LIFECYCLE OF A HATE CRIME

COUNTRY REPORT FOR SWEDEN

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This report has been produced with the financial support of the Rights, Equality and Citizenship Programme (2014-2020) of the European Union. The contents of this report are the sole responsibility of the Irish Council for Civil Liberties and can in no way be taken to reflect the views of the European Commission."

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1 Introduction

Measures against crimes motivated by bias have been defined as a priority issue in Sweden since the mid-1990s. The Swedish Government has stated that these crimes are seen as a violation of human rights and, as such, important to combat.

> *"Effective measures against racism and hate crime contribute towards the objective of ensuring full respect for Sweden's international human rights obligations. Combating racism and similar forms of hostility prevents the risk of individual's rights being infringed."*[1]

For legal actors in the Swedish judicial system, prioritising hate crime concerns increasing the number of prosecutions and convictions and also furthering measures aimed at improving the way in which victims of hate crime are treated when they come into contact with the judicial system. This has for example been discussed in the context of supervisory reports regarding both the work of the police and the work of the prosecutors.[2]

As an example, it can be mentioned that in October 2017 an annual increase of SEK 10 million (approximately 1 million EUR) was announced in the budget of the Police Authority to be directed to the special democracy and hate crimes units within the three largest cities in Sweden.[3] This extra funding is intended to provide the means for strengthening the capacity of the units to investigate hate crimes, by providing them with more opportunity for education and training, and also for improving coordination of the work among them.

The aim of this study is to investigate the application of criminal laws and sentencing provisions regarding bias-motivated crimes in Sweden. Our goal is to identify best practices with regard to the tools used to combat bias-motivated crimes by studying legal regulations and policy documents and comparing these with the experiences of the legal

[1] Government Offices of Sweden, A comprehensive approach to combat racism and hate crime. National plan to combat racism, similar forms of hostility and hate crime, 2017, p. 17.
[2] See for example Utvecklingscentrum Malmö, Hatbrott – en granskning av åklagarnas handläggning. Tillsynsrapport 2016:1, Polismyndigheten, Återredovisning till regeringen angående polisens åtgärder rörande hatbrott, 2017.
[3] https://polisen.se/Aktuellt/Nyheter/Gemensam-2017/Oktober/Mer-pengar-till-hatbrott/

actors (judges, prosecutors and defence lawyers) of how this legal framework is applied in practice. This is a study that contrasts law in books with law in action, in that, by interviewing those working with hate crime legislation, we have attempted to discover what works and where there is room for improvement. In line with this, we also interviewed victims of bias-motivated crimes and offenders who have committed such crimes. The overall aim is to investigate both how these groups have been met by the judicial system and their opinions of these meetings.

There is no specific offense in the Swedish Penal Code called hate crime, or bias-motivated crime. There are, however, other offenses that cover such situations. There are three specific offenses that refers to bias motivation; agitation against a national or ethnic group, unlawful discrimination, and insult. All three offenses include some formulation of protection of categories or groups based on for example ethnicity, sexual orientation or religious beliefs. But a bias motive can also be seen as an aggravating circumstance in regard to almost any criminal offense. That is, can it be proven that the perpetrator of, for example, an assault had a bias motive when committing the assault, s/he can get a more severe punishment. This is formulated in terms of a section on aggravating circumstances in the chapter of the Penal Code dealing with sentencing.[4]

The use of legislation to combat actions motivated by hatred is not only a central strategy in Swedish law, but it is also a legal requirement under international law. The international legal framework comprises global legal requirements, foremost from the United Nations, and entails treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of Racial Discrimination (CERD). The use of hate crime laws is also supported by bodies such as the European Commission against Racism and Intolerance (ECRI), the European Union Agency for Fundamental Rights (FRA) and the Organization for Security and Cooperation in Europe (OSCE).

The report is funded by the EU Directorate-General for Justice and Consumers and forms part of a wider European study into the use of hate-crime laws across five EU Member

[4] For a more extensive description of these offenses and the section on aggravating circumstances, see chapter 4.

States (Sweden; England and Wales; Ireland; Latvia and the Czech Republic). The study was carried out over a 24-month period and uses a variety of sources, both secondary and primary, to answer questions set out as part of the cross-jurisdictional project (see research design below).

1.1 Research Design

As mentioned above, the aim of this study is to investigate the application of criminal laws and sentencing provisions to bias-motivated crimes in Sweden. Our goal is to identify best practices in the measures used to combat such crimes by integrating judicial experiences with those of victims of these crimes and offenders who have committed them. Our concept is to explore how legislation is used in practice from the perspective of those who directly engage in the criminal justice system, be it judges, prosecutors, defence lawyers, victims, victim support workers or offenders.

A mixed-methods approach was employed for the project, enabling us to compare the aims and purposes of policies and legislation with the experiences of those enforcing and applying the law. This approach included an assessment of existing policies and 58 in-depth, qualitative semi-structured interviews with judges, prosecutors, defence lawyers, victims, victim support workers and offenders.

1.1.1 Documentary and Secondary Sources

We used official documents, including legislation, policy and procedures relevant to the enforcement of legislation concerning bias-motivated crimes to establish the ways in which hate crime is conceptualized and dealt with by authorities in Sweden. We also used statistics in the public domain relating to the number of crimes with a bias motive that are recorded by the police each year. This data is available on the public website of the Swedish National Council for Crime Prevention (BRÅ). There are, however, some difficulties attached to using these statistics. For example what the police might record as a hate crime will not necessarily be seen as a hate crime in terms of the evidence needed for a prosecution or conviction. For example, if the victim reports to the police that the offender used a homophobic or racial slur when committing the offense, it is recorded as a hate crime. But if the police do not find witnesses that can collaborate the

victim's story, and the offender denies that such word were used, it is very likely that the crime will not be prosecuted as a hate crime.

Collecting data on hate crimes in Sweden is problematic. Firstly, hate crime is not a category of crime that is expressly regulated in the Penal Code. Secondly, there are no specific crime codes for hate crime in the police computer system for recording reported crimes. Information from the police on the number of hate crimes is in the form of the marking of potential hate crimes by individual officers, which, although a mandatory procedure, has been shown to be substantially deficient in its application. The procedure is designed in a way that the computerised system for recording reported crimes will not allow the police officer to proceed to register the crime in the system without checking a box for "yes" or "no" to the question if the crime could be a hate crime. BRÅ has noted that quite a lot of crimes have been wrongly marked as hate crimes, in that a later analysis have shown that no bias motive could be identified in the actual description of the situation that constituted the crime. For these reasons, BRÅ does not collate the hate crime statistics generically, but instead uses a method specifically developed for this purpose.[5]

BRÅ uses a computerised search based on a list of search words[6], applied to a random sample of fifty percent of police reports relating to a number of specific crime categories. Reports identified by this computerised search method are then studied manually in three steps by at least two different people working independently. An estimation procedure is applied to produce population-level estimates. These estimates constitute the statistics in police reports of crimes identified as being motivated by hate. It is important to know about the method used by BRÅ in order to make accurate use of the statistical information it publishes.

[5] Brottsförebyggande rådet (2017) Hatbrott 2017. Statistik över polisanmälningar med identifierade hatbrottsmotiv och självrapporterad utsatthet för hatbrott. Rapport 2017:11, p. 27–30.

[6] The list of search words consists of about 400 words or phrases that are defined as hate crime related. The compilation of the list builds on the experiences of those working with hate crime statistics, from police reports and contacts with target groups. Example of words: fag, jew, lesbian, gypsy, swastika, nazi etc.

1.1.2 Qualitative Interviews

In-depth qualitative semi-structured interviews were conducted both with legal actors in the criminal justice system and with victims and offenders involved in bias-motivated crimes. The purpose was to obtain information about the day-to-day operation of the criminal justice system in relation to hate crimes. In particular, these interviews were important in identifying differences between stated policy and everyday practice, and any consequences for the handling of bias-motivated crime.

In this study, we have interviewed judges, prosecutors and defence lawyers, asking them about their experiences and opinions of the Swedish criminal process regarding hate crimes. We asked them what they think of the current legislation, if they see any challenges to the handling of these cases by the legal system, and if, in their professional opinion, both victims and offenders are given a fair trial.

We applied various approaches to establish contact with possible interviewees. Regarding judges, we ultimately interviewed ten judges with experiences spanning 3 to 30 years on the bench. It can be said that having years of experience does not guarantee that the judges have come into contact with many cases where hate motivation was an issue. We started our search for interviewees by contacting chief judges at different district courts, asking them to put us in touch with judges with experience of adjudicating bias-motivated crimes. This turned out to be a difficult approach, since almost all of the chief judges we contacted replied that they had difficulty finding judges with the necessary experience. We only succeeded in contacting one interviewee in this way. Instead, we used search engines such as Zeteo (a Swedish legal database that publishes adjudicated court cases) in an effort to identify cases where bias motivation was discussed as an aggravating factor. We then contacted, via e-mail, the judges who had presided in these cases, and asked if they were interested in being interviewed about their experiences of adjudicating such cases. We also pointed out that we were interested in their experiences of these cases in general, and that our aim was not to discuss a specific case. In this way, we found nine judges to interview, giving us a total of ten judges. Those who declined quoted lack of experience of such cases, and some also alluded to a heavy workload which meant they had no time to talk to us.

The prosecutors we interviewed were all specially appointed “hate-crime prosecutors” but, even among them, the experience of prosecuting hate-motivated crimes varied significantly. We contacted the Prosecution Development Centre in Malmö, the branch of the Prosecution Authority that has specific responsibility for dealing with hate crimes, and they supplied us with a list of all appointed hate-crime prosecutors in Sweden. There are about 35 such prosecutors in total, and we contacted all of them, consecutively, via e-mail until we received positive replies from 20 prosecutors who then agreed to be interviewed about their experiences of prosecuting cases with a bias motive.

The defence lawyers we interviewed had all been involved in at least one case where they defended someone accused of having a bias motive for their crime. We identified these lawyers in various ways. We contacted a number of legal firms, asking them if they had partners who had experiences of these cases and managed to contact a few. We also asked the prosecutors we interviewed to mention if they remembered who had defended the accused in the cases they had prosecuted. We found some of the lawyers using the same method we used when searching for judges, i.e. through the above-mentioned court cases. This way, we were finally able to interview 15 defence lawyers.

We have also interviewed both victims and offenders of hate-motivated crimes, to try to elicit their opinions and experiences regarding their encounter with the criminal process and its legal actors in these cases. The victims have experience of being victims of hate-motivated crimes focusing on sexuality or ethnicity and the offenders have committed hate-motivated crimes with the same focus. We identified the victims via gate-keepers in the form of people working in NGOs dealing with crime victims, or via our professional contacts with people otherwise working in support for crime victims. In this way, we identified and interviewed three victims. We also interviewed professionals working with victim support, both in a legal capacity as counsel (målsägandebiträde) for the injured party and in a more curative capacity as counsellors. This way, we were able to conduct a total of ten interviews in this part of the study.

It has been very difficult to find offenders willing to participate in interviews. Mostly, our approach has been to go via gate-keepers, but even identifying gate-keepers who were able to help us make contact with offenders proved difficult. We tried various approaches,

for example via the Swedish probation offices, who were very willing but ultimately unable to help. In the end, we were able, via those who had, for example, been part of a racist organization and later defected, to get in contact with a few people who were willing to be interviewed about their experiences of being convicted of a bias-motivated crime. Ultimately, we conducted three interviews with offenders.

All interviews were recorded and transcribed verbatim. The interviews we conducted were both face-to-face and on the telephone. We have to emphasize that this is a qualitative study, we interviewed a rather small number of people about their personal and professional opinions on these issues. But we would like to think that, despite the limited number of interviews, we are still able to present a picture that has some bearing on the challenges which the Swedish criminal process has to face when handling these cases.

1.1.3 Coding and Analysis

The interviews were transcribed and analysed by highlighting interview text and comparing responses to specific interview questions and topics from the different participants. Stage one comprised a full reading and detailed coding of the interview transcripts, while stage two included a first analysis of the coding, as well as any necessary additional coding. In order to analyse the material we grouped the coded answers according to the frequency of their occurrence in the interview answers:

None – indicates that none of the interviewees supported a claim
A few – indicates that fewer than 25% of the interviewees supported a claim
A minority – indicates that fewer than 50% of the interviewees supported a claim
A majority – indicates that more than 50% of the interviewees supported a claim
A significant majority – indicates that more than 75% of the interviewees supported a claim
All – indicates that all of the interviewees supported a claim

We used thematic analysis, which allowed us to organize the data into a number of different themes, from which we elicited topics evolving from the interview transcripts. The idea of this approach is to construct central themes in the study and then sub-themes that emerge from the main issues/points which interviewees discussed.

1.1.4 Ethical Considerations

We received institutional ethical approval through the Regional Ethics Review Board in Umeå, in their decision of 2016-03-15, dnr 2016/773-31Ö. As mentioned above, calls for participants were sent out in various ways, both through emails and through professional contacts. All interviewees were offered anonymity.

1.2 Report Structure

The report is divided into three main parts. In the first part, the Swedish legal system, with the focus on the criminal system, is briefly introduced. The legislative framework for bias-motivated crimes is outlined, and a summary of policy and guidance documents which inform current practice for the prosecution of bias-motivated crimes is presented. This part of the report ends with a presentation of publicly available statistics concerning hate crime in Sweden. The second part provides an analysis of the interview data. In this section the lifecycle of a hate crime is described, within the Swedish criminal process, based on the experiences of the legal actors as well as those of victims and offenders involved in hate crimes. The third part of the report consists of an analysis of the results of the interviews with judges, prosecutors, defence lawyers, victims (and victim-support actors) and offenders. Finally, some recommendations are offered, based on the findings of the study.

