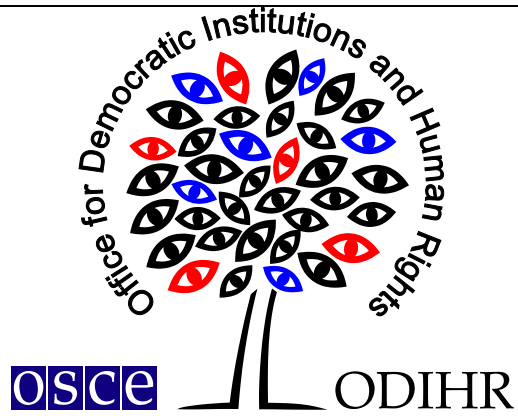


Warsaw, 3 December 2015

Opinion-Nr.: HCRIM- POL/277/2015 [AIC]

www.legislationline.org



OPINION

ON THE DRAFT AMENDMENTS TO CERTAIN PROVISIONS OF THE CRIMINAL CODE OF POLAND

**based on an unofficial English translation of the draft amendments commissioned
by the OSCE Office for Democratic Institutions and Human Rights**

*This Opinion has been reviewed by the
Office of the OSCE Representative on Freedom of Media.*

OSCE Office for Democratic Institutions and Human Rights
Ulica Miodowa 10 PL-00-251 Warsaw ph. +48 22 520 06 00 fax. +48 22 520 0605

TABLE OF CONTENTS

I. INTRODUCTION.....	3
II. SCOPE OF REVIEW	3
III. EXECUTIVE SUMMARY.....	4
IV. ANALYSIS AND RECOMMENDATIONS.....	5
1. International and Regional Standards Related to Bias-Motivated Crimes	6
2. Overall Comments on the Criminalization of Bias-Motivated Crimes	8
3. List of Protected Characteristics.....	12
3.1. <i>2014 Amendments</i>	<i>12</i>
3.2. <i>2012 Amendments</i>	<i>14</i>
4. Additional Comments	15
4.1. <i>Article 119 of the Criminal Code.....</i>	<i>15</i>
4.2. <i>Articles 194 to 196 of the Criminal Code</i>	<i>16</i>
4.3. <i>Articles 256 and 257 of the Criminal Code</i>	<i>17</i>
5. Final Comments.....	21

Annex: Draft Amendments to the Criminal Code of the Republic of Poland

I. INTRODUCTION

1. *On 18 September 2015, the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) received a letter from the Chair of the Standing Sub-Committee for Criminal Law Reform, of the Extraordinary Committee for Codification Amendments of the Sejm of the Republic of Poland (lower house of the Parliament). In this letter, the Chair of the Standing Sub-Committee requested the OSCE/ODIHR to review draft amendments to a number of provisions of the Criminal Code of Poland pertaining to certain criminal acts committed with bias motivation (hereinafter “the Draft Amendments”).*
2. *On 29 September 2015, the OSCE/ODIHR Director responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Draft Amendments with international human rights standards and OSCE commitments.*
3. *This Opinion was prepared in response to the above-mentioned request. The OSCE/ODIHR conducted this assessment within its mandate, as also explicitly established by the OSCE Ministerial Council Decision No. 4/03 on Tolerance and Non-discrimination whereby the OSCE participating States committed to “where appropriate, seek the ODIHR’s assistance in the drafting and review of such legislation [to combat hate crimes]”.¹*

II. SCOPE OF REVIEW

4. The scope of this Opinion covers only the Draft Amendments, which will also be reviewed within the framework of other provisions of the Criminal Code, as appropriate and relevant. While two sets of draft amendments were communicated to the OSCE/ODIHR, this Opinion primarily focuses on the latest set of amendments from 2014, which have a broader scope. Most of the recommendations contained therein are nevertheless also applicable to the amendments proposed in 2012 (hereinafter “the 2012 Draft Amendments”) and are enhanced through additional comments, if and when relevant. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework pertaining to the prevention of and protection from bias-motivated crimes, and the prosecution of perpetrators in the Republic of Poland.
5. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, the Opinion focuses more on areas that require amendments or improvements rather than on the positive aspects of the Draft Amendments. The ensuing recommendations are based on international and regional standards relating to human rights and fundamental freedoms, as well as relevant OSCE commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.
6. This Opinion is based on an unofficial English translation of the Draft Amendments commissioned by the OSCE/ODIHR, which is attached to this document as an Annex. Errors from translation may result.

¹ See par 6 of the OSCE Ministerial Council Decision No. 4/03 on Tolerance and Non-discrimination, taken at the Maastricht Ministerial Council Meeting on 2 December 2003, available at <http://www.osce.org/mc/19382>.

7. In view of the above, the OSCE/ODIHR would like to make mention that the Opinion is without prejudice to any written or oral recommendations and comments related to this and other related legislation of Poland that the OSCE/ODIHR may make in the future.

III. EXECUTIVE SUMMARY

8. At the outset, the intention to specifically address bias-motivated crimes in the Polish criminal legislation is welcome. While the current Criminal Code already contains some provisions that go in this direction, the consideration of additional legal reforms to strengthen the prevention and fight against bias-motivated crimes is a positive step, and follows some of the latest reports and recommendations issued by various international and regional human rights monitoring bodies. As recommended by these bodies, the Draft Amendments explicitly protect additional personal characteristics, which is a powerful expression of society's condemnation of a wider range of bias-motivated crimes.
9. At the same time, the wording of certain provisions of the Criminal Code submitted for review appears to be too vague to meet the requirements of legal certainty, foreseeability and specificity for criminal law. Some of them also have the potential to unduly restrict freedom of expression and should be either reconsidered in their entirety or more narrowly circumscribed.
10. In order to further improve compliance of the Draft Amendments with international human rights standards and good practices, the OSCE/ODIHR makes the following key recommendations:
 - A. To consider introducing in a systematic manner enhanced penalties under relevant provisions of the Criminal Code of Poland for the most serious or frequent forms of crimes committed with a bias motive, while ensuring that they do not overlap with other provisions of the Criminal Code; [par 31]
 - B. To specify under Article 53 par 2 of the Criminal Code that when reviewing the "motivation" of the perpetrator, a court should specifically consider potential bias based on certain protected characteristics of the victim(s) as an aggravating circumstance, where this is not already a constitutive element of the criminal offence; [par 33]
 - C. To specify that bias-motivated crimes also cover criminal offences committed due to the real or presumed affiliation or association of a victim with a protected group, and also cases where the victim's protected characteristic is one of several motivating factors; [pars 39-40]
 - D. To provide, in the Criminal Code or in another law, that existing bias motivation leading to an aggravated sentence should become part of perpetrators' criminal records; [par 34]
 - E. To ensure that penalties for criminal offences committed with a bias motive are harsher compared to penalties for the same criminal offences committed without bias motive; [pars 46 and 64]
 - F. To consider whether Articles 194 and 196 should remain in the Criminal Code, or at a minimum, circumscribe such criminal offences more narrowly; [pars 48-51]

- G. To specify, in Article 256 par 1, what is meant by “promotion” and by “fascist or other totalitarian system of state” to limit more clearly the scope of the prohibition; [pars 53-58]
- H. To clarify in Articles 256 and 257 which forms of public insults or incitement to hatred are criminalized, while ensuring that their scope is narrowly defined; the possibility to impose imprisonment in case of “public insult” should also be excluded; [pars 61-64] and
- I. To extend the scope of the defence provision contained in current Article 256 par 3 to cover not only Article 256 par 2 but also Article 256 par 1 while also considering broadening the scope of such potential defences or exceptions. [pars 57 and 62]

Additional Recommendations, highlighted in bold, are also included in the text of the opinion.

IV. ANALYSIS AND RECOMMENDATIONS

11. Bias-motivated crimes (or “hate crimes”) are usually defined as criminal offences committed with a bias motive.² This means that any crime, be it a crime against a person, his/her life, bodily integrity or property, will be a bias-motivated crime if at least one of the motives is that target’s presumed or actual membership or association with a defined group of persons. Such groups usually share an often visible and immutable characteristic (i.e., an aspect of a person’s identity that is unchangeable or fundamental to a person’s sense of self),³ such as nationality, national or ethnic origin, language, religion or belief, sexual orientation, gender identity, disability or similar ground, constituting a marker for group identity.⁴ In hate crime legislation aiming at special protection for these groups, such characteristics are called “protected characteristics”.⁵
12. “Hate crimes” is to be distinguished from “hate speech” where the underlying action of speaking is not criminal in nature, but is turned into a criminal offence due to its prohibited content.⁶ While there does not exist a universal definition of “hate speech” and there is no clear agreement within the OSCE region on how to deal with the concept of “hate speech”, the criminalization of “hate speech” exists in numerous OSCE participating States and aims at limiting a person’s freedom of speech in cases where this freedom interferes with the basic rights of others.
13. Bias-motivated crimes also need to be distinguished from general discriminatory behaviour, which involves discriminatory actions that are not necessarily criminal actions (e.g. hiring or failing to hire an employee, issuing an administrative order, etc.)

² See OSCE Ministerial Council Decision No. 9/09 on Combating Hate Crimes, Preamble, available at <http://www.osce.org/cio/40695?download=true>. See also OSCE/ODIHR, *Hate Crime Laws: A Practical Guide* (2009) (hereinafter “2009 ODIHR Practical Guide on Hate Crime Laws”), available at <http://www.osce.org/odihr/36426?download=true>, page 16.

