

**The uncomfortable fit.**

**Hate crimes beyond the conventional typology – the study on gender-based  
violence and misogyny.**

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# TABLE OF CONTENTS

<i>Executive summary</i> .....	3
<i>Acknowledgments</i> .....	4
<i>Introduction</i> .....	5
<i>Chapter 1 The concept of hate crimes – why we punish the motive?</i> .....	11
1.1. The concept of hate crimes .....	12
1.2. Defining hate crimes. Is it all about hate?.....	14
1.3. The ECtHR’s case law on bias-motivated crimes .....	16
1.4. Special features justifying hate crime legislation .....	19
1.5. Two models of hate crimes. ....	21
<i>Chapter 2 Gender-based violence as a type of hate crime</i> .....	23
2.1. The history of women’s advocacy .....	25
2.2. International law combating violence against women .....	28
2.3. Gender as protected characteristics among EU Member States .....	35
2.4. Uncomfortable fit. ....	36
2.5. Fitting the hate crime paradigm .....	40
2.6. Common features between conventional hate crimes and VAW.....	45
2.6.1. More severe harm on individual. ....	45
2.6.2. Long-term impact on the victims’ lifestyle.....	46
2.6.3. Impact on the victim’s community. ....	47
2.6.4. Lack of provocation. ....	48

2.6.5. Interchangeability of victims. ....	49
<b><i>Chapter 3 The legislative process – the examples of England and Wales and Italy .....</i></b>	<b><i>52</i></b>
<b>3.1. Violence against women - England and Wales .....</b>	<b>52</b>
<b>3.1.1. Gender as a protected characteristic within hate crime law.....</b>	<b>53</b>
3.1.2. Methodology – the three-step test .....	55
3.1.3. Demonstrable need.....	56
3.1.4. Additional harm.....	58
3.1.5. Sustainability .....	59
<b>3.2. Violence against women – Italy .....</b>	<b>63</b>
3.2.1. Gender as a protected characteristic within hate crime law .....	65
3.2.2. The analyzes of the Zan Bill.....	65
3.2.3. Concerns on the extended protection .....	68
<b><i>Conclusions .....</i></b>	<b><i>70</i></b>
<b><i>Bibliography .....</i></b>	<b><i>73</i></b>

## EXECUTIVE SUMMARY

The raising awareness of the prevalence of violence against women and its sources in the historically entrenched dominance-subordination relationship between genders more and more often put gender-based violence onto the agenda of national parliaments and international organizations. This adverse phenomenon, both quantitatively and qualitatively, and a new surge of bias-motivated crimes caused by the pandemic launched another discussion of the potential role of hate crime laws in combating violence against women. The ultimate purpose of the present research is to examine the defining characteristics of hate crimes laws and normative legitimacy for their special status within the criminal justice system. Furthermore, the paper scrutinizes if the general findings correspond with the characteristics of violence against women and makes an attempt to answer the research question of whether gender-motivated and misogynistic crimes might fit within the hate crime paradigm. Moreover, the paper scrutinizes the presence of *gender* and *sex* among European hate crime regulations and analyzes the legal and pragmatic aspects of the ongoing legislative procedures in England and Wales and Italy aimed at extending the hate crime protection to women.

**Key words:** hate crimes, bias-motivated crimes, violence against women, gender-based violence, domestic violence, sexual assaults.

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## INTRODUCTION

The COVID-19 outbreak led to a new surge of racist and xenophobic attacks and caused a 145% spike in hate crimes against Asian Americans in the United States. Out of 6603 cases reported between March 2020 and March 2021, 64.8% targeted women.<sup>1</sup> The high prevalence of recent racist and xenophobic incidents has also been observed in Europe.<sup>2</sup> The data shows that extraordinary circumstances and extreme emotions during the pandemic exposed rooted within societies prejudice towards discriminated groups. The alarming tendency, both quantitatively and qualitatively, launched another discussion of the potential role of hate crime laws in combating bias-motivated crimes called "the ugly poison that has long haunted and plagued our nation"<sup>3</sup> and led to the implementation of the COVID-19 Hate Crime Act in the United States. Moreover, the European Commission highlighted the need for the European Union's harmonized criminal law response against hate speech and hate crime while announcing the roadmap of the proposal to include those offenses into the EU crimes list under Article 83(1) TFUE in the fourth quarter of 2021.<sup>4</sup> Currently, the proposed legislations serve as an *ad hoc* solution to the crisis but also as strong symbolic condemnation of such undesirable in democratic societies behaviors. Nevertheless, current developments and the ongoing

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<sup>1</sup> Russell Jeung, Aggie J. Yellow Horse, and Charlene Cayanan, "Stop AAPI Hate National Report" (Stop AAPI Hate, 2021), 5, <https://stopaapihate.org/wp-content/uploads/2021/05/Stop-AAPI-Hate-Report-National-210506.pdf>.

<sup>2</sup> "Coronavirus Pandemic in the EU – Fundamental Rights Implications" (The European Union Agency for Fundamental Rights, (2020), 33–35.

<sup>3</sup> Remarks by President Biden at Signing of the COVID-19 Hate Crimes Act, 20 May 2021, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/05/20/remarks-by-president-biden-at-signing-of-the-covid-19-hate-crimes-act/>.

<sup>4</sup> Communication of 23 February 2021 from the Commission to the European Parliament and the Council, "Extension of the List of EU Crimes to Hate Speech and Hate Crime" (Ref. Ares (2021)1431474, 2021).

discussion on the nature of discriminatory attacks may contribute to unlocking the full potential of hate crime legislation.

The conventional typology of hate crimes includes crimes against a person or property motivated partially or entirely by the perpetrator's bias or prejudice against race, ethnicity, nationality, and religion. However, in recent years, more and more states decide to go beyond the typical definition and complete it with offenses motivated by bias against sexual orientation, gender identity, age, sex, or disability. It is disputed both in literature and public debate whether those victims' characteristics fit into the hate crime paradigm and should be classified as such.<sup>5</sup> Civil rights advocacy has been playing a crucial role in recognizing one protected characteristic over the others.<sup>6</sup> Although there is still some resistance, sexual orientation and transgender identity seem to be more commonly accepted as protected grounds that justify heavier punishment for perpetrators, while the broader category of gender continues to be marginalized.<sup>7</sup> Postulates to include gender-based violence and misogyny in hate crimes legislation have been raised since the beginning of the phenomenon and are brought into the debate more frequently recently due to the rapid development of feminist movements in the last thirty years. Notably, strong women's movements focused on combating violence against

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<sup>5</sup> Neil Chakraborti and Jon Garland, *Hate Crime Impact, Causes & Responses*, 2nd ed. (SAGE Publications Ltd, 2015), 10.

<sup>6</sup> Paul Giannasi, "Policing and Hate Crime," in *Responding to Hate Crime: The Case for Connecting Policy and Research* (Bristol: The Policy Press, 2015), 331–42.

<sup>7</sup> Amanda Haynes and Jennifer Scheppe, "Should Hate Crime Legislation Include Misogynistic Crimes?," *American Psychological Association*, 2020, 278.



women are visible across the world, as exemplified by the #metoo movement breaking the taboo on admitting sexual abuse and forcing authorities to introduce changes.<sup>8</sup>

The ultimate purpose of the present research is to examine the defining characteristics of hate crimes laws and normative legitimacy for their special status within the criminal justice system. Furthermore, the paper scrutinizes if the general findings correspond with the characteristics of violence against women and makes an attempt to answer the research question of whether gender-motivated and misogynistic crimes might fit within the hate crime paradigm. The claims found in this paper have been presented from the socio-legal perspective and inspired by the radical feminists' theories which allowed to unveil the correlation between discriminatory gender structures at the macro-level and the power-subordination relationships resulting in violence at the micro-level. The conclusions have been drawn from statistical data, comparative legal research, and national and international reports on a given issue. Due to the interdisciplinary nature of the problem of hate crimes and violence against women, the research required references to the achievements of criminology, sociology, psychology, and political science, especially for the examination of the perpetrator's motive, victimization, and the broader consequences of hate crimes for the society. Because of its European focus, the paper could not ignore the great importance of the case law provided by the European Court of Human Rights in ensuring protection and equal treatment for the most vulnerable. The paper consists of three chapters which have been summarized below.

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<sup>8</sup> See: e.g. Tara Sepehri Far, "Human Rights Watch, Iran Is Having a #Metoo Movement," *Human Rights Watch*, 2020, <https://www.hrw.org/news/2020/09/09/iran-having-its-metoo-moment>.

The first chapter critically examines the concept of hate crimes and depicts two cumulative elements needed for the hate crime to occur, namely a base offense and a bias motive. Therefore, the normative approach is introduced in the analysis of defining characteristics of hate crimes. Furthermore, the paper scrutinizes the perpetrator's *animus* to support the hypothesis that the phenomenon of hate crimes is firmly rooted in the relationship of power, control, and subordination between particular groups within society, and such regulations shall aim not only at more severe criminal punishments but also at reshaping discriminatory structures and moral boundaries that sustain this social hierarchy. Moreover, it is argued that the hate crime legislation shall not be solely limited to extreme cases of offenses committed out of hatred towards the particular group but rather should place the discriminatory motive within the broader category of bias and prejudice. Furthermore, the chapter examines the European Court of Human Rights case law on establishing the threshold of protection for the most vulnerable victims and deriving a separate procedural duty to investigate and unmask discriminatory motives based on Article 14 of the Convention (prohibition of discrimination). Finally, the chapter distinguishes two models of hate crime legislations and presents special features of bias-motivated crimes which justify the existence of such laws.

The second chapter is designed to demonstrate the adverse phenomenon of violence against women and its common global patterns. Moreover, the findings on the legal systems currently including *gender* or *sex* under their hate crime legislation within the European Union are presented. Furthermore, based on the radical feminists' theories, it is argued that gender-based violence, identically as hate crimes, is firmly rooted in the relationship of power and control between the social groups. Both normative and empirical research methods have been used to examine previously identified special features of hate crimes, including more severe harm on

an individual, long-term impact on the victims' lifestyle, impact on the victim's community, lack of provocation, and interchangeability of victims. Ultimately, the chapter conducts a comparative study on characteristics common for bias-motivated offenses and violence against women and makes an attempt to answer the research question of whether gender-motivated crimes fit within the hate crime paradigm.

The third chapter completes the theoretical examination of the research problem with case studies. It conducts a legal analysis of ongoing legislative processes and public discourse on introducing crimes motivated by gender and sex to the hate crime definition in selected European countries, i.e., England and Wales and Italy. The chapter presents the legislative techniques and methodology proposed by the national parliaments. The potential benefits and legal and pragmatic concerns about such regulation have been identified and presented.

Due to the limited scope of this paper, the research focuses on the European context, with particular emphasis on the states currently discussing extending hate crime legislation beyond its conventional typology. Nevertheless, many states, inside and outside Europe, have never reached the point even to debate expanding hate crime definitions due to the illiberal tendencies and widespread populism across the globe. Moreover, it should be emphasized that gender-based violence is often even a greater problem outside of Europe. Furthermore, the paper narrowed down the scope of the research to the power-subordination relation between male perpetrators and female victims due to the overwhelming scale of such violence, quantitatively exceeding any other type of hate crime. Nevertheless, the proposed feministic approach that gender-based violence results from the patriarchal structure of societies and male hegemony over women cannot be blind to violence occurring in non-heteronormative and non-binary

contexts; however, the scale of violence against women in a given context is immeasurably greater.

## CHAPTER 1

### THE CONCEPT OF HATE CRIMES – WHY WE PUNISH THE MOTIVE?

Although the adverse phenomenon of bias-motivated crimes has been known for centuries, the modern era of hate-crime legislation was launched by the US Congress only in 1968.<sup>9</sup> Since then, most democratic states have increasingly responded to such criminal offenses by introducing hate crime laws into their legislation. The main characteristic of hate crime offenses is the reprehensible motive of a perpetrator based on his or her bias or prejudice towards particular - actual or perceived - features of the victim's identity. The hate crimes legislation during the criminal process results in classifying "ordinary" crimes as separate and aggravated offenses punishable by a higher sentence. Moreover, such laws serve as a symbolic political expression of the condemnation of, *inter alia*, racist and xenophobic behaviors within society. "Hate crime laws are thus engaged in a process of *re-moralization* that seeks to challenge the norms and moral boundaries that sustain racial, religious, sexual and other hierarchies of difference."<sup>10</sup> Therefore, the phenomenon of hate crimes is firmly rooted in the relationship of power and control between particular groups in society, and a special criminal law approach aims at re-shaping discriminatory structures and attitudes. The chapter identifies and critically examines defining characteristics of hate crimes and their legitimacy for special status within the criminal justice system.

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<sup>9</sup> Thomas Streissguth, *Hate Crimes* (Library of Congress Cataloging, 2003), 3.

<sup>10</sup> Gail Mason, *The Symbolic Purpose of Hate Crime Law: Ideal Victims and Emotion* (Theoretical Criminology, 2014), 74.

### 1.1. The concept of hate crimes

The concept of hate crimes has no uniform definition, neither in doctrine nor international or national laws. The OSCE Office for Democratic Institutions and Human Rights (hereinafter referred to as ODIHR) developed the most frequently cited working definition, which describes hate crimes as “criminal acts committed with a bias motive.”<sup>11</sup> For a hate crime to occur, there must be two cumulative elements: an act that constitutes a criminal offense under ordinary domestic criminal law called - following ODIHR - a "base offense," as well as a particular motive-bias of the perpetrator.<sup>12</sup> Similarly, the two-elements definition has been included in the 1990 Hate Crimes Statistic Act (hereinafter referred to as HCSA), the first US federal statute to recognize and name gay, lesbian, and bisexual people. The HCSA has been amended in 2009 by the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act by the inclusion of gender and gender identity in the catalog of protected characteristics and obliged the Attorney General to collect data on crimes that manifest evidence of prejudice based on race, gender and gender identity, religion, disability, sexual orientation, or ethnicity.<sup>13</sup>

In regard to the first compulsory element of a hate crime, minor differences between what is criminalized under the domestic penal codes might cause that the scope of hate crimes varies from state to state, even if the introduced legal definitions are the same. It is particularly important in cases of hate speech. As long as the offensive speech is protected under the

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<sup>11</sup> Office for Democratic Institutions and Human Rights, “Hate Crime Laws: A Practical Guide” (Organization for Security and Co-operation in Europe, 2009), 16.

<sup>12</sup> Office for Democratic Institutions and Human Rights, 16.

