

**RESPONSE TO HATE CRIMES IN THE US, UK AND UKRAINE:
CONSIDERATION OF VICTIMS' PERSPECTIVE**

by Olena Bondarenko

HUMAN RIGHTS M.A. THESIS
PROFESSORS: Károly Bárd, Doctor Juris.
Eszter Polgári, Ph.D.
Central European University
1051 Budapest, Nador utca 9.
Hungary

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Executive Summary

The present comparative thesis looks at the issue of consideration of victims' perspective in the systems of hate crime response in Ukraine, United Kingdom and United States. The question of the incorporation of provisions and practices related to situation of victims and taking into account the impact of hate crime on representatives of vulnerable groups is reviewed from the comparative perspective. The research components include analysis of the different stages and mechanisms in responding to crimes motivated by bias, including the following: structure and incorporation of hate crime provisions into the legislative framework, as well as process of adoption of the relevant legislation; procedures and regulations on investigation, including practices of law enforcement agencies; the nature and role of activities of community groups and civil society organizations. Following a comparative analysis, conclusions include explanations of differences in the degree of consideration of victims' perspective in legislation and its implementation in selected jurisdictions, as well as evaluate its impact on the situation of victims.

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INTRODUCTION

Equality stands as one of the key principles underlying the understanding of what human rights mean for an individual, including equal opportunities to develop and realize the inherent potential within every human being. Hate crimes deny this basic principle or send a message of exclusion to the victim and the group of people one belongs to or may be associated with. Response to this damage caused by denial of acceptance of a person's identity is an area where there is still much to be studied and discovered in order to find appropriate solutions.

The definition of hate crimes presents a challenge itself as there is a sensitive balance that has to be achieved while pursuing the aim of coming up with a comprehensive yet precise term. These challenges will be discussed in detail in Chapter 1 in the framework of analyzing how a concept is translated into the legal term in the particular jurisdiction and what consequences there are if this process is conducted without due diligence and proper consideration. For the purposes of present research, the author will use the definition of the OSCE with modifications accounting for differences and experience not only in the process of making the law but also in the social conditions that lead to the necessity of passing these laws, as well as for distinction of hate crimes from other offences that may appear similar in nature. In addition, in the framework of comparative analysis, the term "criminal offence" includes actions that are included into the criminal codes of respective countries regardless of whether the specific criminal code contains a separate hate crime (or bias crime) provision in relation to these actions. Therefore, here a hate crime is understood as a "criminal offence [...] where the victim, premises, or target of the offence are selected because of their real or perceived connection, attachment, affiliation, support, or membership with a group [that] may be based upon a characteristic common to its members, such as real or perceived race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or

other similar factor”¹ where a certain history of prejudice and marginalization poses a threat of the impact of the crime to extend to other group members. We chose to include the “historically marginalized and persecuted”² component into this definition for the purposes of distinguishing hate crimes from other inter-group conflicts, such as football violence, conflicts between groups with different political views etc. However, patterns of marginalization in dynamics and the resulting tensions for the particular country or even a region plays an important role thus stepping away from the intrinsic characteristics approach. The important part of definition is that hate crimes can serve a signal not only for one person, but for the group that the victim belongs to, as well as for the community as a whole. For the purposes of this thesis the term “hate crimes” is interchangeable with the terms “bias crimes”, “bias-motivated crimes” or “crimes of hate” due to the use of this term in academic discourse, legislative acts and other literature referenced in the present work. Similar definitions exist in different countries with ranging protected characteristics, requirements for severity of the predicate offense, as well as other components of a hate crime³.

The author here takes an approach based on the existence of such laws and their implementation in police work, as well as civil-society efforts towards wider recognition and improved monitoring. Since hate crime laws already exist, regardless of the rate of hate crimes, there are additional aspects that call for attention and analysis in this line of studies, one of them being the consideration of victims’ role and perspective in the process of shaping hate-crime legislation and its implementation in the form of

¹ OSCE ODIHR. *Hate Crimes in the OSCE Region - Incidents and Responses*. Annual Report for 2007. Warsaw, 2007. <<http://www.osce.org/odihr/33989>>.

² Chakraborti, Neil, and Garland, Jon. *Hate Crime: impact, causes and responses*. SAGE, 2009, p. 100.

³ For instance, hate crime in the UK the CPS and the ACPO define hate crime as “any criminal offence which is perceived by the victim or any other person, to be motivated by hostility or prejudice based on a person's race or perceived race; religion or perceived religion; sexual orientation or perceived sexual orientation; disability or perceived disability and any crime motivated by hostility or prejudice against a person who is transgender or perceived to be transgender” (The Agreed Definition of ‘Monitored Hate Crime’ for England, Wales and Northern Ireland, http://www.report-it.org.uk/files/hate_crime_definitions_-_v3_0.pdf). In the US it is defined as “a crime” in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person” (The Violent Crime Control and Law Enforcement Act of 1994, s. 280003(a)).

monitoring activities, investigation, prosecution etc. This approach hereinafter is referred to as victim-based and for the purposes of this thesis it refers to a mode of analysis of hate crime legislation and its implementation with an emphasis on the degree of participation of a victim in the process, as well as where the objectives include improvement of the situation of the victim rather than simply punishment of an offender or restoring the damage done to the public order by a particular breach of the law.

The author here realizes that a victim-based approach may be challenged based on the factor of subjectivity and relative vagueness of one's perception in the course of traumatic experience of being a victim of a crime. However, for the purposes of comparative study evaluation and analysis based on the core data composed of numbers of identified incidents, initiated cases and convictions would be flawed given, first and foremost, different definitions of hate crime in the selected jurisdictions. Yet a qualitative analysis of national response mechanisms is of value not only for theoretical crystallization of the term, but for the policies and their implementation with regard to existing practice.

The findings of the comparative thesis could be both used to identify the successes and shortcomings in domestic systems in relation to victims' rights, as well as to create the basis for the study of possible application of the identified aspects to the specific national context. Successful policies are not autonomous from the setting in which they are implemented. Consequently, the norms and their enforcement call for a careful consideration prior to their introduction, including objective analysis undertaken in the course of scientific research.

This research presents a task of answering the following question: how is the victim-centered approach incorporated into the hate-crime response strategy of selected jurisdictions? There is a set of possible subsidiary questions classified in accordance with the levels and modes of incorporation and recognition of victims' rights, namely the legislation, the enforcement mechanisms and non-governmental efforts existing in the country. Thus, examination of the research question would involve finding an answer to the following:

- what are the differences in consideration of victims' perspective in the legislation of selected jurisdictions and in the process of its adoption, and how does affect the situation of victims?
- how does the inclusion of victims' position by the investigation authorities in shape and change the practice of response to hate crimes?
- what are the ways in which the non-state actors can represent interests of victims in their work on combating hate crime?

The hypothesis here is that the stronger and more active participation of both victim groups and individual victims leads to a more effective system of hate-crime prosecution in the country.

An important distinction must be made when we talk about the rights of victims and the states' consideration of these rights. On the one hand, the subject here are interests of the victim in criminal proceeding, as far as formulating the scope and nature of the offence, whereas programs of social assistance, e.g. counselling services aimed at overcoming the traumatic experience, form the side of state or non-state efforts that do not affect directly the outcome of investigation or sentencing. However, though different in purpose, these two types of work with and for the victims of hate crimes are closely connected to each other, yet the present research focuses on the former with consideration of the social assistance aspect in Chapter 3 when discussing community-support groups and non-governmental efforts.

For the purposes of this research, the methodology will include the study of the primary and secondary legislation of the jurisdictions, review and comparison of the information from the government, the civil society actors and the international organizations on the prevalence of hate crimes, and victimization survey data. In addition, the author of this research will refer to the relevant organizations that work in the field of response to hate crimes to obtain the original information about the mechanisms of support for the victims, as well as their experience with criminal justice system, current issues and discussions of the field.

Most of the works examined in the course of research focus on the sociological aspects of the phenomena of hate crimes; various reasons behind the crimes are discussed in the light of social conditions and historical premises of violence, as well as the impact of prosecutions on the situation. Great attention is paid to the police efforts and systems of monitoring and identification of hate crimes, as well as classification of the categories of offenders and victims. In addition, great number of debate is dedicated to defining whether hate crime legislation of different types, i.e. penalty-enhancing statutes or data-collection acts, actually correspond to a pressing social need, as well as whether they bring more harm or use. There are opposing viewpoints on the issue of feasibility of hate-crime laws: while some researchers, including Gerstenfeld⁴ and Lawrence⁵ and put forward supporting arguments for additional punishment should any prejudice be identified motivating it by the impact of crimes on the community and society in general, others question the very need for having a separate hate-crime law (for instance, the critique of hate crime statutes is developed in works of Jacobs⁶, Uviller⁷ and others), as well as point out the dangers related to creating a separate category of offences, such as arbitrariness of their application (Goldberger⁸) and the negative emotional impact on communities (Westbrook⁹).

To sum up, there is an extensive body of research attempting to answer various questions related to the phenomena of hate crime, yet no comparative study focusing on the victims' rights and consideration of this aspect in legislation and its enforcement in the United States and the United Kingdom is available. In addition, research on the state of combating hate crimes in Ukraine is limited to the reports and

⁴ Gerstenfeld, Phyllis B. *Hate Crimes: Causes, Controls, and Controversies*. 2nd. SAGE, 2011.

⁵ Lawrence, Frederick M. *Punishing hate: bias crimes under American law*. Cambridge, Mass.: Harvard University Press, 1999.

⁶ Jacobs, James B., and Potter, Kimberly. *Hate crimes : criminal law & identity politics*. New York: Oxford University Press, 1998.

⁷Uviller, Richard H. "Review article: Making it worse: "Hate" as an aggravating factor in criminal conduct." *Ethnic and Racial Studies* (2000): 761-767. <<http://dx.doi.org/10.1080/01419870050033711>>

⁸Goldberger, David. "The Inherent Unfairness of Hate Crime." *Symposium: Hate Speech and Hate Crime*. Harvard Journal on Legislation, 2004.

⁹Westbrook, Laurel. "Vulnerable Subjecthood: The Risks and Benefits of the Struggle for Hate Crime Legislation." *Berkeley Journal of Sociology* 28 (2008): 3-23. <URL: <http://www.jstor.org/stable/41035631> >.

observations, as well as non-papers, of non-governmental and international organizations. Attempting to fill the gaps mentioned above, this study focuses on the questions identified for research above from a comparative perspective.

The limits to present research are conditioned by the fact that there are certain highly debated issues related to the subject to certain degree, including the relation of hate crimes and hate speech examined, among others, by Lawrence¹⁰, that do not fall within the scope of present thesis given the definition of hate crime provided above.

There are also limits related to jurisdiction as current research focuses on hate-crime legislation and its implementation in one country that has a uniform criminal justice system with the laws applying in the same manner across the territory. Unlike Ukraine, the US and the United Kingdom have a more complex system with separation of powers between the state and the federal government in the former, and with the different government powers, including power to legislate on matters of criminal justice, of the states in the union. Considering this, the research focuses mainly on federal powers to prosecute hate crimes in the United States and the jurisdiction of the UK government in criminal justice matters extending to England and Wales. However, certain practices can be brought into research as examples or case studies should they be relevant to the subject or exemplify the local implementation of a federal approach in the United States, or similar practice in Scotland or Northern Ireland that stands as an analogy to its counterparts in England and Wales. In addition to this, the data from the British Crime Survey dated earlier than 2011 also reflects data from England and Wales despite the name suggesting the coverage of a wider territory; however, the data from True Vision force on hate crime includes figures obtained from the Police Service on Northern Ireland¹¹.

¹⁰. Lawrence, Frederick. "The Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech." *Notre Dame Law Review* 68 (1993): 673.

¹¹ True Vision. "Total of recorded hate crime from police forces in England, Wales and Northern Ireland during the calendar year 2011." 2012. <[http://www.report-it.org.uk/files/final_acpo_hate_crime_data_2011_\(revised_oct_2011\)_1.pdf](http://www.report-it.org.uk/files/final_acpo_hate_crime_data_2011_(revised_oct_2011)_1.pdf)>.

Present thesis will focus on research questions identified according to the following structure. Chapter 1 will discuss the scope of protection (including the protected characteristics and the jurisdictional requirements in case of the United States), as well as existence of other legislation that does not provide for the prosecution of hate crimes but creates/supports other initiatives aimed at combating hate crimes that are reflected on a statutory level; the chapter will also include an analysis of factors that influence adoption of hate crime legislation. The process of implementation of legislation through the work of law enforcement and involvement of victims in investigation, as well as efforts to improve reporting and community relations will be covered in Chapter 2. Finally, Chapter 3 the focus will shift to examining to role of civil society organizations and outcomes of their efforts for victims, as well as possible good practices that would be identified during research.

CHAPTER 1

LEGISLATIVE FRAMEWORK IN RELATION TO VICTIMS OF HATE CRIMES

Recognition of hate crime as a type of offence that differs from the simple predicate crime as well as laws designed to respond and prevent this type of crime came to existence in many countries over the past decades. However, there is no uniform approach to punishing or condemning prejudice, and as a result, some countries recognize hate crimes as a separate category of criminal offences whereas others adopt the view of the bias motive only as an aggravating circumstance accompanying a crime already punishable by the criminal code in the particular jurisdiction, or choose to leave the matter of punishing bias to the sentencing stage etc.

1.1. National approaches to legislating on crimes of hate

There is no agreement in the academia as to when the first statute on hate crimes was adopted as this would indicate a common definition shared by scholars that is absent at the moment. Therefore, choice of square one in different works range from reference to the Ku Klux Klan Act of 1871¹² to the passage of the Hate Crime Statistics Act in 1990¹³. In countries where legislation is in place in one form or another, difference in approaches lies in types of protected characteristics recognized in the national legislation. These classifications may vary upon the cultures and traditions in legal systems, social conditions and the dynamics of inclusion and social interaction, as well as political participation of certain categories of population and other factors that come into play. The above factors in their interrelation and

Malloy-Thorpe, Jessica, and Hemken, David. "Hate Crime Regulation and Challenges." *The Georgetown Journal of Gender and the Law* 13 Geo. J. Gender & L. 289 (2012), p. 2.

¹³ Shively, Michael. "Study of Literature nad Legislation on Hate Crime in America." Final Report. 2005. <Available at <https://www.ncjrs.gov/pdffiles1/nij/grants/210300.pdf>>, p. 2.

co-variation make up a complex pattern yet reflect the social processes in some instances and become tools in political games in other cases.

Let us turn to review what protection are available in the selected countries, including the nature of punishments and crime definitions, as well as the scope of protected characteristics and dynamics of inclusion of certain groups under the umbrella of hate crime legislation. This review is necessary to understand what level of protection, support and recognition, if any, victims belonging to different groups can expect in respective jurisdictions, as well as how the dynamics of the developments in this field are similar or different. Despite the absence of certain characteristics in the lists depending on the country, it is important to understand that crimes against these people still occur and have similar consequences thus, for instance, for Ukraine the definition of hate crime is used in the context of the present work rather than directly taken from the country's legislation. Comparing the degree of protection, therefore, includes looking at the existence of legislation on bias crimes, the scope of protected characteristics, as well as other requirements for establishing an occurrence of hate crime, including components of intent, perception of the victim and actual or perceived belonging of the victim to the group targeted by bias in each particular crime.

Prosecution of hate crimes in the US: the review of federal laws

In the US the legislation that provides enhanced punishment on the federal level includes statutes on prosecution of hate crimes on the federal level and for preventive and/or monitoring measures in the process of combating this type of offences. On the federal level, crimes are prosecuted under Title 18 of the US Code, i.e. the federal criminal code of the United States. Until recently, the 18 USC §245 was the base of federal prosecution of hate crimes that would be triggered in the case where a person was engaged in the 6 federally protected activities that are related to education, state benefits and services, employment,

jury duty, interstate travel and using the service of certain establishments that cater to the public¹⁴. After a long struggle with failed attempts to introduce changes, in 2009, the Title 18 Chapter 13 on Civil Rights was amended by the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, adding section 249, which includes provisions for prosecution of bias-motivated offences that do not require to establish that the victim was engaged in one of the federally protected activities.

The list of protected activities under the amended is construed significantly broader to include several new characteristics marking the recognition of hate crime as more than a race relations or religious tensions category, but rather a problem that is more complex, as well as potentially dangerous for a larger part of population (see table 1.1. below). Thus, in 2009 victims of crimes motivated by prejudice based on one's gender, sexual orientation, gender identity and disability were included into the list of groups that fall under the protection of federal authorities pursuant to conditions specified in subsection (2) of section 249.

