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LGBTI Hate Crimes: A Path Towards Equality

The Urgency of a Criminal Legal Framework at the European Union Level

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ABBREVIATIONS

CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILGA-Europe	European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association
ODHIR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
TFEU	Treaty of the Functioning of the European Union
TEU	Treaty of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
Yogyakarta Principles	Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity

ABSTRACT

This thesis deals with LGBTI hate crimes and hate speech, which are criminal offenses committed against people based on their sexual orientation and gender identity. The fact that both concepts are ambiguous and do not have a comprehensive and consensual definition among the international community, giving them a legal significance is considered a complicated task. As such, their definitions and the way they are perceived vary from country to country, depending on the domestic legislations, contributing even more to the already existing ambiguity.

The purpose of this research is to draw attention for the urgent need of adoption of a criminal legal instrument at the level of the European Union Law, in order for the same criminal behavior to be considered an offense in all Member States, finding a harmonization of the criminal laws of all countries in what concerns LGBTI hate crimes. This thesis will argue for widening the scope of application of already existing criminal instruments or the creation of a new one, in a way that creates an obligation for all Member States at the same level.

The main conclusions to be drawn are that the lack of available data on LGBTI hate crimes across the region is due to the lack of such instrument, creating problems at the level of reporting the crimes and addressing them in a proper manner, considering the motivation. In addition, another goal of this thesis is to conclude that developments at the legislative level are not enough and there is much more to be done regarding a more practical approach.

Key words: sexual orientation, gender identity, hate crimes, hate speech, European Union Law, reporting

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INTRODUCTION

With the advances of our History as human kind, the progresses seen in our society and the changeless inherent to this processes, the need has come to adapt to the new reality and to create new categories of human rights to be acknowledged both in International Law and in the domestic legislation of countries around the World. Nowadays we live in a multicultural and multiethnic world and this Global Village is not the same as it was when the first human rights documents were adopted.

Some rights, especially regarding different types of minorities and vulnerable groups, were disregarded and it is time to stop this discrimination. That is the case with LGBTI rights, regarding sexual orientation, gender identity and gender expression issues. Individuals members of this group suffer discrimination based on their sexual orientation and gender identity and are often victims of violence motivated by prejudice related to it. Given that they face discrimination on so many basic points, enjoying other human rights becomes impossible without laws that permit it. For some people, and in some countries, especially due to religious perceptions, cultural beliefs or long lasting traditions and values, LGBTI rights are a taboo issue and protecting them is not on the table. Hate and violence are spread around the globe and the violence inflicted on these victims is often a result of the lack of a proper legal framework that should protect this category of rights. It is my opinion that there is a need to promote a broader concept of culture, that excel in its protection for equality and diversity. After all, human rights are universal and we should advocate for a world where everybody can enjoy all their rights to the maximum extent.

As such, the aim of this thesis is to deal with hate crimes in the context of International Law, both at the level of the United Nations¹ and the European regional level, and in the context of domestic legislations.

At this point, it is necessary to make some considerations regarding language and explain the concept of LGBTI and both the concepts of sexual orientation and gender identity, given that they will be mentioned thoroughly throughout this thesis.

¹ Hereinafter: UN

LGBTI is an umbrella term for persons who self-identify as being lesbian, gay, bisexual, trans or intersex.

The terms sexual orientation and gender identity are defined in the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity.²

According to the Principles, sexual orientation refers “to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”.

Gender identity refers to “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”.³ Gender identity is a very flexible concept given that it needs to accommodate those who go through gender reassignment treatments and those who identify with the other gender but do not wish to go through these treatments. In addition, there are some individuals who do not conform with the binary distinction between male and female, regardless identifying or not with the gender associated with their sex assigned at birth.⁴ As such, the concept of gender expression refers to a person’s manifestation of their gender identity.⁵

My goal with this thesis is to prove that crimes committed against LGBTI people are not comprehensively protected in International Law and, as a consequence, in the domestic legislations. Because the concept of hate crimes is ambiguous and without a consensus, it is difficult to adopt measures that condemn such criminal offences. In addition, because they are perceived in a different way depending on the States’ approach, there are abundant legal contradictions in this regard.

² *Hereinafter*: Yogyakarta Principles

³ Yogyakarta Principles, page 8

⁴ International Gay and Lesbian Human Rights Commission, *Equal and Indivisible: Crafting Inclusive Shadow Reports for CEDAW - A handbook for writing shadow/alternative reports for CEDAW incorporating human rights issues related to sexual orientation, gender identity and gender expression*, 2009, page 39

⁵ European Union Agency for Fundamental Rights, *European Union lesbian, gay, bisexual and transgender survey - Main Results*, Vienna, 2014, page 19

The scope of application of this thesis is the European regional system for protection of human rights. I will argue that there is a lack of a criminal legal framework that defines hate crimes in the same way, describing the same criminal offence as a hate crime in all the Member States of the European Union,⁶ and that there is an urgent need for this criminal law instrument to be adopted, posing obligations on States. With this research, it is my aim to prove that the fact that this document does not exist creates problems at the level of recording and reporting these crimes, rendering poorly investigations that do not consider the motivation of the crimes, resulting in its deficient data collection. As a consequence, the true reality of these crimes is masked, hidden behind wrong numbers that do not reflect the need for specific public policies adopted to fight this problem.

The main academic aspect of this thesis is law, especially international, European and criminal, focused mainly on human rights instruments. However, the area of international relations is also relevant. In order to test my hypothesis, I will use as primary sources international law (both from the UN and the EU), national law (making a comparison between the LGBTI laws of Portugal and Slovenia) and case law from relevant Courts (such as the European Court of Human Rights⁷ and the Slovene Supreme Court). In order to analyze the law of Portugal I will use my own experience as a Law student in the country, recurring to relevant sources wherever support for my explanations is needed, and my work in the Portuguese NGO *Intervention Lesbian, Gay, Bisexual, Trans and Intersex*.⁸ Regarding the laws of Slovenia, I will use my own participatory observation during the months spent there, along with the knowledge gained through meeting experts in the field, individuals from the country and working in NGOs. The meetings were with *Association for the Integration of Homosexuality*⁹, *Legebitra*¹⁰ and *Transakcija*.¹¹

The structure of this thesis is as follows:

The first Chapter of this thesis will be dedicated to a macro analysis, regarding an International legal framework, and with the help of international legal documents. The chapter is divided into three parts, being the recognition of LGBTI rights, the definition of the concept of hate crimes and the definition of the concept of hate speech.

⁶ *Hereinafter*: EU

⁷ *Hereinafter*: ECtHR

⁸ *Intervenção Lésbica, Gay, Bissexual, Trans e Intersex*, *Hereinafter*: ILGA-Portugal

⁹ Official website available at <http://www.dih.si/> (consulted on 7 March 2017)

¹⁰ Official website available at <https://legebitra.si/> (consulted on 7 March 2017)

¹¹ Official website available at <http://transakcija.si/> (consulted on 7 March 2017)

The second Chapter will start narrowing the analysis and will be dedicated to the European regional system legal framework. The first documents mentioned will be regarding European Union law and in the second part of the chapter, I will move on to analyse documents adopted at the level of the Council of Europe.¹² The final part of the chapter will be dedicated to an analysis of the case law of the European Court of Human Rights.

Third Chapter will deal with the adoption and implementation of the Framework Decision on Racism and Xenophobia¹³, the only document existing at the EU level on the topic of hate crimes, and relate its key provisions to LGBTI issues. In this chapter I will argue for the opening of the scope of the Framework Decision in order to include sexual orientation and gender identity as prohibited grounds of discrimination.

Finally, in Chapter 4 I will make a comparison between the protection of LGBTI rights in the domestic laws of Portugal and Slovenia, two countries with different approaches and practices in the field of LGBTI rights. The point is to analyse their laws and practices and see if they are complying with international standards regarding the protection of these rights, especially in the case of hate crimes. To end the chapter and the thesis, in order to illustrate my research question, I will compare the existing data on hate crimes committed on the basis of sexual orientation and gender identity within both countries.

¹² *Hereinafter*: Council of Europe

¹³ Council of the European Union, *Council Framework Decision 2018/813/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*, L 328/55, 28 of November 2008

CHAPTER 1 – INTERNATIONAL LEGAL FRAMEWORK

1. Introduction

In order to comprehend the protection of LGBTI rights under international law, I believe it is necessary to analyze, through a chronological point of view, the most relevant documents adopted at an international level and the most relevant steps taken forward. Therefore, the first part of this chapter will be dedicated to build such chronological order, hoping to provide a better understanding of the developments the international community had it what comes to this issue. The list of developments is not exhaustive. I am simply listing the ones I find particularly relevant regarding my research question, even though many more documents were adopted, relevant speeches were made and meetings were held. Regarding EU Law, due to the fact that this thesis is about the EU legal framework, I will dedicate Chapter 2 only to analyzing the developments within.

The third part of this chapter is dedicated directly to the thesis topic. The point is to give an overview of the international community's perspective on the concept of hate crimes. Finally, in the last part I will briefly define hate speech in international law.

2. LGBTI Rights in International Law

As History shows us, fundamental rights are established after periods where they were largely neglected and disregarded, causing great atrocities.¹⁴ That is the case of the construction of the United Nations itself. In 1945, the Charter of the United Nations was adopted and human rights were one of the core elements of the discussion between the international community, under the idea of “never again”, following what happened with the Holocaust. Even though there is no clear list of human rights, we can conclude that they were the main purpose of the UN and we find, especially in the Preamble, mentions to values such as tolerance, equal rights for men and women, dignity of the human person, justice and social progress. The Universal Declaration of Human Rights¹⁵ was adopted three years later with a catalogue of human rights. There is no specific reference to sexual orientation or gender identity rights, but according to the principles of universality and equality (article 1), all human rights apply equally to all human beings, meaning LGBTI

¹⁴ Lehnert, J.P., *Pleading for a New History of Human Rights*, in Mihr, A. and M. Gibney (eds), *The SAGE Handbook of Human Rights*, 2014, page 25

¹⁵ Hereinafter: UDHR

rights are already established in the Declaration, even if they are invisible. Other relevant rights are the principle of non-discrimination (article 2), right to life and security (article 3), equality before the law (article 7), right to privacy (article 12), or freedom of expression (article 19). In spite of being a recommendation and not a binding document, the principles of the UDHR are already principles of international law, recognized in the constitutions of domestic legislations. As such, the process of legally affirming the rights at the international level started with the two Covenants in 1966.

Both the International Covenant on Civil and Political Rights¹⁶ and the International Covenant on Economic Social and Cultural rights¹⁷ have enshrined in its article 2 the principle of non-discrimination.

Other relevant rights in the ICCPR are the right to liberty and security of the person (article 9), right to privacy (article 17), freedom of expression (article 19), right to freedom of assembly (article 21) and freedom of association (article 22) and equality before the law (article 26)

I believe at this point it is very important to mention the universality, interrelation, indivisibility and interdependence of human rights, made visible with the Vienna Declaration of 1993¹⁸. Based on this relation between human rights, we can conclude that “under no circumstances can States hide behind the promotion and protection of a certain category of rights to avoid the promotion and protection of another (...)”¹⁹, marking the beginning of a renewed effort to strengthen the human rights protection. These three important concepts are often claimed in order to fill in the legislative gaps that exist when it comes to LGBTI rights, and they can be found at the beginning of some of the documents that I am referring to in this chapter, weather they are actual legal diplomas or studies and reports, as a reminder that the purpose is that human rights are for everyone and everywhere.