<sup>13</sup> “Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act,” Pub. L. No. 28 U.S.C., Section 1 (b) (1), § 534 (2009).

constitutional guarantee to freedom of expression and the legislator has not introduced an exception limiting this freedom, such an act cannot be considered as a hate crime, even if bias or prejudice is evident. In such cases, the doctrine developed the term *hate incidents* describing clearly offensive and motivated by manifest bias actions, which, however, do not constitute a criminal offense.<sup>14</sup> To exemplify, a distribution of anti-Semitic pamphlets would not be considered an offense unless the conduct would fall into a legal definition of incitement to hatred, and in a case of lack of hate crime laws, at most into a littering offense. Identically, wearing a T-shirt with a racist slogan would not be criminalized unless under national criminal law it falls within the scope of the prohibition to incite hatred based on race.

Nevertheless, law enforcement may interpret hate speech as a bias indicator of a suspected hate crime while identifying the legal prerequisites of the perpetrator's *animus*. Indeed, the biased motive is often proven exclusively by the perpetrator's speech which raises controversy whether aggravation of the convictions based nearly solely on constitutionally protected activities does not penalize the activity itself.<sup>15</sup> Freedom of expression as an essential foundation of democratic societies can be limited and criminalized only exceptionally and under strict conditions. Nonetheless, while identifying bias indicators throughout hate speech, hate crime laws would lead to an aggravated sentence because of the reprehensible motive of the committed base offense and not the speech itself. Furthermore, the presence of bias indicators does not automatically prejudge the occurrence of hate crimes. Each case should be considered on a case-to-case basis, and the final decision is left with a judge. The significance

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<sup>14</sup> Chakraborti and Garland, *Hate Crime Impact, Causes & Responses*, 6.

<sup>15</sup> Phyllis B. Gerstenfeld, *Hate Crimes: Causes, Controls, and Controversies*, 4th ed. (SAGE Publications Ltd, 2017), 52.

of speech in hate crimes can be exemplified by the recent event in the United States. Although George Floyd's, an African-American man murder by Minneapolis white police officer, has been viewed by many as a result of systematic racism, the prosecution could not charge Derek Chauvin for a murder based on a racial motive because of lack of explicit evidence that his actions as an individual were factored in the victim's race. Consequently, the evidentiary process of identifying the biased animus significantly limits the scope of hate crime.

However, it is the second element of bias motive that differentiates hate crimes from ordinary crimes. "This means that the perpetrator intentionally chose the target of the crime because of some protected characteristic."<sup>16</sup> Such characteristics - actual or only perceived by the perpetrator – compose an essential element of the targeted person's identity that cannot be simply detached or hidden, making the mitigation of the vulnerability almost impossible.<sup>17</sup>

### **1.2. Defining hate crimes. Is it all about hate?**

The term *hate crime*, although relatively new, has been commonly used in legal terminology, mass media, and public discourse. Nevertheless, the unified legal definition has not yet been developed. However, "the most credible definitions are consistent in referring to broader notions such as prejudice, hostility or bias as key factors."<sup>18</sup> "Hate crimes can be the result of hatred but also stem from a perpetrator's stereotypical views of their victim and the community they represent, resentment, a desire to punish that victim and their community for alleged transgressions, feelings of power and control, a need to keep victims and their communities in

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<sup>16</sup> Gerstenfeld, 16.

<sup>17</sup> Carolyn Turpin-Petrosino, *Understanding Hate Crimes: Acts, Motives, Offenders, Victims, and Justice* (Routledge, 2015), 4.

<sup>18</sup> Chakraborti and Garland, *Hate Crime Impact, Causes & Responses*, 15.



their place, a need for a thrill or adventure, the need to affirm masculinity and male bonds, and from multiple motives, and from motives the perpetrator may not even be aware of himself.”<sup>19</sup>

Therefore, using the term *hate* crime creates an impression of a higher threshold for the perpetrator's motive than the one requisite by the legal definitions. Moreover, the ODIHR's findings confirm that bias does not have to manifest itself as hate towards the victim or victim's group to be classified as a hate crime, nor does hate have to be the only and primary motive.<sup>20</sup> Consequently, recognizing bias-motivated crimes as only those driven by hatred may significantly reduce the scope of application of hate crime laws solely to extreme cases while such acts are predominantly committed by common, ordinary individuals and not by extremists.<sup>21</sup> The effect can be misleading regarding the legal nature of hate crimes that “are not really about hate, but about bias and prejudice.”<sup>22</sup> According to implicit bias theory, biases carrying by all people, even if subconsciously, underline their behaviors and judgments including those within the criminal justice system.<sup>23</sup> Hate-prejudice can be characterized as “an enduring organization of aggressive impulses toward a person or towards a class of persons. Since it is composed of habitual bitter feeling and accusatory fault it constitutes a stubborn structure in the mental-emotional life of the individual.”<sup>24</sup> Prejudice can also be understood as a “learned behavior”<sup>25</sup> that might be rooted in the historical and cultural social structures based

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<sup>19</sup> Beverly A Mcphail, “Gender-Bias Hate Crimes,” *University Of Texas at Austin*, n.d., 127.

<sup>20</sup> Office for Democratic Institutions and Human Rights, “Hate Crime Laws: A Practical Guide,” 16.

<sup>21</sup> Paul Iganski, “*Hate Crime*” and the City (Bristol: Policy Press, 2008), 42.

<sup>22</sup> James. B. Jacobs and Kimberly Potter, *Hate Crimes Criminal Law & Identity Politics* (New York: Oxford University Press, 1998), 11.

<sup>23</sup> Tryon P. Woods, “The Implicit Bias of the Implicit Bias Theory,” *Drexel Law Review* 10, no. 3 (2017): 635.

<sup>24</sup> Gordon Allport, “The Nature of Prejudice,” in *Hate Crimes Criminal Law & Identity Politics*, 1998, 12.

<sup>25</sup> Allport, 12.

on intergroup tensions, conflicts, and stereotypes. It is particularly relevant to understand the complex nature of bias-motivated crimes. Each time the question should be raised whether, under similar circumstances, a base offense would have been committed if the victim did not possess a differentiating characteristic.

On the other side, it has been argued that the solid negative overtone of the term *hate crime* is appropriate from the victim's standpoint due to the profoundly personal nature of hate crimes which, apart from the harm caused by the experienced attack itself, constitute a message to the victims. The message conveys the information that the targeted person and the group she or he belongs to are not entitled to enjoy the right to liberty, human dignity, or personal security on an equal footing with other members of society, only because of the possessed characteristic. Thus, the alternative term "bias crime," "that is more clinical and dispassionate than *hate crime*, which is more reflective of the harm caused,"<sup>26</sup> might be too lenient and consequently diminish the gravity of victimization. Nevertheless, this paper uses the terms *hate*, *bias*, and *prejudice* interchangeably when appropriate, with the preference for words *bias* and *prejudice* due to the primary legal focus of this research and the *lege ferenda* postulates for broader use of the legislation in question.

### 1.3. The ECtHR's case law on bias-motivated crimes

The European Court of Human Rights has played a crucial role in establishing the protection threshold for the most vulnerable victims. The significant findings on the Member States' positive obligation to effectively investigate the discriminatory violence have been derived from the *Menson and Others v. UK* case. The case concerned the lethal attack of a racist gang

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<sup>26</sup> Turpin-Petrosino, *Understanding Hate Crimes: Acts, Motives, Offenders, Victims, and Justice*, 15.

that set a black man on fire, followed by a flawed investigation of the Metropolitan Police Service (MPS). In the context of discriminatory motive, the Strasbourg Court underlines that “where an attack is racially motivated, it is particularly important that the investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society’s condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.”<sup>27</sup> The Court further built on this approach in *Nachova and Others v. Bulgaria*. The case concerns the military police officer who killed two Bulgarian nationals of Roma origin during the attempt to arrest them. The applicants alleged a violation of Article 14 of the Convention (*prohibition of discrimination*), stating that prejudice and hostile towards victims of Roma origin had played a role in the events leading to their deaths,<sup>28</sup> however, the Court had found no violation of the prohibition of discrimination due to the lack of sufficient evidence. Nevertheless, the Court concluded that “the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment”<sup>29</sup> and derived from Article 14 of the Convention a separate procedural duty to investigate and unmask racial motives. In regard to religious bias, in *Milanović v. Serbia*, the Court stated that “treating religiously motivated violence and brutality on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”<sup>30</sup>

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<sup>27</sup>Menson and Others v. UK, No. 47916/99, Decision as to the admissibility (European Court of Human Rights, May 6, 2003), para 13-14.

<sup>28</sup> *Nachova and Others v. Bulgaria*, No. 43577/98 and 43579/98 (European Court of Human Rights, July 6, 2005), para 124.

<sup>29</sup> *Nachova and Others v. Bulgaria*, para 145.

<sup>30</sup> *Milanović v. Serbia*, No. 44614/07 (European Court of Human Rights December 14, 2010), para 96-97.

The Strasbourg case law goes beyond crimes committed out of racial, ethnic, or religious hatred and expands the requirement of special attention in unmasking biased motives to crimes driven by prejudice against persons with disabilities or political views.<sup>31</sup> Nevertheless, verifying discriminatory motive beyond the reasonable doubt under Article 14 of the Convention in practice is very problematic. In *Đorđević v. Croatia*, despite the lack of in-depth analysis of the applicants' discriminatory allegations because effective domestic remedies have not been exhausted, the Court stated that Croatian authorities failed to take all reasonable measures to prevent recurring and progressively more severe abuse of a disabled applicant by a group of minors.<sup>32</sup> Regarding bias against political views, in *Virabyan v. Armenia*, the ECtHR ruled that the State is obliged to "take all reasonable steps to unmask any political motive and to establish whether or not intolerance towards a dissenting political opinion may have played a role in the events"<sup>33</sup> and found a violation of Article 3 (*prohibition of torture*) due to the ill-treatment in police custody. Nevertheless, the same as in the *Nachova* case, the Court concluded that it could not be ruled out that the ill-treatment caused by the police was driven by reasons other than the applicant's political views.<sup>34</sup>

The Court has come a long way in its jurisprudence to provide adequate protection to the LGBTI + community. In the *Identoba and Others v. Georgia* case the participants of the

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<sup>31</sup> Judit Bayer and Petra Bárd, "Hate Speech and Hate Crime in the EU and the Evaluation of Online Content Regulation Approaches" (Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, 2020), 45, PE 655.135.

<sup>32</sup> *Dordevic v. Croatia*, No. 41526/10 (European Court of Human Rights July 24, 2012), para 149.

<sup>33</sup> *Virabyan v. Armenia*, No. 40094/05 (European Court of Human Rights October 2, 2012), para 218.

<sup>34</sup> *Virabyan v. Armenia*, para 212-217.

peaceful demonstration on the International Day against Homophobia in Tbilisi has been assaulted by counter-demonstrators. The Court ruled that there has been a violation of Article 3 taken in conjunction with Article 14 of the Convention due to the State's failure to protect peaceful demonstrators from homophobic violence and conduct an effective investigation. The Court recognized sexual orientation and gender identity as protected characteristics and an aggravating factor and concluded that the hostile attitude and the homophobic hate speech during the demonstration should have triggered a bias-focused investigation, especially because Georgia recognized those characteristics within its domestic hate crime legislation.<sup>35</sup> Moreover, the ECtHR highlighted the importance of unmasking the discriminatory motive by stating that “without such a strict approach from the law-enforcement authorities, prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes.”<sup>36</sup> The Court once again confirmed this approach in the recent *Association ACCEPT* judgment, where the ECtHR found a violation of Article 14 taken in conjunction with Article 11 and Article 8.<sup>37</sup>

#### **1.4. Special features justifying hate crime legislation**

Hate crimes are considered not only as a direct attack on the individual but also as a message that a victim with its particular core identities is not a fully valuable member of society and, as such, should be subordinated to the group represented by the perpetrator. “The power relation and social hierarchy between the groups are often rooted in a long history of discrimination,

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<sup>35</sup> *Identoba and Others v. Georgia*, No. 73235/12 (European Court of Human Rights May 12, 2015), para 76-78.

<sup>36</sup> *Identoba and Others v. Georgia*, para 77.

<sup>37</sup> *Association ACCEPT and Others v. Romania*, No. 19237/16 (European Court of Human Rights June 1, 2021).

oppression and cruelty towards the minority.”<sup>38</sup> Consequently, bias-motivated attacks cause more severe effects than parallel offenses and have a long-term impact on the victims’ lives.<sup>39</sup> It is a consequence of the victim’s great sense of vulnerability and constant fear because usually, the bias-motivated behaviors do not require any provocation or even previous interaction with the perpetrator. It is argued that hate crime victims are interchangeable because the perpetrator’s choice is random and solely based on the victims’ specific characteristics as targeted group members rather than their personal features. Nevertheless, in practice, such an approach might limit the scope of hate crimes only to offenses committed by strangers in public space. Moreover, the special legislation of crimes motivated by bias or prejudice is justified due to their extended impact on the victims’ group and the whole society. Thus, hate crimes have consequences, both in qualitative and quantitative terms, that set them apart from other crimes, which justifies a distinct legal approach.<sup>40</sup>

The direct result of the hate crime legislation in the criminal process is the classification of the base offense as an aggravated one, punishable by a higher sentence. Additionally, the hate crimes legislation means that judges are obliged to consider discriminatory circumstances of the case. The indirect result should include a special treatment of hate crime cases in all areas of the criminal justice system with the main objectives to increase the conviction rates and avoid secondary victimization of members of the most vulnerable groups.<sup>41</sup> What is significant, such a separate category of offenses often compels the authorities to keep a record on bias-

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<sup>38</sup> Jack McDevitt, Jack Levin, and Susan Bennett, *Hate Crime Offenders: An Expanded Typology*, vol. 58(2) (Journal of Social Issues, 2002), 306.

<sup>39</sup> Jacobs and Potter, *Hate Crimes Criminal Law & Identity Politics*, 81–91.

<sup>40</sup> Office for Democratic Institutions and Human Rights, “Hate Crime Laws: A Practical Guide,” 19.