PART I LEGISLATIVE FRAMEWORK, POLICY AND STATISTICS

2 The Swedish Legal System

The Swedish legal system is rooted in continental legal tradition with its dependence on statutory law.[7] Sweden has a strong civil law tradition, but is also influenced by the common law system and is said not to fit either system perfectly. With an independent Parliament and a comprehensive civil code, Sweden is in line with most civil law systems, but with no complete codification.[8] The mixture is also shown in the role of the courts, which are ideally suited to determine the intent of the legislator, while relying rather heavily on preparatory work, and are not really supposed to make law. At the same time, the Supreme Court of Sweden has great influence through its precedents, so the picture is rather ambivalent, or alternatively could be described as a mixture of civil law tradition and common law tradition. In recent years, the influence of EU law and of the decisions of the Court of Justice of the European Union and of the European Court of Human Rights has grown stronger.[9]

2.1 The Constitution and the Instrument of Government

The Swedish Constitution comprises four fundamental laws; the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. The constitutional tradition in Sweden has not been very strong for most of the 20th Century, with a more pronounced change taking place in the mid-1980s.[10] As a result, in the past the fundamental laws have played a less influential role than ordinary Acts of Parliament in the everyday life of the citizens and in the general development of Swedish law.

The Instrument of Government is a rather all-embracing document setting forth not only the framework of the branches of government but also provisions relating to human rights protections. On the question of human rights, it should be noted that in 1995

[7] See for example Carlson, Laura, The Fundamentals of Swedish Law, Studentlitteratur, 2012, Nergelius, Joakim, Constitution Law, in Bodgan (ed.) Swedish Law in the New Millennium, Norstedts Juridik, 2000.
[8] This is mostly relevant regarding the civil law, the criminal law is however completely codified.
[9] Jonsson Cornell, Anna (ed.) Komparativ konstitutionell rätt, Iustus förlag, 2015.
[10] Derlén, Mattias, Lindholm, Johan och Naarttijärvi, Markus, Konstitutionell rätt, Wolters Kluwer, 2016.

Sweden incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms into Swedish law.[11] Constitutional Acts, because of their mode of enactment, are considered highest in the hierarchy of importance among laws in Sweden. Constitutional questions have historically rarely appeared in the Swedish courts but are now becoming more common.

Included in the Instrument of Government is a provision specifying that no authority, including Parliament, may determine how a court should adjudicate in a particular matter. Courts and administrative authorities share responsibility in the Swedish legal system for enforcing the legal rules developed by Parliament. Sweden is similar to other civil law countries in that there is a demarcation of jurisdiction between courts and the administrative authorities. This distribution of power is stated generally in the Swedish constitution (Instrument of Government) and more specifically in subsequent legislation.

2.2 Legal Sources

Legislation, in terms of statutory law, is the primary source in the hierarchy of legal sources in the Swedish system. In day-to-day legal work, in courts and amongst lawyers and prosecutors, the preparatory work, particularly in the form of the government bill proposing a certain piece of legislation, is used to find the intent of the legislator, and is therefore awarded a high degree of authority.[12] At the same time, legal precedents from the Supreme Court (Högsta domstolen), also carry a lot of authority, and with the changes since the 1980s, especially after Sweden joined the EU, precedents, or case law, are becoming more important and the trend is for preparatory works to lose status.[13]

2.3 The Courts

There are three types of courts in Sweden: the general courts (district courts, courts of appeal and the Supreme Court), the administrative courts (administrative courts, administrative courts of appeal and the Supreme Administrative Court) and special

[11] Bull, Thomas, Sterzel, Fredrik, Regeringsformen. En kommentar, Studentlitteratur, 2015.
[12] Lind, Johan, ”Högsta domstolen och frågan om doktrin och motiv som rättskälla”. I: Juridisk Tidskrift 1996-97, p. 352-370.
[13] Ramberg, Christina, “Prejudikat som rättskälla”. I: Svensk Juristtidning, 2017, p. 733.

courts (e.g. Labour Court, Foreign Intelligence Court). Criminal cases are handled in the general courts.

There are 48 district courts spread across the country.[14] These vary in size from a dozen employees to several hundred. District courts have a local connection - the cases heard in district court come from the municipalities included in the district court's jurisdiction. There are six courts of appeal in Sweden; Svea Court of Appeal in Stockholm, Göta Court of Appeal in Jönköping, Court of Appeal for Skåne and Blekinge in Malmo, Court of Appeal for Western Sweden in Gothenburg, Court of Appeal for Southern Norrland in Sundsvall and the Court of Appeal for Northern Norrland in Umeå. Each of the six courts of appeal covers an area of jurisdiction which can vary from five district courts to the fourteen of the Svea Court of Appeal. The Supreme Court is located in Stockholm and examines cases appealed from any of the six courts of appeal in the country.

Every district court, court of appeal, administrative court and administrative court of appeal has a number of lay judges. They are appointed by the municipal councils in the municipalities that are part of the judicial district of each district court, and by the county council assembly in the counties that are part of the judicial district of each administrative court, administrative court of appeal or court of appeal. A lay judge has the same responsibility for the court's decisions as a legally qualified judge.[15] The appointment is non-political, even though lay judges are appointed by the political parties. Lay judges must reside in the district where they sit, and they cannot be affiliated with the legal profession as a judge, prosecutor, or practising lawyer.

[14] For information about the court system, see for example http://www.domstol.se/Om-Sveriges-Domstolar/Domstolarna/

[15] Diesen, Christian, ”För och emot nämndemän.” I: Juridisk Tidskrift 2011-12, p. 531.

3 The Swedish Criminal Justice System[16]

The Swedish criminal justice system is an accusatorial system with inquisitorial elements. In court, the state is represented by the prosecutor and a lawyer/attorney representing the defendant. The crime victim, in more serious cases, is represented by an injured party counsel.

3.1 Actors in the Criminal Justice System: Roles and Responsibilities

The Swedish criminal justice system has a tripartite organizational structure, with the parts interconnected but independent of each other. Included, in addition to the courts, are the Police Authority and the Prosecution Authority.

3.1.1 The Role of the Police and the Prosecutor

The primary responsibility of the police is to investigate crimes and work with the prosecutor in developing evidence. The Swedish criminal justice process is divided into four stages: the preliminary investigation, the prosecution, the main hearing, and decision making.[17] When there is reason to suspect that a crime has been committed the police will begin an investigation. In some cases the prosecutor may be involved with the police in an advisory capacity at these very early stages of the investigation. However, more often the prosecutor will not be involved until the police investigation extends beyond the issue of whether a crime has been committed and is more focused on an individual suspect, that is, when there is a reasonable suspect. When a decision is made that there is a person who can be reasonably suspected of a crime, the prosecution takes over and the police work to develop evidence in support of the prosecutor's case. The prosecutor – who is always a trained lawyer – in the Swedish criminal justice system has a variety of tasks including: heading the police investigation, deciding on when to prosecute a given case, and representing the State's interest in the prosecution of a case.

[16] See for example Carlson, Laura, The Fundamentals of Swedish Law, Studentlitteratur, 2012, Lindblom, Per Henrik, Civil and Criminal Procedure, in Bodgan (ed.) Swedish Law in the New Millennium, Norstedts Juridik, 2000. Jacobsson, Ulla, Criminal Procedure, in Tiberg et. al. (eds.) Swedish Law – A Survey, Juristförlaget, 1994.
[17] Landström, Lena, Brottsoffret och rättsprocessen, in Granström, Görel & Mannelqvist, Ruth (eds.) Brottsoffer – rättsliga perspektiv, Studentlitteratur 2016.

At the point during the investigation when it becomes clear that a person is reasonably suspected of committing a crime, they are informed of their right to a defence counsel. Certain coercive measures may be used against a suspect and their property including apprehension, arrest, prohibition on travel, requirement to report to the police, physical examination, photographing and fingerprinting and ultimately remanding in custody.[18] However, physically placing a suspect in custody is a decision that requires a court order. After making the decision to prosecute, the prosecutor prepares for the main hearing. There is no plea-bargaining in the Swedish system and, thus, there must be a main hearing in every case once a decision is made to proceed with charges.

3.1.2 Judges and Lay Judges

As in a number of civil law systems, the Swedish trial court has no lay jury but, instead, has a mixed panel of professional and lay judges.[19] This mixture of judges acts as a single body, simultaneously deciding issues of both law and fact as well as guilt and punishment. Any judgment made must be based on evidence presented to the court on the day of the trial. Similar to Anglo-American adversarial trials, both defence and prosecution in Sweden follow a standard fixed trial progression including opening speeches, presentation of evidence, and closing addresses. The Swedish system treats the investigatory stage of criminal proceedings as inquisitorial but the trial stage as more adversarial. However, the Swedish criminal trial process is not completely analogous to an adversarial model as the court/judge plays a more active and direct role in the case in Swedish criminal proceedings. For example, at the trial stage, a judge may ask clarifying questions of the defendant, of the victim and of witnesses and may even request parties to submit additional evidence. In many civil law systems the court takes an active role, along with the prosecutor, at an early stage of the investigation. This is not the case in Sweden where – except for unusual situations where the freedom of the suspect is at issue – the court is not usually actively involved until the trial itself begins.

[18] Hjertstedt, Mattias, ”Samtyckets betydelse vid polisiära åtgärder som motsvarar kroppsvisitationer och kroppsbesiktningar: Del I: samtyckesgärning och rättsliga hinder”. I: Juridisk Tidskrift 2017 p. 653.
[19] Diesen, Christian, ”För och emot nämndemän.” I: Juridisk Tidskrift 2011-12, p. 531.

3.1.3 Roles and Rights of the Victim

A crime victim who qualifies[20] as an injured party ("målsägande") has a legal standing, if they support the prosecutor in the case, or sue for compensation. This means that the crime victim is a party in the trial, that they have a chair right next to the prosecutor in the courtroom and the possibility to address the court and the defendant, to ask questions and make statements.[21]

In addition to the prosecutor and defence counsel, the injured party in the case may also be present in the court room, with or without counsel, and is entitled to testify, examine witnesses, and present evidence for the court's consideration. As a rule, victims of serious crime are entitled to free counsel and support services in connection with the preliminary investigation and trial in the form of an injured party counsel (målsägandebiträde).[22] If it is suspected that a child is the victim of an offence committed by one of its custodians, the child may receive support from a special representative for children. There is also voluntary witness support in district courts and courts of appeal, provided by people who offer support and help to victims of crime and witnesses in a trial.

Neither the defendant nor the injured party testify under oath at the trial. No other witnesses are allowed in the courtroom while the defendant and the injured party testify. After presenting evidence of guilt or innocence, the parties will immediately present evidence relating to the punishment to be imposed upon conviction and make closing arguments on both issues. The principle of free evaluation of the evidence also applies in both civil and criminal hearings in the Swedish system.[23] In essence, this requires the court to accept and carefully review all the evidence presented in the case without regard to issues of admissibility.

In a case prosecuted by the state, both the state criminal action and the victim's claim for damages can be, and usually are, tried in the same litigation. The reasons for including

[20] That is, a crime victim which is directly affected by the crime or suffering personal or financial loss because of the crime, see the Procedural Code, chapter 20, section 8, subsection 4.

[21] Landström, Lena, Åklagaren som grindvakt: En rättsvetenskaplig studie av åklagarens befogenheter vid utredning och åtal av brott, Iustus förlag, 2011.

[22] Träskman, Per Ole, Brottsoffret och brottmålsrättegången, in Lernestedt, Claes & Tham, Henrik, Brottsoffret och kriminalpolitiken, Norstedts Juridik AB, 2011.

[23] Dereborg, Anders, Från legal bevisteori till fri bevisprövning i svensk straffprocess. Juristförlaget, 1990.

tort claims in the criminal prosecution are judicial economy and alleviating the situation of the victim by not forcing them to go through two trials. However, when these two actions are combined the civil tort claim is often tried under the same standard of proof as the criminal case, beyond reasonable doubt, as opposed to the typical civil tort claim burden of proof, the preponderance of the evidence. This means that if the defendant is found not guilty, usually no liability for damages in tort is imposed.

4 Legislative Framework for Hate Crimes

4.1 International Legal Framework

Bias-motivated crimes in Sweden are regulated closely following legal requirements under international law. The international legal framework consists of global legal requirements, foremost from the United Nations, and entails treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of Racial Discrimination (CERD). The internationalization of hate crime laws is further supported by bodies such as the European Commission against Racism and Intolerance (ECRI), the European Union Agency for Fundamental Rights (FRA) and the Organization for Security and Co-operation in Europe (OSCE).

4.1.1 Incorporation of Article 4 of the EU Framework Decision

Sweden has made use of the first option provided for in Article 4 of the EU Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, to stipulate in the criminal code that racist and xenophobic motivation shall be considered an aggravating circumstance with regard to all crimes.[24] The Council has not yet assessed the extent to which Member States have complied with the Framework Decision.

4.1.2 Incorporation of the Victim's Directive

Concerning the Victims´ Directive the Swedish Government has stated that implementing the directive would only entail minor legislative changes in Swedish law since most commitments in the Directive were already met by existing laws.[25] The legislative changes came into force on the 1 November, 2015 and consisted mostly of changes made in the Decree on Preliminary Investigations (förundersökningskungörelsen) regarding clarifications of a victim's right to get information as soon as possible, the right to an interpreter if needed, and the right to an individual security assessment. In the ministry memorandum preceding the legislative changes, the provisions of the Directive relating to hate crime were not addressed as such. The view of the Government is that the needs

[24] 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/2014/027 final */

[25] Prop. 2014/15:77. Genomförande av brottsofferdirektivet. (Governmental Bill)

of hate crime victims are already met through the legislation in place regarding the needs of all victims of crime.[26]

4.1.3 UN Universal Periodic Review

Sweden was reviewed by the UN Human Rights Council for the first time in 2010 and for the second time in January 2015.

