

# A New Approach to Hate Crime and Hate Speech

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**ABSTRACT:** The rise in hate speech crime is an undeniable reality around the world, and during the pandemic it has been exponential. Consequently, addressing the causes and effects of these crimes is one of the most difficult tasks or challenges facing many countries. European institutions and others have pointed out that violence and hateful actions directed against the identity of an individual have the potential to spread fear or even terror in whole communities and could even lead to the destabilization of democratic systems. On the other hand, it must be recognized that the impact of hate crimes can be far greater than that of similar crimes committed without a hate or bias motive, so that they could be considered as signal crimes in the sense that they target a particular identity characteristic and aim to send a threatening or hostile message that anyone who shares the specific characteristics of that person, meaning that they are part of that particular or definable group, could be subject to the same treatment. Thus, this type of crime could jeopardize the principles of equality and non-discrimination, recognized and guaranteed by all democracies, but may also have the potential to undermine the effectiveness of law enforcement and the criminal justice system.

**KEYWORDS:** hate crime, hate speech, offences, European Union, list of offences, Committee of Ministers Recommendation 2022(16)

## 1. Introduction

The present study is a follow-up to that already published (Franguloiu and Hegheș 2023) by the same authors. We note in the previous scientific approach that there is a significant increase in hate crimes and hate speech around the world. Terrorism and radicalization are the subject of considerable concern on the part of the European institutions and bodies, particularly in terms of the principle of “*checks and balances*”. Therefore, several questions can be raised not only about how prepared states are to deal with this kind of attack, but also about the need to highlight and draw the attention of decision-makers to the importance of hate crimes, hate speech and to demonstrate the sometimes devastating effects of these crimes.

From a general perspective, as noted above, the importance of criminalization is mainly due to the effects that these offences can produce; from a legal perspective, as noted in the previous study, there are certain issues that require clarification, in terms of whether there should be a single criminalization, under its own *nomen juris* or as an aggravated form of other offences, as in the French system. In order to identify the most appropriate approach to these crimes, a holistic and comprehensive research is required, at least from our point of view, not only from the perspective of substantive rules, but also from that of respect for human rights, the rule of law and democracy, so as to avoid any logical fracture or fragmented or sequential approach in the process of criminalization of this type of acts, but also of their prevention, as we have highlighted in the previous study (Franguloiu and Hegheș 2023, 1-12).

## 2. Draft Recommendations of the Committee of Ministers to Member States on hate crimes

The Council of Europe's Committee of Experts on Hate Crimes (2023) was mandated to draft and has formulated a series of recommendations for approval on behalf of the Committee of Ministers. This is a new, comprehensive legal instrument, building on the rich case law of the European Court of Human Rights and other existing Council legal instruments.

It is true that this process of addressing the causes and effects of hate crimes is extremely difficult, as many societies are currently facing this phenomenon. Acts of violence and hate actions directed against the identity of a person or persons can spread terror or fear throughout entire communities and have the potential to destabilize democratic societies, representing a real danger to them.

The expert panel points out that: *“The impact of hate crimes can be far greater than that of similar crimes committed without a bias motive. Hate crimes are often seen as signal crimes, where targeting an identity characteristic, sends a hostile message that anyone who shares the specific characteristics of the target is unwelcome or at risk of further violence”* (Committee of Experts on Hate Crime 2023). This category of crime is therefore likely to threaten not only the targeted person or their community, but is likely to have the potential to pose a serious threat to social cohesion and inclusion, as well as to the principles of equality and non-discrimination, as objectives that all rule of law states have agreed upon at European and global level. It should be emphasized that failure by the authorities to deal adequately with hate crimes could lead to the alienation of the groups concerned, is likely to foster hostility and mistrust between communities and could undermine the efficiency and effectiveness of law enforcement and the criminal justice system in the States in whose territory these crimes are committed.

We illustrated in the previous study the very different ways in which these offences are regulated in various States. We noted that there are significant differences within and between Council of Europe member states in their approach to hate crimes. It should be emphasized that these differences could lead to further difficulties in comparing across jurisdictions' experiences and responses in preventing and combating hate crime. Under-reporting persists in some states, including problems with data collection and reporting, and the additional complexity of taking into account the local dimensions of hate crime and other forms of bias-motivated violence. We illustrate with a case that has had a particular impact, not only in the media but also at European level: a wave of sexual assaults that took place in several cities in Germany following the reception of several waves of immigrants - in 2015, on New Year's Eve, several sexual assaults targeting women took place near the Cologne train station and cathedral. More than 90 complaints of assault, including rape, were registered.