<sup>41</sup> Sylvia Walby and et al., *Stopping Rape: Towards a Comprehensive Policy* (Bristol: Policy Press, 2015), 128.

motivated crimes, which is a crucial step forward identifying, recognizing the scale, and addressing the problem with adequate and strategic policies and laws.<sup>42</sup>

### **1.5. Two models of hate crimes.**

Considering the characteristics of bias-motivated crimes presented above and differences among national legal definitions, two hate crimes models in the spectrum of various approaches can be distinguished. The first model restrains hate crime laws solely to an aggravating factor and recognizes the interchangeability of victims as a defining feature of hate crimes. In this model, the perpetrator randomly selects previously unknown victims, driven solely by hatred towards the protected characteristics they possess. Moreover, "the mere existence of hateful thoughts and emotions on the offenders' part towards their victims, even when hatred is the only motive of the crime, does not suffice to qualify the offense as a hate crime. What is needed, instead, is a connection between the offense and the offender's hostility towards a certain social group or towards an individual for its membership in that group." Consequently, the model excludes crimes committed by the victim's acquaintance, focusing on strangers-perpetrators in public space and limits the hate crime legislation only to borderline cases of extreme and blatant prejudice towards the protected group. The second model is based on the assumption that hate crimes result from a historically rooted discriminatory hierarchy between particular groups. In this model, the interchangeability of victims might - but does not have to - appear for the offense to be classified as a hate crime. The model presents a holistic approach toward the crimes committed out of bias or prejudice and aims at re-shaping discriminatory structures

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<sup>42</sup> For example, out of 8559 hate crimes reported by the police in 2018 in the USA, only 27 cases have been prosecuted, of which 20 ended up with the sentence See: OSCE/ODIHR, "Hate Crime Reporting," 2019, <https://hatecrime.osce.org/united-states-america>.

through, next to criminal provisions, training for law enforcement and judges, accessible reporting system, procedural facilitation, and adequate victims-support services.<sup>43</sup>

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<sup>43</sup> See: e.g. EStAR project, ODIHR, <https://www.osce.org/odihr/hate-crime-victim-support>.



## CHAPTER 2

### GENDER-BASED VIOLENCE AS A TYPE OF HATE CRIME

Violence against women is a global phenomenon marked by World Health Organization as “a major human rights violation and a widespread public health concern.”<sup>44</sup> Worldwide, one in three women at the age of 15 or older have experienced physical and/or sexual violence, with the most frequent attacks coming from intimate partners.<sup>45</sup> The global ratio of such violence parallels the statistics from the European Union, where 33% of women have experienced physical or sexual violence.<sup>46</sup> Nonetheless, gender-based violence includes not only psychical or sexual abuse but also the forms of violence that are predominantly or solely directed against women, such as trafficking of girls and women, forced prostitution, or female genital mutilation. The extensive list of gender-specific crimes outlines the endemic proportion of the problem. Although the overwhelming scale of the phenomenon is commonly known, all major international organizations working on women’s rights highlight the lack of comprehensive and comparable data, which preclude the development of an adequate and effective policy and laws aimed at preventing and combating violence against women.<sup>47</sup>

Nevertheless, the rapid development of feminist movements in the last three decades significantly improved the discussion dynamic on gender-based violence worldwide. Despite

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<sup>44</sup> World Health Organization, “Violence Against Women Prevalence Estimates, 2018 Global, Regional and National Prevalence Estimates for Intimate Partner Violence against Women and Global and Regional Prevalence Estimates for Non-Partner Sexual Violence against Women.” (Geneva, 2021), 1.

<sup>45</sup> World Health Organization, 16.

<sup>46</sup> “Violence against Women: An EU-Wide Survey” (European Union Agency for Fundamental Rights), 21.

<sup>47</sup> “Violence against Women: An EU-Wide Survey,” 9.

the “north-south tensions” within those movements caused by different focuses and priorities of feminists, depending on their origins, violence against women became a common denominator for women around the globe.<sup>48</sup> The women’s disproportionate vulnerability to violence committed by men turned out to be universal regardless of nationality, religion, or culture. The phenomenon has been exemplified by the #metoo movement creating a global “feminists network against rape culture, misogyny, and harassment.”<sup>49</sup> The women’s experience of abuse, in a slow and arduous process, stops being perceived as shameful and dishonorable, especially among women themselves. Consequently, women consistently become more and more vocal about their experience, and their voices play a crucial role in putting gender-based violence onto the agenda of national parliaments and international organizations.

The above-mentioned developments have raised awareness on gender violence being “deeply rooted in cultural understandings of gender and power”<sup>50</sup> and often results from society’s historically entrenched patriarchy. The approach previously expressed only by radical feminists gained more global representation. The growing focus on gender-based violence not solely as a private matter but as a problem with a similar pattern globally has demonstrated the link between violence against women and hate crimes. The discussion on the nature of this link, however, remains stormy and controversial. Despite the general condemnation of violence

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<sup>48</sup> Luciana Goisis, “Hate Crimes in a Comparative Perspective. Reflections on the Recent Italian Legislative Proposal on Homophobic, Gender and Disability Hate Crimes,” *GenIUS Rivista Di Studi Giuridici Sull’orientamento Sessuale e l’identità Di Genere*, no. ISSN 2384-9495 (2020): 170.

<sup>49</sup> Kaitlynn Mendes, Jessica Ringrose, and Jessalynn Keller, “#MeToo and the Promise and Pitfalls of Challenging Rape Culture through Digital Feminist Activism,” *European Journal of Women’s Studies* 25, no. 2 (2018): 237.

<sup>50</sup> Merry Sarry Engle, *Gender Violence: A Cultural Perspective* (Wiley-Blackwell, 2009), 16.

against women and first binding international instruments against this adverse phenomenon, national legislations remain reluctant in classifying gender as a protected characteristic within their hate crime regulations. The question at stake is not only if gender fits within the hate crime paradigm but also if such legislation could effectively bring change to women taking into consideration the remarks made in Chapter 1. Despite the doubts, a recent tendency shows that more and more states decide to use hate crime legislation as a tool in combating violence against women. The following chapter examines defining characteristics of hate crimes and justifications for their special status within the criminal justice system identified in the previous section and conducts a comparative study on characteristics common for bias-motivated offenses and violence against women in order to answer a normative question of whether gender-based crimes fit within this doctrinal framework. The arguments of both sides of the ongoing discourse will be presented. Furthermore, the chapter scrutinizes the existing European legislation and attempts to assess whether the inclusion of *gender* within hate crime laws might be desirable and effective in combating such violence and challenging the patriarchal environment providing social acceptance for it. As determined above, due to the limited scope of this paper, the research has been narrowed down to the power-subordination relation between male perpetrators and female victims due to the overwhelming scale of such violence, quantitatively exceeding any other type of hate crime.

## **2.1. The history of women's advocacy**

It is argued that the discussion on the inclusion of gender-based violence into hate crime legislations appeared only recently, and feminist movements have opposed such a solution in the past.<sup>51</sup> However, the legislative history of the US Hate Crime Statistic Act of 1990 (hereinafter referred to as the HCSA), considered as a milestone in hate crime legislation, does

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<sup>51</sup> Neil Chakraborti, *Hate Crime: Concepts, Policy, Future Directions* (Willian Publishing, 2010), 73.

not support these claims. Already in 1985, the women's advocacy groups argued that men immensely victimize women who frequently face gender-specific types of violence, such as rapes, which are "overwhelmingly a crime of one gender against the other."<sup>52</sup> At the HCSA hearing in 1988, Molly Yard, then-president of the National Organization for Women, submitted a statement describing many parallels between hate crimes and violence against women from misogynistic roots of such violence to the role of rape and domestic violence in political oppression aimed at preserving men's subordination over women.<sup>53</sup> Moreover, it has been argued that "while national statistic is kept on the incidence of rape and domestic violence, categorization of such crimes as hate crimes is necessary for law enforcement personnel, legislators, educators, and the public at large to truly understand not just the full scope and complexity of the problem but the motivation behind these crimes."<sup>54</sup> Nevertheless, the Coalition on Hate Crimes Prevention sponsoring the HCSA, composed of civil rights, religious, gay and lesbian, and ethnic groups (notably, without a group representing women's rights *sensu stricto*), unanimously rejected the proposal. It has been asserted that violence against women "is so prevalent that its inclusion would overwhelm the other species of hate crime,"<sup>55</sup> and in this way, hate crime laws would lose their symbolic power. Further arguments included concern that the scale of violence against women would overwhelm the collecting data system, and inclusion would encourage other groups, such as the elderly and people with disabilities, to raise the same claims. Another rationale for excluding gender, the only doctrinal rather than

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<sup>52</sup> Elizabeth A. Pendo, "Recognizing Violence against Women: Gender and the Hate Crimes Statistics Act," *Harvard Women's Law Journal* 17 (1994), 165.

<sup>53</sup> Beverly A. McPhail, "GENDER-BIAS HATE CRIMES: A Review," *Trauma, Violence & Abuse, Sage Publications Ltd* 3, no. 2 (2002): 128.

<sup>54</sup> Statement of Moly Yard, President of the National Organization for Women, Senate Hearing before the Subcommittee on the Constitution of the Committee of the Judiciary on 21 June 1988, 100th Congress, Session 264 [in] Jacobs and Potter, *Hate Crimes Criminal Law & Identity Politics*, 73.

<sup>55</sup> Jacobs and Potter, 73.

pragmatic one, stated that violence against women is qualitatively different from other types of hate crimes because a substantial majority of victims have been previously acquainted with their offenders. Therefore, it goes against one of the “traditional” characteristics of hate crimes, namely, victims’ interchangeability.

Despite the failure to include gender into the Hate Crime Statistic Act, the women’s advocacy group successfully lobbied for the Violence Against Women Act of 1994 (hereinafter referred to as VAWA). The VAWA included several provisions representing the holistic approach to combating violence against women, *inter alia*, by providing training and education for law enforcement representatives and improving victims’ support services. Moreover, the Act introduced a landmark from the global perspective of fledgling VAW legislation, provision considering crimes motivated by gender not only as an individual act of violence but also as a form of discrimination against women.<sup>56</sup> In the same year, gender was included in the Hate Crimes Sentencing Enhancement Act of 1994 (hereinafter referred to as the HCSEA). Currently, the federal US law includes race, color, religion, national origin, gender, sexual orientation, gender identity, and disability, among protected characteristics within the hate crime definition.<sup>57</sup> Moreover, 28 out of 49 States included *gender* or *sex* (15 and 12 States, respectively)<sup>58</sup> as one of the protected grounds.

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<sup>56</sup> Julie Goldscheid and Susan Kraham, *The Civil Rights Remedy of the Violence Against Women Act*, 29(5) (Clearinghouse Review, 1995), 505.

<sup>57</sup> 18 United States Code Section 249 Hate Crime Acts (Public Law 111-84, 3 January, 2012), <https://www.govinfo.gov/content/pkg/USCODE-2011-title18/pdf/USCODE-2011-title18-partI-chap13-sec249.pdf>.

<sup>58</sup> A definition of hate crimes in Georgia includes both gender and sex.

## 2.2. International law combating violence against women

Although the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter referred to as the CEDAW) does not contain any specific provision on violence against women and/or domestic violence, the Convention addresses the problem indirectly by drawing the framework of measures invested in gender equality and tackling gendered stereotypes, laws, and practices which make such violence acceptable or justified. Nevertheless, the gravity of the problem of violence against women globally needed to be recognized. Eventually, the Committee addressed the issue by interpretation of the CEDAW in General Recommendation No. 19, stating that „gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on the basis of equality with men.”<sup>59</sup> Moreover, General Recommendation No. 19 defines gender-based violence as „directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”<sup>60</sup> The definition does not provide for a catalog of gender-specific offenses; however, it refers to a broad list of crimes, including *inter alia*, sexual assault or harassment, rape, family violence, compulsory sterilization or abortion, and battering. Moreover, the document recognized the link between such violence and “traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles,” which may justify violence used as a tool to preserve discriminatory gender-roles patterns in political, economic, or educational contexts.<sup>61</sup> The given issue has been later on strengthened in General Recommendation No. 25. Furthermore, General Recommendation No. 19 highlights that the States might be held liable for private acts

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<sup>59</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), “CEDAW General Recommendation No. 19: Violence against Women,” 1992, para 1.

<sup>60</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), para 6.

<sup>61</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), para 11.

under international law if they fail to act with due diligence to prevent, investigate, punish, or compensate for the violations of women's rights and freedoms. The Committee provides the States with the comprehensive, however not binding, recommendations to take appropriate and effective measures to overcome all forms of gender-based violence, whether committed by public or private act, including collecting data and conducting research, providing appropriate support services for victims, and organizing gender-sensitive training for criminal justice system representatives.

The Convention on preventing and combating violence against women and domestic violence of 2011 (hereinafter referred to as the Istanbul Convention) has been long-awaited, the first European legally binding instrument aimed at preventing and combating violence against women and domestic violence. The Istanbul Convention defines gender-based violence against women as “directed against a woman because she is a woman or that affects women disproportionately.” Such violence serves as “one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.”<sup>62</sup> Moreover, violence against women is considered not only as a form of discrimination but also a human rights violation. In addition, the Council of Europe’s violence against women definition is broader than the one proposed in CEDAW by means of including *economic harm* as one of the results of the phenomenon.<sup>63</sup> The Istanbul Convention introduces a set of holistic, legally binding measures to combat violence against women and support the victims. Moreover, it obliges the

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<sup>62</sup> Council of Europe, “The Convention on Preventing and Combating Violence against Women and Domestic Violence,” *Preamble*.

<sup>63</sup> Council of Europe, 3.

Contracting Parties to provide the necessary legislative and other measures to ensure that gender-specific crimes are criminalized.

Both of the discussed documents and developed gender-based violence definitions comply with the hate crime paradigm by considering the discriminatory element of choosing a victim based on a core identity characteristic, i.e., female gender, and situating such violence in the context of power-subordination relation between two groups. Consequently, it can be concluded that including gender-based violence and misogyny in the hate crime legislation is in line with the CEDAW Committee General Recommendation No. 19 and No. 25. and the Istanbul Convention. Nevertheless, it has to be noted that the revolutionary and feministic character of the Istanbul Convention met with strong opposition from some of the Council of Europe Member States.<sup>64</sup> The Constitutional Court of Bulgaria and the National Council of Slovakia rejected the Istanbul Convention primarily because of a non-binary interpretation of gender understood not as a biological but also as a social concept. Accordingly, the Hungarian Parliament has refused to ratify the Istanbul Convention, which – according to the ruling party – excludes men from the scope of protection and promotes “gender ideology” considered as contrary to Hungarian law and values.<sup>65</sup> Based on similar arguments, in July 2020, the Polish right-wing government announced its intention to withdraw from the Istanbul Convention and referred the document to the Constitutional Tribunal. The Polish government also opposes Article 12 (5) of the Convention, which obliges Parties to ensure that countries’ culture, custom, religion, tradition, or *honor* are not considered justification for violence against

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<sup>64</sup> Between 2013 and 2019, 33 out of 57 Member States ratified the Istanbul Convention.

