Universidad del País Vasco
Euskal Herriko Unibertsitatea
ZUZENBIDE FAKULTATEA
FACULTAD DE DERECHO

UNDERGRADUATE THESIS

INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS

Academic year 2022-2023

The Criminalization of Hate Crimes against the LGBT Community in Spain

AUTHOR

JANIRE OZALLA CIRUELOS

DIRECTOR

JON MIRENA LANDA GOROSTIZA

Leioa, June 2023

INDEX

1. Introduction

Every year, hate crimes become more of an issue in our society. According to the Report on the Evolution of Hate Crimes in Spain in 2021, hate crimes continue increasing year by year: in 2021, 1.802 hate crimes occurred in Spain in contrast with the 1.706 that occurred in 2019 and the 1.598 that occurred in 2018.[1] According to the same report, the number one motive for committing hate crimes is racism and crimes committed due to that reason have increased by 24,08% in comparison to hate crimes committed in 2019 for the same reason. The second most common motive for the commission of hate crimes is sexual orientation and gender identity which have increased by 45,30% in regards to hate crimes committed in 2019. This increase is, without a doubt, alarming.

Furthermore, hate crimes due to sexual orientation are now more than ever at the forefront of people's minds due to several incidents against the LGBTQ community that have made national news. For example, the murder of Samuel Luiz, a gay man in his 20s that was beaten to death by a dozen people to the shouts of "*maricon de mierda"* on A Coruña on the night of the 3rd of July 2021[2], or the four murders and two attempted murders of gay men in Bilbao, who were targeted through a gay dating app.[3]

In this thesis, we will analyze the regulation of hate crimes in Spain, specifically those committed due to sexual orientation and gender identity. First of all, we will define the concept of hate crimes and review the origin of its criminalization, both from an international and a national point of view, until we reach the present-day regulation: the aggravating factor of art. 22.4 of the Spanish Criminal Code. Next, we will analyze said article and its evolution, with a special focus on sexual orientation and gender identity. Moreover, we will look at the biased motivation of the perpetrator as the basis for the application of the Article and the controversy surrounding it, as well as its main issue: proof. Finally, taking into account all of it, we will analyze a few judgments where the aggravating factor was applied or dismissed regarding the motive of sexual orientation and evaluate how the existing proof in each case was considered in doing so.

---

[1] MINISTERIO DE INTERIOR. GOBIERNO DE ESPAÑA, *Informe sobre la evolución de los delitos de odio en España en 2021,* 2021.
[2] ROMA, BRAIS, *Así fue la agresión de Samuel, el joven asesinado de una paliza en la Coruña: solo escucha golpes,* 5 julio de 2021, El mundo. http://www.elmundo.es (last access 14 March 2023)
[3]DE ANTONIO, ANGEL, *Alerta en Bilbao por un presunto aesino en serie contra la comunidad homosexual*, 5 de mayo de 2022, ABC. http://www.abc.es (last access 14 March 2023)

2. Concept of hate crimes

Before going any further, it is important to try and limit what the concept of "*hate crime*" refers to and what is the difference between "*hate crime*" and "*hate speech.*"

Hate crimes have been defined by the Organization for Security and Cooperation in Europe (OSCE) as:

(A) "*Any criminal offense, including offenses against persons or property, where the victim, premises, or target of the offense are selected because of their real or perceived connection, attachment, affiliation, support or membership of a group as defined in Part B.*

(B) *A group may be based upon a characteristic common to its members, such as real or perceived race, national or ethnic origin, language, color, religion, sex, age, mental or physical disability, sexual orientation or other similar factors."* [4]

The Practical Guide regarding hate crimes, published by this same organization, clarifies this definition by stating that hate crimes are criminal acts committed with a biased motive. Therefore, we can distinguish two elements to a hate crime: the commission of an act that constitutes an offense under ordinary criminal law (the base offense) and the commission of the act with a biased motive[5]. This second element, the presence of a biased motive in the commission of the act, is necessary to differentiate hate crimes from other criminal offenses. Having a biased motive means that the perpetrator must intentionally choose the victim of the crime because it bore some characteristic (the so-called protected characteristic) shared by a group (the so-called target group), such as race, language, religion, ethnicity… Therefore, following this definition, we can affirm that hate crimes are a conceptual type of crime rather than a specific offense and can range from acts of intimidation, to property damage, to violent assaults and murder. The key distinguishing factor is the biased motive of the perpetrator.[6]

[4] OSCE/ODIHR. *Combating Hate Crimes in the OSCE Region: An Overview of Statistics, Legislation, and National Initiatives*, 2005, p. 12.
[5] OSCE/ODIHR. *Hate Crime Laws: A Practical Guide*, 2009, p. 16.
[6] MASON, GAIL *ET ALTER*, *Policing Hate Crime. Understanding Communities and Prejudice*, Routledge, 2017, p. 31.

However, hate speech is defined differently, as covering all forms of expression "*which spread, incite, promote or justify racial hatred, xenophobia, anti-semitism, or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origi*n."[7] Therefore, we can see that (the criminalization of) hate speech is a limit of freedom of speech and, in contrast with hate crimes, it is based on the commission of a specific offense.

In the broadest sense "*hate crimes*" can include crimes of "*hate speech*." However, in this piece of work, we will focus on "*hate crimes*" in a more restricted sense (bias crimes), as not crimes of speech, but offenses of action, based on the commission of a base offense that deserves a higher level of protection because it was committed with a biased motive. This higher level of protection is what leads to an increased punishment.

Both hate speech and hate crimes (in their restricted sense) were crimes introduced in 1995, but there is a clear differentiation in their origin and their regulation in the SCC. While hate speech is criminalized in Article 510 SCC, hate crimes are criminalized through an aggravating factor established in Article 22.4 SCC that is applied to basic criminal types.[8]

It is also important to keep in mind that, while the aggravating factor that is established in art. 22.4 SCC can be applied to any base offense committed due to a biased motive against a group as defined above, there are specific crimes that have their own aggravated forms when a discriminatory motive is present in the commission of the criminal offense. Examples of this can be the aggravated form of the crime of intimidation of art. 170.1 SCC, that foresees the case when the intimidation is "*intended to cause fear among the inhabitant of a location, ethnic, cultural, or religious group or a social or professional group or any other group of persons*" or the aggravated form of the offense of revelation of secrets foreseen in art. 197.5 when the secret "*reveals the ideology, religion, belief, health, racial origin or sexual preference, or the victim is a minor or person with disabilities requiring special protection.*"[9]

---

[7] COMMITTEE OF MINISTERS, Recommendation no. (97)20, of the Committee of Ministers to Member States on Hate Speech, of October 30, 1997.
[8] LANDA GOROSTIZA, JON-MIRENA, *Los delitos de odio*, Tirant lo Blanch, Valencia 2018, pp. 25-26.
[9] LANDA GOROSTIZA, JON-MIRENA, *Los delitos de odio*, Tirant lo Blanch, Valencia 2018, p. 48.

3. International Framework

As we have explained, hate crimes and hate speech are not equal. Likewise, they have their roots in different international regulations and systems: while hate speech legislation has its origin in the European regulation and the regulation of the United Nations, hate crime legislation has its origin in the US system. Both systems merged in 2008, in the Council Framework Decision 2008/913/JHA of the European Union.

3.1. The Origin of Hate Speech: the United Nations and European Union

The criminalization of hate speech originates in the system established by the United Nations and the European Union.

First of all, in the UN, the Charter of the United Nations, already in June 1945, established in, its preamble, the principles of dignity and equality and, in its first article, that the purpose of international cooperation is "*promoting and encouraging respect for humanist and fundamental freedoms without distinctions to race, sex, language or religion*". Moreover, the Universal Declaration of Human Rights, three years later, in its second Article, establishes that all human beings are "*entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or other statuses*." Therefore, from the very beginning, we can see a clear right to non-discrimination.

However, the fundamental piece of legislation of the United Nations regarding hate crimes, and specifically hate speech, was the International Convention on the Elimination of All Forms of Racial Discrimination which condemns all forms of racial discrimination. It is specifically relevant regarding hate speech, as Article 4 of the Convention establishes that all state parties:

> *"a) Shall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;*

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."[10]

Therefore, the United Nations made the criminalization of hate speech mandatory for all States Party to the Covenant and made a clear definition of which acts were considered as such. Nowadays, 182 states are State Party to this covenant, remaining only 15 States without signing, mainly in Asia.[11] A year later, the International Covenant on Civil and Political Rights of 1966 established in Article 19 the right to freedom of expression and freedom of opinion. However, art. 20 establishes that "*any advocacy of national, racial or religious hatred constitutes incitement to discrimination, hostility or violence shall be prohibited by law*."

The European regulation also has been fundamental in the evolution of the criminalization of hate speech as we know it today. After World War II, after the devastating effects of nazism and fascism in Europe, there was a clear need to limit freedom of speech when it went against the dignity and the rights of all human beings and the importance of prohibiting hate speech became evident. [12]

The European Convention of (ECHR) of 1950, in art. 10, established the right to freedom of expression that included "*freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*" However, the second part of the article establishes that the exercise of these freedoms may be subject to formalities, restrictions, conditions, or penalties prescribed by law and necessary in a democratic society for the protection of the rights of others, among other reasons. Furthermore, art. 17 ECHR established that "*nothing of this convention can be interpreted as implying for any State, group or person any right to*

[10] UNITED NATIONS GENERAL ASSEMBLY, International Convention on the Elimination of All Forms of Racial Discrimination, General Assembly Resolution 2106(XX), of December 21, 1965.
[11] *Status of Ratification Interactive Dashboard.* www.indicators.ohchr.org
[12] LANDA GOROSTIZA, JON-MIRENA, *Los delitos de odio*, Tirant lo Blanch, Valencia 2018, p. 27.

engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein (...)."