¹⁶ *Hereinafter*: ICCPR

¹⁷ *Hereinafter*: ICESCR

¹⁸ World Conference on Human Rights, Vienna Declaration and Programme of Action, A/CONF.157/23, 25 June 1993, Part I, para. 5

¹⁹ Blanc Altemir, A., *Universalidad, indivisibilidad e interdependencia de los derechos humanos a los cincuenta años de la Declaración Universal*, en Blanc Altemir, A., (Ed.): *La protección internacional de los derechos humanos a los cincuenta años de la Declaración Universal*, Tecnos, Madrid, 2001, page 33, found in Gómez Isa, F. and Feyter, K., *International Human Rights Law in a Global Context*, University of Deusto, Bilbao 2009, page 40

Following the same line of thought as the UN documents already mentioned, the Convention on the Rights of the Child also established the principle of non-discrimination in its article 2. Once again, sexual orientation and gender identity are not listed as prohibited grounds of discrimination. However, already in 2003, in its General Comments No. 3²⁰ and 4²¹, the Committee on the Rights of the Child interpreted the article to include sexual orientation, and in 2011, in General Comment No. 13, to include gender identity.²²

In 2006 the first big step regarding LGBTI rights was made in a joint statement on human rights violations based on sexual orientation and gender identity at the Human Rights Council, presented by Norway, on behalf of fifty-four other States.²³ The goal was to raise the awareness of the international community for the occurrence of hate crimes against LGBT individuals and deploy the work of Special Procedures to these violations.²⁴

The first international law document that presented the concepts of sexual orientation and gender identity was the Yogyakarta Principles, “in response to well document patterns of abuse”, also in 2006.²⁵ As set out in the Principles, the goal was not to create new rights but to articulate the already existing ones setting obligations for States to take steps in promoting, protecting and fulfilling them. The first sentence of principle one is also the first sentence of article one of the UNHR, and the first obligation is precisely related to the concepts of interrelation, interdependence and indivisibility, explained before.²⁶

Another joint statement, this time presented by Argentina on behalf of sixty-six States, was delivered in 2008.²⁷ The statement welcomes the Organization of American States’

²⁰ UN Committee on the Rights of the Child, General Comments No. 3: *HIV/AIDS and the Rights of the Child*, CRC/GC/2013/3, 17 March 2013, para. 8

²¹ UN Committee on the Rights of the Child, General Comments No. 4: *Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, CRC/GC/2003/4, 1 July 2003, para. 2

²² UN Committee on the Rights of the Child, General Comments No. 13: *The right of the child to freedom from all forms of violence*, CRC/C/GC/13, 18 April 2011, para. 60 and 72, (g)

²³ Norway, Joint Statement, read at the 3rd Session of the Human Rights Council by Wegger Christian Strommen, Ambassador and Permanent Representative of Norway to the United Nations Office in Geneva, 1 December 2006, available at <http://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement/> (consulted on 28 February 2017)

²⁴ *Ibidem*, point 2 and 3

²⁵ Yogyakarta Principles website, introduction section, available at <http://www.yogyakartaprinciples.org/principles-en/> (consulted on 25 February 2017)

²⁶ An Activist’s Guide to the Yogyakarta Principles, August 2010, page 43, available at http://www.ypinaction.org/wp/wp-content/uploads/2016/10/Activists_Guide_English_nov_14_2010.pdf (consulted on 25 February 2017)

²⁷ Argentina, Joint Statement on human rights, sexual orientation and gender identity, 18 December 2008, available at <http://arc-international.net/global-advocacy/sogi-statements/2008-joint-statement/> (consulted on 28 February 2017)

Resolution, a truly refreshing approach on the topic, where the General Assembly expresses “concern about acts of violence and related human rights violations committed against individuals because of their sexual orientation and gender identity”, and calls for action upon it.²⁸

Of the most relevance is the General Comment published the year after by the UN Committee on Economic, Social and Cultural Rights, referring to the flexibility of the “other status” in article 2 of the ICESCR. For the first time in an international convention of this importance, sexual orientation and gender identity were recognized as a ground for discrimination, meaning economic, social and cultural rights are available to all LGBTI people, with no discrimination.²⁹ The Committee refers to the Yogyakarta Principles for definitions of the concepts, emphasizing once again the importance of this document.

In March 2012, the UN Human Rights Council held a panel on Sexual Orientation and Gender Identity for the first time, with a focus on violence and discrimination, following the Human Rights Council resolution 17/19³⁰, also the first of its kind. The panelists were invited to discuss the findings and recommendations of the report of the High Commissioner.³¹ In the report, it was established that, even though it is not specifically mentioned, article 1 of the UDHR, which refers to the principles of universality and non-discrimination, is also applicable to LGBTI persons. The same with article 2 of the ICCPR, which has an open list of grounds for discrimination, sexual orientation and gender identity fitting in the “other status” category.³² The report mentions important issues, such as violence, discriminatory laws and discriminatory practices in all regions.

In what concerns the topic of this thesis, it is of extreme importance the conclusions on gender-based violence: “violence against LGBT persons tends to be especially vicious

²⁸ Organization of American States, *Human Rights, Sexual Orientation, and Gender Identity*, Resolution AG/RES. 2435 (XXXVIII-O/08), 3 June 2008

²⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 20: *Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, 2 July 2009, para. 32

³⁰ UN Human Rights Council, *Human rights, sexual orientation and gender identity*, A/HRC/RES/17/19, 14 July 2011

³¹ UN, Office of the High Commissioner for Human Rights, *Study on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, A/HRC/19/41, 17 November 2011

³² *Ibidem*, para. 5 and 16

compared to other bias-motivated crimes. According to the OSCE, homophobic hate crimes and incidents often show a high degree of cruelty and brutality and include beatings, torture, mutilation, castration and sexual assault.”³³ The High Commissioner recommends that Member States “take measures to prevent torture and other forms of cruel, inhuman or degrading treatment on grounds of sexual orientation and gender identity, to investigate thoroughly all reported incidents of torture and ill-treatment, and to prosecute and hold accountable those responsible”.³⁴ Once again, it was stressed out the need to create a Special Procedure on LGBT rights, an independent expert and investigator, to examine this issues in all Member States and report on violations.³⁵

On the presentation of the report, Navi Pillay, former UN High Commissioner for Human Rights³⁶, stressed that the first point to note regarding violence was that statistics and available data were very rare due to the lack of systems prepared to record the crime’s motivation within the States and to unprepared police forces.³⁷ Given that this was the first time the High Commissioner for Human Rights raise attention to LGBTI issues, the mandate of Navi Pillay was of extreme importance in the promotion and protection of such rights.

Three years later, the Human Rights Council requested the High Commissioner to update this report “with a view to sharing good practices and ways to overcome violence and discrimination”.³⁸ Following this resolution, the updated report was published in May 2015.³⁹ According to the High Commissioner, huge progress was made in the field of LGBTI rights across the globe since the last report was published. However, human rights

³³ *Ibidem*, para. 22

³⁴ *Ibidem*, para. 84, b)

³⁵ *Ibidem*, para. 85, b)

³⁶ Navi Pillay’s mandate as UN High Commissioner for Human Rights was between 2008 and 2014

³⁷ Navi Pillay, UN High Commissioner of Human Rights, Statement to the Panel on ending violence and discrimination against individuals on the basis of their sexual orientation and gender identity at the Human Rights Council 19th Session, 7 March 2012, available at <https://globalequality.wordpress.com/2012/03/07/pillay-presents-groundbreaking-un-study-on-violence-discrimination-against-people-because-of-their-sexual-orientation/#more-3737> (consulted on 2 March 2017)

³⁸ UN Human Rights Council, *Human rights, sexual orientation and gender identity*, A/HRC/RES/27/32, 26 September 2014, point 2

³⁹ UN, Office of the High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, A/HRC/29/23, 4 May 2015

violations continue to be perpetrated and often with impunity,⁴⁰ meaning the existing protection system of human rights is not sufficient.

Once again it was mentioned that “violence motivated by homophobia and transphobia is often particularly brutal, and in some instances characterized by levels of cruelty exceeding that of other hate crimes”.⁴¹ The report notes that too many gender-based violence cases go unpunished and appoints as reasons “ineffective police action, failure to register cases, loss of documents, inappropriate classification of acts (...) and investigations guided by stereotypes and prejudices”.⁴²

As it was already mentioned, former High Commissioner Navi Pillay was a very important figure in the fight for LGBT rights. It was during her mandate that in 2013 the UN created an unprecedented campaign for the global education and promotion of these rights, in order to tackle homophobia and transphobia, raising awareness for the problems and discrimination LGBT people face worldwide. The UN Free & Equal Campaign⁴³ still exists after four years, presenting annual reports on the developments of the campaign being implemented at the international and national level, within the Member States.

Also in 2013, UN Secretary General Ban Ki-moon said in his message to the Oslo Conference on Human Rights, Sexual Orientation and Gender Identity that LGBT rights are one of the great, neglected human rights challenges of our time” and too many States “refuse to acknowledge the injustice of homophobic violence and discrimination”.⁴⁴ The first time the Secretary General addressed this issue was in 2011⁴⁵ and the year after he once again mentioned it in a video message to the Council,⁴⁶ admitting the sensitivity of

⁴⁰ *Ibidem*, para. 2

⁴¹ *Ibidem*, para. 23

⁴² *Ibidem*, para. 24

⁴³ UN Free & Equal Campaign’s website available at <https://www.unfe.org/> (consulted on 20 March 2017)

⁴⁴ UN Secretary General, Video message to the Oslo Conference on Human Rights, Sexual Orientation and Gender Identity, 15 April 2013, available at <https://www.un.org/sg/en/content/sg/statement/2013-04-15/secretary-generals-video-message-oslo-conference-human-rights-sexual> (consulted on 20 March)

⁴⁵ UN Secretary General, *Remarks to the Human Rights Council*, 25 January 2011, available at <https://www.un.org/sg/en/content/sg/statement/2011-01-25/secretary-generals-remarks-human-rights-council> (consulted on 23 March)

⁴⁶ UN Secretary General, Video Message to Human Rights Council Meeting on Violence and Discrimination Based on Sexual Orientation or Gender Identity, 7 March 2012, available at <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTSpeechesandstatements.aspx> (consulted on 21 March)

the issue and that he did not grow up exposed to it but “learned to speak out because lives are at stake”.

The Organization of American States adopted the Convention against all forms of Discrimination and Intolerance, addressing specifically sexual orientation and gender identity as a discriminatory ground⁴⁷. In 2011, the Organization established a special unit on LGBTI rights⁴⁸ and in 2014 created a Special Rapporteurship dedicated to these issues, being marked as the first inter-governmental human rights body to do so.⁴⁹

Advances were also made in 2014 by the African Commission on Human and Peoples’ Rights with the adoption of the resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.⁵⁰

The most recent progress of the international community towards LGBT rights happened in June 2016 and it was the creation of position of Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, in accordance with the demands of the Norway joint statement of 2008 and the UN High Commissioner Report of 2011.⁵¹ The Human Rights Council appointed Vitit Muntarbhorn in September. The mandate includes assess the implementation of existing international human rights law, identify best practices and gaps, raise awareness of violence and discrimination based on sexual orientation and gender identity, engage in

⁴⁷ Organization of American States, Inter-American Convention against all forms of discrimination and intolerance, A-69, 6 June 2013, available at http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance.asp (consulted on 21 March 2017)

⁴⁸ Organization of American States, Press release, available at http://www.oas.org/en/iachr/media_center/PReleases/2011/115.asp (consulted on 21 March 2017)

⁴⁹ Organization of American States, Press release, available at http://www.oas.org/en/iachr/media_center/PReleases/2013/094.asp (consulted on 21 March 2017)

⁵⁰ African Union, African Commission on Human and Peoples’ Rights, Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, 275, 2014, available at <http://www.achpr.org/sessions/55th/resolutions/275/> (consulted on 24 March 2017)

⁵¹ Human Rights Council, *Protection against violence and discrimination based on sexual orientation and gender identity*, Resolution A/HRC/RES/32/2 (2016), para. 3

dialogue and consultations with countries and other stakeholders, creating a system of cooperation.

As we can conclude, various of developments were made regarding LGBTI rights at the international arena. However, that does not mean the battle is over. As I will demonstrate in the next chapters, legal recognition is only the first step and too many States are still far from taking the next steps.

3. Hate Crimes

The right to life and the right to security of person are enshrined in article 3 of the UDHR and articles 6 and 9 of the ICCPR, respectively.

Article 5 of the UDHR and article 7 of the ICCPR both state that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

Life and security are the two most important values when it comes to the final part of this chapter, dealing with hate crimes.

The concept of hate crime is a very subjective one, varying from country to country according to domestic legislators and depending on the different actions States take towards it. This is precisely the reason why there is no international consensus on its definition, creating a lot of ambiguity. Moreover, it is not a legal concept, but a social construct, a phenomenon, meaning hate crimes can exist without the existence of hate crime laws.⁵²

The Organization for Security and Co-operation in Europe⁵³ is one of the main international organizations committed to tackling hate crime and hate speech and to dealing with hate crime reporting. And in my understanding, it provides with the best definition of the concept and the one I will use for the purpose of this thesis.

⁵² Organization for Security and Co-operation in Europe (OSCE) - Office for Democratic Institutions and Human Rights (ODIHR), *Preventing and responding to hate crimes: a resource guide for NGOs in the OSCE region*, (2009), page 15

⁵³ *Hereinafter*: OSCE

With its Ministerial Council Decision of 2009, hate crime was defined as a criminal offence committed with a bias motive.⁵⁴

In the OSCE's hate crime reporting website we find a more explicative definition, hate crimes being characterized as “criminal acts motivated by bias or prejudice towards particular groups of people. To be considered a hate crime, the offence must meet two criteria: first, the act must constitute an offence under criminal law; second the act must have been motivated by bias (...). Hate crimes include threats, property damage, assault, murder or any other criminal offense committed with a bias motivation”, and they affect not only individuals from specific groups but also associated with, such as human rights defenders.⁵⁵

“Hate crime” as a concept appeared for the first time in 1985 in the United States of America, when a group of Representatives came together to request the collection and publication of statistics on crimes committed based on racial prejudice to the Department of Justice with the bill “Hate Crimes and Statistics Act”, in the House of Representatives. After that, the concept was largely spread, appearing in newspapers and magazines and becoming a part of legal scholars' vocabulary.⁵⁶ Therefore, and as I stated before, the concept is a social construct with the goal to focus on the motivation of criminal acts, rather than the criminal conduct itself, and is a product of recent awareness raised towards the neglect of minority's rights.