In 2010 Sweden was criticized for the situation concerning hate speech, bias-motivated crimes and the occurrence of xenophobia and racism. Sweden was recommended to intensify efforts to prevent, combat and prosecute hate speech, to ensure that relevant criminal law provisions and policy directives were effectively implemented, to adopt further special measures to prevent, combat, prosecute and punish hate crimes as well as xenophobia and racism and to increase efforts to ensure the implementation of legislation prohibiting racist crimes in practice. Special attention was given to effective legislative, administrative and judicial measures against the dissemination of racial and religious hatred in the media and through the Internet and to the issues of Islamophobia, hatred towards Muslims, and incitement to hatred against Islam and Muslims. [27]

Sweden accepted the recommendations to increase prosecution of perpetrators of bias-motived crimes, but did not accept the recommendation regarding further legislation. The Government stated that there are several reasons for the relatively low proportion of prosecutions compared to the number of reported hate crimes in Sweden, mostly connected to the difficulties in identifying and prosecuting the bias motive. Sweden also stated that there was already comprehensive legislation in place to address racism, xenophobia and religious intolerance. Sweden also accepted recommendations to pay more attention to the issues of Islamophobia, hatred towards Muslims and incitement to hatred against Muslims, while asserting that Sweden was already paying continuous attention to these issues.[28]

[26] Ds 2014:14 Genomförande av brottsofferdirektivet. (Ministry Memorandum)
[27] United Nations General Assembly, A/HRC/15/11 as of 16th of June 2010.
[28] Universal Periodic Review of the United Nations Human Rights Council: Sweden's national mid-term report, 19 June 2012, A2012/2841/DISK.

As a result of the criticism and recommendations Sweden also reported that efforts to combat hate crime were to be prioritized. The Swedish Government devoted special funding in 2012, and in 2014, to increasing the safety and reducing the vulnerability of the Jewish minority, who were the object of anti-Semitic hate crimes and harassment. In 2014, the Swedish National Police Board was tasked with developing policing against hate crimes. This assignment included demands to increase knowledge within the police force regarding bias-motivated crimes and a focus on enhancing confidence in the police, particularly among vulnerable groups.[29] The Prosecution Authority was assigned to create better conditions and bases for further monitoring and review of the handling of hate crimes by the police and the prosecutors.

In the UN review of 2015 concerns were raised that despite progress in the fight against discrimination, difficulties remained regarding racism. Persons with a migrant background and Swedes of African descent were often targeted; new measures were therefore required to better protect people who were the targets of discrimination, racism and xenophobia. Concerns were expressed by some treaty bodies about discrimination, xenophobia and racist attitudes against Muslims, Afro-Swedes, Roma and Jews, and about attacks on places of worship of religious minorities.[30]

Replying to comments made and questions raised, Sweden stated that it had extensive legislation in place that could be used against various expressions of racism, xenophobia, religious intolerance, homophobia and transphobia. In response to the recent attacks against Swedish mosques, the Swedish police had prioritized investigations into those cases. There was, however, a need for more dialogue between the police and religious organizations.[31] Sweden has not yet completed its mid-term report, but is scheduled to do so in 2017.

[29] United Nation General Assembly, A/HRC/WG.6/21/SWE/1 of the 14th of November 2014.
[30] United Nation General Assembly, A/HRC/29/13, pt. 43, 49, 57, 71.
[31] United Nation General Assembly, A/HRC/29/13, pt. 72, 74.

4.1.4 UN International Covenant on Civil and Political Rights

Sweden ratified the International Covenant on Civil and Political Rights (ICCPR) in 1972. Since then the UN Human Rights Committee (UNHRC) has reviewed the implementation and safeguarding of the rights included in the ICCPR.

In 2016 the UNHRC criticized Sweden regarding shortcomings in the integration of asylum seekers and how their rights were safeguarded. UNHRC expressed concern about reports of increased racist and xenophobic violence and noted that there was a risk of hate-motivated crimes becoming increasingly common. The Committee believed that Sweden should intensify its efforts to combat incitement to racial hatred, racist and xenophobic violence and negative stereotypical portrayals of minorities. According to the Committee, this should be done through effective implementation of legal and policy measures to combat all forms of racism, hatred and xenophobia, to ensure that cases were thoroughly investigated and perpetrators prosecuted and convicted, and to provide victims with adequate measures for redress when coming into contact with the legal system.[32]

4. 1.5 Convention on the Elimination of Racial Discrimination

The UN Convention on the Elimination of Racial Discrimination (CERD) came into force in Sweden in 1972. The Committee on the Elimination of Racial Discrimination, after the 2013 Report, recommended the Swedish Government to take further actions in order to investigate and prosecute hate crimes efficiently and take effective measures to combat hate speech in the media and on the Internet and, where appropriate, prosecuting the perpetrators regardless of their official position. The Committee also urged Sweden to take the necessary measures to promote tolerance, intercultural dialogue and respect for diversity.[33]

As one of the measures taken to meet these recommendations the Swedish Government instructed the Swedish National Police Board in 2014 to develop more effective policing of hate crimes.[34] Since then, from 2015-2016, there was a national project to raise

[32] Human Rights Committee, 2016.
[33] CERD/C/SWE/CO/19-21.
[34] Regeringskansliet, pm A2014/3085/DISK, 2014-08-28.

awareness internally about hate crimes which has led to the appointment of special hate crimes investigators in several counties. In the three main cities in Sweden – Stockholm, Göteborg and Malmö – there are special hate crime units within the police. Education in how to identify and investigate hate crimes has also been included in the curriculum of the Police Academy. Since 2015, the police have intensified both their efforts to combat hate crimes and to provide education for investigators in the regions.[35]

4.1.6 OSCE/ODIHR

Sweden has been a member of the OSCE since 1973. Unlike other international organizations, the OSCE is not based on an international treaty and its commitments are political, and therefore not legally binding. These commitments, however, provide a normative basis. Sweden regularly reports hate crime data to ODIHR, including acts of defamation, agitation against a national or ethnic group of people and unlawful discrimination.

4.1.7 European Commission on Racism and Intolerance

In 2012 the European Commission on Racism and Intolerance (ECRI) recommended the Swedish authorities to adopt a plan of action to address de factoresidential segregation in Sweden as a matter of urgency. The Swedish authorities replied that several urban development initiatives had been taken to provide support for cooperation between a number of public service agencies and municipalities aimed at reducing social exclusion. The Government contributed funding to 15 selected districts for evaluation activities and knowledge acquisition, information sharing and dissemination. ECRI considered that, while the authorities have taken some small steps towards reducing social exclusion and its effects on migrants, particularly concerning de facto residential segregation, their initiatives did not go beyond individual projects in certain localities.[36] The ECRI has launched its fifth round of reviews of Member States and will visit Sweden during 2017.

4.2 Swedish Measures against Hate Crime

[35] Police Annual Report 2015 and Dnr A188.543/2015.
[36] CRI(2015)24.

There is no specific offense in the Swedish Penal Code called hate crime, or bias motivated crime. There are, however, other offenses that cover such situations. There are three specific offenses that refers to bias motivation; agitation against a national or ethnic group, unlawful discrimination, and insult.[37] All three offenses include some formulation of protection of categories or groups based on for example ethnicity, sexual orientation or religious beliefs. But a bias motive can also be seen as an aggravating circumstance in regard to almost any criminal offense. That is, can it be proven that the perpetrator of, for example, an assault had a bias motive when committing the assault, s/he can get a more severe punishment. This is formulated in terms of a section on aggravating circumstances in the chapter of the Penal Code dealing with sentencing.[38]

Measures against hate crimes were defined as a priority issue in the Swedish judicial system in the mid-1990s. The Swedish Government stated in the early 2000s that these crimes were a violation of human rights and as such it was important to combat them.[39] Hate crime as a priority issue for legal actors in the Swedish judicial system concerns measures aimed at increasing the number of prosecutions and convictions and also measures aimed at improving the way in which victims of hate crime are treated when they come into contact with various legal institutions.

In a Swedish context, you can be a victim of hate crime if the crime is motivated by bias due to race, skin colour, national origin, ethnicity, religious belief or sexual orientation. Studying the prevalence of hate crime reveals that racist or xenophobic hate crimes are most reported. A government body, the Swedish National Council for Crime Prevention (BRÅ), presents annual statistics concerning the number of hate crimes that have been reported to the police. Over the last ten years this number has increased. Whether this is due to more crimes being committed, or more victims being willing to report crimes, is a matter that has been debated over the years.[40]

[37] The Penal Code, chapter 16 section 8 (agitation against a national or ethnic group), chapter 16 section 9 (unlawful discrimination), chapter 5 section 3 (insult).
[38] The Penal Code, chapter 29 section 2 subsection 7.
[39] Regeringens skrivelse 2000/01:59. (Governmental decree).
[40] Granström, Görel, Mellgren, Caroline & Tiby, Eva, Hatbrott? En introduktion, Studentlitteratur, 2016.

4.2.1 Agitation against a National or Ethnic Group

Agitation against a national or ethnic group has been a criminal offence since 1948.[41] The law prohibits statements of a racist or similar nature, regardless of whether they appear orally, in writing, or via other media such as symbols on clothing or pictures. If someone threatens or expresses contempt in a statement or message that is disseminated, and the violation can be linked to a group of persons by allusion to race, skin colour, national or ethnic origin, religious belief or sexual orientation, the offender may be fined or imprisoned for two years. Sexual orientation was added in 2003. Agitation against a national or ethnic group is also a crime included in the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, two of the fundamental laws of Sweden.

The concept of contempt is interpreted as meaning that expressing insulting or degrading opinions about a group of persons by allusion to race etc. can be punishable. It is sufficient that a statement is defamatory to the group's reputation. Even statements that involve ridicule of a group of persons fall within the provision, but at the same time, it is not a punishable crime if it does not exceed the limits of objective criticism. For a statement to be criminal, it must be clear that it goes beyond the limit for an objective discussion.[42] In the preparatory works, it is clearly stated that the crime of agitation must not prevent what is called a free and informed debate. A statement or message has to be assessed in context and the motives for the act have to be considered.

In 2002, there was a discussion about whether transgender persons should be protected by the legislation criminalizing agitation against a national or ethnic group. However, the Government stated in its bill that, even though transgender persons deserve the same protection as homo- or bi-sexual persons, the question was whether they were victims in the same way. That is, the Government said that the number of violations against transgender persons was still rather low. It could be said that more evidence of agitation against transgender persons was needed, before any need to change the law was seen. It would seem that transgender persons were judged to be too small a group to claim special protection.

[41] Chapter 16, section 8, the Penal Code.
[42] Prop. 2001/02: 59, p. 41. (Governmental bill)

In 2015, a Government committee presented a remit suggesting that gender identity should also be included in the legislation on agitation against a national or ethnic group and unlawful discrimination, and that the section in the penal code regulating aggravating circumstances should be amended so that gender identity or gender expression is named as a protected category.[43] The committee's proposal was accepted by the Government, and a Governmental Bill was presented in November 2017. The Parliament will vote on the proposed bill during first half of 2018.[44]

The most famous Swedish case in which the rule has been tested is perhaps the sermon given by Åke Green, the Pentecostal Pastor, in 2003. Green's theme was: "Is homosexuality a genetic instinct or an evil force's game with people?" It was reported to the police as agitation against a group of persons, since it contained statements about homosexuality being an abnormality and that homosexuals were to be seen as a cancer in the body politic. The indictment against him and the subsequent trial is, to date, the most famous example of the examination of that section in the Penal Code. Green was convicted in the first instance but was acquitted in the Court of Appeal and the Supreme Court (NJA 2005 p. 805). Here it was tried as a question of protection for homosexuals as a group as opposed to the right to freedom of expression and freedom of religion. The Supreme Court held that Green was guilty of agitation, but the issue was whether the Swedish legislation really conformed to the European Convention. The Supreme Court acquitted Green but the acquittal was followed a year later by a case in which four young neo-Nazis were prosecuted for agitation after handing out leaflets at a school. The leaflets contained suggestions that homosexuals live promiscuous lives and are responsible for spreading HIV. They were convicted by the Supreme Court, which in this case argued that the precedents of the European Court emphasize the need for freedom of expression in a political context, but that there was also an obligation on those who took advantage of this freedom to try, as far as possible, to avoid unwarranted defamatory statements that do not contribute to any public debate. Unlike the Pentecostal Pastor the accused had not made their statements in a religious context, so religious freedom as a protected principle was not applicable (NJA 2006 p. 467).

[43] SOU 2015:103. Ett utvidgat straffrättsligt skydd för transpersoner m.m.
[44] Prop. 2017/18:59. Ett utvidgat straffrättsligt skydd för transpersoner.

4.2.2 Unlawful Discrimination

Unlawful discrimination, which became a crime in 1970, prohibits certain forms of discrimination in commercial trade and public places, such as shops, restaurants and bars.[45] Those working in such places must not discriminate against persons due to race, colour, national or ethnic origin, religious belief or (after a legislative amendment in 1987) sexual orientation. Such discrimination can result in fines or imprisonment of up to one year. There have been few convictions despite a relatively large number of reported crimes. The explanation lies in the situations, as there is usually a lack of evidence, and it comes down to a question of the victim's word against the perpetrator's.

Although there are few prosecutions and convictions, the Supreme Court has ruled in some cases of shopkeepers accused of unlawful discrimination. One example, from 1999, involved the owner of a department store who banned from the store people dressed in long, wide, heavy skirts. The Supreme Court found that the ban had been so formulated that it was virtually exclusively directed against women belonging to the group of Finnish Roma, and that the shopkeeper must have been aware of this. The owner's argument before the court, which was that the skirts could be used to aid theft, was seen by the Supreme Court as a further indication that it was a case of unlawful discrimination (NJA 1999 p. 556).

In addition to the criminal law regulations, it is also possible, since 2003, to bring a civil action for discrimination. This possibility has been used in a case concerning the denial of admission to a bar. In the city of Malmö, a number of students sued a bar owner who allowed people with blond hair and fair skin entry into the tavern, but refused to admit those with dark hair and brown skin. The Supreme Court found that discrimination had occurred and ordered the bar owner to pay damages to the students (NJA 2008 p. 915).