The European Court of Human Rights, through a case-by-case approach, has pinpointed the extension of freedom of speech and in which cases the expression is not protected by this right. Specifically, in Erbakan v. Turkey, in 2006, the Court, interpreting art. 10.2 ECHR, established that "*tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society*". Due to that, they established that it could be considered necessary to sanction or prevent forms of expression that incite, promote, or justify hatred based on intolerance.

There are a very large number of cases analyzed by the European Court of Human Rights that help color the concept of hate speech and what is covered and not covered by the right to freedom of expression granted in art. 10. Taking into account the focus of this paper in discrimination due to sexual orientation, the case of Vejdeland and others v. Sweden in 2012 is especially interesting. In this case, the applicant had been convicted for distributing 100 leaflets offensive to homosexuals in an upper secondary school, by leaving them in the pupils' lockers. The leaflets stated that homosexuality was a "*deviant sexual proclivity*", "*had a morally destructive effect on the substance of society*" and was responsible for the development of AIDS and HIV. The applicants argued that the pamphlets intended to stir up debate about the lack of objectivity in Swedish education.

In this case, the Court didn't consider that the interference of the Swedish authorities on the right to freedom of expression, that is, the conviction of the applicants for the distribution of these pamphlets, was a violation of their right to freedom of expression (art. 10 ECHR) as the statements constituted "*a serious and prejudicial allegation even if there had not been a direct call to hateful acts*" and the court said that "*discrimination based on sexual orientation was as serious as discrimination based on race, origin or color.*"[13] Therefore, the penalty was "*necessary in a democratic society*" and foreseen by art. 10.2 ECHR.[14]

[13] Judgment of ECHR (Fifth section). Vejdeland and others v. Sweden, of the 9th of February of 2012.
[14] LANDA GOROSTIZA, JON-MIRENA, *Los delitos de odio*, Tirant lo Blanch, Valencia 2018, p. 35.

3.2. The origin of hate crimes: the US system

The regulation of hate crimes, as we have come to know it in the Spanish legislation, has its origins in the US system. The idea of a right to non-discrimination begins as a concept in the Fourteenth Amendment of the US Constitution that establishes the equal protection of the laws of all persons within the US jurisdiction. This granted recently freed slaves the same rights and protections before the law as any other citizen.[15]

In regards to hate crimes, in 1993 the Supreme Court made a historical decision that established the constitutionality of sanction in regards to hate crimes.[16] In *Wisconsin v. Mitchell,* the Supreme Court unanimously ruled in favor of the Wisconsin Penalty Enhancement Statute that provided for a longer maximum sentence for crimes where the accused "*intentionally selected the person against whom the crime is committed or selects the property which is damaged or otherwise affected by the crime because of race, religion, color, disability, sexual orientation, national origin or ancestry of the person or other owner or the occupant of that property*[17]." In the case at hand, Todd Mitchell's sentence for aggravated battery was enhanced because he intentionally selected his victim on account of his race, as proven by the expressions made by Mr. Mitchell previous to the attack: "*Do you all feel hyped up to move on some white people? There goes a white boy; go get him*."

The issue brought to the Supreme Court was whether this legislation went against the First Amendment (the right to freedom of speech and association), as it was argued that they penalized the expressions made by the victim and, therefore, his beliefs. Mitchell argued that the Wisconsin statute punished the same criminal conduct more heavily if the victim was selected because of his race or other protected statuses than if no such motive existed. Therefore, the only difference for the enhancement is the defendant's beliefs when selecting his victim. Due to this, the defendant's First Amendment rights were being violated, as what was being punished were his beliefs.

---

[15] LANDA GOROSTIZA, JON-MIRENA, *Delitos de odio: derecho comparado y regulación española,* (Coord. LANDA GOROSTIZA, JON-MIRENA, GARRO CARRERA, ENARA), Tirant lo Blanch, Valencia 2018, p. 153.
[16] LANDA GOROSTIZA, JON-MIRENA, *Delitos de odio: derecho comparado y regulación española,* (Coord. LANDA GOROSTIZA, JON-MIRENA, GARRO CARRERA, ENARA), Tirant lo Blanch, Valencia 2018, p. 166.
[17] Wisconsin Penalty Enhancement Statute of 1980, sec. 939.645, Stat.

However, the Supreme Court argued that "*sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant. The defendant's motive for committing the offense is one important factor*." It did agree that, in specific cases, the defendant's *abstract* beliefs (such as belonging to a white supremacist prison gang in the case Dawson v. Delaware), however obnoxious for most people, may not be taken into account by a sentencing judge. However, the Supreme Court established that "*the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.*"[18]

Moreover, this would not be the first time a defendant's beliefs would be used to prove its motives. In the case, Barclay v. Florida, the defendant's racial animus against the victim was important for the application of an aggravating factor and the trial judge took into account the defendant's membership in the Black Liberation Army and his desire to provoke a race war to prove said racial hatred. Therefore, the Supreme Court ruled in favor of the Wisconsin Penalty Enhancement Statute.

Due to this, new rules regarding penalty enhancements were established, such as the Hate Crime Sentencing Enhancement Act of 1994, in which penalty enhancements of "*no less than three offense levels are foreseen for offenses that are proved beyond a reasonable doubt are hate crimes*"[19] In 2009, the Mathew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 (The Shepard Byrd Act) was passed, in which enhanced penalties were established for the crime of bodily injury when it was committed due to the victim's (1) actual or perceived race, color, religion, or national origin or (2) actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability and the crime affected interstate or foreign commerce or occurred within federal jurisdiction.[20] This is the first statute in the US allowing federal prosecution of hate crimes motivated by the victim's actual or perceived sexual orientation or gender identity.[21]

---

[18] Wisconsin v. Mitchell, 508 U.S 476
[19] Hate Crime Sentencing Enhancement Act of 1994, 28 U.S.C. 994.
[20] Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. 249.
[21] LANDA GOROSTIZA, JON-MIRENA, *Los delitos de odio*, Tirant lo Blanch, Valencia 2018, p. 41.

3.3. Merge of the two models: Council Framework Decision 2008/913/JHA

Both the European system regarding hate speech and the US system regarding penalty enhancements when dealing with hate crimes merge in the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia through criminal law.

On the one hand, Article 1 of the Decision establishes the obligation of Member States to ensure that certain offenses constituting hate speech are punishable, such as publicly inciting violence or hatred against a member of a group defined by its race, color, religion, descent of national o ethnic origin. On the other hand, in Article 4, the Framework Decision establishes the obligation of the Member States to ensure that racist and xenophobic motivation is considered an aggravating circumstance or is at least taken into account by the courts in the determination of penalties. At the time, Spain already fulfilled this obligation, as it had art. 510 SCC criminalizing hate speech and art. 22.4 SCC criminalizing hate crimes.

It is relevant to mention that this decision does not prevent a Member State from adopting provisions in national law that extend Article 1(1)(c) and (d) to crimes directed against a group of persons defined by other criteria than race, color, religion, descent or national or ethnic origin. Spain did include more reasons than those foreseen in the Council Framework Decision in art. 510 SCC, as well as in art. 22.4 SCC which contemplates the same motives as art. 510 SCC, except for "*family situation*" and "*national origin*" not foreseen in art. 22.4 SCC.

Last year, the European Resolution on growing hate crimes against LGBTIQ+ people across Europe in light of the recent homophobic murder in Slovakia, established that it "*commends those that have unilaterally decided to improve the level of protection by explicitly recognizing as 'aggravating circumstances' the grounds of sexual orientation, gender identity and expression and sex characteristics.*"[22] However, it also establishes the need for the remaining member states "*to combat hatred against LGBTIQ+ persons by all means possible",* by following the recommendations of the Committee of Ministers *"to recognize that a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance.*"

[22] EUROPEAN PARLIAMENT, European Resolution 2022/20894, of October 20, 2022

4. Spanish Framework on hate crimes

While both hate speech and hate crimes are penalized in the Spanish Criminal Code, we will be focusing on the evolution and regulation of hate crimes, specifically the aggravating factor established in Article 22.4 SCC for crimes committed on discriminatory grounds.

4.1. The historical basis of Article 22.4

The idea of the aggravating factor came about in 1992 through a proposal made by the Socialist Group. They proposed the addition of Article 21-4*bis* in which an aggravating factor was foreseen in crimes committed against people due to their ethnic or national origin. Therefore, in this original proposal, this aggravating factor was only foreseen for crimes committed against persons and the only motives that would lead to the application of the aggravating factor would be "*ethnic or national origin*". This proposal didn't end up being included in any legislation.

The same thing cannot be said in 1995, as an aggravating factor was included in the Organic Law 4/1995, of May 11th, which modified the Spanish Criminal Code of 1973. The aggravating factor was foreseen for crimes committed against people or property due to racist or anti-semitic motives or other motives to do with the victim's ethnic or national origin, ideology, religion, or beliefs. In this draft, we can see an increase both in the crimes the aggravating factor can be applied to (both crimes against persons and crimes against property) and the motives for committing the crime that allow the application of the aggravating factor, not only ethnic or national origin but also ideology, religion, beliefs…

Finally, the existing aggravating factor was established in the Organic Law 10/1995, of November 23rd, of the Spanish Criminal Code (OL 10/1995 from now on), which substituted the Spanish Criminal Code of 1973. The Project made for this law previous to its approval, in comparison to the Organic Law 4/1995, maintained the crimes the aggravating factor could be applied to (crimes against people and crimes against property) but added xenophobia to the motives that allowed the application of the aggravating factor.

