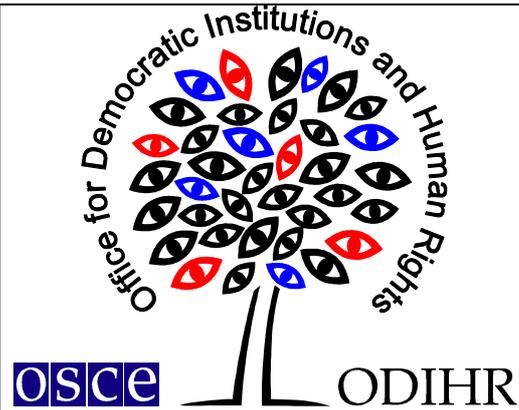


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Comments
on Provisions Relating to Hate Crimes
in the Draft Criminal Code
of the former Yugoslav
Republic of Macedonia

Based on an unofficial English translation of the draft Criminal Code of the former Yugoslav Republic of Macedonia provided by the OSCE Spillover Mission to Skopje

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I. BACKGROUND

1. *During the course of 2008, the OSCE ODIHR was invited by the Ministry of Foreign Affairs ('MFA') to undertake a workshop with government officials in Skopje on the concept of hate crimes. This took place on 4 February 2009, in cooperation with the OSCE Spillover Monitor Mission to Skopje ('the Mission'). Present were officials from all criminal justice ministries, the MFA and other related governmental agencies such as the Broadcasting Council and the Ombudsman's office.*

2. *Subsequently, ODIHR was approached by the Mission to provide comments on the draft Criminal Code and its provisions related to hate crimes.*

3. *The preparation of these comments has been assisted by the Ministry of Justice paper entitled "Strategy for Reform of the Criminal Legislature" which was forwarded by the Mission, as well as translations of the two draft articles prepared by the Criminal Code drafting committee which are most closely linked to hate crimes: Article 173 and Article 394-g.*

II. SCOPE OF REVIEW

4. This commentary analyzes the Criminal Code in terms of its compatibility with relevant international and regional standards and OSCE Commitments; it does not purport to be a comprehensive review. Rather it highlights the key issues, and seeks to provide useful indicators of areas of concern that future drafts should take into account. It is intended to provide a framework for further discussion, and could form the basis of future seminar or roundtable with members of the Criminal Code drafting Committee to elaborate further the issues raised, and to discuss the many drafting options available, which cannot be included in this brief commentary, although, in order to assist drafters, some examples of other states' legislation has been included at the end of the commentary.

5. The aim of this commentary is to provide an assessment of the criminal provisions relating to hate crime and in particular to assess whether the current provisions of the Criminal Code are sufficient to meet international standards, including those set by the European Union.

6. The OSCE/ODIHR notes that the comments provided herein are without prejudice to any other opinions or recommendations that the OSCE/ODIHR may wish to make on the issues under consideration, in the future. A number of references to the OSCE/ODIHR publication *Hate Crime Laws: a Practical Guide* are made; this can be accessed on the OSCE website <http://www.osce.org/item/36671.html>.

III. EXECUTIVE SUMMARY

7. The intention of the Government to address the issue of hate crimes in their legislation is welcome. The current Criminal Code contains some provisions which are relevant to hate crimes, but do not constitute hate crime laws, while the draft articles 173 and 394-g are not sufficient to meet the benchmarks for an effective hate crime law.

8. It is recommended that:

- A. A hate crime provision is created in the draft Criminal Code, which recognizes crimes motivated by bias or prejudice based on certain protected characteristics, and imposes increased penalties for those acts.
- B. The law prohibits acts that would be a crime against one or more people or property.
- C. The protected characteristics in the hate crime law should include at least: ethnicity; religious or lack of religious affiliation; nationality; citizenship; gender; sexual orientation.
- D. The law does not require a specific emotion on the part of the perpetrator but simply that the victim was chosen 'because of' a protected characteristic,
- E. The existence of mixed motives for the crime should not prevent it from being recognized as a hate crime.

- F. The law recognises situations where a person is targeted because of their actual or perceived characteristics, whether or not true in fact.
- G. The law requires the judge to make a public statement of the aggravated penalty based on the motive for the crime.