*“According to the victims, the attackers came from a group of about 1,000 men who were near the city's central train station and had Arab or African features”* the police chief said. The victims also said the men acted in small groups of five individuals, surrounding women to sexually assault them and steal their personal goods. The German justice minister denounced the assaults, saying police were facing *“a completely new form of organised crime”*. He called for security measures in German cities to be stepped up so that citizens *“are not vulnerable to brutal violence”*. Police in Hamburg said similar attacks had taken place in the northern German city on New Year's Eve. Nine reports of sexual assaults and robberies targeting women have been registered, with women claiming they were molested by *“Mediterranean or Arab-looking”* men. The recent incidents in Cologne and Hamburg have created a wave of fears about Middle Eastern and African immigrants on German territory, *“as more than one million immigrants arrived in the country in 2015”* (Maciuca 2016).

Subsequently, the number of complaints increased to more than 1100 and investigations revealed that the attackers used firecrackers to drive away police officers in order to commit crimes without being caught. These attacks have sparked a great debate in Germany about the capacity and possibilities of the German state to accommodate such a large number of immigrants and how asylum seekers found guilty of such crimes should be dealt with, as well as the state's capacity to integrate more than one million immigrants annually (Digi24.ro 2016; Voxeurop.eu 2016). As a result, several members of the community have attacked people they believe committed these sexual assaults and robberies. The situation was similar in other European countries - Sweden, Finland, Switzerland (Aktual24.ro 2024).

In these situations, not all cases of sexual assault and robbery were reported, as not all of the victims had reported them, especially as the imam in Cologne said: *“We have to react appropriately and not add fuel to the fire. The events on New Year’s Eve were the girls’ own fault because they were half naked and perfumed. It is not surprising that people attacked them”*, a statement that sparked further riots among the population, culminating in the assault of people alleged to be part of the ethnic group that assaulted the women (Napocanews.ro 2016). Through this exemplification, our intention was to highlight the diversity of motives that could give rise to the commission of hate crimes or hate speech and how this leads to the commission of violent crimes. These cases (and more) formed the basis of the Committee of Ministers’ Recommendation 2022(16) (Council of Europe 2023, study elaborated by Faloppa, Gambacorta, Odekerken, and Van der Noordaa) and the recommendations of the Committee of Experts on Hate Crime (2023), which are subject to approval and validation by the competent institutions, namely the Council. An in-depth analysis, from the perspective of substantive criminal law, of this Recommendation, which is still in draft form, will be the subject of a future study by the same authors.

### **3. Council of Europe legislative standard on hate crimes**

In the previous scientific approach, we pointed out that the main provision prohibiting discrimination is the European Convention on Human Rights and Fundamental Freedoms, which in its Article 14 prohibits all forms of discrimination: *“The exercise of the rights and freedoms recognised in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”* ([https://www.echr.coe.int/documents/d/echr/Convention\\_ROM](https://www.echr.coe.int/documents/d/echr/Convention_ROM)). Its Protocol No. 12 establishes a general prohibition of discrimination in Article 1, which contains provisions almost identical to those in Article 14: *“1. The exercise of any right provided for by law shall be secured without discrimination based on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by a public authority on any of the grounds referred to in paragraph 1.”* (Council of Europe. 1950). These conventional texts are the basis of the two Recommendations of the Committee of Ministers mentioned above, which we will analyse from the perspective of the object of our study.

#### **3.1. Recommendation of the Committee of Ministers 2022(16)**

The Recommendation CM/Rec(2022)16 of the Committee of Ministers to member States on combating hate speech was adopted on 20 May 2022 at the 132nd session of the Committee of Ministers (Council of Europe 2022). It is true that recommendations, together with opinions, are not legally binding on Member States, but rather represent invitations to them by the competent

bodies (European Commission or Committee of Ministers) to comply with these recommendations (Craig and de Burca 2009, 107-108). The authors cited have legitimately stated that recommendations and opinions, together with other instruments such as guidelines, are part of what is called “*soft law*”, as opposed to other normative acts with full legal force, namely the Founding and Accession Treaties (which represent primary EU legislation), as well as specific acts of secondary legislation - regulations and directives.

These recommendations aim to combat hate speech as “*a deep-rooted, complex and multidimensional phenomenon, which takes many dangerous forms and can be disseminated very rapidly and widely using the internet, and that the persistent availability of hate speech online exacerbates its impact, including offline*” (Council of Europe 2022).

The Committee of Ministers stressed that such speech is likely to negatively affect individuals, communities, but also societies in various ways and with varying degrees of severity, as such speech instils fear and humiliation in the individuals concerned, but also as it has a potentially discouraging effect on their participation in public debate, which is a total negative effect on the exercise of democracy.

