

## **THE ROLE OF THE STATE IN CONFRONTING HATE CRIMES THROUGH THE LAW**

### **Summary**

This article aims to point out the role of the state in dealing with hate crimes through the law. In this regard hate crimes are being understood not so much as a product of individual psychology, but primarily as part of the process of "making a difference", based on the social conceptions of the "other." From this perspective hate crimes are rooted in ideological structures of social oppression and marked by deeply embedded negative representations of difference in terms of race, ethnicity and the like. This in turn implies that the extent to which the difference is socially constructed, it can also be socially deconstructed or reconstructed. And hate crime laws are an explicit attack on the backend infrastructure that provides the context for acts of hatred with ultimate purpose to create (more) moral social fabric. The paper also addresses the dilemmas related to identity politics or the question on whether special treatment can be more helpful or hurtful, again leading to the conclusion that ignoring social differences is rarely enough to produce equality, especially in the criminal justice system. Additionally, although hate crime laws may seem at first glance to identify, limit and promote concern for the social differences, the way they are written and applied aims to promote equality and to overcome the differences.

**Key words:** *hate crimes, identity politics, sanctioning, legislation.*

Individual acts of violence motivated by the cultural identity of the victim<sup>1</sup>, which are now generally referred to as "hate crimes" will be presented here in the socio-cultural context. That is, as a part of the "network of enabling norms, assumptions, behaviors, institutional arrangements and policies, which are structurally related in a way that reproduces cultural hierarchies that characterize the society in question".<sup>2</sup> According to this conception, the execution of individual acts of racial or cultural identity violence confirms the boundaries that separate one group from *the others* or in other words, confirms ("natural") relations of superiority and inferiority between the groups in the society. In this sense hate crimes are form of intercultural expression that indicates boundaries.<sup>3</sup>

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<sup>1</sup> Hate crimes that are otherwise older, are being placed here in the new context opened by the debate on the right to cultural identity. That debate directly affects the motivational basis for "hate crimes". The paper builds on this ratio. Because of this other important protected characteristics, like gender identity, sexual orientation and physical and mental incapacity, are being omitted.

<sup>2</sup> Barbara Perry, *In the Name of Hate: Understanding Hate Crimes*, Routledge, New York, 2001, p. 1.

<sup>3</sup> *Ibid.*, p. 56.

Conceptualization of hate crimes as (informal) mechanism of constructing difference implies that hate crimes may take place only in an enabling environment. The state practices, the policies, and the rhetoric set the framework in which hate crimes appear - as an informal mechanism of control. Additionally, the political rhetoric too often becomes institutionalized in public policy and legislation. This means that hate crimes are legitimized and accompanied by a range of mitigating/enabling mechanisms such as stereotypes, language, legislation and segregation of jobs.<sup>4</sup> Thus, the practices within the state that stigmatize, demonize and marginalize other cultural groups, enable the abuse of the same groups on the streets. It turns out that a hate crime is "abnormal, only to the extent to which the eligible racist perceptions are expressed in a socially unacceptable manner. Sentiments are legal, only the attack is illegal".<sup>5</sup>

But if the state unconsciously or deliberately contributes to certain ethnic/cultural categorizations getting their robust or strong meaning, it also means that the state has the power to effectively weaken them. In other words, to the extent that the difference is socially constructed, it can also be socially deconstructed or reconstructed. Practically this means that "as a society we can redefine the ways in which difference 'matters'. We can fight for a just and democratic society in which ... the difference is revalued in a positive way".<sup>6</sup>

This brings us to the question of the role of the State, and more specifically, the role of the law in confronting hate crimes.

Understanding hate crimes as crimes that "make a difference" (or at least confirm it) consistently maintain our focus on value systems that have created these crimes. Giving the permeating character of those value systems, the state and its law (anti-discrimination and criminal law) will have to play an important role in the intervention against hate crimes.<sup>7</sup> Anti-racist policy is accomplished through structural policy, i.e. through changing the institutions - change of the persecution of persecutors and of the discrimination of discriminators. As Barbara Perry points out, a first important step in enabling *others* is to examine the role that legal structure has in maintaining unequal power relations between the cultural groups. The law is ensnared in shaping and evaluating the difference between them. "It is an integral part of the field where the difference is constructed and reaffirmed, an integral mechanism by which the boundaries between 'us' and 'them' are maintained".<sup>8</sup> This supposes broader legal initiatives that aim to ensure the realization of human rights of all cultural groups in the society. Thus, in accordance with the elimination of discriminatory legislation is also the need for inclusive legislation which specifically addresses hate crimes.

The failure to recognize and to sanction hate crimes as separate crimes only continues the pathology that causes them. What one has to bear in mind is that just as legal actions indicate the value of individuals and communities, their absence is also a mechanism by which people are valued. The absence of a legal response is a message, perhaps unintended, yet clear, regarding the respective value of different human lives.<sup>9</sup>

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<sup>4</sup> Ibid., p. 236.

