

Bias or hate incidents as criminal acts – The new provision of Art. 361 B of the Greek Penal Code

Petros Alikakos

Judge, Ph.D.,

Council of Europe's HELP trainer, CEPEJ expert

1. Hate incident in the international legal literature

In the international doctrine hate or bias incident¹ consists the attack against a person or a property, which is motivated wholly or in part by the intolerant attitude of the offender against a tribe, religion, disability, national origin, sexual orientation or gender identity². According to the prevailing legal theory hate incident relates to an act which is not in itself a criminal offense, but consists of hatred because of the race, color, religion, descent, national or ethnic origin, sexual orientation, gender identity or disability of the victim³. According to this point of view hate incident is an act that could become a hate crime, provided, however, that it would fell in the form of a fixed offense of the Criminal Code.

As examples of hate incidents we could prescribe: the verbal abuse, such as articulation of offensive jokes or jokes using insulting phrases⁴, verbal harassment, coercion or intimidation of children, adults, neighbors, physical aggression, such as pushing, telephone prank calls, billboard posters, graffiti, dropping litters in a garden as derogatory behavior. In the above examples we could also qualify actions such as providing food in a public place to a certain group of individuals, determined by gender, religion, race or ethnic origin, or blood

¹ We could also use the term "prejudicial incident", as in several legal orders we find the term «prejudicial crime» or «crime with prejudicial motive».

² <http://www.davidson.edu/student-life/multicultural-life/hate-crime-and-bias-incidents>,
<http://www.tolerance.org/supplement/identifying-and-responding-bias-incidents>,
<http://www.mpac.org/programs/hate-crime-prevention/what-is-a-hate-crime.php>

³ <https://www.citizensadvice.org.uk/wales/discrimination/hate-crime/what-are-hate-incidents-and-hate-crime/>,
<http://www.davidson.edu/student-life/multicultural-life/hate-crime-and-bias-incidents/> ,
<https://csl.uchicago.edu/get-help/bias-response-team/hate-crimes-and-bias-incidents/>,
http://archive.adl.org/campus/guide/bias_incidents.html#.VcMIE_mSw_B

⁴ The use of the term "refugee" or "gypsy" may not contain violence. What matters is the context surrounding these terms, such as when the context is hostile or used with racist or xenophobic character.

donations provided that the collected blood would be given to a certain group of people with specific characteristics in the base of distinctive behavior⁵.

Hate incidents are mainly located in campuses and workplaces. As part of the university life are addressed by internal regulations against discrimination or codes of conduct of the departments responsible for the staff⁶. In the U.S. literature we find plenty of hate incidents recorded within the academic or school life, and of course in workplaces. As examples they have been registered as hate incidents: 1. reference of derogatory comments by the teachers for certain groups, such as women, religious minorities, racial minorities or people with disabilities. It is also noted⁷ that students are reluctant to report such incidents because of the power relationship developed with teachers, 2. reference of sexist comments, jokes or gestures in the workplace, 3. demonstration in workplaces of images or objects containing inappropriate sexual messages, as many people in these areas are likely to be negatively affected by these images and by the comments that will accompany them⁸.

2. The consequences of the hate incident in the society

Particularly when they are being repeated in a certain frequency and when they gain wider appeal, hate incidents are capable to build strongly racist trends in the society. The repetition of these forms of discrimination and racism and its tacit acceptance by society, can lead to the creation of a racist culture, which can affect subconsciously and consciously persons, who they constitute a society or a social group, and ultimately they can become even customary treatment conditions⁹.

It should also be stressed that hate incidents are the anteroom of hate crimes. Gordon Allport¹⁰ states that there is a risk of escalation. Allport formed a pyramid, starting from verbal violence, continuing to the discrimination and ending in the physical violence and extermination. In this sense, in order to avoid escalation of hostility to more harmful levels,

⁵ <https://www.citizensadvice.org.uk/wales/discrimination/hate-crime/what-are-hate-incidents-and-hate-crime/>,
<https://www.citizensadvice.org.uk/wales/discrimination/hate-crime/what-are-hate-incidents-and-hate-crime/>,
<http://www.mpac.org/programs/hate-crime-prevention/what-is-a-hate-crime.php>

⁶ <http://www.davidson.edu/student-life/multicultural-life/hate-crime-and-bias-incidents/>

⁷ <http://www.davidson.edu/student-life/multicultural-life/hate-crime-and-bias-incidents>

⁸ <http://www.davidson.edu/student-life/multicultural-life/hate-crime-and-bias-incidents>

⁹ So was the case of student unions in the US, which encouraged the use of fancy dress costumes and behavior patterns, thus creating stereotypes with a hostile content to racial or ethnic groups of people:
<http://www.davidson.edu/student-life/multicultural-life/hate-crime-and-bias-incidents>

¹⁰ *The Nature of Prejudice*, Cambridge, Wesley Publishing, 1954.

