Recommendation 15, point 9.

(i) The EP Rules of Procedure should provide for withdrawal of funding provided to, and the prohibition of political coalition with political parties whose members repeatedly (even if inconsistently) represent views that are irreconcilable with the values of the European Union, provided that the party fails to sanction this.

(ii) MSs should be obliged by EU law to withdraw all support by public bodies from political parties and other organisations that use hate speech or fail to sanction its use by their members (in line with ECRI Rec. 15. No. point 9.).

⁴²⁴ Mudde, C., *The far right today*. John Wiley & Sons, Oct 25, 2019.

⁴²⁵ Rule 224. 6. Where Parliament - following verification - establishes that a political party at European level has ceased to observe the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, the Bureau shall decide that that political party shall be excluded from funding." (deleted) Rules of Procedure of the European Parliament, 2019, available at https://www.europarl.europa.eu/doceo/document/RULES-8-2019-03-25-RULE-224_EN.html.

5.1.3. Own the narratives

While important to react to the discriminative narratives, it is recommended to develop independent narratives of liberal democracy, addressing human rights, identity and tolerance, among others through entertainment products (movies, TV shows) to build a common European culture – rather than get consumed in direct counter-narratives which would be defined by the terms and communicative agenda of the hate speakers.

(i) A credible EU narrative should be sought to replace the populist narratives. A credible narrative is one which addresses those real concerns which lie at the bottom of those social tensions that provide a fertile soil to hate speech (and violence). The appropriate policy measurements need to be communicated in the form of a narrative which builds on equality and the rule of law, beyond the facts and figures which they need to be based on. Using narratives means to tell and re-tell the story of Europe, of enlightenment, the values and choices that produced the European Union, through real-life stories.

(ii) Scientific evidence along with value choices – based on the values of the EU – should be presented as a solid point of reference.

(iii) Counter-speech should demonstrate the falsity of the biased statements and also their unacceptability (in line with point 4. of ECRI Rec. No. 15.)

a. Use EU narratives in EP elections campaign

The EU's narrative is weakly heard compared to the real benefits that it provides to the people. European elections take place only at the national level, therefore **election campaigns – the largest and most expensive, narrative-forging media shows** – hardly ever address the benefits and promises of the EU.⁴²⁶ The EU perspective should be brought down to the level of national voters by letting them vote directly to EP parties. If national political candidates would be required to name and advertise the specific political party in the EP to which they would belong, it would bring in discussion of European policies into the election campaigns.

During the EP elections the candidates should be required to campaign for the EP party-family which they belong to, and would be obliged to represent EU policies in their campaign.

b. Bring EU narratives down to the local level

The competent EU institution should identify social segments within the EU which should be addressed with narratives about EU values. A European harmonisation of cultures should be aspired, through support to social programs organised locally but designed and supervised centrally.

(i) for example through online games, quizzes, and stories; to increase knowledge of the EU values and tolerance;

⁴²⁶ Research shows that in EU 28 the EP campaign is not supranational, the topics were prevalingly national. Appx. 15% of issues were "European" those, too, presented within the limits of the domestic consequences. See the European Elections Monitoring Center (EEMC), "Report EEMC_2019", European Elections Campaign, 2019. Available at <https://www.electionsmonitoringcenter.eu/article/b8948aed-67b6-4575-bb9c-4df29ae08538>.

(ii) sensitisation to hate speech and discrimination should be achieved through media experiences, in both entertainment and education;

(iii) promote the idea of European identity by creating and dispersing narratives about a common Europe and European values.

5.1.4. Integration and empowerment

To foster social integration and empowerment of the vulnerable minorities, social programmes should be organised at the local level, and the EU should support and monitor execution of such. It is recommended to realise the plan of the Commission to fund independent NGOs – directly – which engage in promotion and protection of rule of law, democracy, and human rights.⁴²⁷

a. Support local governments or directly NGOs to organise social programmes:

- - to mediate between members of the majority and minority groups;
- - to address matters of conflict and social injustice;
- - to foster social inclusion, reduce polarisation and hostility.
- - in particular help realise the goals in 5.1.6. below.

b. Support education programmes

Particular emphasis on education is recommended, at all levels of institution from early childhood on. Bold integrative measures at a young age should increase exposure to diversity even in homogenous social groups.⁴²⁸ The realisation of the programmes needs to be monitored by an independent entity.