IV. ANALYSIS AND RECOMMENDATIONS

(i) Overview:

9. A number of international instruments specifically call on states to criminalize certain acts.

10. Article 4 of the UN Convention on the Elimination of All Forms of Racial Discrimination imposes an obligation on states to take “*immediate and positive measures*”; paragraph (a) goes on to require that it should be an offence to “*disseminate ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin*” (emphasis added). The Committee overseeing CERD has called upon states to define offences with bias motives as specific offences and to enact legislation that enables the bias motives of perpetrators to be taken into account.

11. The European Commission on Racism and Intolerance (“ECRI”)¹ has also called for the criminalization of such acts in its General Policy Recommendations.

12. The European Union has recently passed a Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.² The decision states there is need for further approximation of Member states criminal laws to ensure effective implementation of comprehensive and clear legislation to combat racism

¹ See especially General Policy Recommendation No. 7 on National Legislation To Combat Racism And Racial Discrimination, ECRI website, 13 December 2002, www.coe.int/ecri

² Council Framework Decision 2008/913/JHA of 28 November 2008, Official Journal L 328, 06/12/2008 P. 0055 - 0058

and xenophobia and requires members states to have in place a framework which enables aggravated penalties for crimes motivated by racism.

OSCE commitments require participating States to strengthen their legislation in relation to hate crimes, while not specifying how this should be done. This general commitment has been supported by the ODIHR's publication *Hate Crime Laws: A Practical Guide* ("the Guide") which sets benchmarks for effective legislation. The Guide deals with the issues raised in this commentary in more detail, and this review utilizes and refers to commentary and recommendations set out in the Guide.

(ii) Definition of Hate Crime:

13. Hate crimes are criminal acts. They are not limited to particular kinds of offences, but typically range from intimidation, threats and property damage to assault and murder. Many countries distinguish between crimes and less serious infractions, such as "misdemeanours", although they are described in a variety of ways. In this commentary "offences" refers to all criminal law provisions; administrative infractions are excluded.

14. Hate crimes are distinguished from other offences because they are committed with a bias motive. The term "bias" in this context means some form of prejudice against a person or group.

15. This means that the perpetrator intentionally chose the *target* of the crime because of some *protected characteristic*.

- The *target* may be one or more people, or it may be property associated with a group that shares a particular characteristic.
- A *protected characteristic* is a characteristic shared by a group, such as their "race", language, religion, ethnicity, nationality, or other similar ground.

16. The term “hate crime” or “bias crime” therefore describes a phenomenon, rather than a specific offence within a penal code. A person may commit a hate crime in a country where there is no specific criminal sanction on account of bias or prejudice.

17. Currently the Criminal Code contains a general aggravating provision in Article 39, which allows sentences to take into account the motive for the crime, but does not explicitly refer to bias motivation on the grounds of race, ethnicity etc. Article 137 creates a criminal offence of limiting a person’s rights based on their race, ethnicity etc. neither of these articles would satisfy the criteria for hate crime laws, nor is it clear whether they are replicated in some way in the new draft Criminal Code. There is therefore no current provision which deals with hate crimes. Articles 173 and 394-g from the draft Criminal Code also fail to recognize and impose additional penalties for crimes committed on the basis of bias motivation.

18. Therefore, it is recommended that a hate crime provision is created in the draft Criminal Code, which recognizes crimes motivated by bias or prejudice based on certain protected characteristics, and imposes increased penalties for those acts.

19. In drafting such a provision, the key issues which should be considered are detailed below.

a) Type of Law

20. While laws which tackle hate crimes can take different forms, they should always explicitly increase the sentence than if the same crime had occurred without the motivation.

21. The government may choose to base a new provision on the previous article 39 i.e. a new aggravating circumstance leading to penalty enhancements. Alternatively, it may choose to create a new substantive offence where the elements of the crime are included in the offence. Although this latter approach is generally more successful in tackling hate crimes, it is a more complex procedure, and it is not possible, within the

confines of a limited legal commentary, to suggest the shape of such a law. However, examples of substantive laws are given in the Guide, such as the law in the UK, which is partly reproduced at the end of this commentary for ease of reference.