However, the final draft that approved Article 22.4 of the Spanish Criminal Code established that it was an aggravating factor: "*Committing the criminal offense for racist or anti-Semitic reasons, or another kind of discrimination related to ideology, religion or belief of the victim, the ethnicity, race or nation to which they belong, their sex or sexual orientation, illness suffered or handicap.*" Therefore, in this case, there was no mention of specific crimes that were subject to this aggravating factor, meaning that the penalty of any type of crime could be aggravated, not only those committed against people or property, and new motives for the commission of the crime were established that allowed the application of the aggravating factor (sex, sexual orientation, illness, and handicap). We also need to mention the addition of the word "*discrimination*" which had not been used in previous drafts. The idea of this addition was to give a homogeneous treatment to discrimination across the project, coordinating this figure with other anti-semitic and anti-discriminatory provisions, such as discrimination in the workplace.[23]

This article led to some criticism by the Socialist Group on Congress, as they believed that the aggravating factor had become excessively generic, and therefore would be ineffective. However, this was the last ditch effort made to limit the application of the aggravating factor, as it, later on, was modified further with other legal provisions to add new motives.[24]

Apart from this concern, there was another one in the Senate: the criminalization of thought. This was because the draft of art. 22.4 SCC talked about the motives of the perpetrator as the basis of the application of the aggravating factor. Different amendments were proposed in the Senate to avoid the use of the word "*motives*" and, therefore, avoid the need to analyze the thought process of the perpetrator. For example, the Mixed Group proposed an art. 22.4 that stated: "*committing the crime with a manifest expression of contempt for the victim because of their belonging to a certain ethnic, cultural, national group, sexual orientation, ideology or beliefs*." However, they weren't passed.[25]

---

[23] LANDA GOROSTIZA, JON-MIRENA, *Los delitos de odio*, Tirant lo Blanch, Valencia 2018, p. 120.
[24] LANDA GOROSTIZA, JON-MIRENA, *La política criminal contra la xenofobia y las tendencias expansionistas del derecho penal*, Editorial Comares, Granada 2001, p. 184.
[25] Vid. BOCG of September 1st of 1995- II Series, Nº 87c), pp. 167, 178.

4.2. Article 22.4 SCC nowadays

The Spanish Criminal Code in force nowadays is the one passed by the OL 10/1995, but it has suffered a great number of modifications. Likewise, Article 22.4 SCC has been modified 4 times, and coincidentally is the only aggravating factor that has ever been reformed.

The first modification was made in 2010, by the Organic Law 5/2010 of June 22nd which modified the OL 10/1995 by adding "*sexual identity*" as one of the motives that allow the application of the aggravating factor to a crime and changing the word "*handicap* (*minusvalía*)" for "*disability* (*discapacidad*)". On the one hand, the addition of sexual identity came due to Law 3/2007, of March 15th, that for the first time, recognized the social reality of transsexuality and allowed the registral rectification of a person's sex and name when they suffered from gender dysphoria. On the other hand, the change from handicapped to disabled was made not only in this article of the Spanish Criminal Code but was a terminological and conceptual change brought about by Law 39/2006 for the whole legal system, as it established in the 8th additional provision ("*disposición adicional octava*") that "*all references in normative texts made to "handicapped and "handicapped persons", shall be understood as made to "persons with disabilities*." This way, the term "*handicapped*" was abandoned due to its pejorative undertones.

Moreover, there was another modification made by Organic Law 1/2015, of March 30th, that modified OL 10/1995 and added "*gender reasons*" as a new motive. The preamble of this law establishes that the reason for this modification is "*to reinforce the special protection that the Spanish Criminal Code gives to victims of domestic and gender violence*." The issue with this addition was the differentiation and compatibility between sex and gender motives, as now they both are discriminatory motives that allow the application of the aggravating factor of Article 22.4 SCC. The preamble of OL 1/2015 establishes that the reason for the addition of gender to the list, seeing that sex was already in it, is the fact that "*gender can constitute a basis for discriminatory actions different than the one covered by the reference to sex.*"

The doctrine has also given different reasons for this differentiation. For example, ALONSO ALAMO establishes that the difference rests in the idea that gender violence is foreseen for violence against women for the mere fact of being one, which has its roots in a patriarchal society that has dominated history, and not in sex in a biological sense[26]. It is clarified by the Supreme Court, which establishes the main difference between both motives in its Judgment 420/2018 of September 25th, 2018, where it establishes that, as established by the Covenant of Istanbul, "*sex refers biological and physiological characteristics that differentiate men and women, while gender refers to cultural aspects related to documents, behaviors, activities, and attributes that are social constructs of a society that attributes them to either men or women. However, the aggravating factor due to sex doesn't require the presence of intent, behavior, or situation of domination from men to women and the passive subject of the crime can be a man, while the aggravating factor due to gender reasons does require the subjugation of women by a man and the only passive subject of the crime are women*".[27] Therefore, we can conclude that sex references physical characteristics and gender refers to the role that one plays in society. [28]

The next modification was made in 2021 through Organic Law 8/2021, of June 4th, of integral protection of infancy and adolescence from violence. This was a modification that brought a big change to Article 22.4 SCC as it added "*age*", "*aporophobia*", "*social exclusion*" and "*gender identity*" to the list of motives that can lead to the application of the aggravating factor. The preamble of the law allows us to understand the reasons behind this modification as it establishes that "*age has been added as a motive for discrimination with a double purpose, as it not only applies to children and teenagers but also to another community that needs protection, such as the elderly people. Likewise, in the spirit of protection that impulses this legislative text, the reform has been used to include aporophobia and social exclusion within those criminal types, responding to social phenomena where in criminal activity there is an underlying rejection, aversion, and contempt to the poor, as it is as well a motive expressly mentioned in art. 21 of the Charter of Fundamental Rights of the European Union."*

---

[26] ALONSO ALAMO, MERCEDES, "Protección penal de la igualdad y Derecho penal de género", *Cuadernos de Política Criminal*, n. 95, 2008, pp. 19-52

[27] Supreme Court Judgment 420/2018 of September 25, 2018.

[28] MARÍN DE ESPINOSA CEBALLOS, ELENA, *La agravante generica de discriminación por razones de genero (art. 22.4 CP)*. Revista electrónica de Ciencia Penal y criminología. p. 11.

It also added the end that this was "*regardless of the fact that such conditions or circumstances effectively concur in the person on whom the action falls*." This means that the aggravating factor will be applied if the perpetrator committed it due to the motives established in the aggravating factor (race, ideology, religion, beliefs, sexual orientation, age…), but it doesn't require the victim to be of that race, sexual orientation, religion… This is an idea that has been established from the very beginning in the Supreme Court Judgment 1341/2002, of July 17th, 2002 (that will be analyzed later on) where it was argued that the aggravating factor could not be applied as it wasn't proven that the victim of the crime was homosexual. However, the Supreme Court argued that the perpetrator had gone to an area frequented by homosexuals and by his language proved his disgust for them, and therefore it was irrelevant whether the victim was indeed a homosexual as believed by the perpetrator. This allows the application of the aggravating factor due to "*association*", that is, in crimes committed against people due to their relationship or closeness to someone on whom the circumstances concur, or "*error*", that is, in crimes committed against people that were perceived by the perpetrator to be part of that minority group.

The final modification is made through the OL 6/2022, of July 12th, which merely added "*anti-Gypsyism*" as another motive that would allow the application of the aggravating factor of art. 22.4 SCC. While discrimination against the Roma would have been covered by the motive of "*ethnicity*" this was a symbolic addition due to the increase of violence towards this community. The change was carried out due to the European pressure to establish measures to fight discrimination against Roma. In ECRI Policy Recommendation no. 13 on combating antigypsyism and discrimination against Roma, adopted on 24 June 2011, the European Commission recognized the alarming situation of Roma in most member states as signs of antigypsyism continue increasing and worsening and recommended Member States combat antigypsyism in all aspects (education, employment, housing, healthcare…) and specifically talked about combating racist violence and crimes against Roma (rec. 8). [29]

[29] ECRI, General Policy Recommendation nº 13, on combating antigypsyism and discrimination against Roma, of June 24, 2011.

5. Sexual orientation and sexual or gender identity

"*Sexual orientation*" and "*sexual and gender identity*" are two of the motives mentioned in Article 22.4 SCC that can lead to the application of the aggravating factor. Both motives are established as a protection of the LGBTIQ community. In the European Union, LBTIQ people are defined as those:

- "*who are attracted to others of their own gender (lesbian, gay) or any gender (bisexual);*
- *whose gender identity and/or expression does not correspond to the sex they were assigned at birth (trans, non-binary);*
- *who are born with sex characteristics that do not fit the typical definition of male or female (intersex); and*
- *whose identity does not fit into a binary classification of sexuality and/or gender (queer)*" [30]

In May 2011, the UN High Commissioner for Human Rights Navi Pillay established that *"homophobia and transphobia are no different to sexism, misogyny, racism, or xenophobia, but whereas these last forms of prejudice are universally condemned by governments, homophobia, and transphobia are too often overlooked."*[31] *This, together with the rising violence against the LGBTIQ community, is why, being unable to analyze in depth all of the motives of the aggravating factor of art. 22.4 SCC, I have chosen to take a long look at the motive of sexual orientation and sexual and gender identity in my thesis.*

[30] COMMISSION OF THE EUROPEAN UNION, Communication to the European Parliament, the Council, the European Economic, and Social Committee and the Committee of the Regions on Union Equality: LGBTIQ Equality Strategy 2020-2025, of November 12, 2020, COM/2020/698 final.
[31] PILLAY, NAVI, Homophobic hate crime on the rise, UN human rights chief warns, [video], https://youtu.be/DxAAvsOwn4E