(i) Fight against segregation; help local governments find solutions – amidst their limited resources – to organise integrated education;

(ii) Organise student exchange programs to mobilise students across cultural boundaries: a) across different social status, b) from city to village, c) from homogeneous to multicultural environment and reverse;

(iii) Nationalistic education in kindergarten and school should at least mention the value of diversity and other EU values. For example, a selection of folk tales of the European nations – those that feature the values of solidarity and tolerance – should be translated into languages and become part of the common cultural heritage. These could as well be processed as cinematographic works, e.g. series.

⁴²⁷ See the EP motion for a Resolution to establish a European Values Instrument to support civil society organisations which promote fundamental values within the European Union at local and national level (2018/2619(RSP), available at https://www.europarl.europa.eu/doceo/document/B-8-2018-0189_EN.html). See also: Šelih, J., *Can EU funds promote the rule of law in Europe?*, Transparency International, 2017. Available at https://transparency.eu/wp-content/uploads/2017/12/pbrief_structural_funds_nov17.pdf.

⁴²⁸ Cultural boundaries are more meaningful today than national boundaries: they exist across the urban/rural divide, the income divide and the divide between multiethnic/homogeneous communities, etc. While international exchange is also nice, social "bubbles" overarch national boundaries.

c. Support social programs of empowerment

According to the study, victims of hate speech and hate crime fear to report, and fear with reason, because the enforcement system has built-in obstacles which hinder to serve justice. This needs to be tackled first of all at the institutional level (see Rec. 5.2. below) and secondly by citizen empowerment:

- (i) targeted groups should be empowered to have no fear from enforcing their rights;
- (ii) witnesses of hate speech and hate crime should be encouraged to speak and act against hate speech and discrimination.

5.1.5. Mainstreaming science

Compared to the amount of interest shown by legal and philosophical science in hate speech, and the existing background literature on hate speech from these perspectives, there is insufficient scientific research on the social and psychological causes of hate speech and hostility. The considerable advancement in statistical and medical research methods promise new insights in the human component of this complex social problem. Knowing more about the motivation, legal policy could better plan preventive measures to eliminate intergroup hostilities. Therefore, it is recommended, with the vision to inform policy, to:

- (i) support linguistic and psychological research on the causes and methods of hate speech, intolerance and populism;
- (ii) build in the research results into public awareness-raising programmes, education and counter-speech activities;
- (iii) initiate a transnational cultural and scientific debate on the causes of intolerance and discrimination, and on the appropriate counter-actions by society.

5.2. Act against hate speech and hate crimes

Counter-speech alone would be weak without the institutional support which in this study is called **counter-action**. Counter-speech may be employed by majority society members, and by the targeted persons themselves. But, because of the deprivation of dignity constituted by hate speech, discrimination and other forms of bias⁴²⁹ requires extraordinary stamina and courage for targeted persons to talk back. Therefore, also the empowerment of the targeted minorities is crucial. Victims ought to be equipped with the appropriate tools necessary to reject the authority claims of the speaker, and to report crimes. These tools are primarily the **appropriate functioning of the administrative and law enforcement procedure**.⁴³⁰

⁴²⁹ Austin, J., *How To Do Things With Words*, Harvard University Press, Cambridge, London, 1975.

⁴³⁰ Whitten, S., 'Recognition, Authority Relations, and Rejecting Hate Speech', *Ethic Theory Moral Prac* 22, 2019, pp. 555–571.

5.2.1. Hard measures to counteract

The EU should oblige Member States to reinforce effective functioning of the existing framework of law-enforcement.