³ *ibid.* page 38 (2009 ODIHR Practical Guide on Hate Crime Laws).

⁴ *ibid.* page 38 (2009 ODIHR Practical Guide on Hate Crime Laws).

⁵ *ibid.* page 16 (2009 ODIHR Practical Guide on Hate Crime Laws).

⁶ *ibid.* pages 25-26 (2009 ODIHR Practical Guide on Hate Crime Laws).

and generally belongs to the civil or administrative law sphere, while a bias-motivated crime will only exist if the underlying action is already a criminal act.⁷

14. The provisions submitted for review address both bias-motivated crimes (Article 119 par 1 and Article 257 partially), criminal offences pertaining to the content of public expression (Articles 196, 256 par 1 and Article 257 partially) as well as some forms of discriminatory behaviours that are criminalized (Article 194).

1. International and Regional Standards Related to Bias-Motivated Crimes

15. At the international level, protection from bias-motivated crimes emanates from general international agreements such as the International Covenant on Civil and Political Rights⁸ (hereinafter “ICCPR”) and the International Convention on the Elimination of All Forms of Racial Discrimination⁹ (hereinafter “CERD”). Under the ICCPR, States have an obligation to exercise due diligence to prevent, investigate, punish and redress deprivation of life and other acts of violence by adopting legislative and other measures to ensure that *every* person is effectively protected against such acts.¹⁰ Article 20 par 2 of the ICCPR specifically addresses some forms of “hate speech” by stating that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. Moreover, pursuant to Article 4 (a) of the CERD, “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 colour or ethnic origin” shall be considered offences punishable by law.
16. Under the UN Convention on the Rights of Persons with Disabilities (hereinafter “CRPD”),¹¹ Article 16 (5) requires States Parties to “put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted”.
17. At the Council of Europe level, general anti-discrimination standards can be found in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”),¹² which prohibits discrimination in conjunction with the enjoyment of rights protected under the Convention, including the right to life and security (Articles 2 and 3 of the ECHR). In relation to bias-motivated

⁷ *ibid.* page 25 (2009 ODIHR Practical Guide on Hate Crime Laws).

⁸ UN International Covenant on Civil and Political Rights (hereinafter “ICCPR”), adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966. The Republic of Poland ratified the ICCPR on 18 March 1977.

⁹ UN International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “CERD”), adopted by the UN General Assembly by Resolution 2106 (XX) of 21 December 1965. The Republic of Poland ratified this Convention on 5 December 1968.

¹⁰ See Article 6 par 1 of the ICCPR which provides that “[e]very human being has the inherent right to life” which shall be protected by law; Article 7 of the ICCPR which states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”; Article 26 of the ICCPR which provides that: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. See also UN Human Rights Committee, *General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), pars 7-8, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en.

¹¹ UN Convention on the Rights of Persons with Disabilities (hereinafter “the CRPD”), adopted by General Assembly resolution 61/106 on 13 December 2006. Poland ratified the CRPD on 25 September 2012.

¹² The Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”), signed on 4 November 1950, entered into force on 3 September 1953. Poland ratified the ECHR on 19 January 1993 but has not yet ratified Protocol No. 12 to the ECHR which extends the prohibition of discrimination in relation to any right set by law.

- crimes, the European Court of Human Rights (hereinafter “ECtHR”) has ruled that “[w]hen investigating violent incidents, such as ill-treatment, State authorities have the duty to take all reasonable steps to unmask possible discriminatory motives. Treating violence and brutality with a discriminatory intent on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights”.¹³
18. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter “the Istanbul Convention”)¹⁴, ratified by Poland recently, also requires State Parties to “take the necessary legislative and other measures to prevent all forms of violence covered by the scope of this Convention by any natural or legal person” (Article 12 par 2). This includes gender-based violence against women (i.e., violence directed against a woman because she is a woman or that affects women disproportionately (Article 3 (d) of the Istanbul Convention)). This year, Poland also became a State Party to the CoE Convention on Cybercrime and its Protocol,¹⁵ which specifically concerns the criminalization of acts of a racist and xenophobic nature committed through computer systems.
 19. The Council of Europe’s Commission on Intolerance and Racism (hereinafter “ECRI”) has also called upon Member States to ensure that national laws, including criminal laws, specifically counter racism, xenophobia, anti-semitism and intolerance. Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity also recommends a series of measures to prevent and fight against “hate crimes” and “hate speech” on grounds of sexual orientation or gender identity.¹⁶
 20. At the European Union level, Poland is bound by the provisions of the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (hereinafter “2008 EU Framework Decision”).¹⁷ It is also worth mentioning that the 2012 EU Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime¹⁸ recognizes “hate crime victims” as a specific category of victim deserving special treatment.
 21. Numerous OSCE commitments also concern OSCE participating States’ fight against discrimination and hate crimes,¹⁹ notably Ministerial Council Decision No. 9/09 on Combating Hate Crimes which calls upon OSCE participating States to “[e]nact, where

¹³ See the case of *Identoba and Others v. Georgia*, ECtHR judgment of 12 May 2015 (Application no. 73235/12), par 67, available at [http://hudoc.echr.coe.int/eng?i=001-154400#{"itemid":\["001-154400"\]}](http://hudoc.echr.coe.int/eng?i=001-154400#{).

¹⁴ The Council of Europe’s Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210 (hereinafter “the Istanbul Convention”) was ratified by Poland on 27 April 2015 and entered into force in the country on 1 August 2015.

¹⁵ The Council of Europe’s Convention on Cybercrime (CETS No. 185) and its Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS No. 189) were ratified by Poland on 20 February 2015 and entered into force in the country on 1 June 2015.

¹⁶ CoE Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010, available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec\(2010\)5&Language=lanEnglish&Site=COE&BackColorInternet=](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2010)5&Language=lanEnglish&Site=COE&BackColorInternet=)

¹⁷ Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32008F0913>.

¹⁸ EU Directive 2012/29/EU adopted on 25 October 2012, the provisions of which EU Member States had to incorporate into their national laws by 16 November 2015, Article 22 par 3, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0029&from=en>.

¹⁹ See e.g., OSCE Ministerial Council Decision No. 4/03 of 2 December 2003: “The Ministerial Council [...] 8. Recognizes the need to combat hate crimes [...]”, par 8; OSCE Permanent Council Decision No. 621 on Tolerance and the Fight against Discrimination, Xenophobia and Discrimination of 29 July 2004, par 1: “The Permanent Council [...] Decides, 1. The Participating States commit to: - Consider enacting or strengthening, where appropriate, legislation that prohibits discrimination based on, or incitement to hate crimes [...]”. See also the Annex to Decision No. 3/03 on the Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area, MC.DEC/3/03 of 2 December 2003, par 9, available at <http://www.osce.org/odihr/17554?download=true>, which recommends the “[i]mposition of heavier sentences for racially motivated crimes by both private individuals and public officials”.

appropriate, specific, tailored legislation to combat hate crimes, providing for effective penalties that take into account the gravity of such crimes”.²⁰ The ensuing recommendations will also make reference, as appropriate, to the OSCE/ODIHR Practical Guide on Hate Crime Laws (2009)²¹ which, although not binding, may serve as a useful resource in the context of legislative reform pertaining to hate crimes and related issues.

2. General Remarks on Addressing Bias-Motivated Crimes in Criminal Legislation

22. Bias-motivated crimes differ from ordinary crimes not only because of the motivation of the perpetrator, but also because of the impact on the victim as well as the victim’s community, since these types of crimes send a very clear message that the victims do not belong to society; such crimes also have the potential to exacerbate existing tensions between societal groups, and may play a part in interethnic or social unrest.²² Specifically addressing bias-motivated crimes in criminal legislation demonstrates society’s rejection and zero tolerance for such crimes, while enhanced penalties and/or sentencing acknowledge their special nature and particular gravity.²³
23. At the international level, the UN Committee on the Elimination of Racial Discrimination recommended the introduction in criminal law of a provision stating that “committing an offence with racist motivation or aim constitutes an aggravating circumstance allowing for a more severe punishment”.²⁴ The UN High Commissioner for Human Rights also recommended “[e]nacting hate crime laws that establish homophobia and transphobia as aggravating factors for purposes of sentencing”.²⁵
24. At the European level, ECRI has called upon Council of Europe Member States to ensure that national laws, including criminal laws, provide that racist and xenophobic acts are stringently punished through methods such as “defining common offences but with a racist or xenophobic nature as specific offences [and] enabling the racist or xenophobic motives of the offender to be specifically taken into account”.²⁶ Further, ECRI has recommended that Member States criminalize different forms of hate speech and that for all crimes that do not involve hate speech, the creation of racist groups and/or genocide, racist motivation should constitute an aggravating circumstance.²⁷ In

²⁰ See OSCE Ministerial Council Decision No. 9/09 on Combating Hate Crimes, 2 December 2009, par 9, available at <http://www.osce.org/cio/40695?download=true>.

²¹ *Op. cit.* footnote 2 (2009 ODIHR Practical Guide on Hate Crime Laws).

²² *ibid.* pages 17 and 19-23 (2009 ODIHR Practical Guide on Hate Crime Laws).

²³ *ibid.* pages 21-23 and 33-37 (2009 ODIHR Practical Guide on Hate Crime Laws).

