



# HATE CRIME PROVISIONS IN EU MEMBER STATES: THE IMPORTANCE OF AN INTERSECTIONAL APPROACH TO ENSURE VICTIMS' RIGHTS

Intersectional discrimination has become increasingly recognised in EU policy discourses. In this vein, the Guidance Note on the practical application of the EU Council Framework Decision on combating certain forms and expressions of racism and xenophobia requires authorities to "(...) be able to identify the protected characteristic(s) on account of which the crime was perpetrated, including where these may be multiple or intersectional."<sup>[1]</sup>

On member state level, however, legislative provisions developed to tackle hate crimes are often under-equipped to ensure the rights of victims of intersectional hate crimes. Based on the data of ENAR's Shadow Report,<sup>[2]</sup> this brief intends to offer a frame to understand institutional failures in 24 EU Member States.<sup>[3]</sup> It presents good practices in Member States and outlines the importance of an intersectional approach to:

- **Design legal frameworks** that protect and provide remedy to those experiencing hate crimes on intersecting grounds;
- **Implement recording practices** that capture the complexity of hate crimes;
- **Conduct investigations** that consider different nuances of harm and needs of victims;
- **Develop policies** that cater to the needs of people positioned at the intersection of protected groups.

## BACKGROUND: THE DIFFERENCE BETWEEN MULTIPLE DISCRIMINATION AND INTERSECTIONAL DISCRIMINATION

### Multiple discrimination

- Refers to discrimination targeting an individual on two or more grounds (e.g. gender and sexuality) either on a single or on different occasions;
- Each ground of discrimination can be proved independently;
- Can be dealt with in legal frameworks by assessing each ground of discrimination separately.

### Intersectional discrimination

- Manifests through the interlocking of different grounds (race, gender, etc.) creating a qualitatively different form of discrimination;
- Rendered invisible by current legal frameworks as grounds of discrimination tend to be assessed separately;
- Requires analysis of institutional and structural aspects of discrimination.

[1] EU High Level Group on combating racism, xenophobia and other forms of intolerance, November 2018, Guidance note on the practical application of the EU Framework Decision 2008/913/JHA on combating racism and xenophobia ([https://ec.europa.eu/newsroom/just/document.cfm?doc\\_id=55607](https://ec.europa.eu/newsroom/just/document.cfm?doc_id=55607))

[2] ENAR's Shadow Report "Hate Crime and Institutional Racism" (2019) interrogates how the prevalence of institutional racism impedes hate crime victims' access to justice.

[3] The 24 EU Member States are: Austria, Bulgaria, Croatia, the Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain and the United Kingdom.

**Intersectionality** describes how **interlocking systems of oppression** (racism, colonialism, capitalism, patriarchy) shape people's experiences and lives. The concept has been developed out of the need to expose the experiences of women of colour, which had been rendered invisible by anti-discrimination laws assessing discrimination on single and separated grounds. Intersectionality as an analytical tool can help to assess which group differentiation warrant protection as it directs our focus on the **structural and institutional dimensions of discrimination**.

## ASSESSING LEGAL FRAMEWORKS TO TACKLE HATE CRIMES IN EU MEMBER STATES

Among EU member states the understanding of what a hate crime is, who the potential victims are, and what type of legislative response is most needed differs vastly. What appears to be a shared obstacle in combating hate crime is the **lack of an intersectional approach in legislation and legislative responses**.<sup>[4]</sup>

The findings of ENAR's Shadow Report show that EU member states' hate crime legislation relies predominantly on a **single axis framework** of discrimination. Hence, laws addressing hate crimes tend to conceptualise protected categories as single and separated entities (e.g. race or sexual orientation or religion, etc.). A single axis framework of discrimination conveys a homogenous notion of victim groups, disguising the **power hierarchies** within protected groups.

The specific forms of vulnerabilities experienced for instance by female Bulgarian Roma (such as early cohabitation, human trafficking, selling to prostitution or to work in poor conditions abroad as in the domestic care industry) or by queer refugees (sexual harassment in accommodation facilities) are invisible to the legislative framework.

