

Krassimir Kanev and Dilyana Angelova

BIAS-MOTIVATED CRIMES SUMMARY

OF THE BULGARIAN LEGISLATION AND CASE-LAW



BULGARIAN
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COMMITTEE



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Contents

Infographic chart 1 "Hate speech"	4
Infographic chart 2 "Hate crimes"	8
Infographic chart 3 "Minorities in Bulgaria – targets of hate"	12
The Problem	15
Legislation in Bulgaria on Combatting Bias-Motivated Crimes.....	16
Case-Law in Bulgaria on Combating Bias-Motivated Crimes.....	20
Bias-motivated crimes against the person	23
Crimes against the equality of citizens.....	29
Hate speech	29
Crimes Against Religious Denominations	43
Crimes against the labour rights of citizens	48
Other essential issues.....	48

INFOGRAPHIC CHART 1 ► "HATE SPEECH"

The cited data is from reports and presentations which were presented during regional round - table discussions organized within the NO HATE BG project in 11 municipalities. There's also cited data from the BHC's annual report "Human rights in Bulgaria in 2018", as well as results from a national representative survey carried out by the Open Society Institute - Sofia in the spring of 2018, summarized in the report "Public attitudes to hate speech in Bulgaria in 2018".

NO-HATE – FOR A CONSOLIDATED RESPONSE TOWARDS MINORITY PROTECTION AND HATE CRIME PREVENTION IN BULGARIA

HATE SPEECH

SOCIAL ATTITUDES, TARGETS, CHANNELS AND THE MEDIA ENVIRONMENT IN BULGARIA

How does the EC define hate crime?

One of the basic forms of hate speech is building negative stereotypes about groups of people which are set against the majority on the basis of their race, skin colour, origin, national identity, etc.

CRIMINALIZING HATE SPEECH

ART. 162 AL.1

Article 162, al. 1 from the Bulgarian Criminal code criminalizes extreme forms of hate speech.

After the amendments of 2009 and 2011 the same notion covers **propagating and inciting discrimination, violence or hatred based on differences in race, nationality or ethnicity** through speech, writing or other means of mass communication, through electronic information systems or in any other manner

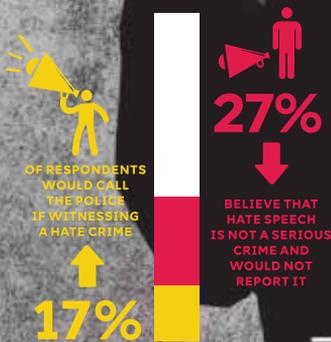
2018



LOWER THAN 2014



2018



26% IN 2014

LOW LEVEL OF PERSONAL ENGAGEMENT WITH FIGHTING THIS TYPE OF CRIME DUE TO DISTRUST OF THE POLICE AND ITS EFFICIENCY

ROMA

TARGETS OF HATE SPEECH

THE ROMA HAVE LONG BEEN A MAIN TARGET OF HATE SPEECH

MUSLIMS



21% OF RESPONDENTS

MOST OF THE PEOPLE WHO HAVE HEARD HATE SPEECH

IN 2018

81%

REPORT THAT IT WAS DIRECTED AGAINST THE ROMA, AND

42% ↑

on the rise compared to previous surveys

AGAINST HOMOSEXUALS

TURKS

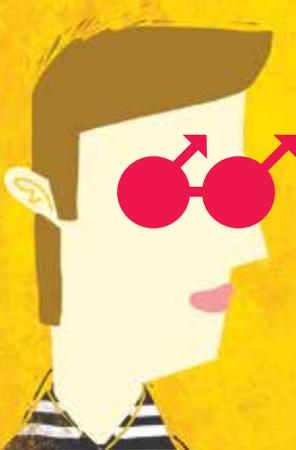


26% OF RESPONDENTS

FOREIGNERS



#@? &;)



IN 2018 FOUR MAIN GROUPS OF PROPAGATORS WERE IDENTIFIED

1/3

OF THE PEOPLE who reported having heard hate speech in the last year said they heard it from the following sources:



FRIENDS AND RELATIVES



COLLEAGUES



SOCIAL ATTITUDES

2018 → **50%**

OF RESPONDENTS HAVE HEARD PUBLIC STATEMENTS EXPRESSING DISAPPROVAL, HATE OR AGGRESSION AGAINST REPRESENTATIVES OF ETHNIC, RELIGIOUS OR SEXUAL MINORITIES



RAISING PUBLIC AWARENESS OF THE PROBLEM



PEOPLE WHO HAVE HEARD THE EXPRESSIONS "HATE SPEECH", "HATEMONGERING"



Respondents find it **difficult to define** what is "hate speech", exactly, which forms are criminal and which ones are just socially unacceptable



They do not know how to react when coming across this type of speech

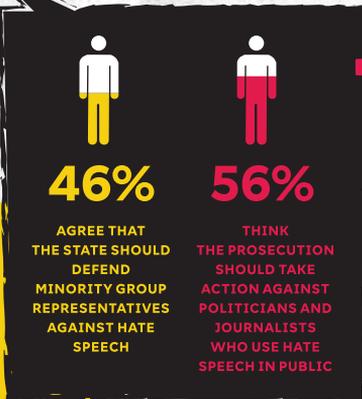
THIS PROVES THAT PUBLIC POLICIES AGAINST HATE SPEECH ARE EITHER ALTOGETHER ABSENT OR HAVE A LIMITED EFFECT



DO NOT APPROVE OF THE PUBLIC USE OF HATE SPEECH

2018

MEDIA

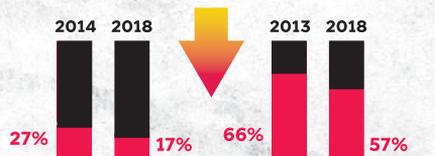


PEOPLE WHO HAVE HEARD HATE SPEECH IN THE RESPECTIVE MEDIA

Older and less educated people encounter less hate speech because they use a more limited range of media

A DECREASE IN PUBLIC SUPPORT FOR PUNITIVE POLICIES

DUE TO A RISE IN NATIONALISTIC TENDENCIES IN POLITICS AND THE INDIFFERENCE OF LAW-ENFORCING INSTITUTIONS TO HATE CRIMES ON A RACIAL, ETHNIC OR RELIGIOUS BASIS



LESS PEOPLE WOULD ALERT THE AUTHORITIES TO AN INCIDENT OF HATE SPEECH

LESS PEOPLE AGREE THAT THERE SHOULD BE LEGAL ACTIONS AGAINST POLITICIANS AND JOURNALISTS WHO USE HATE SPEECH IN PUBLIC



LESS PEOPLE AGREE THAT AGGRESSIVE NATIONALISM SHOULD BE LEGALLY PERSECUTED

INFOGRAPHIC CHART 2 ► "HATE CRIMES"

The cited data is from the Report on bias-motivated crimes
done by Krassimir Kanev and Dilyana Angelova, BHC.

**NO-HATE – FOR A CONSOLIDATED RESPONSE
TOWARDS MINORITY PROTECTION AND HATE CRIME
PREVENTION IN BULGARIA**

HATE CRIMES



**BIAS-RELATED CRIMES, A.K.A. HATE CRIMES, CAN BE BASED ON
RACE, ETHNICITY, RELIGION, SEXUAL ORIENTATION OR ANOTHER ASPECT
OF THE VICTIM'S IDENTITY**

**THE VICTIM IS PERCEIVED BY THE PERPETRATOR NOT AS AN INDIVIDUAL
BUT AS A REPRESENTATIVE OF A HATEFUL GROUP**

A large number of vulnerable groups are affected by our ability or inability to recognize hate crimes, stop their propagation and adopt legislative and redemptive measures. These people fall victim to various forms of crime motivated by prejudices of different type and scale



**BIAS CRIMES ARE PREMEDITATED ACTIONS WHICH SERIOUSLY DAMAGE
SOCIAL RELATIONSHIPS**

**THESE CRIMES
ARE RARELY NOTICED
BY THE LAW-ENFORCEMENT
INSTITUTIONS –
AND WHEN THEY ARE,
THEY OFTEN GO
UNPUNISHED**

NECESSARY CHANGES IN THE CRIMINAL CODE

**THE COUNCIL
FOR ELECTRONIC MEDIA
SHOULD BE ENCOURAGED
TO TAKE ACTION
IN ALL CASES
OF PROPAGATING
HATE SPEECH**

Raising fines for breaching the clauses on hate speech in the Law on Radio and Television so they can really serve their preventive functions, and exercising its right to cancel the broadcasting licenses as appropriate

The Criminal code envisages heavier punishments for some kinds of hate crime, but the distinction is unjustly **LIMITED TO CASES OF MURDER AND PHYSICAL INJURY**

CRIMINAL LAW

**A MEDIUM OF FORMAL
SOCIAL CONTROL USED
BY SOCIETY TO SOLVE
SPECIFIC PROBLEMS
ROOTED IN ITS HISTORY
OR CULTURAL
CHARACTERISTICS**

ACTS OF RACIST VIOLENCE ARE STILL COMMITTED against Roma, Jewish, Muslim, and non-traditional religious groups or their property. **THESE ACTS ARE RARELY PROSECUTED UNDER THE RESPECTIVE CRIMINAL LAW CLAUSES** specifically adopted for this purpose; instead, they are often treated as hooliganism

THE AUTHORITIES HAVE NOT INCLUDED IN THE CRIMINAL CODE

a clause making **RACIST MOTIVATION** an aggravating circumstance for all kinds of crime

The Bulgarian legislation **DOES NOT STIPULATE THE WITHDRAWAL OF STATE SUPPORT** for organizations or political parties **PROPAGATING RACISM**

Hate speech and violence on the basis of **SEXUAL ORIENTATION OR SEXUAL IDENTITY ARE STILL NOT ACKNOWLEDGED AS A CRIME IN THE CRIMINAL CODE**

AN EXAMPLE OF UNLEASHING A WAVE OF XENOPHOBIC AND RACIST VIOLENCE

03.11 2013



A shopkeeper is stabbed during an **ARMED ROBBERY** perpetrated by a man of Algerian origin.

04.11 2013



"A MARCH AGAINST THE IMMIGRANT INVASION" attended by representatives of extreme nationalist formations /political parties like Ataka and VMRO-BND, the National Resistance Movement, the Bulgarian National Union, the Union of Bulgarian Football Fans, etc. /

FOLLOWING A SIGNAL BY THE **BULGARIAN HELSINKI COMMITTEE**, THE PROSECUTION STARTS A PRELIMINARY CAUSE HEARING BASED ON **ART. 162, AL.1 OF THE CRIMINAL CODE** /THE CASE IS DROPPED LATER ON/

THE INCIDENT PROVOKES A SURGE IN ANTI-IMMIGRANT RHETORICS AND POLITICAL SUPPORT FOR ACTIONS AGAINST REFUGEES AND MIGRANTS

CALLS FOR MOB ACTION AGAINST IMMIGRANTS AND THE "CLEANSING" OF THE CITY



A 17-YEAR OLD SYRIAN IS STABBED ON THE DAY OF THE MARCH

FROM HATE SPEECH TO HATE CRIMES

THE UNMITIGATED PREACHING OF RACIST AND XENOPHOBIC HATE AND VIOLENCE LEADS TO AN ESCALATION OF BIAS CRIMES

07.11 2013



A WOMAN FROM CAMEROON is attacked at a bus stop

08.11 2013



Three attackers beat an 18-year old boy, a **BULGARIAN CITIZEN OF GHANA ORIGIN**, in the centre of Sofia

09.11 2013



Attempted murder of a man of a presumed **MUSLIM RELIGIOUS IDENTITY**

11-12.11 2013



Attacks against an 18-year-old **MALI CITIZEN AND A MAN FROM IRAQ**

03.12 2013



THREE SYRIANS are beaten by a group of over ten men with bats and knives

FOR ALL OF THE ABOVE CASES THERE IS ONLY ONE INDICTMENT ON ART. 116, PARAGRAPH 1, IT. 12 – FOR THE XENOPHOBIA-RELATED MURDER ATTEMPT. IN ALL OTHER CASES THE PERPETRATORS OF THE RACIST ATTACKS HAVE PROBABLY AVOIDED CRIMINAL RESPONSIBILITY BECAUSE THEY HAVE NOT BEEN IDENTIFIED, ETC.