<sup>65</sup> European Parliament, Question for written answer E-002981/2020/rev.1 to the Council, (May 14, 2020), [https://www.europarl.europa.eu/doceo/document/E-9-2020-002981\\_EN.html](https://www.europarl.europa.eu/doceo/document/E-9-2020-002981_EN.html).



women.<sup>66</sup> Interestingly, both of the two last before-mentioned countries are subjected to an Article 7 TEU procedure. As a result, the lack of joint agreement among the EU Member States prevents the European Union from ratifying the Convention despite its previous signature and the Advocate's General favorable opinion.<sup>67</sup> Finally, in March 2021, President Recep Erdoğan announced Turkey's withdrawal from the Convention by a presidential decree.<sup>68</sup> From the perspective of this paper, it is notable that the critic around the Istanbul Convention is primarily focused on the social concept of gender, which, even if directly aimed against transgender people, demonstrates an attachment to a stereotypical dichotomy in thinking about gender roles within the social structure.

As a response to the observed general backslides in combating violence against women among the European States in March 2019, the Council of Europe adopted the *Recommendation on preventing and combating sexism* to strengthen the Member States' obligations enshrined in the Istanbul Convention. The Recommendation proposed the first-ever international definition of sexism<sup>69</sup> which "is a manifestation of historically unequal power relations between women and men, which leads to discrimination and prevents the full advancement of women in

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<sup>66</sup> Council of Europe, "The Convention on Preventing and Combating Violence against Women and Domestic Violence."

<sup>67</sup> Advocate General Hogan, "Advocate General's Opinion in Avis 1/19, Istanbul Convention" (Court of Justice of the European Union, March 11, 2021).

<sup>68</sup> The denunciation will enter into force on July 1, 2021.

<sup>69</sup> Nevertheless, the definition of sexism has already been present in some national legislations, e.g., 2014 Belgian legislation on combating sexism in the public space and 2015 French legislation on sexist behavior in the workplace.

society.”<sup>70</sup> Moreover, the failure of ratifying the Istanbul Convention by the European Union resulted in the initiative led by the President of the European Commission to extend the list of so-called EU crimes under Article 83(1) TFEU to all forms of hate crime and hate speech, including those motivated by gender or sex.<sup>71</sup> Article 83 TFEU - so far the fundamental provision for European harmonization of substantive criminal law - states that the European Parliament and the Council are entitled to establish “minimum rules of the definitions of criminal offenses and sanctions in the area of particularly serious crime with a cross-border dimension”.<sup>72</sup> The vague term “particularly serious crime” is accompanied by the close-ended list of the offenses; however, the Council may unanimously decide on its extension. So far, the EU has introduced two significant hate crimes-related instruments, i.e., the Framework Decision and the Victims Directive. The 2008 Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law is limited to race, color, descent, religion, national or ethnic origin.<sup>73</sup> The special attention on victims has been given firstly in the Framework Decision of 2001<sup>74</sup> and later in the Victims Directive of 2012, which provides minimum standards on victims’ rights to assist, support them and ensure that their

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<sup>70</sup> Adopted by the Committee of Ministers on 27 March 2019 at the 1342 nd meeting of the Ministers’ Deputies, “Recommendation CM/Rec(2019)1 of the Committee of Ministers to Member States on Preventing and Combating Sexism” (Council of Europe, March 27, 2019).

<sup>71</sup> See: “A New Push for European Democracy | Proposals to Extend the List of EU Crimes to All Forms of Hate Crime and Hate Speech,” *European Parliament*, 2021, 2.

<sup>72</sup> Article 83, “Treaty on the Functioning of the European Union (TFEU),” Pub. L. No. C 326/47 (2012).

<sup>73</sup> “Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law” (OJ L 328/55, 2008).

<sup>74</sup> “Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings” (2001/220/JHA, 2001).

specific needs are individually assessed and addressed.<sup>75</sup> Moreover, the Directive provides for the comprehensive catalog of protected characteristics fully reflecting Article 21 of the Charter of Fundamental Rights (*principle of non-discrimination*) that includes sex but notably excludes gender identity.<sup>76</sup> Moreover, in the absence of possibilities to overcome the deadlock on the conclusion of the Istanbul Convention by the EU, the Commission announced putting forward a new legislative proposal to combat gender-based violence.<sup>77</sup>

The level of protection within the EU legislation is strongly influenced by the European Court of Human Rights case law because of the binding character of the European Convention on Human Rights for all the Member States due to their ratification and by means of Article 53 of the Charter of Fundamental Rights. The Member States' failure to protect women from violence has been on numerous occasions confirmed by the Strasbourg Court, especially in the context of domestic violence.<sup>78</sup> In the *Opuz v. Turkey* case, the Court, for the first time in a domestic violence case, has found a violation of Article 14 of the Convention (prohibition of discrimination) in conjunction with Articles 2 and 3 (right to life and prohibition of inhuman or degrading treatment, respectively) due to the law enforcement and judicial passivity in providing effective protection to two women. The ECtHR identified "the existence of a *prima*

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<sup>75</sup> "Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA" (OJ L 315/57, 2012).

<sup>76</sup> Nevertheless, the European Court of Justice in the *P v. S* case extended the scope of sex equality protected under the Equal Treatment Directive to discrimination against *transsexual people* in the employee rights context. See: *P v. S* and Cornwall County Council, No. C-13/94 (European Court of Justice April 30, 1996).

<sup>77</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Commission Work Programme 2021: A Union of Vitality in a World of Fragility" (European Commission, October 19, 2020).

<sup>78</sup> See e.g. *Eremia and Others v. the Republic of Moldova*, *Volodina v. Russia*, *Talpis v. Italy*, *Bălșan v. Romania*.

*facie* indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.”<sup>79</sup> Moreover, in the *B.S. v. Spain*, the Court paid attention to the Member States’ obligation to examine discriminatory elements of crimes during the investigation and concluded that Spanish courts “failed to take account of the applicant’s particular vulnerability inherent in her position as an African female sex worker. Thus, the authorities failed to comply with their duty under Article 14 of the Convention taken in conjunction with Article 3 to take all possible steps to ascertain whether or not a discriminatory attitude might have played a role in the events.”<sup>80</sup>

In the *Volodina v. Russia* case, the Strasbourg Court assessed that “the Russian legal framework which does not define domestic violence whether as a separate offense or an aggravating element of other offenses and establishes a minimum threshold of gravity of injuries required for launching public prosecution – falls short of the requirements inherent in the State’s positive obligation to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for victims.”<sup>81</sup> Although the Court might examine the compliance of national laws with the Convention, the legislative provisions and the measures taken by the Member States to prevent the crimes within the national criminal systems fall into the States’ margin of appreciation.<sup>82</sup> A victim needs to prove a *prima facie* discriminatory element against gender; however, a failure to implement the national criminal policy or not

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<sup>79</sup> *Opuz v. Turkey*, No. 33401/02 (European Court of Human Rights June 9, 2009), para 198.

<sup>80</sup> *B.S. v. Spain*, No. 47159/08 (European Court of Human Rights February 24, 2012), para 62-63.

<sup>81</sup> *Volodina v. Russia*, No. 41261/17 (European Court of Human Rights November 4, 2019), para 85.

<sup>82</sup> *A. v. Croatia*, No. 55164/08 (European Court of Human Rights January 14, 2021), para 99.

adequate training on gender sensitivity for law enforcement cannot be solely considered sufficient. Nevertheless, it happens that the Court itself neglects the examination of the discriminatory aspect of the case, especially in the intersectional context. For example, in *Hovhannisyan v. Armenia*, while examining the workplace harassment of two male perpetrators against a female victim, the Court has not paid attention to the gender aspect of the case.<sup>83</sup> Moreover, despite the landmark character of the judgment in *V.C. v. Slovakia* in which the Court recognized the practice of forced sterilization on Roma women in Slovakia as a violation of Article 3 of the Convention, at the same time stated there is no sufficient evidence of State's organized policy or medical staff's intentional racial motive.<sup>84</sup> The ECtHR confirmed this approach in the next forced sterilization cases concerning Roma women, namely in *N.B. v. Slovakia* and *I.G. and Others v. Slovakia*. It is worth noting that the requirement of proved "intentionally racially motivated" act of medical staff sets a higher threshold for evidence than required by the Court in the *Opuz vs. Turkey* case where the breach of Article 14 could be even unintentional.<sup>85</sup>

### **2.3. Gender as protected characteristics among EU Member States**

The discussion on including gender in the hate crime definition is actual and no longer limited to academia due to the current changes in the European legislation. Fourteen out of twenty-seven EU Member States currently include gender or sex into their hate crime or incitement to hatred provisions. Another five countries, namely Austria, the Czech Republic, Finland, Germany, and Hungary, provide an open catalog of protected grounds, which theoretically might concern women. The open-ended definitions might relate to the perpetrator's *animus*

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<sup>83</sup> *Hovhannisyan v. Armenia*, No. 18419/13 (European Court of Human Rights July 19, 2018).

<sup>84</sup> *V.C. v. Slovakia*, No. 18968/07 (European Court of Human Rights November 8, 2011).

<sup>85</sup> *Opuz v. Turkey*, para 200.

through the use of phrases “another particularly condemn motive”<sup>86</sup> or “other contempt for human dignity”<sup>87</sup> in the Czech Republic and Germany, respectively. In other States, open definitions focus on the specific grounds of protection extended by such phrases as “other comparable ground”<sup>88</sup> in Finland and “similar grounds”<sup>89</sup> in Denmark. However, the practice shows that law enforcement and judges do not tend to use hate crime provisions in gender-based violence cases unless gender or sex are explicitly mentioned in the legal definition. Interestingly, only one of the European definitions directly referred to hatred, namely a hate crime in Belgium can be committed “when one of the motives of the crime or offense is *hatred* against, contempt for or hostility to a person.”<sup>90</sup> Moreover, Spain included in its definition not only crimes committed out of the victim’s sex but also out of *gender role bias*.<sup>91</sup>

## 2.4. Uncomfortable fit.

In some aspects, violence against women fails to comfortably fit alongside other protected characteristics within the hate crime paradigm. Moreover, even countries that already decided to include gender into the catalog of protected characteristics have not fully succeeded in their

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<sup>86</sup> Criminal Code of the Czech Republic (2009, No. 40/2009) [excerpts], Article 42, OSCE/ODIHR, Hate crime reporting, <https://hatecrimece.org/czech-republic?year=2019>.

<sup>87</sup> Criminal Code of Germany (Federal Law Gazette I, p. 3322) [excerpts], Section 46, OSCE/ODIHR, Hate crime reporting, <https://hatecrime.osce.org/germany?year=2019>.

<sup>88</sup> Criminal Code (as amended 2011) [excerpts], Section 5, OSCE/ODIHR, Hate crime reporting, <https://hatecrime.osce.org/finland?year=2019>.

<sup>89</sup> Criminal Code of the Kingdom of Denmark (LBK No. 1068) [excerpts], Section 81 No. 6, OSCE/ODIHR Hate crime reporting, <https://hatecrime.osce.org/denmark?year=2019>.

<sup>90</sup> Criminal Code of Belgium, (L 2007-05-10/35) [excerpts], Article 377 bis, Article 405 quater, Article 422 quater, Article 438 bis, Article 453 bis, Article 514 bis, Article 532 bis, OSCE/ODIHR, Hate crime reporting, <https://hatecrime.osce.org/belgium>.

<sup>91</sup> Criminal Code of Spain, (Law 10/1995 of 23 November (amended in 2015) [excerpts], Article 22, <https://hatecrime.osce.org/spain?year=2019>.

effective implementation.<sup>92</sup> Furthermore, many scholars and policymakers resist to recognize women as a vulnerable group and acknowledge that male violence against women is driven by bias or prejudice. The following paragraphs demonstrate the reasons why such resistance has been manifested.

One of the strongest doctrinal arguments against including gender within the hate crime definition concerns the perpetrator's *animus*. As previously mentioned, the perpetrator should be driven by bias or prejudice against the individual because of its membership in a specific group or towards this group itself. Therefore, the features of that group, and not the victim itself, are the reason for victimization. Consequently, it is argued that violence against women is, in principle, not driven by the perpetrator's bias toward all women as a group but a specific person. It is especially evident in the context of domestic violence where aggressive or even terrorizing behaviors are an effect of inter-partner conflicts or the perpetrator's personal problems, while his overall approach towards women is correct. Moreover, it is claimed that male sex offenders are driven by sexual desires and exploit their physical advantage over female victims rather than act out of bias towards them.<sup>93</sup> Therefore, "domestic violence is a deviant, but not sexist, behavior as men commit most violence generally (...) and sexism plays at most a trivial role in rape and physical assault on wives."<sup>94</sup>

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<sup>92</sup> Marguerite Angelari, "Hate Crime Statutes: A Promising Tool for Fighting Violence against Women.," *Journal of Gender & the Law* 2 (1993): 81.

<sup>93</sup> George P. Choundas, *Neither Equal nor Protected: The Invisible Law of Equal Protection, the Legal Invisibility of Its Gender-Based Victims*, vol. 44 (Emory Law Journal, 1995), 1091, <https://linkinghub.elsevier.com/retrieve/pii/S0022098108003444>.

<sup>94</sup> Rae Taylor and Jana L. Jasinski, "Femicide and the Feminist Perspective," *SAGE Publications, Homicide Studies*, 15, no. 4 (2011): 343.

Another rationale behind the ongoing marginalization of gender in the hate crime legislation is the traditional assumption that crimes motivated by bias target vulnerable and disadvantaged minorities. Moreover, enshrined in the vast majority of democratic constitutions, gender equality and the principle of equality before the law within the procedural justice diverts attention from discrimination against women in obtaining substantive justice. Consequently, women making up half of the population and enjoying constitutionally proclaimed equality are not perceived as a numerical minority and, therefore, are not considered powerless on a par with other protected groups.<sup>95</sup> The numerical approach to minorities derives from the assumption of privilege and strength coming with the numbers, while what is decisive for the oppressed status is the “lack of influence or power vis- à-vis the rest of the population.”<sup>96</sup> Moreover, in modern times, political power is considered as the primary instrument of dominance,<sup>97</sup> while only four countries have 50% or more women in parliament in single or lower houses.<sup>98</sup> The most graphic example against a numerical understanding of minorities is the apartheid in South Africa, with white people making up for not more than 10% of the population. Furthermore, most states use the general terms describing protected characteristics in their national penal codes, such as race, nationality, or sexual orientation. Consequently, from the normative perspective, hate crimes can be committed by both quantitative majorities and minorities.<sup>99</sup> The above is also controversial in judicial practice. Although German law

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<sup>95</sup> George P. Choudas, "Neither Equal nor Protected: The Invisible Law of Equal Protection, the Legal Invisibility of Its Gender-Based Victims," *Emory Law Journal* 44 (1995):1091.

<sup>96</sup> Phillip Vuciri Ramaga, “Relativity of the Minority Concept,” *Human Rights Quarterly* 14, no. 1 (1992): 113.

<sup>97</sup> Ramaga, 113.

