

APPLICATION OF THE ARTICLE 42A OF THE CRIMINAL CODE



**IN CASES OF HATE CRIMES AGAINST
MEMBERS OF THE LGBTI COMMUNITY**

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1. INTRODUCTION

For the Criminal Code of Montenegro (hereinafter referred to as: CC) to be effectively applied in cases of hate crimes, specifically - Article 42a of the CC, it is necessary to consider how it will function in practice and whether the legal norm in question is more or less straightforward to understand. Therefore, this Brochure deals with the implementation of Article 42a of the CC in practice, with special reference to criminal acts committed out of hatred towards the LGBTI community. The goal is that it serves as a practical tool for the application of Article 42a of the CC.

Precisely, the brochure is envisioned as a concise guide that will enable members of the Police Administration, prosecutors and judges to better recognize and prosecute hate motivated crimes, especially those directed towards LGBT persons. The aim of the brochure is to provide clear guidelines and concrete examples that will help in identifying the key elements of hate crimes, with special reference to the specifics concerning the LGBT community. This initiative is the part of the implementation process of the project titled „Contribution to the Fight Against Hate Speech Towards LGBTI Persons“, which is implemented by the NGO Centre for Monitoring and Research – CeMI.

The reason why it is necessary to give special attention to this phenomenon is the motivation of the perpetrator. Namely, by committing the act, he makes it known to both the victim and the group to which he belongs on the basis of some common personal characteristic (nation, gender, religion, etc.) that they do not belong to the community, both as individuals and as a separate group. Therefore, the goal of the perpetrator is not only to cause damage and send a message to the victim, but also to other persons who share the same personal characteristics with him. Every society through its legal to preventing and punishing criminal acts motivated by the personal characteristics of the victim.

2. TERM DEFINITION

There is no internationally accepted definition of the term “hate crime.” The European Convention on Human Rights (hereinafter: The Convention) does not contain a definition of “hate crime.” Also, the European Court of Human Rights (hereinafter: ECHR) in its case law also does not provide a definition of this term. In the broadest sense, a hate crime represents a criminal offense motivated by racist intentions, xenophobia, religious intolerance, prejudices based on subjective characteristics of an individual, gender identity, sexual orientation, or other discriminatory basis.

The Office for Democratic Institutions and Human Rights (ODIHR) defines “hate crime” as any criminal offense, including against people or property, where the victim, place of commission, or target of the attack is chosen because of their real or perceived association, affiliation, support, or membership in a group. That group may be based on a characteristic shared by its members such as real or perceived race, national or ethnic origin, language, color, religion, sex, age, mental or physical disability, sexual orientation, or other similar factors. A hate crime consists of two constitutive elements: the commission of any criminal offense, the so-called base or predicate offense directed towards one or more persons or property, and motivated by prejudices based on the specific characteristics of the victim. Therefore, “hate crime” can be defined as a criminal offense plus being motivated by prejudice. The criminal offense and prejudice motivation are its two essential elements. Hate crimes require the commission of a basic criminal offense; in other words, the committed act must represent an offense according to criminal law. If there is no basic criminal offense, then there is no hate crime. The second element of a hate crime is that the perpetrator must commit the criminal offense with a specific prejudice motive or motives (such as prejudice about the victim’s disability, religion, ethnic origin, skin color, and/or gender). The presence of prejudice motivation is what distinguishes hate crimes from other crimes. A hate crime has occurred when the perpetrator intentionally targets an individual or property because of one or more protected characteristics, or expresses hostility towards the protected characteristics during the commission of the crime.¹

Therefore, each so-called “base offense”, if it is motivated by the perpetrator’s prejudices due to one of the listed protected characteristics (bias motivation), it is a hate crime which ex lege leads to a more severe punishment - either through a more severe qualification for which a heavier punishment is prescribed, either through a request addressed to the courts that such behavior should be taken as an aggravating circumstance.²

¹ Handbook on Hate Crime, Council of Europe, 2023, p. 6.

² Hate crime, Judicial Academy, Maya Munivrana and Aleksandar Marsavelski, Zagreb, 2021, p. 14.