INFOGRAPHIC CHART 3 "MINORITIES IN BULGARIA – TARGETS OF HATE" ►

The cited data is from reports and presentations that were presented during regional round table discussions organized within the NO HATE BG project in 11 municipalities. We have quoted the annual BHC report on human rights in Bulgaria in 2018, as well as the nationally representative survey carried out by the Open Society Institute – Sofia "Democracy and civic participation. Public Attitudes towards Democracy, the Rule of law and Fundamental Human Rights in 2018". Also quoted are the findings of two surveys on social attitudes towards LGBTI people conducted by the GLAS foundation and the LGBT Youth Organization Deystvie and a report on "Discrimination as a social phenomenon – mechanisms and reasons for its manifestation" done by Ivan Igov.

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MINORITIES IN BULGARIA – TARGETS OF HATE



**SOCIAL ATTITUDES
BEFORE THE OCTOBER
2019
LOCAL ELECTIONS**

A LOWER LEVEL OF TRUST
in democratic forms
of government, in institutions
and the media

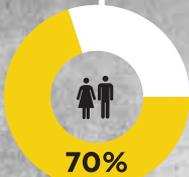
IN 2018,
AS IN PREVIOUS YEARS,
THERE ARE SEVERAL GROUPS
SYSTEMATICALLY SUBJECTED
TO DISCRIMINATION IN A NUMBER
OF PUBLIC SPHERES

↓

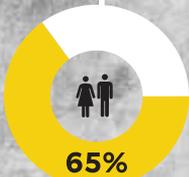
ROMA, LGBT PEOPLE,
REFUGEES AND MIGRANTS,
AS WELL AS BULGARIAN
CITIZENS OF MACEDONIAN
AND POMAK
ETHNIC IDENTITY

THE BIG MYTH OF TOLERANCE

THE MAYOR SHOULD NOT BE
ROMA, GAY OR TURKISH



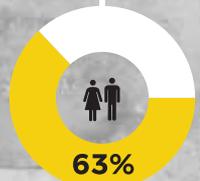
OF RESPONDENTS
WOULDN'T VOTE
FOR A MAYOR OF
ROMA ORIGIN



OF RESPONDENTS
WOULDN'T VOTE
FOR A CANDIDATE
WHO IDENTIFIES
AS GAY OR
LESBIAN



OF RESPONDENTS
WOULDN'T VOTE
FOR A MAYOR OF
TURKISH ORIGIN



OF RESPONDENTS
WOULDN'T VOTE
FOR A DISABLED
PERSON



DISCRIMINATION ATTITUDES TO THE MAIN MINORITY GROUPS



REFUGEES

THE FIRST REASON
FOR INTOLERANCE
TOWARDS REFUGEES IS
PEOPLE'S

FEAR OF

- **CRIMES / 43%**
- **PROPAGATION OF RELIGIOUS BELIEFS / 43%**
- **DISEASES / 36%**

ABOUT 92% OF RESPONDENTS

HAVE NEVER SEEN A REFUGEE OR
COMMUNICATED WITH ONE; PRACTICE
SHOWS THAT ATTITUDES ARE CHANGED
BY COMMUNICATION.



LGBT PEOPLE

LGBT PEOPLE ARE
DISCRIMINATED AND
STIGMATIZED FOR THEIR REAL
OR PERCEIVED

SEXUAL ORIENTATION

OR GENDER IDENTITY

LGBT PEOPLE
ARE PHYSICALLY OR VERBALLY BULLIED,
DISCRIMINATED AGAINST AT THEIR WORKPLACE
AND MADE INVISIBLE IN THE SOCIETY AND IN
THE POLITICAL DECISION-MAKING PROCESS
MANY OF THEM HAVE EXPERIENCED:

- **THREATS / 73%**
- **PHYSICAL ASSAULT / 15%**
- **SEXUAL VIOLENCE / 3%**
- **DOMESTIC VIOLENCE / 3%**

DISCRIMINATION MEANS THE FORMAL OR INFORMAL SEPARATION OF PEOPLE INTO GROUPS WHEREBY THEY ARE GIVEN OR DENIED CERTAIN RIGHTS, RESPONSIBILITIES AND OPPORTUNITIES.

Discriminatory behavior goes through different stages /often called "steps of discrimination". It starts with hate speech, escalates into isolation and ends with physical assault and destruction.



ROMA

SINCE THE BEGINNING OF 2019,
HUNDREDS OF ROMA FAMILIES
ARE LEFT

HOMELESS

OR DISPLACED
AFTER LOCAL PROTESTS

- **55 FAMILIES**
from Voyvodinovo, Plovdiv,
were chased away from
their homes in the night
of January 6, 2019
- **THE DESTRUCTION OF HOUSES** is often used
as a punishment for criminal
activities between Roma and
Bulgarians – scandals, fights,
or hate speech
- **NO OVERALL STRATEGY** for solving
the illegal housing problem

INTEGRATION
CANNOT HAPPEN
IN THE POISONED ATMOSPHERE
BETWEEN THE DIFFERENT ETHNIC GROUPS.
THE ROMA COMMUNITY HAS NO POLITICAL
REPRESENTATION IN PARLIAMENT
OR A PATRON STATE OF SIGNIFICANT
INTERNATIONAL STANDING

The Problem

The problem with the recognition, dissemination, legislation and practice in combating bias-motivated crimes in Bulgaria is extremely serious. It affects a large number of vulnerable individuals who fall victim to various forms of crimes motivated by different types and various degrees of bias.

These crimes are rarely brought to the attention of the law-enforcement authorities and even when they are, they often remain unpunished. Both the legislation for combating them and the standards for their investigation and punishment in Bulgaria are deficient and sometimes discriminatory. They are not in line with international standards. The European Court of Human Rights in Strasbourg (ECtHR) has ruled in several cases against Bulgaria where it found violations related to the investigation and punishment of such crimes. One of them is *Nachova and Others v. Bulgaria*, which involves the murder of two Roma army conscripts by the Military Police. This case is key to the entire European human rights system. The case was decided by the ECtHR Grand Chamber, which in 2005 found a violation of Article 14 (non-discrimination) in conjunction with Article 2 (right to life) of the *European Convention on Human Rights* (ECHR) on account of the failure of the Bulgarian authorities to adequately investigate the possible racist motives for the killing.

The fight against bias-motivated crimes is a commitment for all of society. Of course, law-enforcement bodies play a key role in this effort, but so does civil society. It should also recognize and report these crimes and assist the victims.

Legislation in Bulgaria on Combatting Bias-Motivated Crimes

Provisions criminalizing criminal offenses against denominations and incitement to enmity and hatred against "religious societies (fraternities), nationalities or particular classes of the population" were introduced as far back as 1896 in the first Bulgarian Criminal Law. In the following decades, with the development of international law and legal views, the criminal justice protection of public relations with regard to equality and tolerance gradually expanded. In its original version, the 1968 Criminal Code contained crimes against racial and national equality, crimes against religion, and genocide. Later, in 1975, apartheid was criminalized. Finally, in 2011, following the ratification of the EU Council Framework Decision 2008/913/JHA of 28 November 2008 on combating through criminal law certain forms and manifestations of racism and xenophobia, definitions of qualified crimes for premeditated murder and intentional bodily injury caused by "racist or xenophobic incitement" were also introduced. The 2011 amendments also criminalized publicly condoning, denying or grossly trivialising crimes against peace and humanity.

The current Criminal Code criminalizes bias-motivated crimes in two different ways:

1. Through separate definitions providing for punishment of acts, which are not crimes if not committed with a discriminatory intent. Such are the provisions of Article 162 §§ 1 and 3; Article 163; Article 164 §§ 1 and 2; Article 172 § 1; Article 419a.
2. Through definitions that provide for more severe penalties for already formulated crimes committed with a discriminatory intent. Such are the provisions of Article 116 § 1 (11); Article 131 § 1 (12); Article 162 § 2; Article 416; Article 417; Article 418.

The first type of crimes include:

1. Preaching or inciting to discrimination, violence or hatred based on race, nationality or ethnic origin through word, print or other mass media, through electronic information systems or by other means (Article 162 § 1);
2. Establishment or leading of an organisation or group that seeks to incite to discrimination, violence or hatred based on race, nationality or ethnic origin, or the use of violence against others or damage to their property on account of their race, nationality, ethnicity, religion or political beliefs, as well as the systematic admission of such acts (Article 162 § 3);
3. Participation in a crowd rallied to attack groups of the population, individuals or their property on account of their national, ethnic or racial origin (Article 163);
4. Preaching or inciting to discrimination, violence or hatred on a religious basis through speech, print or other mass media, through electronic information systems, or by other means (Article 164 § 1);
5. Desecration, destroying or damaging of a religious temple, house of worship, sanctuary or adjoined building, their symbols or grave-stones (Article 164 § 2);
6. Intentional obstruction of another to take a job or compelling one to leave because of their ethnicity, race, religion, social origin, membership or non-membership in a trade union or other organisation, political party, organisation, movement or coalition for political purposes, or because of their or their relatives' political or other beliefs (Article 172 § 1);
7. Publicly condoning, denying or grossly trivialising of a crime committed against peace and humanity that creates a threat to violence or hatred against individuals or groups of persons separated by race, skin colour, religion, origin, national or ethnic origin, as well as incitement to public condoning, denying or grossly trivialisation (Article 419a).

The second type of crimes include:

1. Murder committed with hooligan, racist or xenophobic motives (Article 116 § 1 (11));
2. Causing bodily injury with hooligan, racist or xenophobic motives (Article 131 § 1 (12));
3. Use of violence against another person or damage to their property due to their race, nationality, ethnicity, religion or political beliefs (Article 162 § 2);
4. Genocide, i.e. acts with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group: (a) causing death, serious bodily injury or permanent mental harm to a person belonging to such a group; (b) deliberately inflicting on the group living conditions calculated to bring about its physical destruction in whole or in part; c) imposing measures intended to prevent births within the group, and d) forcibly transferring children from one group to another for the purpose of, as well as preparation and incitement to genocide (Article 416);
5. Apartheid, i.e. acts with the intent to establish or maintain the domination or systematic suppression of one racial group over another: (a) causing death or serious injury to one or more persons from the second group; (b) inflicting on that group living conditions calculated to bring about the physical destruction in whole or in part of a racial group of people; illegally imprisoning members of a racial group or subjecting them to forced labour; (c) taking measures to prevent the participation of a racial group in the political, social, economic and cultural life of the country and intentionally creating conditions that impede the full development of this group, in particular by depriving its members of fundamental civil rights and freedoms; (d) taking measures to divide the population by race by creating reserves and ghettos, by banning mixed marriages between members of different racial groups, or by property expropriation; e) the deprivation of fundamental rights and freedoms of organisations or persons because they oppose apartheid (Articles 417 and 418).