<sup>98</sup> Rwanda with 61%, Cuba with 53%, Bolivia with 53%, and the United Arab Emirates with 50%. See: Inter-Parliamentary Union, “Women in National Parliaments,” 2020, <https://data.ipu.org/women-ranking?month=10&year=2020>.

<sup>99</sup> It remains controversial whether members of one minority against another can commit hate crimes.



does not explicitly mention gender in the hate crime legislation, Article 130 (2) of the German Penal Code provides for an open definition which includes incitement to hatred against *segments of the population*, or a national, racial or religious group, or one characterized by its ethnic customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming *segments of the population* or a previously indicated group.<sup>100</sup> Nonetheless, the Bonn Regional Court interpreted the given provision stating that women do not fall within the term “*segments of the population*” because they are not considered as a minority, and that is why they shall not be protected under hate crime laws. As a result, in a given case calling a woman "second class people," "closer to animals," and "inferior humans" has not been qualified as hate speech.<sup>101</sup> However, the Cologne Higher Regional Court overruled the Bonn Regional Court's acquittal by claiming that misogyny can be treated as sedition under the German Penal Code.<sup>102</sup>

Further arguments are pragmatic. It is argued that measures to combat and prevent violence against women already introduced to the national legal systems are sufficient. Consequently, including gender in the hate crime legislation would not bring any change, except a symbolic message to society. An additional concern is that the scale of violence against women might place too great a burden on the criminal justice system and undermine the status of other vulnerable groups. At this point, it should be emphasized that hate crimes provisions are not the only and perhaps not even the most crucial tools in the fight against gender-based violence.

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<sup>100</sup> Paragraph 130 (2) of the German Penal Code.

<sup>101</sup> “German Hate Speech Laws Also Cover Misogynist Abuse, Court Rules,” *Deutsche Welle*, 2020, <https://www.dw.com/en/german-hate-speech-laws-also-cover-misogynist-abuse-court-rules/a-53819941>.

<sup>102</sup> Tobias Al Shomer, “Urteil in Bonn: Ist Frauenhass Volksverhetzung?,” *WDR*, 2020, <https://www1.wdr.de/nachrichten/rheinland/frauenhass-volksverhetzung-prozess-100.html>.

For example, while mass feminist protests took over the streets in Poland after introducing the near-total abortion ban and announcing the government's intention to withdraw from the Istanbul Convention, a new landmark law on combating domestic violence came into force. The new law equipped the police with the power to issue an order to immediate eviction of the violent member of the household. Moreover, the amendment of the Code of Civil Procedure obliged the courts to rule on the request for the permanent eviction in domestic violence cases within 48 hours of receiving the application. The amendment introduces a number of procedural simplifications, such as, e.g., combining eviction ruling with the restraining order and exempting the victim from court fees. In practice, such pragmatic changes accelerating the criminal justice response to domestic violence will be more efficient than eventual inclusion of gender within the hate crime legislation if understood solely as an aggravating provision.

## **2.5. Fitting the hate crime paradigm**

Bias-motivated crimes convey a message that a victim is not a fully valuable member of society and, as such, should be subordinated to the group represented by the perpetrator. According to radical feminist theories, violence against women is “one means by which men as a class enforce conformity of women as a class. Moreover, it is not necessary for all men to engage in violence against women since the very threat of violent censure is constantly with women. Violence against women, then, is indeed a “classic” form of hate crime, since it is to terrorize the collective by victimizing the individual.”<sup>103</sup> Thus, the phenomenon of hate crimes, identically as gender-based violence, is firmly rooted in the relationship of power and control between the social groups. It brings the conclusion that men's violence in numerous types of violent crimes against women, especially rapes and other sexual assaults, is an expression of a

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<sup>103</sup> Barbara Perry, “In the Name of Hate: Understanding Hate Crimes,” *Routledge*, 2001, 83.

male sense of superiority over women in general.<sup>104</sup> Whether in an intimate relationship or between strangers, a man committing sexual offense feels entitled to prioritize the satisfaction of his sexual desires over a woman's wellbeing. The male sense of superiority is deeply rooted in both physical and social hierarchy and can be additionally supported by the cultural, religious, or another local context, as it is in case of war rapes or honor killings. As mentioned above, the opponents of the inclusion of gender into the protected characteristics catalog argue that physical or sexual violence between the opposite sex is usually driven by emotions towards an individual and not hatred towards the whole womankind. Nevertheless, “the key to bias crime categorization is not really about the hateful ‘specific intent’ of the offender, but rather the offender’s discriminatory use of violence to enforce a particular social hierarchy that is biased against the targeted status category.”<sup>105</sup> As with other types of hate crimes, gender-based violence can be driven by strong hatred towards all women; however, such an explicit and drastic motive occurs only in extreme cases. Limiting the scope of hate crimes only to crimes committed by extremists not only would limit the potential of such laws but also should be considered as turning a blind eye on a grand scale of “ordinary” bias-motivated crimes in daily life. In practice, in gender-based violence offenses, correspondingly with other types of hate crimes, the feeling of hatred is frequently replaced by males' sense of superiority over women. Such a sense of superiority can be subconscious and emerge only in specific situations of the exertion of male power and privilege. Consequently, classifying gender-based violence as a type of hate crime would not necessarily mean that the perpetrator’s animus was based on hate towards the whole womankind but rather on his bias rooted in the dominance-subordination relationship between the genders. In conclusion, gender-based violence is not solely based on

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<sup>104</sup> Marguerite Angelari, “Hate Crime Statutes: A Promising Tool for Fighting Violence against Women,” *Journal of gender & the law* 2 (1995): 65.

<sup>105</sup> Steven Bennett Weisburd and Brian Levin, “On the Basis of Sex: Recognizing Gender-Based Bias Crimes,” *Policy Review*, 1994, 35.

a bias against gender *per se* but on a *gender role* bias that situates women in a servile position towards men.

Furthermore, it should be emphasized that crimes motivated by bias against other protected characteristics, such as sexual orientation and gender identity, are very often closely related to gender-specific roles and the traditional power relationship between cis-men and cis-women. Namely, crimes motivated by bias against one's actual or perceived sexual orientation towards gay men are strongly related to the victim's lack of traditionally perceived masculinity, which dictates the perpetrator's subordination and punishment desire. Similarly, violence against lesbians happens to be provoked by crossing the border of stereotypical feminine features and *betraying* a naturally innate gender role. Additionally, the transphobic crimes in their foundations are caused by - in the perpetrator's eyes - victims' "failure" to fit into traditional gender roles. In all three cases - the crimes motivated by sexual orientation, gender identity, and gender - it can be observed that violence is often used as a punishment for transgressing moral or social codes and acting out of the gender roles pattern. The before-mentioned phenomenon is reflected in the so-called gay (and trans) panic defense strategy whereby the heterosexual person (usually a cis man) claims that because of the subjectively perceived unwanted sexual advances of gay or transgender person became "succumb temporarily to an uncontrollable violent sufficient to kill."<sup>106</sup> Consequently, understanding the core of homo- and transphobic violence leads to the conclusion that such crimes cannot be fully addressed while neglecting the discussion on the broader entrenched problem of gender stereotypes and subordination mechanisms between them. "Therefore, aligning or adopting a hate-crime approach to addressing violence against women and/or gender-based victimization may offer

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<sup>106</sup> Perry, "In the Name of Hate: Understanding Hate Crimes," 453.

greater insights into the nature and impact of such victimization and the capacity of the current criminal justice system to respond effectively.”<sup>107</sup>

Including gender within protected characteristics would not automatically mean that all VAW cases fall under the hate crime legislation. A question to explore is to decide in which categories of crimes against women the perpetrator is driven by the gender role bias and select female victims in virtue of being women. The catalog should include gender-specific crimes overwhelmingly committed by men against women, such as rape<sup>108</sup> and other forms of sexual violence<sup>109</sup> and sexual exploitation (including sexual slavery, sexual violence as a tactic of war and sexual trafficking) as well as honor killings and female genital mutilation (FGM).<sup>110</sup> Moreover, the hate crime umbrella should not exclude, often undermined within the criminal legal systems, intimate partner violence (domestic violence) and battery due to their disproportionately effect on women, especially in case of a strong mental, physical, or financial dependence on the perpetrator based on traditional gender role division. Sexual offenses and

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<sup>107</sup> Hannah Mason-Bish and Marian Duggan, “‘Some Men Deeply Hate Women, and Express That Hatred Freely’: Examining Victims’ Experiences and Perceptions of Gendered Hate Crime,” *International Review of Victimology* 26, no. 1 (2020): 116, <https://doi.org/10.1177/0269758019872903>.

<sup>108</sup> According to the statistical data 1 out of 5 women and 1 out of 71 men in the United States have been raped in their lifetime. See: Michele C. Black et al., “The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report. Atlanta,” *GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention*, 2011, 18.

<sup>109</sup> Only in the UK, it is estimated that 20% of women experience sexual assault during their lifetime comparing with 4% of men.

See: Home Office in the media, Violence against Women and Girls Strategy Refresh fact sheet (7 March 2019), available at <https://homeofficemedia.blog.gov.uk/2019/03/07/violenceagainst-women-and-girls-and-male-position-factsheets/>.

<sup>110</sup> Female genital mutilation, however, despite being rooted in gender inequality and the desire to control women's sexuality, does not entirely fit into the hate crime construct based on the conflict between groups, because most of FGM procedures are conducted by women to women.

domestic violence “have been conceptualized as conducts which are intended to subjugate and subordinate women, while simultaneously enforcing a male-dominated social hierarchy.”<sup>111</sup> Thus, gender-specific crimes, in their core, have a discriminatory element towards women reflected in the perpetrator’s *animus* and shall be classified as such by law enforcement, unless the circumstances of a given case prove otherwise (it is possible, for example, in the case of statutory rape). The above allows arguing that including gender-based violence into the hate crime legislation can be based not only on the discriminatory selection model of those crimes but also on the perpetrator’s *animus* model.<sup>112</sup>

Moreover, it has to be acknowledged that many of the above-mentioned gender-specific crimes, especially rapes, in most national criminal systems are already severely punished without the involvement of hate crimes laws. Nevertheless, it is argued that inclusion of violence against women into the hate crime paradigm would “constitute societal endorsement of a notion which has been repeatedly asserted by feminists and experts: rape is not simply a crime which happens to women, but an act of violence which is inflicted on a person because she is a woman.”<sup>113</sup> Consequently, acknowledging the discriminatory nature of violence against women should positively change the practice within the criminal justice system and serve to combat adverse phenomena, such as rape myths, biases in the courtrooms and victim blaming.

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<sup>111</sup> Mark Austin Walters and Jessica Tumath, “Gender ‘Hostility’, Rape, and the Hate Crime Paradigm: Gender ‘Hostility’, Rape, and the Hate Crime Paradigm,” *The Modern Law Review* 77, no. 4 (2014): 565.

<sup>112</sup> Frederick M. Lawrence, “The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes,” *Michigan Law Review* 93, no. 2 (1994): 324.

<sup>113</sup> Eric Rothschild, “Recognizing Another Face of Hate Crimes - Rape as a Gender-Bias Crime,” *Maryland Journal of Contemporary Legal Issues* 4, no. 2 (1993): 235.

## **2.6. Common features between conventional hate crimes and VAW.**

The special legislation of crimes motivated by bias or prejudice is justified due to their extended impact on victims, a group the victim belongs to, and society more broadly. “This means that hate crimes have consequences which set them apart from other crimes and which justify a different legal approach.”<sup>114</sup> On the one hand, the fit of gender-based violence within the hate crime paradigm is not strict in the light of the doctrine nor comfortable from the legislator’s perspective, as proved by the legislative history of the HCSA. On the other hand, the doctrinal framework of hate crimes has significant common denominators with gender-based violence that justify a special criminal approach for other protected characteristics. Such distinctive features, typical for hate crimes and gender-based violence, are interdependent and overlapping and might occur individually or cumulatively in varying degrees depending on the severity of the attack and the personal resistance of the victim.

### **2.6.1. More severe harm on individual.**

Hate crimes, as the acts targeting not only a person but also a person’s core identity, cause a significantly deeper psychological impact on victims than ordinary crimes.<sup>115</sup> “Because the violence is so brutal, the degradation so complete and the vulnerability so omnipresent, bias crime victims exhibit greater psychological trauma than non-bias victims,”<sup>116</sup> including a

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<sup>114</sup> Office for Democratic Institutions and Human Rights, “Hate Crime Laws: A Practical Guide,” 19.

<sup>115</sup> American Psychological Association, “Hate Crimes Today: An Age-Old Foe in Modern Dress” (APA Online, 1998).

<sup>116</sup> Weisburd and Levin, “On the Basis of Sex: Recognizing Gender-Based Bias Crimes,” 25.

higher rate of suicides than in the general population.<sup>117</sup> For some women, especially in the intersectional context, discriminative violence may reassert the so-called indigenous trauma, strengthening the victim's belief that her unchangeable aspect of identity, such as gender, race, or ethnicity, justifies an unequal worth as a member of society and a lack of protection from danger.<sup>118</sup> Correspondingly to other types of hate crimes, it enhances the lack of trust in the criminal justice system, where victims are often exposed to secondary victimization.

### **2.6.2. Long-term impact on the victims' lifestyle**

As stated above, the distinguishing traits are integral to one's identity and usually cannot be simply detached or hidden (perhaps with some exceptions for sexual orientation and credo). Consequently, due to the inability to reduce their vulnerability, victims and other targeted group members change their daily behaviors and develop precautionary strategies. Just as victims of racist, ethnic, or homophobic crimes, women *learn* how to structure their daily activities to avoid dangerous situations with men.<sup>119</sup> The critical precaution elements include not leaving house alone, not returning home after dark, avoiding specific places in public areas, refraining from wearing religious symbols, or changing a dress style.<sup>120</sup> The latter is closely related to victim-blaming patterns that justify men's sexual violence by women's *provocative* clothes or behavior.<sup>121</sup> "The fear of sexual violence is thus 'a core component of being female', one that appears to cut across class, culture and levels of development" because, in all countries, women

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<sup>117</sup> The study shows that even one out of four female rape victims had engaged in at least one suicidal act compared to one out of twenty non-victims. See Susan Stepakoff, "Effects of Sexual Victimization on Suicidal Ideation and Behavior in U.S. College Women," *Suicide and Life-Threatening Behavior* 28 (1) (1998): 116.

<sup>118</sup> Sharon M. Wasco, "Conceptualizing the Harm Done by Rape: Applications of Trauma Theory to Experiences of Sexual Assault," *Trauma, Violence, & Abuse* 4, no. 4 (2003): 315.

<sup>119</sup> Wasco, 316.