5.1. Sexual orientation

Regarding the motive of sexual orientation, as we have established, it was added to the final draft of art. 22.4 of the Spanish Criminal Code of 1995. This addition was made without any previous amendment proposing it.[32] However, it was indeed advanced for its time, as still today the European Parliament is asking countries to add the existence of a bias due to sexual orientation as an aggravating factor when establishing penalties[33]. As of 2020, 7 member states did not expressly include sexual orientation in hate speech and/or hate crime legislation as an aggravating factor, for example, Slovakia.[34]

Sexual orientation is defined by the Yogyakarta Principles, a text that establishes principles regarding the application of international human rights law to issues of sexual orientation and gender identity, as "*each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender"*.[35] This definition has been used multiple times by several international organizations to define sexual orientation, such as the European Commission.[36]

Sexual orientation is usually discussed in terms of three categories: heterosexual (attraction to members of the other gender), homosexual (attraction to members of one's own gender), and bisexual (attraction to all genders). However, LAURENZO COPELLO, establishes that this concept should be applied to all sexual tendencies, understood as ranging from celibacy to sexual promiscuity[37]. Following this argument, DIAZ LOPEZ places within this extensive range given by LAURENZO zoophilia and pedophilia. This argument is based on the idea that the basis of Article 22.4 SCC is to guarantee the equality of citizens of all sexual orientations, regardless of how repugnant those might be, and without protecting the realization of those acts. [38]

---

[32] LANDA GOROSTIZA, JON-MIRENA, *Los delitos de odio*, Tirant lo Blanch, Valencia 2018, p. 119
[33] As in European Resolution 2022/20894, of the European Parliament, of October 20th, 2022, where the European Parliament urges European states "*to recognize that a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance."*
[34] COM/2020/698, of the Commission, of November 20th, 2020.
[35] INTERNATIONAL COMMISSION OF JURISTS, *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity,* 2007.
[36] For example, in ECRI General Policy Recommendation No. 15 on Combating Hate Speech, of December 8th, 2015.
[37] LAURENZO COPELLO, PATRICIA*, "*La discriminaciónn del Código penal de 1995"*, Estudios Penales y Criminológicos, vol. XIX,* 1996, p. 247.
[38] DIAZ LOPEZ, JUAN ALBERTO. *El odio discriminatorio como circunstancia agravante de la responsabilidad penal*, [Tesis doctoral], 2012, Universidad Autónoma de Madrid. p. 323

Nevertheless, looking at the definition of sexual orientation given above, which considers it an emotional, affectional, or sexual attraction to a specific or multiple genders, we can't say that zoophilia or pedophilia fit within the scope of "*sexual orientation*". Both pedophilia and zoophilia are defined by the American Psychological Association (APA) as paraphilias, which are a group of mental disorders in which unusual or bizarre fantasies or behaviours are necessary for sexual excitement. Specifically, these two paraphilias consist of seeking sexual gratification through contact or fantasies with prepubertal children and animals, respectively, and are grouped with others such as necrophilia (sexual gratification through contact with dead bodies), frotteurism (sexual gratification through rubbing against people, normally without their consent) and sexual masochism (sexual gratification through being humiliated, bound or beaten) among others. Paraphilias are classified as mental disorders in the Diagnostic and Statistical Manual of Mental Disorders[39] and cannot be compared with sexual orientation, which has not been included in said manual since 1973 and is no longer considered a mental illness. Moreover, someone that has a paraphilia can still have a specific sexual orientation; someone can both achieve sexual gratification through being humiliated and beaten, that is, be a masochist, and be solely attracted to people from one gender, as both things aren't exclusive.

I would go a step further and argue that celibacy and sexual promiscuity aren't within the scope of sexual orientation either, despite the argument made by LAURENZO CAPELLO, as they are ways of exercising one's sexuality. LAURENZO COPELLO argues that the term "*sexual orientation*" cannot include how sexuality is exercised, and therefore, can not cover other cases of marginalization, such as prostitution[40]. However, it does believe that celibacy and sexual promiscuity are sexual tendencies that are covered by said concept. Not only are those also ways of exercising one's sexuality, but someone that is celibate or sexually promiscuous can also be heterosexual, gay, or bisexual. Of course, morally, no person should be subject to discrimination, no matter if they are celibate, sexually promiscuous, or sadistic, but the list given in art. 22.4 SCC is a taxative list forged to protect members within specific minority groups and these don't fit in those.

---

[39] AMERICAN PSYCHIATRIC ASSOCIATION (APA), *Diagnostic and Statistical Manual of Mental Disorders,* 5th Ed, 2022.
[40] LAURENZO COPELLO, PATRICIA*, "*La discriminaciónn del Código penal de 1995"*, Estudios Penales y Criminológicos, vol. XIX,* 1996, p. 247.

All of this aside, what happens with the new categories of sexual orientation that keep developing aside from the three main ones (heterosexuality, homosexuality, and bisexuality)? Is a crime committed due to these sexual orientation grounds for the application of the aggravating factor of art. 22.4 SCC? Every day, new ways to define our sexual orientation develop, for example, "*asexual*" and "*unromantic*". Asexuality refers to the lack of *sexual* attraction to any gender while unromanticism refers to a lack of *romantic* attraction to any gender. Due to these new categories, which brought up the idea that some people might not be sexually or romantically attracted to any gender, new terms such as "*heteroromantic*" "*biromantic*" and "*homoromantic*" have popped up, as a label for asexuals that do feel *romantic* attraction to a specific gender. In these cases, and in contrast with the previous sexual tendencies analyzed, they are terms that define sexual or emotional attraction to a gender, or more specifically, lack thereof, and therefore, fall within the scope of the definition of "*sexual orientation*" given above.

Therefore, the aggravating factor of Article 22.4 SCC will be applied when a crime is committed due to who the person is emotionally, romantically, or sexually attracted to, but also when it is committed due to who the person is not attracted to.

Looking at the application of Article 22.4 SCC in judgments from 2014 to 2017 we can see that sexual orientation is the most common motive for the application of the aggravating circumstance of art. 22.4 SCC in judgments, as 31% of the time art. 22.4 SCC was applied in judgments, during this time, was due to said motive.[41]

[41] MINISTRY OF LABOR, MIGRATION AND SOCIAL SECURITY, *Analysis of cases and judgments on racism, xenophobia, LGBTIphobia and other forms of intolerance, 2014-2017, 2019* https://www.inclusion.gob.es/oberaxe/en/publicaciones/documentos/documento_0124.htm

5.2. Sexual and gender identity

The addition of sexual orientation paved the way for the addition of sexual identity in 2010 and gender identity in 2021. Gender identity is defined by the Yogyakarta Principles as referring to "*each person's deeply felt and internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of body (which may involve if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech, and mannerism*"[42]. Therefore, gender identity is the personal belief of an identity as a man, a woman, or as neither gender.

However, it cannot be confused with sexual identity that references each person's perception of their own sex based on the evaluation of their physical characteristics, such as genitalia and physical appearance.[43] Therefore, in contrast with gender identity, as explained by Nuria Jorba, a specialized psychologist in sexual therapy, sexual identity has to do with the biological sex one is given to at birth, normally by the interpretation of our genitalia as feminine or masculine, and is a personal belief of one's identity as a specific gender.[44]

If someone's gender identity and sexual identity are a match that person is considered cisgender, but if they aren't, they are identified as transgender. There isn't a universal definition of "transgender" but it has been defined broadly to refer to "*individuals whose gender identity or expression does not conform to the social expectations for their assigned sex at birth*"[45]. Therefore, inside the transgender umbrella, we can fit those who identify with the opposite gender to the one assigned to them at birth (transgender men or women) or those who don't identify within the gender binary, that is, don't identify as men or women. These last trans people have different labels, such as "*androgyne*", "*agender*" *"non-binary*", "*genderqueer*", "*gender non-conforming*"…[46] It is understood that all these gender identities fall within the scope of "sexual and gender identity" motive in art. 22.4 SCC, as they all refer to the gender one identifies with.

---

[42] Yogyakarta Principles, March 2007.
[43] DIMOND, MILTON, "Sex and Gender are different: sexual identity and gender identity are different", *Clinical Child Psychology & Psychiatry*, 2022, pg, 320-334
[44]JORBA, NURIA, *Identidad sexual, identidad de género y orientación sexual, 2018*.
[45] HALL, NATHAN *ET ALTER. The Routledge International Handbook on Hate Crime*, Routledge, 2015, p. 279.
[46] ILGA EUROPE. Glossary: Trans.https://www.ilga-europe.org/about-us/who-we-are/glossary/

Moreover, according to the definition given above for transgender people, which coincides with the one commonly used for transgender people in the EU[47], we have to include people who cross-dress (dress in clothing traditionally worn by members of the opposite gender) within the scope of "sexual and gender identity", as the definition includes not only individuals whose gender identity doesn't conform to the sex assigned to them at birth but also those whose gender expression doesn't conform to it either.

Finally, there are certain people that aren't assigned male or female sex at birth as they exhibit sexual characteristics of both sexes. Despite being intersex individuals, they can identify with any gender, as intersexuality references their sexual identity and not their gender identity. Due to this, intersexuality is covered by this article as well.

Therefore, we can understand that committing a criminal offense because of the gender a person identifies as or their gender expression and whether it does or doesn't match their sexual identity is considered an aggravating factor as understood in Article 22.4 SCC.

[47] Such as COM/2020/698, of the Commission, of November 20th, 2020.

6. Basis of the aggravating factor

There has been an intense debate within the doctrine regarding the basis of an aggravating factor for hate crimes, both at a national and an international level, specifically in the Anglo-Saxon culture. In this debate, two models have been identified: on the one hand, the animus model, which focuses on the discriminatory motivation of the perpetrator in order to apply the aggravating factor; on the other hand, the discriminatory selection model, which bases the aggravating factor on the discriminatory effects the action produces in the minority group or community the victim belongs to.[48] Therefore, from a practical point of view, the difference is that, according to the animus model, a hate crime could be committed against white, cis-gender heterosexual males, while it wouldn't be possible according to the discriminatory selection model, as they don't belong to a group that is discriminated against.