Table 1.1. 18 U.S.C. Sections 245 and 249

Protected characteristics	Section 245	Section 249
Race	<i>yes</i>	yes (actual or perceived)
Color	<i>yes</i>	yes (actual or perceived)
Religion	<i>yes</i>	yes (actual or perceived)
National origin	<i>yes</i>	yes (actual or perceived)
Gender	<i>no</i>	yes (actual or perceived)
Sexual orientation	<i>no</i>	yes (actual or perceived)
Gender identity	<i>no</i>	yes (actual or perceived)

¹⁴18 U.S.C. §245., GPO access <<http://www.gpo.gov/fdsys/pkg/USCODE-2012-title18/html/USCODE-2012-title18-partI-chap13.htm>>.

Disability	<i>no</i>	yes (actual or perceived)
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Looking at the purpose and the wording of section 245, namely the emphasis on federally protected activities and their connection with the person's activities, the law calls into doubt whether it can be described as a hate crime statute in fact. The purpose of eliminating discrimination from access to essential citizens' activities does not per se include the message of discontent for violence and its effects on the community. Moreover, the absence of "actual or perceived" clarification provides support for the conclusion above that the law serves a function of promoting equal access to participation rather than combating bias and its consequences. Eliminating the qualification for federally protected activities mentioned above recognized the fact that one's identity bears significance as a lone-standing value rather than a characteristic that can be protected or exercised through one of these activities.

Overall, among the major challenges in adoption of a federal hate crime statute even prior to the passing of 2009 amendments one related to the separation of powers question, and the second one concerning the First Amendment Rights. On the latter, on the examples of the Wisconsin hate crime law and pointing out that it applies to the similar provision in other states, the US Supreme Court held in *Wisconsin v. Mitchell* that "the First Amendment permits the admission of previous declarations or statements to establish the elements of a crime or to prove motive or intent"¹⁵, as well as it "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent"¹⁶. The Court also examined the matter of whether hate crime statutes are constitutional in relation to the "chilling effect" they might have, but here it came to a conclusion about the speculative nature of the

¹⁵ *Wisconsin v. Mitchell*. No. 508 U.S. 476. 113 S Ct 2194. 19 June 1993.

¹⁶ *Ibid.*

argument about “bigoted beliefs” that would possibly be suppressed in the light of a possible conviction of a serious offence¹⁷.

As to the second challenge about the ability of the Congress to legislate on the matter, the Act was designed to meet the test of constitutionality established under *US v. Lopez* thus it contains limits to its application contained in paragraph (2) of subsection (a), namely the circumstances of crime. The adoption of James Byrd Act in 2009 was quite recent and challenges of constitutionality even with the jurisdictional element within the statute are possible, and here the decision will depend on the analysis established under *Lopez*. In any case, its adoption was a step that sent a message of recognition of a much broader range of crimes as a problem that reached the national level. However, the lack of federal jurisdiction over the wide scope of bias crimes not related to the interstate commerce provisions does not necessarily lead us to conclusion on the lack of protection on the state level, in particular during the time before the adoption of federal legislation. Jeness and Grattet suggest that in the absence of a federal hate crime statute the states were left with the problem of dealing with hate crimes, thus adopted legislation individually based on the situation and social conditions in that state¹⁸.

Additional source of federal powers on the issue is the Violence Against Women Act (Title IV of the Violent Crime Control and Law Enforcement Act of 1994 which saw its reauthorization in 2013 after the unsuccessful first attempt to adopt the legislation in 1994. The process of its adoption and re-adoption brings an interesting perspective to the question of what factors may have significant impact on the progress as regard representation of vulnerable groups that will be examined later in Chapter 1.2.

¹⁷ *Wisconsin v. Mitchell*. No. 508 U.S. 476. 113 S Ct 2194. 19 June 1993.

¹⁸ Jennes, Valerie and Ryken Grattet. "The Criminalization of Hate: A Comparison of Structural and Polity Influences on the Passage of "Bias-Crime" Legislation in the United States." *Sociological Perspectives* 39.1 (1996): 129-154. <http://www.jstor.org/stable/1389346>.

Provisions on hate crimes prosecution and sentencing in the UK

The United Kingdom has also developed the legislation in the recent years, including the new regulations on the hate crime prosecution and expansion of the characteristics of the victimized groups. The Cross-Government Action Plan designed for 2009-2011¹⁹ addressed several important issues that will be studied in the framework of this thesis, as well as the introduction of changes into the Criminal Justice Act and implementation thereof in the domestic law enforcement. Importantly, the legislation is under review now with recommendations for amendments expected to arrive in spring 2014 with the proposed changes mainly directed at initiating the reform of sentencing legislation, as well as “extending the aggravated offences to cover hostility based on grounds of disability, sexual orientation and transgender identity”²⁰. We suggest looking at the existing laws in order to see where the need for change in this area comes from in the UK, i.e. what possible gaps in coverage of vulnerable groups led to propositions on extension. Consequently, the list of protected characteristics that we shall review depends on what stage the case has reached or will reach in the future.

The UK has a complex system of legislation that includes a harsher punishment in cases where there are grounds to consider that the offence was motivated by bias towards certain groups while the way that it is applied varies depending on the group since for racial and religious that are referred to as aggravated offences, whereas enhanced punishment of other groups of crimes motivated by prejudice is conferred upon courts in the sentencing stage. This creates a varying degree of response to crimes against different groups though they are supposedly recognized by the legislator as vulnerable ones in different legislative acts.

¹⁹ HM Government. "Hate Crime - The Cross-Government Action Plan." 2009.
<<http://www.homeoffice.gov.uk/documents/hate-crime-action-plan/hate-crime-action-plan2835.pdf?view=Binary>>.

²⁰ Law Commission. "Hate Crime: The Case for Extending the Existing Offences." Consultation Paper No. 213.
http://lawcommission.justice.gov.uk/docs/cp213_hate_crime_amended.pdf, p. 7.

The legislation now includes the aggravated offences introduced under the 1998 Crime and Disorder Act as defined in section 28 of the Act for racially and religiously aggravated crimes²¹. The wording of section 28 and subsequent sections when compared to the analogous legislation is important for consideration of how the victim's perception is taken into account here. The UK law distinguishes two definitions of aggravated offences with one of them being almost analogous to its US and Ukrainian counterparts in terms of pointing out the existence of motivation. However, the second definition provides that an aggravated offence is also one where "the offender demonstrates towards the victim of the offence hostility based on the victim's membership"²².

Here, we are going back to the definition of hate crime and the reasons for increasing punishments for it or distinguishing it as a separate offence. The motive might be present during the commission of a crime but it is not easy to establish in each particular case, whereas the damage might also come from the hostility whereas the choice of victim might not be based solely of one's group membership. Yet, if such hostility is demonstrated, the victim connects an offence with his/her affiliation with the group, i.e. the person's intrinsic characteristics. The aspect of demonstrated hostility is not present directly in statutory provisions in the US and Ukraine, yet during an investigation process this would nevertheless need to be taken into consideration. While this might seem to draw closer attention to the experience of a victim, it does necessarily do so. As explained in a case decision in *DPP v. Woods*, "the fact that the person to whom the words were directed may have had a personality which enables him to take a resilient or broad shouldered view of the situation is irrelevant to the question which arises under section 28(1)(a)"²³. Consequently, the purpose of provision appears to be to provide for a more concrete ground for establishing the component of bias crime. The second definition is also problematic as the section

²¹Crime and Disorder Act c.37. 1998, s. 28. <<http://www.legislation.gov.uk/ukpga/1998/37/section/28>>

²² Ibid., s. 28(1)(a). . <<http://www.legislation.gov.uk/ukpga/1998/37/section/28>>.

²³ (Law Commission), p. 16.

includes time periods both prior, during and after the commission of the offence thus creating a situation where words spoken out by the perpetrator that could be unrelated to the actual motive of the crime might lead to categorization of the crime as a bias-motivated offence. Here, despite making it easier for prosecution of an offence, the legislation includes a component other than underlying motive into the description of what hate crime is.

Continuing the review of the scope of protected characteristics, the mention of enhanced punitive measures for bias-motivated crimes towards other vulnerable groups exists at a different stage of dealing with hate crimes. Sexual orientation and disability are mentioned in ss. 145 and 146 of the Criminal Justice Act²⁴ that provide for a more serious sentence in case the offence constitutes a hate crime unless the crime is covered by the Crime and Disorder Act provision on aggravated crimes mentioned above²⁵

Similar to the United States federal hate crime statute, provisions of the UK Crime and Disorder Act 1998 suggest that factual membership of the group is not the only target of bias motivation, as it might as well be “presumed membership”²⁶ that leads to an offence classified as a hate crime. Interestingly, though, that presumed membership is only part of disposition of a crime in s. 28(1)(a) where the offender “demonstrates [...] hostility”²⁷, whereas if the victim is chosen based on bias towards “a racial or religious group”²⁸, then the law only speaks of membership. The scope of people considered as victims of hate crime here is broader when it comes to one group, as the UK statute also includes “association with members of that group”. In the sense of providing for the community’s safety, this provision extends the understanding of how impact of crime spread even when the physical danger has not resulted in attack on one of its members directly.

²⁴ (Criminal Justice Act c.44), ss. 145-146.

²⁵ Ibid., s. 145(1).

²⁶ (Crime and Disorder Act c.37), s. 28(1)(a).

²⁷ Ibid., s. 28(1)(a).

²⁸ Ibid., s. 28(1)(b).

The situation in England and Wales constitutes a multiple-layer coverage for different groups despite the fact that, for instance, hate crime statistics is collected according to five strands identified as groups that become victims of hate crimes²⁹. Consequently, changes proposed under the project of Law Commission³⁰.

Combating hate crimes in Ukraine – introduction of new norms

The situation of hate crime response in Ukraine has changed over the past years, but the changes were not always heading in the progressive direction. The administrative reform, the general perception of the significance of efforts towards combating the phenomena and, consequently, the practice have had a significant impact on the way hate crimes are dealt with in Ukraine. Ukraine has no comprehensive approach towards the issue, and this fact could as well contribute to identifying the areas where response to hate crime can exist or fail under circumstances where the laws and their enforcement are in the stage of development.

In Ukraine the only specific statute dealing with the issues of hate crimes is the Criminal Code which defines, *inter alia*, the actions that invoke criminal liability, as well as the aggravating circumstances for determination of the punishment. Most of the provisions were introduced as amendments to the Criminal Code in 2009 pursuant to the Law of Ukraine “On Amendments to the Criminal Code of Ukraine on the responsibility for criminal acts motivated by racial, national or religious intolerance”³¹ thus recognizing “a ‘motive of racial, inter-ethnic or religious bigotry’ as a specific

²⁹ HM Government. "Challenge It, Report It, Stop It." The Government's Plan to Tackle Hate Crime. 2012.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97849/action-plan.pdf.

³⁰ Law Commission. "DPP v Woods [2002] EWHC 85 (Admin), [2002] All ER (D) 154 (Jan) at [10]." Hate Crime: The Case for Extending the Existing Offences 2013. <http://lawcommission.justice.gov.uk/docs/cp213_hate_crime_amended.pdf>.

³¹ "Закон України "Про внесення змін до Кримінального кодексу України щодо відповідальності за злочини з мотивів расової, національної чи релігійної нетерпимості". [The Law of Ukraine “On Amendments to the Criminal Code of Ukraine on the responsibility for criminal acts motivated by racial, national or religious intolerance”]. 2009. <<http://zakon2.rada.gov.ua/laws/show/1707-17>>.

aggravating circumstance for the following offences: manslaughter (art. 115), intentional grave bodily harm (art. 121), intentional bodily harm of medium gravity (art. 122), battery and tormenting (art. 126), torture (art. 127) and threat of homicide (art. 129)”³².

Criminal provisions, however, contain a list of what could be seen as protected characteristics but it is expressed in a different manner and implies two different modes of the bias motive, both attributable to the perpetrator. First way of phrasing is used in the article that provides the list of general aggravating circumstances, and includes a motive of “racial, national or ethnic hatred”³³. Whereas the list of protected characteristics remains the same in the other articles that identify and establish the range of punishment for specific offences listed above, the wording changes from “hatred” to “intolerance” creating an inconsistency in regard to even defining what type of conduct leads to establishing aggravating circumstances.

The actions mentioned in article 161 ought to be intentional to fall under its scope that is similar to section 249 of the US federal hate crime provisions that requires the proof of willfulness of the offender’s actions in causing the injury with exception to cases of using a “fire, a firearm, a dangerous weapon, or an explosive or incendiary device”³⁴. Article 161 can be compared to provisions of the Public Order Act of 1986 in the way that stirring up hatred is punished both under the Ukrainian criminal provision and the UK act with the differences emerging with adoption of the Racial and Religious Hatred Act in 2006. Prior to its adoption, Part III of the Public Order Act did contain a wording describing prohibiting acts as “threatening, abusive or insulting words or behaviour”³⁵ similarly to the wording of

³² No Borders Project. "Observations re hate crimes and racism manifestations in Ukraine." *OSCE Human Dimension Implementation Meeting*. Warsaw, 2011. <<http://www.osce.org/odihr/83454>>

³³ "Кримінальний кодекс України, ст. 67." [*The Criminal Code of Ukraine, article 67*]. 05 04 2001. <<http://zakon4.rada.gov.ua/laws/show/2341-14>>.

³⁴ 18 U.S.C. §249. <<http://www.gpo.gov/fdsys/pkg/USCODE-2012-title18/html/USCODE-2012-title18-partI-chap13.htm>>.

³⁵ Public Order Act 1986, United Kingdom, Part III, Section 18. http://www.legislation.gov.uk/ukpga/1986/64/pdfs/ukpga_19860064_en.pdf.

Article 161 of the Criminal Code of Ukraine where intentional actions with the aim of incitement, denigration of honour and dignity, as well as insulting to religious beliefs are prosecuted. With the amendments introduced in 2006, the UK law now recognizes only threatening behavior as one to be punished under the Public Order Act³⁶ thus limiting the scope of activities falling under the law. In Ukraine, the broad construction of incitement provision remains creating a limitation on words and behavior that are rather broad and have a wording that is relatively vague to allow for abuse of the provision that will be discussed below.

Differences in the level of protection, as well as limitations on the way enhancements or aggravating circumstances are prescribed by the law stem from country-specific details on the structure of laws and organization of the criminal justice system. However, some of them also have historical nature, and we therefore turn to look at the process of adoption

1.2. The road to introduction of hate crimes into legislation

Countries take different roads when introducing hate-crime laws due not only to differences in legal systems, but also social processes and attitudes towards certain groups of people, particularly the history of marginalization and oppression. The way these changes are introduced into the legal system is significant for the understanding of why in some states these laws become effective and actually bring about the change they are intended to create, and in others this legislation is left to complete discretion of local police or prosecution service officers and has no bearing on the public perception of hate crime.

Analysis of the process of legislating on hate crime is important for understanding the perspective of victims: the scope of recognition of vulnerable groups reflects the state's discontent with prejudice

³⁶ Racial and Religious Hatred Act 2006, Sch., 2006 c.1.
http://www.legislation.gov.uk/ukpga/2006/1/pdfs/ukpga_20060001_en.pdf.

towards them, and the ability to bring about changes in legislation helps eliminate one of the reasons for specific recognition of hate crime, namely the existence of the system of exclusion and social division that is believed to contribute to the rise of prejudice. Scholars attempted to evaluate the impact of different factors on the process of changing laws and, among other things, look at the impact of citizen's participation when it comes to formulation of legal norms and approaches to certain issues. For instance, on the relevance of civil society participation in policy-making and influencing decisions, Jenness and Grattet³⁷ in their work test a model of factors relevant to changing policies that can be applied in the process of analyzing why certain states come to the decision on adopting legislation. In principle, they suggest the following classification of influences:

- structural conditions,
- polity conditions,
- conditions of the symbolic realm³⁸.

As a result of testing hypotheses related to the influence of these factors, the authors of research come to the conclusion that "criminalization is not a mere response to isolated structural and polity dimensions"³⁹. These research findings are valuable for the comparative review of these conditions based on the experience in the US, UK and Ukraine and can help answer questions about the reasons for adoption and, perhaps, identify why these factors had more or less significance in each country's experience. Importantly, conditions such as economic situation, percentage of minority groups members and their ability to participate in a political process and likewise do not necessarily determine the outcome of the struggle for recognition of the need to special protection for victims of hate crimes. This is particularly

³⁷ Jenness, Valerie and Ryken Grattet. "The Criminalization of Hate: A Comparison of Structural and Polity Influences on the Passage of "Bias-Crime" Legislation in the United States." *Sociological Perspectives* 39.1 (1996): 129-154. <http://www.jstor.org/stable/1389346>.

³⁸ Ibid.

³⁹ Ibid.

important for Ukraine since the assumptions in the study of Janness and Grattet would render adoption of hate-crime laws in this country impossible given the low level of minorities represented in decision-making bodies and the levels of bias crime. At the same time, the authors point out the importance of the “symbolic realm”⁴⁰ as they call it, “including [...] presence or absence of social movement and/ or watchdog organizations, the amount of media attention devoted to the issue of hate-motivated violence as a social problem, and so-called “triggering-events” that might incite legal reform”⁴¹.