A key idea expressed by the Committee of Ministers with reference to these recommendations stemmed from the right to freedom of expression, to the effect that “*freedom of expression applies not only to information or ideas which are favorably received or regarded as harmless or indifferent, but also to those which offend, shock or disturb the state or any section of the population*” (*ibid.*), subject, of course, to the correlative obligations, the restrictively imposed requirements of legality as to their necessity and proportionality in a democratic society.

The Committee of Ministers has raised the need to develop a common definition, at least at EU level, of the concept of “hate speech”, on the fully justified grounds that it is defined and understood in different ways at national, European and international level, and for this reason there is an absolute need for a common approach to it and to the origin, nature and implications of this phenomenon.

Consequently, there is a need to design and develop common sectoral policies and efficient and effective strategies, as well as appropriate and proportionate measures to prevent and combat the phenomenon, both online and offline.

Based on the idea that all human beings belong to the same species, the Committee of Ministers, like the European Commission against Racism and Intolerance (ECRI), rejected theories based on the existence of different “races”. However, in the text of the recommendation, “*the term ‘race’ is used to ensure that those persons who are generally and wrongly perceived as ‘belonging to another race’ are not excluded from the protection provided by legislation and the implementation of policies to prevent and combat hate speech.*” (*ibid.*) and adopted a series of six recommendations to Member State governments:

“1. Take all necessary measures to ensure the prompt and full implementation of the principles and guidelines annexed to this Recommendation;

2. Take appropriate measures to encourage and support national human rights institutions, equality bodies, civil society organizations, the media, Internet intermediaries and other stakeholders to adopt the measures which are set out for them in the principles and guidelines annexed to this Recommendation;

3. Protect human rights and fundamental freedoms in the digital environment, including through cooperation with internet intermediaries, in line with Recommendation CM/Rec(2018)2 on the roles and responsibilities of internet intermediaries, as well as other applicable Council of Europe standards;

4. Promote the objectives of this Recommendation at national, European and international level and engage in dialogue and cooperation with all stakeholders to achieve these objectives;

5. *Ensure that this recommendation is translated into national, regional and minority languages and that it is disseminated as widely as possible and by all accessible means among the competent authorities and stakeholders;*

6. *Review regularly the state of implementation of this Recommendation with a view to enhancing its impact and inform the Committee of Ministers of the measures taken by Member States and other stakeholders, the progress made and any remaining shortcomings.” (ibid).*

In the present study, from the perspective of the legal framework, we deal only with recommendations that are related to criminal law, leaving aside those that are part of civil or administrative law. The Committee of Ministers has therefore developed a set of principles and guidelines for a holistic approach to this concept, which tends to define a veritable range of offences of a kind already criminalized in the legal systems of all democratic states in the world. We make this claim with reference to the existence of these offences in different legal systems, as presented in our previous study, cited at the beginning of this paper.

An important clarification should be made, namely that these recommendations are only concerned with hate speech offences committed online and offline, which we will analyze from the perspective of the place of commission of the criminal act, sometimes as an essential requirement for the typicity of any crime.

For the purposes of the Recommendation under consideration, hate speech is defined as “*all types of expression that incite, promote, spread or justify violence, hatred or discrimination against or denigrate a person or a group of persons because of their actual or ascribed personal characteristics or status, such as “race”, color, language, religion, nationality, national or ethnic origin, age, disability, gender, gender identity and sexual orientation” (ibid).*

From the perspective to be addressed by criminal law, it was recommended that States “*clearly specify and define in their national criminal law which expressions of hate speech are subject to criminal liability, such as: a. public incitement to commit genocide, crimes against humanity or war crimes; b. public incitement to hatred, violence or discrimination; c. racist, xenophobic, sexist and LGBTI-phobic threats; d. racist, xenophobic, sexist and LGBTI-phobic public insults, under conditions such as those specifically provided for online insults in the Additional Protocol to the Convention on Cybercrime concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189); e. the denial, trivialization and public tolerance of genocide, crimes against humanity or war crimes; and f. the intentional dissemination of material containing such hate speech (listed in (a-e) above), including ideas based on superiority or racial hatred.” (ibid).*

We note that although the definition drawn up by the Committee of Ministers attempts to cover all grounds of discrimination, however, in the recommendation on the criminal legal framework, several grounds are excluded, without denying the inclusion of the most important of these; for example, grounds relating to certain disabilities or illnesses, age, religion or religious belief, family situation, aporophobia - understood as fear or revulsion, aversion to poor or needy people - are excluded. This exclusion leads us to the conclusion that states could rectify the omission and remedy the shortcoming by including these grounds of discrimination when drafting sectoral criminal policy and legislation on the subject. This is necessary because the online environment offers countless examples of discrimination and incitement to hatred based on these grounds.