6.1. Basis in the Spanish system

The same discussion happens at a national level regarding the basis of the aggravating factor foreseen in Article 22.4 SCC. If we look at the article itself, it establishes that the aggravating factor will be applied when a crime is committed due to racist or anti-semitic *reasons* or other kinds of discrimination. Therefore, the literal interpretation of the article follows the anismus model, as it leads us to believe that the aggravating factor will be applied to a crime when the author of said crime commits it due to discriminatory motives.

The motivation of the perpetrator as the basis for the aggravating factor (animus model) is the predominant interpretation of the doctrine and the case law regarding Article 22.4 SCC. In a nutshell, the fact that the motive for committing the crime is despicable leads to a higher reprehensibility, which leads to a higher criminal responsibility, and therefore, a higher penalty[49]. According to DIAZ LOPEZ, this comes from the idea that the perpetrator is a more dangerous criminal due to his motive for committing the crime. Therefore, the responsibility that is applied due to this increased dangerousness needs to

[48] DIAZ LOPEZ, JUAN ALBERTO, *El odio discriminatorio como circunstancia agravante de la responsabilidad penal*, [Tesis doctoral], Universidad Autónoma de Madrid, 2012, p. 109.
[49] LANDA GOROSTIZA, JON-MIRENA, "Delitos de odio: derecho comparado….", p. 202

be added to the pre-existing responsibility for the commission of the criminal type.[50] This is understood as the "subjective thesis" of the basis of the aggravating factor, as it focuses on the internal psyche of the perpetrator of the crime.

This idea of a more reprehensible motive has been stated in the Judgment of the Supreme Court 1145/2006, of November 23rd, which stated that "*the circumstance is based on the higher culpability of the perpetrator due to the higher reprehensibility of the motive that drives the commission of the crime, therefore, being that motivation vital for the commission of the crime*."[51]

The Court established that in order to apply the aggravating factor it "*will be necessary to prove not only the criminal act in question and the participation of the accused, but also the condition of the victim and the intentionality, which is a value judgment that must be motivated. In short, it is a subjective element related to the mood or specific motive of acting precisely for any of the motivations to which the precept refers.*" Regarding the motive, it also specifies that the motives that don't have enough importance in the case will be excluded from the application of the aggravating factor and, therefore, the fact that "*not every crime in which the victim is a person characterized by belonging to another race, ethnic group or nation or participating in another ideology or religion or sexual condition, must be aggravated.*" This Judgment was another step (together with SCJ 1341/2002 previously mentioned) that led to the reform made in 2021 in which the last sentence of art. 22.4 was added ("*regardless of the fact that such conditions or circumstances effectively concur in the person on whom the action falls*").

Moreover, in the Judgment by the Catalonian High Court of Justice 4095/2019, of May 13th, it is established that "*in any case, the application of this aggravating factor requires evidence that the criminal action has occurred due to that precise discriminatory motive, without any other elements that could have influenced the drive of the perpetrator, as not every crime in which the victim is a person belonging to a specific sexual condition fits within the application of the aggravating factor*."

---

[50] DIAZ LOPEZ, JUAN ALBERTO. *El odio discriminatorio como circunstancia agravante de la responsabilidad penal*, [Tesis doctoral], Universidad Autónoma de Madrid, 2012, p. 361.
[51] Judgment of the Supreme Court 1145/2006, of November 23rd

The main line of criticism of this theory comes from the fact that the aggravating factor is based on the motive, on the internal thought process of the perpetrator. This is argued to go near the so-feared offender-based Criminal Law, as the only reason for a higher penalty or punishment is the internal thought process of the perpetrator which seems to clash with the constitutional right of freedom of thought. This criticism follows the same argument adduced by Mitchell in the case of Wisconsin v. Mitchell of 1993, which we have already analyzed.

Another criticism very present regarding this line of argument is the one of evidence: it is very hard to find evidence to prove the motive according to which the perpetrator acted. This will be analyzed in another epigraph.

6.2. Other alternatives

Apart from this predominant idea, there are alternative proposals. The idea directly in opposition to this predominant one is the one regarding the *additional unfair content* of the crime, as it means an additional devaluation of a protected legal interest, in this case, the right to equality guaranteed to all persons by Article 14 of the Spanish Constitution. According to this theory, the devaluation of the right to equality happens when a crime committed against a person is suitable to send a threatening message to a community or a group of people with whom the victim shares characteristics. That is, the additional unfair content of the crime is not due to the effect it has on the person the crime is committed against, but the fact that the people of the same community (LGBTQ+ people, black people, immigrants, muslims…) can be deprived of a feeling or condition of safety that should have been constitutionally guaranteed to them. Therefore, the effect of the action is supra-individual, and that is the reason for the application of the aggravating factor.

LANDA GOROSTIZA establishes the word “motives" in art. 22.4 SCC serves to point out the passive subjects (minority groups) of the damage made by the threatening message sent through the commission of the crime. Moreover, he goes on to say that this alternative would fix the problem of the application of the aggravating factor in cases of “*error in persona*” or “*association*” of the victim with a minority group.

Finally, he goes on to establish that in order to prove the threatening message of a crime towards a community, and therefore prove the basis for the application of the aggravating factor, the motivation of the perpetrator is not the predominant element; instead, what needs to be proven is his "*objective understanding*". With "*objective understanding*" LANDA GOROSTIZA explains that the perpetrator must understand the context and the circumstances in which he is carrying out that action, which would mean an understanding that his actions are going to be understood as an expression that would unfold a threatening message to every person sharing the characteristics of the victim that led to the selection of the victim.[52]

Therefore, more than the motive, the social context and the level of vulnerability of the community that has been the target of the action are the elements that help determine if the action did have a threatening result within that community.

DOPICO goes even further, arguing that the threatening message received by the community doesn't need to correspond with the perpetrator's intent[53]. That is, it is irrelevant whether the perpetrator wanted to send a threatening message or not. Moreover, it doesn't matter if the crimes committed by the perpetrator sent the message that he himself would commit another crime towards a person that belonged to that target group or if, while he had no intention of committing another similar crime, he had cooperated in "*a violent chain of communication*". That chain is based on the idea that the perpetrator, with his crime, fulfills the past threats sent to the community or target group (by previous hate crimes, even when he wasn't the one who committed them) and also renews the formulation of those threats for the future (even if he has no intention of committing a similar crime). In other words, the aggravating factor would still apply because he puts a feeling of unsafety in the target community, which doesn't care if the perpetrator himself will commit another crime against them or, instead, with his actions has encouraged someone else to do so.

[52] LANDA GOROSTIZA, JON-MIRENA, *Los delitos de odio*, Tirant lo Blanch, Valencia 2018, p.124
[53] DOPICO GÓMEZ-ALLER, JACOBO, "Delitos cometidos por motivos discriminatorios…" p. 33

There is, of course, criticism regarding this line of argument as well. DIAZ LOPEZ makes several critics of this argument[54]:

1) Not only discriminatory crimes create a threatening message, but also other non-discriminatory violent crimes could create a threatening message, and not for that should the aggravating factor be applied to them.
2) The aggravating factor applies to all kinds of crimes, including non-violent ones, so requiring intimidation/threat would empty the aggravating factor of any sense.
3) For a collective injury, apart from a threatening message, a community needs to exist and there is no evidence of the existence of a disabled or sick community in the same sense that they exist regarding people characterized by a race or a sexual orientation.
4) The existence of a threatening message could depend on who the author is and not the crime he commits. DIAZ LOPEZ puts as an example that not the same threatening message would be sent if, in a crime committed against an Armenian, the perpetrator is Lebanese or Turkish. The author argues that this would bring us near the "so feared Criminal Law of author."

From my point of view, this alternative proposed by LANDA GOROSTIZA would avoid analyzing the internal thought process of the perpetrator and it would more closely match the goal of the aggravating factor. The Supreme Court judgment 3124/01, of October 9th, establishes that "*the legislator, by including as aggravation a specific content of anti-discriminatory law, grants protection to people part of groups that are discriminated against and who are in a disadvantage to freely develop their lives, preventing them from suffering a situation of discrimination for the mere fact of belonging to a minority and vulnerable group*." Therefore, the main goal of this legislation is to protect minority groups that have historically been subject to discrimination. While a black person can target a white man because he is white, or a homosexual person can target a heterosexual person because he is straight, this doesn't carry the same connotation that if it happened backwards, as it doesn't have the same background of subjugation and domination of those communities. This is why I believe that the basis of the additional unfair content, proved by the suitability of the crime to send a threatening message to the target community would be a more appropriate basis.

[54] DIAZ LOPEZ, JUAN ALBERTO, *El odio discriminatorio como circunstancia agravante de la responsabilidad penal*, [Tesis doctoral], Universidad Autónoma de Madrid, 2012.

7. Proof

When talking about the application of the aggravating factor foreseen in art. 22.4 SCC, one of the main issues that always comes up is that of proof. As the case law follows the line of argument of the animus model, that is, the idea that the discriminatory motivation of the perpetrator is the basis for the application of the aggravating factor, the existence of this discriminatory motivation needs to be proven. However, as stated by GONZALEZ LAGIER the proof of internal or psychological facts adds a complication: those facts can not be known by observation (as no one can see the motivation of the person committing the crime), they can only be known to the person who has them through introspection.[55]

Therefore, one of the main reasons why the aggravating factor foreseen in Article 22.4 SCC is not applied more often is due to a lack of substantiation of the motive of the crime. Frequently, there is an absence of any reference to motivation in police statements, which are critical in the sentencing of hate crimes. The police are the first responders to any crime committed, whether it is a hate crime or not, and in those that are, some of the key evidence can be irretrievably lost if not collected and recorded promptly by the police.[56] It is important that data regarding motivation is obtained, which can be done from witnesses' or victims' declarations or by ocular inspection made by the police with photos and videos that can record all symbols, tattoos, etc that can otherwise be lost.