Despite some progress, the regulation of bias-motivated crimes in the Bulgarian Criminal Code is largely outdated and demonstrates serious shortcomings. It provides for more severe punishments for certain crimes incited by bias, but unjustifiably limits this only to murder and bodily injury. For example, it does not impose more severe punishments for arson or explosion of property of a civic organisation or for rape when instigated by bias. Outside the cases of murder and bodily injury on racist and xenophobic grounds, the definitions of qualified crimes provide that the victims should belong to the group designated by a protected ground, but not be objectively related to or associated in the mind of the perpetrator. Moreover, the law enforcement practice does not provide for the victim to be constituted as such in criminal proceedings in cases of incitement to hatred, discrimination and violence on racial, ethnic or religious grounds. In addition, the protected grounds included in the criminal provisions of bias-motivated crimes are limited. They are most often reduced to race, ethnicity, and religion. Only Article 162 § 2 and § 3, includes among the protected grounds in addition to the above, political beliefs, and in Article 172 § 1 also includes social background, membership in a trade union or another organisation, and beliefs. Among the protected grounds, none of the criminal provisions include, for example, gender, disability or sexual orientation. The law also does not explicitly impose an obligation to take into account discriminatory motives in the commission of any crime as an aggravating circumstance.

Case-Law in Bulgaria on Combating Bias-Motivated Crimes

In 1991, the Supreme Court Plenum left without consideration the request of the Prosecutor General to issue an interpretative decree on the question of the objective comparability of Article 162 § 1 of the Criminal Code on preaching or inciting to national enmity or hatred¹. The reason was the overall lack of practical application of this provision, controversial as it is. To date, the case-law of the courts on criminal provisions related to ensuring equality and tolerance continues to be scarce and underdeveloped, which is due to a number of factors in the pre-trial phase. According to the findings of international organisations for combating bias-motivated crimes, in Bulgaria the level of reporting of bias crimes by victims is very low, there are gaps in the legal framework and in the training of magistrates, there are problems with the proper qualification, effective investigation and proving of the discriminatory motives, etc.

For the purposes of the research on bias-motivated crimes, we reviewed a little over 60 court acts handed down between 2008 and 2019 by all court instances in cases of bias-motivated crimes. In its main part, the review covers case-law in **criminal cases, for which the discriminatory motive is a proper element of the definition of the crime**. According to the immediate target of the crime, these offences are grouped as follows:

- Crimes against the person - Article 116 § 1 (11), clauses 2 and 3 of the Criminal Code, Article 131 § 1 (12), clauses 2 and 3 of the Criminal Code;
- Crimes against the equality of citizens - Article 162 and Article 163 of the Criminal Code;
- Crimes against religious denominations - Article 164 of the Criminal Code;

¹ Supreme Court, Order No. 1 of 22 March 1991 on Criminal Case 1/1991.

- Crimes against the labour rights of citizens - Article 172 § 1 of the Criminal Code;
- Crimes against peace and humanity - Article 416, Article 417 and Article 418 of the Criminal Code.

Secondly, the review also tried to identify **criminal cases for crimes committed on the grounds of a discriminatory motive, which is not criminalised in the Criminal Code, but which features among the protected grounds in the Protection Against Discrimination Act**, on which the discriminatory motives were reported by the court in some form.

Furthermore, the review of the case-law in Bulgaria established that a number of **discriminatory offenses committed on racist or xenophobic grounds qualify as committed on the basis of hooliganism or of the general elements of the respective crime, without taking into account the motive**. The problem has also been identified by the Advisory Committee on the Framework Convention for the Protection of National Minorities and by the European Commission against Racism and Intolerance.

In the scope of the present review also falls the **case-law under Article 108 § 1 of the Criminal Code delivered in connection with crimes perpetrated one of the two forms of the act of commission, namely - preaching fascist or other anti-democratic ideology** - because of the similarities with one of the two forms of the act of commission of the crime under Article 162 § 1 Criminal Code - preaching discrimination, violence or hatred on the grounds of race, nationality or ethnic origin.

The present review also takes into account the **case-law on the Decree to Combat Petty Hooliganism handed down in connection with acts committed with discriminatory motives**.

CASE-LAW REVIEW

In the report on the implementation of the ECtHR judgment in *Nachova et al. V. Bulgaria*, the Bulgarian Government provided detailed information, presented below, on the number of pre-trial proceedings and persons responsible for premeditated murder and bodily injury inflicted with racist or xenophobic motives between 2011 and the third quarter of 2016.² The source of this information is the Supreme Prosecutor's Office of Cassation. Presented in this way, the information can neither be found in the annual reports on the activities of the prosecution and investigative bodies, nor is it included in the statistics of the National Statistical Institute. It is interesting to note that the cited number of indictments filed in cases of intentional bodily injury perpetrated on racist and xenophobic motives is many times higher than the identified court acts in such cases in the Ciela legal information system and in the Centralised Web-Based Case-law Interface (CWCI).

Criminal proceedings for intentional bodily injury perpetrated on racist and xenophobic grounds, 2011 - September 2016

	Instituted pre-trial proceedings (PtP)	Suspended or terminated PtP	Indictments brought to court	Persons brought to court	Convicted persons	Acquitted persons	Proceedings in progress by 2016
Deliberate bodily injury with racist motives	32	11	20	27	23	2	5
Deliberate bodily injury with xenophobic motives	103	67	45	56	45	–	14

² [http://hudoc.exec.coe.int/eng?i=DH-DD\(2017\)201E](http://hudoc.exec.coe.int/eng?i=DH-DD(2017)201E).

On the basis of the analysis of the Bulgarian case-law, below are some legal and criminological aspects of the bias-motivated crimes. Due to the lack of case-law under Article 163 of the Criminal Code and crimes against peace and humanity, these crimes are not referred to.

Bias-motivated crimes against the person

Article 116. (1) For murder:

[...] Item 11 Committed with hooligan, racist or xenophobic motives;

[...] The punishment shall be imprisonment between fifteen and twenty years, life imprisonment or life imprisonment without parole.

Article 131. (1) For causing bodily injury:

[...] Item 12 With hooligan, racist or xenophobic motives

the punishment shall be imprisonment between three and fifteen years in the case of grievous bodily injury; between two and ten years in the case of average bodily injury; up to three years in the case of minor bodily injury under Article 130 § 1, and up to one year or probation under Article 130 § 2 [expressed in causing pain or suffering without a health disorder].

Racist and xenophobic incitement

With the amendments to the Criminal Code effective 27 May 2011, the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and manifestations of racism and xenophobia through criminal law was transposed into Bulgarian law. As a result, for the first time qualified elements of premeditated murder (Article 116 § 1 (11) of the Criminal Code) and premeditated bodily injury (Article 131 § 1 (12) of the Criminal Code) on "racist or xenophobic grounds" were introduced. Qualified definitions result in aggravated punishment because of the higher public danger of crimes committed with a discriminatory intent.

The immediate objects of these crimes are complex - on the one hand, they affect the racial and national equality of citizens, on the other

- human life, health, or physical integrity. The discriminatory motive for both murder and bodily injury on racist or xenophobic motives refers to the subjective side of the crime and the act is considered to be constituent, whether or not the victims actually possess the appropriate protective character. An example in this respect is Sentence No. 26 of 19 June 2013 of the Haskovo Regional Court, whereby the defendant was found guilty of murder of a man of Bulgarian ethnic origin on the basis of hooligan and racist motives.³ The perpetrator, whose aim was to "slaughter with a knife in a deserted place a randomly encountered, wandering person of Gypsy ethnicity", claimed the victim's life as judging by his "vagabond tramp-like appearance and clothing" he likened him to a Roma. The court found that the qualifying element of "racist motives" is proven emphasizing that the fact that the victim was not actually of Roma origin is irrelevant to the legal qualification of the act under Article 116 § 1 (11).

The concepts of "racism" and "xenophobia" have no definitions in domestic law, but clarifying their meaning is important in order to identify the range of cases to which the relevant legal provisions apply. In the case-law, the content of the term "racism" is defined as "a policy of persecution, humiliation, violence, incitement to enmity and hatred of persons, social groups, sections of the population or groups of people, on the basis of colour, ethnicity, religious affiliation, or nationality."⁴ It is undisputed that racial discrimination engulfs that based on ethnicity. The prevailing body of case-law on the crimes against the person committed on the basis of discriminatory motives are qualified precisely as perpetrated on racist motives, whereby the attacks are motivated by prejudice or hatred against the Roma ethnicity. Xenophobia has traditionally been defined by the court as hatred and hostility towards foreigners.⁵ In this context, definitions of xenophobia by the Bulgarian Academy of Sciences are quoted - "fear of everything foreign and hatred of foreigners", and by the Oxford English Dictionary - "hostility or prejudice against people from foreign countries."⁶ The court found that there was a xenophobic motive also when "the act is directed at norms in society that establish freedom of religion

3 Haskovo Regional Court, Sentence No. 26 of 19 June 2013 in Criminal Case of General Nature (CCGN) No.759/12.

4 Vratsa Regional Court, Judgement No. 75 of 11 October 2017 in CCGN No. 493/2017.

5 Vratsa Regional Court, Judgment No. 75 of 11 October 2017 in Criminal Case No. 493/2017; DC-Shumen, Sentence No. 3 of 16 January 2018 in Criminal Case No. 1355/2017.

6 Vratsa Regional Court, Judgement No. 75 of 11 October 2017 in Criminal Case No. 493/2017.

and tolerance between different citizens."⁷ A broader interpretation of the term "xenophobia" was adopted in the Supreme Court of Cassation (SCC) Judgement No. 145 of 8 July 2019, namely "hatred of difference related to various attributes - national, cultural, social, religious, etc. What makes them subordinate to the term "xenophobic incitement" is that they carry a connotation of unequal treatment".⁸ The ambiguous interpretation of the term "xenophobia" in the case-law leads to a controversial application of the law. For example, with Sentence No. 34 of 26 May 2017 of the Vratsa Regional Court, the defendant was found not guilty on the charge of causing minor bodily injury by xenophobic incitement to a boy of Roma ethnic origin.⁹ The court's reasoning is that the crime was committed in view of the victim's ethnicity, "and ethnicity purports to racism, racial discrimination, not to xenophobia". In a similar case, alleging minor bodily harm to a Roma person by "hooligan and xenophobic motives," the Pazardzhik Regional Court found no problem with the legal qualification of the act and found the defendant guilty.¹⁰

In addition, the prosecutor's office often does not, by accident or purpose, attach legal importance to xenophobic and racist incitements to commit a crime, regardless of the evidence collected in the case for the existence of such. Here are two examples in this regard. In the first case, prosecutors charged three men with attempted murder of a person recognized by the defendants as a migrant and a Muslim. According to the defendants, the attack was carried out in order to "clean up the streets of the city and the country from foreigners who do not belong to their culture and religion".¹¹ Despite the obvious xenophobic motive, prosecutors classify the act as a premeditated murder on the grounds of hooliganism alone. However, in the individualisation of the sentences of the defendants, the court regards the xenophobic motives as an aggravating circumstance.