- Police should investigate *ex officio* all criminal hate speech and hate crime events which it gets information about.
- Bias indicators should be taken into consideration by investigation authorities.
- NGOs should be entitled to give notification to the police upon which the police would need to start investigation. Police co-ordination with civil society could also build community confidence and at the individual level increase official reporting.
- Even in the absence of *sui generis* hate crime provisions or specific qualifying circumstances, courts could take the bias motive into consideration, and under the Framework Decision 2008/913/JHA have an unequivocal obligation to do so. MSs should nevertheless adopt *sui generis* provisions or qualifying circumstances to show their denouncement of the phenomenon, and to express state solidarity with the victims of such crimes.
- According to Article 82(2)(c) of the TFEU to the extent necessary to facilitate mutual recognition of judgments and police and judicial cooperation in criminal matters having a cross-border dimension, the EU may adopt legislation to establish minimum rules on – among others – the rights of victims of crime. Using this power, EU lawmakers could incorporate the standards specifically related to victims of hate crimes developed by the ECtHR into a piece of EU law, such as showing special vigilance to explore and unmask racist and other bias motives behind crimes, whether committed by state agents or private parties, acknowledging mixed motives, and protecting those who can be associated with someone having a protected characteristic.
- The special needs of hate crime victims in criminal proceedings should be acknowledged in line with the EU Victims Directive, and if needed more specific laws and recommendations should be laid down. At the minimum its enforcement should be closely monitored.

5.2.2. Provide for restorative justice possibilities and alternative punishments

Administrative procedures with smaller impact could reach more significant changes than the high-cost-high-stake criminal procedure. Easy and quick procedures which would build a web of several local authorities in charge to counter-speak and counter-act all manifestations of hate speech, discrimination or hate crime, could be fast reactive, reinforce moral values locally, satisfy with a lower threshold of what is regarded as hate speech, and a lower threshold of individual responsibility; would have the potential to restore the dignity of the targeted group or individual by regularly reinforcing social values of tolerance and equality.

Local level would not necessarily be restricted to geographical proximity. In the digital age, proximity could be interpreted as virtual proximity of a virtual community; and the small networks of society. Existing authorities could and should act as 'local authorities' for example professional associations, press councils, schools, towns.

The EU should prescribe that the MSs enable the possibility in their legal systems that hate speech and hate crimes are diverted from the traditional criminal justice system and/or that they are consequently sanctioned with alternative punishments:

- Victim-offender mediation or other restorative justice procedure should be made available, with specifically trained mediators;
- Perpetrators should be banned from public office, especially political function, teaching, etc.;

- Sanctions should include compulsory education on facts related to the problem area: for example, paying a visit to a concentration camp, reading books or watching movies specified by the court and write reading diaries about them;
- Community service specifically related to the attacked minority could be imposed.

5.2.3. The framework of administrative rules should be reinforced to better tackle hate speech and discrimination.

The adoption of the Proposal for the **Antidiscrimination Directive**⁴³¹ should be further urged and the hesitating MSs should be persuaded with the growing need for the supranational regulation, because the problem apparently cannot be solved sufficiently at the national level, whereas the values at stake are common values of the European Union. FRA has also supported the urgent adoption,⁴³² and the EP has repeatedly called on the Council to adopt the Directive.⁴³³ Alternatively, the Equal Treatment Directives' scope should be extended to cover discrimination and verbal assault in all public situations, and provide redress to victims and sanctions with preventive effect for future transgressions. This approach is also recommended in point 4-5-6. of the ECRI Rec. no. 15.

The Directive should ensure that:

- MSs have an administrative framework in place to provide redress and support and justice to targets of hate speech;
- Authorities in this network need to act both ex officio, and upon notification;
- Whistle-blowers should receive enhanced protection and attacks against them should be treated with exceptional care.⁴³⁴

5.2.4. EU programmes and funding

The EU should put in place programmes and funding to achieve the following effects:

- Establish international contact points where attacked whistle-blowers can ask for support;
- Establish or support an umbrella organisation where NGOs can exchange experiences or an already existing umbrella organisation should take up that role;
- Support existing or new counter-speech initiatives;
- Support local and national NGOs which combat hate speech, hate crime, and support victims;
- Make sure that MSs do not introduce restrictions or measures with equal effect on the financial support of NGOs from within the European Union;
- Support online anonymous hate crime reporting system;

⁴³¹ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}

⁴³² European Union Fundamental Rights Agency, "Fundamental Rights Report 2018", Publications Office, Luxembourg, Chapters 1 and 3, 2018.

⁴³³ Available at <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-anti-discrimination-directive#:~:text=In%202008%2C%20the%20European%20Commission,discrimination%20through%20a%20horizontal%20approach.>

⁴³⁴ The term "whistleblowers" needs to be interpreted in a wider scope than in the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, and primarily include those who report, or combat discrimination and hate speech or hate crime.