Source: national researcher Bulgaria

This approach to discrimination not only renders invisible different needs and vulnerabilities. Our research shows that legal frameworks within the EU member states are also often under-equipped to protect and provide remedy to people experiencing hate crimes on intersectional as well as multiple grounds.<sup>[5]</sup>

## THE SITUATION IN DIFFERENT MEMBER STATES

When asked whether their national legislative framework on hate crimes uses an intersectional approach, national researchers in 14 of the member states surveyed said no.<sup>[6]</sup> Six out of 24 surveyed countries have legislative provisions that allow for using multiple aggravating circumstances (see table 1). However, the national researchers concluded for these six countries that in legislative practice multiple protected grounds are seldom taken into consideration often due to a lack of understanding of intersectionality and intersectional discrimination.

## SUGGESTED STRATEGIES FOR IMPROVEMENT

Considering how different social categories such as race, gender identity, class, disability and sexual orientation interplay is crucial to protect and provide proper remedy to those who experience intersectional hate crimes. Legal provisions could require prosecutors and judges to **assess discrimination from an overall perspective** focusing on relations of disadvantage, rather than being separated by grounds. Discussing this option, Fredman (2016) suggests a broad definition and interpretation of existing protected grounds: "If it is accepted that discrimination law addresses relationships of disadvantage, the aim would be to address all relationships of disadvantage experienced by that person in a synergistic manner."<sup>[7]</sup>

[4] A report by the Center for Intersectional Justice (CIJ) commissioned by the European Network Against Racism (ENAR), (forthcoming) "Intersectional Discrimination in Europe: relevance, challenges and way forward EU" shows that anti-discrimination laws and frameworks do not explicitly cover intersectional claims of discrimination.

[5] Multiple discrimination is generally understood as discrimination on more than one protected ground.

[6] The survey was conducted in 24 different EU member states. National Experts of Austria, Denmark, France and Netherlands did not provide any information to this question.

[7] Fredman, S. 2016. "Intersectional discrimination in EU gender equality and non-discrimination law." EU Commission, DG Justice, 0.2838/24152.pp. 69-70 (see also for a thorough discussion of the implications of such an approach).

A broad interpretation would require to take into account all aspects of an individual's identity within one protected ground. This would allow for an **application of intersectionality within a fixed list of protected grounds**. At the same time the following steps need to be taken on the judicial level:

- Lawyers and judges receiving training on intersectionality and intersectional discrimination.
- Cases can be presented in a nuanced way in order to highlight the differing power relationships.

TABLE 1

Country	Does the national legislative framework for hate crimes use an intersectional approach?	Country	Does the national legislative framework for hate crimes use an intersectional approach?
Czech Republic	Yes	Bulgaria	No
Finland	Yes	Croatia	No
Greece	Yes	Cyprus	No
Ireland	Yes	Estonia	No
Lithuania	Yes	Germany	No
Spain	Yes	Hungary	No
		Italy	No
		Latvia	No
		Malta	No
		Poland	No
		Portugal	No
		Romania	No
		Slovakia	No
		UK	No

## RECORDING HATE CRIMES: FLAWS OF A SINGLE AXIS APPROACH

The proper identification and recording of hate crimes are crucial to ensure that offences are investigated and, where necessary, prosecuted and sanctioned. State authorities in EU member states are also legally required to proceed in this manner. Notwithstanding existing legal frameworks, our research suggests that the lack of an intersectional understanding leads to the misflagging of hate crimes and failure to properly remedy and protect victims.

Article 22 of the **Victims' Rights Directive** obliges state authorities to identify whether a victim's vulnerability requires taking special measures to avoid secondary or repeat victimisation, intimidation or retaliation.

The **European Court of Human Rights'** interpretation of Article 14 has imposed a positive duty on EU member states to render visible the bias motivation of a crime.