Despite the absence of a concrete mention and given the developments in information technologies, this system of classification of factors other than structural and polity conditions should include on-line activism via social networks, petitions and other tools available to interest groups via the Internet given the rising levels of access and broadening scope of reach for these tools. In additions, methods of work with on-line community enable the movement for recognition of the rights of vulnerable group to gain international perspective and exchange experience, as well as call for and receive additional support from organizations in different countries that have already went through certain stages in their struggle. In addition, the new possibilities bring new challenges along as “whereas hate mongers once had to stand on street corners and hand out mimeographed leaflets to passersby, extremists now use mainstream social networking sites such as MySpace or Facebook to access a potential audience of millions—including impressionable youth”⁴².

In addition to conditions that constitute prerequisites for government response in the general domain, there are issue-specific factors recognized as those contributing to the introduction of hate crimes into actual laws, including “a combination of the extent and nature of hate crimes, their seemingly increasing upward trend [...], public tolerance to issues of diversity and sensitivity to prejudice, and the

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Confronting the New Faces of Hate: Hate Crimes in America 2009. Leadership Conference on Civil Rights Education Fund - June 2009. (Leadership Conference on Civil Rights Education Fund), p. 8.

influence of identity politics”⁴³. However, as the experience shows, the increasing sensitivity to diversity does not always play the role in advancing the legislation on hate crimes. In Ukraine, for instance, the level of national distancing was gradually increasing at the time of adoption of hate crime legislation, i.e. the latest changes into the Criminal Code where additional penalties were introduced for crimes committed with the bias motive. Yet, the levels of xenophobia described through the index of national distancing were decreasing⁴⁴ throughout 1994-2011 and has remained stable throughout 2008-2011. Therefore, the level of tolerance had little impact on adoption of hate crime laws in Ukraine except for the reverse influence in response to the rise of xenophobia – 2007 and 2008 saw cruel killings of foreign citizens that resonated strongly with the international community through involvement of embassies and international organizations in cooperation with local CSOs.

In comparison, in their analysis of tolerance trends towards gays or lesbians from the opinion polls by CBS/The New York Times, The Gallup and by Yankelovich Partners, Schafer and Shaw find that levels of tolerance expressed in the attitude both to individuals and homosexual relations had risen in the 2000’s significantly from the indicators in the 1990’s. For instance, Gallup data provided in the research says that the number of respondent who would not wish to see homosexuals as neighbors had dropped by 11% from 1990 to 2006⁴⁵. The authors note that “[g]ay and lesbian people perhaps have enjoyed the largest shift in public opinion during the past decade and a half, particularly in the realm of civil rights”⁴⁶. Notably, the shift in public opinion came during the struggle for inclusion of homosexuality into the list

⁴³ Law enforcement and hate crime : theoretical perspectives on the complexities of policing 'hatred' / Nathan Hall in Chakraborti N. Hate Crime : Concepts, Policy, Future Directions / Edited By Neil Chakraborti [e-book]. Cullompton, Devon ; Portland, Or. : Willan, c2010; Available from: CEU Library Catalogue, Ipswich, MA. Accessed November 19, 2013, p. 150.

⁴⁴ IHRPREX. "Human rights in Ukraine, level of xenophobia, attitude to different social groups and regional tolerance.". <http://www.ihrpex.org/en/article/2036/the_summary_of_the_report_human_rights_in_ukraine_level_of_xenophobia_attitude_to_different_social_groups_and_regional_tolerance>.

⁴⁵ Schafer, Chelsea E. and Greg M. Shaw. "The Polls–Trends: Tolerance in the United States." *Public Opinion Quarterly* 73.2 (2009): 404–31. <http://poq.oxfordjournals.org/content/73/2/404.full>.

⁴⁶ Schafer, Chelsea E. and Greg M. Shaw. "The Polls–Trends: Tolerance in the United States." *Public Opinion Quarterly* 73.2 (2009): 404–31. <http://poq.oxfordjournals.org/content/73/2/404.full>, p. 428.

of protected characteristics into the federal statute with the adoption of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention act.

Consequently, the examples above do not give us the grounds to say that a change in societal attitudes towards victims or groups at-risk is a factor that always affects the legislator in the direction of adoption of hate crimes laws. Moreover, the change of attitudes in its turn can be affected by advocacy campaigns and force majeure events, like the 9/11 or 7/7 attacks that led to a major shift in attitudes towards Muslim communities and increase in attacks on Muslims in both the US and the UK.

In the framework of the factors of symbolic realm, we now turn to look at the issues of advocacy groups supporting amendments to legislation, impact of individual cases, as well as importance of mainstreaming the issue hate crimes into the general anti-violence agenda and support for victims of crime.

In terms of the advocacy impact, in the United States, the struggle for equal rights was the key catalyst for recognition of hate crimes with the purpose “to combat violence intended to prevent racial and ethnic minorities from exercising their constitutional and federal statutory rights”⁴⁷. Later on, the level of support for hate crime legislation has been one of the major arguments for introduction of the bill to cover the existing gaps in state statutes as “the legislation has attracted the support of more than 300 religious, civil rights, education, professional, and civic groups—as well as every major law enforcement organization in America”⁴⁸. The direction of advocating for legal change appears to be the priority in the work of a range of the US non-governmental institutions as “social actors have assumed that legal actions were the most appropriate responses to discrimination and, as a result, have focused on anti-hate crime

⁴⁷ Woods, Jordan B. "Reconceptualizing Anti-LGBT Hate Crimes as Burdening Expression and Association: A Case for Expanding Federal Hate Crime Legislation to Include Gender Identity and Sexual Orientation." *Journal of Hate Studies* 6 (2008): p. 81. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092363>.

⁴⁸ Leadership Conference on Civil Rights Education Fund. "Confronting the New Faces of Hate: Hate Crimes in America, 2009." Ed. Nancy Zirkin. 2009. <http://www.protectcivilrights.org/pdf/reports/hatecrimes/lccref_hate_crimes_report.pdf>, p. 35.

legislation”⁴⁹. There has been a consequent development of anti-hate crime activities within different movements for equality, starting with the Civil Rights Movement and continuing with groups fighting for women’s rights, rights of disabled people, as well as the LGBT community. The struggle for recognition went along the path of demanding the same rights and equality following the successes of previous movements “by suggesting that certain groups or categories of people who do not yet enjoy these rights or protections are similar in relevant respects to groups or categories of people who already do”⁵⁰. In addition to working around the achievements and building on legislation that already exists, when the changes were met with resistance in the parliaments, and extensive work was done to attract stakeholders to joint work towards a common goal, one example of this being joint efforts of the Leadership Conference on Civil Rights Education Fund with its report for 2009 being cited by Jr. Attorney General during a Senate hearing on Matthew Shepard and James Byrd, Jr. Hate Crimes Act⁵¹.

Despite success of advocacy for extending the legislation on hate crimes, it took a long time and a lot of effort to achieve the result. For instance, the Human Rights Campaign organization cites that these efforts included involvement of a large advocacy capital and broad public support, including “over 600,000 YouTube view of [...] hate crimes advocacy videos, more than 1 million emails/faxes and phone calls sent to Capitol Hill, at least 26 states whose Attorney General have supported the hate crimes bill”⁵² and many other activities. Thus building a sufficient amount of political pressure, as well as the coming to the office of the new President who signed the bill in 2009, was not an easy endeavor and required a multifaceted approach undertaken by various organizations across America.

⁴⁹ Westbrook, Laurel. "Vulnerable Subjecthood: The Risks and Benefits of the Struggle for Hate Crime Legislation." *Berkeley Journal of Sociology* 28 (2008): 3-23. <URL: <http://www.jstor.org/stable/41035631> >, p. 5.

⁵⁰ Berard, Tim J. "Extending Hate Crime Legislation to Include Gender: Explicating and Analogical Method of Advocacy." *Qualitative Sociology Review* 1.2 (2005), p. 44.

⁵¹ Holder, Eric H. "Statement before the Committee on the Judiciary." *"The Matthew Shepard Hate Crimes Prevention Act of 2009" hearing*. 2009. <<http://www.judiciary.senate.gov/pdf/06-25-09HolderTestimony.pdf>>, p.7.

⁵² Human Rights Campaign. *Hate Crimes Prevention Act*. 2009. <<https://www.hrc.org/issues/pages/hate-crimes-prevention-act>>.

In the course of advocating for amendments to legislation, civil society organization can take an active part in the process by drafting it or providing expertise for commissions creating new laws. For instance, the Anti-Defamation League, a US non-governmental organization, created a bill on hate crimes to suggest it as a model for the states to adopt, as well as a large part of legislation on hate crimes was adopted “as a result of the continued pressure exerted through mobilization of campaign groups and sustained lobbying”⁵³.

As shown above, the work of civil society groups is not only diverse in the forms of advocating for change and combating the phenomenon in general, but it is also visible and active in voicing the concerns related to increased numbers of attacks. Here, the level of awareness is critically important and gives certain insights into the process of recognizing the issue. A simple search on news using Google engine returns over 11000 results for “hate crime” query, with numerous reports of incidents, investigations and prosecutions across the country, whereas the same simple exercise for Ukraine returns 3 results with one of them directly related to the topic of racial prejudice and two others talking about a horrid crime in Lugansk region. This type of presence in the public discourse is to be taken into account when the question arises of why the legislature is not interested in addressing the problem, since the problem might not exist in the eyes of general public.

The dynamics of development of hate crime legislation in the UK is now at one of the peak points as there are changes being suggested and consultations held in the direction of expanding the list of protected characteristics under the aggravated offences provisions. The development follows the path of the US legislation where race and religion also came first in the creation of separate offences or aggravating circumstances provisions in the criminal law. The steps on including sexual orientation and

⁵³ Chakraborti, Neil, and Garland, Jon. *Hate Crime: impact, causes and responses*. SAGE, 2009.

disability, as well as gender identity come as the movements that voice the concerns of discriminated group become louder in the framework of the general pattern of recognizing their vulnerability.

Next, except for the pressure and awareness raising, though these efforts prove to be fruitful, there are certain windows for advocacy that are utilized by organizations and individuals, including the cause célèbre, i.e. cases that receive public attention and thus lead to a higher vigilance in their investigation and response. These cases attract a great deal of public attention and lead to starting or fuelling public debate on different levels in the US and UK. In the US, both names of the Hate Crime Prevention Act of 2009 are those of victims of two brutal murders: James Byrd, Jr., an African American who was murdered in 1998 in Texas, and Matthew Shepard, a young gay man who was subjected to humiliating treatment and cruel fatal beating by two men in Wyoming. Starting with the families of victims speaking out on what had happened, and followed by various initiatives and activities by civil society organization calling for the attention on issues of hate crime as an imminent threat to communities.

Even more so, the First federal hate crime legislation of 1968 was adopted following another loud case “in the wake of the assassination of civil rights icon Martin Luther King”⁵⁴.

Likewise, an individual case of a tragic murder of Stephen Lawrence in 1993 along with the reports of the Home Affairs Committee on the increasing rates of racist offences and harassment⁵⁵ and the following consultations on creation of new offences⁵⁶ held by the Home Office, provided for changes in the legislation as far as introduction of aggravated circumstances clause. In this case, though, the impact resulting from the murder was related more to the practice of responding to allegations of racist crimes from the police. However, given the fact that adoption of new provisions of the Crime and Disorder Act

⁵⁴ Confronting the New Faces of Hate: Hate Crimes in America 2009. Leadership Conference on Civil Rights Education Fund - June 2009. http://www.protectcivilrights.org/pdf/reports/hatecrimes/lccref_hate_crimes_report.pdf, p. 35

⁵⁵ "Hate Crime: The Case for Extending the Existing Offences." Consultation Paper No. 213. http://lawcommission.justice.gov.uk/docs/cp213_hate_crime_amended.pdf, B.9, p. 5.

⁵⁶ "Racial Violence and Harassment." A Consultation Document. 2007. <http://www.nationalarchives.gov.uk/ERORecords/HO/421/2/P2/RVAH.HTM>.

was in 1998, while the inquiry into Lawrence's murder and its investigation was ongoing, and the level of publicity attained by the family efforts supported further by civil society organizations, the impact of this case is definitely one of the factors of symbolic realm mentioned above, exemplifying how a set of circumstances in a given momentum might lead to structural changes in the system in general. In addition, the case of Stephen Lawrence is most often associated with the inquiry into police practices and legislative changes in the UK and the following McPherson Report⁵⁷ has become a direct admission of institutional racism and led to major shifts in looking at racism in the police force, as well as demonstrated the emergence of a symbolic victim associated with a social problem⁵⁸. In addition, unlike the riots of 1981, the Lawrence case acted as a "catalyst for change"⁵⁹ not only in the context of police-minority relations but also with respect to public attitude.

Consequently, given the patterns described above, there is a certain type of action that has potential impact on the legislation, its adoption and amendments, namely building a strong lobby in favor of the legislation, certain events that attract a maximum amount of public attention, as well as the dynamics of movement for rights in general. Now, in Ukraine these factors took a different shape as changes to legislation have occurred prior to consolidation of CSO efforts in the area.

In Ukraine, though events of outrageous crimes widely reported in the media preceded the adoption of changes to the Criminal Code, it was not the public outrage or concerns of peaceful co-existence within the society that was a decisive factor. First of all, several racist attacks resulting in damage of various levels of severity, including the murders of a Gambian student in 2007⁶⁰ and a 19-year old Joseph Bunta

⁵⁷ MacPherson, William. "The Stephen Lawrence Inquiry." Report of an Inquiry. 1999. <<http://www.archive.official-documents.co.uk/document/cm42/4262/sli-00.htm>>..

⁵⁸ McGhee D, *Intolerant Britain Intolerant Britain?: Hate, Citizenship and Difference*, Open University Press, 2005 – 233, p. 17-18.

⁵⁹ Chakraborti, Neil, and Garland, Jon. *Hate Crime: impact, causes and responses*. SAGE, 2009, p. 25.

⁶⁰ European Commission against Racism and Intolerance. "Third Report on Ukraine." 2008. <http://www.libertysecurity.org/IMG/pdf_Ukraine_20third_20report_20-_20cri08-4.pdf>.

from the Democratic Republic of Congo in 2008⁶¹, gave rise to a wave of critique reflected in reports by international organizations, such as Amnesty International⁶² and the Council of Europe (see ECRI report on Ukraine⁶³). As to other individual cases in Ukraine the names of victims are unknown most of the times and there are no bills named after individuals yet the serious racist attacks and efforts on attracting attention to these cases by diplomatic missions and non-governmental organizations have led to the changes in legislation “inspired” by international pressure.

The history of adoption of harsher punishments in Ukraine is fairly recent – only in 2009 the Parliament adopted a law suggested by Taras Chornovil that added an enhanced punishment into specific provisions of the Criminal Code of Ukraine to increase sanctions in cases where the crime was committed on the grounds of “racial, national or religious intolerance”. Prior to 2009, these articles contained no specific reference to bias motive thus we can consider that a separation of hate crime in Ukraine into a distinct category of crimes was only done in 2009. In the explanatory note for the draft bill, its authors pointed out that 29 incidents had been recorded in 2008 where violence against foreigners was committed that “according to international experts” can be qualified as racial intolerance or xenophobia⁶⁴. The authors continued to say that “there have been recent statements by international organizations, diplomatic corps and civil organizations about the inability or unwillingness of Ukrainian government to fight racism [...] and ignoring these issues might lead to international sanctions against Ukraine”⁶⁵. Even in the bill

⁶¹ (Amnesty International) Ukraine: Government Must Act to Stop Racial Discrimination. Amnesty International, 2008, available at <http://www.amnesty.org/en/library/asset/EUR50/005/2008/en/836170ae-4392-11dd-a1d1-2fa8cc41ebbd/eur500052008eng.pdf>, [accessed 05 March, 2013]

⁶² Ibid.

⁶³ European Commission against Racism and Intolerance. "Third Report on Ukraine." 2008. <http://www.libertysecurity.org/IMG/pdf_Ukraine_20third_20report_20-_20cri08-4.pdf>.

"Супровідна записка до проекту Закону України «Про внесення змін до Кримінального кодексу України»." *Analytical note to the draft on the Law of Ukraine "On Amendments to Criminal Code of Ukraine"*. 28 03 2008. <w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=32154>.

⁶⁵ Ibid.

⁶⁵ Ibid.

suggesting that victims of crime need specific protections the key attention is paid to the international community and external pressure imposed upon the country.

As to article 161 of the Criminal Code of Ukraine, it was “inherited” by Ukraine from the Criminal Code adopted back in the 1960 when the country was a part of the Soviet Union. The predecessor of article 161, article 66 of the outdated Criminal Code, provided for the punishment of originally on the grounds of “race, nationality and religion”⁶⁶. In the form very close to original but with a list of protected characteristics expanded to include political views, gender, ethnic and social origin, place of residence, language or other characteristics⁶⁷ it remains a part of the Criminal Code of Ukraine as of now.