It remains open to debate, as we stated in our previous study, whether it would be necessary to have a separate incrimination, under its own *nomen juris*, as in the American or Spanish system, as a variant of the corresponding offences that are already criminalized in almost all legal systems in the world, or as aggravated forms or variants of these corresponding offences, as in the French system. We only note that a variant of species would be difficult to define given the

multitude of ways in which these offences can be committed and refer to the comparative study carried out in our previous study (Franguloiu and Hegheş 2023). It would also be necessary to discuss the place of commission of these offences, in the sense envisaged by the Recommendation, namely the online and offline environment, since the place of commission of the offence may be a requirement of the typicality of an offence, having the character of a pre-existing element of the offence, such as the public road, an essential condition for the commission of the offence of driving a motor vehicle without a driving license (Mitrache and Mitrache 2019, 162-163); in certain situations the place of commission acquires the valence of a circumstantial element aggravating the offence, such as, for example, a public place or a common means of transport, in the case of the offence of aggravated theft (*ibid.*).

We presume that the online and offline environment was taken into account as an essential element of the commission of the offence, since the recommendation does not deal with the offence of hate speech committed with the physical presence of persons or the hypothesis that the offence would be committed by publication in the printed press, by sending letters, by spreading manifestos or leaflets among members of the community. In addition, all the feelings of hatred that underlie the commission of this type of crime, both hate crime and hate speech, are in fact the motivations for committing the crime. In the literature, motive is defined as “*the internal cause of the act of conduct which designates that feeling (in our case, hatred, our emphasis) which led to the idea of committing a certain act arising in the mind of the perpetrator*” (*idem*, p. 174-175).

It has been asserted in the doctrine, and rightly so, that “*the purpose, motive or reasons for the offence must not be confused with the intention or animus delinquendi, the intention being the will to commit the offence which the perpetrator wishes to commit, whereas the purpose or motive is the cause for which he wishes to do that thing, the result which he seeks to achieve. The aim or motive is already, as we said, causa remota delicti, and the intention is causa proxima*” (Tanoviceanu 1912, 343).

Therefore, the purpose is considered as a distinct variety within the motives, namely the remote motive that the offender pursues (Cioclei 2007, 256). It is obvious that in the case of these offences, the motive is the element that distinguishes them from the corresponding offences, for example where the perpetrator strikes the person motivated by a feeling of hatred towards him for certain reasons relating to the object of the discrimination, for example his ethnicity. On the other hand, this motive must be established with certainty, since not all acts are based on hatred of a specific or identifiable group of persons for certain reasons: for example, a group of young people who want to steal money and enter into a church, synagogue or mosque with the aim of appropriating the money or valuables there will not be committing a hate crime but simply a theft, because they were not motivated by feelings of hatred towards the religion of the place of worship in question - Christian, Moslem or Islamic.

We have given just one example, in order to emphasize that, regardless of the method chosen by the national legislator, the definition of the offence in terms of its essential features of illegality, typicality and immutability must be very clear and meet the requirements of clarity, precision and predictability necessary for any criminal legal rule.

#### 4. Conclusions

Crime, criminality in general, is more than a concern that absorbs theorists and practitioners, and its presence in the social reality of any community provides reasons for fear for community members and requires a response. In any modern society, crime and the corresponding act of justice is structured in three stages (Gross 1979, 7). In the first stage a charge is brought against a

person who is said to have broken the law. As the accusation itself can be criticized and verified so as to lead to the conclusion of guilt or innocence, the second stage is reached. If the accusation is proved by evidence, the third stage is to punish the guilty party for the act he has committed.

In order to correctly respect this structure, it is necessary to define and articulate the definitions according to the structure and requirements of the criminal legal norm, in order to eliminate the possibility that any act committed against a person belonging to a certain group (although everyone belongs to a certain group, regardless of nationality, ethnicity, race, religion, education/studies, gender, age, profession, etc.) is automatically considered as hate crime or hate speech. In our view this is a difficult task, given both the complexity and multiplicity of the reasons that can lead to discrimination and the multitude of material activities through which it can be committed, the possibilities being virtually limitless. The procedural aspect must not be overlooked either, in that, in our opinion, no exceptions to the rules of procedure can be allowed, nor can the burden of proof be reversed, i.e. the accused person be obliged to prove his innocence, since in criminal proceedings the burden of proof lies with the accuser, namely the prosecutor, while the suspect/defendant benefits from the presumption of innocence as an essential principle of criminal proceedings.

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