## THE SITUATION IN DIFFERENT MEMBER STATES

In the majority of countries, investigating police officers, courts or prosecutors decide - at times by applying a bias indicator - whether an offence is deemed a hate crime.<sup>[8]</sup> 15 countries surveyed allowed flagging multiple grounds of discrimination, which, in the majority of cases, is limited to ticking boxes. Although the possibility of registering multiple grounds of discrimination represents an improvement, it does not equate an intersectional approach. Also, our research shows that police officers tend to prioritise one category and often lack understanding of how to investigate the intersectionality of hate crimes. This practice is rooted in a single axis framework of discrimination, which frames protected groups as being rigidly delineated by race, religion, sexual orientation or another protected status. This leads to the assumption that hate crime victims are exclusively targeted because of their actual or perceived membership to one particular identity group (gay or black).

Focusing only on one protected identity and not using the victim's perception of the crime as the basis of the recording can lead to:

- Not recognising the bias element of a crime;
- Disguising the distinct bias motivation, with the ensuing risk of not taking appropriate measures to avoid further victimisation;
- A lack of disaggregated and systematically collected data that shows the quantity and complexity of hate crimes experienced.

[8] Only in Cyprus, Denmark, Spain, Finland, Hungary, Ireland, Latvia, Sweden and the UK is the perception of the victim or of witnesses used to assess or even define if the offence was motivated by bias, prejudice or hostility.

## GENDERED ASPECTS OF HATE CRIMES

Our research suggests that practitioners often overlook how gender identity - especially if a person is perceived as a woman or trans woman - adds an additional layer to the experience and manifestation of racist hate crimes. Recording systems that apply an intersectional approach would help to:

- Ensure that the **different forms of victimisation** and nuances of harm created are captured as the investigation progresses.
- **Reveal the complexity** of hate crimes in data collection, analysis and publication.

The following case study outlines the importance of intersectional analysis to understand forms of victimisation and different nuances of harm created.

## ISLAMOPHOBIA AND GENDERED NUANCES OF HARM

Reports on Islamophobia show that **Muslim women are disproportionately the targets of hate crimes** when compared to their male counterparts. ENAR's Report "Forgotten Women: The Impact of Islamophobia on Muslim women" stresses how the combined intersectional identities of Muslim women shape the quantity as well as the quality of hate crimes. "Perpetrators trying to remove Muslim women's headscarf and/or using racist and sexist gestures and/or insults, show that the image of these women is reduced to what they wear, to their body and the feeling of entitlement perpetrators have to exert power over them."

On 30 March 2016 two Syrian girls were attacked by a group of five people on the street in Bucharest. The attackers pulled off their hijabs and physically assaulted them. The girls and their parents did not want to make a complaint for fear of retaliation and new abuse. However, in this case the police started investigations ex officio. There is no further information on the outcomes.

Source: national researcher Romania

Veiled [9] Muslim women are not only targets because they are easy to identify as Muslims but also for what they and the veil seem to represent in our societies. In public and political narratives, veiled Muslim women are routinely portrayed as oppressed, "culturally dangerous", and "threatening" to the western way of life and public security.[10] These narratives seem to offer perpetrators a sense of justification to enact their racist and misogynistic resentments on Muslim women. Often victims themselves might not be aware that they are victims also on the basis of being perceived as a woman. Nonetheless, for many Muslim women the threat or removal of their veil is perceived as a form of sexual assault as well as an attack on their religious identity.[11] Muslim women's intersectional experiences of racist hate crimes are made invisible when analysed on a single ground.

## SUGGESTED STRATEGIES FOR RECORDING AND INVESTIGATING HATE CRIMES



Police authorities should use the 'perception test' – the victim's perception of the crime – as the basis for recording hate crimes and starting investigations. The concept of the 'perception test' must be included in operational guidelines and shared and communicated across teams within police departments and the wider justice system.



Police authorities should record hate crimes with the bias indicator as well as information on the ethnic or racial identity of the victim, as well as the victim's and/or witness' perception of the ethnic or racial identity of the perpetrator for the purpose of collecting disaggregated data.



Government authorities should introduce technical changes that allow police officers to flag more than one bias indicator and register qualitative information. Police officers should be encouraged to include categories that go beyond nationally defined protected identities if the victim or witness reporting feel there are further biases that motivated the criminal offence.