1.3. Supporting legislation and its impact on victims’ rights

A complex impact of hate crime on the victim includes not only the immediate consequences of the crime in physical or material damage but also additional damage caused by the fact that “experiencing a hate crime causes a victim’s core identity to become directly linked to the heightened sense of vulnerability that normally follows victimization”⁶⁸. Data from the UK provides that respondents of victims survey who were victims of hate crime were “more than twice as likely to experience fear, difficulty sleeping and anxiety or panic attacks compared with [other] victims”⁶⁹. In addition, the crime reaches a lot further than an experience of an individual victim as other members of a particular group

⁶⁶ "Кримінальний кодекс України." [The Criminal Code of Ukraine]. 1960. <http://zakon1.rada.gov.ua/laws/show/2001-05/ed19960712/page3>, article 66.

⁶⁷ "Кримінальний кодекс України, ст. 161." [The Criminal Code of Ukraine, article 161]. 05 04 2001. <http://zakon4.rada.gov.ua/laws/show/2341-14>, art. 161.

⁶⁸ Herek, Gregory M., Roy J. Gillis and Jeanine C. Cogan. "Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay and Bisexual Adults." *Journal of Consulting and Clinical Psychology* (1999).

⁶⁹ Home Office, Office for National Statistics and Ministry of Justice. "An Overview of Hate Crime in England and Wales." 2013. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266358/hate-crime-2013.pdf, p. 46.

“perceive the crime as a direct, personal attack [and] experience reactions of actual threat and attack from this event”⁷⁰.

The nature of this experience calls for a complex response to the phenomena stemming from the idea that enhanced punishment, though serving as a deterrent in a particular case, is by far not the only tool that can serve the purpose of combating hate crime. Legislating on hate crimes can be a difficult task as there are various factors that need to be considered, including not only the number and nature of protected characteristics and the social need for enhanced protection means for certain categories of population, but also policy issues as parliamentarians in all three jurisdictions are elected by the people and are often concerned about the impact of their vote on their political career. In addition, issues considered in chapter 1.2 above play an important role in shaping the results of introducing the concept of hate crime into legislation and creating enhanced punishments in different forms to deter further occurrence of this phenomenon in a state.

Moreover, these changes need additional resource allocation for such things as development of expertise on qualification of bias motive, education of police officers, prosecutors or judges, work with the community on identification, and ramification of possible consequences etc. Finally, the same limited number of resources requires for allocation of just the necessary amount to these needs and careful consideration of the relevance of chosen measures to the situation in the country, so the money spent on implementation of hate-crime legislation does not take away from equally important needs, such as healthcare, social benefits, state policies on education etc.

There are several ways to address the issues above. For instance, community consultations and studies on the prevalence of hate crime can be useful in drawing a picture of current situation in the field

⁷⁰Lawrence, Frederick M. "Enforcing Bias-Crime Laws without Bias: Evaluating the Disproportionate-Enforcement Critique." *Law and Contemporary Problems* 66 (2003): 49-69. <http://www.jstor.org/stable/20059188>, p. 51.

and backing up the legislation with concrete figures and evidence for the necessity of amendments or new laws. Also, delegating certain responsibilities, such as victim support, to community organizations and civil society may serve as a solution in cases where the level of trust towards police is low within a particular community. However, these measures do not replace the necessity to solve a problem in general, as well as the existence of legislation on aggravated punishments does not completely address the issue if as shown by Ukrainian example where measures in place are simply not being implemented. Therefore, additional measures are taken to address the problem or, in certain instances, identify the existence of the problem, as well as address the needs of victims apart from prosecuting the crime. Following examples illustrate the possible solutions in the form of supporting legislation or policy documents issued by agencies within the system.

First set of supporting regulations includes laws and other regulatory instruments designed to require recording of bias-motivated offences. These vary upon the jurisdiction and may come in a form of a provision in the law or a separate document issued by a law enforcement body as a guidance or policy paper, or code of practice outlining respective recording activities. In addition, crime victimization surveys in the US and the United Kingdom serve the purpose of reviewing experiences of victims of hate crimes.

An example of supporting legislation on data collection in the US is the Hate Crimes Statistics Act that originally invested a responsibility to collect information about hate crimes onto the Attorney General⁷¹ under the strands of “race, religion, sexual orientation, or ethnicity” with the list further amended to include disability by under section 320926 of the Violent Crime Control and Law Enforcement Act of

⁷¹ Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140. Apr. 23, 1990. GPO access. Available at: <http://www.gpo.gov/fdsys/pkg/STATUTE-104/pdf/STATUTE-104-Pg140.pdf>

1994⁷², and finally gender and gender identity was included into the list in 2009⁷³. The direct application of the Hate Crime Statistics Act is its impact on the definitional component of the Bureau of Justice Statistics' National Crime Victimization Survey⁷⁴, as well as the FBI official data on the number of hate crimes committed in the US. Availability of data from different jurisdictions also leads to a situation where "[t]hose charged with the enforcement of the law will be better able to quantify their resource needs and direct available resources to the areas where they will have the most effectiveness"⁷⁵.

Recording of hate crimes towards different groups is also a part of law enforcement work in the United Kingdom regulated by the Criminal Justice Act insofar as section 95 thereof requires that "[t]he Secretary of State shall [...] publish such information as he considers expedient for the purpose of facilitating the performance of those engaged in the administration of justice to avoid discriminating against any persons on the ground of race or sex or any other improper ground"⁷⁶. It has also been altered in the post-MacPherson era as a result of the adoption of the development of the Code of Practice on Reporting and Recording Racist Incidents⁷⁷ and the decision to include disability, gender identity and sexual orientation into the list of the "five strands"⁷⁸ that comprise the monitoring spectrum for hate crime response from the law enforcement.

⁷²"Violent Crime Control and Law Enforcement Act of 1994", Pub. L. 103-322, title XXXII, §320926, Sept. 13, 1994, 108 Stat. 213. http://www.house.gov/legcoun/Comps/VIOLENT_CMD.pdf

⁷³ Pub. L. 111-84, div. E, §4708, Oct. 28, 2009, 123 Stat. 2841. GPO access <http://www.gpo.gov/fdsys/pkg/PLAW-111publ84/html/PLAW-111publ84.htm>

⁷⁴ Hate Crime Victimization, 2003-2011, U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics, March 2013. <http://www.bjs.gov/content/pub/pdf/hcv0311.pdf>

⁷⁵ Criminal Justice Information Services Division, Uniform Crime Reporting Program. "Hate Crime Data Collection Guidelines and Training Manual." U. S. Department of Justice, Federal Bureau of Investigation, 2011. <<http://www.fbi.gov/about-us/cjis/ucr/data-collection-manual>>. p.3.

⁷⁶ "Statistics on Race and the Criminal Justice System." 2010. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/219967/stats-race-cjs-2010.pdf, p 8.

⁷⁷Docking, Maria and Rachel Tuffin. "Racist incidents: Progress since the Lawrence Inquiry." Home Office Online Report 42/05. 2005. <<http://www.statewatch.org/news/2005/oct/ho-racial-incidents.pdf>>, p. 1.

⁷⁸HM Government. "Challenge It, Report It, Stop It." The Government's Plan to Tackle Hate Crime. 2012. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97849/action-plan.pdf>, p.6.

In Ukraine, a Plan of Actions on Combating Racism and Xenophobia also provided for monitoring and publication of information on a number of articles that include bias motivation in its clauses, yet the Plan saw lack of attention from the side of the Ministry of Interior with most of its provisions being ignored by the force, including the provision on monitoring where no action was taken⁷⁹. Consequently, the assessment of situation in Ukraine is complicated by the absence of proper data on bias crime; the only statistics published at the moment without submitting a separate information request are numbers on crimes committed against foreigners. The latter has very limited use since most foreigners in Ukraine come from the territory of the former Soviet Union, including Russia, and as it is difficult to recognize whether someone is Russian or not, so it is hard to say whether any other foreigner is one, thus statistics on crimes against foreigners is a misleading activity creating a false impression of foreigners being the only victims of hate crimes. Also, statistics on crimes against foreigners is successfully accompanied by the crimes committed by foreigners information that serves as a tool to justify imposition of stricter migration regulations and conduct of police operation on foreigner eviction. In addition to statistics on recorded crime, another type of indicator for monitoring is used in the United Kingdom in the data collection process. Given the fact that “it may be more difficult to prove why a defendant committed an offence than, for example, whether they intended the offence or foresaw the consequences of their conduct”⁸⁰, introduction of the system of monitoring with a different category can account for the overall situation and potential escalation of the conflict. In the UK the system includes the notion of a “hate incident” defined by the CPS, is “[a]ny incident, which may or may not constitute a criminal offence,

⁷⁹ABA ROLI/Kharkiv City Orgazation "Institute of Applied Humanities Research". "Оцінка моніторингу та звітності (державних органів) з питань расизму та ксенофобії в Україні та рекомендації щодо його вдосконалення." [Evaluation of monitoring and reporting (by state authorities) on racism and xenophobia. Recommendations for improvement]. 2012. http://www.iahr.com.ua/files/works_docs/131.pdf, p.10.

⁸⁰ "Hate Crime: The Case for Extending the Existing Offences." Consultation Paper No. 213. <http://lawcommission.justice.gov.uk/docs/cp213_hate_crime_amended.pdf>, p.20.

which is perceived by the victim or any other person as being motivated by prejudice or hate”⁸¹. The OSCE Office on Democratic Institutions also uses the model of incident/crime distinction when it provides information for all three jurisdictions reviewed under present research . According to ODIHR, this approach accounts for the fact that “incidents often precede, accompany or provide the context of hate crimes”⁸². In general, adoption of a less formal approach that provides greater flexibility does have an impact of what victims can expect from the government with regards to their experience in communication with law enforcement as the recording of instances that do not reach the threshold of a crime in the understanding of criminal justice system still leads to “improved identification and management of risks, threats to safety, vulnerability and repeat victims”⁸³.

Introduction of a hate incident concept satisfies two purposes at a time: provide an avenue for complaints where the threshold of severity prevents the issue from resulting in a criminal prosecution thus dealing with the tension of inculpability of the offender, and at the same time helps identify crimes that are “abandoned” by the victims as petty ones where in reality a prosecution should be initiated under the legislation. As proved by different studies, the mechanism for deciding on whether to report a crime or not includes the evaluation process where gains and losses of reporting are analyzed with gains meaning the probability of conviction of a perpetrator and the severity of the crime. Provided this logic, the crime might not be seen by the victim as a particularly serious one yet it will leave its trace on community relations and might result in unexpected hostility or fear that is damaging to the group.

⁸¹ The Crown Prosecution Service. "Disability Hate Crime." Policy for Prosecuting Cases. 2007. <http://www.cps.gov.uk/publications/docs/disability_hate_crime_policy.pdf>. p. 16.

⁸² OSCE Office for Democratic Institutions and Human Rights. "Preventing and Responding to Hate Crimes." A resource guide for NGOs. 2009. <http://www.osce.org/odihr/39821?download=true>.

⁸³ National Policing Improvement Agency. "The National Standard on Incident Recording." *Incorporating the National Incident Category List*. 2011.

Another type of legislation that here is considered as supporting would be mentioned in the sub-chapter 1.1. if not for a Supreme Court decision in the case of *US v. Booker*⁸⁴ where the Court found that “the provision [...] that makes the Guidelines [on Sentencing] mandatory [...] incompatible with the today’s constitutional holding” and that it was “effectively advisory”⁸⁵. Therefore, at the moment the ability of the Commission on Sentencing to influence the process directly is limited, yet an important aspect – the presence of a broad definition in a public law adopted prior to the Mathew Shepard and James Byrd, Jr., Act serves as a signal of what hate crimes are meant to be by the law and, moreover, that they should be taken into account by courts when it comes to federal prosecution of crimes.

In addition, as the issue of hate crimes is mainstreamed into the general anti-violence discourse, interests of victims of crime in relation to the necessary support are promoted by including specific mentions of this type of offence and recommended responses into documents related to victims of crime in general. The effectiveness of these programs depends heavily on the development of the victim support programs in the country in general.

Chapter 1 conclusions

Legislation defines to a large extent what groups receive protection from the state according to the damage resulting from hate crimes, and among the countries selected for research the US has a law with a broad list of characteristics that might trigger federal investigation into the crime under hate crime charges. In the UK, on the other hand, the legislation provides different degrees of seriousness when different groups are involved thus the consideration of their perspective has different levels. Given the history of enactments and factors that influenced it, as well as current initiatives, the UK legislation is

⁸⁴ *United States v. Booker*. No. (04-104) 543 U.S. 220 . 2005.

⁸⁵ *Ibid.*

possibly going to face changes to address this. In Ukraine, however, the list is rather narrow but the adoption was not a result of attracting broad public attention. The link between advocacy and adoption of laws is clear, and where strong groups exist, new laws are being implemented. This does not come without public attention that can only be achieved through receiving a critical mass of attention through publicizing information on victim experiences and reporting the figures to make the government aware of the existing problem. Now, when the legislation is in place, it is in the hands of law enforcement to implement these provisions, which will be reviewed in the following chapter.

CHAPTER 2

VICTIMS OF HATE CRIMES AND THEIR INVOLVEMENT IN REPORTING AND INVESTIGATION PROCESS

An important measure of results of legislating on certain issues is the implementation of a law in practice where the law works in a manner that is consistent with its purpose and corresponding to the need that it is supposed to meet. It is important to note that number-based approach based on conviction or prosecution rates does not always reflect the situation. For instance, enforcement of hate-crime laws or statutes that specifically require monitoring or reporting of such incidents may lead to an increase in reported hate crimes in the initial stage of implementation while the number of incidents stays the same. The same difficulty of evaluation arises when it comes to prosecutions or convictions under the provisions of criminal code that provide for persecution of hate crimes, as the number of prosecution would be affected significantly per se with adoption of a new law or expansion of the list of characteristics that constitute the basis of determining bias motivation. The flaw in numbers-based approach is illustrated by the following example. A presentation⁸⁶ made by the manager of the UK's True Vision campaign, which is a "police campaign aimed at raising awareness of hate crime, specifically in relation to gender and sexuality, race and religion and disability⁸⁷", includes a slide titled "Where we are – International Performance" (2009)" with a map as a backdrop for the numbers and country names, including the following captions: "USA 7,800 (2008); United Kingdom 52,102; Italy 142; Russian Federation 460 (2008)"⁸⁸. Consequently, without proper explanation possible interpretations of these numbers include a

⁸⁶ Gianassi, Paul. *Hate Crime: The UK Approach*. Leicester, 2011.
<http://www.leicestershiretogether.org/hatecrime_paul_giannasi.pdf>.

⁸⁷ Derbyshire Constabulary. *What is Hate Crime*. <http://www.derbyshire.police.uk/Contact-Us/Hate-Crime/What-is-Hate-Crime.aspx>.

⁸⁸ Gianassi, Paul. *Hate Crime: The UK Approach*. Leicester, 2011.
<http://www.leicestershiretogether.org/hatecrime_paul_giannasi.pdf>.

picture where the UK would be a far more dangerous place to live for the risk groups. Though here the representation itself needs clarity, numbers on statistic reports often guide us in the wrong direction on the way to analysing what certain laws' impact on the situation is and how they are actually enforced.

Moreover, even adoption of laws by the parliament does not guarantee there effective implementation if there are insufficient resources for quality implementation, including lack of expertise on behalf of persons dealing with it, as well as the level of awareness about the tools provided by a certain piece of legislation. Regarding hate crimes, factors such as “victims’ rights awareness; victims’ readiness to report to the police; effective support services available to victims; the responsiveness and ability of law enforcement agencies to understand and thoroughly investigate hate crime”⁸⁹ play an important role in combating this phenomenon through adequate reporting and prosecution of offences.

2.1. Implementation of regulations in practice: guidelines for investigation of hate crimes

In implementation of criminal law, practices may vary depending on the qualification of police officers and their experience in dealing with hate crime in a particular community, as well as the overall situation with prioritization of hate crimes in the agenda of law enforcement agencies and relevant supervision performed by respective agencies. Particular tools designed to assist law enforcement in implementation of hate crime laws may include, in addition to instructions on general mode of investigation, evidence collection, charging guidelines etc., materials specifically dealing with this type of offences based on prior experience and aimed at addressing the most difficult issues pertaining to this field of police work. Existence of these instruments at the disposal of police units and prosecutors dealing

⁸⁹ EU Agency for Fundamental Rights. "Making hate crime visible in the European Union: acknowledging victims' rights." 2012. http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf, p. 28.

with the case is crucial since decisions of these “gatekeepers” of the criminal justice system [...] are crucial in determining what [...] ultimately comes to the attention of the rest of the justice system”⁹⁰. Moreover, it is the experience with police at the point of initial complaint submission by the victims that might have significant impact for the decision of a victim to proceed with the case or provide information about the similar situation in the future.