²⁴ See UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination Against Non-Citizens*, 19 August 2004, par 22, available at

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7502&Lang=en. See also UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, 2005, par 4(a), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7503&Lang=en.

²⁵ See UN High Commissioner for Human Rights, *2015 Update of Report A/HRC/19/41 (on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity)*, A/HRC/19/23, 4 May 2015, par 78 (a), available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Pages/ListReports.aspx>.

²⁶ See Council of Europe’s Commission on Intolerance and Racism (hereinafter “ECRI”), *General Policy Recommendation No. 1 on Combating Racism, Xenophobia, Anti-Semitism and Intolerance*, adopted by ECRI on 4 October 1996, Section A on “Law, Law Enforcement and Judicial remedies”, available at

https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N1/Recommendation_1_en.asp. See also ECRI, *General Policy Recommendation No. 9 on the Fight against Anti-Semitism*, adopted by ECRI on 25 June 2004, available https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N9/Recommendation_9_en.asp.

²⁷ See ECRI, *General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination*, adopted on 13 December 2002, pars 18 and 21, available at https://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/Recommendation_7_en.asp#P127_11468.

its Recommendation CM/Rec(2010)5, the Council of Europe’s Committee of Ministers recommends that Member States should ensure that “when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance”.²⁸

25. The duty to unmask possible discriminatory motives in criminal acts mentioned in several ECtHR judgments (see par 17 *supra*) implies that, where there is an indication of a bias motive, States have the procedural obligation to take all reasonable steps to establish whether such bias motive connected to a protected characteristic may have played a role in a violent act.²⁹ The ECtHR has also affirmed that “effective measures of deterrence against grave acts [...] can only be achieved by the existence of effective criminal law provisions backed up by law enforcement machinery”.³⁰ Notably in the case of *Angelova and Iliev v. Bulgaria*, the ECtHR specifically mentioned several possible means to “attain the desired result of punishing perpetrators who have racist motives”, such as the separate criminalization of “racially”³¹ motivated murders or serious bodily injuries, explicit penalty-enhancing provisions relating to such offences, as well as the possibility in domestic legislation to impose a more severe sentence depending on, *inter alia*, the motive of the offender.³²
26. At the EU level, the 2008 EU Framework Decision specifically requires the criminalization of certain forms of hate speech (Articles 1 and 2) and that the racist and xenophobic motivation be considered as an aggravating circumstance, or alternatively that such motivation be taken into account by the courts in determining the applicable sentence (Article 4).
27. It must be pointed out in this context that practice varies greatly in different countries with regard to the choices made by policy and law makers to address bias-motivated crimes. The list below exemplifies different approaches taken by different OSCE participating States:
 - Some domestic criminal codes contain a general sentence-enhancing provision that expressly mentions the bias motivation of the perpetrator as an aggravating factor, to be considered by the court when deliberating the sentence for a

²⁸ *Op. cit.* footnote 16, par 2 (Appendix to CoE Recommendation CM/Rec(2010)5).

²⁹ See e.g., *op. cit.* footnote 13, par 67 (2015 ECtHR judgment in the case of *Identoba and Others v. Georgia*). See also the cases of *Beganović v. Croatia*, ECtHR judgment of 25 June 2009, (Application no. 46423/06), pars 93-94; *B.S. v. Spain*, ECtHR judgment of 24 July 2012 (Application no. 47159/08), pars 58-59; *Nachova and others v. Bulgaria*, ECtHR judgment of 6 July 2005 (Applications nos. 43577/98 and 43579/98), pars 160-161; *Fedorchenko and Lozenko v. Ukraine*, ECtHR judgment of 20 September 2012 (Application no. 387/03), par 65.

³⁰ See e.g., the cases of *O’Keefe v. Ireland*, ECtHR judgment of 28 January 2014 [GC] (Application no. 35810/09), par 148, available at [http://hudoc.echr.coe.int/eng?i=001-140235#{"itemid":\["001-140235"\]}](http://hudoc.echr.coe.int/eng?i=001-140235#{); and *M.C. v. Bulgaria*, ECtHR judgment of 4 December 2003 (Application no. 39272/98), par 149. See also the case of *T.M. and C.M. v. Republic of Moldova*, ECtHR judgment of 28 January 2014 (Application No 26608/11), pars 38-39, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140240#{"itemid":\["001-140240"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140240#{), where the ECtHR also referred to the obligation “to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals”.

³¹ While recognizing that the term “race” is a purely social construct that has no basis as a scientific concept, for the purpose of the opinion, the term “race” or “racial” may be used in reference to international instruments using such a term to ensure that all discriminatory actions based on a person’s (perceived or actual) alleged “race”, ancestry, ethnicity, colour or nationality are covered - while generally preferring the use of alternative terms such as “ancestry” or “national or ethnic origin” (see e.g., *op. cit.* footnote 2, pages 41-42 (2009 ODIHR Practical Guide on Hate Crime Laws); see also the footnote under the first paragraph of *ECRI General Recommendation N°7: National legislation to combat racism and racial discrimination*, where it is stated that “[s]ince all human beings belong to the same species, ECRI rejects theories based on the existence of different ‘races’. However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to ‘another race’ are not excluded from the protection provided for by the legislation”). Except when part of a citation from a legal instrument or case law, the word “race” or “racial” is placed in quotation marks in this Opinion to indicate that underlying theories based on the alleged existence of different “races” are not accepted.

³² See the case of *Angelova and Iliev v. Bulgaria*, ECtHR judgment of 26 July 2007 (Application no. 55523/00), par 104, available at [http://hudoc.echr.coe.int/eng?i=001-81906#{"itemid":\["001-81906"\]}](http://hudoc.echr.coe.int/eng?i=001-81906#{).

perpetrator for the commission of any criminal offence; certain codes specify the degree of the increased sentence, while others do not;³³

- Other domestic criminal codes include penalty-enhancing provisions under certain specific criminal offences when the said crime is committed with a bias motivation linked to certain protected characteristics of the victim;³⁴ if the bias motivation cannot be proven beyond a reasonable doubt, the aggravated form of the crime cannot be invoked but the perpetrator may still be convicted for the underlying general criminal offence;
- Some states introduced separate substantive bias-motivated criminal offences, where the bias motive is a constitutive element of the criminal offence itself, as is done in Poland;³⁵
- Finally, another category of codes follows a combination of the above,³⁶ with the general sentence-enhancing provision only applying when the aggravating factor is not already specifically mentioned as a constitutive element of a criminal offence.³⁷

28. While there exist various legislative options for addressing bias-motivated crimes in criminal legislation,³⁸ general sentence-enhancing provisions are sometimes considered to be insufficient to ensure the effective investigation and prosecution of “hate crimes”. Indeed, in these cases, bias motivation at times risks not being considered in its own right in police reports/investigations and court proceedings.³⁹ Moreover, this approach leaves the entire question of enhancing the sentence due to the perpetrator’s motivation

³³ See e.g., the new Article 42a of the Criminal Code of Montenegro (introduced by the Law amending the Criminal Code of 30 July 2013) which states that “[i]f a criminal offense was instigated by hate due to race, religion, national or ethnic background, gender, sexual orientation or gender identity of another person, the court will assess such circumstances as aggravating, unless this is stipulated as a characteristic of a basic or graver form of a criminal offense”; Article 50 (j) of the Criminal Code of Albania which lists “the commission of the offence due to motives related to gender, race, [skin] colour, ethnicity, language, gender identity, sexual orientation, political, religious, or philosophical convictions, health status, genetic predispositions or disability” as one of the aggravating circumstances. See also Article 81A of the Criminal Code of Greece (as amended in 2014) which provides for special aggravating circumstances “[i]f an act is committed out of hatred on the grounds of race, colour, religion, descent, national or ethnic origin, sexual orientation, gender identity or disability, of the person against whom the attack is committed” and specifies the increase of the minimum limit of the sentence in these cases (see http://www.legislationline.org/download/action/download/id/5622/file/CC_Greece_excerpts_am_2014_en.pdf).

³⁴ See e.g., the Criminal Code of Belgium which provides for doubling the minimum correctional punishments stipulated in relevant articles or an increased by two years in the case of incarceration, when applicable, for the following criminal offences: indecent assault and rape (Article 377 bis), murder and intentional bodily injury (Article 405 quarter), non-assistance to a person in danger (Article 422 quarter), violation of personal liberty and personal property (Article 438 bis), harassment (Article 442 ter), desecration of graves (Article 453 bis), arson (Article 514 bis), destruction of various constructions and machines (Article 525 bis), destruction of personal possessions or property (Article 532 bis), graffiti and other damage to immovable property (Article 534 quarter), see <http://www.legislationline.org/documents/action/popup/id/15715>.

³⁵ See *op. cit.* footnote 2, pages 32-33 (2009 ODIHR Practical Guide on Hate Crime Laws).

³⁶ See e.g., the French Penal Code which contains both a general sentence-enhancing provision (Articles 132-76 and 132-77 state that penalties incurred for a crime or misdemeanour will be aggravated if the offence is committed by reason of the victim’s actual or supposed membership or non-membership of a given ethnic group, nation, race or religion or by reason of the victim’s actual or supposed sexual orientation or gender identity) as well as penalty-enhancing provisions for the criminal offences of murder (Article 221-4), torture and ill-treatment (Article 222-3), serious bodily harm (Article 222-10), less serious bodily harm (Article 222-12), threats to commit certain crimes or misdemeanours (Article 222-18-1), rape (Article 222-24), sexual offences (Article 222-30), desecration of graves (Article 225-18), theft (Article 311-4), intimidation (Article 312-2), damage to or destruction of property or goods (Articles 322-2 and 322-6), as well as for the following misdemeanours: non-public defamation (Article R624-3), non-public insult (Article R624-4) and non-public incitement to discrimination, hatred or violence (Article R625-7).