3. HATE CRIME SPECIFICS

Criminal acts committed out of hatred differ from other types of criminal acts by the motive of the perpetrator; since the motive is usually irrelevant to proving the essential elements of the crime, it is rarely investigated in sufficient detail to identify it. They affect community cohesion and social stability. If the criminal law system does not utilize the concept of "hate crime," the motive is not recognized as an essential element of the legal violation, and the existence of hate crimes will therefore remain invisible.

Their uniqueness lies in the fact that the perpetrator sends a message about the victim and their right to belong to society. This means that hate crimes have consequences that distinguish them from other criminal acts and justify a different legal approach.³

3.1. HUMAN RIGHTS AND EQUALITY

Hate crimes undermine the ideal of equality among members of a society. The norm of equality represents a fundamental value that aims to achieve complete human dignity and give all people the opportunity to realize their full potential. The status of the equality norm is evidenced by its constant repetition in human rights protection documents. The first sentence of the UN Declaration of Human Rights speaks of "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family." This theme is repeated in most of the legal instruments of the UN for the protection of human rights, and in the key constitutional documents of almost every country in the world. Violation of these values and norms through hate crimes has a heavy practical and symbolic impact.

3.2. IMPACT ON THE VICTIM

By targeting a person's identity, hate crimes do more harm than ordinary crimes. A direct victim may experience greater psychological injury and a heightened sense of vulnerability because she is unable to change the characteristic that made her a victim. Hate crimes have a much deeper psychological impact on their victims, leading to feelings of depression and anxiety.

3.3. IMPACT ON THE COMMUNITY

The community that shares a characteristic with the victim can also feel frightened and intimidated. Other members of the targeted group not only may feel at risk of future attacks but may experience the attack on the victim as if they were victims themselves. These effects can be multiplied if it is a community that has historically been a victim of discrimination. Societal acceptance of discrimination against certain groups is an important factor in increasing the number of hate crimes. Therefore, although hate crimes can be committed against members of the majority population, in fact, a disproportionately large number of victims of hate crimes are committed against members of the most

³ Hate crime laws: A practical Guide, ODIHR (2009), <https://www.osce.org/odihr/36426>, p. 15-16.

marginalized communities. Therefore, in relation to such groups, the symbolic value of adopting and implementing strict laws on hate crimes is particularly strong.

3.4. SECURITY ISSUES

Hate crimes represent potentially serious problems for security and public order and peace. Hate crimes affect a much wider range of people than ordinary crimes and have the potential to cause social divisions and civil unrest. By creating or highlighting existing social tensions, these criminal acts can have the effect of causing division between the group to which the victim belongs and society at large. Hate crimes can exacerbate existing tensions between groups and play a role in interethnic or social unrest. In cases of internal conflicts, widespread hate crimes usually accompany the escalation phase. In situations where relations between ethnic, national, or religious groups are already sensitive, hate crimes can have an explosive impact.

4. CRIMINAL CODE OF MONTENEGRO

The national criminal legal framework of Montenegro includes several criminal offenses from the Criminal Code related to the protection against hate crimes/hate speech/discrimination and provides structured protection at multiple levels:

1. Direct criminal law protection through a series of acts motivated by “hate” according to certain protected characteristics (hate crimes, hate speech, and discrimination offenses as such). (Inciting national, racial, and religious hatred, Article 370.)
2. Hate crimes among other forms of commission of specific criminal acts (e.g., Torture, Article 167; Violent behavior at a sports event or public gathering, Article 399a)
3. A specific or serious form of the basic/primary crime motivated by hate. (Endangering security, Article 168, paragraph 2). Also, it is defined as one of the two more specific aggravating circumstances or the way of committing the crime.
4. Finally, amendments and supplements to the Criminal Code in 2013 and 2017 expanded the range of protection from hate crimes by introducing special circumstances for sentencing for a hate crime (Article 42a of the Criminal Code).

Article 42a of the Criminal Code applies to all criminal offenses in the criminal code and allows the court to treat any criminal offense proven to be motivated by hatred based on race, religion, national or ethnic origin, disability, gender, sexual orientation, or gender identity of another person as an aggravating circumstance. The court will consider these circumstances as aggravating unless they are prescribed as a characteristic of the basic or more severe form of the criminal offense (paragraph 1 of this article). When a criminal offense is committed against a particularly vulnerable category of persons (children, persons with disabilities, pregnant women, elderly people, refugees), the court is obliged to consider this circumstance as aggravating. (paragraph 2 of this article).⁴

⁴ Analysis and recommendations regarding legislation, investigation and prosecution and data collection on hate crime, hate speech and discrimination in Montenegro, Council of Europe, Milorad Markovic and Joanna Perry, 2020, p. 9.