There are certain specifics to prosecution of hate crimes in jurisdictions under review depending on the legal order and organization of the criminal justice system in general. For instance, even with the existence of federal hate crime legislation, federal power over prosecuting hate crimes is subject to limitations specified in 18 U.S.C. section 249, thus most hate crime cases are dealt with by state and local authorities⁹¹. However, the power of the Department of Justice to proceed with federal prosecution is activated in cases where the jurisdictional element is met under the conditions of section 249(a)(2)(B) where a connection to interstate commerce is established through one of the clauses, as well as certification requirements are fulfilled, namely:

- (A) the State does not have jurisdiction;
- (B) the State has requested that the Federal Government assume jurisdiction;
- (C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or
- (D) a prosecution by the United States is in the public interest and necessary to secure substantial justice⁹².

⁹⁰ Hall, Nathan. "Law enforcement and hate crime : theoretical perspectives on the complexities of policing 'hatred'." Chakraborti, Neil. *Hate Crime : Concepts, Policy, Future Directions*. Portland, Or.: Willan, c2010, p. 150

⁹¹ The Federal Bureau of Investigation. "Hate Crime—Overview." http://www.fbi.gov/about-us/investigate/civilrights/hate_crimes/overview.

⁹² 18 U.S.C. s. 249(b)(1). <http://www.gpo.gov/fdsys/pkg/USCODE-2012-title18/html/USCODE-2012-title18-partI-chap13.htm>.

Unlike the prosecution, investigation of cases can occur as soon as the Federal Bureau of Investigation is notified of a potential hate crime through one of its field offices across the country. It is up to the Department of Justice then to make a decision whether or not to prosecute a case as a federal hate crime based on the circumstances. However, federal involvement in the investigation efforts is not limited to the process itself but also involves activities provisioned by the HCPA, such as granting and non-financial assistance upon the decision of Attorney General⁹³. Consequently, in the investigation process depending on the prospects of conviction under the federal or state law the federal agency might choose the mode of operation either independently or in joint venture with the local law enforcement.

As the system is rather different in the United Kingdom, unlike in the US, it is almost certain for hate crime cases that prosecution and formulation of charges will be handled by the Crown Prosecution Service given the seriousness of offences motivated by bias⁹⁴ and the requirements of the Full Code Test Public Interest prong stating that “a prosecution is more likely to be required if [...] the offence was motivated by any form of discrimination [...] or the suspect demonstrated hostility towards the victim based on any [protected] characteristics”⁹⁵. Therefore, when dealing with cases that are motivated by bias the law enforcement in the United Kingdom is involved both on the side of police that receives the initial complaint, as a rule, and the Crown Prosecution Service.

Since certain courts do not allow for alternative verdicts if the initial charges do not find the necessary proof in the court’s view, the CPS, for instance, recommends “putting alternative charges to both the basic and the racially or religiously aggravated offences”⁹⁶ in order to ensure that predicate offence is prosecuted regardless of the status of aggravation charges. In Ukraine, something quite opposite

⁹³ Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. No. H.R. 2647-646 Div.E. 2009, ss. 4704-4706.

⁹⁴The Crown Prosecution Service. "Disability Hate Crime." Policy for Prosecuting Cases. 2007. <http://www.cps.gov.uk/publications/docs/disability_hate_crime_policy.pdf>, s. 4.2.3, p. 15.

⁹⁵ Ibid., s. 4.16.

⁹⁶ Ibid.

in its purpose is being done as “in most of such cases racist motivation was dismissed from the outset”⁹⁷. Given regulations and requirement for initiating a criminal prosecution that will end in successful conviction, the police are pushed by “performance indicators” and losing a case is not in their favor, as well as there is very little experience with dealing with this type of crimes in general due to reporting-related reasons, as well as very short history of existence of these charges in general.

In Ukraine, the recently amended Code of Criminal Procedure⁹⁸ introduced several important changes into the mode of investigation of hate crimes with regard to separation of agencies’ involvement in the investigation on each stage. Prior to these amendments, the prosecution oversight was required only in cases where article 161 of the Criminal Code of Ukraine⁹⁹ was under investigation, whereas aggravating circumstances under article 67(3)¹⁰⁰ did not automatically trigger the involvement of prosecution service. According to the new rules, oversight of prosecution service is a must for any criminal case and the level of cooperation on the pre-trial stage between the prosecution and the police has shifted from a distant review to cooperation on the case together. For hate crime investigations it now means that the Prosecution service has also assumed responsibility for any case where aggravating circumstances showing bias motive as defined by Ukrainian legislation are present. No particular regulation on the procedure on investigation of hate crimes is available in public domain, nor are these crimes listed as more serious in the Instruction on the Functioning of Pre-Trial Investigation Bodies unless they receive

⁹⁷ No Borders Project/EaPMN. "Statement from No Borders Project and Eastern Partnership Minorities Network regarding developments in the field of minorities’ rights in Ukraine, particularly in relation to hate crimes and state response." Ed. HDIM. Warsaw, 2013. <http://noborders.org.ua/en/about-us/news/statement-from-no-borders-project-and-eastern-partnership-minorities-network-regarding-developments-in-the-field-of-minorities-rights-in-ukraine-particularly-in-relation-to-hate-crimes-and-state-resp/>.

⁹⁸ "Кримінальний процесуальний кодекс України." [*The Code of Criminal Procedure of Ukraine*]. 2013. <<http://zakon2.rada.gov.ua/laws/show/4651-17>>.

⁹⁹ "Кримінальний кодекс України, ст.161" [*The Criminal Code of Ukraine, article 161*]. 05 04 2001. <<http://zakon4.rada.gov.ua/laws/show/2341-14>>.

¹⁰⁰ "Кримінальний кодекс України, ст. 67(3)" [*The Criminal Code of Ukraine, article 67(3)*]. 05 04 2001. <<http://zakon4.rada.gov.ua/laws/show/2341-14>>

“heightened public attention” or “critical reviews in the media”¹⁰¹. Consequently, this gives reasons for the civil society organizations and victims to consider voicing the problem in public even though risk analysis often prohibits them from doing so.

As we can see, the prosecution of hate crime can present difficult tasks in the view of complex interrelation of different responsibilities of law enforcement agencies in choosing whether or not to bring charges on bias grounds based on how sufficient the evidence is to prove motivation. The initial process, however, in all three jurisdictions in the majority of cases involves a police officer dealing with the complaint and taking the victim’s statement. This officer may or may not be trained in dealing with this category of crimes in particular, yet his/her task is crucial to the outcome of the case, as it may affect the victim’s decision about proceeding with the complaint in general. This highlights the need for a particular guidance developed to assist an officer in identifying hate crime with a particular focus on identifying the motive and possible presence of bias in each case. In addition, elements of dealing with hate crime are often included into the training process for police officers and manuals on the mode of operation with regard to referencing the case to FBI in the US or the Crown Prosecution Service in the United Kingdom. As mentioned above, no particular guidance is available in Ukraine on this matter other than endless action plans that are not followed by concrete action and reports in the framework of the EU-Ukraine Association agenda with mentions of cooperation and active work but no specific figures or data on the actions taken.

It is the complexity of hate crimes and the difficulty of proving bias motivation while remaining objective in the process of investigation calls for the introduction of supporting norms, manuals and guides for police officers to ensure effective legislation with a fair outcome for both the perpetrator and the victim. Here, several challenges can be identified and need to be addressed in order to ensure successful

¹⁰¹"Інструкція з організації діяльності органів досудового розслідування Міністерства внутрішніх справ." *Instruction on the Functioning of Pre-Trial Investigation Bodies of the Ministry of Interior of Ukraine*. 2012. <<http://zakon1.rada.gov.ua/laws/show/z1770-12>>, s. 3.8.10.

prosecution of the crime, starting with the police conduct and the incentives to report crimes. The reporting issue will be addressed in detail in sub-Chapter 2.3 when discussing the police cooperation with victims and community as this is where one of the key challenge in tackling hate crime lies.

In the UK, the police service operations and availability of such guidance has undergone changes and modification to address the issues raised in the MacPherson Report¹⁰² and the following inquiries into the issues of bias in police work. In addition to changing the legislation prior to report but in the time of its writing, recommendations were made specifically to address the work of police recognizing that dealing with individual cases depends heavily on law enforcement officers regardless of the existing legislation.

Since the new objectives were set out to eradicate the shortcomings identified as a result of inquiry, UK Home office in cooperation with the Association of Chief Police Officers (ACPO) in its 2005 Good Practice and Tactical Guidance on policing hate crime: “[...] the perception of the victim or any other person is the defining factor in determining a hate incident. The apparent lack of motivation as the cause of an incident is not relevant as it is the perception of the victim or any other person that counts¹⁰³”. The guidance also includes recommendations for discretion in the application of hate crime legislation where “local areas [...] are free to include other strands in addition to the monitored five when developing their approach to hate crime” as the often raised concerns about the lack of protection for other groups are related specifically to the existence of rigid regulations.

Other areas where certain definitional clarifications are needed, n the issue of difficulties with proving the subjective aspect of the crime, the Crown Prosecution Service suggests that ‘in the absence of precise legal definition of hostility, consideration should be given to ordinary dictionary definitions, which

¹⁰² MacPherson, William. "The Stephen Lawrence Inquiry." Report of an Inquiry. 1999. <http://www.archive.official-documents.co.uk/document/cm42/4262/sli-00.htm>.

¹⁰³ UK Home Office, Police Standards Unit. "Hate Crime: Delivering a Quality Service." Good Practice and Tactical Guidance. 2005, p. 9. <http://www.bedfordshire.police.uk/pdf/tacticalguidance.pdf>,

include ill-will, ill-feeling, spite, contempt, prejudice, unfriendliness, antagonism, resentment, and dislike”. Indeed, the word “hostility” itself can take different meanings depending on the circumstances, thus its understanding should come within a range of possible definitions.

In the US, the federal effort for providing clearer guidance on combating hate crime includes both the component on proper identification for reporting purposes and statistics on hate crime on a national level, as well as the tools for dealing with an individual hate crime. The fact that reporting and dealing with a hate crime have been combined into one comprehensive resource for law enforcement officers indicates a trend towards understanding that without treating the issues of structural prejudice within police, as well as long-lasting practices of underreporting or not including the bias element into investigation, is necessary for effective implementation of legislation. In addition, these changes and updates reflect the dynamics of legislating on crimes of hate and recognition of certain groups as those possessing protected characteristics. For instance, police work in the field of reporting had to be brought in compliance with the changes brought about by the 1994 Violent Crime and Law Enforcement Act, the 1996 Church Arson Prevention Act and the most recent 2009 Mathew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.

Given the limits set out for this thesis, in the framework of this paper we shall not turn to regulations and recommendations governing implementation of state statutes on hate crimes, but rather will look at an example of federal efforts in pursuance to their mandate in relation to hate crimes. In the framework of the Hate Crimes Prevention Act, federal agencies may also provide “technical, forensic, prosecutorial, or any other form of assistance”¹⁰⁴ to local and state authorities, as well as “award grants to State, local, and tribal law enforcement agencies for extraordinary expenses associated with the

¹⁰⁴Pub. L. 111–84, div. E, §4708. No. 123 Stat. 284, s 4704(a)(1). 28 10 2009. <<http://www.gpo.gov/fdsys/pkg/PLAW-111publ84/html/PLAW-111publ84.htm>>

investigation and prosecution”¹⁰⁵. As to specific guidance documents in the US, the new Hate Crime Data Collection Guidelines and Training Manual published by the FBI includes a clear requirement that “bias is to be reported only if investigation reveals sufficient objective facts to lead a reasonable and prudent person to conclude that the offender’s actions were motivated, in whole or in part, by bias”¹⁰⁶. Police officers, therefore, are required to decide on the facts of the case and see whether there is sufficient evidence to conclude that the crime was motivated by bias. Here lies one of the most complicated components in investigation of hate crime and recognition thereof as an event different than an “ordinary crime” if any crime can be ordinary, of course. The question of definitions is important in this regard, and the US and UK guidance and literature include these definitions of groups identified by bias, whereas nowhere in the Ukrainian legislation there is a relevant indication of what the differences between different groups include.

Guidance and recommendations, as well as other education and professional development materials, are not the only tool available to ensure that response to hate crimes and implementation of laws are at the relevant level corresponding to what is needed. Actions can be taken to audit developments of the system that provide important data for policy within the police force. Here, several conclusions can be drawn about the work in the field of combating bias crime. For instance, the 2009 Report of the Criminal Justice Joint Inspection points out that the level of awareness about the procedures and rights guaranteed to victims under the Victim’s Code in the UK is significantly higher among the specialized units, including the staff working with investigations of hate crimes¹⁰⁷. Consequently, these lead to conclusion that in a system where hate crimes are dealt with by the general force members with no specific experience and

¹⁰⁵ Ibid., s. 4704(b)(1).

¹⁰⁶ Criminal Justice Information Services Division, Uniform Crime Reporting Program. "Hate Crime Data Collection Guidelines and Training Manual." U. S. Department of Justice, Federal Bureau of Investigation, 2011. p.4. <http://www.fbi.gov/about-us/cjis/ucr/data-collection-manual>.

¹⁰⁷ Criminal Justice Joint Inspection. "Report of a Joint Thematic Review of Victim and Witness Experiences in the Criminal Justice System." 2009, p. 28. http://www.hmcpai.gov.uk/documents/reports/CJJI_THM/VWEX/VW_thm_May09_rpt.pdf.

training on the issue, the level of treatment received by the victims may be lower resulting from the lack of qualification. To address this, police units in the UK often include a position of a hate crime officer whose task is to deal specifically with offences that are motivated by bias towards people belonging to specified categories. Moreover, even when the crime is dealt by the officer who might not specialize in the field of hate crimes investigation or dealing with complaints of this nature, a clear guidance on procedure is provided, including steps to ensure receiving quality information, as well as providing quality service that includes “e both reassurance and immediate support to the victim”¹⁰⁸.

In comparison, Ukraine has seen a number of police units changing due to administrative reforms that have consecutively created, transformed and dismissed specific units that were dealing with crimes of this category. Moreover, existence of these units was reported by the state even in times where their core competencies were combating the “ethnic crime” or fighting irregular migrants, or “illegals” as they are often referred to in the police communication statements. Consequently, problems on investigation related to not reviewing charges under appropriate articles are exacerbated by the lack of clear development and assessment of competencies in this domain.

2.2. *The scope of victims’ involvement in investigation process*

Work on combating hate crimes does not end with passing a law that requires imposition of harder punishments for a certain type of bias accompanying the criminal act, nor does it end with implementation of the law in practice by police officers per se. It is true that one of the end results aimed at is the use of hate crime legislation in practice by police officers as the situation to the contrary clearly makes the legislation a “dead bill” collecting dust in libraries and shelves at police stations. However, when it comes to hate crimes from a perspective of a person attacked or whose property was damaged simply because of

¹⁰⁸ UK Home Office, Police Standards Unit. "Hate Crime: Delivering a Quality Service." Good Practice and Tactical Guidance. 2005, s. 5.1.6, p. 20. <http://www.bedfordshire.police.uk/pdf/tacticalguidance.pdf>.

his/her affiliation with a certain group, a conviction does not always compensate for the harm and consequences if it is not accompanied by a certain degree of recognition of the impermissibility of such acts from the authorities dealing with the crime. Yet, without consideration of the victim's perspective the mere process of establishing the motive may be influenced by existing prejudice in the system of law enforcement and acts of violence accompanied by bias characteristics may still be prosecuted yet the bias itself will remain a norm in the view of investigation.

This perspective includes participation of the victim in the process of investigation that can be organized on different levels and may include the following:

- direct participation in the criminal procedure, if there is one initiated, including, first of all, the ability to receive protection being a member of a certain group that is directly related to the list of characteristics established by the law, as well as to provide a statement evaluating the damage caused by a certain crime;
- the level of interaction with the government structures, including victim support services and access to them. Here, methods of working with victims outside the process of investigation directly have been developed in the United Kingdom and the United States varying in the degree of affiliation with state structures, from the unit being a part of the state mechanism to delegation of victim care functions to the civil society.

Direct involvement in investigation

As to giving members of different groups the ability to actually report a hate crime and receive adequate attention from the law enforcement, in Ukraine provisions themselves impede victims' involvement by simply not having a number of protected characteristics in the statute. Ukraine's Criminal Code does not recognize other characteristics as grounds for establishing a bias motivation in the offender's actions, and the scope of the term "hate crime" compared to other jurisdictions is, therefore,

narrower and strictly defined as the list is exhaustive. As mentioned above the only provision that refers to protected characteristics in the Criminal Code and contains an open list is Article 161 criminalizing incitement to hatred and discrimination based on “race, color of skin, political, religious and other views, gender, ethnic and social origin, property status, and place of residence, language affiliation or other characteristics”¹⁰⁹. The possibility of applying this provision to a broad category of hate crimes lies in the fact that, in addition to the bias component of the choice of victim of the hate crime, it requires to also prove that the perpetrator was intentionally committing the actions with a purpose of inciting hatred.