Hate crimes committed against LGBT people are motivated by a prejudice based on the person's actual or perceived sexual orientation or gender identity.

In the OSCE's understanding, hate crimes, and the idea of discrimination and intolerance that they bear, are a threat to the security of individuals and they send the message that those belonging to a certain group should be excluded from the society and stripped of their rights as human beings.⁵⁷ Being the biggest and most dangerous demonstration of intolerance, when hate crime cases do not go through an effective investigation and, as a consequence, go unpunished, the threat grows to another level. It can be a national

⁵⁴ OSCE, Ministerial Council, *Decision No. 9/09, Combating hate crimes*, MC.DEC/9/09, 2 December 2009, available at <http://www.osce.org/cio/40695?download=true> (consulted on 2 April 2017)

⁵⁵ OSCE, ODHIR, Hate Crime Reporting Website, <http://hatecrime.osce.org/what-hate-crime>

⁵⁶ Jacobs, J. B. and Potter, K., *Hate Crimes: Criminal Law and Identity Politics*, Oxford: Oxford University Press, (1998), page 4

⁵⁷ *Supra*, note 52, page 9

security threat, creating a problem of social cohesion and a great challenge to the institution of the rule of law.⁵⁸ The first big problem is reporting these crimes.

As a part of its mandate, the Office for Democratic Institutions and Human Rights⁵⁹ monitors and reports hate crimes in the OSCE region, compiling the results in an annual report with data submitted by participating States, international organizations, NGO's and media reports.⁶⁰ The ODHIR notes that there is a lack of official data on hate crimes throughout the region, together with a lack of accuracy, reliability and comprehensibility, undermining "the ability of states to understand fully and to deal effectively with the problem of hate crime".⁶¹ As such, as recommendations, the ODHIR lists the creation of a data collecting system that separates hate crimes from other crimes and that separates each ground of discrimination, and the encouragement of victims to report crimes, so that data can in fact be collected. The main purpose of ODHIR's reporting work is to provide assistance to Member States, in order to improve hate crime data-collection mechanisms so that statistics on the issue can be made available, mirroring the reality of hate crimes in the OSCE region. This is the only way national and international legislators can understand how to create new public policies to combat the problem. In order to provide States with a more comprehensive way of collecting data, the ODHIR launched in 2014 two practical guides.^{62 63}

The ODHIR lists hate crime indicators so that it is easier to recognize hate crimes. They are the perception of the victim, the conduct of the offender and the characteristics of the victim and the perpetrator. Other indicators can be the targeted property, the involvement of an hate group, where the incident happened and previous hate crimes.⁶⁴

4. Hate Speech

Given that I believe hate speech is also a category of hate crime or can, in some cases lead to it, it is also important to provide here with a definition for this concept, since it

⁵⁸ *Supra*, note 52, page 11

⁵⁹ *Hereinafter*: ODHIR

⁶⁰ *Supra*, note 52, page 12

⁶¹ OSCE, ODHIR, *Hate Crimes in the OSCE region: incident and responses, Annual Report for 2012*, Warsaw, November 2013, page 92

⁶² OSCE, ODHIR, *Hate crime data collection and monitoring: A practical guide*, Warsaw, OSCE, 29 September 2014

⁶³ OSCE, ODHIR, *Prosecuting Hate Crimes: A practical guide*, Warsaw, OSCE, 29 September 2014

⁶⁴ *Supra*, note 52, page 21 to 26

will also be occasionally mentioned along the thesis. Since there is no universal consensus on the concept definition, I will use the one provided by the OSCE. According to it, hate speech are “forms of expression that are motivated by, demonstrate or encourage hostility towards a group – or a person because of their membership of that group”.⁶⁵

The first document at the international law level to look at this issue was the International Convention on the Elimination of All Forms of Racial Discrimination, in its article 4. It commands the States to condemn the dissemination of racial superiority and hatred and the incitement of racial discrimination and acts of racially motivated violence.

The ICCPR also mentions that “hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by the law”, in its article 20, number 2, and establishes that freedom of expression is not an absolute right, listing restrictions to it in article 19, number 3.

In addition, the American Convention on Human Rights also prohibits hate speech,⁶⁶ being the only regional treaty to specifically do so.

Hate speech is, in my understanding, even harder to recognize and analyze than hate crime. It is necessary to find a balance between two fundamental rights, the freedom of expression and the principle of non-discrimination, and sometimes, maybe too often, the line that separates them, gets too blurry.

⁶⁵ *Supra*, note 52, page 17

⁶⁶ Organization of American States, Inter-American Commission on Human Rights, *American Convention on Human Rights*, 22 November 1969, article 13, number 5

CHAPTER 2 – EUROPEAN LEGAL FRAMEWORK

1. Introduction

Given the research question of this thesis and the fact that it verses specifically on the European regional level, I decided to dedicate a chapter only to the legal protection of LGBTI people within the EU, enumerating a list of the most relevant developments in the field, resembling the previous chapter. Once again, this list is not exhaustive, I am simply referring to the developments I find the most relevant concerning my research question.

It is relevant to note that when talking about a human rights legal framework at the European regional level, it is first necessary to mention the work of the Council of Europe, with a specific mandate on the promotion of human rights within the continent. The CoE, having 47 Member States and 6 Observer States, is an official United Nations observer. In 1950, the year after its formation, the CoE adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms⁶⁷, that came into force in 1953. In its Section II, the Convention established the European Court of Human Rights, to interpret and apply the legal dispositions of the Convention, having the power to receive individual complaints regarding human rights' violations (article 34, under the criteria enunciated in article 35).

On the other hand, the European Union, created in 1951, has 28 Member States and it was built under the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.⁶⁸

Both institutions are interconnected in the protection of human rights and developments achieved by one and other have to be analyzed concurrently. The first part of the chapter will be dedicated to the European Union Law and the second part to the Council of Europe.

Given that this thesis has its main focus on European Union Law and that the judgments of the Court help with the correct interpretation of the ECHR, I will dedicate the final part of this chapter to analyze relevant case law of the ECtHR regarding sexual orientation and gender identity, and hate crimes and hate speech with those motivations. The purpose

⁶⁷ *Hereinafter*: ECHR

⁶⁸ Treaty of the European Union, article 2

of this is not to list all the cases brought to the Court on regard of LGBTI rights, but to mention the most relevant ones, especially when it comes to the topic of this thesis, giving the abundant number of cases already closed and the ones still on going.

I will divide the cases according to the issues dealt in them and the similarity of the Court's conclusions. First, I will present the most general cases regarding general considerations on sexual orientation and gender identity. Secondly, the cases concerning the balance between the right to freedom of expression and hate speech. And thirdly, the cases dealing with the right to life and the prohibition of inhuman and degrading treatment.

It is important to note that same-sex sexual activity is legal in all EU Member States. Employment discrimination is prohibited in all EU Member States.⁶⁹ Same-sex marriage is allowed in fourteen countries.⁷⁰ Civil partnership, with similar rights to marriage is recognized in other seven countries.^{71 72} Adoption by same sex couples is permitted in fourteen countries.⁷³ Gender identity is protected in the criminal law of only eight countries.⁷⁴ Twenty Member States have in their domestic legislations the incitement to hatred, violence or discrimination based on sexual orientation as a criminal offense.⁷⁵ Fifteen Member States consider homophobic intent as an aggravating circumstance.^{76 77}

⁶⁹ Council of the European Union, *Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation*, L 303, 02/12/2000 P. 0016 – 0022, 27 November 2000

⁷⁰ Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom

⁷¹ Austria, Cyprus, Greece, Hungary, Italy, Switzerland, Slovakia and Switzerland

⁷² Information available at <http://www.euronews.com/2017/06/28/which-countries-in-europe-allow-gay-marriage> (consulted at 20 April)

⁷³ Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden and the United Kingdom

⁷⁴ Croatia, France, Greece, Hungary, Malta, Portugal, Spain and the United Kingdom

⁷⁵ Austria, Belgium, Croatia, Cyprus, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, Sweden and the United Kingdom

⁷⁶ Belgium, Croatia, Denmark, Finland, France, Greece, Hungary, Lithuania, Malta, Portugal, Romania, Spain, Slovakia, Sweden and the United Kingdom

⁷⁷ European Union Agency for Fundamental Rights, *Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU – Comparative legal analysis*, Update 2015, page 59 to 63

2. European Union Law

Enshrined in article 2 of the Treaty of the European Union⁷⁸, are the core values in which the EU is built upon. They are the “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. In this list, we find the typical values of a constitution of a democratic State ruled by the rule of law, given that there cannot be contradictions between the principles here established and the ones established in the constitutions of the Member States. It is important to mention the concept of constitutional pluralism, meaning there must be pluralism in the relations between the constitutions of the Member States and the so called “Constitution of the EU” (constituted by the Treaties and the Charter of Fundamental Rights), since the EU is nothing else but a network of constitutions, interacting in which is essential.

In the number 2 of article 3 we see that the Union offers an area of freedom, security and justice to its citizens.

In its article 6, number 1, the Treaty refers to the Charter of Fundamental Rights of the European Union (which includes both civil and political rights and social, economic and cultural rights), recognizing it the same legal value as the Treaties, and in number 2 accedes to the ECHR, thus creating a much broader protection system of fundamental rights by the acceptance of the jurisdiction of the ECtHR.⁷⁹

The European Union aims to fight discrimination with the implementation of its policies. As such, in article 10 of the Treaty on the Functioning of the European Union⁸⁰ sexual orientation appears as a ground of discrimination. In addition, article 19, number 1, also gives the Council of the EU the power to fight discrimination on the grounds of sexual orientation.

⁷⁸ *Hereinafter*: TEU

⁷⁹ As of today, the EU still did not access the ECHR. However, since all the countries of the EU are also members of the CoE, all of them are bind by the Convention, being recognized as a major legal instrument when it comes to human rights in the region. The information of the accession is available at [http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2017\)607298](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)607298) (consulted on 14 July 2017)

⁸⁰ *Hereinafter*: TFEU

The Charter of Fundamental Rights⁸¹ is the third legal instrument that complements the treaties. It is acknowledged in the preamble that “it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter”. When it comes to rights particularly relevant regarding LGBTI protection, the Charter provides for the rights to human dignity (article 1), to life (article 2), to the integrity of the person (article 3), the prohibition of torture and inhuman or degrading treatment or punishment (article 4), right to liberty and security (article 6), respect for private life (article 7), freedom of thought, expression and assembly (articles 10, 11 and 12), right to equality before the law (article 20) and the principle of non-discrimination (article 20, where sexual orientation already appears as a ground of discrimination).

In 2000, the EU adopted the directive establishing a general framework for equal treatment in employment and occupation⁸², in which listed sexual orientation as a ground of discrimination in its article 1.

The Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law⁸³ was adopted in 2008 in order to approximate the laws of the EU Member States on hate crimes motivated by racism and xenophobia, so that the same offense is effectively punished in all domestic legislations. In Chapter 4, I will analyze the adoption and implementation of the Framework Decision and the need to open its scope so that it includes sexual orientation and gender identity.

Even though it was never adopted, it is important to mention the so-called horizontal anti-discrimination directive.⁸⁴ In 2008, the European Commission presented a proposal of a directive to be adopted by the Council regarding the principle of non-discrimination. It is written in the explanation of the context of the proposal that discrimination based on sexual orientation is prohibited only in employment, occupation and vocational training, when other grounds of discrimination also have protection in non-employment areas such as social protection, health care, education and access to goods and services, including

⁸¹ The Charter was proclaimed in 2000 but its legal value was only recognized by the Treaty of Lisbon, in 2009 (article 6 of the TEU). The last version is Charter of Fundamental Rights of the European Union, 2012/C 326/02, October 2012, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> (consulted on 17 April)

⁸² *Supra*, note 69

⁸³ *Supra*, note 13

⁸⁴ European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, {SEC(2008) 2180} {SEC(2008) 2181}, 2 July 2008

housing (discrimination based on race and ethnic origin), education and media and advertising (discrimination based on sex). The purpose of this Directive, if it will ever be adopted, is to level all the grounds of discrimination, in order to give the same legal protection to all vulnerable groups in the EU Member States, ending the hierarchy of rights within the EU. Given that the unanimity is required in the Council when dealing with what is considered a sensitive issue, such as the harmonization of national legislation regarding social protection, the proposal never got all the necessary votes, being blocked at the Council since then. At the time, the European Region of the International Lesbian and Gay Association⁸⁵ prepared a working document welcoming the proposed Directive and giving their own position on the key legal provisions.⁸⁶ It is my personal belief that this Directive would bring the solution to many of the problems regarding discrimination based on sexual orientation. However, in what concerns hate crimes, which is the emphasis of this thesis, the best approach would something like the Framework Decision on racism and xenophobia, given that it is a criminal law instrument, as I will explain in the next chapter.