This is because hate crimes don't have any direct evidence to prove the motivation of the perpetrator. In the Supreme Court Judgment 2446/2015, of May 4th, it is stated that proving the perpetrator's motivation in the commission of the crime means entering in a valorative insight which leaves a lot of ground for discretionality, and therefore, we find ourselves in the discovery, in regards to the burden of proof, of a motivational element that can only be inferred from indicators. The value of indicators regarding the burden of proof has been accepted from the very beginning by both the Constitutional Court and the Supreme Court. Specifically, the Supreme Court in Judgement 3869/1998 establishes that the presumption of innocence is not contrary to the judicial conviction

[55] GONZALEZ LAGIER, DANIEL, *Buenas razones, malas intenciones*, Doxa, nº 26, 2003, pp. 7-13
[56] MASON, GAIL *ET ALTER*, *Policing Hate Crime. Understanding Communities and Prejudice*, Routledge, 2017, p. 99

in a criminal process formed on the basis of indiciary proof as long as it fulfills two requirements.

These requirements have been developed further in the Supreme Court Judgment 2462/2016, which establishes 20 requirements for indiciary proof to be accepted, the most important being:

- The indicators must be completely proven by direct proof
- The indicators need to be plural: due to their indirect nature, one of them by itself does not cover the burden of proof necessary for a conviction. Exceptionally, a sole indicator can be used when it has special relevance of force, such as the assault of a person that belongs to a discriminated group that doesn't have any other apparent reason, such as a previous argument. [57]
- The judicial organ must explain the reasoning or the logical connection made between the indicators and the consequences inferred from them
- The reasoning behind the connection made must follow the "*rules of logic and experience, in a way that from the facts proven, it is inferred, as a natural conclusion the fact that needs to be proven, existing between them a precise and direct link according to the rule of the human criteria*."[58]

The Organization of the Security and Cooperation in Europe (OSCE), together with the International Association of Prosecutors, made in 2014 a practical guide for prosecuting hate crimes, in which they established the different indicators that police and first responders need to look for if there is a chance they are dealing with a hate crime in order to prove the bias motivation of the perpetrators[59]:

- Circumstances connected with the victim or target of the crime:
    - Belonging to a minority group
    - Having a relationship with a person belonging to a minority group or promoting a minority group (association with a minority group)
    - The special function of the property target of the crime (worship, cemetery, place of assembly of persons of a particular racial group, nationality, or religion…).

[57]GENERALITAT DE CATALUNYA. *Manual Práctico para la investigación y enjuiciamiento de los delitos de odio,* (1ª edición), 2015, pg. 319.
[58] Supreme Court Judgment 3504/2019, of November 4th, 2019m. FJ 2, p. 21.
[59] OSCE/ODIHR. *Prosecuting Hate Crimes. A Practical Guide,* 2014. pp. 47-49.

- Circumstances connected with the offender:
    - The offender has previously been involved in incidents of this crime
    - The offender is a member of an organized hate group
- Conduct of the offender
    - Statements, comments, and gestures made before and during the commission of the crime
    - Signs, symbols, graffiti, and crime scene drawings, including those in the offender (tattoos, clothing…)
- Circumstances of the time and place of the crime
    - The incident occurs on a day, time, or place, that commemorates an event or is symbolic for the offender, or is significant to the target community
    - Several crimes or incidents of hate have taken place in the same location
- A pattern of similar incidents is detected using sufficiently similar methods, suggesting the strong likelihood of a link between the events
- Perception of the victim or a witness of the crime as motivated by a bias
- There is an absence of motives

A year after this guide was published, a similar one was passed in Spain: "*Manual Práctico para la Investigación y el Enjuiciamaiento de los Delitos de Odio y Discriminación*." In it, the same indicators that were established in the OSCE's guide were established as a means to prove bias.

Looking at the indicators that have successfully been used in judgments between 2014 and 2017 to prove a bias, we can see that there is usually one single indicator of the hate crime per judgment (57%) and the most commonly identified indicator is the use of racist, homophobic or degrading expressions or comments and the least identified is the "*victim's perception*" which did not appear in a single case.[60]

[60] MINISTRY OF LABOR, MIGRATION AND SOCIAL SECURITY, *Analysis of cases and judgments on racism, xenophobia, LGBTIphobia and other forms of intolerance, 2014-2017*, 2019, p. 24 https://www.inclusion.gob.es/oberaxe/en/publicaciones/documentos/documento_0124.htm

8. Case law

Now we will look at certain judgments regarding the application of the aggravating factor of art. 22.4 SCC, specifically in cases of discrimination due to sexual orientation and gender identity.

8.1. Supreme Court Judgment 1341/2002, of July 17, 2002.

First of all, the first judgment that applied the aggravating factor was the Judgment of the Supreme Court of 1341/2002, of July 17th of 2002, which made important statements regarding the basis of the aggravating factor of art. 22.4 SCC. Coincidentally, the first judgment to apply the aggravating factor had to do with discrimination due to sexual orientation.

The facts of the case date back to September 14, 1996, when the accused (Valentín and Juan Carlos) went to an area of bars frequented by the gay community. Once there, they saw a man coming out of a bar a proceeded to say "*this is full of faggots*" and "*they (homosexuals) disgust me*". At that moment, seizing the chance when the man coming out of the bar went to pick a flyer from the floor, Valntín struck him in the back, throwing him to the floor. Right after that, Juan Carlos decided to join in, incessantly striking all sorts of blows and kicks while the man was on the floor bleeding abundantly[61].

The Provincial Audience of Barcelona found the men guilty of the criminal offense of injuries foreseen in art. 142.1 SCC, applying the aggravating factor of art. 22.4 SCC.

The application of this aggravating factor, among other decisions, was appealed to the Supreme Court by the legal representation of Valentin and Juan Carlos, alleging that it couldn't be applied because it wasn't proven that the victim was homosexual. The Supreme Court established that the defendants had gone to an area that they knew was frequented by homosexuals, which is corroborated by the statement they made about the place being full of "faggots." Moreover, the statement made by the accused regarding their disgust of them made it clear that the assault was carried out against a person due to the sexual orientation the accused assumed he had.[62]

---

[61] Supreme Court Judgment 1341/2002, of July 17, 2002, Antecedentes 1
[62] Supreme Court Judgment 1341/2002, of July 17, 2002, FJ 5

In this case, we can see that the aggravating factor was applied based on the discriminatory motive of the accused, their disgust of homosexuals. This motive was proven by one of the indicators we have mentioned: the statements made by the accused right before the commission of the crime. Moreover, we could say that there was no other apparent motive for the commission of the crime, that could, even irrationally, explain the assault.

LANDA GOROSTIZA has analyzed this case to see if this aggravating factor would still have been applied if the application of the aggravating factor wasn't based on the discriminatory motives of the perpetrator. Instead, he analyzes if the factor would have been applied according to the alternative proposed by him: the additional unfair content of the crime due to the threatening message the crime sends to the homosexual community, in this case. For this, he says that we need to analyze if the beating inflicted on the victim is suitable, by the context of the beating, to send a threatening message to the homosexual community of the area, in such a way that all its members will have to live with the highly plausible expectation of being the subject of a crime of this nature in the future.

As we know, for that we need to prove the "*objective understanding*" of the perpetrator, his understanding of the context and the circumstances in which he is carrying out the action, which means an understanding that his action would unfold a threatening message to every person sharing the characteristics of the victim. In order to do this, first of all, he states that due to the numerous acts that at that time had been happening against the homosexual community, they were considered an especially vulnerable group, in the sense that they are a common target for assaults of this nature. Moreover, he states that part of this community is easily identifiable, and therefore the possible effect of the threat could be easily transmitted to them. Finally, he states that the criminal act clearly affects the core of existential security: the physical integrity of the community is what is put in danger by this criminal act, which speaks to the seriousness of the threat that allows us to think of this indirect threat as a direct one. This is due to the fact that the homosexual community, understood as an average citizen, should be threatened by this criminal act and take the assault seriously.[63]

[63] LANDA GOROSTIZA, JON-MIRENA, *La política criminal contra la xenofobia y las tendencias expansionistas del derecho penal*, Editorial Comares, Granada 2001, pp. 197-198.

8.2. Judgment of the Provincial Audience of Barcelona 14418/2019, of October 29, 2019

In this case, we can see a case where the application of the aggravating factor of art. 22.4 SCC due to sexual orientation was denied by the Judgment of the Provincial Audience of Barcelona as it considered that the main motive of the crime was not the victim's sexual orientation. As we have established, not every crime where the victims belong to a target group will lead to the application of the aggravating factor when the motive for the commission of the crime doesn't appear to be discriminatory.

The facts which this case judges date back to the 31st of October of 2016, when a same-sex couple, Constantino and Cristobal, were assaulted. On that day, they arrived at the Square Ventura Gassol in Barcelona and while one of them unloaded their personal effects to leave them in their residence, the other one proceeded to take their dog on a walk without putting him on a leash. In that walk, their dog encountered another dog, with whom it had had previous altercations, and pounced on said dog. The dog's owner, Caridad, moved her dog from the dog's path and due to that ended up with a split and bloody eyebrow.