³⁷ See e.g., Article 77 par 2 of the Criminal Code of the Republic of Moldova which states that “[i]f the circumstances mentioned in par. (1) [including the commission of a crime due to social, national, racial, or religious hatred] are also set forth in the corresponding articles of the Special Part of the this Code as evidence of these criminal components, they may not be concurrently considered as aggravating circumstances”; Article 87 par 20 of the new Criminal Code of Croatia (as of 2011) which states: “A hate crime is a crime committed because of race, color, religion, national or ethnic origin, disability, gender, sexual orientation or gender identity of another person. Such actions will be taken as an aggravating circumstance if this law does not explicitly prescribe heavier punishment.”

³⁸ See *op. cit.* footnote 2, pages 31-32 and more generally Part II (2009 ODIHR Practical Guide on Hate Crime Laws).

³⁹ See page 11 of European Union Agency for Fundamental Rights (FRA), *Report on Making hate crime visible in the European Union: acknowledging victims’ rights*, 2012 (hereinafter “2012 EU FRA Report on Making Hate Crime Visible”), available at http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf. See also EU FRA, *Paper on Equal protection for all victims of hate crime - The case of people with disabilities* (March 2015), Section on “Aggravating Circumstances” on page 5, available at http://fra.europa.eu/sites/default/files/fra-2015-focus-03-hate-crime-disability_en_0.pdf.

to the judge's discretion. In addition, this may mean that the bias motive is less likely to be adequately reflected in the court decision, criminal record and/or in official statistics.⁴⁰ This legislative option may therefore fall short of the positive obligation recognized by the ECtHR to "unmask" the bias motivation.

29. Overall, the EU Fundamental Rights Agency (hereinafter "EU FRA") recommends that legislators should go beyond general provisions setting out the perpetrator's motivation as an aggravating circumstance for all crimes and rather look into models where enhanced penalties for "hate crimes" are introduced.⁴¹ This approach would appear to recognize the special nature and particular gravity of such crimes and the need to treat them differently from other crimes given their greater harm on victims, the impact on the community and the potentially serious security and public order problems that they may cause.⁴² Additionally, this latter option is likely to contribute to creating a framework within which cases can be more effectively identified and data collected.⁴³
30. The current version of the Polish Criminal Code already contains a few provisions that specifically address bias-motivated crimes and certain forms of expression that interfere with the basic rights of others,⁴⁴ which refer to a limited number of protected characteristics (national, ethnic, "racial", political, religious or lack of religious affiliation). Additionally, Article 53 of the Criminal Code includes a general provision stating that when sentencing perpetrators, the courts shall take into account, among others, their particular motivation and behaviour when determining the penalty, within the limits specified by law; this provision does not, however, explicitly mention a *bias* motivation on specific grounds. While certain criminal offences of the Polish Criminal Code also include specific reference to aggravating factors leading to the imposition of higher penalties, they also do not include references to bias motivation as such. In particular, Article 148 of the Criminal Code on murder refers to penalty-enhancing circumstances for crimes committed "for motives deserving special condemnation"; however, this wording remains relatively vague and may trigger diverging court interpretations as to whether "bias motive" constitutes such a circumstance.
31. Based on the above, **it is thus recommended that the Polish drafters consider introducing enhanced penalties under relevant provisions of the Criminal Code of Poland, for cases where the respective offences are committed with a bias motive. This should be done particularly for those provisions addressing the most serious or frequent forms of crimes that generally target certain persons or groups by reason of their protected characteristic(s) in the domestic context,**⁴⁵ as long as they

⁴⁰ See *op. cit.* footnote 2, pages 22 and 35-36 (2009 ODIHR Practical Guide on Hate Crime Laws).

⁴¹ *Op. cit.* footnote 39, page 11 (2012 EU FRA Report on Making Hate Crime Visible). See also EU FRA, *Opinion 02/2013 on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime*, 15 October 2013 (hereinafter "EU FRA Opinion 02/2013"), page 14, available at http://fra.europa.eu/sites/default/files/fra-opinion-2-2013-framework-decision-racism-xenophobia_en.pdf.

⁴² *Op. cit.* footnote 32, par 117 (2007 ECtHR judgment in the case of *Angelova and Iliev v. Bulgaria*), available at [http://hudoc.echr.coe.int/eng?i=001-81906#{"itemid":\["001-81906"\]}](http://hudoc.echr.coe.int/eng?i=001-81906#{), where the ECtHR found that Bulgaria had failed to "make the required distinction from other, non-racially motivated offences, which constitutes unjustified treatment irreconcilable with [the anti-discrimination principles inherent in] Article 14 of the Convention". See also, *op. cit.* footnote 2, pages 19-21 (2009 ODIHR Practical Guide on Hate Crime Laws).

⁴³ See *op. cit.* footnote 2, pages 22 and 35-36 (2009 ODIHR Practical Guide on Hate Crime Laws).

⁴⁴ These include Article 119 on the use of violence and unlawful threat against a group of persons or a particular person on the grounds of their national, ethnic, racial, political or religious affiliation or lack of religious affiliation; Articles 194 to 196 regarding specifically criminal offences against freedom of conscience and religion; Article 256 par 1 relating to the incitement to hatred on the grounds of national, ethnic, racial, political or religious affiliation or lack of religious affiliation; and Article 257 on public insults and interference with the bodily inviolability of another person or grounds on the grounds of national, ethnic, racial, political or religious affiliation or lack of religious affiliation.

⁴⁵ E.g. homicide, physical assaults, rape and sexual assault, serious and less serious bodily harms, threats, harassment or stalking, arson, robbery/theft/burglary, damage to or destruction of goods and property, vandalism and the desecration of graves.

- do not overlap with other provisions of the Criminal Code,**⁴⁶ (particularly Article 119 par 1 (violence and unlawful threats) and Article 257 (interference with the bodily inviolability of another person) by reason of protected characteristics).
32. In this context, it is noted that hate crimes targeting goods and property may have a similar devastating effect on the person or group as physical violence, since they also constitute a direct and very personal threat to a person's home or work place. They also tend to affect a group of people (e.g. a family) and/or other persons frequenting a targeted building or area, or using a targeted vehicle, and thereby send a very clear, hostile message to a group or community. If such a systematic approach is followed, the drafters should discuss the overall coherence of the legal framework for combating and prosecuting "hate crimes" and whether Articles 119 par 1 and 257 should remain as is to ensure that there is no duplication. If not, at a minimum, the wording of such criminal offences should be clarified and the level of penalty increased to reflect the gravity of such crimes (see comments on these Articles in pars 45-46 and 64 *infra*).
33. **Additionally, the legislator should specify under Article 53 par 2 of the Criminal Code that when a court deliberates the sentence and reviews the "motivation" of the perpetrator, it should also specifically consider a potential bias based on certain protected characteristics of the victim(s), when this is not already a constitutive element of the criminal offence.** In such cases, to ensure that the collection of hate crimes data is made easier, **a provision could be introduced to ensure that the competent court expressly mentions in its decision the specific circumstances taken into account in determining the sentence,** as done in certain other countries.⁴⁷
34. On a practical note, it is also essential that the Criminal Code or Criminal Procedure Code ensure that the identified bias motive for a committed crime becomes part of the public record. This is necessary both to facilitate data collection of bias-motivated crimes, but also to make sure that in cases of recidivism, prior hate crimes may be taken into account when debating on the criminal sentence.⁴⁸ It is thus recommended **to amend relevant legislation to ensure that existing bias motivation leading to an aggravated sentence is included in perpetrators' criminal records.**

3. List of Protected Characteristics

3.1. 2014 Amendments

35. The proposed amendments to Article 119 par 1 of the Criminal Code would introduce new protected characteristics regarding acts of violence or unlawful threats committed with a bias motive against a group of persons or a particular person. In addition to national, ethnic, "racial", political affiliation or religious or lack of religious affiliation, the proposed amendments would add express reference to "sex, gender identity, age, disability or sexual orientation".
36. This is overall a positive addition in light of recent recommendations made by international and regional human rights monitoring bodies to Poland. Both the UN Committee against Torture and the UN Human Rights Committee recommended in their

⁴⁶ See *op. cit.* footnote 41, page 14 (EU FRA Opinion 02/2013).

⁴⁷ See e.g., Article 50 of the Swiss Criminal Code of 21 December 1937 (as last amended in 1 July 2014) which states that "[w]here a judgment must be justified, the court shall also specify the circumstances taken into account in determining the sentence and their weighting".