A special circumstance for sentencing for a criminal offense committed out of hatred Article 42a

(1) If the criminal offense is committed out of hate towards another individual based on their national or ethnic origin, race or religion, or due to the absence of such affiliation, citizenship, or due to differences in political or other beliefs, gender, language, skin color, education, social status, social origin, sexual orientation, gender identity, or disability, the court shall consider this circumstance as aggravating, unless it is prescribed as a characteristic of the basic or aggravated form of the criminal offense.

(2) If the criminal offense was committed against a person who belongs to a particularly vulnerable category of persons (children, persons with disabilities, pregnant women, elderly persons, refugees), the court will consider that circumstance as aggravating.⁵

The nature of this provision in terms of applying aggravating circumstances has led to questions in Montenegrin practice about which body is responsible for collecting evidence. There are different views of the court and the prosecution regarding the stage of the criminal procedure during which such a circumstance could be relied upon in a formal sense. The court's view is that the prosecutor can refer to the provision of Article 42a only in the closing argument at the main trial, and that the court is essentially the body that implements this provision while assessing all the circumstances of the case when imposing a sentence. At the other side, there are views in the prosecution that indicate that the prosecution should rely on Article 42a when identifying, recording, and treating a case as a hate crime from the beginning of the procedure to its conclusion. It should be emphasized that the views of the ECHR are clear that investigative bodies – the police and the prosecution are obliged to collect evidence during the investigative procedure in order to determine the possible existence of motives based on hatred related to some personal characteristic of the victim:⁶

In particular, they were required to determine whether the attacks were caused by discriminatory reasons and to identify the perpetrators... In those circumstances, it was necessary for local authorities to take all reasonable measures to reveal possible homophobic motives for the attacks. If the police had conducted an appropriate investigation, violence committed out of discriminatory motives would have received the same treatment as any other type of violence... In view of the above, the Court concluded that the domestic authorities failed to conduct an appropriate investigation into the abuse and therefore established how the violation of Article 3 of the Convention in connection with Article 14 of the Convention."

⁵ Criminal Code, "Official Gazette of Montenegro", No. 70/2003, 13/2004, 47/2006 and "Official Gazette of Montenegro", No. 40/2008, 25/2010, 32/2011, 64/2011 – Other law, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015 – Other law, 44/2017, 49/2018, 3/2020, 26/2021 - Correction, 144/2021 i 145/2021 i 110/2023.

⁶ Identoba and others v. Georgia (application no. 73235/12) 12th May 2015.

5. DIFFERENT FORMS OF HATE CRIMES

Hate crime can manifest in many forms including:⁷

- **Violence:** hitting, punching, pushing, slapping, kicking, beating, assault with a weapon, murder, etc.
- **Damage to property:** offensive graffiti, desecration of graves or places of worship, vehicle vandalism, breaking windows, arson, etc.
- **Threats:** insulting letters, disturbing messages, groups stopping around to intimidate, etc.
- **Verbal abuse:** insults and calling derogatory names, etc.
- **Malicious communication:** obscene phone calls/texts, distribution of offensive flyers and posters, threatening letters, malicious mail, etc.
- **Online hate crimes:** using the internet and other social networks to spread hatred and direct hate towards individuals or communities based on what they are or believe, etc.
- **Isolation:** intentionally excluding, ignoring, spreading rumors about someone or gossiping, etc.
- **Humiliation and degradation:** putting feces through mailboxes, spitting, calling derogatory words, violent gesturing, spreading malicious rumors, etc.
- **Sexual violence:** rape, sexual abuse, sexual intimidation, etc.
- **Harassment:** filing unfounded malicious complaints against someone, repeated incidents of lower intensity verbal abuse, threats or intimidation, stalking, following the victim, persistent phone calls, emails, internet posts, or texts, etc.

⁷ Hate crime – Handbook for professionals, Sanja Bezbradica Jelavic, House of Human Rights Zagreb, 2019.