During investigation proceedings intersectional discrimination needs to be assessed from an overall perspective, rather than being separated or cumulated by grounds.

[9] The veil is understood here as a broad descriptor for a variety of different garments, including the hijab (headscarf) or niqab (face veil) as well as fuller body garments such as the jilbab and burqa.

[10] Zempi, I., and Chakraborti, N., 2014. Islamophobia, Victimisation and the Veil. Basingstoke: Palgrave Macmillan.

[11] Mason-Bish, H. & Zempi, I., 2018. Misogyny, Racism, and Islamophobia: Street Harassment at the Intersection. *Feminist Criminology* 00(0), pp. 1-20. Allen, C. 2015. 'People hate you because of the way you dress': Understanding the invisible experiences of veiled British Muslim women victims of Islamophobia. *International Review of Victimology*, 21, 287-301.

## A CASE FOR CONSIDERING STRUCTURAL AND INSTITUTIONAL DISCRIMINATION IN HATE CRIME PROVISIONS

As outlined above, the focus on separate grounds of discrimination homogenises protected groups, rendering invisible the needs and vulnerabilities of those who are positioned at the intersection of systems of oppression. Nowhere is this more visible than in policy discourses that fashion the police as a crucial tool to combat hate crimes and keep communities safe. The following two case studies demonstrate the importance of considering structural and institutional discrimination in developing protection and support mechanisms. Disregarding these factors risks further harming the victim instead of ensuring protection and safety.

### POLICE AS A BARRIER TO JUSTICE

In the Netherlands, a racist and homophobic attack was reported to the police but was not recorded as such, and it was felt that the case was not followed up appropriately before the investigation was closed. After the investigation was closed, it is reported that:

Omair (victim) specifically requested a meeting at his local police office with a member of the Pink in Blue Network, a network of LGBTQI police officers. During the meeting, the officer acknowledged the case should have been investigated as a hate crime and that the incident was recorded improperly in the Basisvoorziening Handhaving, the Dutch police incident recording system. The officer notified Omais of the possibility to reopen the case and record the incident properly by filing a complaint, but Omais refrained from doing so: "I don't have the energy for that. I have to be on watch 24/7 just because of who I am, it drains me. I'm just not important". Furthermore, Omais states: "When I used the word racist (in regard to the first officer's attitude) she told me the conversation was over. They don't care about me as citizen. I was discriminated three times".

Source: Interview with the victim

Omais's encounter with the Pink in Blue Network showcases how measures which only focus on separate grounds form of discrimination (homophobia) can end up reproducing forms of oppression (racism) and advancing only the interest of more privileged individuals (white LGBTQI in this case). Although the police officer representing the Network acknowledged the mistakes made by the first police officer, Omais's denomination of this officer's behaviour as racist was immediately silenced. For a police officer to deny evidence that a gay person of colour couldn't file a hate crime complaint due to racist views held by another officer suggests at best ignorance of the institutional racism experienced by black and people of colour in contemporary Europe. At worst, it speaks for the disregard of the needs of black and racialised LGBTQI people. A consequence of the officers' denial of the relevance of the intersectional dimension of Omais's experience is the perpetuation of violent consequences for racialised minorities along with their deepening mistrust of the criminal justice system and doubts about its capacity to deliver justice.

### UNDOCUMENTED MIGRANTS LEFT WITHOUT PROTECTION

For some groups, engagement with law enforcement agents is not even an option due to their irregular residence status. The justified fear of deportation is a reason for migrants who happen to be undocumented not to report the violation of their rights. Many EU member states have no firewall between policing and immigration enforcement. This situation impedes undocumented migrants' access to their right to report hate crime, seek protection and other rights foreseen by the Victims of Crime Directive.[12]

[12] The Victims' Directive 2012/29/EU guarantees minimum rights for all victims of crime in the European Union, whatever their visa or residence status. This means that undocumented victims of crime have the same right to services, protection and justice as anyone else who has been victimised.