In the second case, the prosecutor's office indicted a man for causing average bodily injury considering the general elements of the crime - Article 129 § 1 of the Criminal Court, for assaulting a family of Roma who are his neighbours, but whom he dislikes because "the two Roma were

7 Shumen Regional Court, Judgement No. 51 of 23 May 2018 in CCGN No.107/2018.

8 SCC, Judgement No. 145 of 8 July 2019 in Criminal Case No. 534/2019.

9 Vratsa Regional Court, Judgement No. 75 of 11 October 2017 in Criminal Case No. 493/2017.

10 Pazardzhik Regional Court, Agreement No. 199 of 11 July 2016 in CCGN No. 1088/2016.

11 SCC, Judgement No. 145 of 8 July 2019 in Criminal Case No. 534/2019.

making dirt and noise".¹² According to the factual situation reflected in the sentence, striking "with legs and arms in the head" of the injured man was also accompanied by "swearing and racial slurs". Although the racist incitement was reflected in the sentence, the charge was not issued on the qualified elements of the crime. In this case, the court failed to consider the discriminatory motive as an aggravating circumstance.

Other discriminatory motives

Grounds such as sexual orientation, gender, disability and other otherwise protected characteristics under the Bulgarian equality law remain entirely beyond the scope of the criminal-justice protection.¹³ By virtue of Article 52 § 1 of the Criminal Code, in the individualization of the sentence the court is obliged to take into account the motives for committing the act. However, this general rule does not prove to be effective enough to ensure that committing a crime in the light of any of the protected characteristics will be regarded as an aggravating circumstance. Indicative in this regard is Judgement No. 39 of 21 June 2018 under Criminal Case No. 1258/2017 of the Supreme Court of Cassation, issued in connection with the murder in 2008 of a young man in the capital Sofia's Borisova Gradina park. Although in the case it was indisputably found that the defendants had assaulted and killed the victim, motivated by his alleged homosexual orientation, the court determined the size and type of penalties in the presence of numerous mitigating circumstances and in the absence of aggravating ones and without taking into account the homophobic motives.

Discriminatory, hooligan and personal motives

According to the case-law, the existence of a discriminatory motive for committing a crime does not exclude the presence of hooliganism. This is also the reasoning of a recent ruling of the SCC by Judgement No. 145 of 8 July 2019 under Criminal Case No. 534/2019, which concerns the attempted murder of a man because of his alleged migrant and Muslim background. Although the case involved only a charge of hooliganism and the xenophobic motives were only assessed as an aggravating circumstance,

¹² Varna Regional Court, Judgement No.168 of 24 June 2013 in CCGN No.627/2013.

¹³ Protection Against Discrimination Act, Article 4 § 2.

the court clarified in detail why the two qualifying elements may exist simultaneously.

"[Hooliganism and xenophobic motives] exist simultaneously when the relevant criminal conduct is not only a manifestation of disregard for the right of the public to impose restrictions on certain acts and those restrictions are brutally demonstrated against; but along with it or as a continuation of the whole conduct, the regime of equality between individuals is dismissed as a protective feature. On the one hand, the defendants' conduct has been debated as hooliganism because of the qualifying element for which they have been convicted. On the other hand, the victim, against whom actions escalated as an expression of hooliganism, was recognized as a migrant and a Muslim and was assaulted also because of his presumed identity by the perpetrators. In this sense, not only can the argument of the defence for the alternative of the two discussed features not be shared, but moreover, supported is the position of the deciding instances to consider xenophobic motives as an aggravating circumstance in the individualization of the sentences of the defendants."¹⁴

The possible compatibility of the discriminatory and hooligan motive is also taken into account in the Methodological Guidelines for Work on Files and Pre-Trial Proceedings Initiated on the Basis of Alerts for Committed Crimes with a Discriminatory Element of the Supreme Cassation Prosecutor's Office:

"The two motives are compatible when through his or her acts the perpetrator not only rejects the values of equality, but demonstrates a fundamental disregard for the right of society to impose prohibitions of any kind on them. These are hypotheses in which the act is characterized by audacity, rampage, illiteracy, and other typical hooligan characteristics, which clearly manifest intolerance toward a particular protected ground - for example, the victim was clearly chosen on account of the attribute or the act was accompanied by a profoundly negative characterization of the victim by such an attribute. In cases where both the conduct of the discriminatory motive and the hooliganism are present simultaneously, the act reveals signs of disrespect, far exceeding the number of ordinary cases of discriminatory motive of the respective type, pointing to the conclusion

14 SCC, Judgement No. 145 of 8 July 2019 in Criminal Case No. 534/2019.

of a particularly persistent attitude of non-compliance with external prohibitions and restrictions.”¹⁵

On the other hand, the case-law does not give a definite answer to the question of the compatibility between the discriminatory and the personal motive for committing the criminal act. In some cases, the court examines the existence of a personal motive in the context of a charge of mixed motive - racist/xenophobic and hooliganism. It is not clear whether the assessment of the presence or absence of personal motives is carried out solely with a view to identify or reject hooligan motives or discriminatory motives.

“The [a]ct was perpetrated on hooligan and racist motives - it was committed in a public place, without being provoked or challenged by V.B., without personal motives, in demonstration of impunity and disregard for the rules established by law and protecting good morals, without respecting personal integrity and dignity, the [defendant] told the witness B. that they beat him because he was "black" - a crime under Article 131 § 1 (12) [...].”¹⁶

In another case, the court considered the lack of personal motives of the perpetrator as an aggravating circumstance, from which it can be concluded that the court in principle allows the two motives - personal and discriminatory - to exist simultaneously.

“An aggravating circumstance is, above all, the lack, beyond racist motives, of any other motives that, when it comes to murder, could never be socially acceptable and justified, but would be at least purely life-comprehensible - old enmity, prolonged, acute personal conflict, resentment, revenge, etc. It is incomprehensible, and especially socially reprimanding, to deprive a person, who has never given you any reason, whom you have never met before, about whom you know nothing apart from just having them somewhere, of his or her life.”¹⁷

Bulgarian academic literature advocates for the compatibility between the two groups of motives,¹⁸ which should be supported as con-

15 Supreme Prosecutor's Office of Cassation (2011), "Methodological guidelines for work on files and pre-trial proceedings initiated on alerts for committed crimes with a discriminatory element", Ref. No. 10892/2011.

16 Sofia District Court, Sentence No. 354196 of 20 February 2018 in CCGN No. 11161/2016.

17 Haskovo Regional Court, Sentence No. 26 of 19 June 2013 in CCGN No.759/12.

18 Pushkarova, I., Popova, P., "Identifying Crimes with a Discriminatory Element", in: Training Module ii "Anti-discrimination law - criminal law aspects" (for magistrates), Commission for Protection against Discrimination, p. 46.

forming to international standards developed in the case-law of the Court in Strasbourg. According to the ECtHR, "not only acts based solely on the victim's characteristics can be classified as hate crimes. For the Court, perpetrators may have mixed motives, influenced by situational factors equally to or more strongly than by their prejudice against the group to which the victim belongs."¹⁹

Crimes against the equality of citizens

162. (1) Anyone who, by speech, press or other media, by electronic information systems or in another manner, preaches or incites discrimination, violence or hatred on the grounds of race, nationality or ethnic origin shall be punished by imprisonment from one to four years and a fine from 5,000 to 10,000 leva, as well as public censure.

(2) Anyone who uses violence against another person or damages his/her property because of the person's race, nationality, ethnic origin, religion or political convictions, shall be punishable by imprisonment from one to four years and a fine from 5,000 to 10,000 leva, as well as public censure.

Hate speech

The first paragraph of Article 162 criminalizes hate speech on the grounds of race, nationality and ethnicity. There are two possible forms of executive action - preaching and inciting.

"On the objective side, the act of preaching racial or national enmity or hatred or racial discrimination is expressed by proclamation of views capable of inflaming feelings of hostility for persons of a particular ethnic or racial origin, and incitement is prompting, creating someone's desire to do something by trying to induce an unlimited circle of persons to accept feelings of hatred and to motivate them to act in enmity against individual citizens or population groups based on their race or ethnicity. In order for the act to be implemented, it is sufficient for the appeal or sermon to

¹⁹ ECtHR, *Balázs v. Hungary*, No. 15529/12, Judgment of 20 October 2015, § 70.

reach at least one person, without the person having to take action to fulfil the appeal.”²⁰

Although hate speech in the public space in Bulgaria, including at the highest political levels, has escalated in recent years, the prosecution of preaching and incitement to discrimination, violence and hatred based on race and ethnicity is an exception. As a consequence, the jurisprudence under Article 162 § 1 of the Criminal Code is scarce, and in some parts – extremely disturbing.

Proportionality test between the right to freedom of expression and the right to protection against hate speech

Of particular interest is Sentence No 328501 of 01 February 2018 of the Sofia District Court,²¹ confirmed by the higher instance.²² Referring to the case-law of the ECtHR under Article 8 (right to respect for privacy and family life) and Article 10 (freedom of expression) of the European Convention on Human Rights (ECHR), the domestic court proposes an extremely comprehensive analysis and explanation of the rules for assessing the existence of a ground for realization of criminal liability under Article 162 § 1 of the Criminal Code. This is also the only identified judicial act of case-law under Article 162 § 1, in which a Bulgarian court formulates and applies a balancing test between the right to freedom of expression and the right to protection from hate speech. In this particular case, the court finds the defendant guilty of inciting race-based hate speech and violence for having made a call with a megaphone: “Things can't go on like this, it's time to wake up! Here are the blacks that you see! A serious criminal offense was committed last night against a young Bulgarian girl - she was stabbed by a person of such origin. Here are the blacks that you see! Things cannot go on like this! The time has come to take action and deal with these blacks! We have to deal with these blacks!”. The key excerpts of the court act are given below:

“In its judgements interpreting the Convention, the European Court of Human Rights states that Article 8 of the ECHR introduces two types of obligations of the State - an obligation on the State to refrain from arbitrary interference with private and family life, home and the

20 Varna District Court, Sentence No. 430 of 13 October 2011 in CCGN No. 5980/2011.

21 Sofia District Court, Sentence No. 328501 of 1 February 2018 in CCGN No. 422/2014.

22 Sofia City Court, Judgement No. 1215 of 29 November 2018 in CCGN No. 1857/ 2018.

correspondence, and an obligation of the State to take appropriate legislative and administrative measures designed to ensure respect for the interests under Article 8 of the Convention, as well as actions to ensure compliance with those measures and protect the rights of the citizens from violations of private individuals under Article 8. When fulfilling the obligation to refrain from interference, the State determines its interference with the interests under Article 8 § 1 of the ECHR, taking into account the restrictions under § 2 of Article 8, and when fulfilling the obligation to undertake protective action the State applies measures appropriate for respecting the interests under Article 8, which may also affect other rights protected by the Convention. When interfering with another interest protected by the Convention, the State should apply a fair balance between competing protected interests based on the significance of the threatened interest.