This incident led to the intervention of other people that were in the area and who started admonishing Cristobal and Constantino for having their dog without a leash. Among those people were Jose Daniel and Augusto, who stood out from the rest due to the derogatory and homophobic statements they made: "*You faggots are bothering with this dog again and again, always the same, puto de mierda"* "*I'm going to kill you when no one is around, fucking fagots, this is just the begging*", "*don't hide, we are going to kill you, fucking faggot.*" The men went to leave the dog in the house and came back out, where the recriminations continued from the men and other neighbors.

Later on, in the course of the discussion, after saying "*what are you always doing in the square?*", Augusto threw a punch to Constantino's face, throwing him to the floor. Afterwards, Jose Daniel and Augusto surrounded Cristobal and Jose Daniel punched Cristobal two or three times, pushed him, and threw him to the floor. This led to different injuries in both Cristobal and Constantine that required treatment for their healing and damages to the victim's phones, Ipad, and glasses[64].

[64] Judgment of Provincial Audience of Barcelona, 14418/2019, of October 29, 2019, HP 1, p. 3.

The Prosecutor in its accusation qualified these acts as criminal offenses of injuries and damages punishable by arts. 147, 150, and 263 SCC. Moreover, it understood that two modifying circumstances were applicable: the aggravating factor of premeditation of art. 22.1 SCC regarding the crime of injuries and the aggravating factor of committing the crime due to discriminatory motives of sexual orientation of art. 22.4 SCC regarding all crimes.

Regarding the application of the aggravating factor of art. 22.4 SCC, that is really what concerns us in this case, the Provincial Audience of Barcelona doesn't consider it applicable to this case. The first reason given by the tribunal is the fact that the origin of the conflict was an incident that occurred between the dog of the victim and another dog of the area, not their sexual orientation, as the incident led to people, among which were the accused, siding with the other dog's owner and defending her.

As we have established in another epigraph of this paper, offensive statements made before or during the commission of the crime can be indicators to prove the discriminatory motivation of the crime and are the most common indicator used in judgments to prove said discriminatory motives. In this case, such offensive statements regarding their sexual orientations were made as evidenced by the repetitive use of the word "faggot", a derogatory term historically made against homosexuals. Regarding those expressions, the tribunal states that while those expressions can be an indicator of the commission of the crime due to discriminatory motives, it is only one relevant indicator that isn't conclusive when the origin of the conflict is another reason other than the sexual orientation of the victims[65]. Therefore, this follows the idea that while indicators can be enough to prove a discriminatory motive, they must be plural, unless it has a big relevance or weight to stand on their own.

Secondly, the Provincial Audience of Barcelona analyzes the likelihood of the assault if not for the sexual orientation of the victims. The victims argue that the reason for the attack was their sexual orientation, as they had previously been on the receiving end of hateful glares and disdainful behavior from the same group, and the conflict with the dogs was just an excuse to do so. It is important to point out that the perception of the victim that the crime is motivated by a discriminatory motive is considered by OSCE an

[65] Judgment of Provincial Audience of Barcelona, 14418/2019, of October 29, 2019, FJ 6, p. 9.

indicator of the biased motivation of the perpetrator, which was present in the case. However, it wasn't taken into account by the court as they "*didn't mention it in their first police statements*" and the court believed that "*as their belief of the crime being committed due to sexual orientation is as reasonable as the belief that it would have been committed either way, the aggravating factor isn't applied due to the principle of in dubio pro reo and the second hypothesis needs to prevail over the first one*"[66]. Therefore, Jose Daniel was found guilty of the criminal offense foreseen in art. 150 SCC and 263 SCC and Augusto was found guilty of the criminal offense foreseen in art. 147.1 SCC and 263.1 SCC, without the application of any aggravating factor.

In my opinion, it can be proven that the attack wouldn't have happened if not for the sexual orientation of the victim, because while the origin of the conflict was the dispute regarding the dogs, other neighbors and pedestrians were part of the dispute, but, coincidentally, only the ones making derogatory statements (the defendants) decided to carry out an attack. From a legal point of view, the court could have applied the aggravating factor, as the indicators were plural (the statements made before the commission of the crime and the perception of the victims), and therefore, sufficient for the application of the article.

8.3. Judgment of the Barcelona Provincial Audience 1516/2020, of February 3rd, 2020

Finally, we will see a case in which the aggravating factor was applied as the discriminatory motive of the perpetrator was proven through signs left by him at the scene of the crime and through his affiliation with an organized hate group, two indicators that prove the discriminatory motive of the perpetrator.

The facts of this case date back to the 8th of March of the year 2000, when the accused, Camilo, went to Montgat to meet with Domingo, the victim, as they had previously agreed to, who picked him up at the train station and brought him to his residence. There, Domingo ingested a considerable amount of alcohol, to the point of suffering alcohol poisoning, and took off his clothes intending to propose sexual intercourse. At that moment, the accused attacked Domingo with a knife that he had previously taken from the residence and stabbed him multiple times in various parts of his body,

[66] Judgment of Provincial Audience of Barcelona, 14418/2019, of October 29, 2019, FJ 6, p. 10.

including the face, the neck, and the pulmonary and cardiac cavities. The stabbing eventually led to the death of Domingo who entered into hypovolemic shock due to blood loss. [67]

After the death of Domingo, the accused left a daisy flower in his right ear and with the blood of Domingo he wrote: "*Hitler was right*" and "*KKK*" (an acronym for the US white-supremacist organization named the Ku-Kux-Klan).[68] It was later proven by the testimony of his ex-girlfriends that he was a sympathizer of the nazi ideology, as corroborated by posters with swastikas hung in his room and the right-wing Facebook groups that he followed and commented on.

The prosecutor in its provisional conclusions, in conformity with the defense, considered these acts as constituting crimes of manslaughter with premeditation and wanton cruelty as foreseen in arts. 238, 139.1º and 3º, and 140 SCC, concurring the aggravating factor of art. 22.4 SCC.

Regarding the application of this aggravating factor, the Provincial Audience of Barcelona establishes that, while the defense has manifested their conformity with the application of this aggravating factor, there still was a need to substantiate this application[69]. As we have seen in previous epigraphs, the membership of the perpetrator to a specific hate group and the presence of discriminatory or offensive signs or drawings at the crime can both be indicators of the presence of a discriminatory motive in the commission of the crime. This is exactly what the tribunal uses to argue the application of the aggravating circumstance.

Before going into the indicators that prove the motivation of the perpetrator, the Provincial Audience of Barcelona reminds us that, for the application of the aggravating factor, it is not enough that the victim is a homosexual. It states that the basis of the aggravating factor is the higher reprehensibility of the motive and therefore this motive needs to be proven[70]. It goes on to state that motive is very difficult to prove, as evidence is always incendiary and there might be concurring motives, but in this case,

[67] Judgment of Provincial Audience of Barcelona 1516/2020, of February 3rd, 20202, HP 1 and 2
[68] Judgment of Provincial Audience of Barcelona 1516/2020, of February 3rd, 2020, HP 5
[69] Judgment of Provincial Audience of Barcelona 1516/2020, of February 3rd, 2020, FJ 4 A) parg. 1
[70] Judgment of Provincial Audience of Barcelona1516/2020, of February 3rd, 2020, FJ 4 A) a)

there are certain facts that have been proven, which serve as indicators from which the discriminatory motive can be inferred:

> On the one hand, it is considered proven that the perpetrator was a sympathizer of the nazi ideology due to the testimony given by his ex-partner Adela, who stated that he had flags hung in his room with swastikas, and due to the Facebook groups with the nazi ideology that he followed and commented on[71].
>
> On the other hand, there were writings made with the blood of the deceased on the scene of the crime ("*Hitler was Right*" and "*KKK*") that the court believes conveys the motives that have driven him to commit the crime[72]. The main motive was to advocate an idea that has been inherent to the nazi ideology and the white supremacism of the US, the idea that there are certain groups (among them homosexual people) that are inferior and therefore, deprived of the ownership of basic human rights.

The court also states the fact that the crime, if not for the discriminatory reason, was committed without any other explanation, even an irrational one, so there are no concurring motives that could difficult the determination of the motive of the perpetrator.

Therefore, in this case, the court applied the aggravating factor on the basis of the discriminatory motive of the perpetrator, which was proven thanks to a plurality of indicators: the fact that the victim belongs to a minority group, the affiliation of the perpetrator to an organized hate group and signs and symbols left at the crime scene that allows us a peek to the internal thought process of the perpetrator in the moment of the commission of the crime.

[71] Judgment of Provincial Audience of Barcelona 1516/2020, of February 3rd, 2020, FJ 4 A) b)
[72] Judgment of Provincial Audience of Barcelona 1516/2020, of February 3rd, 2020, FJ 4 A) c)

9. Conclusions

Ultimately, the three cases analyzed have made one thing apparent: the aggravating factor of art. 22.4 SCC is applied in cases where there is no other apparent reason for the commission of the offense but discrimination, that is, when there aren't concurring motives that can difficult the determination of the motive of the perpetrator. As we know, the basis of the aggravating factor is the biased motivation of the perpetrator, which requires proof of said motivation. This is done through indicators, and the lack of other apparent motives for the commission of the crime is one useful indicator, however, it isn't the only one.

In the first (SCJ 1341/2002) and third (PAJ of Barcelona 1516/2020) judgments analyzed, there were indicators that demonstrated the biased motivation of the perpetrators (be it statements made before and during the commission of the crime or signs left at the crime scene) but the other thing they had in common was that there was no other apparent reason for the commission of the crime but discrimination.