<sup>120</sup> Carol Brook Gardner, "Safe Conduct: Women, Crime, and Self in Public Places," *Oxford University Press, Social Problems*, 37, no. 3 (1990): 19.

<sup>121</sup> Rebecca M. Hayes, Katherine Lorenz, and Kristin A. Bell, "Victim Blaming Others: Rape Myth Acceptance and the Just World Belief," *Feminist Criminology* 8, no. 3 (n.d.): 206.



feel less safe than men.<sup>122</sup> Such a global sense of apprehension and vulnerability reflects the extended effect of men's single attacks on the entire targeted group of female victims. The above has a confirmation in the World Bank report exposing how the fear of violence curtails women's freedom of movement and use of public space in daily life. In 93 communities in 20 countries worldwide, the research suggests that the problem of safety in practice means „a virtual curfew on women” after dark.<sup>123</sup> The study shows that women's sense of danger increases by incidents of verbal or physical harassment on the streets and at work or school, reducing women's economic and educational opportunities. „Women police themselves by restricting their activities in public because of the anxiety about potential violence and by using, in public and in private, more safety precautions than do men.”<sup>124</sup>

### **2.6.3. Impact on the victim's community.**

The described-above characteristic is closely related to the expanded impact of hate crimes on the victim's family, community, and entire society. The non-provoked attack on one member of the exposed group has a frightening and intimidating result for the rest of the community. The “message crime” communicates to other members of the group that they are all at risk. The constant fear of violence limits the rights and freedoms of victims of hate crimes and violence against women. Furthermore, the law enforcement and the whole criminal justice system response can deepen the group's victimization. Inadequate behavior of law authorities in assessing the gravity of a crime taken together with inefficient – and often biased itself - criminal justice system increases the vulnerability of the attacked group and aggravates the

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<sup>122</sup> Naila Kabeer, “Violence against Women as ‘Relational’ Vulnerability: Engendering the Sustainable Human Development Agenda,” *UNDP Human Development Report Office*, 2014, 21.

<sup>123</sup> Kabeer, 21.

<sup>124</sup> Elizabeth A. Stanko, “Women, Crime, and Fear,” *The ANNALS of the American Academy of Political and Social Science* 539, no. 1 (May 1995): 51.

feeling of injustice and fear. Moreover, the negligence and passivity of the criminal justice system strengthen the sense of social acceptance for such acts, both for the targeted and attacking groups. The stereotyping and discriminatory approach of public authorities - often minimizing the victims' experience and undermining their credibility<sup>125</sup> - are common for both hate crimes and gender-based and domestic violence, several times founded as human rights violations at the international level.<sup>126</sup> While the rape myths might affect victims of other types of hate crimes, especially in the intersectional context, bias experienced within the criminal justice system and victim-blaming are more likely to appear in hate crimes and gender-based violence cases than in basic criminal offenses.<sup>127</sup>

#### **2.6.4. Lack of provocation.**

As already demonstrated, hate crimes are firmly rooted in the relationship of power and control between particular groups.<sup>128</sup> The perpetrator's discriminatory use of violence is to enforce and maintain a particular social hierarchy.<sup>129</sup> The sense of empowerment to commit hate crimes against individuals from a specific group perceived as non-equal results from the perception that a victim transgresses from what is perceived by the majority as "normal" or "natural." Hence, a victim should remain subordinate to the perpetrator and, therefore, to the perpetrator's group. Consequently, the distinguished characteristics alone are enough to trigger the aggressor

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<sup>125</sup> Jennifer Temkin, Jacqueline M. Gray, and Jastine Barret, "Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study," *Feminist Criminology* 13, no. 2 (2016): 205.

<sup>126</sup> See, e.g., ECtHR, *Talpis v. Italy*, *Opuz v. Tukey*, *Branko Tomašić v. Croatia*, UN CEDAW Committee: *Vertido v. Philippines*.

<sup>127</sup> Petra Bárd and Veronica Anna Szontagh, "Áldozathibáztatás Kisebbségi Csoportok Sértettjeivel Szemben," *Szociológiai Szemle* 40, no. 2 (2021): 38.

<sup>128</sup> Barbara Perry, "The Sociology of Hate: Theoretical Approaches," in *Hate Crimes, Volume 1: Understanding and Defining Hate Crime*, (Westport, CT: Praeger Publisher, 2009), 71.

<sup>129</sup> Weisburd and Levin, "On the Basis of Sex: Recognizing Gender-Based Bias Crimes," 36.

without any further provocation. In parallel to gender-based violence, women targeted by sex offenders or experiencing verbal or physical abuse in public space are chosen primarily because of their gender without any provocation or even previous interaction with the perpetrator. Moreover, the perpetrator uses the victim's femaleness to justify the assault or even blame the victim.<sup>130</sup> Likewise, in the domestic context, men tend to use violence against women to intimidate, control, or exert power over their partners.<sup>131</sup> Such punishments and “putting a woman in place” do not have to be anyhow related to her behavior. Nevertheless, the myth of division between the dangerous-public and safe-private spheres still plays a crucial role in the criminal perception of domestic abuse. It is enough to mention that most European states outlawed marital rapes only in the late 1980s or early 1990s, with the last one – Germany – introducing the change only in 1997 after over twenty-five years of lobbying by women's rights activists. The changes in legal systems and social perception of domestic violence progress slowly and hate crimes legislation should not become another area of its exclusion. In other words, the inclusion of gender-based crime in the public sphere within the hate crime paradigm while excluding the same type of crimes in the private setting would again invalidate the gravity of domestic and intimate relationship violence and send an undesirable message to the perpetrators and victims.

#### **2.6.5. Interchangeability of victims.**

It is argued that from the perpetrator's perspective, victims of hate crimes are, in principle, interchangeable. It means that victims are chosen not due to their personal features but belonging to a particular group distinguished by specific characteristics. Commonly, it is

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<sup>130</sup> Elaine Hilberma, “Overview: The ‘Wife Beater’s Wife’ Reconsidered,” *Malaysian Journal of Psychiatry* 137 (1980): 1336.

<sup>131</sup> Jennifer A. Scarduzio et al., “‘Maybe She Was Provoked’: Exploring Gender Stereotypes About Male and Female Perpetrators of Intimate Partner Violence,” *Violence Against Women* 23, no. 1 (2017): 3.

argued that conceptually hate crimes can be committed only in a public area and by the perpetrator who is a stranger to the victim. On the other hand, it is alleged that even the traditional types of hate crimes are not entirely interchangeable since such a strict approach would not classify as a crime motivated by race, e.g., the assassinations of Martin Luther King or Medgar Evers. In those cases, the racist motive is evident; nevertheless, the victims have not been chosen accidentally and could not be easily replaced by any other person of the same skin color. Consequently, the assumption that the victim cannot have a preexisting relationship with the perpetrator excludes a significant number of hate crimes, even those falling within the traditional definition. Moreover, the approach characterized by the “one size fits all” method of classifying perpetrator–victim relationships is challenged by the statistical data. For example, homophobic hate crimes victims in a substantial number of cases know their abuser (a perpetrator is often a neighbor, a co-worker, or even a member of the victim’s immediate family).<sup>132</sup> Furthermore, there are types of hate crimes that are more likely to happen in a domestic setting, namely from the caregivers of a person with disabilities or the elderly. As a result, considering victims’ interchangeability as a condition *sine qua non* to be classified as a hate crime is not consistently applied to other crimes of this type. The above might suggest double standards in assessing gender’s feasibility as a category that deserves protection under the hate crime umbrella.

Importantly, even if the victims’ interchangeability would be considered a necessary characteristic of hate crimes, many kinds of violence against women would still meet this criterion, for example, femicides, rapes, and sexual harassment committed by strangers on the

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<sup>132</sup> Gail Mason, “Hate Crime and the Image of the Stranger,” *British Journal of Criminology*, 2005, 837–59.

randomly chosen victim. Furthermore, there is no sufficient evidence to conclude that bias-motivated crimes committed in the public sphere by strangers are characterized by significantly different or less nefarious prejudice than the crimes based on the same motive but committed in the private sphere by the person familiar to the victim. “In fact, the previous relationship makes the crime more heinous because the sense of connection and shared community implied in social familiarity is viciously shattered.”<sup>133</sup>

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<sup>133</sup> Elizabeth A. Pendo, “Recognizing Violence against Women: Gender and the Hate Crimes Statistics Act,” *Harvard Women's Law Journal* 17, 1994, 168.

## CHAPTER 3

### THE LEGISLATIVE PROCESS – THE EXAMPLES OF ENGLAND AND WALES AND ITALY

#### 3.1. Violence against women - England and Wales

In the last decade, the government of England and Wales introduced two iterations of the strategies aimed at ending violence against women and girls. The strategies established several objectives to be achieved by 2020, including challenging behaviors and attitudes that normalize violence against women and girls and improving the victims' support services. Moreover, the laid by the government 2016-2020 strategy aimed at advancing the criminal justice response by monitoring the implementation of the new domestic offense of coercive and controlling behavior in an intimate or family relationship. Moreover, it enhanced the international cooperation to promote adoption of legislation criminalizing abusive behaviors against women and better protection for victims.<sup>134</sup> Such a holistic approach strengthened the law on gender-specific crimes, including forced marriages, stalking, and female genital mutilation introduced the so-called Clare's Law, which allows women to check if their partner has a violent history. From the perspective of this paper, it is significant that the strategy also led to the preparation of the Domestic Abuse Bill expected to come into force during 2021/2022, which will create a statutory presumption that victims of domestic abuse are eligible for special measures in the criminal, civil and family courts.<sup>135</sup> The implementation of such far-reaching solution would

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<sup>134</sup> Home Office, "Ending Violence Against Women and Girls Strategy 2016-2020," March 2016, 57, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/522166/VAWG\\_Strategy\\_FINAL\\_PUBLICATION\\_MASTER\\_vRB.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522166/VAWG_Strategy_FINAL_PUBLICATION_MASTER_vRB.PDF).

<sup>135</sup> Home Office, "Policy Paper: Domestic Abuse Act 2021: Overarching Factsheet," May 18, 2021, <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-bill-2020-overarching-factsheet>.

be desirable for all types of hate crimes. Moreover, the Domestic Abuse Bill will create a statutory definition of domestic abuse, including not only physical but also emotional, economic, controlling, and coercive abuse. The new 2021-2024 strategy is designed to put more focus on online abuse and intersectional victims.<sup>136</sup> Nevertheless, despite the United Kingdom's signature placed under the Istanbul Convention in 2012, the treaty is yet to be ratified. The latest report on the government's progress states that the ratification of the Istanbul Convention can proceed only when the UK meets all the obligations set by the Convention. The above is planned to be achieved by the implementation of the above-mentioned Domestic Abuse Bill, which includes the necessary legislative measures on extraterritorial jurisdiction of crimes covered by the Istanbul Convention for England and Wales, Scotland, and Northern Ireland, and criminalization of psychological violence in the domestic context in Northern Ireland.<sup>137</sup>

### **3.1.1. Gender as a protected characteristic within hate crime law**

The current hate crime legislation in England and Wales provides enhanced protection and aggravated sentencing based on five characteristics: race, religion, sexual orientation, disability, and transgender identity. However, in 2016, the Nottinghamshire Police started reporting incidents motivated by misogyny along with other hate crimes as a response to the

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<sup>136</sup> Home Office, "Violence Against Women and Girls (VAWG) Strategy 2021 to 2024: Call for Evidence," March 24, 2021, <https://www.gov.uk/government/consultations/violence-against-women-and-girls-vawg-call-for-evidence/violence-against-women-and-girls-vawg-strategy-2021-2024-call-for-evidence>.

<sup>137</sup> Home Office, "Ratification of the Council of Europe Convention on Combating on Violence Against Women and Girls and Domestic Violence (Istanbul Convention) – 2019 Report on Progress," October 2019, 37–39, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/843509/CCSO\\_919132732-001\\_Istanbul\\_Convention\\_2019\\_Report\\_Option\\_A\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843509/CCSO_919132732-001_Istanbul_Convention_2019_Report_Option_A_Web_Accessible.pdf).

activists' campaigns and The Misogyny Hate Crime Evaluation Report.<sup>138</sup> The report's findings showed that 93.7% of the female respondents had experienced or witnessed street harassment, 24.7% had experienced sexual assault, and 21.7% had experienced online abuse.<sup>139</sup> Since hate crimes do not criminalize new acts, gender-based violence and sexual offenses already classified as criminal offenses have started to be reported as hate crimes, while street harassment as hate incidents (which could result in Police caution).<sup>140</sup> Another six police forces have followed the example of the Nottinghamshire Police, and in 2018, the legislative proposal to add gender to the protected characteristics within hate crime laws reached the national level. Currently, following the nationwide consultation, the proposal is in the policy development phase.<sup>141</sup> However, after the public condemnation of the brutal murder of a 33-year-old woman, Sarah Everard, allegedly committed by the London police officer, in March 2021, the Home Office announced that any crime where the victim perceives it to be motivated by hostility based on their sex, would be recorded on "an experimental basis" as hate crimes by police forces in entire England and Wales.<sup>142</sup>

The ongoing legislative process raises many practical and theoretical aspects of the inclusion of gender into the hate crime legislation. Along with sex or gender, the discussed amendment proposes to add age, sex workers, homeless people, members of alternative subcultures, and philosophical beliefs to the catalog of protected grounds. However, the British proposal is more

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<sup>138</sup> See: Louise Mullany and Loretta Trickett, "Misogyny Hate Crime Evaluation Report" (For Nottingham Women's Centre, Funded by the Office of Nottinghamshire Police and Crime Commissioner, 2018).

<sup>139</sup> Mullany and Trickett, 58.

<sup>140</sup> Chakraborti and Garland, *Hate Crime Impact, Causes & Responses*, 6.

<sup>141</sup> See: Law Commission, Hate Crime - Current project status, <https://www.lawcom.gov.uk/project/hate-crime/>

<sup>142</sup> "Police to Record Crimes Motivated by Sex or Gender on 'Experimental Basis,'" *BBC*, 2021, <https://www.bbc.com/news/uk-politics-56435550>.



comprehensive than that and aims at ensuring parity of treatment amongst characteristics and providing a framework for more consistent enforcement of hate crimes in general in order to move the focus from purely criminal justice response to tackling the cause of such crimes and ensuring adequate support for victims.<sup>143</sup> Due to the concerns around including sexual violence and domestic violence within hate crime laws, the center of attention is the physical and verbal sexual harassment in the public sphere. It is argued that the social acceptance of any kind of sexist and misogynistic behaviors serves as a catalyst for further violence against women. Nonetheless, the public consultations have also covered the controversial aspects of including gender-based violence within hate crime laws by acknowledging the practical concerns, especially in regards to vindicating the biased *animus*, which calls into question the effectiveness of such a solution.