In its case-law, the European Court of Human Rights interprets the right to privacy in a broad sense - as an opportunity to live without arbitrary interference in the life of the individual. According to the Court's case-law, the concept of privacy covers both the physical and mental integrity of the individual, as well as personal data and reputation as part of the identity and psychological integrity of the individual. Everyone has the right to privacy, and the scope of the right and the degree of protection afforded to him/her varies according to the specific circumstances of the individual cases.

The obligation of the state to respect privacy, while protecting this interest of individuals from unjustified actions of third parties, is also covered by the protection from unjustified violation of the right to privacy while exercising the freedom of expression under Article 10 of ECHR. In this case too, a fair balance must be struck between the two protected interests, taking into account the specific importance of competing interests. Adopted as criteria for assessing the balance in the case-law of the Court are the discussion on the contribution of the views expressed and the information disseminated to the debate of general interest and the enhanced protection of the right under Article 10 of the ECHR in the case of serious public interest in the opinion expressed and the information disseminated; the function of persons with competing interests as public figures or private individuals; the enhanced protection of the rights of private individuals under Article 8 and the greater acceptable criticism of

politicians and public figures; the purposes, content, form and consequences of the dissemination of information and the expression of opinions, the circumstances under which they are made, the conduct of persons with competing interests, etc.

In its judgements under Article 10 of ECHR - T. v. L., Nielsen and Johnsen v. Norway, Pedersen and Baadsgaard v. Denmark, Handyside v. the United Kingdom, etc., interpreting the Convention, the European Court of Human Rights states that freedom of expression is fundamental in a democratic society, but it is also subject to a number of limitations, which, however, should be interpreted restrictively, and the need to restrict freedom must be convincingly established.

According to the Court's judgments, the interference with the right to freedom of expression provided for in Article 10 § 2 of ECHR should be statutory, pursue a legitimate aim under Article 10 § 2 of ECHR and be necessary in a democratic society.

The examination of the need in a democratic society to restrict freedoms under Article 10 of the Convention requires the Court to determine whether the interference with freedom of expression corresponds to a "pressing public need", namely whether the grounds relied on to justify the need to restrict the freedom under Article 10 are, first, relevant, and second, sufficient, and whether the interference is proportionate to the legitimate aim pursued by law.

With regard to the right to freedom of expression related to the discussion of matters of serious public interest - "legitimate public interest issues" - the enhanced protection of freedom under Article 10 of the Convention is recognized in the Court's judgments, with the Court stating (Nielsen and Johnsen v. Norway) that, despite the enhanced protection, there are also limits to freedom of expression and limits to permissible criticism established in the interests of a legitimate purpose – the protection of the rights and reputation of others - in assessing the excess of which, when comparing the interest of free speech and the interest of protecting the rights and reputation of others, the Court should pay particular attention to both the nature of the speech and the words used and in the context in which they are made public, given the case as a whole.

It follows from the foregoing that the criminal liability under Article 162 § 1 provided in the Criminal Code provisions protecting the rights of citizens, is the fulfilment of the described obligation of the State to ensure

respect for the interests under Article 8 of the Convention and to protect the rights under Article 8 against infringements by private persons, and also the sanction referred to in paragraph 2 of Article 10 of the ECHR, provided for the protection of the reputation and rights of others, for failure to fulfil an obligation restricting the right to freedom of expression.

The criminal liability under Article 162 § 1 of the Criminal Code is a sanction in defence also of Article 6 of the Constitution, according to which all people are born free and equal in dignity and rights, all citizens are equal before the law and no restrictions on rights are allowed, including under Article 8 of the ECHR, also privileges based on race, nationality, ethnicity, gender, origin, religion, education, beliefs, political affiliation, personal and social status or property.

Therefore, the stated principles and established rules for the interpretation of Articles 8 and 10 of the ECHR and for the permissible restriction of the right to freedom of expression should also be decisive in the assessment of the existence of grounds for criminal liability under Article 162 § 1 of the Criminal Code.

In the light of the principles set out in the interpretation of Article 10 of the ECHR, in the particular case with the assessment of the nature of the speech being judged, it must be held that the content of the procedural appeal constitutes a political statement concerning a matter of public interest. This conclusion is based on the finding in the case that defendant B. was a member of a political party and the occasion for his appeal established in the case was organized by a political party rally in response to a serious crime, which question is undoubtedly a legitimate, socially important topic.

In this case, in accordance with the standard adopted by the Court under Article 10 of ECHR, when comparing the interest of free speech with the interest of protecting the rights of others, it should be held that, in so far as it forms part of a political debate on a matter of common interest, the processed statement as an expression of law under Article 10 of the Convention is, in principle, subject to enhanced protection, although it, as stated in the Court's judgments under Article 10 of the Convention, may affect, disturb and even shock.

Pursuant to the ECtHR Article 10 judgements, when considering in this case the adherence to the permissible limits on freedom of expression, except in the context of the enhanced protection of that freedom,

conditioned by the nature of the speech and the public interest already mentioned from openly discussing a matter of public concern, the speech should be judged in view of its specific content and in the context of the circumstances in which it is made public, and considering whether it actually contributes to public debate.

In accordance with what has been decided regarding the application of Articles 8 and 10 of the Convention, in this case, when juxtaposing the interests of free speech and the interests of protecting the privacy of individuals, and when assessing the adherence to the limits of permissible criticism, of particular importance is the finding that, although the occasion for the speech was publicly significant, the defendant's appeal did not in any way contribute to the achievement of a useful public result. On the contrary, it is a deliberate message of violation of rights under Article 8 of the Convention and Article 6 of the Constitution, provoking actions against the privacy of people of colour, for which actions no public need has been identified to justify them.

For that reason, it must be held that the defendant's appeal is entirely devoid of justification for defining it as a legitimate discussion of a topic of public significance, and therefore cannot be afforded the enhanced protection initially recognized when discussing matters of common public interest.

It therefore constitutes an unlawful exceeding of the limits of permissible criticism in the exercise of the right of expression and there are relevant and sufficient grounds, as required by the case-law of the Court under Article 10 of ECHR, which justify the need to limit the right under Article 10 of the Convention by imposing a criminal sanction in defence of the legitimate purpose stated in law - the rights under Article 8 of ECHR, Article 32 and Article 6 of the Constitution of the Republic of Bulgaria."²³

Hate speech on the Internet

This review identified two cases of criminal prosecution of hate speech on the Internet. One case relates to the organization of an event on the Internet entitled "The slaughter of Gypsies" with an event description "All to arms!"²⁴ The event was organised in connection with the anti-Roma unrest of September 2011 in the village of Katunitsa. The site

23 Sofia District Court, Sentence No. 328501 of 1 February 2018 in CCGN No. 422/2014.

24 Varna District Court, Sentence No. 430 of 13 October 2011 In CCGN No. 5980/2011.

had been viewed by hundreds of users, and some had written comments expressing hatred of the Roma and a desire for violence against persons of this ethnic group. The court in this case did not credit the defendant's explanations claiming that he was not aware of the public danger of the act and did not perpetrate it intentionally. The court accepted that all the facts show that the defendant created the web page at a time of intense public tension with manifestations of ethnic intolerance against the Roma population and that he was aware that by creating an event on the topic of "Slaughter of the Gypsies" and by the invitation "All to arms" to an unlimited number of people to the event he preached and incited ethnic-based violence and hatred.

The second case is about preaching national hatred, enmity and racial discrimination on the grounds of ethnicity by the defendant, who posted pictures with the following texts: "Roma will inherit Bulgaria and enjoy their fruits forever...", "Bulgaria is overwhelmed with Bulgarians and cared for by the Roma ... BG is for the Roma. Remember it, BG Bullshit" and "Kudos, guys. Kudos. Bulgarians deserve a cruel death because they are a crappy shit. We, Roma, will inherit Bulgaria because it does not deserve that smelly, ugly and sweaty Bulgarians. Its shameful to be Bulgarian. Bulgarians are murderers, rapists, brilliant thieves. Death and mockery, you dirty Bulgarian plagues, and the Roma that mocked good for them, good for them. Those fighters who are in the portraits themselves have died for this BG stinker urghhhhhh, fuck you, die forever amen to come true", on the Internet profile Armacedone Penkov (AP) and the website "Life.for. Roma" he created and maintained on Facebook.

Misapplication of the protection against hate speech

The case-law review identified flagrant examples of misapplication of criminal legal protection against hate speech in order to restrict the right to freedom of expression for minority groups or to protect minority groups, as well as the right to freedom of conscience and religion. One possible explanation for this is the personal prejudices and discriminatory attitudes of representatives of state authorities towards representatives of ethnic and religious minorities, as well as the desire to take into account the dominant political and social sentiments.

In the first example, by a sentence of 30 May 2008 under Criminal Case of General Nature (CCGN) No. 113/2008 of the Berkovitsa District

Court, the defendant was found guilty of inciting racial hatred under Article 162 § 1 of the Criminal Code, for distributing campaign materials with the content not to vote for a certain mayoral candidate, because he was in coalition with the leader of Ataka Political Party who wanted to evict the Gypsies and turn them into soap, and this created ethnic tension in the neighbourhood.²⁵ While dismissing the request of the convicted person to revoke the sentence in the order of reopening, the SCC stated: "[I]n the factual findings of the appellate instance that the defendant distributing campaign materials with a content not to vote for a particular mayoral candidate because he was in coalition with the leader of the Ataka Political Party who wanted to evict the Gypsies and turn them into soap and this created ethnic tensions in the neighbourhood, the substantive law was applied precisely with his conviction."²⁶

In the second example, by a sentence of 26 April 2018 the Shumen District Court sentenced two men, founders of a new party, for committing crimes under Article 162 § 1 and Article 164 § 1 of the Criminal Code.²⁷ In the first place, the defendants were found guilty of preaching national and ethnic hatred against the Bulgarian nation and the Bulgarian ethnic group, in particular:

- they used the word "OTOMAN", individually and as an acronym for the Political Party "Union for Tolerance, Responsibility, Morality and Alternative Progress";
- one of them had stated that "...if we can make any change, I would like my hometown of Targovishte to be called Eski Dhumaya", he asked the question "Who told you that this is a Bulgarian city? Targovishte has been a Turkish city for over 500 years";
- one of them wore a fez hat;
- they used the Turkish military march "Cheddin Dede, Neslin Baba" and the song "Dhzelem, Dhzelem" - as the anthem of the emerging political party "Union for Tolerance, Responsibility, Morality and Alternative Progress" - OTOMAN,

25 Berkovitsa District Court, Sentence of 30 May 2008 in CCGN No. 113/2008.

26 SCC, Judgement No. 570 of 7 January 2009 of SCC in Criminal Case No. 581/2008.

27 Shumen District Court, Sentence No. 30 of 26 April 2018 in CCGN No.398/2017.

Secondly, the defendants were found guilty of preaching religious hatred, because they:

- used the word "OTOMAN", both individually and as an acronym for the Political Party "Union for Tolerance, Responsibility, Morality and Alternative Progress";
- one of them wore a fez hat;
- used the crescent symbol in the flag of the emerging political party "Union for Tolerance, Responsibility, Morality and Alternative Progress" - OTOMAN;
- scheduled and organized the constituent assembly of the Political Party "Union for Tolerance, Responsibility, Morality and Alternative Progress" - OTOMAN on 2 April 2010 - Good Friday in Eastern Orthodoxy;
- used the symbolic colour combination Green-Yellow in the flag of the emerging political party "Union for Tolerance, Responsibility, Morality and Alternative Progress" - OTOMAN;
- performed the Muslim prayer "Namaz" when laying a wreath at the monument of Colonel K. in Shumen - a hero from the Balkan War and the Inter-Allies War.