- Continue to encourage the collection of comparable hate crime data across the EU disaggregated by bias motivation, indicated whether the victim belonged to the majority or the minority, and this data should be made public;
- Victimisations surveys should be conducted regularly also in the future;
- Support training program for the police, prosecutors and judges working with hate crime victims and witnesses.

5.2.5. Rule of Law monitoring

When discriminative ideas have infiltrated public administration, then national law enforcement weakens – at this point, only an independent judiciary, or international supervision could improve the situation to some extent. The EU's regular rule of law mechanism – whichever proposal from the various institutions or a combination of them is realised⁴³⁵ – could be an important element to prevent further backsliding, and thus revert to the institutional background necessary for the efficient realisation of the fight against hate speech and hate crimes.

The Rule of Law monitoring should include a checklist whether the States have satisfied their obligations to fight against hate speech and hate crime.

The EU should require regular report from the MSs on the fulfilment of the mentioned requirements. When assessing the rule of law and fundamental rights in a country, scrutinising the effectiveness of the fight against hate speech and hate crime should be added. Assessment of soft laws, recommendations could add to understanding the context of bias motivated speech and crime. A special emphasis should be placed on the enforcement of black letter laws. Disrespect for secondary laws currently in force such as for example the Framework Decision 2008/913/JHA and Directive 2012/29/EU, but also the above proposed EU laws, should result in infringement proceedings, or if there are serious and persistent breaches by a MS of human dignity, equality, or the principle of non-discrimination, systemic breaches should entail a loss of privileges or the suspension of rights deriving from the application of the Treaties.

⁴³⁵ Council of the EU, Presidency conclusions - Evaluation of the annual rule of law dialogue, 19 November 2019, Available at <https://www.consilium.europa.eu/media/41394/st14173-en19.pdf>; European Commission, Communication 'Further strengthening the Rule of Law within the Union State of play and possible next steps', COM(2019) 163 final, 3 April 2019; European Parliament, resolution with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL), 25 October 2016. Available at https://www.europarl.europa.eu/doceo/document/TA-8-2016-0409_EN.html.

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ANNEXES

ANNEX 1: QUESTIONNAIRE ON HATE SPEECH

The purpose of this questionnaire is to provide authentic information and gather reliable resources for the hate speech chapter the above referenced comparative study requested by the Committee on *Civil Liberties*, Justice and Home Affairs (LIBE) of the European Parliament. (In case you have expertise on violent hate crime as well, we kindly ask you to fill out the other form we sent you along the present one, too.)

Beyond black letter law and case law of national courts, you are kindly invited to give your professional insights or personal opinion whenever you find it relevant.

We would be grateful if this document would not be converted, i.e. if it could be returned in Microsoft Word format.

Name and affiliation of the national researcher:

County:

Do you permit Authors of the study to reference your name and affiliation, or do you wish to remain anonymous?

Both name and affiliation can be mentioned	Only name can be mentioned	I wish to remain anonymous

I. QUESTIONS RELATING TO THE LAWS ADDRESSING HATE SPEECH

1. Which branches of law address hate speech in your country?

Criminal law	Administrative law	Civil law	Media law	Other (please specify)

2.

i. Is the list of protected characteristics an open-ended one or an exhaustive list?

Open-ended	Exhaustive
•	•

ii. If it is exhaustive, what protected characteristics are expressly mentioned by your national law?

	YES	NO	SUPPORTING INFORMATION
Nationality	•	•	•
Ethnic origin	•	•	•
Religion	•	•	•
Other belief	•	•	•
Race or racial origin	•	•	•
Colour	•	•	•
Language	•	•	•
Age	•	•	•
Gender identity	•	•	•
Sexual orientation	•	•	•
Disability	•	•	•
Homelessness	•	•	•
Migrant, refugee status	•	•	•
Lifestyle	•	•	•
Subculture (<i>e.g. punks, emos, goths</i>)	•	•	•
Political opinion	•	•	•
Other (<i>please specify</i>)	•	•	•

3. If the list of protected characteristics is open-ended, how is it formulated by the law ("for example", "such as", "belonging to any societal group", "etc.")?