⁴⁸ *Op. cit.* footnote 2, pages 36-37 (2009 ODIHR Practical Guide on Hate Crime Laws).

latest concluding observations on Poland to incorporate offences in, or amend, the Criminal Code to ensure that crimes that target persons on the basis of their sexual orientation, gender identity, disability or age are duly punished.⁴⁹ The Republic of Poland also accepted to implement recommendations from the 2012 Universal Periodic Review regarding the recognition of “gender identity and sexual orientation as an aggravating circumstance for hate crimes”,⁵⁰ and more generally the strengthening of legal and other measures to address bias-motivated crimes.⁵¹ Finally, while noting some progress made by Poland, ECRI in its latest monitoring report on Poland issued this year, recommended that sexual orientation and gender identity be explicitly added to the prohibited grounds mentioned under Articles 118, 119 and 255 to 257 of the Criminal Code.⁵²

37. Such amendments would also correspond to existing practice in the majority of OSCE participating States, which specifically include or refer to sexual orientation and gender identity as protected characteristics in their criminal legislation.⁵³ Amendments to Articles 256 par 1 and 257 of the Criminal Code similarly add these grounds in relation to incitement to hatred as well as “public insult” and interference with the “bodily inviolability of another person” respectively, and are also to be welcomed (see additional comments relating specifically to Articles 256 par 1 and 257 of the Criminal Code in pars 59-64 *infra*). As mentioned above (pars 22, 29 and 32 *supra*), this would demonstrate Poland’s awareness of the special nature of such crimes and allow for more accurate data recording to better inform public decision and policy making in the criminal justice sphere.
38. However, regarding “age”, while some countries do include such a protected characteristic in their criminal legislation,⁵⁴ it may be questionable whether this really constitutes a strong marker of group identity and an aspect of a person’s identity that is fundamental to a person’s sense of self (see par 11 *supra*). Also, it is not clear whether certain aged groups are perceived as an oppressed group in the Polish context and hence deserve specific mention in the Criminal Code. **The drafters should consider whether such a characteristic should be included in light of the domestic context.**
39. At the same time, the above-mentioned provisions do not recognize the possibility that the perpetrator may target a person due to his/her possible affiliation or association (real or presumed) with a certain group. This should not in principle prevent an offence from

⁴⁹ See Concluding Observations of the UN Committee against Torture on the Republic of Poland (23 December 2013), par 25, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fCO%2fPOL%2fCO%2f5-6&Lang=en; and Concluding Observations of the UN Human Rights Committee on the Republic of Poland (15 November 2010), par 8, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fPOL%2fCO%2f6&Lang=en.

⁵⁰ See in particular Recommendations 90.68 (and 90.66) of the Report of the Working Group on the Universal Periodic Review (UPR) for Poland, A/HRC/21/14, 9 July 2012, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/150/70/PDF/G1215070.pdf?OpenElement>; and the Views on conclusions and/or recommendations, voluntary commitments and replies presented by Poland (including list of UPR recommendations accepted by Poland), A/HRC/21/14/Add.1, 7 September 2012, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/165/80/PDF/G1216580.pdf?OpenElement>.

⁵¹ See in particular UPR Recommendations 90.45 to 90.47, 90.49, 90.50, 90.54, 90.55, 90.57, 90.60, 90.64, 90.65 and 90.94 as accepted by Poland.

⁵² See ECRI, *Report on Poland (5th monitoring cycle)*, adopted on 20 March 2015 and published on 9 June 2015, pars 27-28 and 46-47, available at <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Poland/POL-CbC-V-2015-20-ENG.pdf>.

⁵³ The protected grounds of “sexual orientation” and/or “gender identity” or similar wording are expressly mentioned in the criminal legislation of many OSCE participating States either as an aggravating circumstance or when incitement to hatred are based on such characteristics (see <http://www.legislationline.org/topics/country/4/topic/4/subtopic/79>), such as: Albania, Austria, Andorra, Azerbaijan (“motives of sexual belonging” although mentioned only in Article 109 on Discrimination), Belgium, Bosnia and Herzegovina, Canada, Croatia (“gender” and “sexual preference”), Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Iceland (“sexual inclination”), Lithuania, Luxembourg, Malta, Monaco, Montenegro, the Netherlands (“gender” and “heterosexual or homosexual orientation”), Norway (“homosexual orientation”), Portugal, Romania, Serbia, Slovenia, Spain, Slovak Republic, Sweden, the United Kingdom and the United States.

⁵⁴ See e.g., *op. cit.* footnote 2, pages 43-44 (2009 ODIHR Practical Guide on Hate Crime Laws).

being qualified as a bias-motivated crime.⁵⁵ Hence, **it is recommended that the above-mentioned provisions be supplemented to also cover criminal offences committed due to the real or presumed affiliation or association of a victim with a protected group, which should include cases where such crimes are committed under the mistaken belief that the victim has a certain protected characteristic.**

40. Finally, it is important to note that in order for a crime to become a “hate crime”, the bias or hate motive does not need to be the only motive for the criminal offence.⁵⁶ Crimes in general, including bias-motivated crimes, are often committed out of a variety of reasons (mixed motives). In order to give full effect to hate crimes legislation and take into account the complexity of criminal motives, **it is recommended to clarify that the enhanced penalty (or enhanced sentence) will apply even if the prohibited bias motive was only one of several motives.**

3.2. 2012 Amendments

41. The proposed 2012 Draft Amendments provide that the new protected characteristics under Article 256 par 1 would include “national, ethnic, racial, political or social affiliation or their personal characteristics, natural or acquired, or beliefs”.
42. First, such a wording (“personal characteristics, natural or acquired”) creates a potentially open-ended list of protected characteristics. In this regard, the ECtHR has recognized that “many laws are inevitably couched in terms which, to a greater or lesser extent, are vague” and that “progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition in the Convention States”, while also noting that “one of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists”.⁵⁷ However, it is doubtful whether the proposed formulation would respect the principles enshrined in Article 7 of the ECHR, in particular that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*).⁵⁸ This principle implies that criminal offences and the relevant penalties must be clearly defined by law, meaning that an individual, either by himself/herself or with the assistance of a legal counsel, should know from the wording of the relevant provision what acts and omissions will make him/her criminally liable and what penalty he or she will face.⁵⁹
43. While certain countries do include an open-ended list of protected characteristics in their penalty-enhancing provisions,⁶⁰ this runs the risk of offering a vague legal basis to impose grave criminal sanctions which can involve terms of up to two years of

⁵⁵ See *op. cit.* footnote 2, pages 49-51 (2009 ODIHR Practical Guide on Hate Crime Laws). See e.g., Articles 132-76 and 132-77 of the French Penal Code which refer to victim’s *actual* or *supposed* membership or non-membership of a given protected group; and Section 216 of the Criminal Code of Hungary which addresses violence against members of certain protected groups, whether they are part of such groups “in fact or under presumption”; see also several criminal provisions of the Criminal Code of the Czech Republic including penalty-enhancing provisions for bias motivation based on “real or perceived” protected characteristics (see <http://www.legislationline.org/documents/action/popup/id/15725>).

⁵⁶ See *op. cit.* footnote 2, pages 55-56 (2009 ODIHR Practical Guide on Hate Crime Laws). See also the case of *Balázs v. Hungary*, ECtHR judgment of 20 October 2015 (Application no. 15529/12), par 70, available at [http://hudoc.echr.coe.int/eng#{"itemid":\["001-158033"\]}](http://hudoc.echr.coe.int/eng#{).

⁵⁷ See e.g., the cases of *Del Rio Prada v. Spain*, ECtHR judgment of 21 October 2013 [GC] (Application no. 42750/09), pars 91-93, available at [http://hudoc.echr.coe.int/eng?i=001-127697#{"itemid":\["001-127697"\]}](http://hudoc.echr.coe.int/eng?i=001-127697#{); and *Perinçek v. Switzerland*, ECtHR judgment of 15 October 2015 [GC] (Application no. 27510/08), par 134, available at [http://hudoc.echr.coe.int/eng?i=001-158235#{"itemid":\["001-158235"\]}](http://hudoc.echr.coe.int/eng?i=001-158235#{).

⁵⁸ See e.g., the case of *Kokkinakis v. Greece*, ECtHR judgment of 25 May 1993 (Application no. 14307/88), par 52, available at [http://hudoc.echr.coe.int/eng?i=001-57827#{"itemid":\["001-57827"\]}](http://hudoc.echr.coe.int/eng?i=001-57827#{).

⁵⁹ See e.g., the case of *Rohlena v. the Czech Republic*, ECtHR judgment of 27 January 2015 [GC] (Application no. 59552), pars 78-79, available at [http://hudoc.echr.coe.int/eng?i=001-119066#{"itemid":\["001-119066"\]}](http://hudoc.echr.coe.int/eng?i=001-119066#{).