<sup>5</sup> Ibid., p. 37.

<sup>6</sup> Ibid., p. 236.

<sup>7</sup> Paul Iganski, *"Hate Crime" and the City*, The Polity Press, University of Bristol, Great Britain, 2008, p. 122.

<sup>8</sup> Barbara Perry, *In the Name of Hate: Understanding Hate Crimes*, Routledge, New York, 2001, pp. 228-229.

<sup>9</sup> Mari Matsuda, "Public Response to Hate Speech: Considering the Victim's Story" in *Words That Wound*, Mari Matsuda, Charles Lawrence III, Richard Delgado, and Kimberlé Williams Crenshaw (ed.), Westview, Boulder, Colorado, 1993, p. 18.

The hate crime law, i.e. the legislation that specifically punishes these crimes declare that the motivation of hatred or prejudice will not be tolerated in the society. It also sends message to individuals who can commit these crimes in the context of their everyday lives. The persistence and pervasiveness of the value systems on which hate crimes rely requires the law to serve as a reminder against potential offenses of this kind. Hate crimes laws in this sense are an explicit attack on the backend infrastructure that provides the context for the acts of hatred. Their ultimate purpose is to create (more) moral social fabric, a structure through normative obedience of not only the extremely intolerant, but also of the ordinary people taking care of their everyday lives.<sup>10</sup>

### **- The Legal Response to Hate Crimes as a Part of the State's Identity Politics -**

The request for legal confrontation with hate crimes is basically a request for special (and stricter) treatment of cases of hate crimes in the criminal law of the country. Thus, this request is necessarily faced with dilemmas that are tied to identity politics. These dilemmas in our context will be summarized through the following question: should the care of the state for improving the status and well-being of vulnerable cultural groups be focused on policies that provide their "special" treatment or on policies that ignore the particular social location, special qualities and socially structured obstacles that they encounter and work only on improving the social and legal resources available to all victims of crimes regardless of their cultural characteristics or membership? In other words, should all victims of crimes be treated the same or some of the victims, in this case those who are exposed to cultural identity violence, should be singled out and treated differently? The answer to this question affects the creation of the criminal law and social justice in the particular states.<sup>11</sup>

As pointed out by R. Grattet and V. Jenness (who specifically analyze this issue in the context of hate crimes towards people with disabilities), there are advantages and disadvantages associated with both choices in policy creation. Critics of identity politics point out that identity categories, even when used in a way to fix things, become accomplices in oppressive/regulatory regimes that produce them.<sup>12</sup> Ironically, they say, identity politics responds to group-founded exclusions by affirming the group boundaries. In other words, what is commonly known as the negativity of policies that emphasize the "special" needs of vulnerable groups, such as policies of affirmative actions, anti-discrimination laws and hate crime laws, is that they can strengthen cultural distinctions, that is, to underline their "incapacities" and special needs as a defining feature of peoples identities and thus put them in a subordinate position within the public and private spheres of social life. Arguably, one of the consequences intended by social policies that single out vulnerable groups for "special" care and treatment is strengthening the idea that people of color, ethnic minorities, immigrants, etc. are more vulnerable members of society, which is usually interpreted as less capable to respond to the real and perceived vulnerabilities and, finally, less credible participants in the range of social activities, especially those facing the

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<sup>10</sup> Paul Iganski, *"Hate Crime" and the City*, The Polity Press, University of Bristol, Great Britain, 2008, p. 123.

<sup>11</sup> Види Ryken Grattet and Valerie Jenness, "Examining the Boundaries of Hate Crime Law: Disabilities and the Dilemma of Difference", in *Crimes of Hate*, edited by Phyllis B. Gerstenfeld, Diana R. Grant, Sage, Thousand Oaks, California, 2004, p. 271.

<sup>12</sup> Martha Minow, *Not Only for Myself, Identity, Politics, and the Law*, The New Press, New York, 1997, p. 88.

criminal justice system.<sup>13</sup> In short, the use of identity groups or categories may do more harm than good.

These warnings deserve attention. However, they overlook the fact that the unrecognized group oppression does not solve, not relieve, but accommodates constant group categorizations. "These are related errors. They demand related but contrasting answers".<sup>14</sup> Namely, the injuries resulting from the group oppression are more than just facts of exclusion, economic hardship and humiliation. Along with these specific exclusions a network of narratives is being developed, narratives that seek to legitimize these exclusions by constructing identity of excluded groups to explain why members of that group cannot enter certain fields.