Please write your answer here

	YES	NO	SUPPORTING INFORMATION
4. Was Article 1 c) and d) of the Framework Decision, regarding denial of genocide transposed in your country? ⁴³⁶	•	•	•
5. Does the law require intent or <i>motivation, or some goal, objective</i> ?	•	•	•
6. Can a case be prosecuted also against the will of the victim?	•	•	•
7. Are there civil remedies against hate speech? If so, what are its limitations (e.g. only applicable if an individual is specifically targeted?)	•	•	•
8. Is the formal object of legal protection:	•	•	•
.public peace	•	•	•
.public order	•	•	•
.individual reputation	•	•	•
.other (please specify)	•	•	•

	YES	NO	SUPPORTING INFORMATION
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⁴³⁶ c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

9. Is a hate speech crime only if it threatens public order, public peace? (e.g. relying on the "clear and present danger test")	•	•	•
10. Is it also a hate speech crime when a communication is threatening, abusive or insulting in regard of an individual based on the protected characteristics? •	•	•	•

11. Who has the right to initiate the procedure?

Only the victim	Public interest group, NGO	Ex officio procedure	Other (please specify)
•	•	•	•

	YES	NO	SUPPORTING INFORMATION
12. Is <i>result</i> of the expressive conduct required to establish the crime, either by law or jurisprudence?	•	•	•
13. Are there any conditions or circumstances which have developed through case law and not directly accessible from the text of the law? If yes, please could you provide links or references to those court decisions (whether Constitutional or ordinary court) which are guiding in this respect?	•	•	•
14. Is there any specific regulation regarding persons exercising authority (e.g. state authority representatives, teachers, elected politicians) on the side of the perpetrator?	•	•	•
15. Is the potential effect of the hate speech an important factor in the judicial procedure?	•	•	•

	Only minority	Only majority	Both	I don't know	Supporting information
16. Does the national law of your country protect minorities only, or does it cut both ways protecting both minority and majority citizens (in the sense of power)?	•	•	•	•	•

17. What are the institutions to combat hate speech in your country? Could you please name them or provide a link to them?

Authorities	Supervisory bodies or ombudspersons	Civil society organisations	Other
•	•	•	•

• **ONLINE HATE SPEECH**

	YES	NO	SUPPORTING INFORMATION
18. Has the AVMSD been implemented yet? If yes, does it extend beyond the minimum requirements of the directive? If yes, in what respect?	•	•	•
19. Is there a specific rule to combat online hate speech - whether in social media, press or other?	•	•	•
20. Is there a specific rule in <i>criminal</i> or <i>administrative</i> law for online hate speech or harassment?	•	•	•
21. Is there a rule to oblige <i>social media platforms</i> to combat hate speech? If so, is it regarded as effective/ ineffective/over-restricting?	•	•	•
22. Are you aware of any administrative or court procedures involving online hate speech?	•	•	•

23. Could you provide us links or references to **statistics** regarding the prevalence of online hate speech?

Please write your answer here

• **WRITTEN PRESS**

	YES	NO	SUPPORTING INFORMATION
24. Is hate speech prevalent in the printed press or the 'online written press'? (To be distinguished from social media.)	•	•	•
25. Is there a – or are there more – journalistic codes of ethics which address hate speech?	•	•	•
26. According to your professional judgment, would you describe it as effective – ineffective – over-restrictive?	•	•	•

• **MEDIA**

In this section you are invited to mark your answer on a scale from 1 to 6

	1	2	3	4	5	6
27. According to your professional judgment, does public service (or state-owned) broadcasting refrain from any form of hate speech? • (1= Completely refrains from, 6= hate speech is often and explicitly published)	•	•	•	•	•	•
28. Do private broadcasters refrain from any form of hate speech? • (1= Completely refrains from, 6= hate speech is often and explicitly published)	•	•	•	•	•	•
29. Does public service broadcaster engage in counter-speech? • (1= Regularly and frequently lays emphasis on counter-speech, 6= Counter-speech is unnoticeable)	•	•	•	•	•	•

	YES	NO	SUPPORTING INFORMATION
30. Should a broadcasting organisation impart hate speech, would that be followed by an official procedure at the Broadcasting Council or similar supervisory body?	•	•	•
31. Were there any instances that broadcasters have been officially found to impart hate speech? If so, were they penalised?	•	•	•