⁶⁰ See e.g., Article 144(4) and 319 of the Criminal Code of the former Yugoslav Republic of Macedonia; Section 216 of the Criminal Code of Hungary which refers to “a certain group of population – especially due to a disability, sexual identity or sexual orientation”; and Article 116 of the Criminal Code of Slovenia referring to murder “because of violation of equality”.

imprisonment. On the contrary, anti-discrimination legislation which is by nature private/civil or administrative and provides non-criminal sanctions, may enjoy greater flexibility and often includes open-ended list. By leaving a wide margin of interpretation to public authorities, the wording of amended Article 256 par 1 of the Criminal Code appears too vague to meet the requirements of legal certainty, foreseeability and specificity of the criminal law.⁶¹ **The drafters should rather consider including additional specific personal characteristics (such as sex, disability, sexual orientation or gender identity), as is done in the 2014 amendments and recommended by international or regional human rights monitoring bodies.**

44. Second, a “political or social affiliation” is generally not considered as constituting immutable or core characteristics as such affiliations may change over time and do not represent markers of a group identity (see par 11 *supra*) comparable to other potentially mutable characteristics, such as religion. Moreover, if expressing hatred or insulting a person or group of persons by reason of their “political affiliation” can be prosecuted under the amended Article 256 par 1, this could potentially lead to arbitrary criminal investigations against certain persons merely for criticizing a certain political opinion or party.⁶² The protected characteristic of “social affiliation”, apart from not necessarily being a marker for group identity, is also quite unclear and could lend itself to a wide-ranging, potentially arbitrary interpretation.⁶³ **Consequently, if the 2012 Draft Amendments are being considered further, the drafters should reconsider the inclusion of such grounds as protected characteristics in the revised Article 256 par 1 of the Criminal Code.**

4. Additional Comments

4.1. Article 119 of the Criminal Code

45. Article 119 par 1 criminalizes “violence” or “unlawful threat” against certain persons or groups based on their protected characteristics. While “unlawful threat” is defined in Article 115 par 12 of the Criminal Code, the term “violence” is not, and is *per se* quite general in nature. In order to clarify this provision and underline the illegality of the intended acts, **it is recommended to delete the term “violence” and instead specify which violent criminal acts are covered, for instance by including express cross-references to certain criminal offences against life and health from Chapter XIX of the Criminal Code.** The drafters should also ensure that “hate crimes” against property (see par 32 *supra*) are also addressed in the Criminal Code, either under Article 119 or other relevant provisions. It must be reiterated that if the recommendation made in par 31 *supra* is followed (i.e., adding systematically penalty-enhancing provisions for the most serious or frequent forms of crimes), then Article 119 par 1 may become obsolete and in any case, the drafters should avoid duplication with other provisions.
46. It is important to note in this context that according to Article 156 of the Criminal Code, grievous bodily harm is punishable by imprisonment from one year to ten years, while

⁶¹ See e.g., *op. cit.* footnote 2, page 46 (2009 ODIHR Practical Guide on Hate Crime Laws). See also OSCE/ODIHR, *Opinion on draft Amendments to the Moldovan Criminal Code Related to Hate Crimes* (7 June 2010), par 24, available at <http://www.legislationline.org/documents/id/15840>.

⁶² See e.g., *ibid.* par 35 (2010 OSCE/ODIHR Opinion on draft Amendments to the Moldovan Criminal Code Related to Hate Crimes).

⁶³ See also *op. cit.* footnote 2, page 45 (2009 ODIHR Practical Guide on Hate Crime Laws).

less serious bodily harm under Article 157 of the Criminal Code is punishable by imprisonment from 3 months to five years. Article 119 of the Criminal Code foresees the same level of penalties as the latter (3 months to five years). **Given their particular gravity, bias-motivated crimes should however in principle be punishable by harsher penalties compared to similar general criminal offences.**⁶⁴ Hence, the drafters should ensure that the penalties provided under Article 119 for acts of violence motivated by bias are adapted accordingly.

4.2. Articles 194 to 196 of the Criminal Code

47. Article 194 of the Criminal Code, in its current form, provides that “[w]hoever restricts another person from exercising their rights by reason of their religious affiliation or lack of religious affiliation shall be subject to the penalty of restriction of liberty or the penalty of deprivation of liberty for a term of up to 2 years”. While retaining the same wording, the Draft Amendments introduce the possibility to impose enhanced penalties when the offence is committed by a public official in the performance of his/her duties.
48. As stated above (see par 13 *supra*), it is important to distinguish actions that constitute “hate crimes” from more general anti-discrimination provisions which are usually addressed by administrative or private/civil legislation. In Article 194 of the Criminal Code, the underlying alleged offence is the restriction of a person’s rights, which does not necessarily *per se* constitute a criminal act. It must however be highlighted that several countries have introduced in their criminal legislation provisions criminalizing discriminatory acts committed by private persons and/or by public officials,⁶⁵ although the related criminal offences are sometimes framed in very broad and vague terms which are unlikely to comply with the principle of specificity of criminal law (see par 42 *supra*). **The drafters should discuss whether there is a *rationale* in light of the national context and case law pertaining to Article 194 to leave such an offence in the Criminal Code (particularly whether there is a need to criminalize such conducts for preventive, protective, and/or retributive reasons in the given context) or whether it should rather become part of relevant anti-discrimination legislation.**
49. Even if maintained in the Criminal Code, it is doubtful whether the definition of the criminal offence contained in Article 194 would respect the principles enshrined in Article 7 of the ECHR, which require that a criminal law should be specific enough for an individual to anticipate what acts and omissions will make him/her criminally liable (see par 42 *supra* regarding Article 7 of the ECHR).⁶⁶ As it stands, the mere mention of the act of restricting others from exercising their rights, without specifying what kind of acts the term “restricting” would entail and which rights are being referred to,⁶⁷ would appear to be too vague to satisfy such conditions. While recognizing that laws are generally couched in general terms and that criminal law provisions generally develop

⁶⁴ *ibid.* page 23 (2009 ODIHR Practical Guide on Hate Crime Laws).

⁶⁵ See e.g., Albania, Bosnia and Herzegovina, Croatia, Estonia, France, Latvia, Lithuania, Luxembourg, Moldova, Montenegro, Serbia, Slovenia, etc.

⁶⁶ See e.g., *op. cit.* footnote 59, pars 78-79 (2015 ECtHR judgment in the case of *Rohlena v. the Czech Republic [GC]*).

⁶⁷ See, for instance, Articles 225-1 to 225-4 of the French Penal Code which address the criminal offence of discrimination (on a number of listed protected grounds) defined as any distinction made between individuals or legal persons by reason of their (real or presumed) protected grounds “where it consists of: (1) a refusal to supply goods or services; (2) an obstruction to the normal exercise of any economic activity; (3) a refusal to hire, or a sanction or a dismissal; (4) making the supply of goods or services subject to fulfilling a condition based on one of the [protected grounds]; (5) making an offer of employment, internship or job training period subject to fulfilling a condition based on one of the [protected grounds]”, making it punishable by up to three years of imprisonment and a fine of € 45,000.

progressively through case law of courts as noted in several ECtHR judgments,⁶⁸ **the drafters should consider clarifying the said provision by specifying which rights are concerned.**

50. At the same time, even if the said provision becomes part of more general anti-discrimination or other non-criminal legislation, similar comments would also apply: the current wording reflected in Article 194 does not sufficiently clarify which behaviour or acts are forbidden, and thus does not meet general international standards of legal certainty and foreseeability of laws.
51. As regards the proposed amendments to Article 196 of the Criminal Code relating to offences to the religious feelings of others, it is noted that they seek to specify and narrow the scope of the criminal offence. First, the new amended provision would expressly require that criminal proceedings can only be initiated upon a “private charge”. Second, the *actus reus* would be more clearly defined by now specifying what is meant by intentionally insulting the religious feelings of others, i.e. “outraging in public a place intended for the practice of religious rites or an object of religious worship located therein”. However, the term “outraging” may still be subject to varying interpretations. Importantly, such a criminal offence should not be used to prevent or punish criticism directed at ideas, beliefs or ideologies, religions or religious institutions, or religious leaders, or commentary on religious doctrine and tenets of faith.⁶⁹ Additionally, it must be noted that the UN Human Rights Committee has expressly recognized that “[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in Article 20 par 2 of the Covenant” i.e., when constituting incitement to discrimination, hostility or violence.⁷⁰ Article 196 fails to refer to such specific circumstances, and even if it would, this may then lead to a potential overlap with Article 256 par 1 on incitement to hatred (see Section 4.3.2 of the Opinion *infra*). Hence, in light of the above, **the drafters should reconsider the inclusion of such an offence in the Criminal Code, or at minimum, circumscribe more narrowly the prohibition contained in Article 196 of the Criminal Code to ensure that it does not unduly restrict freedom of expression.**

4.3. Articles 256 and 257 of the Criminal Code

4.3.1. “Promotion of a fascist or other totalitarian system of state”

52. Article 256 par 1 of the Criminal Code in its current form makes it a criminal offence to promote “a fascist or other totalitarian system of state”.
53. First, since such a provision aims at limiting freedom of expression, it must comply with the strict criteria provided by international human rights standards in this respect.

⁶⁸ See e.g., *op. cit.* footnote 57, pars 91-93 (2013 ECtHR judgment in the case of *Del Rio Prada v. Spain*); and par 134 (2015 ECtHR judgment in the case of *Perinçek v. Switzerland*).

⁶⁹ See UN Human Rights Committee, *General Comment No. 34 on Article 19: Freedoms of opinion and expression*, 12 September 2011, par 48, available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>. See also Principle 12.3 of the Camden Principles on Freedom of Expression and Equality (2009), prepared by the international non-governmental organization Article 19 on the basis of discussions involving a group of high-level UN and other officials, and civil society and academic experts in international human rights law on freedom of expression and equality issues, available at <https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>.

⁷⁰ See *ibid.* par 48 (UN Human Rights Committee General Comment No. 34). See also UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, *2010 Joint Declaration on Ten Key Threats to Freedom of Expression*, 3 February 2010, Section 2 on Criminal Defamation, available at <http://www.osce.org/fom/154846?download=true>.