6. SEXUAL ORIENTATION AND GENDER IDENTITY AS PERSONAL TRAITS

Article 42a of the Criminal Code stipulates as an aggravating circumstance if a special criminal offense is committed to the detriment of a person due to some of his personal characteristics such as "national or ethnic affiliation, race or religion affiliation or absence thereof, citizenship, or differences in political or other beliefs, gender, language, skin color, education, social status, social origin, sexual orientation, gender identity, or disability."

Therefore, criminal acts committed out of hatred aim to intimidate the victim and the community in which he lives based on their personal characteristics explicitly enumerated in the relevant norm. Due to the purpose of this brochure, special attention will be paid to criminal acts committed out of hatred due to the victim's belonging to a group that has sexual orientation or gender identity as common characteristics.

Yogyakarta plus 10 principles from 2017, the concepts of sexual orientation and gender identity are defined as:⁸

Sexual orientation refers to each person's capacity for profound emotional, affectionate, and sexual attraction and intimate and sexual relations with persons of different gender, the same gender, or more than one gender.

Gender identity refers to each person's deeply sensitive inner and individual experience, which may or may not correspond to the sex assigned at birth.

In order to properly discuss this matter, the key cases of the ECHR will be presented, which concern the execution of criminal acts motivated by hatred towards the victim because of his sexual orientation or gender identity.

Identoba and Others v. Georgia (Application no. 73235/12) May 12, 2015

The case of Identoba and Others v. Georgia concerned homophobic violence in the context of peaceful demonstrations in Tbilisi in May 2012, held on the occasion of the International Day Against Homophobia. The demonstration was violently interrupted by counter-demonstrators who had a hostile attitude towards the LGBT community and outnumbered the demonstrators. Thirteen applicants claimed that the authorities failed to protect them from violent attacks and that they failed to effectively investigate the incident by establishing, in particular, the discriminatory motive of the attackers.

The Court found that the violence suffered was sufficiently serious to reach the relevant threshold under Article 3 of the Convention. It was further stated that, in the light of existing reports on negative attitudes towards sexual minorities in certain parts of society

⁸ THE YOGYAKARTA PRINCIPLES plus 10 - Additional Principles and State Obligations On the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 2017.

and the warnings sent to the police by the organizers of the march about the possibility of conflict, the police authorities did not fulfill their tasks:

“ The organizers of the peaceful protest had alerted the police about the potential for harassment against LGBT individuals, so the police had a positive obligation to protect the protesters from violence. However, only a small number of police officers were present at the protest and without prior notice they moved away from the place where the violence started, thus allowing tensions to escalate into physical violence. At the moment when the police decided to intervene, the applicants were already subjected to insults and violence. Instead of concentrating on restraining the most aggressive offenders to facilitate the peaceful continuation of the protest, the police focused their efforts on arresting and removing some of the protesters whom they were actually supposed to help. The court therefore found that the domestic authorities failed to provide the applicants with protection from the violence of individuals during the protest.”

Also, the ECHR found that the authorities failed to fulfill their procedural obligation to investigate the incident, thus violating Article 3 in conjunction with Article 14 of the Convention.

“ The competent authorities failed to fulfill their procedural obligation to investigate what went wrong during the events. In particular, they were required to determine whether the attacks were caused by discriminatory reasons and to identify the perpetrators. Despite the complaints filed by the applicants immediately after the events, the domestic authorities did not initiate a comprehensive investigation to examine all aspects of the case concerning all the applicants. Instead, for unknown reasons, the domestic authorities narrowed the scope of the investigation to two separate incidents related to physical injuries inflicted on two individuals, for which the perpetrators were fined 45 euros each. In view of the above, the Court determined that the defendant state, considering the degree of violence suffered by the applicants, did not fulfill its procedural obligation provided for in Article 3 of the Convention. Under these circumstances, it was necessary for the domestic authorities to take all reasonable measures to uncover possible homophobic motives for the attacks. If the police had conducted an appropriate investigation, violence committed from discriminatory motives would have received equal treatment as any other type of violence. The lack of such an effective investigation diminishes public confidence in the state’s anti-discrimination policy. Therefore, the Court concluded that the domestic authorities failed to conduct an appropriate investigation into the abuse, thus determining a violation of Article 3 of the Convention in conjunction with Article 14 of the Convention.”