An undocumented migrant (failed asylum seeker) was a victim of hate crime in March 2017 in Larnaca, Cyprus. He was hurt and needed medical attention but did not go to the public hospital, nor did he report it to the police, for fear of deportation. This person has suffered serious PTSD following the attack.

Source: Reported to NGO

As exemplified here, the police is often more a barrier than a gatekeeper of criminal justice. The development of protection mechanisms has to be informed by the experiences of people positioned at the intersection of racism, capitalism and patriarchy. Only then can adequate remedy and protection of the victims be ensured.

## STRATEGIES TO TACKLE INSTITUTIONAL DISCRIMINATION



EU member states should develop a firewall system that guarantees that whatever the migration status, the victim or witness of a hate crime can report the crime to the police and the whole procedure will remain safe for them, without risk of arrest, extradition or deportation at any time before the outcome of the investigation and judicial process. In addition, victims reporting a hate crime must be guaranteed that their current or upcoming claims for a regular status will not be harmed.



EU member states should implement legal standards that clearly prohibit discrimination in law enforcement.



EU member states must ensure the existence and support of an institutional and personal independent investigative body that oversees police and intelligence services to ensure that all practices meet tests of necessity and proportionality, and comply fully with European anti-discrimination norms. These should be complemented by accessible complaints mechanisms that are capable of investigating allegations of discriminatory behaviour, through examining individual complaints and analysing patterns of complaints.

## WAYS FORWARD: MORE RESOURCES FOR THIRD-PARTY REPORTING AND SUPPORT SERVICE

As ENAR's Shadow Report [13] clearly illustrates, institutional racism is a crucial factor for the under-reporting of hate crimes. The **lack of reliable, disaggregated and systematically collected data** distorts the extent and quantity of hate crimes and severely impairs the criminal justice system. This, in turn, allows authorities not to take hate crimes seriously and justify the reluctance to allocate further resources. To tackle under-reporting, state authorities should support the establishment or strengthen existing **third party services**.

Also, in order to emotionally and financially un-burden victims of hate crimes, third parties should be enabled to **stand in hate crime proceedings**. Entrusting third parties with this task requires stable resources to employ professional staff. In various EU member states, the general lack of funding and the cut in stable government funding impedes victim support groups' ability to build or maintain professional capacity.

## BENEFITS OF THIRD PARTY SERVICES

- Hate crimes victims often feel **safer and more comfortable** to report to a civil society organisation;
- Targeted professional support services often provide **reassurance and encouragement for victims** which is crucial to address the harm experience;<sup>[14]</sup>
- Victim support groups tend to **record hate crimes in more comprehensive ways** (e.g. victims' perspective, qualitative data), which allow them to capture the **intersectional elements** of a hate crime.

[13] ENAR's Shadow Report "Hate Crime and Institutional Racism"(2019) interrogates how the prevalence of institutional racism impedes hate crime victims' access to justice. The report unveils how law enforcement agents silence victims' experiences of racist violence, fail to investigate and prosecute cases of racist hate crimes successfully and to protect victims from further victimisation.

[14] European Union Agency for Fundamental Rights. 2016. Ensuring justice for hate crime victims: Professional perspectives. Luxembourg: Publications Office of the European Union.

## STRATEGIES FOR IMPROVING HATE CRIME PROVISIONS



There should be a positive duty on state authorities to ensure the existence of third party support and record services for victims of hate crimes, that are equipped to warrant particular attention to the needs of victims experiencing intersectional hate crimes.



State authorities should enable third parties to stand in judicial hate crime proceedings.



State authorities should guarantee the opportunities for victim support services to advance their professional capacities through providing funding for capacity building projects.

## BEST PRACTICES IN EU MEMBER STATES

In the United Kingdom the benefits of third-party reporting services have long been acknowledged and one prominent example is the government's funding for the creation of 'Tell MAMA' ('MAMA' is an acronym for 'measuring anti-Muslim attacks').