Article 19 of the ICCPR and Article 10 of the ECHR which protect the rights to freedom of expression or opinion list specific exceptional situations where this right may be curtailed. In particular, any restriction must meet the three-part test i.e., be “prescribed by law”, pursue a “legitimate aim” provided by international human rights law and be “necessary in a democratic society”, and as such respond to a pressing social need. It is worth noting that Article 5 par 1 of the ICCPR and Article 17 of the ECHR exclude from the scope of protection of the ICCPR and ECHR respectively “any act aimed at the destruction of any of the rights and freedoms” recognized in these instruments. It must be highlighted however that according to the case law of the ECtHR, the notion of freedom of expression is applicable also to information or ideas that “offend, shock or disturb”,⁷¹ even when they include elements of exaggeration or provocation.⁷² The UN Human Rights Committee in its General Comments No. 34 has also recognized that Article 19 protects also expression “that may be regarded as deeply offensive”.⁷³ Hence, any limitation to freedom of expression must not be too general or extensive and should be narrowly interpreted, and the necessity for restrictions must be convincingly established.⁷⁴

54. Second, it is questionable again whether the wording of this provision would respect the principles enshrined in Article 7 of the ECHR, particularly that it should be clear from the wording of the relevant provision which acts and omissions will trigger criminal liability (see par 42 *supra*). It is acknowledged by various international human rights bodies that “all criminal restrictions on content [of speech] – including those relating to hate speech, national security, public order and terrorism/extremism – should conform strictly to international standards, including by [...] not employing vague or unduly broad terms [...]”⁷⁵ noting that terms such as ‘glorifying’, ‘justifying’, ‘promoting’ or ‘encouraging’ generally constitute vague concepts.⁷⁶
55. Moreover, the OSCE/ODIHR and the European Commission for Democracy through Law (Venice Commission) have considered certain terms, notably “totalitarian ideologies” or “fascism and communism” to be vague and open-ended. Additionally, they concluded that the prohibition of “propaganda of totalitarian ideologies” is not in conformity with European standards, since such terminology is not specific enough, and thus makes it difficult for people to adjust their conduct to the requirements of the legal regulation.⁷⁷
56. In this context, it is noted that other countries do provide a ban similar to the one mentioned under Article 256 par 1 of the Criminal Code. In doing that, however, they circumscribe more clearly the scope of such prohibition, e.g., by expressly stating the purpose of “fascist” and/or “totalitarian” movements/systems (such as advocacy for the

⁷¹ See the case of *Handyside v. the United Kingdom*, ECtHR judgment of 7 December (Application no. 5493/72), par 49, available at [http://hudoc.echr.coe.int/eng?i=001-57499#{"itemid":\["001-57499"\]}](http://hudoc.echr.coe.int/eng?i=001-57499#{); see also the case of *Vona v. Hungary*, ECtHR judgment of 9 July 2013 (Application no. 35943/10), par 53, available at [http://hudoc.echr.coe.int/eng?i=001-122183#{"itemid":\["001-122183"\]}](http://hudoc.echr.coe.int/eng?i=001-122183#{).

⁷² *Op. cit.* footnote 57, pars 204-208 (2015 ECtHR judgment in the case of *Perinçek v. Switzerland*).

⁷³ *Op. cit.* footnote 69, par 53 (UN Human Rights Committee General Comment No. 34).

⁷⁴ See e.g., the case of *Observer and Guardian v. United Kingdom*, ECtHR judgment of 26 November 1991 (Application no. 13585/88), par 59, available at [http://hudoc.echr.coe.int/eng?i=001-57705#{"itemid":\["001-57705"\]}](http://hudoc.echr.coe.int/eng?i=001-57705#{).

⁷⁵ See UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, *2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations* (4 May 2015), par 3 (a) and (b), available at <http://www.osce.org/fom/154846?download=true>.

⁷⁶ *ibid.* See also regarding specifically the term “promotion”, UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, *2005 Joint Declaration* (21 December 2005), par 9, available at <http://www.osce.org/fom/99558?download=true>.

⁷⁷ See OSCE/ODIHR-Venice Commission, *Joint Amicus Curiae Brief for the Constitutional Court of Moldova on the compatibility with European Standards of Law No. 192 of 12 July 2012 on the prohibition of the use of symbols of the totalitarian communist regime and of the promotion of totalitarian ideologies of the Republic of Moldova*, adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013), pars 74-78 and 125, available at <http://www.legislationline.org/documents/id/17873>.

violent seizure of power, the suppression of human rights and freedoms or incitement to hostility or violence against certain groups) or by expressly naming certain specific movements/organizations (e.g., including reference to “former National Socialist organization” in the German Criminal Code).⁷⁸

57. Finally, an additional way to mitigate partially the potentially wide interpretation of the term ‘promote’ could be to include defences or exceptions to the rule stated in Article 256 par 1, for example for true statements or for statements which were intended as part of a good faith discussion on a matter of religion, education, scientific research, politics or some other issue of public interest.⁷⁹ While Article 256 par 3 contains such type of defence, it only applies to Article 256 par 2, which relates to the production, duplication, import, purchase, storage, possession, presentation, transport or transfer for the purpose of dissemination of printed matter, recordings or other objects containing the substance defined in Article 256 par 1 of the Criminal Code (see specific recommendation in that respect in par 62 *infra*).
58. In view of the above, **the drafters should review Article 256 par 1 of the Criminal Code and specify what is meant by the “promotion of fascist or other totalitarian systems of state” to circumscribe more narrowly the said prohibition.**

4.3.2. Incitement to Hatred (Article 256) and Public Insult (Article 257) against Certain Persons or Groups

59. Article 256 par 1 and Article 257 of the Criminal Code criminalize the incitement to hatred and public insults against persons or groups by reason of certain protected characteristics. However, neither provision, nor Article 115 of the Criminal Code, (which contains definitions of terms mentioned in the Criminal Code), nor any other provisions, would appear to provide adequate guidance on how to define what will in practice constitute an “incitement to hatred” or “public insult”.
60. It must be noted in this respect that the ECtHR has acknowledged the “impossibility of attaining absolute precision in the framing of laws” “even in cases in which the interference with the applicants’ right to freedom of expression had taken the form of a criminal ‘penalty’”, noting that in this field, the situation changes according to the prevailing views of society.⁸⁰ Further, when drafting legislation in this field, the factors considered by the ECtHR when assessing whether a given conviction for calls to violence and “hate speech” constitutes an interference with the exercise of the right to freedom of expression in specific cases could provide valuable guidance. These include the following: whether the statements were made against a tense political or social background; whether such statements, being fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance; the manner in which the statements were made; their capacity – direct or indirect – to lead to harmful consequences; and the proportionality of sanctions.⁸¹

⁷⁸ See, for instance, the examples of the Czech Republic and Germany, *ibid.* pars 33-34, 60-63 and 74-78 (2013 OSCE/ODIHR-Venice Commission Joint Amicus Curiae).

⁷⁹ See e.g., OSCE Representative on Freedom of the Media, *Legal Analysis of the Proposed Bill C-51, the Canadian Anti-terrorism Act, 2015: Potential Impact on Freedom of Expression* (May 2015), pages 9-10, available at <http://www.osce.org/fom/156261?download=true>.

⁸⁰ *Op. cit.* footnote 57, par 133 (2015 ECtHR judgment in the case of *Perinçek v. Switzerland* [GC]).

⁸¹ *ibid.* pars 204-208 (2015 ECtHR judgment in the case of *Perinçek v. Switzerland*).

61. Accordingly, even if absolute precision may not be possible, when reading Articles 256 par 1 and 257, it may prove difficult for an individual to distinguish between permissible statements or ideas that offend, shock or disturb (see par 53 *supra*) and public expression that may insult certain persons or groups of persons or incite to hatred and hence render him/her criminally liable. The domestic legal framework on incitement should rather be guided by Article 20 of the ICCPR (i.e., “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”) and should consider including robust definitions of key terms such as “hatred”, “discrimination”, “violence” and/or “hostility”.⁸² Furthermore, as recommended by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, “[t]o prevent any abusive use of hate speech laws, [...] only serious and extreme instances of incitement to hatred [should] be prohibited as criminal offences”.⁸³
62. Overall, **Articles 256 and 257 should outline specifically which forms of public insults or incitement to hatred would be criminalized, while ensuring that their scope is narrowly defined. Moreover, the drafters should consider extending the scope of the defence provision contained in the current Article 256 par 3 to cover not only Article 256 par 2 but also Article 256 par 1 while also considering broadening the scope of such potential defences or exceptions to the rule** (see par 57 *supra*).
63. Finally, it must be noted that the penalty for incitement to hatred (Article 256) is a restriction or deprivation of liberty of up to two years, which is much lower than the penalty provided for public insult (Article 257), i.e., up to three years of deprivation of liberty. It must be noted in that respect that various international human rights bodies have raised some concerns regarding laws making “insults” a crime, and particularly those that impose “[u]nduly harsh sanctions such as imprisonment”.⁸⁴ Hence, in addition to the clarification of the above unclear terminology, **the drafters should consider excluding the possibility to impose imprisonment in case of “public insult” and also discuss more generally whether the range of proposed sanctions for these criminal offences is adequate and appropriate.**

4.3.3. Interference with the Bodily Inviolability of Another Person (Article 257)

64. Article 257 of the Criminal Code criminalizes the interference with the “bodily inviolability” of a person by reason of certain protected characteristics. However, it appears that this term is not defined in Article 115 or other provisions of the Criminal Code. Such a provision may also potentially overlap with Article 119 par 1. As similarly done in par 45 *supra*, **to ensure that this criminal offence is specific and foreseeable, it is recommended to make an express cross-reference to the relevant articles of the**

⁸² See par 19 of the 2012 Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012, available at http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf. See also UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation* (10 December 2008), page 3, available at <http://www.osce.org/fom/99558?download=true>, which states that “[r]estrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.