Another great development was the adoption of the Victim's Directive⁸⁷, which enunciates the concepts of sexual orientation, gender identity and gender expression as grounds of discrimination, being the only document at the EU level that protects victims of violence on the reason of these grounds.⁸⁸ In order to assist the States with the correct implementation of the Directive, the European Commission issued a Guidance Document, in which it calls on the States to develop comprehensive public policies protecting the principle of non-discrimination, the foundation of the Directive, and to strengthen their criminal justice system.⁸⁹

⁸⁵ *Hereinafter*: ILGA-Europe

⁸⁶ ILGA-Europe, *ILGA-Europe's position on the proposal for a Council Directive on the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – a Working Document*, October 2008

⁸⁷ Council of the European Union, *Council Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime*, 25 October 2012

⁸⁸ *Supra*, note 77, page 55

⁸⁹ European Commission, *DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, 19 December 2013, page 8 and 9

Of extreme importance is the set of guidelines launched by the Council of the European Union, in order to promote and protect LGBTI rights,⁹⁰ where it is expressed the gravely concern for the violence that people belonging to this group suffer and for the fact that sexual orientation and gender identity are still used as a reason to justify human rights violations. Hate crimes are mentioned in the document and the Council urges the EU to encourage the States to effectively combat hate crimes, with comprehensive policies, and to train law enforcement personnel in order to raise awareness.⁹¹

As a proof that LGBTI issues should be defined beyond the borders of each country, in a partnership between the European Commission and the Member States, in 2014 the European Parliament called on the Commission to monitor and assist Member States in their application of laws regarding sexual orientation, gender identity and gender expression, especially in the case of the Victim's Directive and with the investigation of crimes committed based on hate concerning the victim's characteristics.⁹² The European Parliament also acknowledge that there is, indeed, a lack of a comprehensive policy protecting LGBTI rights.⁹³

3. Council of Europe

The most important human rights document at the European level, is the European Convention of Human Rights, adopted by the CoE in 1953. Similar rights to the ones we find relevant when it comes to LGBTI issues at the international legal framework, are also found here. Such as the right to life (article 2), prohibition of torture (article 3), right to life and security (article 5), right to respect for private and family life (article 8), freedom of thought, expression and assembly (articles 9, 10 and 11, respectively) and prohibition of discrimination (article 14).

The principle of non-discrimination is the one that has the most relevance in the fight for LGBTI rights. Even though, sexual orientation and gender identity are not listed as

⁹⁰ Council of the European Union, *Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons*, 24 June 2013

⁹¹ *Ibidem*, para. 28

⁹² European Parliament, *Resolution on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity*, 2013/2183(INI), 4 February 2014, para. 4 (j) (i)

⁹³ *Ibidem*, para. 2

grounds of discrimination, the ECtHR already established that the list is open and nothing prohibits the inclusion of new terms. In 1999 the Court decided that sexual orientation is included⁹⁴ and in 2010 included, for the first time, gender identity.⁹⁵ Article 14 cannot be considered individually or independently. It is always necessary to interpret it at the light of other rights enshrined in the Convention, to guarantee its correct application.

Already in 1997, the Committee of Minister of the Council of Europe provided with a definition of the concept of hate speech.⁹⁶ According to it, the definition of hate speech is “all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.”. Sexual orientation and gender identity are not mentioned but, like other grounds of discrimination, they fall within the scope of minorities and are also a target of intolerance.

In 2009, the Council of Europe launched a Manual on Hate Speech.⁹⁷ The definition of hate speech is the same as the one given by the Recommendation no. (97) 20 of the Committee of Ministers, acknowledging that, however, there is no universal understating of the concept and that it varies from country to country. It is mentioned that, by the time the Manual was released, no homophobic hate speech cases were brought to the ECtHR, but they still fall under the definition.

The first document adopted by the Council of Europe in matters of fighting discrimination on the grounds of sexual orientation and gender identity was the Committee of Ministers Recommendation of 2010.⁹⁸ The Committee recommends that Member States ensure that the victims of discrimination are aware of the existence and have access to effective legal remedies and that sanctions are foreseen for those breaking the measures combating

⁹⁴ ECtHR, *Salgueiro da Silva Mouta v. Portugal*, Application no. 33290/96, 21 December 1999, para. 28. The Court emphasized this issue once again in 2010 in the case *Vejdeland and Others v. Sweden*, Application no. 1813/07, 9 February 2012, para. 55

⁹⁵ ECtHR, *P.V. v. Spain*, Application no. 35159/09, 30 November 2010

⁹⁶ Council of Europe, Committee of Ministers, *Recommendation no. (97) 20 of the Committee of Ministers to Member States on “Hate Speech”*, 30 October 1997

⁹⁷ Council of Europe, Weber, A., *Manual on Hate Speech*, 2009

⁹⁸ Council of Europe, Committee of Ministers, *Recommendation CM/REC(2010)5, of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity*, 31 March 2010

discrimination. The recommendation already mentions hate crimes, directly related to the right to life and security and protection against violence, enshrined in articles 2 and article 5 of the ECHR, respectively. As such, it calls on the Member States to proceed with the realization of effective investigations of possible hate crimes, to consider the hate motivation and pursued it as an aggravating circumstance of the crime, to encourage victims to report the crimes by creating trustworthy mechanisms, and to collect and analyze data on hate crimes. Regarding hate speech, the Committee also urges the States to ensure that incitement to hatred is banned, both in the media and on the internet, and that values such as tolerance and respect are spread by relevant stakeholders when giving public speeches.

A report on the implementation of the recommendation was published in 2013.⁹⁹ Despite the legal effort made by some States in what comes to adopting or discussing the adoption of new public policies, other States claimed that their domestic legislation already complies with the Recommendation. Furthermore, and one of the key observations of this report, especially regarding the research proposal, was that States willing to improve were giving too much importance to legal aspects, putting a lot of effort into improving their legal protection system, and not so much on the practical side of the issue, such as the training of relevant stakeholders and the raise of awareness among the community, resulting in the lack of a transversal policy. As I will note in the next chapter, improving the legal situation is not enough without the correct knowledge on how to apply the provisions.

It is important to refer that The European Commission against Racism and Intolerance (ECRI), a human rights body of the CoE that prepares extensive and helpful reports on its Member States regarding problems of racism, xenophobia, antisemitism, intolerance and discrimination, is now paying attention to LGBTI issues, especially violence motivated due to the sexual orientation or the gender identity of the victim, given that it somehow falls under their mandate on discrimination.¹⁰⁰ Since then, homophobic and

⁹⁹ Council of Europe, Committee of Ministers, *Steering Committee for Human Rights (CDDH), Report on the implementation of Recommendation CM/REC(2010)5, of the Committee of Ministers to Member States on measures to combat discrimination on grounds of sexual orientation or gender identity, CM(2013)36-add2*, 2 May 2013, para. 8

¹⁰⁰ Council of Europe, ECRI, *Information document on the fifth monitoring cycle of the European Commission against Racism and Intolerance (ECRI)*, 28 September 2012, para. 8

transphobic violence have been incorporated into the reports, such as the cases with the most recent report on Poland, for example.¹⁰¹

The CoE Convention on preventing and combating violence against women and domestic violence of 2014, provides for the extended principle of non-discrimination, including the concepts of sexual orientation and gender identity.

3.1 Case Law of the European Court of Human Rights

The European Convention on Human Rights is the most important human rights document at the level of the European Union law, finding its legal force in the number 2 of article 6 of the TUE. Within the Convention, is also established the European Court of Human Rights, in order to “ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols”.¹⁰² The Court has jurisdiction in “all matters concerning the interpretation and application of the Convention and the Protocols”.¹⁰³ The Court is prepared to rule in inter-state cases, where a Member State may refer to violations of another Member State,¹⁰⁴ and to receive individual applications “from any person, nongovernmental organization or a group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols”.¹⁰⁵ By the power of article 46, the decisions of the Court by binding for the High Contracting Parties.

3.1.1 Case Law on Sexual Orientation and Gender Identity

According the Court’s understanding, article 14 of the ECHR, establishing the principle of non-discrimination, does not exhaust all the grounds of discrimination, having space for the concepts of sexual orientation and gender identity, in spite of not being specifically mentioned.

¹⁰¹ Council of Europe, ECRI, *ECRI Report on Poland (fifth monitoring cycle)*, 9 June 2015, page 20 and 21

¹⁰² ECHR, Article 19

¹⁰³ *Ibidem*, Article 32

¹⁰⁴ *Ibidem*, Article 33

¹⁰⁵ *Ibidem*, Article 34

The opening of the scope of article 14, the principle of non-discrimination, in order to include sexual orientation happened in 1976, with the case *Salgueiro da Silva Mouta v. Portugal*.¹⁰⁶

Since then, many cases were adopted regarding the recognition of the inclusion of sexual orientation in said principle. For example, in *E.B. v. France* (no. 43546/02),¹⁰⁷ the principle of discrimination is considered in an adoption case. After declaring in a previous case that the denial of adoption to a homosexual man was not a breach to article 14 and to article 8 (right to respect for private life)¹⁰⁸, the Court ruled that, since the possibility of adoption was allowed to single persons, not allowing it to a lesbian woman was a violation of article 14, in conjunction with article 8.¹⁰⁹

In *X. v. Turkey*¹¹⁰, when an inmate was confined to solitary after suffering harassment from other inmates, the Court acknowledged that the reason for his confinement was due to his sexual orientation, so there was a breach on article 14, prohibition of discrimination, in addition to a breach in article 3, regarding the prohibition of inhuman and degrading treatment. Besides, the conditions in which the inmate was confined were not in respect with the principle of human dignity.

In 1986, in *Rees v. the United Kingdom*,¹¹¹ and in 1990, in *Cossey v. the United Kingdom*,¹¹² the Court ruled on the recognition of trans people in the United Kingdom, since both cases have to do with it. In both of them, the decision was the same: the lack of acknowledgement by the States of a new legal status for trans people was not a violation of article 8 of the ECHR, regarding respect for private life, and of article 12, concerning the right to marry and found a family. The justifications were related to the fact that the changing of the systems would have implications at the administrative level and that it would not be the best solution. “In the Rees judgment, the Court, having noted that the United Kingdom had endeavored to meet Mr. Rees’ demands to the fullest extent that its system allowed - and this applies also in the case of Miss Cossey -, pointed out that the need for appropriate legal measures concerning transsexuals should be kept under

¹⁰⁶ *Supra*, note 94, para. 28

¹⁰⁷ ECtHR, *E.B. v. France*, Application No. 43546/02, 22 January 2008

¹⁰⁸ ECtHR, *Fretté v. France*, Application No. 36515/97, 26 February 2002

¹⁰⁹ Similar decisions were taken in *Gas and Dubois v. France*, Application No. 25951/07, 15 March, 2012 and *X and Others v. Austria*, Application no. 19010/07, 19 February 2013

¹¹⁰ ECtHR, *X. v. Turkey*, Application number 24626/09, 9 October 2012

¹¹¹ ECtHR, *Rees v. the United Kingdom*, Application no. 9532/81, 17 October 1986, para. 42 to 46

¹¹² ECtHR, *Cossey v. the United Kingdom*, Application no. 10843/84, 27 September 1990, para. 40 to 42

review having regard particularly to scientific and societal developments (pp. 17 and 19, paras. 42 and 47). The Court has been informed of no significant scientific developments that have occurred in the meantime; in particular, it remains the case - as was not contested by the applicant - that gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex.”¹¹³

In 1992, however, the Court for the first time made a different conclusion and in *B. v. France*,¹¹⁴ and recognized that the inefficiency of the State to change the legal states of a trans person was, indeed, a breach of article 8 of the Convention, a violation of the right to respect for private and family life. The decision mentioned the two cases described before and compared the systems of both countries, paying attention to scientific, legal and social developments, as it was pointed out already in *Cossey v. the United Kingdom*, concluding that the situation has change regarding trans rights since the last decision. In France, in 1992, the applicant “finds herself daily in a situation which, taken as a whole, is not compatible with the respect due to her private life.”¹¹⁵

As opposed to the recognition of sexual orientation being included in article 14, the acknowledgment of gender identity being also a ground of discrimination, happened only in 2009 with the case *P.V. v. Spain*.¹¹⁶

3.1.2 Case Law on Hate Speech and Freedom of Expression

Freedom of expression is enshrined in article 10 of the ECHR. First paragraph states, together with the principle of universality, that everyone has the right to “hold opinions and to receive and impart information and ideas without interference by public authority”. However, and given that the freedom of expression is not an absolute right, second paragraph provides with restrictions. “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals for the protection of the

¹¹³ *Ibidem*, para. 40

¹¹⁴ ECtHR, *B. v. France*, Application no. 13343/87, 25 March 1992

¹¹⁵ *Ibidem*, para. 63

¹¹⁶ *Supra*, note 95

reputation of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

It is the role of the ECtHR to interpret the Convention and, when the issue verses on such complex analysis, the understanding of the Court is very helpful. At stake is the balance between freedom of expression and hate speech and the line is difficult to draw. According to the provisions set in the Convention, the Court may either create restrictions on freedom of expression based on article 10, number 2, or exclude the speech from the protection of the Convention based on article 17, regarding the prohibition of abuse of rights.¹¹⁷ “The conflict of rights is therefore resolved either through denial, through the loss of the right to rely on Article 10, under Article 17 of the ECHR, or by conciliation, in which case the Court proceeds to a balance of the interests involved”.¹¹⁸

Already in 1976, in *Handyside v. the United Kingdom*, the Court’s judgment was very clear in indicating that the right to freedom of expression, although being a fundamental right for the progress of a democratic society, for the same reason involves both duties and responsibilities.¹¹⁹

In addition, it was also made clear by the Court that any form of expression resembling hate speech cannot enjoy the protected of article 10 of the ECHR, falling outside its scope and into the possibilities of restriction.¹²⁰

In *Erbakan v. Turkey*,¹²¹ the Court made clear “it may be considered necessary (...) to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance”¹²²

In *Vejdeland and others v. Sweden*,¹²³ freedom of expression is once again on the spotlight, and this time regarding specifically discrimination against LGBTI people. The case concerns the distribution of flyers at a determined secondary school containing wrong and deceiving information about homosexuality, namely that it was a “deviant sexual proclivity”, with a “morally destructive effect on the substance of society” and a

¹¹⁷ ECtHR, *Factsheet – Hate Speech*, March 2017, page 1

¹¹⁸ *Supra*, note 96, page 19

¹¹⁹ ECtHR, *Handyside v. the United Kingdom*, Application no. 5493/72, 7 December 1976, para 49

¹²⁰ ECtHR, *Jersild v. Denmark*, Application no. 15890/89, 23 September, 1994, para. 35, and ECtHR, *Norwood v. UK*, No. 23131/03, 16 November 2004. In this last judgment, the Court rules on both the exclusion from the protection of article 10 and the prohibition of abuse of rights in article 17.