b) Prohibited acts

22. It is recommended that the law prohibits acts that would be a crime against one or more *people* or *property*.

c) Protected characteristics

23. A hate crime law always states explicitly the characteristics which are protected. As is made clear in the Guide, the law must provide equal protection for all, hence cannot protect any specific group or community: it should protect characteristics which are fundamental and immutable. The characteristics to be included should be determined by reference to the groups which are most likely to be subject to vilification and victimization. Deciding this is often best done in conjunction with a wide range of civil society groups, but it is recommended that the protected characteristics in any hate crime law should include at least: ethnicity; religious or lack of religious affiliation; nationality; citizenship; and sexual orientation.

d) Motive:

24. The Guide notes that the issue of motive can be dealt with in law through one of two models. First, ('the hostility model') requires that the act was motivated by hatred or bias as a motivating factor. The alternative approach ('discriminatory selection model') requires rather that there is a causal link between the characteristic of the victim and the offender's conduct, but a specific emotion is not required. This latter is preferable because it focuses on objective criteria not the subjective emotional state of the perpetrator which can vary and be extremely difficult to specify. Amendments should be designed to enhance application of the provisions in practice, and this approach is more effective in that respect.

25. The Guide strongly warns of the risk in crafting legislation where bias plays as the sole motive; to do so is to drastically limit the number of offences that could be charged.³

26. It is recommended that the law does not require a specific emotion on the part of the perpetrator but simply that the victim was chosen ‘because of’ a protected characteristic, and that the existence of mixed motives for the crime should not prevent it from being recognized as a hate crime.

e) Mistakes and Association

27. The law should recognise the possibility that the perpetrator may target a person under a mistaken belief that they have a certain characteristic – the mistake should not prevent such an act from being qualified as a hate crime. Hence, it is recommended that the law recognise situations where a person is targeted because of their actual or perceived characteristics, whether or not true in fact.

f) Increasing penalty:

28. The amount of increased penalty must be a matter for national legislators. But a major reason for passing hate crime laws is the visibility it brings to hate crimes and the state response to them. Hence, it is recommended that the law requires the judge to make a public statement of the aggravated penalty based on the motive for the crime.

V. CONCLUSION

29. In view of the above recommendations, if a new aggravating penalty clause is included in the draft Criminal Code, it could take the following form:

30. Where any offence is committed against a *person* or *group of persons* or *property* committed, in *whole or in part*, because of *actual or perceived* ethnic or national origin; citizenship; language; religious beliefs, or lack of religious belief; skin colour; gender;

³ At p. 48.

sexual orientation, or because of the person's *affiliation* with persons with any of the above protected characteristics, the court :

(a) shall treat that fact as an aggravating factor (that is to say, a factor that increases the seriousness of the offence); and

(b) shall state in open court that the offence was so aggravated.

EXAMPLES OF HATE CRIME LAWS

In the United Kingdom New substantive offences of racially and religiously aggravated assault, criminal damage, harassment and public disorder are created by sections 29-32 of the Crime and Disorder Act 1998. Where a person is charged with racially or religiously aggravated offences, it automatically increases the minimum and maximum penalties for the offence, sometimes lifting it from a minor offence to a more serious category of offence. Section 28 defines as follows:

(1) An offence is racially or religiously aggravated for the purposes of sections 29 to 32 below if—

(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group ; or

(b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

(2) In subsection (1)(a) above—

“membership”, in relation to a racial or religious group , includes association with members of that group;

“presumed” means presumed by the offender.

(3) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

(4) In this section “racial group” means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

(5) In this section “religious group” means a group of persons defined by reference to religious belief or lack of religious belief

Articles 33-42 of the **Belgium's** Law of 10 May 2007 provides that "hatred against, contempt for, or hostility to a person on the grounds of his so-called race, color of skin, descent, national or ethnic origin, nationality, sex, sexual orientation, marital status, birth, age, fortune, belief or philosophy of life, current and future state of health, disability, language, political conviction, or physical or genetic characteristic or social origin" are aggravating circumstances that can double the penalty of the following specified crimes: indecent assault and rape; manslaughter and intentional injury; non-assistance to a person in danger; violation of the personal liberty and of the inviolability of private property; ambush or lying in wait; libel; arson, and destruction of personal possessions or property.

Denmark's Criminal Code Section 81 No. 6 describes the following as aggravating circumstances

"In determining the penalty it shall, as a general rule, be considered a circumstance in aggravation

(...)

6) that the offence stems from others' ethnical origins, religious beliefs, sexual orientation or similar;