4.2.3 Insult

In addition to the crimes of agitation and unlawful discrimination, the defamatory crime of insult may be invoked in reference to hate crimes. A person who vilifies another by using an insulting epithet or accusation or by other infamous conduct towards him, shall

[45] Chapter 16, section 9, the Penal Code.

be sentenced to a fine for insulting behaviour. If the crime is gross, a fine or imprisonment for a maximum of six months shall be imposed. As shown in the formulation of the legal text, this is a crime that has long historical roots, but today we would perhaps say that it concerns the statements of people who intend to humiliate, ridicule or insult, for example by using invective.

Insult is a crime where the victim must personally want to proceed with a complaint; police and prosecutors may not start a preliminary investigation without the consent of the victim. However, there are exceptions to this rule. If, as stated in the Penal Code, for special reasons, it is deemed necessary in the public interest to bring charges, and if the charge relates to an insult to a person by alluding to his or her "race, colour, national or ethnic origin, religious belief or sexual orientation"[46] the police and prosecutors may proceed without the consent of the victim.

The crime of insult may be used when there is a statement of a racist nature, for example, which can be seen as agitation, but when the statement is also directed against an individual, and could then be seen as insulting that individual. There are not many precedents in this area, but the Supreme Court has held that statements such as "Fucking Immigrant" or "Fucking Lesbian" are insulting (NJA 1989 p. 374).

4.2.4 Aggravating Circumstances

Regarding other offences, such as assault, harassment, unlawful threats, vandalism etc. motivated by bias it is possible for the court to increase prison sentences or fines if it can be determined that a bias motive was present in the offence. This is formulated in terms of a section on aggravating circumstances and is found in the chapter of the Penal Code dealing with sentencing:

> *"In assessing penal value, the following aggravating circumstances shall be given special consideration in addition to what is applicable to each and every type of crime:*
>
> *--- whether a motive for the crime was to aggrieve a person, ethnic group or some other similar group of people by reason of race, colour, national or*

[46] Chapter 5, section 5, the Penal Code.

ethnic origin, religious belief, sexual orientation or other similar circumstance."[47]

The provision, introduced in the Penal Code in 1994, means that in the case of offences such as assault etc. if the prosecution can show that the offence was bias-motivated it can be seen as an aggravating circumstance. Culpability is defined through intent but what complicates the use of this kind of provision in Sweden (and other countries) is that the court also has to take into account the motivation for the crime. If the prosecution is not able to present evidence of both intent and motivation, aggravating circumstances cannot be cited, and the perpetrator has to be sentenced according to the standard for the original crime.

There are no guidelines for the judge and the court as to the impact this aggravating circumstance may have. There is no rule that lays down, for example, "if this is deemed to be a hate crime, the prison sentence should be six months instead of four." It is also important to note that the bias or prejudice motive only may have an impact; it is not mandatory. The court's discretion is seen as fundamental to the Swedish judicial system.[48]

Unlike in the other section of the Penal Code that regulates agitation and unlawful discrimination, in the section on aggravating circumstances there is a formulation – after the usual "race, colour, national or ethnic origin, religious beliefs and sexual orientation – which states that "similar circumstances" can also be covered. The scope of aggravating circumstances is thus somewhat wider in that more groups or aspects can be covered. It has, in fact, been invoked in cases of transgender persons being subjected to hate crimes, on the grounds that the provision list is a list of examples, and can therefore be considered to include violations based on, for example, gender identity or gender expression.[49]

[47] Chapter 29, section 2, the Penal Code. "Aggrieve" is a translation of the Swedish word "kränka", which could also be translated as violate or injure.

[48] Granström, Görel, Straffskärpningsregelns användning vid hatbrott: En fråga om domstolens frihet eller brottsoffrets rättssäkerhet? in Anita Heber, Eva Tiby & Sofia Wikman (eds.) Viktimologisk forskning: Brottsoffer i teori och metod, Studentlitteratur, 2012.

[49] Prop. 2001/02: 59, Hets mot folkgrupp m.m. p. 57. (Governmental bill)

There has not been much discussion in the Swedish context about protection for other categories of people connected, for example, with disability or sex (gender). There has been hardly any discussion in Sweden about whether sex (gender) can be seen as a basis for being considered a protected category when it comes to hate crime.[50] The one exception occurred in 1995 when a government commission (the same one that proposed the new crime Gross Violation of a Woman's Integrity) suggested that gender bias should be seen as a hate crime.[51] But in its bill in 1998 the Government said that only especially vulnerable groups, such as immigrants and homosexuals, should be protected by the regulation concerning hate crimes. The argument was that a regulation of this character would run the risk of losing its significance if it was extended to more or less the whole population.[52] Furthermore, the Government proclaimed that there was really no need for such a regulation, since the crime Gross Violation of a Woman's Integrity would lead to more severe punishments for those who abused another person in a close relationship.

With regard to this section on aggravating circumstances, it is important to remember that the victim does not have to be gay, or an immigrant or of a different religion from the offender. It is enough that the victim was targeted because the offender thought that they were gay and attacked them for that reason. It is a question of the offender's motivation for the crime.

4.3 Case Law on Hate Crime

Given the absence of a specific paragraph in the Swedish penal code that criminalizes hate crime per se, identifying case law on hate crime is difficult. It is possible, from the official crime statistics, to identify the number of cases each year where someone has been convicted of the crime of agitation against a national or ethnic group and unlawful discrimination. The crime of insult, however, can be both an "ordinary" crime, i.e. a crime without a bias motive, and a hate crime, so there the statistics are somewhat impenetrable. Since most of the bias crimes that are committed are crimes such as assault, defamation, molestation, damage etc. with a bias motive, all these cases would have to be examined individually, to identify where a bias motive had been discussed because,

[50] Sex or gender is used in the Swedish legal context when it comes to biological sex. When talking about transgender rights, the term used is gender identity or gender expression.
[51] SOU 1995:60 Kvinnofrid, p. 295. (Governmental Committee).
[52] Prop. 1997/98:55 Kvinnofrid, p. 86-87. (Governmental bill).

unfortunately, it is not mandatory to list aggravating circumstances in the court's ruling by its paragraph in the penal code, and therefore it is not searchable in the crime statistics. The question of the impact of aggravating circumstances in sentencing is rarely discussed in the court rulings, and thus very seldom discussed in the supreme judicial body, the Swedish Supreme Court. There are therefore very few precedents to be found regarding the use of this section of the penal code.[53]

4.4 Policy Documents

The Swedish Government introduced a national action plan to combat racism, xenophobia, homophobia and discrimination in the spring of 2001. In the plan it was noted that Sweden was experiencing a period of pronounced and aggressive racism and xenophobia, a development that occurred simultaneously elsewhere in Europe. Violence and threats affected both individuals and representatives of various groups such as active anti-racists, journalists and politicians and this was seen as a threat to democratic government and the notion of equal value.[54] The action plan emphasized that efforts to combat hate crimes were already a priority, but that the measures needed to be more effective. The judicial system was commissioned to increase understanding of the context in which hate crimes occur and the need for interaction between judicial actors was stressed.

In 2016 the Swedish Government introduced a new action plan to combat racism and hate crimes based on the current situation in Sweden and on suggestions from civil and state actors, and from international monitoring bodies.[55] The plan identified five strategic areas seen to be crucial in combatting racism and hate crimes and would also at the same time allow Sweden to meet its international obligations and the criticism from international monitoring bodies. The strategic areas were:

- More knowledge, education and research
- Improved coordination and monitoring
- Civil society: greater support and more in-depth dialogue

[53] Granström, Görel Mellgren, Caroline & Tiby, Eva, Hatbrott? En introduktion, Studentlitteratur, 2016.
[54] Regeringens skrivelse 2000/01:59. (Governmental decree).
[55] Government Offices of Sweden, A comprehensive approach to combat racism and hate crime. National plan to combat racism, similar forms of hostility and hate crime, 2017.

• Strengthening preventive measures online
• A more active legal system

Within these strategic areas, the Government has defined some major problems and measures that should be taken in addition to those already in use. To achieve "a more active legal system" the Government plans to ensure that the police are more reassuring towards victims through confidence building and activities to promote security, as well as making sure that reported hate crimes are followed up more efficiently. The Prosecution Authority is to develop a consistent routine for the handling of hate crimes and see to it that this work is distributed and implemented by all public prosecution offices.

An examination of other policy documents shows that police and prosecutors in a variety of ways are supposed to prioritize hate crimes in accordance with the instructions received from the Government. The police guidelines are more concrete in that they establish guidelines for how to carry out investigations and how to respond to victims. The police have also produced materials directly targeting potential victims, to raise awareness of victims' rights and what the police can do to assist in the event of a crime being committed. The prosecutors have established the division of responsibility between the police and prosecutors in these cases, and how lawsuits and claims should be formulated so that bias motives can be addressed in a trial.[56]

The Swedish police and the Swedish prosecuting authority were given government directives each year over a ten-year period, to prioritise hate crimes. This resulted in policy documents, in action plans and in training. But in 2008, the Government changed the way it gives directives, moving from a rather detailed formal control to a more informal one. As a result, for a period of time (2008-2014) government directives no longer demanded a prioritization of measures against hate crimes. This changed in 2014, and as of 2015 the police have once again been given directives each year to prioritise hate crimes.

[56] For more information regarding the responsibility of the police and the prosecutors concerning hate crime, see section 4.4.1 Strategic Documents for Police and Prosecutors.

4.4.1 Strategic Documents for Police and Prosecutors

In 2000 both police and prosecutors were given instructions by the Government to present strategic documents to ensure that all personnel had adequate knowledge about hate crimes and the situation for the victims.

Police Policy

The document produced by the police contained a list of concrete measures, and the importance of the whole organization working towards the same goal was emphasised.[57] In 2001, it was decided that each police station should have contact persons for hate crimes and on a regional level designated hate crime investigators are quite common, often placed strategically close to the regional headquarters. In the police training programmes (students of policing receive their education in three different places in Sweden, Umeå in the north, Stockholm in the centre, and Växjö in the south) courses are given on serious crimes, where hate crimes form part of the curriculum.

In 2005 guidelines were presented concerning police work with victims of homophobic hate crimes.[58] The guidelines were based on the strategic document of 2000, but with a stronger focus on how to actually deal with both victims and crime scenes; what questions to ask victims, how to behave towards victims and key indicators for the police to look for in cases of suspected hate crimes. One aspect discussed is in what way hate crime differs from other crimes, and what the police should think about regarding contact with the victim's community and also why the victim of a hate crime might be reluctant to report the crime.

In 2008, the police produced a pamphlet entitled Being yourself is not a crime, aimed at potential victims of hate crimes. It contained information concerning the definition of hate crime, a description of potentially dangerous situations and what help could be obtained from the police if a hate crime occurred.[59]

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[57] Rikspolisstyrelsen, Strategi för polisens arbete med frågor som har anknytning till rasism, främlingsfientlighet och homofobiska brott, 2000.

[58] Rikspolisstyrelsen, En handledning för att förbättra stödet till offer för homofobiska brott, 2004.

[59] Polismyndigheten i Stockholms län, Att vara sig själv är inte ett brott, 2008.

In the spring of 2015, The Swedish Police Authority presented a report with a number of proposals on how the policing of hate crime could be developed and improved.[60] The report discussed, among other things, the need for a more developed focus on crime prevention, mainly through increased contact and dialogue with vulnerable groups, organizations and individuals in order to arrive at a shared view of how the climate in society and the threat situation could affect prevention. One suggestion was to establish groups consisting of specially trained police officers, to handle investigations of hate crimes in the three metropolitan regions. These groups should be responsible for skills support, coordination, and victim support and monitoring. The report also suggested the forming of a consultative forum in which representatives of vulnerable groups would get the opportunity to meet representatives of the judicial authorities. Another proposal was to implement capacity-building measures so that all police investigators have sufficient knowledge about the legal aspects of hate crimes.

In the spring of 2017, a report was presented which stated that the work was ongoing. There have been training programmes for police officers, an online training programme is under way and the response from non-government organizations working with victims of hate crime has been positive regarding the fact that the police are intensifying their work in this area.[61] There are guidelines and policy documents on the regional level, that is, each region in Sweden (the Swedish police is divided into seven regions) has their own documents regarding hate crimes.

In the guidelines and policy documents for the police, there has been a focus on how to treat victims of hate crime and also a tendency to focus on victims of homophobic hate crimes. This can be seen in the guidelines from 2005 which were specifically aimed at measures against homophobic hate crimes, but also in the pamphlet from 2008. Since the target group for the pamphlet was potential victims of hate crime in general, it is interesting to note that when examples are given in the text, vulnerability and potential victimization due to sexual orientation are the examples used. This can also be seen in the strategic document from 2000, where the examples were based on victimization due to sexual orientation.

[60] Polisens utvecklingsavdelning, 2015.
[61] Polismyndigheten, Återredovisning till regeringen angående polisens åtgärder rörande hatbrott, 2017.

Prosecution Policy

In the late 1990s the Swedish Prosecution Authority issued the first guidelines on handling cases relating to unlawful discrimination. It was stated that the difficulty of securing evidence made these criminal investigations especially demanding. The inquiry should always, therefore, be guided by the prosecutor and a special prosecutor should be appointed for this type of case. The prosecutors should also give specific directives to the police investigation. In 1999, a programme for combating hate crimes was drafted. The programme was replaced in 2002 by the still existing guidelines which were summarized in the "Prosecutor's memorandum and guidelines for combating hate crimes".[62] The guidelines state that hate crime investigations should be given priority and that someone from the prosecutor's office should always lead the investigation. There should also be specially appointed prosecutors in each local prosecutor's office, responsible for hate crimes.