¹²¹ ECtHR, *Erbakan v. Turkey*, Application no. 59405/00, 6 July 2006, para. 56

¹²² *Ibidem*, para. 56

¹²³ *Supra*, note 94

cause for the spread of HIV and AIDS.¹²⁴ Even though there was no incitement to hatred implied in the content of the information, just the fact that wrong information was being spread, specifically in a school, contributing to the rise of the stigma against LGBTI people and the misinformation concerning the issue, the ECtHR gave reason to the national Supreme Court and ruled that there should be a restriction to the right of freedom of expression, given that this type of restriction is necessary in a democratic society and necessary to protect the reputation of others, as stated in number 2 of article 10 of the ECHR.¹²⁵ It is relevant to note that the Court also stated that discrimination based on sexual orientation should be perceived in the same serious manner as discrimination on the grounds of “race, origin or color”.¹²⁶

Féret v. Belgium is another important case, this time regarding the opening of the scope of the concept of incitement to hatred. After being convicted by a Belgium criminal court for distributing discriminatory flyers against Islam and non-Europeans, a politician appealed to the ECtHR, believing that his right of freedom of expression was being restricted without a justifiable cause. The Court ruled that the Belgium Criminal Court was right in restricting the applicant’s freedom of expression, finding no violation on article 10 of the ECHR. On the contrary, “the applicant’s comments had clearly been liable to arouse feelings of distrust, rejection or even hatred towards foreigners, especially among less knowledgeable members of the public. His message, conveyed in an electoral context, had carried heightened resonance and clearly amounted to incitement to racial hatred. The applicant’s conviction had been justified in the interests of preventing disorder and protecting the rights of others, namely members of the immigrant community.”¹²⁷ Furthermore, the Court concluded that “it was not necessary to demonstrate an actual call to violence of crime; rather, insult, ridicule and defamation can constitute incitement to hatred” being “an irresponsible exercise of freedom of expression, undermining dignity and security of certain groups of the population”¹²⁸

In Slovenia, a journalist was convicted by abuse of his right to freedom of expression, with the publishing of an article with offensive language towards a politician that had previously made a discriminatory and intolerant statement about homosexuals, when

¹²⁴ *Ibidem*, para. 8

¹²⁵ *Ibidem*, para. 57 to 60

¹²⁶ *Ibidem*, para. 55

¹²⁷ *Supra*, note 117, page 10

¹²⁸ ECtHR, *Féret v Belgium*, Application no. 15615/07, 16 July 2009, para. 73, (currently available in French only), found in *Supra*, note 77, page 57

same-sex issues were being discussed at the Parliament. Curiously, in 2014, in this case, *Mladina D.D. Ljubljana v. Others*,¹²⁹ the Court actually ruled in favor of the journalist, criticizing the Slovene Courts for not being able to find the balance between freedom of expression and hate speech and for prioritizing the statement of the politician¹³⁰, with a hateful character, instead of the right to freedom of expression of the journalist. It was decided that, even though the article contained offensive language, which would, for the same reasons as cases mentioned before, fall outside the scope of protection of article 10, given that it was a magazine article, the journalist used stylistic elements¹³¹ in the discourse. The right of freedom of expression of the politician cannot be more important than the right to freedom of expression of the journalist, especially since the case verses on the prohibition of discrimination of certain groups.

3.1.3 Case Law on the Right to Life and the Prohibition of Inhuman and Degrading Treatment

The first milestone regarding the prohibition of inhuman treatment in relation with LGBTI issues in the case law of the ECtHR is *Identoba and Others v. Georgia*.¹³² The case was present by and NGO in the name of the applicants, given that the incident happened during a peaceful parade celebrating the International Day Against Homophobia in 2012, organized by the Ibentoba. A group of people opposing the parade, belonging to religious groups, interrupted it and started threatening the participants and physically assaulting them. The counter-demonstrators said that such event was an act of perversion. The fear was established and the police forces present failed to protect the victims, actually stepping aside and keeping the distance from the scene. One of the applicants called for the help of the police and was taken away to a police station, detained without an explanation. In this matter, it was ruled by the Court that homophobic hate speech, the starting point of the incident, can constitute inhuman and degrading treatment, established in the article 3 of the ECHR.¹³³ This was a ground-breaking interpretation of the combination of hate speech/hate crime and inhuman and degrading treatment. In order to comply with this provision, States have a positive obligation to protect individuals. Furthermore, when the ECtHR was analyzing the domestic legislation of the county, it

¹²⁹ ECtHR, *Mladina D.D. Ljubljana v. Slovenia*, Application no. 20981/10, 17 April 2014

¹³⁰ *Ibidem*, para. 47

¹³¹ *Ibidem*, para. 45

¹³² ECtHR, *Identoba and Others v. Georgia*, Application no. 73235/12, 12 May 2015

¹³³ *Ibidem*, para. 81

was discovered that gender identity and sexual orientation are considered an aggravating circumstance of offences and that the national Courts failed to redress the case as a hate crime.¹³⁴ In addition, it is important to note that the right to freedom of assembly and association, present in article 11 of the ECHR, is also at stake, given that the parade was meant to be a peaceful manifestation.

Following the same line of thought, in *M.C. and C.A. v. Romania*¹³⁵, the Court once again ruled that there was a violation of article 3 (inhumane and degrading treatment), in coordination with article 13 (principle of non-discrimination). This time the incident happened after a gay parade in Bucharest in 2006, when two participants were physically and verbally attacked. In the applicants' understanding, the investigation following the incident was not effective or even appropriate, and that the police forces dealing with it did not even register or consider the hate based on their sexual orientation as a motivation for the incident. As such, the Court also ruled that the investigation was, indeed, poorly led, taking unnecessary time and without considering relevant grounds of discrimination.

CHAPTER 3 – THE FRAMEWORK DECISION ON RACISM AND XENOPHOBIA

1. Introduction

This chapter will find its focus on the adoption of the Council Framework Decision, of 28th November 2008, on combating certain forms and expressions of racism and xenophobia by means of criminal law,¹³⁶ which is the only EU piece of legislation in the field of hate crime.

Throughout the chapter, I will analyze the drafting process and the context in which the Framework Decision was adopted, the main legal obligations it posed on Member States, the opinion of the European Union Fundamental Rights Agency¹³⁷ and of Amnesty International regarding its implementation.

My intention is to demonstrate that the way the Framework Decision was constructed is, from my legal perspective, very protective of hate crimes committed based

¹³⁴ ECtHR, *Fact Sheet – Sexual Orientation Issues*, April 2017, page 2

¹³⁵ ECtHR, *M.C. and C.A. v. Romania*, Application no. 12060/12, 12 April 2016

¹³⁶ *Supra*, note 13

¹³⁷ *Hereinafter*: FRA

on racial and xenophobic motives and an amazing starting point for a common EU legal approach on the issue.

The point of this thesis is precisely to suggest the opening of the scope of the Framework Decision, in order to include the concepts of sexual orientation and gender identity.

When studying the legal path of the Framework Decision, I came across some difficulties regarding its transposition and, more important, its implementation. This still poses as a problem, even nowadays, as I will demonstrate next. However, it is my belief that, given the fact that hate crimes were neglected and kept away from legal dispositions for so long, the fact that the Framework Decision exists is already a victory for those advocating for these rights.

2. Adoption and key provisions

The issue of racism and xenophobia is far from being completely solved and even though there are abundant legal documents adopted and working groups established in order to tackle it¹³⁸, it still haunts the Member States of the EU, creating serious and urgent problems.

The Framework Decision is one of said documents adopted in order to address and tackle the issue of racism in EU Member States.

The European Union is built upon common values of respect for fundamental rights. Freedom of expression, as we all might agree, is fundamental for a democratic society. Nonetheless, it is not the only fundamental principle. Tolerance, respect, peaceful coexistence, liberty, equality, non-discrimination and human dignity¹³⁹ are also some of the core principles pursued by a democratic, pluralistic and multicultural society. As such, any manifestations of racism and xenophobia are not compatible to the values shared by EU countries.

Human rights often clash with each other, such as the case of freedom of speech and hate speech. There is a correlation between the scope of the right and its strength: the broader

¹³⁸ For example: Council of the European Union, *Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*, 27 November 2000; Council of the European Union, *Council Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, 29 June 2000, and the *EU High Level Group on combating racism, xenophobia and other forms of intolerance*,

¹³⁹ Article number 2 of the TEU

the right is formulated, the more it is needed to restrict it. This means that it is necessary to balance and weight the rights and that restrictions to the right of freedom of expression may be necessary in order to protect the rights of others.

The Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law is precisely a balance between the freedom and the regulation of speech.

The Framework Decision is a follow-up and a substitute of the Joint Action 96/443/JHA,¹⁴⁰ adopted by the Council in order to amplify its scope.¹⁴¹ We can understand, just by reading the preamble of this document, that racism and xenophobia were a huge concern for the European Union and its Member States and “despite the efforts made over recent years (...) offences are still on the increase”. It was acknowledged that “the differences between some criminal law systems regarding the punishment of specific types of racist and xenophobic behavior (...) constitute barriers to international judicial cooperation”. Furthermore, and as I mentioned before in the previous chapter, it was emphasized that “the right to freedom of expression implies duties and responsibilities, including the respect for the rights of others”.

As stated before, the Framework Decision was adopted due to the unfortunate and continuous rise of racism and xenophobia across the EU, an issue that still demands a lot of attention from Member States and, as such, it was, and, given its current and present dimension, still is, considered an instrument of key importance. It was thought that there was a need to define a common criminal law approach among all EU Member States, resulting in the approximation of laws and regulations, in order for the same criminal behavior constitute an offence in all countries and, therefore, be punishable by effective, proportionate and dissuasive penalties. Member states must punish public inciting to violence or hatred and public condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes. Judicial cooperation is to be improved and encouraged and hate crimes, meaning crimes with a racist and xenophobic motivation, “shall be considered to be an aggravating circumstance or, alternatively, the Courts must be empowered to take such motivation into consideration when determining the penalties to be applied”.¹⁴²

¹⁴⁰ Council of the European Union, *Joint Action to combat racism and xenophobia*, 96/443/JHA, 15 July 1996

¹⁴¹ *Supra*, note 13, para. 3

¹⁴² Summary of the Framework Decision, available at <http://eur-lex.europa.eu/summary/EN/URISERV:133178> (consulted on 26 April 2017)

The process of drafting the Framework Decision lasted for seven years, given the differences in the domestic law of the EU countries and the various approaches and perspectives to this issue. It is meant to protect the rights of individuals and, at the same time, to respect the fundamental rights of freedom of expression. Finding this balance can be extremely difficult.