• **SUBJECTIVE OPINION**

	YES	NO	SUPPORTING INFORMATION
32. Are hate speech incidents in your view under-reported?	•	•	•
33. If reported, are hate speech crimes generally prosecuted?	•	•	•
34. Is counter-speech noticeable (e.g. by governmental campaigns, public advertisements, NGOs, influencers, etc.?)	•	•	•
35. Is hate speech prevalent in the political elite; such as members of the government, employees of the government, members and employees of the administrative branch, teachers?	•	•	•
36. Are you aware of instances where the law has been misinterpreted or used to protect <i>majority opinions</i> against dissident, oppositional opinions?	•	•	•
37. Do the courts refer to international standards for freedom of expression and non-discrimination in their decisions?	•	•	•

38.

39. In your view, are illegal hate speech incidents appropriately tackled by law and judicial procedures or the other available legal remedies? **If not**, what are the main reasons in your opinion?

	YES	NO	EXPLANATION
• In the investigation phase			
Underreporting (If so, what is the reason: distrust in the police, fear from re-victimisation, fear from secondary victimisation, vulnerability of the victim, „coming out“ fear, etc.)	•	•	•
Lack of expert knowledge regarding new technology	•	•	•
Institutional discrimination	•	•	•
Unclear of the new technology responsibility rules	•	•	•
Other (please specify)	•	•	•
• In the prosecutorial phase			
Unclear of the new technology responsibility rules	•	•	•
Anonymity of the speaker	•	•	•
Institutional discrimination	•	•	•
Other (please specify)	•	•	•
• In the courtroom			
Difficulty in proving the elements of the crime (e.g. effect, result, motive)	•	•	•
Lack of expert understanding of the online technology	•	•	•
Institutional discrimination	•	•	•
Other (please specify)	•	•	•

40. According to your personal opinion how common is hate speech committed based on the following protected characteristics?

	Very frequently	Frequently	Sometimes	Very rarely	Never
Nationality	•	•	•	•	•
Ethnic origin	•	•	•	•	•
Religion	•	•	•	•	•
Other belief	•	•	•	•	•
Race or racial origin	•	•	•	•	•
Colour	•	•	•	•	•
Language	•	•	•	•	•
Age	•	•	•	•	•
Gender identity	•	•	•	•	•
Sexual orientation	•	•	•	•	•
Disability	•	•	•	•	•
Homelessness	•	•	•	•	•
Migrant, refugee status	•	•	•	•	•
Lifestyle	•	•	•	•	•
Subculture (e.g. punks, emos, goths)	•	•	•	•	•
Political opinion	•	•	•	•	•
Other (please specify)	•	•	•	•	•

41. Please add any further comment or detail that you consider relevant for your country, and that can help us to prepare a comprehensive overview and analysis.

Please write your answer here

THANK YOU FOR YOUR COOPERATION!

ANNEX 2: QUESTIONNAIRE ON HATE CRIMES

The purpose of this questionnaire is to provide authentic information and gather reliable resources for the hate speech chapter the above referenced comparative study requested by the Committee on *Civil Liberties*, Justice and Home Affairs (LIBE) of the European Parliament. (In case you have expertise on hate speech as well, we kindly ask you to fill out the other form we sent you along the present one, too.)

Beyond black letter law and case law of national courts, you are kindly invited to give your professional insights or personal opinion whenever you find it relevant.

We would be grateful if this document would not be converted, i.e. if it could be returned in Microsoft Word format.

Name and affiliation of the national researcher:

Country:

Do you permit Authors of the study to reference your name and affiliation, or do you wish to remain anonymous?

Both name and affiliation can be mentioned	Only name can be mentioned	I wish to remain anonymous

II. QUESTIONS RELATING TO THE LAWS AND JURISPRUDENCE ADDRESSING HATE CRIMES

• BIAS MOTIVE

	YES	NO	SUPPORTING INFORMATION
42. Was Article 4 of the Framework Decision on racist crime transposed in your country?	•	•	•
43. Does the legislation of your country provide for a <i>sui generis</i> hate crime provision?	•	•	•
44. Does the legislation of your country acknowledge the bias motive as an aggravating / qualifying circumstance?	•	•	•
45. Does the legislation of your country comprise any criminal law provision that concerns sentencing and allows for an aggravation of a sentence on the basis of an offence committed with a discriminatory motive?	•	•	•
46. Is there any other type of guidance for courts to consider the bias motive during sentencing? (whether soft law or guidance from apex courts)	•	•	•