Since then, however, the prosecutor's role as investigator has changed, due in part to criticism from police officers who worked on the investigation of hate crimes and pointed out that the existing rules led to unnecessary delays. The police felt that they had to wait for instructions from the prosecutor, and that this had a negative effect on the investigations in that they were unnecessary prolonged. Since 2011, the police investigator has led the police investigation in the majority of hate crime investigations, and it is only when there is a reasonable suspect, or if there is a more serious case, that the prosecutor comes in and oversees the investigation from the first stage.[63]

There are no procedural rules stating that the prosecutor in the case of a hate crime must indicate that there has been a hate crime motive for the crime. But this lack of regulation has been seen in different reports and government commissions as a reason why the bias motive tends to disappear in many lawsuits. As a result, it was established in the Prosecutor General's guidelines of 2002 that the bias motive should be clearly stated, and that this aspect should be included in the case. The Prosecutor General also stated that the prosecutor in the trial should formally request the application of the aggravating

[62] Promemoria och riktlinjer för bekämpning av hatbrott. Riksåklagaren 2002.
[63] RPSFS 2014:5 FAP 403-5.

factor, when applicable. These guidelines have had a positive effect, since it is nowadays more common that it is clearly stated in the summons application regarding bias-motivated crimes that such a motive is part of the case.[64] The current policy, which builds on the guidelines from 2002, can be found in a memorandum – Hatbrott, RättsPM 2016:8 – produced by the national Prosecution Development Centre in Malmö.

Policy documents and guidelines for the prosecutors tend to focus on traditional legal aspects, such as the need for legal clarification, and discussions about how to best present a case in court. There are hardly any references to how to treat victims of hate crimes, and the documents regulating the work of the prosecutors do not distinguish between different groups of victims of hate crimes. The needs of victims of hate crime is seen as being met through the general legislation regarding the rights of victim when coming into contact with the judicial system.[65]

In 2016, the Prosecution Authority presented a report where the aim was to investigate, through a case review, which crimes were reported as hate crimes, whether the bias motive was investigated as closely as possible and how many prosecutions this resulted in. The investigation also aimed to identify whether there were particular factors which led to more successful prosecutions. A review was produced of 300 cases registered as hate crimes. The conclusion reached was that the rule concerning aggravating circumstances was applied when it should be, i.e. when a bias motive was identified, and that the application of the rule was consistent and in accordance with the aim of the legislation. However, it was noted that there is a need for guidance from the courts in these cases.[66]

[64] For more information about this, see section 6 below.
[65] Ds 2014:14 Genomförande av brottsofferdirektivet. (Ministry Memorandum).
[66] Åklagarmyndigheten, Hatbrott – en granskning av åklagarnas handläggning, 2016.

5 Statistical Analysis

The Swedish hate crime statistics are based primarily on police reports with identified hate crime motives, but also include self-reported victimization of hate crime based on data from the Swedish Crime Survey. Hate crime data are collected annually by the Swedish National Council for Crime Prevention (BRÅ). The method of data collection differs significantly from that employed for the official crime statistics for reasons described below:

> *"Hate crime is not a type of crime that is expressly regulated in the Penal Code. Nor are there specific crime codes for hate crime in the police computer system for recording reported crimes. The computer system does, however, provide a space for officers to mark offences as potential hate crimes, but this was not introduced for statistical purposes, and although the marking procedure is mandatory, studies have shown substantial deficiencies in its use. For these reasons, the hate crime statistics cannot be collated generically, but instead require the use of a method specially developed for this purpose. The method employed was originally developed by the Swedish security police in the early 1990s. In 2006, the National Council for Crime Prevention (BRÅ) took over the method along with responsibility for maintaining the statistics."*[67]

The method used by BRÅ is described as follows:

> *"[A] computerised search based on a list of search words, applied to a random sample of fifty percent of police reports relating to a number of specific crime categories. The random sample is drawn and the search conducted two months subsequent to the end of the month in which the police report was registered. Reports identified by this computerised search method are studied manually in three steps by at least two different people working independently of one another. Details of reports considered to meet Brå's definition of a*

[67] Brottsförebyggande rådet, Hate crime 2014. Statistics on police reports with identified hate crime motives and self-reported exposure to hate crime. English summary of Brå Report 2015:13, p. 3.

hate crime are coded. The coded variables and the assessment of whether the report includes a hate crime are double-checked by a second person. Finally, an estimation procedure is applied to produce population-level estimates based on the random sample of police reports examined. These population-level estimates make up the statistics on police reports with identified hate crime motives. [---] Police reports relating to the crime categories: violent crime, unlawful threat, non-sexual molestation, defamation, criminal damage, graffiti, agitation against a population group, unlawful discrimination and a selection of other offences. The crime categories were selected by the Swedish security police when they started collating hate crime statistics in the early 1990s since these crime categories were considered more likely than others to include reported hate crimes. In 2014, the population amounted to a total of approximately 428,000 police reports."[68]

In the report from 2017 on hate crimes presented by BRÅ, giving the statistics for 2016, police reports with identified hate crimes were estimated to number 6.415. This is an 8 per cent decrease compared to 2015, but still on a higher level than the years before that.[69] Xenophobic or racist motives are by far the most common, and crimes such as unlawful threats and non-sexual molestation are the most common crimes committed with a bias motive. The numbers are as follows:

72 per cent xenophobic/racist motive
9 per cent Christianophobic or other anti-religious motive
9 per cent sexual orientation motive
7 per cent Islamophobic motive
3 per cent anti-Semitic motive
1 per cent transphobic motive

The above-mentioned numbers refer to crimes with a bias motive identified in the police reports, but the hate crime report from BRÅ also contains information from the latest victimization survey, in this case, victimization that occurred in 2015. The self-reported

[68] Brottsförebyggande rådet, Hate crime 2014. Statistics on police reports with identified hate crime motives and self-reported exposure to hate crime. English summary of Brå Report 2015:13, p. 3–4.
[69] Brottsförebyggande rådet, Hatbrott 2016. Statistik över polisanmälningar med identifierade hatbrottsmotiv och självrapporterad utsatthet för hatbrott. Rapport 2017:11, p. 9.

victimization of hate crime based on data from the Swedish Crime Survey (Swedish abbreviation: NTU) comprises data collected through telephone interviews (mostly telephone interviews but a smaller percentage participated through posted questionnaires or Internet questionnaires). Approximately 11, 900 persons have answered the questions in the latest study related to victimization in 2015, giving a response rate of 60 per cent.[70]

It was estimated that approximately 145,000 individuals (1.9 per cent) in the population (aged 16–79) were victims of a total of 255,000 xenophobic hate crimes that year.[71] It was indicated that approximately 47,000 individuals (0.6 per cent) were victims of a total of 81,000 anti-religious hate crimes, and approximately 23,000 individuals (0.3 per cent) were victims of a total of 45,000 homophobic hate crimes.[72] Compared to previous years, the level of victimization can be viewed as relatively stable for all hate crime motives, according to BRÅ.[73]

There is, of course, a large difference between self-reported victimization and reported hate crimes. The usual arguments can be made here, pertaining to difficulties for the police (and BRÅ) to correctly identify hate crime, leading to many hate crimes being recorded as 'ordinary' crimes. We also know of course that most crimes, bias-motivated or not, tend to go unreported by the victim. According to the data from the latest NTU, 17 % of hate crimes with a xenophobic/racist motive were reported to the police, 11 % of hate crimes with a homophobic motive and 26 % of hate crimes with an anti-religious motive.[74] This can be compared to the overall willingness to report crime, which is estimated to be, according to NTU, 23 %.

[70] Brottsförebyggande rådet, Nationella trygghetsundersökningen 2016. Om utsatthet, trygghet och förtroende. Rapport 2017:1 s. 6. This is a general population survey without information about racialised identity etc.
[71] Brottsförebyggande rådet, Hatbrott 2016. Statistik över polisanmälningar med identifierade hatbrottsmotiv och självrapporterad utsatthet för hatbrott. Rapport 2017:11. p. 8.
[72] Brottsförebyggande rådet, Hatbrott 2016. Statistik över polisanmälningar med identifierade hatbrottsmotiv och självrapporterad utsatthet för hatbrott. Rapport 2017:11. p. 37–38.
[73] Brottsförebyggande rådet, Hatbrott 2016. Statistik över polisanmälningar med identifierade hatbrottsmotiv och självrapporterad utsatthet för hatbrott. Rapport 2017:11. p. 38.
[74] Brottsförebyggande rådet, Hatbrott 2016. Statistik över polisanmälningar med identifierade hatbrottsmotiv och självrapporterad utsatthet för hatbrott. Rapport 2017:11. p. 39–40.

If we look at the sort of hate crimes that are reported, and the bias motives that are most common, the picture has not changed so much over the years. It is important to note that it is mostly statistics of police-reported crimes that are presented above. As for numbers of convictions, or even the numbers of cases actually being brought to court, it is difficult to obtain correct information. The only data obtainable from these BRÅ reports show that 59 % of all identified police reports referring to hate crimes were investigated, but there is no information about how many of these actually made it as far as a court proceeding. For comparison, general statistics concerning all crimes reported to the police usually show that approximately 10 percent find their way into court.

Regarding statistics concerning the number of cases in which a more serious penalty was imposed, there is no way to obtain these statistics in the Swedish system, a fact that has been criticised by both researchers and some government committees. The court should consider the bias motive as an aggravating circumstance, if the prosecutor has been able to prove that a bias motive exists, but this is part of determining the penalty, and it is therefore not mandatory for the court to specifically name the relevant statute in their decision. For that reason, it is not possible to search effectively for court decisions where the aggravating circumstance due to bias motivation is used. It is not searchable in a data-base and the courts themselves do not register their decision in this way. The name of the relevant statute has to be given when passing sentence for the crime, for example assault, but not whether aggravating or mitigating circumstances played a part in the decision.

PART II RESEARCH FINDINGS

6 Hate Crime and the Swedish Criminal Process

The Swedish criminal process, with its historical roots is an inquisitorial model, nowadays firmly situated within an adversarial or accusatory model. The prosecutor represents the state's interest, but also has some responsibilities towards the crime victim, principally to help with claims for compensation, claims that are handled within the criminal procedure. Under certain circumstances, mostly connected with the severity of the crime, the defendant is entitled to a public defender, and in cases with a hate crime element, a public defender is usually appointed. One anomaly, if the Swedish system is compared to most other European legal systems, is that the victim has a legal standing in the process in the form of the legal status of injured party, that is, they are a party to the trial if they support the prosecutor's case or sue for compensation. The crime victim will also, in more serious cases, have the right to legal counsel in the form of an injured party counsel, a lawyer who assists in both legal and other matters concerning the case.

As mentioned above, there is no specific offense in the Swedish Penal Code called hate crime, or bias motivated crime. There are, however, other offenses that cover such situations. There are three specific offenses that refers to bias motivation; agitation against a national or ethnic group, unlawful discrimination, and insult. All three offenses include some formulation of protection of categories or groups based on for example ethnicity, sexual orientation or religious beliefs. But a bias motive can also be seen as an aggravating circumstance in regard to almost any criminal offense. That is, can it be proven that the perpetrator of, for example, an assault had a bias motive when committing the assault, s/he can get a more severe punishment. This is formulated in terms of a section on aggravating circumstances in the chapter of the Penal Code dealing with sentencing.[75] In this part of the report, where we present the result of our interviews, it is important to point out that we have asked about experiences regarding all these forms of regulations of hate crime.

[75] For a more extensive description of these offenses and the section on aggravating circumstances, see chapter 4.

Hate-motivated crimes are handled within the ordinary court procedure, in the regular courts and adjudicated by judges who deal with all sorts of criminal and civil cases. There is no specialization on this level. The Prosecution Authority has appointed special hate crime prosecutors within their organisation, so that every district should have at least one prosecutor who is especially appointed to handle these (and other) cases. In this study, all of the prosecutors interviewed were appointed as special hate-crime prosecutors.

In the last 10-15 years the Swedish police have been working towards establishing some specialised units to act as investigators of hate crime, but this has mostly been in the three largest cities in Sweden. Regarding the defence lawyers, there is seldom any specialisation of this kind. The defence lawyers interviewed in this study have experience from at least one assignment as defenders of hate-crime offenders.

When it comes to lawyers who work as counsels for injured parties, there are some who have specialised in working with victims of hate crime, and usually, this is done in cooperation with NGOs that recommend certain lawyers when they come into contact with victims of hate crime. In this study we have been in contact with several lawyers who have worked as counsel for the injured party, some of those were therefore able to give us access to victims of bias-motivated crimes.

6.1 Occurrence and Experience of Hate crimes

A significant majority of the prosecutors and defence lawyers interviewed are of the opinion that hate crimes are an increasing feature of Swedish society and that the legal system has become better at identifying these crimes. However, there are still very few cases that lead to prosecution and conviction. In addition a few prosecutors considered it difficult to know how many cases are overlooked. With regard to a bias motive as an aggravating circumstance many cases are dismissed due the fact that the motive could not be proved or that the crime itself could not be proved. For example, in the case of the crime of insult, a crime that is quite common when discussing aspects of bias-motivated

crimes, in Swedish legislation the plaintiff must report it and be willing to go to court in order for a charge to be brought. One of the prosecutors explained:

> *"…insult is something that is often reported, it is possible to say that many of those reports do not lead to prosecution just because of the way the law is designed, where only in exceptional cases are they designated a public prosecution offence." (Interview prosecutor 10)*

The legislation dealing with agitation against a national or ethnic group and the law criminalizing unlawful discrimination are rarely used. All those interviewed, judges, prosecutors and defence lawyers, stated that they almost never handle cases regarding unlawful discrimination, and that cases of agitation against a national or ethnic group are rarely brought to court. One of the prosecutors explained why s/he believed that, as prosecutors, they were reluctant, as s/he put it, to prosecute actions in accordance with the legislation on agitation against a national or ethnic group:

> *"…I make the assessment that when it concerns agitation against a national or ethnic group, I usually prosecute, … but there is quite a lot of caution, too much caution in using this legislation due to the relation to freedom of speech and freedom of opinion. And of course that is important, absolutely basic rights one should not tamper with, but at the same time there are regulations that some opinions are not allowed to be expressed." (Interview prosecutor 11)*

This opinion is somewhat in line with what a minority of the judges referred to. As one of the judges explained:

> *"This is a damn hassle. Eh… what I think is the dilemma… is the balance between freedom of expression and the right of vulnerable groups to be protected, not to be exposed. Eh… and that is difficult." (Interview judge 01)*

On the other hand, the possibility of seeing a bias motive as an aggravating circumstance when sentencing is considered to be used more frequently. This is also shown in the research findings of this study. However, the majority of the defence lawyers have the perception that a bias motive as an aggravating circumstance is still fairly seldom used. One of the defence lawyers referred to this legislation as "a forgotten part of the criminal code" (Interview defence lawyer 2). Nevertheless, when the various legal actors discuss hate crimes it is mostly in the context of the possibility and consequences of using bias motive as an aggravating factor when prosecuting, defending or adjudicating cases where

assault, molestation, insult, slander, unlawful threats and sometimes such serious crimes as attempted murder were an issue.