Allport stressed the importance of the response, when phenomena are still at the base of the pyramid.

In the U.S. literature we could identify several examples where inaction against "innocent" incidents resulted in the physical extermination of the victims of these incidents. In particular, it is referred a student suicide incident, who occasionally became victim of hate incidents by his housemates, as a result of his sexual preferences. The act of suicide ultimately was prosecuted as a hate crime, with the aggravating circumstances that this offense has. An early, however, and effective response to the incidents of violence could possibly avert the fate of his desperate step.

In a broader context, in the wider interpersonal and social relations, police authorities have assessed the gravity of the facts and they call for the reporting of such incidents, so that they can record them, without, although, the ability of their criminal response¹¹. The modern trend promotes the creating of online anonymous reporting of hate incidents. In the United Kingdom there is an online system called "True Vision"¹². Through this system everyone anonymously is able to report an incident of violence, choosing the local police force and filling out a form, which can describe the incident of violence, giving also details about the victim and the perpetrator. The site provides information on the outcome of the petition and the possible response of the police in this.

3. The gravity of the problem

Typically, as mentioned above, hate incidents take place in educational units¹³. Apart from universities or schools, frequently incidents are growing in areas as workplaces (see above). It thus becomes apparent that the size of the problem expands and occupies almost the entire spectrum of society.

This problem becomes more pronounced, as hate incidents are being spread throughout the society, as forms of social or political action. This is coupled with the lack of legislative provision at criminal, administrative or disciplinary level, regarding the suppression and treatment of such phenomena and finally makes the size of the problem particularly acute.

4. Fighting the problem in international and European level

¹¹ <https://www.citizensadvice.org.uk/wales/discrimination/hate-crime/what-are-hate-incidents-and-hate-crime/>

¹² www.report-it.org.uk

¹³ <http://www.sa.ucsb.edu/responding-to-distressed-students/concerns/hate-crimes-hate-incidents-or-hazing/hate-crimes-or-hate-incidents> , <http://www.davidson.edu/student-life/multicultural-life/hate-crime-and-bias-incidents> , <https://csl.uchicago.edu/get-help/bias-response-team/hate-crimes-and-bias-incidents>

Already in the context of hate speech, which is not a criminal offense in many countries, the ministerial meeting of the OSCE in 2003 adopted the position that there is the possibility that hate speech can lead to hate crime phenomena¹⁴.

According to the International Convention on the Elimination of All Forms of Racist Violence of the UN of 1965¹⁵, the parties should not permit authorities or institutions, at national or local level, to promote racial discrimination (art. 4c). According to Article 6 of the Convention, the Parties shall ensure effective legal protection against all acts of racial discrimination, enabling compensation to victims of such acts¹⁶.

Hate incidents, when they are isolated incidents that take place at work, at school or at the university, they may be addressed by the mechanisms of these institutions. They even could be approached in the context of therapeutic or restorative justice, especially when incidents occur on campuses or in the neighborhood¹⁷.

On another level, however, when incidents of violence or hate incidents are forms of "social action", which receive special publicity, carried out in public and addressed to an indefinite number of people, the extent of their impact to the community should be taken into account. Since the discriminatory treatment based on gender, religion, national origin, etc. takes these broader dimensions, we see that the limits to violence or hate crime are blurring, especially in the form of one or other of the so called honor crimes.

Moreover, according to the recent EU Directive 2012/29, to which member - states should have complied by November 15, 2015, it requires (Art. 22) from member - states to take all necessary measures, in order to provide early protection to the victims of hate crimes. Moreover, according to the above Directive the training for public order forces should be specialized, so as they would be able to understand hate crimes and take the appropriate

¹⁴ Resolution 4/2003, ministerial meeting of OSCE in Maastricht.

¹⁵ International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted by the no 2106 (XX) Resolution of the General Assembly of U.N. on 21-12-1965 and entered into force on January 4, 1969.

¹⁶ «States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination, which violate human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination». Already the Committee on the Elimination of Racial Discrimination of the UNHCR on Human Rights monitors the member states for their compliance with the Convention (<http://www2.ohchr.org/english/bodies/cerd/>).