3. Implementation

In 2013, the Amnesty International submitted considerations about the Framework Decision, specifically about its poor and incorrect application in the Member States of the EU.¹⁴³

According to the report, “hate crimes require a comprehensive response, including legislation and other policy measures to ensure competent authorities do the utmost to prevent hate crimes, that hate motives are duly taken into account from the outset of investigations, and that authorities firmly condemn any acts of violence that are allegedly motivated by hatred. The Framework Decision has proved to be ineffective in tackling hate motivated violence. (...) has failed to ensure that: Member states comprehensively prohibit racist hate crimes and that investigative authorities use all their powers to uncover and acknowledge any alleged racist motive (...); Member states adequately tackle all forms of hate crimes other than those perpetrated with a racist or xenophobic motive (...); Member states adequately protect the right to freedom of expression when considering potential punishment of opinions on historical facts.”¹⁴⁴

In addition, in its 2014 Annual Report, FRA mentions that “barriers persist in implementing effectively European Union legislation that prohibits and penalizes manifestations of racism, xenophobia and ethnic discrimination”.¹⁴⁵

¹⁴³ Amnesty International, *Amnesty International submission to the European Commission and the Council of the European Union on the Framework Decision on racism and xenophobia (Council Framework Decision 2008/913/JHA)*, Ref: IOR Ref: IOR52/001/2013, October 2013

¹⁴⁴ *Ibidem*, page 2

¹⁴⁵ European Agency for Fundamental Rights, *Fundamental Rights: Challenges and Achievements in 2014 - European Union Agency of Fundamental Rights' Annual Report 2014, 2015*, page 49

Among other recommendations, FRA insists that “EU Member States should proceed with the full and correct transposition and effective implementation of the Framework Decision on Racism and Xenophobia. In addition, Member States are encouraged to adopt and implement policies and measures aiming at combating racism and hate crime, as well as deradicalization programs”.¹⁴⁶

Also in 2014, the European Commission launched its report on the implementation of the Framework Decision.¹⁴⁷ The report draws attention to the fact that although the majority of Member States penalize incitement to racist and xenophobic violence and hatred, their legal provisions do not always seem to fully transpose the offences covered by the framework decision.¹⁴⁸

The Commission is engaging in bilateral dialogues with the EU Member States in order to ensure full and correct transposition of the Framework Decision.¹⁴⁹

4. Opening the scope

As I mentioned before, the Framework Decision does not include sexual orientation or gender identity as grounds of discrimination. Nonetheless, by the time of its implementation, some States had already hate crimes motivated by racism and xenophobia in their domestic legislations, so they took advantage of the opportunity to enlarge their own scope of protection to include other grounds.¹⁵⁰ That is, for example, the case of Portugal. When the Framework Decision was adopted, the then Minister of Justice of Portugal, Alberto Costa, said in a press conference¹⁵¹ that when it comes to Portugal, the Decision would not create any legislative alteration in the legal system regarding racism and xenophobia, given that it already had all the necessary solutions to fight the issues, having no need for new adaptations or legal creations in order to satisfy the Framework Decision. This was, in fact, true. However, in 2007, right during the process of negotiating the Framework Decision, the Portuguese Criminal Code was

¹⁴⁶ *Ibidem*, page 63

¹⁴⁷ European Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*, COM(2014) 27 final, 27 January 2014

¹⁴⁸ *Ibidem*, point 3.1.1

¹⁴⁹ *Ibidem*, point 5

¹⁵⁰ *Supra*, note 77, page 9

¹⁵¹ Rádio e Televisão de Portugal, Agência Lusa, *Ministros da Justiça da UE de acordo sobre criminalização da incitação ao racismo*, 19 April 2017, Available only in portuguese at http://www.rtp.pt/noticias/mundo/ministros-da-justica-da-ue-de-acordo-sobre-criminalizacao-da-incitacao-ao-racismo_n136382 (consulted on 28 April)

amended to include sexual orientation as a ground for discrimination, opening its own scope of protection.¹⁵²

The only document at the level of the European Union Law that mentions sexual orientation, gender identity and even gender expression is the so-called Victim's Directive, that provides tools to support victims of crimes and especially, victims of crimes committed with prejudice.¹⁵³ However, as opposed to the Framework Decision, it does not pose as a criminal law obligation to EU Member States. As such, and as I will elaborate ahead, in the context of the EU law, there is a lack of an LGBTI hate crimes legal framework.¹⁵⁴

At this point, we should ask ourselves why is it important to open the scope of this Framework Decision or to create a similar one for LGBTI hate crimes at the level of the EU law?

It is true that a many advances were made within the EU and within its Member States at the legislative level, especially in recent years, as it was described already in the previous chapter. It is important to recognize this and praise the positive developments. However, the path towards strengthening protection in order to create a safe place where people of all sexual orientations and gender identities can enjoy their rights fully, remains daunting and too slow. Discrimination is still a reality, reflected especially in the occurrence of hate crimes and it is fundamental to make it visible. The principle of non-discrimination, present both in the Charter of Fundamental Rights and the TFEU (articles 21 and 19, respectively), is not enough. It is necessary to create the same kind of legal piece that protects all grounds of discrimination consistently, given that at this point, only the Framework Decision protects racism and xenophobia.

Twenty EU countries criminalize the incitement to hatred, violence or discrimination on the ground of sexual orientation. However, only fifteen of those countries consider homophobic intent as an aggravating circumstance.¹⁵⁵

With all the respect for the principle of sovereignty of States, it is time to recognize that some issues are far too important to be left to the discretion of the domestic legislator. This has the most relevance when we talk about minority issues and, in this case, LGBT issues. If the discrimination and neglect comes from within the State, we cannot expect

¹⁵² *Infra*, Elaborated on Chapter 4, 2.3, note 146

¹⁵³ *Supra*, note 87

¹⁵⁴ *Supra* note 77, page 48

¹⁵⁵ *Ibidem*, pages 67 and 68

and wait for the State to take the step by itself and make changes, especially when values such as tolerance and non-discrimination are on the core of the EU foundation. That being said, some issues find its public policy best venue at the European Union level and it is my belief that LGBTI rights are one of those issues. The fight against homophobia and transphobia must be framed within a fundamental rights context and with its starting point at the European Union, creating the basis for a common Member States approach on the issue, an obligation at the same level, precisely as it is the case with the Framework Decision.

In addition, hate crime legislation is necessary and important for other relevant reasons, as listed by the OSCE, such as the symbolic acknowledgement to victims, offenders and the society as a whole that hate crime is taken seriously, building trust in the system; the raise of the public awareness by the discussion following the legislative process; and the mere fact that it obliges law enforcement agencies and other stakeholders to consider motive, fulfilling the gap enunciated before when it comes to the complaint registration systems, and contributing to a more reliable and comprehensive collection of data, the biggest challenge indicated by all the international and regional reports on the issue.¹⁵⁶

In 2011, ILGA-Europe brought attention to this issue¹⁵⁷ by claiming that the Framework Decision should be revised and listing some possible revision scenarios, such as the amendment of the Framework Decision so that the other groups listed in article 19 TFEU¹⁵⁸ could also be part of the Framework's scope of application, or the adoption of a Directive including all those groups and going beyond the substantive provisions of the Framework. This last scenario was appointed as the preferable one because besides improving the protection for individuals members of all the groups listed, it would end the discussion related to the hierarchy of the grounds of discrimination.

In 2014, it was the time for the European Parliament to notice this lack of a criminal law instrument to protect LGBT people against hate crimes, and adopted a resolution¹⁵⁹ to pressure the European Commission to propose a recast of the Framework Decision in order to include other grounds of hate crimes, such as sexual orientation and gender identity.

¹⁵⁶ Supra, note 52, pages 19 and 20

¹⁵⁷ ILGA-Europe, Peers, S., *The legal grounds for inclusive EU legislation against bias violence and hatred*, 2011, page 10

¹⁵⁸ The grounds of discrimination listed in this article are: sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

¹⁵⁹ Supra, note 92, para. 4 (j) (ii)

It is the opinion of the FRA that in order to comply with the principle of non-discrimination of article 14 of the Charter of Fundamental Rights, the Framework Decision should include all grounds of discrimination listed in the article. They are sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age and sexual orientation.¹⁶⁰

Furthermore, article 47 of the Charter of Fundamental Rights establishes that everyone has the right to an effective remedy before a tribunal when their rights are violated. Article 13 of the ECHR establishes the same, in a tight relation with article 14. However, it is my opinion that if hate crimes against LGBTI people are not clearly enshrined in the law, homophobic and transphobic motivation do not pose as an aggravating circumstance, the complaint registration system does not enable the motivation to be registered or the cases that are indeed reported do not make it to criminal procedures, then the victims will never have an effective remedy for their human rights violations they suffered. Access to justice needs to be improved in all countries. Since this is a problem transversal to all EU Member States, I think the starting point of a public policy in this regard should clearly be found in the European Union Law.

It is necessary to create a relationship of trust between the LGBTI community and relevant stakeholders, namely security forces. Given that until very recently homosexuality was defined as a disease and criminalized, there are still people with a wrong and stigmatized opinion on the subject. As such, it is understandable that the victims of hate crimes motivated by sexual orientation and gender identity may feel embarrassed to report such crimes, having to come out to some officer they never met before, not knowing what he/she feels about the topic. In this case, police forces need to be trained and aware of the issue, in order to know how to deal with the victims and what kind of questions to ask. Having hate crime laws and implementing them immediately tells the victims that someone out there cares and there is hope regarding the effective punishment of the perpetrator.

¹⁶⁰ *Supra*, note 77, page 55

CHAPTER 4 – LGBTI LAWS AND HATE CRIME REPORTING IN PORTUGAL AND SLOVENIA

1. Introduction

In order to illustrate my point that there is an urgent need for a LGBTI legal framework at the EU law level that harmonizes the criminal approach of all EU Member States regarding violence motivated by sexual orientation and gender identity, I will dedicate this chapter to analyze the most relevant legal developments within the domestic legislations of both Portugal and Slovenia. The choice for these two countries specifically is not only related to the fact that I am from Portugal and that I did my second semester in Slovenia. The point was to compare two countries with different practices and legal approaches on LGBTI issues. On one hand, we have Portugal, with a very complex but, at the same time, inclusive legal framework, and with what are considered good practices in the LGBTI area, and on the other hand we have Slovenia, a country with a lot less protection regarding LGBTI rights and even less regarding hate crimes motivated by the sexual orientation or gender identity of the victims.

From what it was described in Chapter 1, international law had abundant recent developments in the protection of the rights of LGBTI people. According to the UN Free & Equal Campaign, States have five core obligations: protect individuals from homophobic and transphobic violence, prevent the torture and cruel, inhuman and degrading treatment of LGBTI persons in detention, repeal laws criminalizing homosexuality, prohibit discrimination based on sexual orientation and gender identity and safeguard rights such as freedom of expression, association and peaceful assembly for all members of the LGBTI community. In what concerns the topic of this thesis, the most important core obligation is the first one, related to hate crimes. In this regard, it is the view of the UN that States are obliged to adopt laws that include sexual orientation and gender identity as protected characteristics, in order to discourage violence, to establish effective systems for reporting hate motivated acts of violence and ensure the

effective investigation and prosecution of the offenders, and to provide for the appropriate training of law enforcement officers.¹⁶¹

Following this line of thought, I will analyze the LGBTI laws of both countries and see if they pass this five-step test created at the light of this campaign.

The chapter will start with the key provisions in the Portuguese Law (namely in the Constitution, the Civil Code and other documents) and move on to the protection against hate crimes. I will use the same outline regarding the Slovene Law.

After that, I will analyze the existing data on hate crimes committed based on sexual orientation and gender identity in both countries, with the help of the reports of ILGA-Europe and the OSCE.

2. LGBTI Laws in Portugal

2.1 Constitution of the Republic of Portugal

According to the article number 2 of the Portuguese Constitution, Portugal is a democratic State under the principle of the rule of law, which is the fundamental principle of the contemporary constitutionalism. The rule of law means that the existing rules are applicable to everyone, preventing those who are using the democratic cape from destroying democracy itself. The rule of law cannot suffocate democracy and democracy needs to be limited by the Law. There is no democracy without rights, freedoms and guarantees, that cannot be in the hands of the majority but above it, protected by constitutional rules aiming to safeguard the minorities.

Articles number 12 and 13 set the common regime for fundamental rights, being the principle of universality and the principle of equality, respectively. According to these principles, all citizens have the same rights and the same duties recognized by the Constitution, and have the same social dignity and equality before the law, meaning no one can be “privileged, favored, prejudicated, deprived of any right or exempt from any duty for reasons of ancestry, sex, race, language, territory of origin, religion, political or

¹⁶¹ UN Human Rights Office of the High Commissioner, *Born Free and Equal – Sexual Orientation and Gender Identity in International Human Rights Law*, 2012, page 13, and *Fact Sheet on International Human Rights Law and Sexual Orientation and Gender Identity*, page 2

ideological beliefs, education, economic situation, social circumstances or sexual orientation” (article 13, number 2).