Preaching Nazi and anti-Semitic ideology

The case-law review shows that criminal responsibility can be claimed for preaching Nazi and anti-Semitic ideology as both independently under Article 108 § 1 - preaching anti-democratic ideology and in combination with the crime under Article 162 § 1. According to the SCC, "the [c]ommonality between the acts of execution on the two criminal offences is the dissemination of evaluative information through which the perpetrator develops, substantiates and publicizes views that are inherently anti-democratic or capable of inciting racial enmity or hatred, or of growing into racial discrimination."²⁸

For example, two men from Pazardzhik were convicted of preaching fascist ideology and racial and ethnic hatred and racial discrimination for sewing a red flag with a white circle in the middle, with a painted

28 SCC, Judgement No. 80 of 24 February 2009 in Criminal Case No. 34/2009.

fascist swastika in the circle - a broken cross - which is the national flag of Nazi Germany in the period 14 March 1933 to 08 May 1945, which flag was then hung on the chimney of a former factory on the night of 19 against 20 April 2009. The case is interesting in that the court appoints several types of expertise, including heraldic and vexillological and historical-lexicological. The following two tasks were assigned to the expert's first examination:

1. To identify the red flag with a white circle in the middle and a fascist swastika drawn in the white circle, and to draw a conclusion as to since when such a flag had been known to human civilization.
2. To analyze the symbolism of the processed flag and the symbolism of its sewing and suspension, taking into account the date of its suspension – 20 April 2009 - the birthday of Adolf Hitler.

The expert's answers come across as very comprehensive and valid, which prompts the authors of the present review to quote them in full.

"The conclusion from the examination establishes that the red flag with a white circle in the middle with a painted broken cross on it has been known in history since 1920 as a symbol and identification mark of the German National-Socialist Workers' Party, and subsequently of the Third Reich and the national-socialist ideology in general. Although red and white are the most commonly used colours in vexillology (the study of flags), and the swastika is a sign known in human civilization since ancient times, precisely combining them as a red flag with a white disk and a black swastika on the disk in the direction clockwise, rotated 45 degrees from the base line (known as a broken cross) allow unambiguous identification of the flag. This flag was adopted in 1920 as the banner of the German Workers' Party (then renamed the German National-Socialist Workers' Party or known as the Nazi Party). The flag-makers are considered to be Dr. F. K. and the Nazi Party leader himself - Adolf Hitler.

After Hitler became chancellor of Germany and subsequently a sole leader of the state, the Nazi party symbolism was also imposed as German national symbolism. From 14 March 1933 to 15 September 1935, the swastika flag was proclaimed the second national flag of Germany, together with the national flag from before the First World War. Since 15 September 1935, the swastika flag was officially the only national German flag. This was until 08 May 1945, when Germany capitulated and the flag and all forms of the swastika were banned by the Allied Occupation Authorities.

Hitler attributed the combination of the colours of the flag and the swastika to the victory of the Aryan and the Aryan productive labour that had always been anti-Semitic. After the Nazi ideology was discredited and declared criminal, the main symbolism of the Nazi flag is that it represents the national-socialist ideology and is a symbol of the crimes against humanity committed by the Nazis.

Historical events during World War II attach importance to this flag as a symbol of an ideology of human hatred and crimes against humanity. The hanging of such a flag on 20 April 2009 at the chimney of the former Sila factory in Pazardzhik is interpreted from a vexillological point of view as a demonstration of a cult to Adolf Hitler's personality, a commitment to the ideology of Nazism. At the same time, the anonymity of the perpetrators of the act is preserved. The hanging of the flag caused great visual impact among the residents of Pazardzhik."

In the second examination - the historical-lexicological - the expert clarifies that the racist theory of the superiority of the Aryan people suggests that "other races can justifiably be suppressed and even completely liquidated," and that "nationalism is a reactionary ideology and a policy of recognition and preaching the superiority of one nation over another".

In another case, the court found the defendant guilty of preaching national-socialist and racist ideology - a crime under Article 108 § 1 of the Criminal Code - the crime was committed by drawing a fascist swastika on a mosque - a broken cross, a symbol of the national-socialist ideology and a combination of number "14", which symbolizes the fourteen words - "We must ensure the existence of our people and the future of the White Children" or "Because the beauty of the white Aryan woman must not disappear from the Earth," and number "88" - signifying the greeting "Heil Hitler".²⁹ Based on the findings of the heraldic expertise in the case, the court held that the depiction of broken crosses, graphically, through the language of symbols, denoted the national-socialist ideology and implied a hidden message of neo-Nazism for white supremacy. The second instance court also argued that "the graphic representation of the sign and numerical code on the remains of an Islamic religious site, in a public place on the outside of the walls, in a central urban area, close to a school, with a highly-visual effect, with colour, size and location visible to every citizen, the ideas preached by the accused of praise of the neo-Nazi and racist

²⁹ Court of Appeal, Judgement No. 23 of 11 July 2016 in Criminal Case No. 126/2016.

ideology and views have reached an unlimited number of addressees, thus completing the criminal preaching activity.” Although the act committed could be qualified also as a preaching, in this case, however, there is no charge under Article 162 § 1 of the Criminal Code.

From hate speech to hate crimes

The unpunished preaching and incitement of racist and xenophobic hatred and violence leads to the escalation of crimes committed on the basis of discriminatory incitement. A clear example in this regard is the unlocking of a wave of xenophobic and racist violence following a knife attack on a shop assistant during an armed robbery on 3 November 2013 in Sofia, the perpetrator of which is a man of Algerian origin. After the incident, anti-immigrant rhetoric intensified and political support for actions against refugees and immigrants in the country increased. On 4 November 2013, a “procession against immigrant invasion” was held, in which representatives of extremely nationalist formations took part - Ataka, IMRO, National Resistance Movement, Bulgarian National Union, Association of Bulgarian Football Fans. During the event, there were unambiguous calls for the expulsion of the immigrants from Bulgaria, for arming and self-organizing the population in voluntary civilian patrols in order to protect and clean the city of immigrants.³⁰ In connection with the procession, upon a signal from the BHC, the Prosecutor's Office instituted pre-trial proceedings under Article 162 § 1 of the Criminal Code, which were later discontinued.

On 4 November 2013, the day of the procession, a 17-year-old Syrian was attacked with a knife.³¹ On 7 November 2013, a woman from Cameroon was attacked at a bus stop. On 8 November 2013, an 18-year-old boy, a Bulgarian citizen of Ghanaian origin, was beaten by three attackers in downtown Sofia.³² On 9 November 2013, an attempt was made to kill a man because of his alleged immigrant and Muslim background.³³ According to the perpetrators, the attack was carried out in order to “[clean up] the city streets and the country from foreigners who do not belong to their

30 Bulgarian Helsinki Committee, “Open Signal to the Prosecutor General on Crimes of IM-RO-BNM Representatives and Other Formations”, 5 November 2013, available at: <http://www.bgghelsinki.org/bg/novini/press/single/otkrit-signal-do-glavniya-prokuror-otnosno-prestpleniya-na-predstaviteli-na-vmro-bnd-i-drugi-formacii/> (in Bulgarian).

31 Bulgarian Helsinki Committee, Human Rights in Bulgaria in 2013.

32 Ibid.

33 SCC, Judgement No. 145 of 8 July 2019 in Criminal Case No. 534/2019.

culture and religion." Moreover, it is clear from the relevant judgement of SCC that with their defence version the two defendants tried to legitimize their actions with the need to take in their own hands "the punishment of Muslim foreigners committing [...] crimes against Bulgarian citizens." On 11 November 2013, an 18-year-old citizen of Mali was assaulted.³⁴ On 12 November 2013, an Iraqi man was attacked.³⁵ On 3 December 2013, three Syrians were beaten by a group of over ten men with sticks and knives. Of all the cases of violence listed so far, the review of the case-law establishes an indictment brought only for the crime under Article 116 § 1(12) - the attempted murder on xenophobic motives. In all other cases, the perpetrators of racist attacks are likely to have avoided criminal liability for failure to identify them or for other reasons.

Violent actions on discriminatory motives

The criminal elements of Article 162 § 2 of the Criminal Code require that violence against another be used or that the property of another be damaged due to his/her race, nationality, ethnicity, religious affiliation or political beliefs. In the first hypothesis of an act of commission, the crime is formal, simple to commit - it is sufficient to have the use of violence, with the actual damage to the health or life of the victim not being a constituent element of the crime.

"Existence of explicit medical documents establishing the physical injury of a person is not necessary to prove the physical abuse, since the fact of the physical act used is sufficient to complete the crime in the form of an act of violence (use of violence). This form of the act of execution means a formal crime because the immediate object of protection is damaged by the very use of violence, without the need for a specific constituent result".³⁶

In the second hypothesis of the act of commission, the crime is effective - the damage to the property of the victim is required. It should be noted here that during the review of the case-law, no case of prosecution was identified under the second hypothesis of the act of commission of the crime under Article 162 § 2 of the Criminal Code.

³⁴ Bulgarian Helsinki Committee, *Human Rights in Bulgaria in 2013*.

³⁵ Ibid.

³⁶ Sofia Court of Appeal, Judgement No. 221 of 1 June 2018 in Criminal Case No. 528/2018.

The legal theory shares the view that race, nationality, ethnicity, religious affiliation and political beliefs under Article 162 § 2 of the Criminal Code are part of the objective side of the crime, which implies that in order to make it a crime, the victims must in fact bear the relevant protected features.³⁷ This assumption is unjustified, since the main characteristic of bias-motivated crimes is that discriminatory incitement is part of the subjective, mental side of the crime.³⁸

The objectification of discriminatory motives with the utterance of specific words - swearing, insulting or otherwise, is not an element of the criminal offence.³⁹ Thus, in a case of assault and beating against a group of Roma, the court stated that the fact that one of the defendants did not utter specific words objectifying the manifestation of ethnic intolerance against the victims is irrelevant. Instead, the court acknowledges that "by acceding to the call of one of the accomplices and objectively solidifying and supporting this proposal (for beating the Roma), by taking concrete factual actions to implement this proposal, the convicted K. has, in practice, subordinated his behaviour to the leading motive to exert violent physical effects on the victims with the aim of physically damaging them solely because of the fact of their Roma ethnic background, thus demonstrating his ethnic intolerance to the representatives of this ethnic group".⁴⁰

The use of offensive words and expressions by the attackers can serve as proof of the constituent motive. In fact, in all the cases reviewed the existence of the discriminatory motive was proved, in whole or in part, through the use by the perpetrators of such expressions - "Mangal, Gypsy", "Monkey, go to Africa", "Fuck your black mother. Negro. Gypsy".