It is true that the stigma of difference can be re-created, by either focusing on it or ignoring it. However, according to the proponents of identity politics, the refusal to recognize the vulnerability of racial, ethnic, religious and other groups may extend the negative sense of identity characteristics in a world designed for some, but not for some others.<sup>15</sup>

More specifically, the same treatment of the victims of hate crimes as the victims of other crimes does not reduce the prejudices and stereotypes on which the officials of criminal justice often act upon. Ignoring the social differences is rarely enough to produce equality, especially in the criminal justice system. Hate crimes are often unrecognized or ignored by the law enforcement. Failure to recognize the differences over the systematic injustices allows civil servants to continue to work as usual and do little to cure the legal and systematic inequality.<sup>16</sup>

The choice between emphasizing social differences in law or not, i.e. the tension between the policies of "same" as opposed to "different" treatment, Martha Minow labels as "dilemma of difference". According to Minow, "the dilemma of difference" is philosophical, legal and strategic issue that has implications for a range of social issues (for example, from affirmative action to discrimination at work because of disability). The value of considering this "dilemma of difference" is that it forces us to anticipate the negative consequences of the reforms based on creating "special" treatment where such treatment directly or indirectly reproduce the stereotypes for minorities and to recognize the flaws of ignoring the differences that define minorities of any kind. In other words, the dilemma of difference sharpens the sense of the legislators and policymakers of the consequences associated with the implementation and running of one policy approach over another.

Minow emphasizes that the identity politics is inclined to locate the problem more in the identity group than in the social relations that produce identity groupings. But when *the fundamental legal issue is whether the individual deserves a remedy for it is ill-treated because of a group membership*, Minow points to an important alternative.<sup>17</sup> Namely, the legislation may use the legal concepts that explicitly focus on the negative attitudes that violate individuals, such

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<sup>13</sup> Ryken Grattet and Valerie Jenness, "Examining the Boundaries of Hate Crime Law: Disabilities and the Dilemma of Difference", in *Crimes of Hate*, edited by Phyllis B. Gerstenfeld, Diana R. Grant, Sage, Thousand Oaks, California, 2004, p. 271.

<sup>14</sup> Charles R. Lawrence III, *The Epidemiology of Color-Blindness: Learning to Think and Talk about Race, Again*, 15 Boston College Third World LJ, 1995, pp. 6-7. Цитиран според Martha Minow, *Not Only for Myself, Identity, Politics, and the Law*, The New Press, New York, 1997, p. 150.

<sup>15</sup> Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law*, Cornell University Press, Ithaca, New York, 1990, pp. 20-23.

<sup>16</sup> Ryken Grattet and Valerie Jenness, "Examining the Boundaries of Hate Crime Law: Disabilities and the Dilemma of Difference", in *Crimes of Hate*, edited by Phyllis B. Gerstenfeld, Diana R. Grant, Sage, Thousand Oaks, California, 2004, p. 271.

<sup>17</sup> Martha Minow, *Not Only for Myself, Identity, Politics, and the Law*, The New Press, New York, 1997, p. 56.

as the perception of skin color, ethnicity, religion and the like.<sup>18</sup> This draws attention to the situation with the arrangements of power and unfavorable treatment instead of supposedly unfaltering nature of people injured by these arrangements of power and unfavorable treatment. In other words, *the focus of identity politics should not be on the nature of people who are discriminated against, but on the idea of them formed in the policies and programs that treat them less favorably (for e.g. vulnerable cultural groups will lose either from the claims that culture is innate/rooted in the individual, either from the claims that it is not). "The perception and abuse are and should be the focus of attention, not the naturalness of the categories"*.<sup>19</sup> This feature emphasizes the damage from "being considered" a member of specific (vulnerable) group and diverts attention on being labeled and abused by others.<sup>20</sup>

With the "dilemma of difference" in mind, we again conclude that certain types of groups (on grounds of race, ethnicity, religion, etc.) should be specially protected by the criminal law.

Namely, hate crimes laws are recent, innovative and special response to violence motivated by racial, ethnic, religious, etc. hostility and prejudice. This criminal category - hate crimes calls for special control measures, special investigation concerns and stricter penalties.

Although hate crime laws are designed to protect certain groups - racial, ethnic, religious and other groups that witness presence of historical discrimination and violence motivated by prejudice directed at them, they - like the other anti-discrimination laws that preceded them - are written in a way that leaves out the historical basis and significance of hate crimes. Hate crime laws translate specific categories of people, such as blacks, Jews, Muslims, immigrants into comprehensive and seemingly neutral categories, such as race, religion, national origin. In doing so hate crime laws do not offer remedies or protection of vulnerable groups that are not simultaneously available to all other races, religions, nationalities, etc. In other words, hate crime laws are written in a way that evens hate crimes against black person with those against white person thus promoting equality "within the category". So, although hate crime laws, at first glance may seem to identify, limit and promote concern for social differences, the way they are written and applied aims to promote equality and overcome differences. Accordingly, in the context of Martha Minow's alternative, it is possible for hate crime laws to succeed in enhancing public awareness to criminal victimization of people without defining them as "special."

### **References:**

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<sup>18</sup> Ibid., p. 80.

<sup>19</sup> Ibid., p. 63.

<sup>20</sup> Ibid., p. 88.