2.2 Civil Law

Same-sex marriage is permitted in Portugal since 2010, with the adoption of the law number 9/2010, of 31st May, that approved amendments to the Civil Code, indicating that “all legal provisions regarding marriage and its effects should be interpreted in the light of this law, regardless the gender of the spouses”.¹⁶² The law was already altered in 2016 to include adoption by same-sex couples. In its article number 3, now we read that “the regime introduced by the law implies the legal admissibility of adoption, in all its modalities, by people married with a partner of the same sex”. In number 2 of the same article, it is written that “no legal disposition can be interpreted in an opposite sense”¹⁶³

2.3 Other Developments

Regarding gender identity, in 2011 was adopted what is known as the Gender Identity Law, which creates the process for sex change and name in the civil registry, simplifying the procedure.¹⁶⁴

Two national plans elaborated in 2013 are of the most importance regarding non-discrimination in the case of LGBTI people. The V National Plan for Prevention and Combat of Domestic and Gender Violence 2014-2017, was the first to include LGBT issues, as the V National Plan for Equality, Gender, Citizenship and Non-Discrimination 2014-2017, which is the second national plan to include sexual orientation and gender identity (4th strategic area). This plan includes a coordination between ministries when it comes to public policies concerning sexual orientation and gender identity and guarantees

¹⁶² Portugal, *Law 9/2010, Allows civil marriage between same-sex people*, (Lei n.º 9/2010, Permite o casamento civil entre pessoas do mesmo sexo), 31 May, article number 5

¹⁶³ Portugal, *Law 2/2016, Eliminates discriminations in the access of adoption, civil custody and other legal family relations*, (Lei n.º 2/2016, Elimina as discriminações no acesso à adoção, apadrinhamento civil e demais relações jurídicas familiares, procedendo à segunda alteração à Lei n.º 7/2001, de 11 de maio, à primeira alteração à Lei n.º 9/2010, de 31 de maio, à vigésima terceira alteração ao Código do Registo Civil, aprovado pelo Decreto-Lei n.º 131/95, de 6 de junho, e à primeira alteração ao Decreto-Lei n.º 121/2010, de 27 de outubro), 29 February

¹⁶⁴ Portugal, *Law 7/2011, Creates the process for sex change and name in the civil registry and proceeds to the 17th alteration of the Civil Registry Code* (Lei n.º 7/2011, Cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração ao Código de Registo Civil), 15 March

the implementation and monitorization of Portugal's international commitments in the field. The goals are meant to be achieved especially by the appropriate training of relevant stakeholders, such as law enforcement officers. For that matter, in a combined effort between ILGA-Portugal and the Committee for Gender Equality, members of the security forces across the country have been received appropriate training, learning how to deal with this issue, what questions they should ask the victims and how should they treat them without falling into discrimination.

With Law number 28/2015, of 14th of April, the Labor Code was amended in order to include gender identity in its article number 24, prohibiting discrimination in the access to work. Sexual orientation was already included with the approval of the Code in 2009.

2.3 Hate Crimes

As I mentioned already in Chapter 3, with the adoption of the Framework Decision on Racism and Xenophobia, some States that already had racism and xenophobia included in their domestic legislations related to hate crimes decided to open the scope and include more grounds for discrimination. That is the case of Portugal, that in 2007, during the seven years drafting process of the Framework Decision, modified the Criminal Code¹⁶⁵ to added the concept of "sexual orientation" to the article number 132, with the heading qualified murder, establishing an aggravating circumstance if there is a motivation related to the victim's sexual orientation. As of 2013, the Criminal Code was again amended in order to also include "gender identity" as a reason for discrimination.¹⁶⁶ With both alterations, the article in force nowadays reads as follows: "1. if death is produced in circumstances that reveal special reprehensibility or perversity, the agent is punished with imprisonment up to twelve to twenty-five years". Number 2, f) describes that special reprehensibility or perversity happen if the agent is "determined by racial, religious, political or generated by color, ethnic or national origin, by sex, sexual orientation or gender identity hate".

Same situation can be observed in article number 145, regarding qualified offense to physical integrity, where its number 2 forwards the possible circumstances to number 2 of the above-mentioned article.

¹⁶⁵ Portugal, *Law 59/2007, 23rd amendment to the Criminal Code*, (Lei n° 59/2007, 23ª alteração ao Código Penal), 4 September 2007, article 1

¹⁶⁶ Portugal, *Law 19/2013, 29th amendment to the Criminal Code*, (Lei n° 19/2013, 29ª alteração ao Código Penal), 21 February 2013, article 2

In addition, article number 240 is precisely about racial, religious and sexual discrimination, criminalizing incitement to hatred and discrimination.

However, there is not a general policy establishing that the homophobic and transphobic motivation constitute an aggravating circumstance for the practice of all crimes, meaning that when it comes to other crimes than those previously mentioned, it is up to the Courts to consider this intent as a hate crime and apply the penalty or not. It is my goal to draw attention to the fact that this is an issue too important to be left to the discretion of the ones applying the law.

It is true that Portugal has come a long way in protecting LGBTI rights. We are nowadays amongst the best laws in the European Union. However, it is my understanding that there is still a lot of work to be done, not only legally speaking. It is one thing to enact hate crime laws and another to actually implement them.

As it was explained before, the fact that sexual orientation and gender identity are considered a discriminatory ground and a special circumstance for qualified murder and offense to physical integrity, it does not mean that these articles are being put into practice and are enough to maintain the victim's trust in the system. From a legal perspective, it is already an amazing starting point, but from a practical approach it is far from being sufficient. If we see once again the core obligations posed on States by international law, listed by the UN Free & Equal Campaign,¹⁶⁷ we can conclude that Portugal is complying with almost all of them. The problem is no longer regarding legal initiatives but regarding the proper implementation of the key provisions already in force.

The fact is that the existing complaint registration system does not enable registration of the motivation of the crime, plus the lack of appropriate training available to police forces who fail to ask the right questions, leads the investigation to follow the path of a normal crime, making hate crimes pass unnoticed and the aggravating circumstances not being pursued. At this point, it is almost as if the possibility of applying the aggravating circumstances was not even there. Therefore, there is no available official data on hate crimes against LGBTI individuals in Portugal, giving the wrong idea of the atmosphere which is not as tolerant as it appears. Consequently, there is no public policy to combat hate crimes (since they do not exist officially). It is very clear that the existing legal framework is too restrictive and keeps the discrimination category invisible. Besides, the

¹⁶⁷ Supra, note 161

fact that all discriminatory grounds are put together in the same bowl makes them lose even more visibility and not have the right treatment, given the non-existing public policies regarding these special aspects.

This issue has been in the center of the discussion in LGBTI fora. As such, attention has already been brought to this and measures are being taken in order to tackle it. Therefore, in the aforementioned National Plan for Equality, Gender, Citizenship and Non-Discrimination, it is said that the goals will be achieved by the official collection, treatment and dissemination of statistic data on hate crimes against LGBT people. Furthermore, a Work Group dealing with hate crimes (related to sexual orientation, gender identity, ethnicity and religion) was created by the Ministry of Justice in 2015, as it was laid down in the II Plan for Equality of the Ministry of Justice. What is important to note is that the group was not only formed by members of the Directorate-General for Justice Policy, but also by members of the Police, contributing to a much bigger coordination in all aspects regarding public policies versing LGBTI issues.

3. LGBTI Laws in Slovenia

3.1 Constitutional of the Republic of Slovenia

It is important to note that up until 1991, Slovenia was part of Yugoslavia. Some laws were mandatory and equal for all the six republics. Even though Yugoslavia had modern laws regarding family issues, for example, the decriminalization of homosexuality only happened, for some countries, in 1997, Slovenia included. In fact, in the 80s Ljubljana was already a vibrant city when it comes to LGBTI events and the birth of LGBTI NGOs¹⁶⁸ and Slovenia was the first country of the six republics to even consider legalizing same-sex marriage.

Articles number 1 and number 2 of the Constitution of the Republic of Slovenia state that Slovenia is a democratic republic governed by the rule of law.

¹⁶⁸ Magnus, a section of ŠKUC (Students Cultural Centre), is the oldest LGBTI organization and Slovenia and was founded in 1984, with the main role to organize the Magnus Festival, which through a number of activities had the purpose to integrate LGBTI people and raise the awareness of the community to their inclusion. Magnus organizes the oldest LGBTI film festival in Europe. Information available at <http://www.magnus.si/en/index.html> (consulted on 14 July 2017)

Article number 14 establishes the principle of equality before the law, stating that “everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political, or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance. All are equal before the law.” Even though, neither the concept of sexual orientation or gender identity specifically appear as a ground for discrimination, in July 2009 the Constitutional Court ruled that discrimination based on sexual orientation should also be banned given its analogous nature to other protected grounds.¹⁶⁹ It is curious to note that the Court based its decision in a Portuguese case brought to the ECtHR in 1999,¹⁷⁰ where it was decided that sexual orientation was covered by article 14 of the ECHR, even though it was not clearly mentioned.

Prohibition of Incitement to Discrimination and Intolerance is guaranteed by article number 63 that states “any incitement to national, racial, religious, or other discrimination, and the inflaming of national, racial, religious, or other hatred and intolerance are unconstitutional”. This article, same as the previous mentioned, does not specify sexual orientation or gender identity. However, an extensive interpretation of the law leads us to fit this invisible category inside “other discrimination”.

Other articles presented in the Slovene Constitution relevant to this thesis are article number 35, establishing the protection of the rights to privacy and personality rights and article number 39, establishing the right to freedom of expression.

3.2 Civil Law

Same-sex civil partnerships have been legal in Slovenia since 2006. As opposed to the institution of marriage, the registration of the civil partnership only recognized a few rights to same-sex partners, namely maintenance, inheritance, health information and joint ownership of property. Social rights were excluded from this provision, together with the rights towards children.

Regarding same-sex marriage, in March 2015 a law was approved by the Parliament in order to recognize it (introduced by the Left Party), amending the Marriage and Family Relations Act of 1976 which specifically considered marriage only as a heterosexual

¹⁶⁹ Constitutional Court of the Republic of Slovenia, Blažič and Kern v. Slovenia, U-I-425/06-10, July 2009, available only in Slovene at <http://odlocitve.us-rs.si/sl/odlocitev/US28771> (consulted on 20 May 2017)

¹⁷⁰ *Supra*, note 94

union. However, opponents decided to collect signatures in order to bring this issue into a referendum. The National Assembly held an extraordinary session trying to block the referendum, calling upon article number 90 of the Constitution that states that “(...) a referendum may not be called (...) on laws eliminating an unconstitutionality in the field of human rights and fundamental freedoms or any other unconstitutionality (...)”, but the opponents appealed to the Constitutional Court, which months later allowed the referendum to proceed. LGBTI movements campaigned for the “yes” and even the President of Slovenia, Borut Pahor, was openly in favor. However, the Catholic Church, with a strong presence in the country, campaigned for the “no” and, in the end, the referendum resulted in the rejection of the law by more than 20% of registered voters, the threshold in the Slovene Law.^{171 172}

However, the issue continued to be discussed and, as of February 2017, same-sex civil unions are now legal in the country, with the coming into force of the new law Civil Union Act, approved already in April 2016. The first wedding was celebrated already in February, right after the adoption of the law. The new law gives to same-sex marriages the same legal force as a marriage between an heterosexual couple, providing for the same rights in all legal fields, regarding, for example, pensions, compensations and so on. Notwithstanding, both adoption and the procedure of artificial insemination are still not allowed for same-sex couples.¹⁷³ The only possibility is second-parent adoption, established in the combination of articles 138 and 135 of the Marriage and Family Relations Act. The first second-parent adoption happened in 2011, after a woman was denied the right to adopt her partner’s child and complaint to the Ministry of Labor, Family and Social Affairs, that decided that any prohibition in this regard would be a violation of the principle of non-discrimination on the ground of sexual orientation. Before this, in 2010 the Supreme Court had already decided that an adoption by a same-sex couple in another country is valid in Slovenia.¹⁷⁴

¹⁷¹ Votes in favor: 37%; Votes against: 63%.

¹⁷² ILGA-Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe*, 2016, page 154 (the review covers the period between January and December 2015)

¹⁷³ Information available at <http://www.zurnal24.si/slovenija/prva-sklenitev-istospolne-partnerske-zveze-v-soboto-286307> (consulted on 2 June 2017)

¹⁷⁴ Information available at http://old.ilga-europe.org/home/guide_europe/country_by_country/slovenia/the_first_same_sex_second_parent_adoption_case_in_slovenia (consulted on 3 June 2017)

3.2 Other Developments

In 2004, the Act implementing the principle of equal treatment was adopted, prohibiting discrimination based on sexual orientation, together with other grounds, of all persons “in performing their duties and exercising their basic freedoms in every field of social life, and especially in the fields of employment, labor relations, participation in trade unions and interest associations, education, social security, access to and supply of goods and services”.¹⁷⁵

In addition to this provision, and this time directly related to hate speech, the Mass Media Act also prohibits the dissemination of programs that encourage inequality, violence and war or incited hate motivated by nationality, race, religion, sex and others.

3.3 Hate Crimes

As opposed to Portugal, in Slovenia committing criminal offences with a homophobic or transphobic intent does not pose as an aggravating circumstance, except in the case of murder, according to the article number 116 of the Criminal Code, in which its number 3 enunciates murder “because of violation of equality”.