### Tell MAMA

A report and support service for people experiencing anti-muslim racism launched in February 2012. It was initiated by the NGO Faith Matters and financed by the British government – via the Department for Communities and Local Government. It is the first state-funded project of its kind in Europe. The report service is designed in a way to minimise as many barriers as possible, hence victims can either report using freephone numbers to speak to trained staff; or report electronically, via email, SMS, Twitter, Facebook and the Tell MAMA website. Tell MAMA forwards information directly to police forces through 'True Vision', an online reporting system that was set up by the Association of Chief Police Officers to help combat and report hate crimes. 'True Vision' provides a single reporting facility to all British police forces through a dedicated server hosted by London's Metropolitan Police Force.

Throughout EU member states the support provided by independent support services is often highly fragmented and somewhat piecemeal.<sup>[15]</sup> Coalitions of support services on a regional or national level could be a measure to counter the fragmentation of services. On how to establish national networks, the ODIHR suggests: "The creation of such hate crime reporting networks requires defined objectives, shared definitions, a common monitoring methodology, effective communication, an inclusive attitude and sustainable mechanisms for co-ordinating information". A good practice example of such a network is the Racist Violence Reporting Network in Greece.

### Racist Violence Reporting Network (RVRN), Greece

The RVRN is an umbrella network of 46 civil society organisations coordinated by UN High Commissioner for Refugees (UNHCR) in Greece and the Greek National Commission for Human Rights. The Network was set up in 2011 after consultation with NGOs working with victims of racist violence. The organisations involved offer social, medical, legal and other services to hate crime victims. RVRN members monitor hate crimes using a common methodology and share information among members. The network annually publishes reports on hate crime trends in Greece. Some of the groups involved in the network include:

- Greek Forum of Refugees - Ελληνικό Φόρουμ Μεταναστών;
- Greek Red Cross - Ελληνικός Ερυθρός Σταυρός;
- Afghan United Association - Σύλλογος Ενωμένων Αφγανών;
- Amnesty International - Διεθνής Αμνηστία.

[15] Ibid. p. 37.

## DIVERSIFYING STRATEGIES TO TACKLE HATE CRIME

Crimes committed with a bias motivation cause heightened levels of fear, anxiety and insecurity amongst individual victims, those immediately associated with them and wider society. This impact is one of the key reasons why hate crimes should be treated differently than the same crimes committed without a bias motivation.

The tendency is to sentence hate crimes with a more severe punishment than the same crime committed without bias. However, punitive measures should be allied with preventive work. Focusing solely on a criminal justice approach to hate crime can easily suggest that hate crimes can be reduced to individual perpetrators' behaviour. An intersectional approach directs our attention to the structural and institutional forces that position people at the receiving end of hatred and harassment.

The historical legacies of colonialism and contemporary gendered and racialised discourses of the dangerous Other are not addressed by merely focusing on punishing individual perpetrators. Also, studies have suggested that penalty enhancements do little to actively repair the emotional, social and cultural damage caused by hate crimes, nor do they directly challenge an offender's underlying prejudices.[16]

In the context of other criminal offences, there has been an increased deployment of alternative interventions such as restorative practices, education programmes and rehabilitation programmes. Despite the existence of projects and studies suggesting that restorative practices can help to alleviate the harms created by hate crime, their deployment remains limited.[17]

### ALTERNATIVE INTERVENTIONS ALLIED WITH CONVENTIONAL PUNITIVE MEASURES COULD COMPRISE:



Community service orders for hate crime perpetrators, such as monetary penalties (e.g. compensation orders), unpaid work placements, programmes, regular supervision with a social worker, etc.



Restorative practices such as supervised mediation between the victim and the offender to which both parties voluntarily agreed to.

Combatting hate crimes in the long term requires more than addressing the immediate harmful impact. It is a complex task, which must attempt to change a myriad of individual, institutional and structural factors.

[16] Walters, M. 2015. Repairing the harms of crime: A restorative justice approach. In: hall, N., Corb, A., Giannasi, P. and Grieve, J.G. D. The Routledge International Handbook on Hate Crime. Routledge. Pp. 400 – 410.

[17] Ibid. see also: Gavrielides, T. 2012. "Contextualizing Restorative Justice for Hate Crime" Journal of Interpersonal Violence, Volume: 27 issue: 18, page(s): 3624-3643.

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