Please provide further comments here (if you have any)

• **PROTECTED CHARACTERISTICS**

	YES	NO	SUPPORTING INFORMATION
47. Is the list of protected characteristics an exhaustive list or an open-ended one? (e.g. nationality, ethnicity, race, religion <i>and other characteristics...</i>).	•	•	•

48. What protected characteristics are expressly mentioned by your national law?

•	• YES	• NO	• SUPPORTING INFORMATION
Nationality	•	•	•
Ethnic origin	•	•	•
Religion	•	•	•
Other belief	•	•	•
Race or racial origin	•	•	•
Colour	•	•	•
Language	•	•	•
Age	•	•	•
Gender identity	•	•	•
Sexual orientation	•	•	•
Disability	•	•	•
Homelessness	•	•	•
Migrant, refugee status	•	•	•
Lifestyle	•	•	•
Subculture (<i>e.g. punks, emos, goths</i>)	•	•	•
Political opinion	•	•	•
Other (<i>please specify</i>)	•	•	•

49. If the list of protected characteristics is open-ended, how is it formulated by the law ("for example", "such as", "belonging to any societal group", "etc.")?

•

Please write your answer here

	Only minority	Only majority	Both	I don't know	Supporting information
50. Does the national law of your country – as interpreted by the courts – protect minorities only, or does it cut both ways protecting both minority and majority citizens (in the sense of power)?	•	•	•	•	•

	YES	NO	SUPPORTING INFORMATION
51. Does the national law of your country have an abuse of rights provision, or was this principle established by the case-law? (e.g. victims belonging to groups aiming at the subverting of the constitutional order shall not be protected by hate crime provisions)	•	•	•

• **BASE CRIMES**

52. Please indicate which of the following criminal offences are covered by such enhanced penalties if committed with a discriminatory motive:

	YES	NO	SUPPORTING INFORMATION
Intentional killing of a person	•	•	•
Bodily injury or bodily harm	•	•	•
Threatening or intimidating a person	•	•	•
Stalking	•	•	•
Defamation, insulting or offensive statements or other such behaviour	•	•	•
Intentionally damaging another person's property	•	•	•
Acts of vandalism against public monuments or cemeteries, desecration of graves	•	•	•
Other	•	•	•

• **PROCEDURAL MATTERS**

	YES	NO	SUPPORTING INFORMATION
53. Are the police obliged to take the enhanced penalty into account when conducting investigations and reporting to public prosecution?	•	•	•
54. Are there specific units or officers within the police tasked with investigate hate crimes?	•	•	•
55. Are there specific prosecutors tasked with prosecuting hate crimes?	•	•	•
56. Does the prosecutor have to prove animosity towards the victim's social group (bias model of hate crimes) or is it sufficient to prove that the victim was selected due to their protected characteristic (discriminatory selection model)?	•	•	•
57. Does your country follow the legality or the opportunity model?	•	•	•
58. Can a victim object to prosecution?	•	•	•
59. If a prosecutor decides to discontinue the case, can the victim press on with the charges?	•	•	•
60. If a court decides not to apply the <i>sui generis</i> provision or the enhanced penalty and the victim disagrees with this decision, does the victim have the possibility to avail of a legal remedy which could lead to a revision of the court's decision by a higher court?	•	•	•
61. Are there provisions that prohibit discriminatory or harassing behaviour towards victims belonging to certain social groups? Which social groups are covered?	•	•	•
62. Are there provisions that prohibit blaming the victims for the crime? Are they general provisions or specific to hate crimes?	•	•	•
63. Are there provisions that require hate crime victims to be interviewed by specially trained professionals?	•	•	•

64. Are there any other measures in place to prevent secondary victimisation of hate crime victims during the criminal proceeding?	•	•	•
65. Is there a possibility of victim-offender mediation or other type of restorative justice in case of hate crimes?	•	•	•

• **HATE CRIME DATA**

66. Could you please provide us with official hate crime data?

Please write your answer here

67. Could you please let us know which authorities can be addressed to receive official data?

Please write your answer here

68. Are you aware of any unofficial data? (whether general, or relation to a certain protected characteristic, or a special type of conduct)