In Ukraine, for instance, no other strands are monitored or included except for the characteristics provided in article 67(3) and article 161, thus marking a significant difference from the US and the UK in relation to the scope of protection. This has been particularly evident with the cases of attacks on LGBT activists where qualification of crimes includes no mention of a bias motive due to the absence of the exact wording in legislation and the lack of police manuals or explanations on the formulation of “other characteristics”. This situation effectively makes the victims of hate crimes towards groups not mentioned in the particular article unable to complain about the incident and expect investigation with inclusion of a bias motive into the case. Thus, the number of victim groups is limited to what is specifically mentioned in the law.

Even a more comprehensive list in the Law on Prevention of Discrimination¹¹⁰ includes the following protected characteristics: race, skin colour, political, religious or other views, gender, age, disability, ethnic and social background, family and proprietary status, place of residence, language and other characteristics leaving out sexual orientation as one of the grounds for committing hate crimes.

¹⁰⁹ "Кримінальний кодекс України, ст. 161(1)." [*The Criminal Code of Ukraine, article 161(1)*]. 05 04 2001. <http://zakon4.rada.gov.ua/laws/show/2341-14>.

¹¹⁰ "Закон України "Про засади запобігання та протидії дискримінації в Україні"." [*The Law of Ukraine "On the Principles of Prevention and Counteraction to Discrimination in Ukraine"*]. 06 09 2012. <<http://zakon2.rada.gov.ua/laws/show/5207-17>>.

At the same time, as mentioned above in sub-chapter 1.3., supporting legislation in the UK and the US aimed at recording instances of bias-motivated crime did not always correspond to the list of characteristics mentioned in the law. Should this be the case for Ukraine, perhaps the number of reported incidents would increase if law enforcement adopted a different, more inclusive approach to this issue.

In the UK, direct involvement includes having an actual impact on the sentence through the Victim Personal Statement that reflects victim's experience resulting from the offence and affect that this had on the victim. Except for ability to express what harm the crime had on the victim personally, the statement has a concrete impact as it is taken into account by the prosecutors and the court "so far as the court considers it appropriate"¹¹¹ at the sentence determination stage. Consequently, a possibility to influence the prosecution is provided not only by the participation in the collection of evidence, but also in ability to explain the impact of offence and have it considered by the relevant agency. Analogous to the Victim Personal Statement is the US tool of Victim Impact Statement whereby "the victim is afforded the opportunity to make a statement to the court regarding the impact of the crime on the victim and her family"¹¹² yet this differs from state to state, as well as its admissibility depends on the type of case, and is not a uniform policy.

Services of victim support

Next, the system of victim support established in the country also affects the level of participation for victims as criminal investigation. The formalistic approach as to victim present in Ukraine is different from the practice in the UK where the presence of a criminal offence in the understanding of the law is not a prerequisite for provision of assistance. In the UK, the system of support for victims comes in a

¹¹¹ UK Home Office, Police Standards Unit. "Hate Crime: Delivering a Quality Service." Good Practice and Tactical Guidance. 2005, s. 1.21, p. 17. <http://www.bedfordshire.police.uk/pdf/tacticalguidance.pdf>.

¹¹² Stevens, Mark. "Victim Impact Statements Considered in Sentencing." *Berkeley Journal of Criminal Law* 2.1 (2000), p. 1. <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1071&context=bjcl>.

form of a combination of state and non-state efforts with a wide network of state structures that are placed outside of the core process of investigation yet are involved in the victim's participation in the latter, as well as provide other support. Examples of these efforts include establishment of Community Safety Units (or Partnerships) established in different regional police forces, as well as Witness Care Units that, despite their name, also provide "a single point of contact and tailored support"¹¹³ for victims, as well as make possible arrangements when specific circumstances may require different mode of giving a statement in court, as well as call for specific arrangements. As stated by the CSU of the Metropolitan Police¹¹⁴, Community Safety Units do not reject complaints based on the sole absence of the crime in the incident, instead it is investigated and dealt with in a manner that should show respect for the victim's experience. This goes in hand with the understanding that the impact of the hate crime and the reason why these crimes are often accompanied with an enhanced sentence is specifically the damage to the person and the community which lies not only in the gravity of the offence but in the message perceived by the victim

The system of victim support during investigation process may be organized by the state agency but also delegated to a government grantee, for instance in the UK these functions are within the scope of responsibility of Witness Care Units yet "the bulk of central Government funding is currently provided by the Ministry of Justice to Victim Support, an independent charity and the largest provider of emotional and practical support to victims"¹¹⁵, and contact information for service providers working with the civil society is included into official publications of state bodies.

¹¹³"Racist and Religious Crime." CPS Guidance, p. 39. <http://www.cps.gov.uk/publications/prosecution/rpbcbrbook.html#a01>.

¹¹⁴ Metropolitan Police. *What is a Community Safety Unit*. <http://content.met.police.uk/Article/What-is-a-Community-Safety-Unit/1400004877592/1400004877592>.

¹¹⁵ Ministry of Justice. "Getting it right for victims and witnesses." Consultation Paper. 2012, p. 17. https://consult.justice.gov.uk/digital-communications/victims-witnesses/supporting_documents/gettingitrightforvictimsandwitnesses.pdf.

The degree of victim's participation and entitlements matter to the effect that, first of all, establishing facts of the case and the bias motive is complicated if there is no statement of the person who was targeted, thus proving motivation and remedying the damage by determining an appropriate punishment becomes a harder task. Secondly, for communities that were excluded from the justice system except for when they were overrepresented in incarcerated population, the full inclusion and recognition of validity of claims to equality is a first step in overcoming negative consequences reported to include "fear, difficulty sleeping and anxiety or panic attacks"¹¹⁶ more often than for victims of other crime.

Despite creation of victim services, concern remains coming from research data and civil society monitoring efforts over under-reporting of hate crime due to "fear of attracting further abuse, for cultural reasons, or because they don't believe the authorities will take them seriously"¹¹⁷. Addressing the problems above is one of the tasks that police and other stakeholders need to engage with in order to be able to provide effective response to the actual level of victimization among marginalized communities.

2.3. Vectors of police cooperation with victims, their representatives and community policing

There is a certain paradox in the view of rights in the criminal justice, as more often these terms when heard together refer to the rights of those suspected or accused of a crime whether they are actual offenders or they are being charged with a commission of a crime. In the UK, for instance, there is a big

¹¹⁶ Home Office, Office for National Statistics and Ministry of Justice. "An Overview of Hate Crime in England and Wales." 2013, p. 46. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266358/hate-crime-2013.pdf.

¹¹⁷ HM Government. "Challenge It, Report It, Stop It." The Government's Plan to Tackle Hate Crime. 2012, p. 7. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97849/action-plan.pdf.

discrepancy in the public opinion about protecting the rights of people who are accused and meeting the needs of victims, as 80% of respondents in the British Crime Survey were “very/fairly confident” in former, whereas only 36% expressed their confidence in the latter¹¹⁸. This indicates a point where allocation of resources is necessary to make sure that the criminal justice system is also credible in the eyes of those who come into contact with it, regardless of their status in criminal proceeding.

Cooperation between police and the community can be found in different areas of the criminal law, and it has undergone changes in its structure and purpose just as did the police forces in general. As pointed out by Chakraborti and Garland, “support and trust of the public plays an important part in the policing [...] generically, but this has proved to be especially problematic in the context of hate crime”¹¹⁹. Therefore, for the successful policy directed towards combating hate crimes, it is necessary to develop approaches that are specific to the issue of relations of police forces and communities that are at risk of becoming victims of hate crimes. These policies need to include both the general techniques of policing with community involvement, as well as address the issue of victimization that lays in the core of the difficulties in relations of the communities and the police leading to the lack of trust and doubts as to successful outcome of the investigation.

Consequently, the vectors of police work in this are include both the involvement of communities in terms of encouraging reporting and consultations on modifications to the service, as well as developing methods of cooperation for effective use of resources such as outsourcing of services mentioned above in the context of victim support. In other words, the work is directed towards engagement and related issues, and cooperation that involves coordination of efforts and resources. The mode of implementation of the law also depends on how police structures its work with communities as research “reveal[s] that while

¹¹⁸ Smith, Dominic. "Public confidence in the Criminal Justice System: findings from the British Crime Survey 2002/03 to 2007/08." *Ministry of Justice Research Series* 16/10 (2010), p. 5. <http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/confidence-cjs-british-crime-survey.pdf>.

¹¹⁹ Chakraborti, Neil, and Garland, Jon. *Hate Crime: impact, causes and responses*. SAGE, 2009, p. 114.

symbolic law is not intrinsically incapable of producing changes in enforcement patterns, such effects are contingent upon agency and community processes”¹²⁰. In the area of hate crimes, inclusion of the public into consultations and cooperation with police bears another significance – since the extent of hate crime is believed to reach communities in general, these communities have a direct interest in cooperation with police if such cooperation is not grounded in prejudice.

As to the first issue mentioned above, it is important to understand the reasons for reporting or not reporting crime that are specific to the hate crime context. Research into motivation of victims in their decision-making reveals that key factors here are that the crime is “perceived [as] too trivial [and] the police would or could not do much”¹²¹. Remedy to the first notion is most often addressed in the legislative phase by including the motivation as an aggravating factor, whereas the second issue is a matter of police performance, and here deeper reasons ought to be reviewed to improve the situation.

In Ukraine the lack of motivation to report comes also from the image of police as a force with a task of combating illegal migration, and as often crime victims are either temporarily residing in Ukraine as foreign students, or had an experience of dealing with police in relation to stop-and-search often used by the law enforcement disproportionately towards marginalized groups, there is a degree of disassociation between the communities and the police. A broader strategy for reaching out to the victims of hate crime is necessary where the issue of hate crime is not a subject of wide public discussion and at the same time the police is not known to be the defender of rights of vulnerable groups. The situation in Ukraine is rather illustrative for this matter, as the persistent practice of having the fight against illegal migration as one of the key achievements of Ukrainian law enforcement, led to the creation of the image of law

¹²⁰ Grattet Ryken and Jenness Valerie. "Transforming Symbolic Law into Organizational Action: Hate Crime Policy and Law Enforcement Practice." *Social Forces* 87.1 (2008), p. 501. <http://sf.oxfordjournals.org/content/87/1/501.full.pdf+html>.

¹²¹ Smith, Kevin, et al. "Hate crime, cyber security and the experience of crime among children: Findings." Supplementary Volume 3 to Crime in England and Wales 2010/11. 2012, p. 20. <http://www.report-it.org.uk/files/hosb0612-2.pdf>.

enforcement that is not other-friendly, particularly when it comes to persons with unregulated legal status or where there is possibility for abuse or extortion.

Ukraine is not the only country where the situation of police-community relations created difficulties in providing service to victims of hate crime, as in the UK and the US the law enforcement also was known not to enjoy a significant amount of trust with certain marginalized communities. Looking into the deeper reasons behind the lack of confidence in police, the McPherson Report in the UK included an important “admission that policing could be institutionally racist”¹²², and the prejudice should be addressed by creation of specific mechanisms with expertise and ability to respond to these challenges. These include both the Police Community Support Officers and the specific unit – Racial and Violent Crimes Task Force.

Certain UK initiatives like third-party reporting opportunity¹²³, as well as facilitating dialogue by creating platforms such as Community Safety Partnerships¹²⁴. Certainly, one needs to be careful when assessing the intended/real impact of initiatives as, for instance, the Institute of Race Relations was critical about the work of Family Liaison Officers and pointed out the “poor” performance¹²⁵. However, positive changes resulting from establishing new ways of working with communities have also been reported, though sometimes “gradual”¹²⁶ or relating only to certain aspects. In the UK, the efforts on coordination of government and non-governmental structures towards monitoring the extent of hate crime resulted in the formulation of the five “equality strands” that include disability, gender-identity, race, religion/faith

¹²²Williams, Chris A. "Police Governance – Community, Policing, and Justice in the Modern UK." *Taiwan in Comparative Perspective* 3 (2011): 61.

<http://www.lse.ac.uk/asiaResearchCentre/countries/taiwan/TaiwanProgramme/Journal/JournalContents/TCP3Williams.pdf>.

¹²³ True Vision. *Reporting a Hate Crime or Incident*. http://www.report-it.org.uk/report_a_hate_crime.

¹²⁴UK Home Office, Police Standards Unit. "Hate Crime: Delivering a Quality Service." Good Practice and Tactical Guidance. 2005, <http://www.bedfordshire.police.uk/pdf/tacticalguidance.pdf> p.34.

¹²⁵ The Institute of Race Relations. "Counting the cost: racial violence since Macpherson." A report to to London Boroughs Grants, p. 14. http://www.irr.org.uk/pdf/counting_the_cost.pdf.

¹²⁶ Ibid.

and sexual orientation and, importantly, noting that “[c]rimes based on hostility to age, gender, or appearance, for example, can also be hate crimes, although they are not centrally monitored”¹²⁷.

- In the US, the Federal Bureau of investigation identifies the following priority directions of working on the issue of hate crime, all of these within the vectors of cooperation: participation in Hate Crime Working Group
- partnerships with organizations of civil society to “establish rapport, share information, address concerns, and cooperate in solving problems”
- trainings for both the police and possible service providers and police on local levels, as well as representatives of vulnerable groups”¹²⁸

The Community Relations Service of the US Department of Justice is also involved in cooperation with stakeholders outside of investigation and prosecution process with its stated functions as facilitation agency in the “development of viable, mutual understandings and agreements as alternatives to coercion, violence, or litigation”¹²⁹ with representations in handling 728 cases throughout 2012 as reported by the agency. There seems to be an overlapping area of hate crime where the CRS and the FBI are working in the field of preventing hate crime and particularly working with communities to achieve this goal with a difference in the position of these agencies outside or within the dialogue.

Chapter 2 conclusions

Victim’s involvement in investigation and consideration of the victim’s situation depends not only on the law, but also on the structures that exist to implement the law, including the police and prosecution,

¹²⁷ Smith, Kevin, et al. "Hate crime, cyber security and the experience of crime among children: Findings." Supplementary Volume 3 to Crime in England and Wales 2010/11. 2012, p. 14. <http://www.report-it.org.uk/files/hosb0612-2.pdf>.

¹²⁸ The Federal Bureau of Investigation. "Hate Crime—Overview" http://www.fbi.gov/about-us/investigate/civilrights/hate_crimes/overview.

¹²⁹ US Department of Justice. "Community Relations Service FY 2012 Annual Report", p. 1. <http://www.justice.gov/crs/pubs/crs-fy2012-annual-report.pdf>.

as well as federal agencies when we talk about the United States. In the UK and the US, specific guidance is developed on the implementation, as well as mechanisms exist for taking into account victim's experience in the form of a Statement to be presented in court. In addition, these offences are treated as more serious ones, for example, by the Crown Prosecution Service thus cases are under heightened supervision accounting for the complexity of hate crimes.

Where the relations of police and community make reporting and contacting police harder, mechanisms for cooperation and third-party reporting are developed in the UK, as well as in the United States. In Ukraine, no recognized third-party reporting exists other than victims supported by nongovernmental organizations. Thus in jurisdictions where the scope of protection is broader, guidance is developed in greater detail and with more attention, whereas in the state with weak system of response to hate crimes the lack of legislative measures is exacerbated by police performance issues. The situation with response to certain crimes of bias in the US (anti-Sikh crimes) is not covered by the state agencies due to lack of legislative measures, thus civil society remains the main responder to the issue at the moment. We now move to Chapter 3 where strategies and tools of civil society and community organizations shall be analyzed.

CHAPTER 3

THE ROLE OF NON-STATE SUPPORT FOR VICTIMS IN COMBATING HATE CRIMES

Existence of the law in a particular country does not per se guarantee eradication of negative phenomena that the lawmakers intended to eradicate. Other factors, such as the level of confidence in police actions, effectiveness of the criminal justice system in general and the courts in particular, as well as the outcomes of cases, leads us to looking at other actors in the field that somehow influence the process of combating hate crime in different ways. The history of relations of marginalized groups and the police with pages of ethnic profiling or persecution of homosexual relations has created a wall between these groups and the officials. In this context, efforts of civil society or representative groups appear to be particularly important in the framework of voicing victims' concerns or becoming liaisons between the law enforcement and the community targeted by hate crime.

3.1. The role of communities and civil society in responding to hate crime

Civil society efforts in all three jurisdictions are aimed at recognition of the problem, including improvements of hate crime reporting and legislative actions to extend protections to groups that were not covered on the basis of struggle for equality. On the other hand, these efforts include provision of services to victims where there is lack of state assistance or difficulties in communication with the police structures. Cross-direction efforts that combine the purposes above also include networking and establishment of cooperation mechanisms with other organizations that are involved in the like activities, or with government structures in the form of advisory assistance or as grantees performing functions sponsored or designated by the state.