6.2 Investigating Hate Crimes and the Proof Requirements

We asked all interviewees within the judiciary about the importance of cooperation with the police, the gathering of evidence and about the decision to prosecute.

6.2.1 Current Policies

In most cases, the initial investigation into a possible hate crime is conducted and led by the police. When the investigation has progressed so far that it is possible to identify a person as being suspected of the crime, a prosecutor (ideally a hate-crime prosecutor, but not always) takes over the responsibility for the investigation. Therefore, cooperation between the police and the prosecutor is vital and is, in general, considered to work fairly well. There is, however, an ongoing discussion in Sweden about the reorganization of the Swedish police force which took place some years ago and that still has repercussions in the form of lack of resources and confusion about prioritizations. This affects the whole organization, and also the work that the police do in investigating hate-motivated crimes.

The standard procedure to prove a criminal offence is to establish the circumstances in direct relation to the event. The first interrogations at the crime scene are therefore usually the most valuable for being able to establish a motive. Prosecutors usually give specific directives to the police concerning questioning the suspect, victims and witnesses in regard to a possible hate motive; directives concerning what to look for, what questions to ask and so on. Usually, oral evidence is seen as the most important evidence needed in these cases. Therefore the knowledge and expertise of the police officers are vital.

6.2.2 Research Findings

Even though the police are often described as competent and doing a good job investigating hate crimes, both defence lawyers and prosecutors state that errors are made and that investigations can be improved. For example, a majority of the prosecutors refer to studies that shows that a majority of the crimes that were identified as hate

crimes by the police were done so incorrectly and that this also had consequences for the statistics from BRÅ.[76]

Many defence lawyers also described it as problematic for the prosecution to prove a bias motive and that the gathering of evidence in the first phase of the investigation is vital. In the words of one of the prosecutors:

> *"First hearings are most important, then there are possible witnesses in place and people are most likely to talk. Police officers must be better at holding interrogations on the spot, reporting faster, and just making more comprehensive efforts initially." (Interview prosecutor 05)*

Another prosecutor described the initial investigation that takes place at the crime scene as often insufficient and explained that:

> *The investigative work often takes place in retrospect." (Interview prosecutor 01)*

It takes a lot of investigating and resources to be able to validate a claim that there is a bias motive. It was suggested that the police need more knowledge of how the legislation is constructed in order to be able to improve the gathering of evidence and to be able to establish a bias motive. A minority of defence lawyers stated that recorded material has become more common, and is considered more reliable than oral statements. It was also suggested that the police should always carry recording equipment to be able to document the situation at the scene. The gathering of evidence is often focused on the actual crime while the motive is forgotten, or is left until a later stage in the investigation when most of the evidence no longer exists or is harder to gather. One of the prosecutor concluded that:

> *"The police have become better at investigating hate crimes, but still, they focus too much on the objective - what has happened - and not so much on the motive." (Interview prosecutor 01)*

However, there has been a change in how the police and prosecutors work to establish a bias motive. Instead of only looking at the specific event, the background, lifestyle and

[76] The studies referred to by the prosecutors is for example Utvecklingscentrum Malmö, Hatbrott – en granskning av åklagarnas handläggning. Tillsynsrapport 2016:1, Brottsförebyggande rådet, Hatbrott 2014. Statistik över polisanmälningar med identifierade hatbrottsmotiv och självrapporterad utsatthet för hatbrott. BRÅ rapport 2015:13.

values of the suspect are also investigated to establish a possible hate motive. Using this approach, evidence such as clothing, symbols, technical appliances from the suspect's home or workplace as well as membership of various organizations can be used to show a bias motive. This method is not, however, generally accepted amongst all prosecutors and many lawyers are very critical. Some hold that it should not be considered as relevant which organization or political party the suspect is a member of, and that the prosecutor should be neutral, objective, and only provide sufficient material for a conviction. One prosecutor also stated that:

> *"One should not focus too much on things that do not lead to anything in the end, but rather create additional tension in society." (Interview prosecutor 06).*

A minority of the prosecutors were of the opinion that the focus should instead be a on what is directly expressed in connection with the criminal act, not what could be found in the suspect's home or living situation.

A few prosecutors also expressed difficulties when gathering evidence to prove agitation against a national or ethnic group, for example through the use of symbols. The prosecutor is required to explain the relevance of the symbol. The meaning of a symbol is not always clear and can be ambiguous, so the prosecutor must be able to show that the offender used the symbol for a specific purpose. A few prosecutors expressed frustration over the fact that the meanings of symbols are changing and that there are certain trends in how different symbols are used for different purposes, a previously innocent symbol can suddenly be used to symbolize racist views, etc. They also expressed frustration over the fact that symbols do not seem to carry much weight as proof in courts, except for the most common symbols of racism.[77] One prosecutor concluded:

> *"So we will have to prove if this is a racist symbol or something else. Such things can be difficult and I don't even know if it is possible to prove. There are trends where symbols are currently used to express hatred, and which only some people know about." (Interview prosecutor 17)*

[77] This would be for example the swastika.

A significant majority of the prosecutors find it difficult to prosecute an offence as a hate crime. From their experience there are two aspects to these difficulties. First, the prosecutor needs to provide evidence both regarding the requirements for the actual crime, the intent to commit a crime, and also of the motive behind it. So, there is a double burden. Secondly, it is difficult to provide evidence of the motivation as a motive is seldom visible. So, for example, if no oral comments were made in relation to the offence it could be difficult to prove motive. The change in the way proof is gathered that was mentioned above (that the police also look at membership of certain groups, for example, and what material can be found in the suspect's home) in an attempt to form a chain of evidence which proves the existence of a bias motive has made the prosecution of hate crimes more effective. It also, however, means more work for the police, which in turn entails the use of more resources and requires the police force to have more knowledge. Furthermore, as mentioned above, this change is not uncontroversial.

6.3 Court Procedure and Rules of Evidence

We asked all interviewees what were the most common types of evidence they had encountered in proving a bias motive in court, and what common evidential factors they felt increased or reduced the likelihood of a successful prosecution.

6.3.1 Current Policies

The Swedish criminal process is defined by the principles of free evaluation of evidence and of oral presentation. The court makes it decision according to what has been brought before it in the court room at the main hearing. Since there is no plea-bargaining in the Swedish system there must be a main hearing in every case when a decision is made to proceed with charges.

According to guidelines issued by the national Prosecution Development Centre in Malmö, the centre which has a special responsibility for hate crimes, a suspected bias motive must always be included in the summons application as an aggravating circumstance.[78] It is considered important to do this as clearly as possible in order to "force" the court to take a stand on the question. The actual procedure, however, differs between prosecutors as to when and how the hate motive is introduced.

[78] Åklagarmyndigheten, Hatbrott – en granskning av åklagarnas handläggning, 2016.

6.3.2 Research Findings

Many different opinions were expressed among the legal actors interviewed regarding how bias-motivated crimes are, and should be, dealt with in the courts

According to policy instructions prosecutors are able to include aggravating factors in their summons application. However, a majority of the judges are of the opinion that prosecutors very seldom include aggravating factors in their summons application to the court. This opinion is shared by the defence lawyers, the majority of whom agreed that prosecutors seldom include a suspected bias motive in the summons application. It is, however, considered important that the prosecutors do so for the defendant to be able to prepare his defence. According to the lawyers it is more common for the bias motive to be introduced at a later stage in the court procedure.

> *"In that case a bias motive is brought up by the prosecutor as an aggravating circumstance, it will usually come later in the hearing and, in my experience, is then only dealt with with the left hand, so to say." (Interview defence lawyer 10)*

This picture is refuted by the prosecutors. The majority of the prosecutors state that they are very meticulous in their use of the aggravating factor, when such a factor is relevant, even though some prosecutors also admit that it is easy to forget to invoke the provision on aggravating circumstances.

The majority of defence lawyers believe that if the prosecutor has enough evidence, and is sure of a conviction, the bias motive is included in the summons application. If it is not, it could be an indicator that the prosecutor may not want to focus too much on the motive during the trial if they are not sure that it can be proved. If the prosecutor's reasoning is wrong with respect to the motive, it may weaken the entire case. The actual method of procedure, however, differs between prosecutors as to when and how the hate motive is introduced. According to a minority of the defence lawyers, this also depends on the dedication of the individual prosecutor.

> *"…it is probably closely tied to the prosecutor's involvement,…" (Interview defence lawyer 07)*

A minority of the judges conclude that there could be a reasonable explanation for prosecutors omitting the bias motive in the summons application. They are of the opinion that there is no real tradition among prosecutors of naming aggravating circumstances at that stage of the criminal process. Other aggravating circumstances apart from those connected to bias motivation are also omitted. This could be due to the fact that traditionally, prosecutors have had little to say about the penalties for the crime; this has been left to the court to decide. Usually the prosecutor has only stated that there should be a prison sentence, but has not discussed the length etc.

> *"Traditionally, the prosecutors have not argued so much about what kind of penalties there should be or their duration, and there are also regulations about this in the chapter on penalties in the Penal Code. Often, the prosecution have just stated that there should be a prison sentence."*
> *(Interview judge 04)*

This has changed to some extent and prosecutors are now more active not only as regards the guilt aspect but also when it comes to what sanctions should be imposed. Most judges see this as a positive development.

A significant majority of the defence lawyers are of the opinion that it is relatively easy to deny a bias motive, or at least that it presents no more difficulties than denying the regular crime. One defence lawyer stated:

> *"It is easy to make objections in regard to a bias motive as defenders, difficult for the prosecutor to prove and easy for the defence to deny."*
> *(Interview defence lawyer 10)*

A significant majority of both prosecutors and defence lawyers see it as more difficult for the prosecution to prove a motive. The defence only needs to deny the allegation, and in the end, only the perpetrator knows for certain why they did it. However, it often entails more work for the defence lawyers, and if the defendant has previous convictions for hate crimes it is harder to create a credible defence.

Some prosecutors question how the courts handle the bias motive. Even though they present detailed and informative interrogations from the police investigation the court may not give so much importance to the bias motive as an aggravating factor in the

verdict. Prosecutors tend to see judges as unwilling to take the bias motive seriously. One prosecutor concluded that:

> *"There are **frequently** very detailed and good police interrogations that the court attaches little or no importance to." (Interview prosecutor 03)*

A few prosecutors were also of the opinion that bias-motivated crimes can be more difficult to handle in court as they concern sensitive topics, that neither the victim nor the suspect may want to reveal. These trials are also more challenging for the prosecution as they bear the burden of proving the motive. The prosecutors also conclude that the court never brings up the question of a bias motive ex officio

A significant majority of the judges, on the other hand, are very much in agreement that it is not their job to "save" the prosecutor. Even if a judge realizes during the main hearing that there was a bias motive behind the crime, but the prosecutor has failed to argue this, it is not in accordance with the role of the court to actively, or ex officio raise the topic. This is a question of both the underpinning of the accusatory process and of fair trial.

> *"There is a very thick wall between the court and the prosecutor. We are not crime investigators and we are not crime fighters and the prosecution **does not have us on a leash**."(Interview judge 03)*

If, on the other hand, the prosecutor raises the issue of a bias motivation for the crime as an aggravating factor during the introductory part of the trial, even though the motive has not been presented in the summons application, this is not a problem. The principles of the trial, with free evaluation of evidence and the oral principle, guarantee that the defendant gets a fair trial, with a possibility to refute the accusations. In practice, it is almost never the case that a defendant is surprised at the main hearing by the introduction of a bias motive since this should have been part of the initial police investigation and the defendant would have been questioned about it then. However, should the bias motivation be introduced late in the trial, as part of the closing argument for example, it could be a problem.

It is the view of the majority of judges that if the prosecutor has not raised the issue of there being a bias motive during the trial, but only mentions it during closing arguments,

it does not make for a fair trial. Usually what happens then is that the judge interrupts the prosecutor and asks the defendant if they want time to confer with counsel to see if there is a need for more time for the defence, if they need to present other evidence or ask the victim more questions. As a last resort, it is possible to postpone the trial. Since the bias motivation is usually most relevant in connection with sentencing, as an aggravating circumstance, a majority of the judges are not troubled by the fact that the discussion can come up during the trial. Sentencing is the stage where the court has more freedom to decide what factors should be taken into account.

> *"I don't really see it as a problem, as long as the question of a bias motivation is taken up during the main hearing in court, in an open and transparent way so to say. It can, of course, happen that the defence argues that this has not been presented by the prosecution in the right way, and that the defence wants to present counter evidence and so on, well, then you have to handle that question. But as I said, this can happen in all cases not only in cases with aggravating factors. So, really, this is not a problem, either the question is resolved during the trial or you have to postpone the verdict." (Interview judge 02)*

Regarding the possibility of a fair trial for those accused of a crime with a bias motive, most judges' point out that there is the same burden of proof in these cases as in other cases. There is often a problem, however, with the prosecution not presenting enough proof of a bias motive. To prove motivation is something more than proving intent. It is not enough that the victim belongs to a protected group, the prosecution needs to show beyond reasonable doubt that the crime of assault, for example, can be linked to the defendant yelling racial slurs.

> *"The motive is something that is inside the head of the defendant, some sort of external manifestation is required for the prosecution to be able to prove a motive." (Interview judge 06)*

6.4 Sentencing

We asked all interviewees of the possible importance of more severe sentencing in hate-motived crimes. A significant majority of the prosecutors and defence lawyers are of the opinion that there is a need for legislation that states that those who commit bias-motivated crimes should be penalized more severely. Another important finding from our interviews with the legal actors was the relevance of how the sentencing is established in

the verdict. This is mainly a question of the possibility of using bias motive as an aggravating circumstance.