⁸³ See UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *2012 Report*, A/67/357, 7 September 2012, par 79, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/501/25/PDF/N1250125.pdf?OpenElement>.

⁸⁴ See also *op. cit.* footnote 70, Section 2 on Criminal Defamation (2010 Joint UN-OSCE-OAS-ACHPR Declaration on Ten Key Threats to Freedom of Expression).

Criminal Code; the penalty should also be harsher compared to similar general criminal offences committed without a bias motive (see par 46 *supra*). Alternatively, as recommended in par 31 *supra*, the drafters should consider introducing enhanced penalties under these articles for cases where the respective offences are committed with a bias motive. In any case, the acts covered by Article 257 should not overlap with those addressed under Article 119 par 1, nor with other provisions of the Criminal Code.

5. Final Comments

65. While a number of the above-mentioned amendments to criminal law provisions would be welcome, they would by themselves not achieve results in practice if they are not accompanied by other measures to ensure a comprehensive approach to preventing and combatting bias-motivated crimes. Thus, any criminal law reform in this field should go hand in hand with other measures, such as educating the public (especially young people) on tolerance and non-discrimination, collecting accurate data on crimes with a bias motive, ensuring that victims have access to effective remedies, public awareness-raising campaigns, political will, and more generally, other measures addressing discrimination in all spheres of life, including public and political, economic, health, social and cultural life.⁸⁵
66. Moreover, various recommendations at the international and regional levels note that a criminal justice system and its actors need to be representative of the community as a whole, including in terms of gender balance and diversity,⁸⁶ to enhance the confidence of the entire population in the system. Good practices have also shown that specialized services provided by the police, prosecution service and courts, and additional and continuous training, tend to increase reporting, trust and engagement of crime victims with the criminal justice system and the overall efficiency and effectiveness of such system.⁸⁷ Consequently, the reform of hate crime-related legislation should be complemented by other reforms that address the composition, organization, and capacity development of all actors of the criminal justice system as a whole.
67. Finally, recommendations at the international level highlight the need for direct and meaningful participation of all criminal justice agencies, civil society, in particular vulnerable and minority groups, and other stakeholders throughout the process of amending legislation on preventing and combating hate crimes.⁸⁸ Consequently, policy and law makers in Poland should ensure that all stakeholders are, and continue to be,

⁸⁵ See e.g., *op. cit.* footnote 2, page 12 (2009 ODIHR Practical Guide on Hate Crime Laws).

⁸⁶ See e.g., UN Special Rapporteur on the Independence of Judges and Lawyers, *2011 Annual Report*, par 81 on the “Adequate Representation of Women in the Judiciary”, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/130/15/PDF/G1113015.pdf?OpenElement>; OSCE/ODIHR, *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010), par 24, available at <http://www.osce.org/odihr/KyivRec?download=true>, which states that “[g]enerally, it would be desirable that the composition of the judiciary reflects the composition of the population as a whole”; see also OSCE, *Guidebook on Democratic Policing* (May 2008), par 124, available at <http://www.osce.org/spmu/23804?download=true>; and Preamble Paragraph, 8(a) of the *UN Code of Conduct for Law Enforcement Officials*, adopted by the UN General Assembly in its resolution 34/169 of 17 December 1979, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>. See also pars 1-2 of the OSCE Ministerial Council Decision MC DEC/7/09 on Women’s Participation in Political and Public Life, 2 December 2009; and Document of the Seventeenth OSCE Ministerial Council, Athens, 1-2 December 2009, available at <http://www.osce.org/mc/40710?download=true>.

⁸⁷ See also, for instance, in cases of domestic violence the draft of the *European Union Handbook of Best Police Practices on Overcoming Attrition in Domestic Violence Cases*, December 2012, page 10, available at <http://www.eucpn.org/download/?file=EUHndbookAttritionDomViol.pdf&type=3>. Regarding juvenile justice, see also Section 12 on “Specialization within the Police” of the *UN Minimum Rules for the Administration of Juvenile Justice* (or “Beijing Rules”), adopted by UN General Assembly resolution 40/33 of 29 November 1985, available at <http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>.

⁸⁸ See *op. cit.* footnote 2, pages 13-14 (2009 ODIHR Practical Guide on Hate Crime Laws).

OSCE/ODIHR Opinion on the Draft Amendments to Certain Provisions of the Criminal Code of Poland

fully consulted and informed, and that they are able to submit their views throughout the amendment process. Public discussion and an open and inclusive debate will increase all stakeholders' understanding of the various factors involved, enhance confidence in and ownership of the adopted legislation, and ultimately improve implementation.

[END OF TEXT]

ANNEX:

PAPER NO. 2357
(7 March 2014)

**ACT
OF 2014
AMENDING THE ACT – CRIMINAL CODE**

Article 1.

The Act of 6 June 1997 – Criminal Code (Journal of Laws [Dziennik Ustaw] of 1997, No 88, item 553, as amended) shall be amended as follows:

- 1) Article 119 § 1 shall be replaced by the following:

Whoever uses violence or unlawful threat against a group of persons or a particular person on the grounds of their national, ethnic, racial, political or religious affiliation, lack of religious affiliation, sex, gender identity, age, disability or sexual orientation shall be subject to the penalty of deprivation of liberty for a term of 3 months to 5 years.

- 2) Article 194 shall be replaced by the following:

§ 1. Whoever restricts another person from exercising their rights by reason of their religious affiliation or lack of religious affiliation shall be subject to the penalty of restriction of liberty or the penalty of deprivation of liberty for a term of up to 2 years.

§ 2. If the act specified in § 1 is committed by a public official in connection with the performance of their duties, the perpetrator shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for a term of up to 3 years.

- 3) Article 195 shall be replaced by the following:

§ 1. Whoever maliciously interferes with the public performance of a religious ceremony of a church or another religious association with regulated legal status shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for a term of up to 2 years.

§ 2. The same punishment shall be imposed on anyone who maliciously interferes with a funeral, mourning ceremonies or rites.

§ 3. If the act specified in § 1 and 2 is committed by a public official in connection with the performance of their duties, the perpetrator shall be subject the penalty of deprivation of liberty for a term of up to 3 years.

- 4) Article 196 shall be replaced by the following:

§ 1. Whoever intentionally insults the religious feelings of other persons by outraging in public a place intended for the practice of religious rites or an object of religious worship

OSCE/ODIHR Opinion on the Draft Amendments to Certain Provisions of the Criminal Code of Poland

located therein shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for a term of up to 6 months.

§ 2. The prosecution of the offence specified in § 1 shall occur upon a private charge.

5) Article 256 § 1 shall be replaced by the following:

§ 1 Whoever publicly promotes a fascist or other totalitarian system of state or incites hatred on the grounds of national, ethnic, racial or religious differences, lack of religious affiliation, sex, gender identity, age, disability or sexual orientation shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for a term of up to 2 years.

6) Article 257 shall be replaced by the following:

Whoever publicly insults a group within the population or a particular person on the grounds of their national, ethnic, racial or religious affiliation, lack of religious affiliation, sex, gender identity, age, disability or sexual orientation, or interferes with the bodily inviolability of another person on those grounds, shall be subject to the penalty of deprivation of liberty for a term of up to 3 years.

Article 2.

The Act shall come into force within 30 days of its publication.

PAPER NO. 1078

(27 November 2012)

ACT OF
AMENDING THE ACT – CRIMINAL CODE

Article 1. The Act of 6 June 1997 – Criminal Code (Journal of Laws [Dziennik Ustaw] of 1997, No 88, item 553, as amended) shall be amended as follows:

1. Article 119 shall be repealed.

OSCE/ODIHR Opinion on the Draft Amendments to Certain Provisions of the Criminal Code of Poland

2. Article 256 shall be replaced by the following:

“Article 256 § 1. Whoever publicly promotes a fascist or other totalitarian system of state or incites hatred against a group of persons or a person on the grounds of their national, ethnic, racial, political or social affiliation or their personal characteristics, natural or acquired, or beliefs, or insults a group of persons or a person on those grounds, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for a term of up to 2 years.

§ 2. The same punishment shall be imposed on anyone who produces, records or imports, acquires, stores, owns, presents, carries or transmits computer data, prints, recordings or other objects containing the content specified in § 1 with the intent of dissemination.

§ 3. The perpetrator of the prohibited act specified in § 2 does not commit an offence if that act is committed in the pursuit of artistic, educational, collector’s or scientific activity.

§ 4. In the event of conviction for the offence specified in § 2, the court shall order the forfeiture of the objects referred to in § 2, even if they are not the property of the perpetrator.

§ 5. Whoever uses violence or unlawful threat against another person on the grounds specified in § 1, or interferes with their bodily inviolability on those grounds, shall be subject to the penalty of deprivation of liberty for a term of 3 months to 5 years.”

3. Article 257 shall be repealed.

Article 2. The Act shall come into force within 14 days of its publication