First mode of activities aimed at reporting includes collecting statistics that is either complementary or alternative to state-gathered data. These are characteristics for civil society

organizations in all three jurisdictions and present either information on specific groups or crimes in general. One specific characteristic for the United States is that organizations now rely largely on the data collected by the FBI, for instance the LCRC Education Fund paper refers to federal hate crime statistics in its report hate crime in America issued in 2009¹³⁰ and the Southern Poverty Law Center also uses this information in its publications. There seems to have been a change from the situation prior to adoption of the Hate Crime Prevention Act of 2009 with the expansion of protected characteristics, as previously the nongovernmental organizations are said to “have been increasingly resourceful and effective in gathering hate crime incident reports on their own”¹³¹ with more information from the official sources being used.

However, where there is a gap in data collection, NGOs collecting data from particular communities play an important role by providing statistics to uncover the scope of the problem. New tasks present new challenges for civil society when certain types of violence are present yet not accounted for by the state authorities, thus ad-hoc coalitions are formed to address these issues, an example of one being a coalition for supporting increased attention to violence against Sikhs, Arabs and Hindus as there is “there is substantial evidence that these communities have been targeted for bias-motivated violence”¹³². Also, The National Coalition of Anti-Violence Programs provides important insights into the scale of violence against the LGBTQ and HIV-affected persons including the facts of under-reporting with “[o]nly 56% of survivors [having] reported their incidents to the police”¹³³ thus adding a new side to the understanding of the scope of violence against this group of people.

¹³⁰ Leadership Conference on Civil Rights Education Fund. "Confronting the New Faces of Hate: Hate Crimes in America, 2009" Ed. Nancy Zirkin. 2009, p.7. http://www.protectcivilrights.org/pdf/reports/hatecrimes/lccref_hate_crimes_report.pdf.

¹³¹ McClintock, Michael. "Everyday Fears: A Survey of Violent Hate Crimes in Europe and North America" A Human Rights First Report, p. 86. <http://www.humanrightsfirst.org/wp-content/uploads/pdf/everyday-fears-080805.pdf>.

¹³² Anti-Defamation League. *Coalition Urges FBI to Track Hate Crimes Against Sikhs, Arabs and Hindus*. n.d. <http://www.adl.org/combating-hate/hate-crimes-law/c/hate-crimes-statistics-letter.html#.Utlr3fT8KIU>.

¹³³ The National Coalition of Anti-Violence Projects. "Hate Violence in 2012: Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected" 2013, p. 9. http://www.avp.org/storage/documents/ncavp_2012_hvreport_final.pdf.

Organizations in the United Kingdom also cite the official data published by the Home Office, Office of National Statistics and Ministry Justice that includes information collected from different government sources and surveys to cover areas such as reporting, prosecution, victim satisfaction etc. Also, similar to the US, independent charities provide their insights into the issues that are either under-reported or considered to be unattended by the state to sufficient degree, as well as certain policies ought to be changed based on the data available in these publications. For example, separate source of data on hate crime in London committed against LGBT persons is the yearly Gallop Hate Crime Report¹³⁴,

Even though, some authors point out their concern about the fact that “many projects [are] grounding their analysis in official data”¹³⁵, it is the quality of data and actual availability thereof is what matters, and having organizations analyze the official statistics and compare it with the victim experiences is a necessary component for establishing credible conclusions. These conclusions result in the organizations’ ability to make recommendations on the level of advocacy or even influence the law-making in a direct way as, for instance, the ADL that “has created model legislation covering all hate crimes that has been widely adopted at the state level”¹³⁶.

In addition to monitoring directed at data publication and advocacy efforts, there are also options for victims offered by service providers include tools for reporting either with the purpose of limiting communication with police, or to provide assistance to the victims if the organization has appropriate resources. For instance, on-line reporting tools and following assistance in the UK is provided by a number

¹³⁴ Antjoule, Nick. "The Hate Crime Report" 2013. <http://www.galop.org.uk/wp-content/uploads/2013/08/The-Hate-Crime-Report-2013.pdf>.

¹³⁵ Chakraborti, Neil. "Future developments for hate crime thinking : who, what and why?" Chakraborti, Neil. *Hate crime : concepts, policy, future directions*. Portland, Or.: Willan, 2010, [p. 19](#)

¹³⁶McClintock, Michael. "Everyday Fears: A Survey of Violent Hate Crimes in Europe and North America" A Human Rights First Report, p. 88. <http://www.humanrightsfirst.org/wp-content/uploads/pdf/everyday-fears-080805.pdf>.

of organizations, including the Gallop with a range of services available¹³⁷, TellMAMA¹³⁸, Community Security Trust and others. In Ukraine, organizations dealing specifically with provision of service to victims of hate crime are very few in numbers, including the Social Action Centre¹³⁹ program for victim assistance, support services offered by LGBT organizations, as well as small ad-hoc community interventions.

In particular, it is worth noting that organizations focusing on issues of violence and attempting to assist victims of crime in general, such as the National Center for Victims of Crime (USA) and the Victim Support (UK), have included the assistance to victims of hate crime as one of their priorities thus creating a space in the service provision field for those suffering from bias crime. The aspect of inclusion of hate crimes into the general service-provision scheme is important from, again, the point of view of ambiguity and uncertainty surrounding hate crimes in general – despite the lack of proof for establishing bias motivation, victims of hate crime require assistance and assessment of needs at the relevant level.

In Ukraine, the system of legal aid that is being developed at the moment through several channels, including the civil society efforts, despite being designed to assist all victims of crime in their interaction with the criminal justice system, now lacks the expertise and does not pursue the cases specifically attempting to ensure the inclusion of bias motivation into the original qualification by police officers.

In general, inclusion of hate crimes into agenda of wide-range service providers and initiatives is a trend observed both in the USA and in the UK. For instance, an organization called DO SOMETHING¹⁴⁰ among dozens of its activities targeting various spheres of social life and emphasizing the importance of youth action, has included work on hate crimes into its agenda. As to the quality and character of service,

¹³⁷ Gallop. *How else can Gallop assist me if I've been a victim of hate crime?* <http://www.gallop.org.uk/about-galops-hate-crime-service/how-else-can-gallop-assist-me/>.

¹³⁸ MAMA, Tell. *Measuring Anti-Muslim Attacks*. <http://tellmamauk.org/>.

¹³⁹ "Project of legal support for victims of hate crimes and discrimination" <http://noborders.org.ua/en/projects/ongoing/project-of-legal-support-for-victims-of-hate-crimes-and-discrimination/>.

¹⁴⁰ Do Something. <http://www.dosomething.org/>.

the UK-based Institute of Race Relations upon studying responses to certain racist crimes and the efforts that families of victims undertook to make sure that these cases were investigated properly, and concluded that victim support groups ought to consider providing a range of services, including taking over certain parts of relations with the police, media and raising awareness and support for the family¹⁴¹.

Lastly, in order to achieve results with limited resources, as well as build on the experience of fellow organizations, coalition-building can serve as an instrument that is applicable to different kind of activities, ranging from advocacy to victim support, as well as professional development of organization staff through learning by sharing.

In the United States, nation-wide organizations that are at the front of the fight against crimes in the US, including the Anti-Defamation League, the Southern Poverty Law Center, Human Rights First and others, have joined their efforts in the Leadership Conference on Civil Rights Hate Crimes Task Force¹⁴² that was advocating for the adoption of the Matthew Shepard Act in 2009 and is considered to have influenced the adoption of legislation significantly.

In Ukraine, community organizations efforts to create a system of response to hate crime follow the scheme of the US and the UK in building coalitions against this manifestation of intolerance. One of these coalitions was established by the International Organization for Migration and the United Nations High Commissioner on Refugees Regional Office for Ukraine, Belarus and Moldova under the name of the Diversity Initiative. Among other things, the Initiative conducts monitoring of hate crime cases through collection of information and publication of results upon verification. In addition, where cases are reported to the Ministry of Interior, members of the Diversity Initiative, if not involved in the case through legal assistance or consultations, address police with requests about the progress in investigation.

¹⁴¹ he Institute of Race Relations. "Counting the cost: racial violence since Macpherson" A report to to London Boroughs Grants, pp. 17-18. http://www.irr.org.uk/pdf/counting_the_cost.pdf.

¹⁴² LCRC Education Fund. "Confronting the News Faces of Hate: Hate Crimes in America" 2009, p. 3. http://www.protectcivilrights.org/pdf/reports/hatecrimes/lccref_hate_crimes_report.pdf, p. 3.

In addition, few times a year the Initiative holds discussions with the Ministry of Interior with regard to follow-up on individual incidents and developments in each case as this information is often unavailable with the victim's decision not to follow the hate crime prosecution.

Despite the similarity of the scheme that includes different organizations working towards a common cause, the Ukrainian version has one characteristic that affects the way it can be perceived in both positive and negative way, though negative consequences are far more real than positive outcomes. The Diversity Initiative, despite being a network of organizations that represent different communities and potential groups of victims, was created by the joint effort of two international organizations with mandates for protection of migrants' rights and a mandate to support asylum seekers, refugee, and actively since recent developments in Ukrainian legislation and accession to the 1961 Convention on the Reduction of Statelessness and the 1954 Convention relating to the Status of Stateless Persons. Consequently, hate crime as dealt with by the network can be associated simply with a crime committed towards migrants and refugees and asylum seekers, also representing a part of the society perceived as an alien one. Here, it only strengthens the agenda of the Ministry of Interior to treat hate crimes under the overtly simplistic categorization of "crimes against foreigners" and "crimes committed by foreigners". It is not to say that individual organizations working with specific groups of people should not represent communities in the dialogue on issues pertaining to bias-motivated offences, but when the representation has no alternative, like in the case of Ukraine, there exists a danger of exclusion of other groups or development of distorted understanding of the phenomena and the current situation.

On the other hand, of course, international organizations have a larger political capital in the country in terms of ability to hold negotiations with the governmental structures and influencing the formulation of policies in the field. However, having a mandate and being limited by the framework prescribed for the country-office activities, as well as coordinated by a headquarters, international

organizations with rare exceptions have no real power when it comes to direct influence onto the progress of a criminal investigation.

The negative impact of the trend of separated representation of hate crime victims is evident in Ukraine with two groups of population that often appear to be victims of attacks, the Roma population and LGBT. The two groups face violence based on prejudice towards their identity, yet when it comes to reporting hate crimes different difficulties emerge leading to separation of efforts and lessening the effect of advocacy initiatives for each group. In case of Roma population, the history of marginalization is exacerbated by the lack of documentation and registration leading to police abuse. As a result, reporting hate crimes to the police might result in further victimization or eviction from the land that a particular community is occupying at the moment, thus silence is often chosen as the only way to (not) deal with the problem. In the case of LGBT organizations, the lack of specific inclusion of sexual orientation into the list of protected characteristics leads to the complete denial of existence of hate crimes towards LGBT people from the side of the government. In addition, police is often involved in practices of targeting LGBT people in online forums and arranging provocations by using alias in their work, thus the law enforcement is perceived to be bias towards LGBT community. Consequently, coordination of efforts is important with regard to the issue of hate crime policies' ability to create "hierarchy of victims"¹⁴³ that in its turn leads to marginalization of groups that do not have enough political power or advocacy capital to ensure protection of the particular group.

Importantly, since coalitions represent different groups of victims, in their coordination it is worthwhile to review what the victims receive as a result of civil society efforts and changes to legislation, as well as how their combination affects the situation,

¹⁴³ Chakraborti, Neil, and Garland, Jon. *Hate Crime: impact, causes and responses*. SAGE, 2009, p. 9.

3.2. *Positive and negative impact of advocacy achievements for victims*

When looking for an answer to the question of what hate-crime laws give their victims, the system of evaluation of can be biased and not reflect the actual situation. Moreover, the issue of hate-crime laws is a plane for academic debate on the necessity and effectiveness of enhanced penalties or additional legislative efforts. For instance, a group of scholars, such as Richard Uviller¹⁴⁴ and Jacobs and Potter¹⁴⁵, challenge the validity of hate-crime laws and the very purpose of treating bigotry as aggravating circumstance in criminal prosecution. With opposing standpoints on rationality of enhanced penalties or separate offences identified with hate-crimes, present research does not intend to engage in the debate on justification of the laws on hate crimes though certain considerations need to be discussed in relation to the protection of victims' rights.

The impact of hate crime laws can be identified through looking at what changes they bring about, if any, and whether these changes affect the situation at all. As some authors, e.g. Jacobs and Potter, argue "it would take some heroic assumptions to believe that bigoted and anti-social criminals and potential criminals, if they are listening at all, will be any more responsive to this message than they have been to all the other threats and condemnations contained in criminal laws that they regularly ignore¹⁴⁶". However, such statement appears to be flawed in its reasoning: in general, law-abiding citizens are not the target groups of criminal laws, and they would not normally engage in behaviours that lead to criminal prosecution. Using the logic provided above, there is no sense on imposing harsher penalties for any of the crimes, nor is it feasible to have criminal laws at all for the purposes of deterrence since engagement in criminal activities is a predisposition that includes neglecting societal standards of conduct. Moreover,

¹⁴⁴ Uviller, Richard H. "Review article: Making it worse: "Hate" as an aggravating factor in criminal conduct." *Ethnic and Racial Studies* (2000): 761-767. <<http://dx.doi.org/10.1080/01419870050033711>>.

¹⁴⁵ Jacobs, James B., and Potter, Kimberly. *Hate crimes : criminal law & identity politics*. New York: Oxford University Press, 1998.

¹⁴⁶ *Ibid.*, p. 68.

suggesting that crimes statistics when it comes to interracial crimes actually harms the ethnic minorities¹⁴⁷ is based on the mode of representation of crime statistics with no distinctions made on the line of bias motivation, thus confusing the reader with their suggestion.

The author of present research also disagrees with suggestions that low hate crime rate should be followed by easing the rate of persecution as the social situation get better and the need to prosecute these offences decreases. One has to remember that there are some crimes which are committed on an extremely narrow scale. For example, in 2010/2011 there were 5 recorded instances of crimes under the title of “Causing or allowing death of a child or vulnerable person” in England and Wales¹⁴⁸ yet this does not call for easing the penalty for it.

Next, the very entitlement of victims to certain rights and the principle of equality before the law and equal access to justice, creates a situation where these principles are rendered ineffective unless specific circumstances are considered when situation is different. Thus, absence of laws addressing hate crime leads to lessening the scope of rights, whereas particular attention to these issues is a matter of recognition of the rights curtailed. As rightly pointed out by Spade, “though the widespread failure of criminal punishment to act as a deterrent to crime calls into question the extent to which hate crimes legislation actually reduces violence against a particular group, it is apparent that the process of social and legal naming of such activism does offer an opportunity to produce new popular and legal understandings of “outsider” groups that can positively affect their status in society”¹⁴⁹.

In addition to recognition of rights and positive effects on the victims’ status in society, there is another benefit coming from hate crime legislation for victims in case it is implemented. As absence of

¹⁴⁷ Ibid., p. 17.

¹⁴⁸ Taylor, Paul and Steve Bond. "Crimes Detected in England and Wales 2011/12" Home Office Statistical Bulletin. 2012, p. 16. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116435/hosb0812.pdf.

¹⁴⁹ Spade, Dean. "Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique" *Chicano-Latino Law Review* 21, p. 38-52. (2000).

protection leads to fears and marginalization of groups within society and serves as a barrier in implementation of other rights by being an instrument of support for the system based on exclusion and discrimination. Introducing additional elements of protection and dedicating resources to their implementations is the service the state needs to provide for people in order to remove these barriers. Thus, an individual feeling less threatened and heard should be able to talk about other concerns than physical safety that are just as important for the development of a person.

For an offender, this type of crime may constitute establishing a hierarchy, even supremacy, over the victim. Consequently, the victim might feel that s/he has been treated as a member of an inferior group. In order to reestablish that, as well as to prove the guilt for the crime belongs to the actual offender, hate crime laws induce tougher punishments since you need to somehow equalize the position again and shift the guilt burden back to where it belongs originally.

The shortcomings, however, are evident as the critique of criminal justice selective approach and disproportionate attention to non-white population, for instance in the US, is abundant. Here, it is important to note what has been emphasized in Chapter 2, namely that laws per se do not remedy the situation unless they are enforced with proper consideration of all circumstances, particularly when it comes to marginalized communities.