Following the introduction in 2011 of qualified definitions for causing premeditated murder and bodily injury on racist or xenophobic motives, the question arises as to whether there is an ideal combination, specialty or absorption between these crimes and the crime under Article 162 § 2, clause 1. While the case-law identifies examples of cases, in which the court finds that the criminal panels were carried out simultaneously with one act and under Article 131 § 1(12), clauses 2 or 3, and under Article 162

37 Stoynov, A., "Criminal law Special Section. Crimes against Human Rights", Sofia, 2013, p. 247.

38 On this issue, see: Pushkarova, I., "Legislation to Combat Criminal Offenses with a Discriminatory Element", in Training module II "Anti-discrimination law - Criminal law aspects" (for magistrates), CPA, p. 51. See also the ECtHR judgment cited above, *Škorjanec v. Croatia*.

39 Sofia Court of Appeal, Judgement No. 221 of 1 June 2018 in Criminal Case No. 528/2018; Stara Zagora District Court, Sentence No. 57 of 7 April 2010 in CCGN No. 1012/2010.

40 Sofia Court of Appeal, Judgement No. 221 of 1 June 2018 in Criminal Case No. 528/2018.

§ 2, clause 1,⁴¹ in the legal literature opposite views are expressed on this matter.⁴² In this respect, the relationship between the concepts in question should be clarified.

Crimes Against Religious Denominations

Article 164. A person who preaches or instigates discrimination, violence or hatred on religious basis by speech, through the press or other mass media, through electronic information systems or in another way, shall be punished by imprisonment for up to four years or probation and a fine from five thousand to ten thousand levs.

(2) A person who desecrates, destroys or damages a religious temple, a house of prayer, sanctuary or an adjoined building, their symbols or gravestones, shall be punished by imprisonment up to three years or by probation, and a fine from three thousand to ten thousand levs.

Religious hate speech

The first paragraph of Article 164 of the Criminal Code criminalizes preaching and incitement to discrimination, violence or hatred on religious basis. The SCC brings out the content of the term "religion" through the definition given by the Bulgarian interpretative dictionary - "religion is an organized system of beliefs, cultural systems, worldviews that link humanity to a given order of existence."⁴³ Although it is not explicitly stated in the case-law and there are no examples in this regard, the legal doctrine accepts that the atheistic views of citizens are also subject to criminal defence.⁴⁴ The offences committed within this criminal act are identical to

41 Plovdiv District Court, Agreement No. 230 of 20 March 2012 in CCGN No. 569/2012; Pazardzhik District Court, Agreement No. 199 of 11 July 2016 in CCGN No. 1088/2016.

42 Stoynov, A., "Criminal law Special Chapter. Crimes against human rights", Sofia, 2013, pp. 249-250; Adeva, E., "The role of the court in criminal proceedings for crimes with a discriminatory motive", in Training module II "Anti-discrimination law - criminal law aspects" (for magistrates), Commission for Protection against Discrimination, p. 85. Gocheva, Y., "The role of the prosecutor in criminal proceedings for crimes with a discriminatory element", in Training module II "Anti-discrimination law - criminal law aspects" (for magistrates), Commission for Protection against Discrimination, p. 74.

43 SCC, Judgement No. 38 of 25 April 2019 in Criminal Case No. 66/2019.

44 Stoynov, A., "Criminal law Special Chapter. Crimes against human rights", Sofia, 2013, p. 257.

those of preaching and inciting racist and xenophobic hatred under Article 162 § 1 of the Criminal Code. In its practice under Article 164 § 1, the SCC clarifies the content of the executive form of "preaching" as follows:

"[P]reaching is the dissemination of evaluative information through which the perpetrator develops, argues and disseminates views that are inherently capable of inciting enmity or hatred (Judgment No 80/2009 on criminal case No 34/2009 - 1st Criminal Department of the SCC). Preaching, when by word of mouth, is a purposeful outreach activity that influences the minds of the addressees, motivating them to adopt a certain outlook that contains a negative appreciation for different beliefs and faith. To its constituent nature, the attitude of third parties to whom it is addressed is irrelevant, whether they reject it or accept it, because the crime is a formal act and is completed by the first act expressing the illegal activity."⁴⁵

The jurisprudence under Article 164 § 1 of the Criminal Code is scarce. Probably the first sentence under this provision was pronounced in 2011 by the Sofia City Court, stating that the defendant, "through his book, *Fundamentals of National Socialism*, preached hatred on religious grounds and in the texts of the book made allegations of Jewish ethnicity and religion, thus endangering ethnic peace and understanding between religions."⁴⁶ The crime report was filed by representatives of the Bulgarian Helsinki Committee. In this case, the court noted that at "the heart of the book in question is the author's understanding of the Jews professing their religion as a threat to so-called selected "Aryan" peoples of racial superiority. It has been consistently developed that the Jews, led by their religious worldview and using other "serving" ethnic groups, want to conquer the world by committing crimes - ritual killings, robbing everyone else, committing genocide against the Slavic peoples. It is claimed that they reject God and accept only the belief in National Socialism, and that every synagogue holds them in absolute obedience. An idea is also presented that the Holocaust is the most grandiose fraud of the 20th century." In addition, the Jews are defined by the defendant as "vagrants, moneylenders, swindlers and born criminals, foreign, vile and harmful people, Judeo idiots, crap, half-literate", which offensive qualifications and epithets "affect the honour and dignity of Jews, and inspire hostility." The Court explicitly emphasizes that the publication does not benefit from the protection of the right to

45 SCC, Judgement No. 38 of 25 April 2019 in Criminal Case No. 66/2019.

46 Sofia City Court, Sentence No. 227 of 4 July 2011 in CCGN No. 5259/ 2010.

freedom of expression guaranteed by the Constitution and the ECHR, since it does not contain ideas and information, be it not insulting and shocking, but only offensive qualifications and calls for opposition to the Jews. Along with the crime under Article 164, the author of the book was also convicted of preaching fascist ideology under Article 108 § 1 of the Criminal Code.

The review of the case-law under Article 164 § 1 found that the most numerous judgements are on Ahmed Musa's charge, imam in Pazardzhik, for preaching religious hatred by word in the period 2008-2011. The conviction on this charge, imposed by the Pazardzhik Regional Court in 2014⁴⁷ and amended by the appellate court in the direction of increasing the sentence,⁴⁸ was overturned by a judgement of the SCC in 2016 due to lack of reasons.⁴⁹ It is noteworthy that in its judgement the SCC stated that "it is sufficient that the act of committing hatred is to be rooted in religious beliefs, to rely on religious dogmas and tenets, in order to carry out the crime." Such a requirement - for the presence of opposition to some religious views against others, however, is not provided for by Article 164 § 1 of the Criminal Code. The final sentence of the defendant on the charge was only made in 2019 by the SCC Judgement No. 38 of 25 April 2019.⁵⁰ Through the prism of Article 9 of the ECHR and the ECtHR's relevant case-law, the supreme judges make a comprehensive analysis of the question of why the defendant's incriminated appeals do not enjoy the protection of the right to freedom of thought, conscience and religion.

In order to substantiate the view that defendant A. did not exercise his lawfully guaranteed right to freedom of religion, the SCC should address what it involves according to the ECtHR case-law. According to the Strasbourg Court, the right to freedom of "religion" has two aspects - the right of everyone to have a conviction, which is an "absolute" right, and the right to demonstrate that conviction which is "not absolute", as it may affect the rights of other persons. Therefore, it is not accidental that Article 9 § 2 of the ECHR provides that "the freedom to profess a chosen religion or belief is subject to restrictions provided for by law and necessary in a democratic society, in the interests of public security, for protection of public order, health, morals or for protection of the rights and freedoms of

47 Pazardzhik Regional Court, Sentence No. 15 of 19 March 2014 in Criminal Case No. 330/2012.

48 Plovdiv Court of Appeal, Sentence No. 9 of 1 July 2015 in CCGN No. 294/2014.

49 SCC, Judgement No. 71 of 28 July 2016 in Criminal Case No. 123/2016.

50 SCC, Judgement No. 38 of 25 April 2019 in Criminal Case No. 66/2019.

others (*Kokkinakis v. Greece, Eweida and Others v. UK, Ivanova v. Bulgaria*, among others).

The facts incriminated in the prosecution against defendant A. do not affect "his domestic right to religious beliefs", which enjoys absolute protection from the state and is inviolable under ECHR and Constitutional provisions. Their focus is on the defendant's chosen way of demonstrating his religious beliefs and the content of the messages sent to his supporters. In his speech, the defendant called for a "holy struggle" against Christians and other religions, inculcating against them, calling them "unbelievers," "gyauri," and "sinners," qualifications that are sufficient in themselves to incite hatred on a religious basis among people of different ethnicities.

Next, the European Court of Human Rights holds that the freedom to demonstrate one's own religion includes the right to try and convince and "convert" through training and sermons other people into one's own religion. According to the practice of applying Article 9 § 1, on the contrary - to deny this right would mean the norm to remain a "dead letter" (*Kokkinakis v. Greece*). However, this right (to attract like-minded people) is denied when the attraction is through pressure, threats or rewards (*Larrisis et al. v. Greece* and others). In his speeches to followers and listeners, defendant A. used threats, arguing that whoever does not accept his beliefs will burn in hell (as Christians), that faith should be enforced with power and sword, that those who die "bombing" for the sake of faith, go to paradise etc. Therefore, the cassation instance found no reason to accept that the defendant's actions in attracting followers through his sermons were acts protected by law because they did not express the right to freedom of religion. Therefore, regardless of whether they were inspired or motivated by religious incitement, they cannot be protected by Article 9 § 1 of the ECHR (judgements in this regard *Kalaç v. Turkey, Manoussakis v. Greece, S.A.S v. France* and others).

Because of the above, recognizing the right to autonomous existence of religious communities as mandatory for pluralism in a democratic society (*Hasan and Chaush v. Bulgaria*), the ECtHR grants "the right to intervene by the State provided by law when hate speech affects genuine democratic values, rights and freedoms of other citizens. (*Kokkinakis v. Greece, Larrisis v. Greece*, etc.). Such is the case according to the SCC.

With their content the messages sent by the defendant A. are in striking contradiction with the protected object in Article 9 § 1 of the

ECHR and with the public interest in guaranteeing the right to religious freedom, since he has by his actions affected the right of other citizens to profess their religion undisturbed. In the second place, his words threaten public security, as he calls for a holy battle (Jihad) with the "unbelievers", to enforce faith with power and sword. In the specific cases, the defendant A. did not freely practice religion in any of its intended forms - individually or collectively, publicly or privately, through worship, training, religious rites and rituals protected by the Convention - but incited enmity and hatred towards people from other religions that do not profess his religious views. Incriminated appeals contain hatred of different religious communities and people, on the one hand, and on the one hand, contain positive assessments ("bows") for "those who cut heads, put bombs and die for the faith" and for their views to enforce their beliefs by power and sword. They are in conflict with the fundamental values enshrined in a democratic society, which accepts the diversity of religions and guarantees their free profession, and for this they cannot enjoy the protection of Article 9 § 1 of the Convention.

Attacks on religious symbols and temples

The second paragraph of Article 164 criminalizes attacks on religious temples, houses of worship, religious symbols, gravestones. The possible enforcement forms of the crime are three: defilement, damage, and destruction. According to the wording of the provision, except in cases of "defilement" of religious symbols and temples, the perpetrators are not required to have a specific, discriminatory motive.