Please write your answer here

• TRAININGS

69. Could you please name examples of...

	<i>Please write your answer here</i>
• police trainings	•
• judicial trainings (judges' and prosecutors' trainings)	•
• lawyers' trainings	•
• awareness raising beyond the justice sector (primary, secondary, higher education)?	•

70. How do you evaluate the quality of the...

	High quality	Acceptable quality	Low quality	I do not know
• police trainings	•	•	•	•
• judicial trainings (judges' and prosecutors' trainings)	•	•	•	•
• lawyers' trainings	•	•	•	•
• awareness raising beyond the justice sector (primary, secondary, higher education)?	•	•	•	•

71. How many people attended at the...

	<i>Please write your answer here</i>
• police trainings	•
• judicial trainings (judges' and prosecutors' trainings)	•
• lawyers' trainings	•
• awareness raising beyond the justice sector (primary, secondary, higher education)?	•

- **JURISPRUDENCE**

72. What are the main controversies in the case-law?

Please write your answer here

73. How are mixed motives assessed?

Please write your answer here

74. Is restorative justice practiced?

Please write your answer here

75. Are alternative sanctions imposed?

Please write your answer here

76. Are restraining or protective orders applied?

Please write your answer here

77. How do prosecutors prove the bias motive? (spoken or written words, drawings, symbols, graffiti, other bias indicators, criminal history, suspect's lifestyle choices, assessment of social media posts by the suspect, psychological tests, etc.)

Please write your answer here

• **EXPERT'S OWN OPINION**

	YES	NO	SUPPORTING INFORMATION
78. Do the official statistics reflect the phenomenon and frequency of hate crimes?	•	•	•

79. **If not**, what are the main reasons in your opinion?

	YES	NO	EXPLANATION
• In the investigation phase			
Underreporting (If so, what is the reason: distrust in the police, fear from re-victimisation, fear from secondary victimisation, vulnerability of the victim, „coming out“ fear, etc.)	•	•	•
Lack of expert knowledge (bias indicators)	•	•	•
Institutional discrimination	•	•	•
Other (please specify)	•	•	•
• In the prosecutorial phase			
Going for the cases which are easy to prove (base crime is easier to prove than bias crime)	•	•	•
Institutional discrimination	•	•	•
Other (please specify)	•	•	•
• In the courtroom			
Difficulty in proving the motive	•	•	•
Countering the prosecution by searching for other motives („road rage“, „just a fight“)	•	•	•
Institutional discrimination	•	•	•
Other (please specify)	•	•	•

80. According to your personal opinion how common hate crimes committed based on the following protected characteristics

	Very frequently	Frequently	Sometimes	Very rarely	Never
Nationality	•	•	•	•	•
Ethnic origin	•	•	•	•	•
Religion	•	•	•	•	•
Other belief	•	•	•	•	•
Race or racial origin	•	•	•	•	•
Colour	•	•	•	•	•
Language	•	•	•	•	•
Age	•	•	•	•	•
Gender identity	•	•	•	•	•
Sexual orientation	•	•	•	•	•
Disability	•	•	•	•	•
Homelessness	•	•	•	•	•
Migrant, refugee status	•	•	•	•	•
Lifestyle	•	•	•	•	•
Subculture (e.g. punks, emos, goths)	•	•	•	•	•
Political opinion	•	•	•	•	•
Other (please specify)	•	•	•	•	•

81. Please add any further comment or detail that you consider relevant for your country, and that can help us to prepare a comprehensive overview and analysis.

Please write your answer here

THANK YOU FOR YOUR COOPERATION

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee. The study argues that hate speech and hate crimes poison societies by threatening individual rights, human dignity and equality, reinforcing tensions between social groups, disturbing public peace and public order, and jeopardising peaceful coexistence. The lack of adequate means of prevention and response violates values enshrined in Article 2 TEU. Member States have diverging rules, and national public administrations are torn by disagreement in values. Therefore, EU regulation is needed to reinforce the existing standards and take measures to counter hate speech and counter-act against hate speech and hate crime. The study – on the basis of a cross-country comparison conducted – proposes concrete, enforceable and systematic soft and hard law measures to counter hate speech and hate crimes EU-wide efficiently.

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