### 3.1.2. Methodology – the three-step test

The Law Commission of England and Wales (hereinafter referred to as The Law Commission) established the three-step test to examine the feasibility of gender-based crimes into hate crime laws. The test requires the fulfillment of three conditions cumulatively. Firstly, the first step requires a demonstrable need for a special legal approach due to the prevalent targeting of a specific group linked to the bias or prejudice towards the unified characteristic of this group. This includes the evidence of criminal behavior against women, the link between such behavior and prejudice or hostility towards the unifying characteristic, and its prevalence. Secondly, criminal targeting based on hostility or prejudice towards the characteristic needs to cause additional harm to the primary victim, members of the targeted group, and society. Finally, the

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<sup>143</sup> Law Commission of England and Wales, “Hate Crime – Consultation Paper Summary,” 2020, 9, <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/Hate-crime-final-summary.pdf>.

logical suitability of the protected characteristic within the offenses and sentencing framework has to be demonstrated.<sup>144</sup> The test has been implied separately to women and men in order to examine the feasibility of “women”, “sex,” or “gender” as protected characteristics within the hate crime paradigm.

### 3.1.3. Demonstrable need

The Law Commission demonstrated the evidence of criminal behavior disproportionately affecting women within the catalog of crimes, including sexual assaults, domestic abuse, FGM, forced marriages, online abuse, and harassment. Presented data shows, *inter alia*, that in the United Kingdom, it is estimated that 20% of women will experience sexual assault and 25% domestic abuse during their lifetime, compared to 4% of men. Furthermore, in an overwhelming majority of sexual and domestic violence cases, men are the perpetrators.<sup>145</sup> It has also been demonstrated that perpetrators of violent crimes are likely to be male; women made up merely 1,8% and 7.9% of defendants in rape-flagged and domestic abuse prosecutions, respectively.<sup>146</sup> Importantly, it has been acknowledged that women are more likely to be victimized in the intersectional context<sup>147</sup> and that other racially or religiously motivated crimes tend to be “inextricably linked” to the fact that the victim is a woman.<sup>148</sup> Finally, it has been noted that the police recording and prosecutions underestimate the actual

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<sup>144</sup> Law Commission of England and Wales, “Hate Crimes Laws – A Consultation Paper No. 250,” September 23, 2020, 236–37.

<sup>145</sup> Men are defendants in 98.2% of rape-flagged and in 97.2% of other sexual offenses prosecutions.

<sup>146</sup> Law Commission of England and Wales, “Hate Crimes Laws – A Consultation Paper No. 250,” 249.

<sup>147</sup> Law Commission of England and Wales, 242.

<sup>148</sup> Hannah Mason-Bish and Irene Zempi, *Misogyny, Racism and Islamophobia: Street Harassment at the Margins*, 14 (Feminist Criminology, 2019), 540.

scale of violence against women and that approximately only 15% of the most severe sexual offenses have been reported to authorities.<sup>149</sup>

The second element of the Law Commission's examination of demonstrable need focuses on identifying the link between the previously recognized criminal behavior against women and prejudice or hostility towards the unifying characteristic, i.e., female gender. The examination of gender-based crimes presented in the previous chapter suggests that women's victimization is more likely to be based on gender *per se* or *gender role bias* rather than on bias *against* gender. Consequently, it is of great importance that the Law Commission acknowledged feminist scholars' conceptualization of sexual offenses and domestic violence as "conducts which are intended to subjugate and subordinate women"<sup>150</sup> and recognized the connection between those kinds of offenses perpetrated by men against women on a micro level, with the acceptance and sustenance of male-dominated social hierarchy and female subordination at a macro level.<sup>151</sup> Furthermore, "there is no equivalent dynamic that subordinates the broad category of "men" and sustains the domination of the broad category of "women" at a macro level."<sup>152</sup> Finally, the Law Commission claimed that the presented data, in the context of the women's size as a group taken together with the high severity of such crimes, indicates a notable

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<sup>149</sup> Ministry of Justice, Home Office & the Office for National Statistics, "An Overview of Sexual Offending in England and Wales," 2013, 9, [https://webarchive.nationalarchives.gov.uk/20140712155209/https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/214970/sexual-offending-overview-jan-2013.pdf](https://webarchive.nationalarchives.gov.uk/20140712155209/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214970/sexual-offending-overview-jan-2013.pdf).

<sup>150</sup> Mark Austin Walters and Jessica Tumath, "Gender 'Hostility', Rape, and the Hate Crime Paradigm: Gender 'Hostility', Rape, and the Hate Crime Paradigm," *The Modern Law Review* 77, no. 4 (2014): 563–65.

<sup>151</sup> Law Commission of England and Wales, "Hate Crimes Laws – A Consultation Paper No. 250," 249.

<sup>152</sup> Law Commission of England and Wales, 249.

degree of the relative prevalence of violence against women. Consequently, the demonstrable need criterion is “very convincingly satisfied” in relation to female sex or gender.<sup>153</sup>

#### **3.1.4. Additional harm**

Thereafter, the Law Commission assessed if criminal behaviors based on hostility or prejudice towards women cause additional harm to the primary victim, members of the targeted group, and society more broadly. The Law Commission has demonstrated that gender-based crimes can cause enhanced levels of psychological harm to primary victims, which despite limited research on the subject, is parallel with hate crime victims’ experiences of trauma, self-blame, and intensified fear.<sup>154</sup> While women’s responses to violence are not homogenous, and their level of resistance may depend on other external factors and intersectional characteristics, it has been argued that, in principle, women are “collectively affected by the prevalence and normalized nature of VAWG in society, even if they themselves are not primary victims.”<sup>155</sup> As demonstrated in the previous chapter, the nature of both hate crimes and violence against women instills fear in targeted groups that constantly accompanies their members’ everyday activities. Therefore, the Law Commission recognized the strong evidence of women’s collective secondary harm resulting in disproportionate violence levels against them. Finally, the Consultation Paper considered an adverse impact of criminal targeting on social cohesion and women’s equal participation in economic, social, political, and cultural life.<sup>156</sup> The constant fear of violence and the prevalence of violence itself infringe women’s equal right to education, housing, employment, and free and safe use of public space. It has been highlighted that the impairment of women’s rights and freedoms also occurs in digital reality since online

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<sup>153</sup> Law Commission of England and Wales, 250.

<sup>154</sup> Mason-Bish and Duggan, “Some Men Deeply Hate Women, and Express That Hatred Freely,” 112–16.

<sup>155</sup> Law Commission of England and Wales, “Hate Crimes Laws – A Consultation Paper No. 250,” 253.

<sup>156</sup> Law Commission of England and Wales, 255.

abuse has a chilling effect on women's participation in public debates and the expression of opinions. The dictated by fear of abuse social isolation of the group representing over 50% of the population undermines efforts towards gender equality and negatively impacts democracy.<sup>157</sup>

### 3.1.5. Sustainability

The last element of the test considers whether gender-based hate crime would fit logically within the broader offenses and sentencing framework and prove to be workable in practice.<sup>158</sup> As a result, the Law Commission raised several potentially harmful consequences of including gender within the hate crime regulations. Firstly, it has been underlined that the legal test applied while identifying hate crimes requires evidence of expressed bias towards the victim's sex or gender, which in practice limits the application of such laws only to "a small set of unusual cases."<sup>159</sup> The serious difficulties in collecting evidence supporting the perpetrator's *animus* can result in an artificial distinction between "misogynistic" and "non-misogynistic" gender-based crimes and establish an undesirable hierarchy of such crimes that may contribute to the prevalence of rape myths.<sup>160</sup> Furthermore, even if the legal test would capture more extensive prejudice based on the understanding of violence against women as rooted in men's entitlement and privilege to assert control or power over women, the prosecutor would still face difficulties in confirming such bias in ambiguous cases, for example, if the perpetrator has a history of targeting both men and women. Nevertheless, concerns on evidence

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<sup>157</sup> Law Commission of England and Wales, 256.

<sup>158</sup> Law Commission of England and Wales, 257.

<sup>159</sup> Jane M. Maher, Jude McCulloch, and Gail Mason, *Punishing Gendered Violence as Hate Crime: Aggravated Sentences as a Means of Recognising Hate as Motivation for Violent Crimes against Women*, vol. 177, 41 (Australian Feminist Law Journal, 2015), 192.

<sup>160</sup> Law Commission of England and Wales, "Hate Crimes Laws – A Consultation Paper No. 250," 259.

gathering seem to be common for all types of hate crimes and not gender-based violence specifically.

Additionally, the Consultation Paper assessed whether the hate crime paradigm is an appropriate way to characterize sexual offenses and domestic violence. It has been acknowledged that sexual offenses in England and Wales are already classified as serious offenses punishable by long-term imprisonment. The Law Commission suggested that the rationale behind the severity of punishments in the criminal law might concern excessive targeting towards women in cases of sexual assaults. Consequently, it has been argued that including gender-motivated crimes as an aggravating factor within hate crime laws could lead to “double counting” while increasing a defendant’s sentence. Nevertheless, the Law Commission in this regard has not supported its claim with comprehensible research and omitted in its assessment other factors determining the severity of the punishment, such as the demeaning and dehumanizing nature of sexual assaults as well as general purposes of the punishment, especially deterrence, incapacitation, and retribution. Moreover, criminal provisions on sexual assaults, unlike hate crimes aimed at protecting particularly vulnerable groups, apply to all people. Nevertheless, while examining the feasibility of sexual offenses, the Law Commission proposed a way to mitigate described suitability concerns by carving sexual offenses out of sentencing aggravations for gender-based hate crimes. Such an exception has its precedent in the United States Sentencing Commission Guidelines<sup>161</sup> and the New Jersey’s Code of Criminal Justice.<sup>162</sup> The latter used the rationale that sexual offenses are an

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<sup>161</sup> United States Sentencing Commission Guidelines, Chapter 3 – Adjustments, Part A – Victim-related adjustments, §3A1.1, Application Notes, 1. (2018), <https://www.ussc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-3#NaN>.

<sup>162</sup> New Jersey Revised Statute § 2C:16-1 (2013).

effect of “sexual release” and “men’s physical urges” rather than an attempt to exert power or control over women.

Furthermore, the Consultation Paper has sought the answers to one of the most controversial issues related to including gender within hate crime laws, namely whether domestic violence fits within the hate crime paradigm. On the one side, it is argued that “domestic abuse involves control and coercion within the dynamics of a specific relationship and frames abuse as intimate partner violence rather than gendered violence perpetrated by men against women.”<sup>163</sup> Consequently, the victimization is caused by the victim's prior relationship with the perpetrator rather than her membership in a particular social group. It is supported by the fact that men also can be the victims of domestic violence, and women can experience intimate partner violence from another woman. This has been reflected in the Scottish Executive's VAW Unit's report which stated that "domestic violence is an abuse of power within a relationship, whereby a man seeks to exert his power over a female partner but does not generally abuse other women."<sup>164</sup> Albeit, such an approach reduces domestic abuse to incidental violent behavior at micro level without linkage to the perpetrator’s attitudes towards women in general.

Conversely, the radical feminist perspective stands that “violence against women is a result of the subordinate position women occupy in the social structure and this subordination is the cultural legacy of the traditional family.”<sup>165</sup> English women’s organizations argue that the

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<sup>163</sup> Law Commission of England and Wales, “Hate Crimes Laws – A Consultation Paper No. 250,” 263.

<sup>164</sup> Scottish Executive, “Working Group on Hate Crime Report,” 2004, 27, <https://www.webarchive.org.uk/wayback/archive/3000/https://www.gov.scot/Resource/Doc/26350/0025008.pdf>.

<sup>165</sup> Scottish Executive, 343.

problem of domestic abuse is overwhelmingly gendered, and limiting it to individual relationships' dynamics might threaten progress in combating normalization and silent social acceptance of such violence.<sup>166</sup> Nevertheless, as critically noted, “refocusing on male domination rather than male violence” and “reframing partner abuse as a crime against liberty and equality”<sup>167</sup> may seem too radical in the male-dominated policy-making environment. In this regard, the English draft proposed removing the *so-called* “dwelling exemption” to the “stirring up hatred” offenses; however, the proposal met with negative feedback due to valid concerns on the right to freedom of expression and respect for one’s private and family life.<sup>168</sup>

In conclusion, while the criteria of demonstrable need and additional harm have been evident, the suitability criterion remains controversial. The range of presented concerns could be partially mitigated by making use of a carve-out for sexual offenses and domestic violence; however, it might have negative implications for the coherence and intelligibility of the law. Furthermore, introducing gender to the hate crime legislation with an exception for sexual offenses and domestic abuse constituting the main types of violence rooted in the power-subordination dynamic between genders would undermine one of the primary objectives of such laws, namely reshaping the discriminatory social structures. Additionally, the proposed carve out might be read as a message to the perpetrator and victims that the two excepted types of violence are not considered equally serious with other gender-based hate crimes and

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<sup>166</sup> Law Commission of England and Wales, “Hate Crimes Laws – A Consultation Paper No. 250,” 264.

<sup>167</sup> Evan Stark, “Re-Presenting Battered Women: Coercive Control and the Defense of Liberty,” *Les Presses de l’Université Du Québec*, Violence Against Women: Complex Realities and New Issues in a Changing World, 2012, 16.

<sup>168</sup> Chairman of the Law Commission, Letter of 9 February 2021 to Lord Vinson of Roddam Dene and Lord Pearson of Rannoch, <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/02/Letter-to-Lords-Vinson-Pearson-09.02.2021.pdf>.



strengthen the conviction of acquiescence to such behavior. However, even if sexual offenses and domestic violence, as a result of public consultation, would be excluded from the hate crime framework, adding gender to the protected characteristic still could be beneficial in cases of street harassment and a considerable number of online abuse disproportionately targeted against women. Nonetheless, despite the difficulties to satisfy the suitability criterion, the Law Commission provisionally supported the extended hate crime protection for gender and sex, giving great importance to the findings related to the first two criteria.

### 3.2. Violence against women – Italy

The Italian society is rooted within the patriarchal model that has been institutionalized by the 1930 Penal Code drafted under Benito Mussolini. It is sufficient to mention that Article 578 of the Penal Code significantly reduced the legal penalty for the man who killed his wife, daughter, or sister after having discovered the illegitimate carnal relationship (so-called honor killing), and Article 544 of the Penal Code allowed for abandonment of the criminal charges for rape if the offender has consented to marry the victim.<sup>169</sup> In regards to sexual abuse, only Law No. 66 of 1996 began to consider sexual violence as a crime against personal freedom instead of the previous classification, which placed it among the crimes against public morality.<sup>170</sup> The belief of being entitled to use violence in a domestic context is still represented in Article 571 of the current Penal Code that introduces a peculiar justification for violence by "the means of correction or discipline" (*animus corrigenda*) towards a person under the perpetrator's authority or entrusted to him for reasons of education, instruction, care,

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<sup>169</sup> Giacomo Viaggiani, "Il Femminicidio Come Reato. Prassi Applicative e Prospettive de Iure Condendo," *GenIUS Rivista Scientifica Rilevante Ai Fini Dell'Abilitazione Scientifica Nazionale*, 2019, 2.