The jurisprudence under Article 164 § 2 of the Criminal Act, although scarce, reveals some problematic issues. For example, in one case a Roma man who stole for the purpose of heating, wooden crosses from a cemetery park for a total of 102 leva (app. 50 EUR) was found guilty of committing three crimes in an ideal setting - theft, hooliganism and defilement and destruction of gravestones.⁵¹ The punishment imposed is one year of effective deprivation of liberty and a fine of 3,000 leva (app. 1,500 EUR). In this case, the court does not examine the existence of an anti-religious or other discriminatory motive for committing the crime. This is one of the heaviest punishments for crime within the scope of this review,

⁵¹ Plovdiv District Court, Judgement No.178 of 21 June 2016 in CCGN No.1257/2016.

except those imposed for murder and attempted murder on discriminatory motives.

Crimes against the labour rights of citizens

Article 172. (1) A person who intentionally impedes another to take a job, or compels him to leave a job because of his nationality, race, religion, social origin, membership in a trade union or another type of organization, political party, organisation, movement or coalition with political objective, or because of his or of his next-of-kin political convictions, shall be punished by imprisonment for up to three years or by a fine of up to 5,000 levs

The criminal protection of the labour rights of citizens is regulated in Article 172 of the Criminal Code, with the first paragraph of the provision criminalizing the unlawful obstruction of the exercise of the right to work due to discriminatory motives. The legal theory assumes that the protected features referred to in the provision are an element of the objective side of the criminal panel and, despite the existence of discriminatory motives, the actual absence of such a characteristic in the person who is not admitted to work or is forced to leave work would lead to incommensurability of the act. In the review of the case-law, only one case of a sentence under Article 172 § 1 of the Criminal Code⁵² was identified and its discriminatory motives are related to the victim's political affiliation.

Other essential issues

Duration of criminal proceedings

The case-law review established several examples of excessive length of criminal proceedings in criminal cases with a discriminatory motive. Some examples in this regard include:

52 Petrich District Court, Sentence No. 471 of 5 October 2018 in CCGN 871/2018.

- Criminal proceedings for the murder of a young man in the Borisova Gradina park on homophobic grounds continued 10 years - from 2008 to 2018.
- The criminal proceedings for the murder of a man due to his alleged immigrant and Muslim background continued six years - from 2013 to 2019 - although the perpetrators were detained immediately after the crime was committed.
- The criminal proceedings against Biser 'Petnoto' Manolov for committing a crime under Article 162 § 1 - incitement to racial hatred and violence - lasted for five years - from 2013 to 2018, although the perpetrator was arrested immediately after the crime was committed.

The victims

One observation from the review of the case-law in bias-motivated cases is that only in isolated cases are victims of these crimes constituted as civil claimants and private prosecutors in criminal proceedings. On the one hand, this can be explained with the widespread perception among investigative and prosecution authorities that, as formal crimes, offences against equality of citizens and against confessions do not allow the constitution of a victim in the proceedings.⁵³ On the other hand, the victims of this type of crime are often representatives of socially and financially vulnerable groups of the population - mostly Roma and migrants - who in principle have limited access to institutions and often face institutional prejudices. Last but not least, victims have a fear of re-offending and often refuse to report any cases of discriminatory crime to law-enforcement authorities.

Petty hooliganism

Violence incited by bias is not always prosecuted as a crime under the Criminal Code. In some cases, it qualifies as petty hooliganism under Decree No. 904 of 28 December 1963 on Combating Petty Hooliganism: "Indecent manifestation in the use of profanity, swearing or other obscene language in public in front of more people, in an abusive attitude and behaviour towards citizens, to the authorities or to the public, or in scuffle,

⁵³ See ECtHR, *Karahmed v. Bulgaria*, No. 30587/13, Judgement of 24 February 2015.

brawl or other similar actions against public order and tranquillity, but because of its lower degree of public danger does not constitute a crime under Article 325 of the Criminal Code".⁵⁴ Petty hooliganism, however, does not include bias motivation, and the case-law examples clearly demonstrate that the discriminatory motives are ignored by the court and are not considered as aggravating circumstances in the individualization of the sentence. By definition, petty hooliganism is an act of low public danger, and the penalties envisioned for committing it are low - detention of up to 15 days in a structural unit of the Ministry of Interior or a fine of 100 to 500 levs. However, we cannot agree that the use of violence or the intention to kill on racist or xenophobic motives, such as the case-law examples, should be classified as acts of low public danger. In one case, the offender, without being provoked by anything, approached the victim and started offending him with the words "Mangal", "Dirty Gypsy", "Hobo", kicking his things and striking him with the leg in the groin. The fine imposed on her is 200 levs. The use of violence in this example cannot be qualified as a "brawl", which is the enforced form of petty hooliganism provided for in the Decree, due to the total absence of opposite aggression on the part of the victim.

An intruder who threatened with a kitchen knife a group of four people in the park was also convicted of petty hooliganism for having told them, "Within three seconds you must be gone, because I will kill you all" and "I will kill all of you, blacks", and after the scared victims fled from the bench on which they were sitting, the offender began hitting the knife on it. He was sentenced to pay a fine of 200 levs. In this case, arguments can be made for the constancy of the act, rather, under Article 144 § 3 of the Criminal Code - threat to commit murder.

However, the law-enforcement authorities acted otherwise in another case that can be described as similar to those described hitherto or even lighter in terms of intensity of the violence used. In it, the victim is a child of Bulgarian ethnic origin, who was punched in the face by the defendant telling him "Bulgarian, *****! *****, you have no job here, I don't want to see you here again!". The perpetrator was prosecuted under the Code of Criminal Procedure and found guilty of causing minor bodily harm for hooligan and xenophobic reasons - Article 131 § 1(12), clauses 1 and 2, for which he was sentenced to 12 months' imprisonment.

54 Decree No. 904 of 28 December 1963 for combating petty hooliganism, Article 1 § 2, available at: <https://lex.bg/bg/laws/ldoc/-1632842751>.

Another example, which enhances the perception of the application of double standards in the prosecution of prejudice-motivated crimes depending on the ethnicity of the victims, is Judgement No 23.05.2013 of the Dobrich District Court.⁵⁵ In the course of the case, initiated under the Decree, the court found that the use of violence against another person, expressed in blows to the head and kicks to the body, accompanied by the words: "Fuck your, Bulgarian", points to the constancy of the act under Article 162 § 2 of the Criminal Code. In this regard, it terminated the case and referred the case to the prosecutor's office.

Typology of the perpetrators

In the examined case-law, with the exception of one offender who was convicted under the provisions of the Decree on Combatting Petty Hooliganism, all convicted perpetrators of discrimination offences were men. Another characteristic is that in most cases the perpetrators are young men or underage boys. In criminology, the young age of perpetrators is associated with the desire of young people to assert themselves and seek approval from their peers and their immediate environment, often using aggression, domination, and power stereotypically associated with masculinity. The current review confirms this conclusion, in which, with one exception, all identified juvenile-delinquency cases were committed by more than one juvenile or in the presence of other youths.

Second, the perpetrators of bias-motivated crimes often demonstrate belonging to formal or informal ultra-nationalist, neo-Nazi and other organizations and movements whose principled ideology is related to hate speech and violence against ethnic and religious minorities, migrants and the LGBTI community. The case-law provides many vivid examples in this regard.

"The 21-year-old perpetrator of a murder motivated by racist motives of a man he recognizes as Roma, "communicated with persons with skinhead and neo-Nazi beliefs and views, and gradually formed racial hatred of the Gypsies, which he perceived as inferior and unworthy. Thus, over time, a desire emerged in him to deprive a representative of the Roma minority of his life."⁵⁶

55 Dobrich District Court, Decision of 23 May 2013 in a criminal case of an administrative nature – CCAN No. 837/2013.

56 Haskovo Regional Court, Sentence No. 26 of 19 June 2013 in CCGN No. 759/2012.

"A youth convicted of the attempted murder of a Roma man attended the club of the "informal nationalist youth organization N.R.B. [National Resistance - Bulgaria], which aimed at harassing foreigners, mainly refugees and immigrants and Gypsies, by beating and harassing them."⁵⁷

"One of the two men convicted of preaching fascist ideology and racial and ethnic hatred by sewing and hanging a Nazi flag on a chimney of a former factory in Pazardzhik was the leader of the local structure of the Bulgarian National Union - an ultranationalist formation."⁵⁸

"The perpetrators of the murder of a man on account of his alleged homosexual orientation, were members of an informal group that searched the park for "men who looked homosexual and beat them calling this action "kicking" or "cleansing."⁵⁹

"Before attacking and stabbing a Syrian national, the perpetrator agreed with a witness in the case to meet as many people as possible so that they can "causelessly strike at randomly passing Roma or persons of ethnic groups other than Bulgarian. For this reason, everyone was wearing dark hooded sweatshirts so that they could not be recognized and identified." In the end, the attack group reached around 20 people."⁶⁰

Belonging to an organized form of hatred and hostility is not a mandatory feature of perpetrators of discriminatory crimes. However, even when they do not belong to such organized groups, those convicted of grave crimes against the person, motivated by racist or xenophobic incitements, as well as for preaching nationalist and anti-Semitic ideology, demonstrate lasting prejudices and hatred against the holders of the respective protected grounds - race, ethnicity, nationality, and religion.

"The perpetrator of a deliberate murder of an elderly Roma family from Pazardzhik "had repeatedly declared his hatred of Roma people, believing that they were the reason that Bulgaria is not a good enough place to live, because they stole, had many children and planned on Islamizing the country's population."⁶¹

"The perpetrator of an attack on a representative of the religious group Jehovah's Witnesses "did not know the victim, was not familiar with the religious doctrine, but perceived it as something bad, different and

57 Sofia City Court, Sentence No. 79 of 16 March 2016 in CCGN No. 3294/2015.

58 Plovdiv Court of Appeal, Judgement No. 25 of 12 March 2012 in CCGN No. 14/2012.

59 Sofia Court of Appeal, Judgement No. 330 of 12 July 2017.

60 Sofia City Court, Judgement No. 210 of 16 February 2016 in CCAN No. 4501/2015.

61 Pazardzhik Regional Court, Sentence No.39 of 30 June 2017 in CCGN No. 424/2017.

dangerous to others. His hostility was provoked by the fact that these people are different from the rest, without realizing in what way and without trying to understand them, he reacted by showing his superiority and hatred towards them."⁶²

"The four convicted persons of the attempted murder of a man they presumed was a migrant and a Muslim were motivated by "a desire to punish foreigners who illegally entered the country, because they committed unlawful acts against Bulgarian citizens."⁶³

"The perpetrator of a crime under Article 108 § 1 of the Criminal Code adhered to the ideology of National Socialism (Nazism). He was interested in the personality of Adolf Hitler, whom he perceived as someone who effected tremendous change in the world and reached the status of governing it; he watched films about Hitler, read parts of his book, My Struggle. He was well-versed in Nazi symbols created under the leadership of party leader Adolf Hitler, not only as a graphic image but also in content, namely, the Nazi broken cross, rotated 45 degrees from the base line and the combination of number 14 - a phrase of fourteen words in English related to the superiority and dominance of the white race, and the number 88 - related to the Nazi salute "Heil Hitler"."⁶⁴

62 Shumen Regional Court, Judgement No. 51 of 3 May 2018 in CCGN No.107/2018.

63 Sofia City Court, Sentence No. 152 of 14 June 18 In CCGN 3455/2014.

64 Specialized Criminal Court, Judgement No. 23 of 11 July 2016 in CCAN No. 126/2016.