M.C. and A.C. v. Romania (Application no. 12060/12), April 12, 2016.

Very similar to the previous case is the case of M.C. and A.C. v. Romania, which concerned an attack on the applicants who participated in a march in support of LGBT community rights. The applicants were attacked by a group of individuals who uttered homophobic insults. The applicants complained that the authorities did not conduct an effective investigation into their allegations that the violence committed against them was motivated by homophobia. The ECHR found that the authorities did indeed delay the investigation and, more importantly, did not take reasonable steps to examine the possible homophobic motive behind the attack. He concluded that Article 3 was violated in connection with Article 14 of the Convention.

“ Moreover, the Court cannot accept that the investigative actions taken by the domestic authorities can be considered adequate steps to identify and punish those responsible for the incident, especially since these measures were taken so long after the initial events.

What is even more important on this issue, the Court considers that the authorities did not take reasonable steps to examine the possible role of homophobic motives behind the attack.”

Beizaras and Levickas v. Lithuania (Application no. 41288/15) January 14, 2020

The applicants, two young men, posted a photograph of a homosexual couple’s kiss on Facebook in 2014, aiming to announce the start of their homosexual relationship and to initiate a public debate about LGBT rights in Lithuanian society. The post received hundreds of virtual homophobic comments, including terms like “castrate,” “kill,” and “burn.” At the applicants’ request, an NGO advocating for LGBT rights filed a complaint with the Prosecutor’s Office against thirty-one comments, requesting an investigation based on Article 170 of the Criminal Code for incitement to hatred and violence. The Prosecutor’s Office refused to initiate an investigation, and the court dismissed the appeal, stating that the public posting of the “eccentric” photo was a provocation contrary to the respect for others, aligned with “traditional family values” prevalent in Lithuania, and the negative comments were considered rude and in poor taste but did not individually contain the elements of *actus reus* and *mens rea* of the crime, according to the practice of the Supreme Court. The ECHR found a violation of the Convention, noting that the way the prosecutor applied the Supreme Court’s practice was not in line with the right to an effective legal remedy for the complainants regarding acts of homophobic discrimination.

The way in which the prosecutor applied the Supreme Court’s practice cannot be deemed consistent with the right to an effective legal remedy (protection) for complainants regarding acts of homophobic discrimination;
The authorities didn’t do anything to address the growing intolerance towards sexual minorities; in fact, the bodies responsible for enforcing the law have not recognized prejudice as a motive for such acts; they have not adopted an approach that takes into account the seriousness of the situation; and, notably, there has been no comprehensive approach to combating racist and homophobic hate speech.

Sabalic v. Croatia (Application no. 14/04/2021) January 14, 2021.

In the case of Sabalic v. Croatia, the applicant was physically attacked by a man in a nightclub after revealing her homosexual orientation, resulting in multiple injuries treated in a hospital. The attacker was fined 40 euros in a misdemeanor proceeding for public order violation. The applicant, who was not informed about that procedure, filed a criminal complaint against the attacker at the Prosecutor's Office, stating that she was the victim of a violent crime of hate and discrimination. This competent authority launched an investigation, but ultimately dismissed the criminal charges, because the attacker had already been prosecuted in misdemeanor proceedings, and his criminal prosecution, therefore, would constitute ne bis in idem. The national courts confirmed this decision. The ECHR found that the misdemeanor proceeding against the attacker did not address the hate crime element and resulted in a derisory penalty, highlighting a fundamental flaw in the procedure. It would have been justified for the authorities to annul the misdemeanor proceeding and reexamine the case instead of dismissing the applicant's criminal complaint based on dual proceedings.

" Instead of filing a criminal complaint with the State Prosecutor's Office regarding the hate-motivated attack on the applicant or conducting additional activities to clarify the possible elements of a hate crime, as required by the instruction in question, the police initiated proceedings before the Misdemeanor Court accusing M.M. for violating public order and peace. This procedure ended with a guilty misdemeanor verdict of payment of a fine in the amount of around 40 euros, without the court even dealing with the question of hatred as a motive.

The court cannot ignore the fact that the sentence of M.M. in the misdemeanor proceedings, clearly disproportionate to the severity of the abuse suffered by the applicant."