6.4.1 Current Policies

The impact of aggravating circumstances in sentencing is seldom discussed in court rulings. The court has to name the relevant statute under which the sentence for the crime, for example assault, is given but there is no requirement to explain the impact of aggravating or mitigating circumstances on the decision. This has an historical explanation, in that the court's independence and the judges' independence in sentencing have very strong roots in the Swedish legal tradition. There have been efforts to change this, through legislation that defines what aggravating circumstances may be taken into account, which has resulted in the current legislation on aggravating circumstances in the Swedish Penal Code.[79] The impact of these circumstances, whether a bias motive should result in two months imprisonment instead of one, for example, is still, however, a matter for the court to decide, and it is still up to the court to decide whether or not they want to present an explanation. Some do, but most court decisions consist of a statement in the form of "after a balanced assessment, it is the court's decision to…". This is due to the fundamental principle of Jura novit curia, the court knows the law, and has no duty to show how that knowledge was obtained.

6.4.2 Research Findings

According to all of the prosecutors, the possibility of seeing bias motivation as an aggravating circumstance is seldom used by the courts, and the judges are not believed to have much experience in this area. The presence of an aggravating circumstance in a crime should entail a more severe sentence, be it higher fines or more time in prison. A majority of prosecutors and a few defence lawyers are of the opinion that it is difficult to determine how much impact the aggravating circumstance has had on the verdict. One prosecutor stated that:

[79] Granström, Görel, Straffskärpningsregelns användning vid hatbrott: En fråga om domstolens frihet eller brottsoffrets rättssäkerhet? I: Anita Heber, Eva Tiby och Sofia Wikman (ed.) Viktimologisk forskning: Brottsoffer i teori och metod, Studentlitteratur, 2012.

…It is quite rare, I think, for the court to refer explicitly to the legislation on aggravating circumstances. That's, that's… very rare. (Interview prosecutor 04).

This could be explained by the way in which Swedish judges formulate their verdicts in general, where there is seldom a motivation, as mentioned above, regarding either aggravating or mitigating circumstances and their impact. Nonetheless, there is a marked frustration, especially amongst prosecutors, when they talk about these issues. A few explain it as frustration over having to put in a lot of extra work to be able to prove a bias motivation and succeed, only to realize that although the court acknowledged that there was evidence of a bias motive, that it had been proved, it still did not define just how this had impacted the length of the sentence. One prosecutor concluded that:

"In my last hate crime case, which involved unlawful threats, I had written in the summons application that this should been seen as an aggravating circumstance because it was hate motivated, but the court did not mention it at all in the verdict. (Interview prosecutor 07)

When asked why they thought it was important to be able to discern just how much the bias motive was worth, in terms of higher fines or longer prison sentence, the prosecutors answered that this was both a question of validation for their work, but also an educational question with regard to the victim of the crime and the offender. One prosecutor explained the need to be aware of the reasoning of the court like this:

"I have never experienced that the crime is classified as a more severe crime because it is hate motivated. It is not always that the court justify, or raise that issue in their judgments and then no one knows how they have reasoned. It is simply important for us to know how they have assessed the rule of aggravating circumstances." (Interview prosecutor 17)

A few of the prosecutors were of the opinion that the way Swedish legislation is used when it comes to aggravating circumstances, i.e. it is difficult to see what impact the bias motive has on sentencing, leads to the legitimacy of the legislation being questioned. Even when an impact can be shown, it is almost always rather limited, for example that the offender gets four months in prison instead of three, or 10 extra "day-fines", that is 50 day-fines instead of 40. This is not a significant enough difference to make a real

statement, according to these prosecutors. Some prosecutors argued that it would be more efficient if there was a presumption for imprisonment when it came to certain crimes with a bias motive, with the possibility for fines, usually seen as a less severe punishment, being excluded and imprisonment the only option.

A few of the judges on the other hand pointed out that it is quite often the case that aggravating circumstances, such as a bias motive, are considered in the verdict, even though it is not explicitly stated in the text of the verdict. Some judges emphasized that if a bias motive is proved, it is taken into account in the verdict and has an impact on the sentence, but most of them agreed that aggravating circumstances are not often explicitly discussed in their writing of the verdict. There are a lot of different aspects to take into account in deciding a case and the judges make an overall or balanced assessment, but they do not put all their reasoning in print.

> *"It happens that the aggravating circumstances, for example a bias motive for a crime, are taken into account without it being explicitly written in the verdict. This is mostly due to the fact that there are usually different reasons why the specific sentence is chosen and in an overall assessment there is no reason to put that in writing." (Interview judge 08)*

They also emphasize that this is not something that is characteristic of bias motivation as an aggravating circumstance alone, but of all aggravating or mitigating circumstances, "you do not usually refer to any of these circumstances, it happens, but not often." (Interview judge 09). The judges also imply that if the prosecution do not present the bias motive in their summons application, the motive, even though it is part of the process, tends to become invisible.

6.5 The Relevance of Legislation

As part of our study we asked interviewees whether they felt that the current framework of legislation should be reformed in any way. During our interviews with the legal actors, some common themes could be identified regarding the question of the relevance of the legislation in this area. As noted above, it was mainly a question of the possibility of using bias motive as an aggravating circumstance that was discussed, but there have also been some discussions about other parts of the legislation that could be used with reference to

hate crimes, mainly unlawful discrimination and agitation against a national or ethnic group.

A significant majority of the prosecutors and defence lawyers are of the opinion that there is a need for this kind of legislation, and that those who commit bias-motivated crimes should be penalized more severely. The legislation in itself is not a big issue, but the prosecutors believe that there is a problem with the added burden of proof regarding the motivation for the crime. It is usually difficult enough to prove intent but to get inside someone's head and prove motivation is challenging. All defence lawyers and prosecutors agree that the main problem lies in the implementation of the legislation on all levels in the judicial system, from the police to the courts.

A significant majority of the prosecutors and defence lawyers agree that there is a sufficient number of protected categories. If more categories were to be added, and that is questionable, some mentioned disability and gender, but it was not a common answer. The main argument against extension was that it would be difficult to include more categories and still have a clear and distinct legislation. One of the prosecutors concluded that the limits of the protection through this legislation would be unclear:

> *"I also see problems with whether the protection that one should give would be much too general." (Interview prosecutors 07)*

There is a more general formulation in the statute of aggravating circumstances, that concludes "…or other similar circumstance" and some of the prosecutors suggest that this should be used more frequently in courts to award protection to other categories.

The question was raised as to whether the Swedish way of legislating against hate crime could be formulated differently, for example by introducing a new crime into the Penal Code; a statute that specifically criminalizes hate crime. Here, both the prosecutors and the defence lawyers were divided. A few argued that specifying hate crime could focus more attention on it, perhaps make it easier for the police and the general public to understand what a hate crime is and also that a special provision would be easier to use in court. A few others argued that it would be difficult to create one specific provision since hate or bias motivation could be a factor in so many different situations. It was also

pointed out that it is important to remember that it is the manifestation of these thoughts that should be criminalized. Some prosecutors also added that this sort of legislation is regarded as somewhat political and that judges seldom want to engage too much in politics.

The judges did not differ very much from the prosecutors and lawyers in their opinions on this matter. They all see the legislation as relevant and needed, even though as one of them said, "you cannot do wonders with legislation" (Interview judge 01).

One theme that came up in all categories of legal actors was why the categories that are protected today "deserve" that protection. In this regard arguments were made along the lines that these groups have been persecuted in the past and are still persecuted. So they require this kind of legislation to emphasize their need and right to protection.

6.6 Attitudes towards Continued Education

Another theme that was brought up during the interviews with the legal actors was whether there was a need for more education about hate crime, focusing particularly on how the legislation should be applied or what impact a bias motive could have on the verdict. Not surprisingly, attitudes towards a potential need for education varied widely among the different groups, with a significant majority of the prosecutors and defence lawyers being positive and having some experiences of it, and all the judges being more cautious or negative. It is a rather well-known fact in the Swedish legal world that judges are often of the opinion that there is seldom a need for education on special issues. It tends to be seen as a way of risking their impartiality and objectivity. Courses are given, but on matters of more general applicability, so in our interviews a majority of the judges stated that they did not see a need for any special education in matters concerning hate crimes. They did however suggest that prosecutors and police officers might need education in these matters.

> *"Regarding education, I think it is important to see to it that the police and the prosecutors get education. That is, we – the judges – … the material, the investigation, is what it is when it comes before us, we cannot do much. We know how to use the relevant legislation, if the investigation is done well enough." (Interview judge 03)*

A majority of the prosecutors, on the other hand, would like more education regarding how to investigate and prosecute hate crimes with a special focus on the use of aggravating circumstances. Some pointed out that there is still so much focus on proving intent in the actual crime, that it pushes investigation into the motivation slightly out of focus. Almost all the prosecutors mentioned that they have great support from the special Prosecution Development Centre in Malmö. This centre is responsible for coordination of, among other things, education about hate crimes for prosecutors.

A majority of the defence lawyers would also like more education regarding bias motivation and also on human rights. This last request was closely linked with the offence of agitation against a national or ethnic group and its relation to the right of freedom of expression within the European Convention on Human Rights, which has been seen as problematic. One of the defence lawyers stated that:

> *"It is problematic in terms of agitation against a national or ethnic group, since behaviour may be punishable under that provision, but it is not compatible with the European Convention to restrict the freedom of expression and religion in the manner of such prosecution." (Interview defence lawyer 02).*

6.7 Experiences of Victims of Hate Crime

In this study we also interviewed victims of hate crime and those working to support these victims concerning their experiences of encountering the criminal process and judicial officers. We were presented with many different experiences that are not easy to summarise comprehensively. We have, however, identified a few common themes that occurred during our interviews and summarised them as follows: all were satisfied with the treatment they received from the court and from the prosecutor, a significant majority were satisfied with the work of the police and a few also felt that the defendant's lawyer treated them with respect. The most important contributor to this satisfaction was, however, another legal actor, the legal counsel (the injured party counsel) who helped them throughout the whole process.

The victims we have interviewed have been victims of various crimes, ranging from unlawful threats to attempted murder. Some of them contacted the police in person to

report the crime, others were in a situation where the police came to the crime scene. All were more or less satisfied with the way that they were treated by the police, and in those cases where something was not correct it was dealt with by their legal counsel, if such a person was appointed. They all said that they were treated with respect by the police, and also by the prosecutor, even though they often only met the prosecutor outside the courtroom when waiting for the trial to begin. One victim told of being surprised by the respectful treatment:

> *"First of all, when I went to the police, I was fed up and damn irritated, pissed off one could say. But then to be met with such respect by the police, it was nice, because it was in [a small town in the north of Sweden] and the police there are not considered to be super-professional. But then, later on, I got a phone call from this person [a prosecutor] who wanted to take my case to court, then I experienced… almost like I thought, 'oh my God, is this in Sweden'? Like, it was such a positive experience." (Interview victim 03).*

The defence lawyers were mostly professional in their questioning in court, but some of the victims felt that they were questioned in a way that bordered on disrespectful. One victim described opposing counsel as follows:

> *"I thought he was extremely self-important and condescending, it felt like he was trying to undermine my character. I just thought it felt so wrong. He was very patronizing." (Interview victim 01).*

Again, the importance of the injured party counsel was mentioned. S/he had usually prepared the victim for what the trial would be like, and also coached the victim in how to cope with sitting in the same room as the offender; where to look, how to handle being nervous and so on. One of the victims described the scene outside the courtroom as follows:

> *"We [the victim and the offender] sat outside in the same waiting room, on the benches in front of each other. And I did not think that could happen. I thought you would be much more separated from each other than that. There was like an electric charge in the air. I did not even want to look at him [the offender]. … So that was really unpleasant. But my lawyer [the injured party counsel] had told me beforehand that she would always stand quite literally physically right between us so that I could feel quite*

calm… she was always half a meter in front of me so that she served as a wall. And she was a great wall."(Interview victim 01).

The court, with its judges and lay judges, was also felt by most of the victims to be professional and respectful. Some had other experiences, in that the judge had not dealt properly with the disruptive relatives of the offender. One victim described a situation where the relatives laughed derisively each time the victim said something and even though the judge admonished the relative it happened repeatedly.

"I thought the judge was very, how to say it, meek. For example, the offender's wife was sitting among the spectators, and as soon as I said something she scoffed. She also took photos and filmed with an Ipad. And the judge issued warnings, but she still got to stay in the court room." (Interview victim 01).

Some of the victims told us that the time between the crime and the trial was very difficult, with a lot of anxiety about how the trial would be. They got help, often via NGOs, with contacting psychologists and were greatly helped by that, but were then disappointed when the court did not decide that the offender should pay for this within the damages they claimed.

With reference to the bias motive being presented in court, almost all the victims felt that it had been brought up and that as victims they had been given enough opportunity to address the court and explain how the crime had upset them. Almost everyone stated that having the crime defined as a hate crime was important to them, but most important was that the perpetrator was convicted of a crime, with or without the bias motive. Regarding sentencing, was not seen as very important whether the perpetrator received a longer sentence due to the bias motive. Again, the most important thing was that the perpetrator was actually convicted. When asked whether they remembered what sentence the offender got, one victim answered:

"I don't remember, and I was not really interested in that, all I was interested in was that there should be some sort of statement, a signal in some way." (Interview victim 02)

Another victim stated that:

"My lawyer [the injured party counsel] had warned me that it would be extremely difficult to get a verdict where the bias motivation was acknowledged. So it did not feel important. For me personally, it was like, I just felt that if at least he gets convicted of a crime I'm happy. I did not care about damages, I did not care about the penalty. I just wanted to get recognition that, yes, he is guilty. My lawyer was more focused on it being defined as a hate crime but for me it made no difference really. He had done wrong towards me and I wanted a confirmation of that." (Interview victim 01)

It was almost as important that the victims were listened to, that they got to tell their story and that they were borne out, that they had been victims of a crime and that it was wrong. At the same time, for some of the victims, life after the hate crime would never be the same again; some of them told about forced career changes, of disabilities, of loss of trust.