Another possible shortcoming of the legislation can be narrow focus as [t]he focus of courts remains on isolating individual racists [...] while disregarding manifestations of systemic racial subordination”¹⁵⁰. Here, the paradox of the individuality of a crime and the social nature of certain criminal acts comes into play: whereas no one can be punished for crimes other than committed and convicted of individually, including the presumption of innocence and the fair trial rights, the bias remains the key target of the prosecution, and its scope extends far beyond one person. Therefore, it is logical to

¹⁵⁰ Ibid.

suggest that bias as an aggravating factor can and should be considered given the aim of legislating on crimes of hate, yet its impact and nature must be viewed on a case-by-case basis in order to escape reverse consequences of “prosecution-happy” policies. Of course, here, it is important to look at the issue of balancing freedom of expression and punishment for hate crimes since the clash of rights of victims and the rights of perpetrators is inevitable, but that abuse of the hate-crime legislation, namely lack of clear limits to the power of persecution for hate crimes, may lead to consequences where the credibility and public recognition of the necessity to combat manifestations of hate,

3.3. *Good practices and effective tools in combating hate crimes*

Prior to moving to the review of big programs that have significant funding sources and are implemented over the course of years and in consultations with dozens of stakeholders, let us look at cases from the countries examined here that are worth attention and where the comparison is appropriate to understand. These are individual stories yet their impact of a specific incident, as discussed above, can change the modus operandi of the system in whole.

The first case is an example from the city of Manchester in the United Kingdom where in 2007 a brutal murder of Sophie Lancaster shocked the community and led to a case decision that presents a possible answer to the questions about hate crimes that have been raised above, namely the reasons for inclusion of one group but not the other into the list of groups with protected characteristics, and the degree to which each group in the country should enjoy a special protection in a way that is fair and lawful in relation to the group and to others as well. The case has appealed not only to the hearts of public but to the judge’s reasoning in the outcome of the offenders’ trial, due to the extreme brutality and the circumstances of the assault. Sophie Lancaster and her boyfriend, both belonging to a goth subculture, were attack by a group of young people and beaten severely. Attempting to protect the young man, Sophie Lancaster suffered grievous bodily harm and did not survive after going to a coma state. The attack was not

only accompanied by indicators pointing to prejudice and extreme hostility of offenders towards goths, but as the court materials show the perpetrators were talking about the incident specifically mentioning the fact that they had managed to hurt someone from the particular subculture¹⁵¹. The judge stated in the final decision that “[the offence] was a hate crime against these completely harmless people targeted because their appearance was different to yours”¹⁵². The impact of this decision was recognized in the government plan stating that “[a]lthough crimes such as this may fall outside of the nationally monitored strands, they are nonetheless hate crimes, and they should therefore be treated as such”¹⁵³ and the decision of the Greater Manchester Police to record “alternative Sub-culture related hate crime”¹⁵⁴

Personal narratives and creation of groups for commemoration are of universal value and application in these instances. Indeed, it is through representation and personalization that it enables certain things gain voice of a different magnitude but also appeal to the core of human nature. Just recently, following the re-authorization of the Violence Against Women Act, the US Vice President Joe Biden pointed out the fact that “it makes a difference with the women in the Senate”¹⁵⁵ since it enables the group at risk to bring a narrative back to the personal level and deliver it to the lawmakers in a compelling manner.

A change of discourse from revenge to commemoration and fair things is one of the tools to use, along with education and telling the story like, for instance, done by the Laramie Project¹⁵⁶ - an initiative

¹⁵¹ Edmonds, Lizzie. "Killer serving life for murdering a teenage Goth six years ago given further sentence for battering a nurse at psychiatric unit." *Daily Mail Online* 18 09 2013. <http://www.dailymail.co.uk/news/article-2424435/Brendan-Harris-killer-Goth-Sophie-Lancaster-given-extra-sentence-battering-nurse-psychiatric-unit.html>.

¹⁵² Stratton, Allegra. "Teenagers jailed for life for killing goth woman." *The Guardian* 28 04 2008. <http://www.theguardian.com/uk/2008/apr/28/ukcrime>.

¹⁵³ HM Government. "Challenge It, Report It, Stop It." The Government's Plan to Tackle Hate Crime. 2012, p. 6 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97849/action-plan.pdf.

¹⁵⁴ Greater Manchester Police. *Hate Crime*. <http://www.gmp.police.uk/content/section.html?readform&s=C4D5E39C4F3817F680257961004019B9>.

¹⁵⁵ Joe Biden speaking at the 19th Anniversary of the VAWA Passage. 2013. <http://www.politico.com/politico44/2013/09/biden-neanderthal-crowd-slowed-va-wa-renewal-172549.html>.

¹⁵⁶ Matthew Shepard Foundation. Laramie Project Support. <http://www.matthewshepard.org/our-works/lp-support>

introduced to tell the story of Matthew Shepard and link the tragedy of the young boy and his family to the situation in the US through means of theatre. It also bring the marginalized group closer to population and introduces them not only to the crime but to the person on a deeper level. Personal testimonies of victims are powerful tool also employed by personal testimonies recorded by the MAMA Project¹⁵⁷.

Apart from using personal narratives, there is another resource that has been utilized by the MAMA Project as an approach to advocacy efforts. It is often said that nongovernmental organizations lack credibility or might be bias in their work since they are closely related to victims. Moreover, resources of nongovernmental organizations are not always sufficient for all the streams of work that might benefit their target groups. The UK government, for instance, outsources certain tasks to victims support organizations also in situations where they are in better position to provide service. Therefore, employing other resources that also help establish credibility and add more weight is a strategy that is worth applying particularly in conditions where funding is limited or unavailable. The strategy includes involving think-tanks and academic institutions into work on hate crimes in the form of doing research or working with the data available to civil society. The MAMA Project, for instance, has used services of the Institute of Applied Social Sciences of the University of Birmingham¹⁵⁸ and the Centre for Fascist, Anti-Fascist and Post-Fascist Studies of the Teesside University¹⁵⁹

For Ukraine, specific circumstances of the adoption of the hate crime provisions in 2009 described in Chapter 1 where international pressure played its role in the passing of amendments, advocacy efforts with involvement of international actors seem to be fruitful. For instance, in 2012, after a long time of negotiations between the Ministry of Interior of Ukraine and the OSCE/ODIH, a Memorandum of

¹⁵⁷ MAMA Project. *Measuring Anti-Muslim Attacks*. n.d. <<http://tellmamauk.org/>>

¹⁵⁸ Allen, Chris and Arshad Isakjee. "Maybe we are hated: The experience and impact of ant-Muslim hate on Muslim British women" <http://tellmamauk.org/wp-content/uploads/2013/11/maybewearehated.pdf>.

¹⁵⁹ Copsey, Nigel, et al. "Anti-Muslim Hate Crime and the Far Right." 2013. <http://tellmamauk.org/wp-content/uploads/2013/07/antimuslim2.pdf>.

Understanding¹⁶⁰ was signed between these organizations outlining the scope of cooperation between the Ministry and the international organization. This is one of the few, if not the only, documents whereby the Ministry of Interior has expressed its intentions to work on hate crimes thus the Memorandum marks at least a shift towards introduction of the term itself into the discourse of the law enforcement. It is not by coincidence that the Memorandum was signed during the year of Ukraine's Chairmanship in the OSCE, as the advocacy window for bringing about changes was used by ODIHR in cooperation with the national counterparts to emphasize that Ukraine's performance in the human rights sphere will be subject to heightened scrutiny at the end of the chairmanship year.

Despite the document's soft-law character, its symbolic significance cannot be underestimated as the obligations taken under the Memorandum ought to provoke the review of a "hate crime" concept if the Ministry implements at least some of its provisions. At the moment, negotiations have moved forward to the stage of arranging trainings for police officers on combating hate crimes.

Chapter 3 conclusions

Civil society efforts often follow the path of what government should be doing but is not for some reasons, including collecting data and providing assistance. One distinct feature of CSOs is their ability to be flexible in their choices of tools, as well as the target group they want to focus on, which is beneficial for the group if there is gap in official data or a specific need. There seems to be another value to this, namely the synergy of specialized agencies that can work together if they identify common areas of concern or possibilities for coordination of efforts. Yet, there is a danger in the existence of separate civil society monitoring and support and the governmental services in parallel mode – since the victims' groups

¹⁶⁰ "Меморандум про взаєморозуміння між Міністерством внутрішніх справ України та Бюро з демократичних інститутів і прав людини ОБСЄ (БДІПЛІ)." [*Memorandum of Understanding between the Ministry of Interior of Ukraine and the ODIHR*]. 05 07 2012. http://zakon4.rada.gov.ua/laws/show/994_b16.

position can be questioned in terms of objectivity, so can the data published by these groups. In addition, with the existence of parallel reporting tools and different standards for monitoring and recording cases certain incidents can be recorded twice or not fully checked due to the lack of resources and cooperation with the police forces in follow-up to different cases.

However, provision of assistance should be critically assessed from the point of view of taking into account the victim's interests. First of all, equality of treatment applies to all victims of crime, and law enforcement has to provide for full exercise of victims' rights regardless of the nature of the crime but with consideration of specific circumstances. Second, relying solely on non-governmental organizations creates obstacles for building community-police relations and does not address the need to eliminate certain barriers in reporting hate crimes. However, there are indeed positive examples of community efforts that can be developed and taken as models for implementation, including voicing concerns and telling stories of victims, as well as cooperating with other fields such as academia,

CONCLUSION

When considering victims' perspective in legislations of the selected jurisdictions a set of criteria to evaluate includes the existence or absence of legal provisions that address bias motivation, the nature of these provisions and the consequences they bear, as well as the scope of characteristics that are identified by the law as those that may be targeted and require special protection. Clearly, there are differences that come from the specifics of national legal system, yet common grounds for comparison such as the availability of provisions on aggravating circumstances or enhanced punishment, as well as definition of hate crime and the perception taken into account, provide ground for a number of conclusions on the question of how groups of victims are recognized by the law and whether there are differences in representation of different groups.

In all three countries the legislation is undergoing changes yet in the UK and the US the changes are towards including the new characteristics into the list of protected ones, whereas in Ukraine the changes are related to the very recent introduction and the general reforms of the criminal justice system with no particular attention or debate about the hate crime provisions. Provisions that make hate crimes more serious in their consequences exist in all three jurisdictions ranging from a separate category of offences, for instance federal hate crimes in the US or racially and religiously aggravated crimes in the UK, to aggravating circumstances for committing an offence with bias motivation in Ukraine or provisions on sentence-enhancement for other types of hate crime in the United Kingdom. The system of different treatment of offences depending on the victims belonging to a group in the UK seems to create a gradation of protection and recognition of different groups in relation to each other. Significantly, a similar situation existed in the US where other groups were not covered by the federal law, and this difference of protection led to the claims and subsequent amendments of the list in direction of its expansion. In Ukraine, the list of protected characteristics in the article on aggravations and in aggravation clauses of specific articles is

significantly shorter and corresponds to the list of aggravated offences in the UK, yet no other forms of recognition for other groups of victims are available.

In addition, another group of potential victims who may not be members of a group but perceived as such is mentioned by the laws in the US and UK whereas in Ukraine there is no “perceived” option thus narrowing the scope of protection under these provisions. The specific mention of “actual or perceived” criteria when deciding whether to consider the crime as bias-motivated indicates the move to recognition of the greater danger of hate crimes for the public and persons who may not have actual connection to the group except for the offender’s own qualification.

Accordingly, in United States victims of crimes motivated by prejudice towards gender, sexual orientation, gender identity or disability therefore can only expect the same level of consideration of the bias motive as groups identified by racial, religious and national background.

The review of the developments in the area of hate crime legislation, as well as current trends and consultations in the UK, suggest a pattern for the process of inclusion of the categories mentioned above under the umbrella of common provisions as a result of recognition of equal entitlement to consideration and protection for these groups based on the struggle of those already recognized. The commonalities in the developments between the US and the UK include the impact of “symbolic factors” such as civil society representing a wider array of marginalized groups, as well as increasing public attention achieved through mapping and voicing the problem through initiating public debate and drawing attention to well-known cases as examples of problems of systemic character. Both countries have adopted supporting legislation, and in the US the Hate Crime Statistics Act signified that the question has been brought for a closer review from the state and was a step towards extending the list of protected characteristics. Thus there are reasons to suggest a possibility of analogous developments in the UK. Given the fact that legislation in Ukraine was adopted under significant influence of international actors, and the lack of

similar trends in victim representation and data collection to study the problem, a large number of victim groups remain unrecognized as potential victims of bias crimes.

When the legislation is in place, whether with an extensive list or a narrow one for protected characteristics, the reality of laws and their actual impact on the level of individual case comes when a person becomes a victim of bias crime and interacts with authorities responsible for enforcing the law. Here, effect of the law comes down to the way law enforcement personnel is treating the case as it produces concrete consequences for an individual case. Victims' involvement in the process includes both direct input to the investigation, and the participation as someone entitled to services from the state.

For the victim, decision to come into contact with the criminal justice system is largely based, as research shows, on the seriousness of the offence as perceived by the victim¹⁶¹. The way victim can see the actual seriousness is not just the outcome of the case, but the degree of attention and resources allocated to the cause demonstrated by creation of special units and task forces, reporting on the work done and reaching out to communities while admitting existence of problems. Factors that have influence on this experience include not only the legal environment and ability to report the case, but also the availability of resources to address the issue and the level of expertise of police officers or prosecutors in the matters. In addition, the degree of seriousness mentioned above is also detected by the level of personnel: for instance, a federal agent or a Crown prosecutor assisting or dealing with the case might indicate about the elevated status of the crime and its seriousness from the victim's perception.

The laws in all three jurisdictions contain a rather concise definition of what hate crimes are and no mention of the complex impact they have on a victim or degrees of damage, as well as an exhaustive list of factors indicating presence of bias. Addressing these issues is undertaken through additional

¹⁶¹ Christmann, Kris and Kevin Wong. "Hate crime victims and hate crime reporting: some impertinent questions" Chakraborti, Neil. *Hate crime : concepts, policy, future directions*. Portland, Or.: Willan, c2010, p. 199.

guidance or recommendations developed both in the US by the Federal Investigation Bureau of the Department of Justice and in the UK by the Crown Prosecution Service, as well as other Home Office Units. Requirements in these guidelines and manuals establish, among other things, the victim's position in relation to the necessity of proving certain facts based on the testimony, as well as provide an opportunity to impact the outcome of a court case through the mechanism of the Victim Personal Statement in the UK or the Victim Impact Statement in the US. In Ukraine, in the absence of the code of operation in the public domain, victims of hate crime are not only unaware of what their rights are if there are any specific entitlement, but are often denied the opportunity to express their concerns about the damage resulting from the crime.

However, issues remain even with trained officers and equipped police stations that concern the lack of confidence in police and under-reporting of incidents. The commitment to improving reporting includes the victim directly into the focus of attention of law enforcement, specifically what concerns the vulnerable community has and what ought to be done by the police to address problems impeding response to hate crimes. These call for development of programs and modifications in the service, as well as including the community directly into reporting scheme if the lack of confidence in police comes from a historical memory of discrimination coming from this institution. The same issue of discrimination takes different forms depending on the social context, including the over-policing of certain groups of populations infamous in the US, as well as lack of attention to racial attacks in the UK as revealed in the course of the Lawrence Inquiry.

Here, a connection exists between the victims' involvement in the process even in the absence of a comprehensive policy and prior to any changes in the law, and the outcomes leading to changes (for example, recommendations of the MacPherson Report) whereby the police is supposed to modify its actions based on the experience it provided to victims or their families in the first place. In Ukraine the

link of reporting and expecting an outcome is broken in the sense of lack of prospects of conviction and the lack of critical mass as victims are discouraged by previous responses from police.

In order to establish a link where this link might be broken, third parties may step in to bridge the gaps. The role of civil society here in the US and UK was not only providing assistance to victims, but first to voice the issue and direct efforts towards recognition of the problem. In addition, communities are able to mobilize internal resources to create a cause or respond to problematic issues. However, one concern here relates to the sustainability of such efforts, as well as the reduction of claims of victims as a result of lowering demands towards the state. In addition, there are risks associated with the fact that when civil society operates within the close cooperation with the state, certain functions of the state in the UK or the US, in the field of victim support or training, are delegated to civil society and the activities are done in accordance with these regulations, including operating on the basis of the government statistical data. If quality service is to be provided, the voice of victims and consideration of impacts of laws on them are necessary for maintaining a flexible enough and a responsive system.

To conclude, in countries where the existing legislation includes the range of groups that need recognition as those who suffer from violent forms of bias, there is a dynamics of development of services and consideration of further needs of the vulnerable groups of population, as examples of the United Kingdom and the United States show. Therefore, the stronger victim voice leads to a higher degree of consideration of the perspective of the victim in legislation and the following implementation by the state authorities. This enables other groups to voice their concerns as well, and use the tools of predecessors in the activities towards improvement of their situation. However, this works for the instances the legislation itself comes from the admission of the scope of the problem, and where the process is not going with a full participation of victims but rather through other channels, including international pressure, the results hardly benefit marginalized communities. As one suggestion, if the voice is not strong enough to be heard, there is a possibility of advancements if choosing a strategy of raising awareness about the issue in

different contexts, for instance in the context of issues that would attract more public support such as narratives calling to reduce violence or help victims of hate crime and their families just as other victims but with regard to the impact that hate crime brings.

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