¹⁷ <http://www.tolerance.org/supplement/identifying-and-responding-bias-incidents>

measures to protect the victims of such crimes. Finally, in accordance with Decision 9/2009¹⁸ of the OSCE Ministerial Council held in 2009, member - states were obliged in that incentives violence will be recognized and condemned by the public authorities and the political leadership.

5. Hate or bias incidents and human rights from the point of ECtHR case law

ECtHR in a series of decisions argued that States have, in accordance with the European Convention on Human Rights (ECHR), the obligation of their own motion to investigate the existence of racial motivation in crimes, when it is probable. On the contrary, according to the Court, 'would be tantamount to turning the authorities their back in the specific nature of the acts, which is however particularly destructive of fundamental rights' and that consists a violation of the prohibition of discrimination enshrined in Article 14 of the Convention¹⁹.

The Court emphasizes that in crimes of violence based on racial or religious discrimination, the state should set high demands. Investigators and prosecutors must recognize fluently and give the highest priority to violence elements involved in violence or hate crime. They should further take all measures, so that in a short time could be able to collect evidence on the intention and mood of the offender and lead the perpetrator to justice²⁰.

From the case law of the Court interesting is the case *Dordevic v. Croatia*²¹, which is one of the few cases, in our view, that considered a hate incident. In this case, a mother and a son lived in a ground floor apartment in Zagreb, Croatia, next to a primary school. Between 2008 and 2011 they suffered permanent harassment by schoolchildren. Incidents escalated and the minor son was derided in the street, strangers urinated in front of the door of their house, they threw stones at the windows and eventually caused burns to the hands of the child with cigarettes. These offenses had a negative effect on the child, who became antisocial and finally suffered psoriasis due to the accumulated stress. The mother of the minor reported the incidents to the competent authorities (social services, police, school), but according to the

¹⁸ See also <http://www.osce.org/cio/40695>. We should extol the efforts of the OSCE against hate crimes through mainly by the actions of the Office for Democratic Institutions and Human Rights (ODIHR), one of which is the creation of a specific crime reporting website hate the states - members (<http://hatecrime.osce.org/>).

¹⁹ *Nachova and Others v. Bulgaria*, (Grand Chamber), 6 July 2005, par. 160-168: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69630>.

²⁰ *Milanovi v. Serbia*, (Chamber Judgment), (Final) 20 June 2011: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102252>

²¹ (Chamber Judgment), (Final) 24 October 2012: <http://hudoc.echr.coe.int/eng?i=001-112322#1%22respondent%22:%22HRV%22,%22documentcollectionid%22:%22GRANDCHAMBER%22,%22CHAMBER%22,%22itemid%22:%22001-112322%22>

Court sufficient measures were not taken. In this case the Court held that the competent authorities, although they knew of the continued harassment of the applicant and her son, however, they did not take the necessary measures to identify the magnitude of the problem, so as to avert further escalation of violence.

Although the Court does not require that ECHR member states would institutionalize this type of legislation to combat hate incidents or hate crimes, however categorically the Court recognizes that "hate crimes require a proportional response to the induced damage on the part of criminal justice²²". As hinted above, ECtHR has not employed the concept of the hate incident in a direct way. This attitude, however, of its case-law, when the Court had to deal with hate crimes or hate speech, always interpreted according to the principles of subsidiarity and proportionality, we believe that allows the inclusion of some forms of hate incidents in the criminal system of the member states. Especially since that is going to take place an express provision in the criminal legal system of the member states, then the ECtHR will be called in the future to determine the semantic nature of the hate incident more precisely.

6. The new article 361 B of the Greek Penal Code

De lege lata according to the provision of Art. 16 par. 1 of Law no. 3304/2005, whoever violates the prohibition of discrimination on grounds of ethnic or racial origin or religion or other beliefs, disability, age or sexual orientation, provided for by this law, during the sale of goods or the provision of services to the public is punished by imprisonment of six (6) months up to three (3) years and with a fine of one thousand (1,000) to five thousand (5,000) euro. This provision has been in force in the Greek legal order for over ten years (since 27 January 2005). Therefore, we notice that at the level of the trading of goods or services (Article 4, 1) there is already a ban on discrimination for the above reasons.

In the above context and in the direction of the criminal answer to incidents of violence, the newly introduced provision of article 361 B of the the Greek Penal Code (P.C.), as it was added by art. 29 law no. 4356/2015 (Government Gazette A / 181 of 24.12.2015), regulates the occurrence of violence or hatred and is correctly included in the relevant chapter of crimes against honour. This provision extends the criminal protection of Law no. 3304/2005, as described above, to the field of voluntary humanitarian supply of goods and services²³.