6.8 Offenders' Perspectives

In this study, we also interviewed hate crime offenders to obtain some information about their experiences of coming into contact with the criminal process and the judicial officers. As with the victims, there were many different stories but we have identified a few common themes that came up during our interviews. These could be summarised as follows: a significant majority felt that for the most part they were treated well by the legal actors they met; a significant majority were not asked a lot of questions during the main hearing about their offences being bias motivated; and if the verdict showed that this was a hate crime, it was of no great importance to the significant majority, or perhaps important in the wrong way - as enhancing their status.

The crimes that they were accused of, and in some cases also convicted of, were usually acts of violence against the person. Even though all the offenders interviewed were involved with various hate groups, the police never saw or noted the connection between the criminal activity and membership of these organizations. Their membership of these groups was not investigated. One of the offenders stated:

"Well, they did not see the connection, between who had carried out the beatings, or why the beatings was done. It was certainly a problem then, and actually, I think it is still a common problem that the police do not see this connection." (Interview offender 01)

All of the offenders interviewed had experienced going to trial and all of them met witnesses and victims in the courtroom. They were given the opportunity during the trial to describe what had happened in their own words. Not all of them took this opportunity. They all pleaded not guilty initially, until the evidence became too strong. There was very little mention of their crimes being bias motivated during the main hearings. One of the offender explained:

> *"But not much was asked about the reason, more about what the dispute was about, or something like that, why we had fallen out and started arguing, as they often called it. But nothing about the underlying motive, what that was about, actually not." (Interview offender 02)*

All the interviewees felt in retrospect that they were treated fairly in the court proceedings. They were satisfied with the way they were treated by their defence lawyer. They also felt, however, that the police were their enemies and that the prosecutor had already convicted them in advance. One stated that he felt as if the prosecutor was very angry with him during the trial, and that it almost felt personal:

> *"The prosecutor was really, well, he felt almost pissed at me. He put a lot of pressure on me. And it felt almost like he had some personal grudge against me. There and then I felt like I was sentenced before the court's verdict, that's how it felt." (Interview offender 01)*

In some cases one or more witnesses did not make their statement in the court room due to fear of the offender. Some of the interviewees were annoyed by this and felt that the witnesses were cowards. One of the offenders felt confused, and had not realized that the witnesses were afraid and this insight triggered a feeling of being guilty of wrongdoing:

> *"One witness would not even enter the courtroom. It was a girl and she wanted to use a video link instead. Because she was afraid of entering the courtroom. And it felt... it felt very special when you heard it. It did not feel okay that this person in question should be afraid of me. It was really the first time, I felt something that could be compared to a punch in the face. That this girl felt scared. And, that first she went into the courtroom, but then she wanted to have a video link instead. Something happened there and then, it was not something that was predetermined, but she regretted entering the courtroom when she sat waiting. She brought her grandfather in." (Interview offender 01)*

None of the interviewees described the criminal process as being instrumental in breaking their habits or changing their way of life, but perhaps, some of them said, it could be seen as a small part of the process of moving towards another life. The fact that the crime was or was not acknowledged as a hate crime in the court proceedings did not make much difference to the offenders. Some of the interviewees said instead that being convicted of a hate-motivated crime raised their status among their peers. One of the offenders explained the feeling of being convicted:

> *"It was almost like, however sick it might sound, that when you were sentenced, it was almost like you got confirmation… it gets established that you are who you've claimed to be. Then you get it in print... so then you moved up in the hierarchy." (Interview offender 02)*

None of the interviewees had any knowledge about whether they had been given a longer sentence because of the bias motive. Furthermore, none of them believed that longer sentences would reduce hate crime or make anybody refrain from committing such a crimes. The heavier sentence was, however, seen as an important indicator of the fact that this was something more than a regular crime. One of the offenders explained that he did not understand what a hate crime was when he was involved in criminal activities, (that is that he did not know there was such a thing as crimes being seen as more serious or more hurtful because of the motive of the crime) but that he now has understood that all the crimes he committed must have been hate crimes and concluded:

> *"The words hate crime are quite hard words." (Interview offender 02)*

PART III CONCLUSIONS AND RECOMMENDATIONS

7 Concluding Remarks

We have portrayed the lifecycle of a hate crime, from a crime being committed, to the case being investigated, brought to court and adjudicated, sometimes being defined by the court as a crime with a bias-motivation. The legal actors interviewed about this lifecycle have alluded to the same difficulties in dealing with these crimes in a Swedish context. Below, a concluding analysis is presented of the most salient points to emerge from our interviews. We contrast these points with those made by the victims and the offenders, to indicate which aspects of the meeting with the legal system seem to work well and which seem to need improvement. Finally, we conclude with some recommendations about what the judicial system, in terms of both its legal actors and the legal framework which regulates this area of the law, might take note of when trying to improve their work in this area.

7.1 Legislation and Occurrence of Hate Crime

There is a general opinion among Swedish legal actors, mainly among prosecutors and defence lawyers that hate crimes are increasing in Swedish society and that the legal system has become better at identifying these crimes. However, there are still very few cases that lead to prosecution and conviction. This is not seen as being due to the legislation as such but rather to its implementation. The fact that the bias motive is treated as an aggravating circumstance tends to result in very low general awareness of this provision and in the police not having the same level of knowledge concerning this provision as they do of other parts of the legislation.

It is also interesting to note that the judges interviewed all say that they have very little experience of dealing with these cases, and could only remember a handful when we asked about it. This would support the opinion of the prosecutors (and some of the defence lawyers) that judges are not always very good at handling bias motive as an aggravating circumstance, if you believe that learning by doing is important. On the other hand, one cannot help but wonder where all the cases are being dealt with, since the

prosecutors all say that they have worked on quite a few cases during their years in practice.

A significant majority of the legal actors were of the opinion that the legislation regarding hate crimes is sufficient and that problems in Sweden have more to do with implementation, that is, how the legislation is used or rather not used. This makes sense concerning the bias motive as an aggravating circumstance, which is detected by the police and the prosecutors but then fails to make a mark in the court procedure. There is also the matter of the legislation on unlawful discrimination and agitation against a national or ethnic group, two provisions that are almost never used. Hardly any of the prosecutors interviewed mentioned prosecuting cases of unlawful discrimination, and when they talked about the crime of agitation, almost all of them stated that the statute was difficult to use. Based on the replies we received, we would suggest that it might be a good idea to look at these two statutes to see if reformulation is needed.

It is also interesting that a few of the defence lawyers were of the opinion that the European Convention on Human Rights could be used as a legal source in Swedish courts when dealing with the offence of agitation against a national or ethnic group. This is valid because the Supreme Court has opened the way for these kinds of discussions in their ruling on the above-mentioned case of the Pentecostal minister. It is however, important to note that the offence of agitation against a national or ethnic group is considered a legal limitation on the Swedish constitutional right to freedom of expression and that this same right in the European Convention of Human Rights allows such national limitations. This is problematic as the Swedish constitutional right to freedom of expression is not included in the discussion even though the offence of agitation against a national or ethnic group is considered a legal limitation on this right. It is also problematic due to the fact the European Convention on Human Rights is not an instrument designed to be used in national courts but rather as a national legislative tool. Added to this, Swedish Courts are not used to dealing with this kind of international instrument, and judges dealing with such legislation are put under unnecessary additional pressure.

7.2 Police Investigation and Cooperation with Prosecutors

Cooperation between the police and prosecutors is vital to being able to prove any kind of bias-motivated crime. Since the bias motive is handled as an aggravating circumstance and not as a criminal offence in its own right the police do not have the same routine for investigating it. A majority of the prosecutors described the police as mostly doing a good job in detecting bias motivation. At the same time, it was noted that the police incorrectly flagged many crimes as having a bias motive. Further, according to our interviews, the police often seem to have difficulties, due to lack of experience or knowledge of hate crimes, securing the evidence required to prove a bias motive in the first vital stage of the investigation. Prosecutors, from the three special hate crime units currently in place in Sweden, who have worked with police were much more satisfied with police investigations than prosecutors who had worked with the ordinary police.

Some prosecutors referred to the possibility of proving a bias motive by not only looking at the specific event, but at the background, lifestyle and values of the suspect as a means of improving the possibility of a conviction. This way of working is, however, not generally accepted amongst all prosecutors and many defence lawyers and judges are critical. The manner in which evidence is collected is somewhat unique to this kind of legislation, where not only the act itself has to be proved but also the motive behind it has to be established. The background and lifestyle check is used to prove the motive, and not the criminal act, which is why most of the legal actors are unfamiliar with this kind of evidence. It is however, according to a few of the prosecutors, important that this kind of evidence can be used in these cases in order to prove a bias motive.

7.3 Including the Bias Motive in the Summons Application

A significant majority of the legal actors agreed that it is important for the prosecution to include a suspicion of a bias motive as an aggravating circumstance in the summons applications. Partly so that the defendant should have the opportunity to prepare their defence adequately, and partly, because it might be needed to “force” the court to include considerations of the bias motive in its decision.

However, even though a significant majority agree on the importance they disagree on how this works in reality. The majority of the prosecutors were of the opinion that the

bias motive was always included in the summons application, while the defence lawyers and judges were of the opinion that this was rarely the case. Here we have a picture that does not really tally. One explanation could be that we only interviewed the special hate crime prosecutors who have more experience and have gone through additional training with regard to hate crimes, whilst those who prosecute hate crimes in court are not always specialized prosecutors. This shows the importance of having additional training, as these cases require a different kind of knowledge and experience.

7.4 Sentencing and Specifying the Bias Motive as an Aggravating Circumstance

A significant majority of the prosecutors and defence lawyers are of the opinion that there is a need for this kind of legislation, and that those who commit bias-motivated crimes should be penalized more severely. This is interesting in relation to the answers we received from the victims of hate crimes and the hate crime offenders, both of whom thought that the heavier sentencing did not make much difference. For the majority of the victims it was most important that the offender was found guilty, for a few it was also important that the offence was referred to as a hate crime, but the heavier sentencing was not as vital. A significant majority of the offenders were of the opinion that the possibility of a more severe sentence was irrelevant. None of them knew whether or not they had been given a heavier sentence in their own cases. It was stated that marking an offence as a hate crime could in some cases be a positive thing for the offender, who would then gain status amongst their peers.

7.5 The Importance of Support – the Role of the Injured Party Counsel

One aspect that cannot be emphasized enough is the role of the injured party counsel for victims of hate crime. This is a result that is in agreement with findings regarding other categories of victims in Sweden. The role of the injured party counsel, as both a legal representative in court, but also as a more curative support person should not be ignored.

Those victims we interviewed all gave the same picture; without that support, their encounter with the judicial system would have been very different. We heard stories of counsel preparing the victims for court, not only as regards what would actually take place, but also about strategies to cope with being in the same room as the offender, where to look, how to think about things that the offender might possibly say or do. They

also told stories about how the counsel helped them to handle the press, got them counselling from professionals, and explained the court decision when reading the judgement was not enough for them to understand what had really happened in court.

Many of the injured party counsels also played an active part in the investigation leading up to the court case, in that they accompanied the victim to the police interrogation and helped them to understand why it was necessary to answer the, sometimes intrusive, questions put to them. It is our understanding from these interviews that the injured party counsel plays an important part not only for the victim, but actually for the legal process as a whole, in the successful legal handling of these crimes.

7.6 Recommendations

After interviewing judges, prosecutors and defence lawyers, as well as victims of bias-motivated crimes, victim support personnel and perpetrators of bias-motivated crimes, we would like to offer some recommendations. These recommendations are mainly aimed at those legal actors who, in various ways, come into contact with victims of bias-motivated crimes, but we would also like to point out that our recommendations could also inspire possible law reforms in this area. As we have shown, even though most of the legal actors interviewed are of the opinion that the legislation dealing with bias-motivated crimes is sufficient, there still remain possible legal avenues that are not used.

- We would therefore recommend that the legislation on unlawful discrimination and agitation against a national or ethnic group should be critically evaluated focusing on investigating why it is so seldom used, and in what way it could be amended to allow more effective application.

- We would also recommend that the judges look more positively on the possibility of further education in dealing with bias motivation in court. As we have shown, there is a frustration amongst defence lawyers and prosecutors about what they see as the judges' lack of knowledge, or lack of interest, in these cases. Mostly, this seems to be frustration about not being able to discern the impact of a bias motivation in sentencing. Has the motive had an impact and, if

so, what kind of impact? We would suggest that some of this frustration could be dissipated if a different kind of formulation were to be used in the actual verdicts, i.e. the text in the verdict was so formulated that the impact of the bias motivation is clearly visible. Our suggestion is, therefore, that both aggravating and mitigating circumstances should be more clearly formulated in the verdicts, and that the impact of these circumstances should also be more clearly formulated.

- We would also recommend that education is not directed exclusively to judges, quite the opposite. The interviews show that those legal actors who specialize in prosecuting bias-motivated crimes, i.e. hate-crime prosecutors, see it as vital that the police are also educated in this area. There is an obvious difference, according to the prosecutors, if the investigation is carried out by the specially trained police working at one of the three hate crime units in Sweden or by other police officers. Specialization is needed, but it is just as important that this kind of knowledge is spread to those, police or prosecutors, who do not usually work with these cases but who come into contact with them from time to time.

- We would also like to point out a special feature of the Swedish legal system that we think is vital to both victims of hate crime and to the handling of these cases in court, and that is the role of the injured party counsel. This is a legal actor whose role cannot be emphasized enough, according to our interviewees. We would recommend that all victims of bias-motivated crimes should be seen as entitled to legal representation in the form of an injured party counsel. It is in the best interest of the victim and also, we would like to think, in the best interest of the legitimacy of the judicial system. A victim who feels safe in the legal process is a victim who will continue to believe that their rights are taken seriously.

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