However, when it comes to hate crimes in the Slovene Law, it is necessary to analyze article number 297 with the heading “public incitement to hatred, violence and intolerance”. First paragraph reads as follows: “Whoever publicly incites or stirs up violence or intolerance base on ethnic, racial, religious, sex, skin color, origin, property, education, social status, political or other opinion, disability, sexual orientation or any other personal circumstance, and the act is committed in a way that can jeopardize or disrupt the public order and peace, or by the use of threats, intentions or insults, shall be punished by imprisonment of up to two years”. Sexual orientation was also included in 2008, the same as Portugal. Although we cannot say that there was a direct link between the inclusion of sexual orientation as a ground of discrimination and the adoption of the Framework Decision, Slovenia might have used the Framework Decision to open the scope of discrimination. What is clear is that the incorporation of the condition “in a way

¹⁷⁵ Slovenia, Act implementing the principle of equal treatment, 6 May 2004, para. 1

that can jeopardize or disrupt the public order and peace”, was, in fact, included as a consequence of the Framework Decision, as explained in the amendment of the article.

The fact that the article specifically mentions “public order and peace”, makes it lose some of the power it could have. This aspect ends up being one of the requirements for the offence to be considered a crime that fits in the provision, meaning a crime of incitement to hatred, violence or intolerance. As such, an act that could fit the provision but is not committed in a way that disrupts the public order or peace, cannot be considered a hate crime. This gives little space for victims to find an effective remedy to the violations of their human rights.

In addition, if we read this provision in conjugation with article 63 of the Constitution, which also prohibits incitement to discrimination and intolerance, as mentioned, we could conclude that article 297 of the Criminal Code is, in fact, unconstitutional, given that there is no reference to the need for the offense to be public. It is very dangerous, from a legal point a view, to have two contradictory provisions in the same legal system, especially of this importance.

There was only one case in Slovenia that the Court considered might fall under the scope of article 297, being considered a hate crime.¹⁷⁶ The incident happened in 2009, in a LGBTI-friendly café, during the Pride week. A group of adolescents outside the café started insulted someone inside and eventually proceed to physical assault. The case was brought to the Court and was falling under the scope of article 297. The victim of the crime was a well-known LGBTI activist, aware of his rights and of the existing law, knowing that the incident would fall on the definition of hate crime. However, due to a procedural mistake, the criminal case was considered inadmissible and only the civil case went on, regarding compensations for the victim.

Regarding hate crimes in the Slovene law, is also necessary to analyze article 131 of the Criminal Code, with the heading “violation of the right to equality”, that incorporates the concept of sexual orientation in its wording. The provision laid down in the number 1 refers to the crime of depriving or restraining “another person of any human right or liberty recognized by the international community or laid down by the Constitution”. Violation of equality is also mentioned in article 265, dedicated to torture. If we combine the two articles, considering that violation of equality includes sexual orientation as a

¹⁷⁶ Higher Court, Republika Slovenija Visje Sodisce v. Ljubljani, II Kp 5357/2010, 4 July 2011

discriminatory ground, when it comes to the article related to torture, even if sexual orientation is kept hidden, we already know that it falls within the scope of the concept of violation of equality, being able to apply it to such cases. However, this extensive interpretation was never used.

As we can see, the hate crime legal framework within Slovenia is very restrictive. Since hate is not a motivation to be taken into account in any other crime aside from murder, its recognition passes by the discretion of the ones applying the law. And, as I said before, the issue is of two much importance to be dealt with in this manner. However, article 49, number 2 provides with some kind of protection against the discretion of the Court. It is said that “the Court shall consider all circumstances, which have an influence on the grading of the sentence”, include the motive. Nothing is said regarding the characteristics of the victim but, again with an extensive interpretation, in some cases motive is, in fact, related to the victim and sexual orientation and gender identity could fall inside this provision. None the less, if we are in fact dealing with a homophobic hate crime, the perpetrator might have said something to the victim that indicates its intent and, in that case, it falls automatically under the provision.

4. Hate Crime Data Collection

In order to provide with an overview of the data existing regarding hate crimes in both Portugal and Slovenia, I will use the annual reports of ILGA-Europe, which compile the series of developments of LGBTI laws across all European countries, with a reference to violence motivated by prejudice towards sexual orientation and gender identity, and the reports on hate crimes of the OSCE. ILGA-Europe started these reports in 2011 and the OSCE in 2009.

In the first year of the OSCE reports, Portugal reported a crime of homicide by omission of a transgender person. In the following year, no official information was released, but ILGA-Portugal reported two physical assaults and one rape. Same situation happened in 2011, but this time ILGA-Portugal reported three cases of physical assault, one of them involving attempted murder, and one case of vandalism in the office of the NGO. In 2012, ILGA-Portugal reported three serious physical assaults. The year after, ILGA-Portugal reported 37 physical assaults resulting in serious injuries, together with 69 threats and six incidents of damage to property. In this report, there is a note by the

ODHIR observing that Portugal has not provided with reliable statistics on hate crimes. In 2014, ILGA-Portugal reported eight violent attacks against LGBTI people. Once again, in this report there is a note by the ODHIR stating that Portugal's law enforcement agencies have not recorded the bias motivation of hate crimes. In 2015, the latest of the ODHIR reports, Portugal explained that due to an informatic problem with their data base, it was not possible to provide with the official data. However, ILGA-Europe reported eight violent attacks and two attacks against property.¹⁷⁷

On the other hand, according to ILGA-Europe latest report, 339 cases of discrimination were reported to ILGA Portugal's Observatory on Discrimination in 2014, together with 198 cases of hate crimes. Only 7% of these cases were officially reported to national authorities, leaving the remaining unreported.¹⁷⁸ In the previous report, again based on the data collected by the Portuguese NGO, were recorded 69 cases of threats and psychological violence and 37 cases of extreme physical violence in 2013, with a percentage of reporting of only 4%.¹⁷⁹

In the case of Portugal, we can see that the numbers are rising. More people are reporting hate crimes both to the NGO's Observatory and to national and competent authorities. None the less, there is a visible discrepancy between the numbers presented by the NGO and the official numbers. And what is even scarier is that the already small percentage of officially collected numbers, reduces even more, given that not all of them continue the procedure until the Courts. As such, the official numbers are not enough to build an effective sample and they do not mirror the reality of homophobic and transphobic hate crimes.

In the case of Slovenia, and based on the reports of the OSCE, in 2009 and in 2010 no official data was provided, but in 2010 the NGO ŠKUC-LL (Lesbian Section – Students' Cultural Centre) reported two physical assaults against lesbians, two arson attacks against a lesbian café and two cases of graffiti. In 2011, the Legebitra Information Centre reported two cases of physical assault against gay men, including one involving a group of perpetrators; one case of damage to property of a gay-friendly bar; and one case of threats against a gay couple. In 2012, Legebitra once again reported one case of

¹⁷⁷ Available at <http://hatecrime.osce.org/portugal?year=2015>

¹⁷⁸ *Supra*, note 172, page 133

¹⁷⁹ ILGA-Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe*, 2015 (the review covers the period between January and December 2014)

vandalism against a gay-friendly bar the day after a pride event. There is a note by the ODHIR referring that Slovenia has not reported on hate crimes separately from cases of hate speech. In the most recent reports, no information was collected regarding hate crimes against LGBTI people. It is to note that the last time Slovenia contributed to the ODHIR report was in 2011.¹⁸⁰

ILGA-Europe has other numbers regarding Slovenia. In its first report in 2011¹⁸¹, an incident of hate speech was recorded, together with two physical assaults at LGBTI tourists. In addition, after a young LGBTI couple was disturbed by a homophobic costumer at a bar, the police decided to charge the man with public nuisance, instead of hate speech, disregarding completely the motivation of the crime. In 2013's report, one incident of hate speech and one incident of violence were reported by ILGA-Europe.¹⁸² In 2015, ILGA-Europe reported one case of LGBTI-based violence.¹⁸³

¹⁸⁰ Available at <http://hatecrime.osce.org/slovenia?year=2015>

¹⁸¹ ILGA-Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe*, 2011 (the review covers the period between January and December 2010), 151

¹⁸² ILGA-Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe*, 2013 (the review covers the period between January and December 2012), page 202

¹⁸³ *Supra*, note 178, page 149

CONCLUSION

The purpose of this thesis was to analyse what documents exist under the wing of the international law that protect LGBTI rights, namely, the correct and comprehensive prohibition of hate crimes committed on the basis of sexual orientation and gender identity, especially in the Law of the EU and its Member States. My main argument was that there is a lack of a criminal law instrument at the level of the European Union law regarding LGBTI hate crimes and an urgent need for the EU institutions to adopt one.

After analysing legal documents adopted under international organizations, namely the UN, the main human rights international institution, the Organization of America States and Africa Union, it is clear that LGBTI rights were not contemplated during the first negotiations, being disregard in the adoption of primarily human rights legal instruments.

However, regarding the inclusion of the concepts of sexual orientation and gender identity in the scope of the principle of non-discrimination, various and welcomed advances were made, especially in the last decade, with the adoption of new documents and the extended interpretation of already existing ones. I would say that regarding non-discrimination according to international legal standards, LGBTI people are protected, at least from a legal point of view and regarding the recognition of their sexual orientation and gender identity. None the less, violence committed against LGBTI people still happens all over the world. In this regard, even though the international community has been bringing attention to this problem, expressing gravely concern in several occasions, nothing but mere recommendations or guidelines were adopted. Since no binding document that poses obligations on the States came into force yet, the protection of these people from violence is left to the discretion of domestic legislators. This is no longer accepted. It is my opinion that this is an issue of too much importance to be left at the discretion of domestic legislators. We are talking about violence. About the right to security of the person, the right to life, the prohibition from inhuman and degrading treatment. Not wanting to list human rights according to a hierarchy structure, there is a reason why these rights are always the first to appear in any piece of legislation, automatically standing out. Such rights need to be at the reach of all individuals without discrimination.

Hate crime is not a defined concept under international law. In order for States to start paying more attention to this problematic, there is a need to define this concept in a consensual way. The same goes for the concept of hate speech. There needs to be a

definition in which States can agree upon, pressuring them to adopt instruments in their domestic legislations that comply with this definition.

When it comes to European Law, the process was more or less the same as it was in International Law. Sexual orientation and gender identity began to be included in the larger scope of the principle of non-discrimination, with the help of ECtHR's decisions and the adoption of new legal instruments, and are now part of abundant documents, namely directives, conventions, recommendations and guidelines. Efforts have been made concerning the inclusion of LGBTI people. Law is a reflexion of social progress and that is why the debate around LGBTI issues is so recent. The past was marked by ignorance and misinformation regarding the issue and it is the role of decision makers to fight the ignorance and misinformation that still exists.

Regarding the European Union Law, it seems unreasonable that a system created so many years ago, under values such as tolerance, respect, non-discrimination, human dignity and equality, having stand out in the fight against homophobia almost since its beginning, still has not adopted a comprehensive criminal law instrument regarding hate crimes against LGBTI people and, consequently, still having discrimination within its law when it comes to LGBTI people. With this research, it became even more clear that this need for a criminal law instrument should be considered a priority.

The main conclusion to be drawn is that hate, violence and discrimination still exist. If not in the law, it exists in the mind of some people. Having specifically in the law that criminal offences with a hate motivation based on sexual orientation and gender identity are prohibited, especially if they are considered as an aggravating circumstance, gives people the message that the issue is to be taken seriously. States should also make a greater effort in raising the awareness of people, either with campaigns or through educational programs.

The main problem regarding hate crimes is, as I concluded, reporting and, consequently, under-documentation. This problem is a common denominator in all the reports on hate crimes across the globe that I was able to analyse, given that they all point out the lack of available data. Victims might report hate crimes to NGOs, as I observed in the last chapter regarding Portugal and Slovenia, but few of these cases are in fact officially reported.

So why do not victims report crimes committed against them? According to my analysis, the main reason is the lack of trust in the system. The idea that nothing will change even

if they report. And even if they report and the case goes further, because it is not always possible to register the motivation of the crime, the offense will just be defined as another crime and not as a hate crime. Besides this, given the stigma, ignorance and misinformation that still exists, not every victim wants to be open when it comes to their sexual orientation or gender identity, so reporting the crime might make them feel even more vulnerable and exposed to abuse. Also, sometimes victims fail to make the link between the criminal offence and their own personal characteristics that triggered it. In addition, police officers need to be aware of the issue, in order to be able to help and to redress the crime in the best manner, which, in the most cases, they are not.

All things considered, without reporting there is no official data available. Consequently, according to the numbers, it is almost as if hate crimes do not exist. And if they do not exist it is not necessary to adopt any new measures to prevent them and to protect LGBTI people. There is an urgent need to create a uniform approach in collecting data.

In my understanding, the only way to uniformize criminal law and data collecting practices in all Member States, is with the adoption of a comprehensive criminal law instrument at the level of the European Union. As such, and after what I learned with this thesis, it is very clear the need for opening the scope of the Framework Decision on racism and xenophobia or for the creation of another instrument specifically inclusive of LGBTI rights.

I share this opinion with other organizations, as I mentioned throughout my research. This issue has been brought up before and it is my hope that the adoption of such criminal instrument happens somewhere in a near future, given the human rights at stake and the need to protect LGBTI people from criminal offences, so that they can enjoy their other human rights fully.

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