However, in Judgment of the Provincial Audience of Barcelona 14418/2019, of October 29, 2019, art. 22.4 SCC wasn't applied because there was another reasonable motive for the crime: an incident with a neighbor's dog. Despite the statements made by the perpetrators during the attack and the belief of the victims that the crime was a hate crime (another indicator), the courts still stated that the fact that there was another possible motive for the crime, led to the application of the principle in dubio pro reo. While in dubio pro reo would no doubt need to be applied if no other indiciary proof existed but the belief of the victims (making it one person's word against the other's), in this case, due to the discriminatory statements made by the perpetrators before and during the assault, it is not reasonable to affirm that the assault would be as likely to occur if the victims weren't gay or the perpetrators weren't homophobic. Therefore, in this case, the indicators were plural and art. 22.4 SCC should have been applied, but it is clear that the courts have a difficult time applying the aggravating factor if there is another possible motive for the commission of the crime.

This issue is nothing but a symptom of the real problem: the motivation of the perpetrator cannot be proven through direct proof, only indiciary proof. Therefore, as long as any other motive masks the real motivation of the perpetrator (something that

will happen more and more in cases regarding sexual orientation as homophobia in our society becomes more frowned upon and perpetrators feel a bigger need to hide their real motives), the hypothesis that the crime would have happened anyway will always be reasonable, and hate crimes will go unpunished.

That is the reason why, in my belief, there is a need to eliminate the word "motive" from art. 22.4 SCC, as proposed from the very beginning of its draft in 1995 by different Senate groups. LANDA GOROSTIZA proposes that the word be understood as referencing the passive subjects of the Article. While this would solve the issue of the appearance of the word "motives" being used to justify the use of the animus model regarding the basis of the aggravating factor; in my opinion, it would be easier to modify the article and not use that word at all. For example, we could follow the proposal made by the Mixed Group in 1995, and modify art. 22.4 SCC to say: "*committing the crime with a manifest expression of contempt for the victim because of their real or perceived race, ethnicity, nationality, religion, ideology, beliefs, age, sex, gender, sexual orientation, gender identity, economic situation, illness or disability."* This way, the idea that the basis of the aggravating factor is the suitability of the offense to send a threatening message to a community or a group of people with whom the victim shares characteristics, as proposed by LANDA GOROSTIZA, could correspond more easily with the literal interpretation of the article, and the evidence would be easier to find as we wouldn't be looking at the internal psyche of the perpetrator, and instead we would look at the external manifestations of the crime.

10. Bibliography

10.1. Consulted bibliography

ALONSO ALAMO, MERCEDES, "Protección penal de la igualdad y Derecho penal de género", *Cuadernos de Política Criminal*, n. 95, 2008, pp. 19-52

DIAMOND, MILTON, "Sex and Gender are different: sexual identity and gender identity are different." *Clinical Child Psychology & Psychiatry*, 2002, pg, 320-334

DIAZ LOPEZ, JUAN ALBERTO. *El odio discriminatorio como circunstancia agravante de la responsabilidad penal*, [Tesis doctoral], Universidad Autónoma de Madrid, 2012.

DOPICO GÓMEZ-ALLER, JACOBO, "Delitos cometidos por motivos discriminatorios: una aproximación desde los motivos de legitimación de la pena", *Revista General de Derecho Penal*, nº 4, 2005.

GONZALEZ LAGIER, DANIEL, *Buenas razones, malas intenciones,* Doxa, nº 26, 2003, pp. 7-13

LANDA GOROSTIZA, JON-MIRENA, *Los delitos de odio*, Tirant lo Blanch, Valencia 2018.

LANDA GOROSTIZA, JON-MIRENA, *Delitos de odio: derecho comparado y regulación española,* (Coord. LANDA GOROSTIZA, JON-MIRENA, GARRO CARRERA, ENARA), Tirant lo Blanch, Valencia 2018.

LANDA GOROSTIZA, JON-MIRENA, *La política criminal contra la xenofobia y las tendencias expansionistas del derecho penal*, Editorial Comares, Granada 2001.

LAURENZO COPELLO, PATRICIA*, "*La discriminaciónn del Código penal de 1995"*, Estudios Penales y Criminológicos, vol. XIX (1996)*. Cursos e Congresos nº 95, Servizo de Publicacións da Universidade de Santiago de Compostela, pp. 221-288.

MARÍN DE ESPINOSA CEBALLOS, ELENA, "La agravante generica de discriminación por razones de genero (art. 22.4 CP)", *Revista electrónica de Ciencia Penal y criminología,* 2018.

HALL, NATHAN; CORB, ABBEE; GIANNASI, PAUL AND GRIEVE, JON G.D., *The Routledge International Handbook on Hate Crime*, Routledge, 2015.

MASON, GAIL; MAHER, JANEMAREE; MCCULLOCH, JUDE; PICKERING, SHARON; WICKES, REBECCA AND MCKAY, CAROLYN, *Policing Hate Crime. Understanding Communities and Prejudice*, Routledge, 2017.

10.2. Conventions, legislation and other sources

10.2.1. United Nations:

UNITED NATIONS, *Charter of the United Nations,* of October 24, 1945, 1 UNTS XVI.

UNITED NATIONS GENERAL ASSEMBLY, *Universal Declaration of Human Rights (UDHR), General Assembly Resolution 217A (III)*, of December 10, 1948.

UNITED NATIONS GENERAL ASSEMBLY, *International Convention on the Elimination of All Forms of Racial Discrimination, General Assembly Resolution 2106(XX)*, of December 21, 1965.

10.2.2. European Union:

COUNCIL OF EUROPE, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14,* of November 4, 1950, ETS 5.

COMMITTEE OF MINISTERS, *Recommendation no. (97)20, of the Committee of Ministers to Member States on Hate Speech*, of October 30, 1997.

COUNCIL OF THE EUROPEAN UNION, *Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia through criminal law*, of November 29, 2008.

ECRI, *General Policy Recommendation nº 13, on combating antigypsyism and discrimination against Roma*, of June 24, 2011.

COMMISSION OF THE EUROPEAN UNION, *Communication to the European Parliament, the Council, the European Economic, and Social Committee and the Committee of the Regions on Union Equality: LGBTIQ Equality Strategy 2020-2025,* of November 12, 2020, COM/2020/698 final.

EUROPEAN PARLIAMENT, *European Resolution 2022/20894, on growing hate crimes against LGBTIQ+ people across Europe in light of the recent homophobic murder in Slovakia*, of October 20, 2022.

10.2.3. United States of America:

Hate Crime Sentencing Enhancement Act of 1994, 28 U.S.C. 994.

Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. 249.

Wisconsin Penalty Enhancement Statute of 1980, sec. 939.645, Stat.

10.2.4. Spain:

Organic Law 4/1995, of May 11th, which modified the Spanish Criminal Code of 1973.

Organic Law 10/1995, of November 23rd, of the Spanish Criminal Code.

Organic Law 5/2010 of June 22nd, that modified OL 10/1995, of November 23rd.

Organic Law 1/2015, of March 30th, that modified OL 10/1995, of November 23rd.

Organic Law 8/2021, of June 4th, of integral protection of infancy and adolescence from violence.

Organic Law 6/2022, of July 12th, that modified OL 10/1995, of November 23rd.

10.3. Case law

EUROPEAN COURT OF HUMAN RIGHTS (FIFTH SECTION), Vejdeland and others v. Sweden, of February 9, 2012.

Supreme Court Judgment 420/2018, of September 25, 2018.

Supreme Court Judgment 3504/2018, of September 4, 2019.

Supreme Court Judgment 1341/2002, of July 17, 2002.

Supreme Court Judgment 593/2017, of July 21, 2017.

Supreme Court in Judgement 1980/2000, o January 25, 2001.

Supreme Court Judgment 2446/2015, of May 4, 2015.

Supreme Court Judgment 1145/2006, of November 23, 2006

Supreme Court Judgment 3124/01, of October 9, 2001.

Judgment of the Provincial Audience of Barcelona 14418/2019, of October 29, 2019.

Judgment of the Provincial Audience of Barcelona 1516/2020, of February 3, 2020.

Judgment of the High Court of Justice of Catalonia 4095/2019, of May 23, 2019.

10.4. Other sources

AMERICAN PSYCHIATRIC ASSOCIATION (APA), *Diagnostic and Statistical Manual of Mental Disorders,* 5th Ed, 2022.

DE ANTONIO, ANGEL, *Alerta en Bilbao por un presunto asesino en serie contra la comunidad homosexual*, 5 de mayo de 2022, ABC. http://www.abc.es

GENERALITAT DE CATALUNYA, *Manual Práctico para la investigación y enjuiciamiento de los delitos de odio y discriminación*, Ed. 1, 2015.

INTERNATIONAL COMMISSION OF JURISTS, *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity,* 2007.

JORBA, NURIA, *Identidad sexual, identidad de género y orientación sexual, 2018*.

MINISTERIO DE INTERIOR. GOBIERNO DE ESPAÑA, *Informe sobre la evolución de los delitos de odio en España en 2021,* 2021.

MINISTRY OF LABOR, MIGRATION, AND SOCIAL SECURITY, *Analysis of cases and judgments on racism, xenophobia, LGBTIphobia and other forms of intolerance, 2014-2017*, 2019.
https://www.inclusion.gob.es/oberaxe/en/publicaciones/documentos/documento_0124.htm

OSCE—Office for Democratic Institutions and Human Rights (ODIHR), *Combating Hate Crimes in the OSCE Region: An Overview of Statistics, Legislation, and National Initiatives,* 2005.

OSCE—Office for Democratic Institutions and Human Rights (ODIHR), *Hate Crimes: A Practical Guide*, 2009.

OSCE—Office for Democratic Institutions and Human Rights (ODIHR), *Prosecuting Hate Crimes. A Practical Guide,* 2014.

PILLAY, NAVI, Homophobic hate crime on the rise, UN human rights chief warns, [video], https://youtu.be/DxAAvsOwn4E

ROMA, BRAIS, *Así fue la agresión de Samuel, el joven asesinado de una paliza en la Coruña: solo escucha golpes,* 5 de julio de 2021, El mundo. http://www.elmundo.es