<sup>170</sup> Monica Gazzola, "Crimini d'odio Contro Le Donne: Il Modello Patriarcale Nel Sistema Penale Italiano," *Nella Rete Nazionale per Il Contrasto Ai Discorsi e Ai Fenomeni d'odio*, 2021, <https://www.retecontroloodio.org/2021/03/09/crimini-d-odio-contro-le-donne-modello-patriarcale-sistema-penale/>.

supervision, or custody. Such conduct is criminalized only if the act derives "a direct danger of a disease in the body or mind."<sup>171</sup> The Supreme Court of Cassation (*Corte Suprema di Cassazione*) only in 1956 stated that Article 571 of the Penal Code does not apply to the husband who beats his wife because he does not have a corrective power over his spouse.<sup>172</sup> The opposite would not comply with Article 29 of the Constitution (moral and legal equality of the spouses). The historical and institutionalized misogynistic structure of the society is reflected in the prevalence of gender-based violence. Consequently, neither a transformation into democracy nor revolutionary achievements of women's liberation movements of the 1960s and 1970s have prevented the continuation of moral legitimacy for male violence. According to the report issued by the Italian Institute of Statistics (ISTAT), 31.5% of women between 16 and 70 years old (6 million 788 thousand of the Italian population) have suffered some form of physical or sexual violence during their life.<sup>173</sup> Moreover, only in 2019, 111 femicides have been reported; current or former intimate partners have committed over 60% of them.<sup>174</sup>

Overcoming the patriarchal model and breaking the violent pattern requires adequate laws and policies. A significant step was taken in 2011 through Italy's ratification of the Istanbul Convention. The decision has been followed by legal amendments of 2013 and 2020 aimed at reforming the anti-discrimination law in line with the Convention's requirements. Furthermore, the historical sources of the patriarchal and violent model of the Italian society and the great

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<sup>171</sup> Article 571 of the Penal Code.

<sup>172</sup> Silvia D'Oro, "Brevi Note Sulla Violenza Di Genere Alla Luce Dei Recenti Interventi Normativi: De Iure Condito e de Iure Condendo," *Pari Opportunita* 4 (2016): 40.

<sup>173</sup> Senato della Repubblica, "Femminicidio, Stalking, Malamore, Maltrattamenti e Altre Violenze Di Genere: I Primi Dati Della Commissione Parlamentare d'inchiesta," November 27, 2017, 2–3.

<sup>174</sup> Istituto Nazionale di Statistica, "Autori e Vittime Di Omicidio in Italia," February 5, 2021, <https://www.istat.it/it/archivio/253279>.

prevalence of such violence fit into the conceptualization of hate crimes as rooted in the power-subordination dynamic between the groups and justify including sex and gender among protected characteristics. The gender-based hate crime legislation is believed to be “a historic overcome of the patriarchal model”<sup>175</sup> and “the most suggestive” tool in combating femicide.<sup>176</sup>

### 3.2.1. Gender as a protected characteristic within hate crime law

Currently, the Italian legal system, based on the 1993 *Mancino Law*, provides for the conventional definition of hate crimes which prohibits violence or incitement to violence motivated by race, ethnicity, nationality, and religion. Previously, the Italian Parliament on several occasions rejected proposals to extend this catalog relying on Article 3 (the principle of equality) and Article 25 (the principle of legality) of the Constitution of the Italian Republic and raising the argument of “reverse discrimination.”<sup>177</sup> Eventually, in November 2020, Italy’s Chamber of Deputies (*Camera dei deputati*) passed the unified text of the *d.d.l. Zan et Alli* law (hereinafter referred to as the Zan Bill) aimed at extending the existing list of protected characteristics to sex, gender, sexual orientation, gender identity, and disability. The bill is awaiting consideration before the Senate of the Republic (*Senato della Repubblica*); voting for its scheduling is planned for 6 July 2020.

### 3.2.2. The analyzes of the Zan Bill

The proposal consists of ten provisions introducing several measures to prevent and combat discrimination and violence motivated by sex, gender, sexual orientation, gender identity, and

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<sup>175</sup> Gazzola, “Crimini d’odio Contro Le Donne: Il Modello Patriarcale Nel Sistema Penale Italiano.”

<sup>176</sup> Viaggiani, “Il Femminicidio Come Reato. Prassi Applicative e Prospettive de Iure Condendo,” 21.

<sup>177</sup> Monica Gazzola, “Crimini d’odio Contro Le Donne: Il Modello Patriarcale Nel Sistema Penale Italiano,” *Nella Rete Nazionale per Il Contrasto Ai Discorsi e Ai Fenomeni d’odio*, 2021, <https://www.retecontroloodio.org/2021/03/09/crimini-d-odio-contro-le-donne-modello-patriarcale-sistema-penale/>.

disability.<sup>178</sup> Article 1 provides legal definitions of sex, gender, sexual orientation, and gender identity, corresponding with the national and international anti-discriminatory provisions. *Sex* has been defined as “biological or personal sex” and *gender* as “any outward manifestation of a person that conforms or contrasts with the social expectations connected with sex.”<sup>179</sup> Albeit Italian law has neither defined disability nor already existing protected characteristic, which creates an unnecessary disparity between discriminating factors and leaves a scratch on legal cohesion.<sup>180</sup>

The Italian legal system establishes a separate category of Crimes Against Equality provided for by Articles 604-*bis* and 604-*ter* of the Penal Code that prohibits discriminatory and violent acts committed based on racial, ethnic, religious, or national grounds, which do not constitute more serious offenses within criminal law. The prohibition enshrined in Article 604-*bis* (1) a) and b) captures propagating ideas based on superiority or racial and ethnic hatred, instigating to committing, and committing discriminatory or violent acts out of the victim's race, ethnicity, religion, or nationality. Article 2 of the Zan Bill extends the scope of protection ensured by Article 604-*bis* (1) a) and b) by adding sex, gender, sexual orientation, gender identity, and disability to the catalog of protected characteristics. The “new” protected grounds are also included within the scope of Article 604-*bis* (2), which refers to the prohibition of incitement

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<sup>178</sup> Senato della Repubblica, “Misure Di Prevenzione e Contrasto Della Discriminazione e Della Violenza per Motivi Fondati Sul Sesso, Sul Genere, Sull’orientamento Sessuale, Sull’identità Di Genere e Sulla Disabilità” (No. 005, XVIII Legislature, 4 November 2020), <http://www.senato.it/service/PDF/PDFServer/BGT/01179390.pdf>.

<sup>179</sup> Article 1, Senato della Repubblica.

<sup>180</sup> Luciana Goisis, “Hate Crimes in a Comparative Perspective. Reflections on the Recent Italian Legislative Proposal on Homotransphobic, Gender and Disability Hate Crimes,” *GenIUS Rivista Di Studi Giuridici Sull’orientamento Sessuale e l’identità Di Genere*, No. ISSN 2384-9495 (2020): 10.

to discrimination and violence committed by organizations, associations, movements, and groups. Importantly, this prohibition excepts propaganda in order to avoid the criminalization of expressions of opinions. Similarly, the extension concerns the aggravated circumstances established in Article 604-ter for crimes punishable with a penalty other than life imprisonment committed out of biased purposes.

Because the crucial part of the amendment considers the incitement to hatred, the most common concerns relate to the limitation of freedom of speech. Consequently, in Article 4, the proposal envisaged a safeguard clause for freedom of expression, pluralism of ideas, and freedom of choices, as long as it does not determine the concrete danger regarding the fulfillment of acts of discrimination or violence. Similar clauses are present in the legislations of other countries, *inter alia* in England and France, and should be assessed positively because they seek a balance between freedom of expression and human dignity while providing judges with a certain margin of appreciation in drawing a line between those two fundamental rights.

Furthermore, due to Italy's problem with overcrowded prisons resulted in the ECtHR's *Torreggiani* pilot judgment, the amendment introduces non-custodial measures of aggravated sentencing, such as unpaid community service with the possibility to be served at the organizations supporting the victims of bias-motivated crimes related to the reasons the crime was committed. The already existing non-custodial measures also include a curfew, prohibition of gun possession, suspension of driving license and passport, or prohibition of conducting

electoral activities.<sup>181</sup> Another provision amends Article 90-quater of the Code of Criminal Procedure by including sex, gender, sexual orientation, gender identity, and disability among circumstances determining the victim's particular vulnerability in the criminal proceedings. The status of a particularly vulnerable victim results in a more sensitive approach during the trial; for example, audiovisual recordings of the statements are permitted in all cases, and the assistance of a qualified psychologist is provided during collecting summary evidence regardless victim's age.<sup>182</sup> Finally, Articles 7, 8, 9 of the Zen Bill provide measures to promote equal rights of the LGBTQ+ community. At the same time, Article 10 obliges the Italian Institute of Statistics to carry out surveys on discrimination and violence committed out of racial, ethnic, religious, and homo-transphobic reasons at least once in three years, in order to verify the application of the Zan Bill and adequately plan further policies.

### **3.2.3. Concerns on the extended protection**

Despite the Chamber of Deputies' approval of the Zen Bill, the legislative process still causes many controversies, especially from the right-wing conservatives. Moreover, the public discussion has been heated up again by the recent "unprecedented" formal request of the Secretary of State of His Holiness to the Italian government aimed at reformulating the proceeded law "so that the Catholic Church can continue to carry out its pastoral, educational and social action freely." The Holy See claimed that the content of the legislative proposal reduces the freedoms guaranteed to the Catholic Church in the Concordat, especially in relation to freedom of thoughts and expression but also the autonomy of Catholic schools in the context of the National Day Against Homophobia and Transphobia established by the draft. In the eyes

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<sup>181</sup> See: Article 3 of the Decree-Law 26 April 1993, No. 122, coordinated with the conversion Law of 25 June 1993, No. 205.

<sup>182</sup> See: Article 351(1-ter) and Article 362(1-bis) of the Code of Criminal Procedure, respectively.

of many, such a request is considered the Catholic Church's attempt to interfere in the state's internal affairs. Furthermore, in June 2020, a group of feminists sent a letter to the parliamentarians requesting removing the term "gender identity" from the Zan Bill and replacing it with the term "transsexuality" because of a negative tendency to replace gender with gender identity in all areas of life, including sports, politics, research on women. It is argued that the above has adverse consequences for the achievements of women's rights movements. The penholders claimed the need to mitigate the risk of classifying statements on biological differences between sexes as transphobic and therefore punishable under hate crime laws.

## CONCLUSIONS

Through the hate crime legislation, criminal law tries to draw a clear line between biased and non-biased motives while marginalizing the problem of systematic discrimination and intersectionality. Furthermore, the current legal approach reduces the application of hate crime laws only to extreme cases with explicitly expressed hate bias while ignoring the prevalence and frequency of such attacks in daily life. Concerns about the effectiveness of such regulations raise the question of whether hate crime laws should be re-defined in order to achieve their doctrinal goals. Therefore, hate crimes should not be treated solely as aggravating provisions but rather as an umbrella of laws and policies aimed at reconstructing the underlying discriminatory structures that have caused the vulnerable groups' oppression. Furthermore, *de lege ferenda* postulates include providing members of the protected groups with a special status within the criminal justice system that would be presumed after identifying *prima facie* bias or prejudice. The holistic response towards bias-motivated crimes requires a more context-sensitive and human rights-oriented approach through procedural simplifications, accessible reporting systems, data collection, and training for law enforcement and judicial representatives. Only the re-shaped concept of hate crime legislation that takes into consideration the societal power-subordination context of those crimes, together with its symbolic meaning towards both victims and perpetrators, have the potential to be transformative and effective.



The marginalization of violence against women in the hate crime legislation corresponds with a long history of minimizing and discounting women's experiences as victims.<sup>183</sup> Both social and legal perceptions of the gravity of male violence against women have severe implications on the phenomenon and explain a low rate of reporting such crime to the police. "The socialization of sex roles, gender stereotypes and expectations (...) and the male justification of rape all play a part in not recognizing violence against women as a hate crime."<sup>184</sup> According to radical feminist theories, "male privilege has long been guaranteed by legal proscriptions and silences that have simultaneously excluded women from involvement in the public sphere, while failing to protect them in the context of their private lives."<sup>185</sup> The research presented in this paper proved that despite controversies, numerous types of violence against women fit within the doctrinal paradigm of hate crime and share the same distinguishing characteristics with other crimes of this type that justify a special legal approach for other protected grounds. Especially, gender-based violence fits into one of the core rationales for hate crime laws, namely that the harm caused by the crime is not limited to the affected individual but impacts the broader community of people sharing the same characteristic. The women's fear of male violence deepens the social inequality and significantly limits their rights and freedoms in public and private spheres. However, the fit is not strict because gender-based violence frequently fails to meet the model conditions of victims' interchangeability and no previous relationship with the perpetrator. Moreover, the fit remains uncomfortable because of the male-dominated policymakers' restraint to accept the radical feminist theories recognizing gender-

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<sup>183</sup> Liz Kelly and Jill Radford, "'Nothing Really Happened': The Invalidation of Women's Experiences of Sexual Violence," *SAGE Publications, Critical Social Policy* 10, no. 30 (1990): 41.

<sup>184</sup> McPhail, "Gender-Bias Hate Crimes," 132.

<sup>185</sup> Perry, "In the Name of Hate: Understanding Hate Crimes," 83.

based violence as rooted in the, still, patriarchal social hierarchy, which makes the decision on extending the catalog of protected characteristics dependent on the political agenda.

As demonstrated above, the inclusion of gender within the hate crime legislation is not necessary if other laws and policies aimed at combating gender-based violence are sufficient. Nonetheless, the great scale of violence against women, a low report and prosecution rate, the lack of comprehensible data, and gender bias within the criminal justice system causing the secondary victimization bring to the conclusion that immediate and decisive steps must be taken to bring gender discrimination to an end. The effectiveness and efficiency of such legal approach would be, however, reduced by the general limitation of hate crime legislation related to difficulties in identifying the biased *animus*. Nevertheless, despite the concerns, *gender* and *sex* become more and more present within the national and international hate crime legislation which leaves a room for debate on how such laws should be implemented in order to provide an effective instrument in combating violence against women and not only a symbolic condemnation.

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