²² *Secic v. Croatia*, (Chamber Judgment), (Final) 31 August 2007, par. 66:
<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80711>.

²³ According to the introductory report of the new provision: "the extension of criminal protection in the field of voluntary humanitarian supply of goods and services is deemed necessary, because in these cases, the detestable exclusion does not merely diminish the victim's social performance but denotes the denial of his own human property, thus humiliating the victim but also propagating to the community the notion that there are lives stripped of the person's personality, for food or for treatment".

The first paragraph of the new article defines the basic form of the crime. According to this provision, "any person who supplies goods or services or announces by public invitation the provision or supply of such persons by excluding out of contempt persons due to their race, color, ethnic or ethnic origin, birth, religion, disability, sexual orientation, identity of sex is punishable by imprisonment of at least three (3) months and by a pecuniary penalty of at least one thousand and five hundred (1 500) euro'. The second paragraph defines the aggravating form: "if in the act of the preceding paragraph two (2) or more persons have been involved, the act is punishable with an imprisonment of at least six (6) months and a fine of five thousand (5,000) to twenty five thousand (25,000) euro.

The new provision harmonizes with the Greek Penal Code system and is in line with the provision of Article 81a of the Penal Code, which defines hate crime. Its objective condition requires the supply of goods or the provision of services or the announcement by public call for the supply or supply thereof. We consider it to be a cumulatively mixed crime, which can be realized in three different ways of behavior.

In this sense, the perpetrator of the crime by committing a single way or type of the offense, also carries out a separate offense and the provisions on the cumulative sentence (94 P.C.) is applied. However, there may be a relationship between the acts and the continuation of the same crime (98 P.C.) would be applied. Finally, in the case of committing a single form of the crime, it is no eligible to change the accusation to another form, than that for which the accused is being introduced to the criminal trial.

The above offence is also an offense of over-subjective subjection, as the legislator demands it to be "out of contempt". This condition should not in principle be overshadowed, because the Penal Code introduces in most cases subjective elements of the wrongdoing that make the subjective hypostasis 'superfluous'. The concepts are known, such as: "selfishness", "fugitive", "cruel behavior", "cruel offense", "compassion", "malice", scattered in provisions of the Greek Penal Code (articles 199, 300, 358, 394, paragraph 4, 406, 407).

The phrase "out or hatred" set out in Article 81a of the Penal Code on racist crime could be also adopted. However, the legislator chose the phrase "out of contempt" because in Article 81a of the Penal Code the perpetrator has already committed an unfair act against the victim, has already externalized an illegal behavior that can reach up to the culpable offense of malice. In contrast to Article 361b of the Penal Code, the offender's conduct is not subject to any prior tension and is criminalized firstly by the adoption of this article, thus making the offense of 361 B PC an actual crime in comparison to the principal crime that is the insult (art. 361 P.C.).

For the assessment of contempt, account shall be taken of the circumstances and particularities of the act referred to in Art. 361 B P.C. In the introductory report of the new provision, it is mentioned in this regard that the element of contempt is not sufficient to be inherent in the subjective intentions and motives of the perpetrator, but should characterize the objective meaning of the act of exclusion. It is to be inferred from the circumstances and the particular characteristics of the act, the actual humiliation of the victim. The legislator also

stresses in his report that exclusion from services and goods should objectively be seen as the victim's actual contempt.

7. Conclusion

Hate or bias incidents are found in the bottom of an escalation pyramid, which finally peaks to hate crime. The criminal response to the hate incident is needed more, when hate incidents take place as acts of public and/or political action. In this case their inclusion in to the penal code as criminal acts against the honor is the only severe answer of the state. So is the response of the Greek legislator after the last amendment of the Greek Penal Code with the article 361 B according to art. 29 of the law no. 4356/2015.

The criminal provision of the new Article 361B of the Greek Penal Code broadcasts a teaching message. The role of criminal law is also a pedagogical role for the society as a whole. The inclusion in the penal code of a provision penalizing the occurrence of violence or hatred, especially in the form of social action, such as the new provision of Art. 361 B of the Greek P.C., conveys to the citizen the message of cultural maturity and of human cooperation.

On the international level ECHR protects the right to the integrity of the person and it forbids the discrimination and the racist and intolerant behavior in many articles such as 2, 3, 8, 9, 10. The provision of the hate or bias incident as criminal acts in the criminal codes of the respective states – members of the Council of Europe will help the structure of a European standard and a European consensus, that will contributes in the fight against racist and intolerant behaviors in Europe.