

Racing Race: Should Sexual Orientation Be Protected by Hate Crime Laws? Lessons from Poland

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While some European countries protect people from violence based on sexual orientation, others, such as Poland, only combat crimes motivated by racism and xenophobia. The aim of this paper is to shed some light on this phenomenon. The author argues that the fact that hate crime (law) is understood through the genocide of ethnic minorities provides one explanation, in addition to high levels of homophobia, and by extension, the unwillingness of the Polish authorities to provide institutional protection for LGBT people.

Introduction¹

Homophobic attitudes and violence based on sexual orientation and gender identity persists across Europe.² While the need to combat hate crimes based on race and

¹ I would like to thank the reviewers and Richard Mole for their helpful advice and comments. The opinions expressed here, and of course any errors, are mine.

religion have been recognised almost universally in Europe, there is a considerable difference in the response to homophobic crimes. Out of twenty eight EU member states, sixteen treat sexual orientation as a protected ground in hate crime legislation, whereas nine recognise transphobic crimes.³ The question arises: Why do some countries develop inclusive hate crime policies, while others focus exclusively on combatting racism and xenophobia?

While the issue of expanding the catalogue of protected grounds has been discussed in the context of the US and the UK, the literature on other countries, such as Poland, is scarce. This is a significant because violence targeting minorities continues to be a problem there. But whereas the reasons for intolerance in Polish society can be explained through an historical analysis, the rationale behind the choice of protected characteristics is less clear. In particular, it is unclear why Poles, who are suspicious of a range of 'Others', take racist and xenophobic violence relatively seriously. If Polish society is prejudiced against both Jews and gays, why only protect the former? This question is important, because it shows that specific country's policies, while similar in certain areas (legislating against racial violence), may be completely different in other issues (legislating against homophobia). The aim of this research is therefore to shed some light on the factors that condition hate crime policies in Poland. While, due to space constraints, it is not possible to provide a full account of these factors, I argue that there are lessons we can learn: (1) the understanding of hate crime (laws) in Poland is grounded in the memory of genocide against ethnic minorities within Polish territory; (2) that this leads to focusing the efforts on preventing history from repeating itself, rather than repairing harms of

² Data from research are alarming. In a survey conducted in 2013 by the EU Fundamental Rights Agency among lesbian, gay, bisexual and transgender (LGBT) people living in the EU, 26% of all respondents said that they had been attacked or threatened with violence in the five years preceding the question. This number goes up to 35% for transgender people. 'Survey Data Explorer: LGBT Survey 2012', EU Fundamental Rights Agency, 2013, accessed 10 December 2014.

³ 'Hate Crime in the OSCE Region: Incidents and Responses. Annual Report for 2012', OSCE ODIHR, 2013, accessed 10 December 2014.

individual victimisation; and (3) that it provides another explanation, in addition to high levels of homophobia, of the unwillingness of the Polish authorities to provide institutional protection for LGBT people.

This paper is divided into two sections. In the first part, I briefly review the current debate on (not) protecting gay people. In the second part, I analyse the criminal justice responses to two hate crime cases: one motivated by racism and one by homophobia. In doing so, I identify the frames through which hate crimes are seen in Poland. Whenever possible, I provide further context and refer to relevant literature.

(Not) protecting LGBT: Theoretical debates

Hate crime laws, which emerged out of the civil rights movement in the US⁴, and in response to the victimisation of ethnic minorities during WW2 in Europe⁵, were initially introduced to combat violence motivated by racism and xenophobia. Following their institutionalisation, and as a result of claims made by other minority groups, some states, particularly western democracies, further expanded the catalogue of protected grounds to punish other discriminatory motives.⁶ As a result, the catalogue often includes multiple categories, such as race, ethnicity, religion, sexual orientation, gender identity and disability, reflecting the reality of a multicultural, diverse society.⁷

⁴ P. B. Gerstenfeld, *Hate Crimes: Causes, Controls, and Controversies*, Thousand Oaks, London, and New Delhi, Sage Publications, 2004; V. Jenness and R. Grattet, *Making Hate a Crime: From Social Movement to Law Enforcement*, New York, Russell Sage, 2001.

⁵ K. Goodall, 'Conceptualising 'racism' in Criminal Law', *Legal Studies* 33, 2: 220.

⁶ J. B. Jacobs and K. Potter, *Hate Crimes: Criminal Law & Identity Politics*, New York and Oxford, Oxford University Press, 1998; V. Jenness and R. Grattet 2001.

⁷ The groups which have most commonly been included in the hate crime legislation have specific 'tools of political and legal persuasion: a well-recognised history of oppression; an established currency in human rights discourse; the backing of an influential social movement; and the capacity to establish empirical credibility for the targeted violence they experience' (G. Mason, 'Victim Attributes in Hate Crime Law', *British Journal of Criminology* 54, 2: 162; see also R. Grattet and V. Jenness, 'Examining the Boundaries of Hate Crime Law: Disabilities and the 'Dilemma of Difference'', *Journal of Criminal Law and Criminology* 91, 3: 653–97; Jenness and Grattet 2001; 'Hate Crime Laws: A Practical

Nevertheless, the inclusion of new grounds, particularly sexual orientation, on the list of protected characteristics has not been straightforward, and remains a heated topic of discussion. The aim of this section is to provide a brief account of the arguments used in the academic debate. Due to limited space, I do not discuss general reasons for homophobia, which have been explained elsewhere.⁸

Enacting hate crime laws, but not including all commonly targeted groups, has been discussed as creating a hierarchy of 'legitimate' victims.⁹ While hate crime statutes are said to be sending a message that intolerance will not be tolerated¹⁰, enacting the legislation, but refusing to include sexual orientation, may create a situation in

Guide', OSCE ODIHR, 2009; S. A. Soule and J. Earl, 'The Enactment of State-Level Hate Crime Law in the United States: Intrastate and Interstate Factors', *Sociological Perspectives*, 44, 3: 281–305.)

⁸ Homophobia has been explained as (1) being against nature and religion (J. Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century*, Chicago: University of Chicago Press, 1981; G. L. Mosse, *Nationalism and Sexuality: Respectability and Abnormal Sexuality in Modern Europe* New York, Howard Fertig, 1985); (2) threatening the hegemonic position of heterosexual men (R. W. Connell, *Gender and Power: Society, the Person, and Sexual Politics*, Stanford, California: Stanford University Press, 1987; J. Nagel, 'Masculinity and Nationalism: Gender and Sexuality in the Making of Nations', *Ethnic and Racial Studies* 21, 2: 242–69); (3) a punishment for doing gender incorrectly (B. Perry, *In the Name of Hate: Understanding Hate Crimes*, London, Routledge, 2001; C. West and D. H. Zimmerman, 'Doing Gender', *Gender and Society* 1, 2: 125–51.); and (4) being incompatible with national identity (R. Mole, 'Nationality and Sexuality: Homophobic Discourse and the 'National Threat' in Contemporary Latvia' *Nations and Nationalism* 17, 3; C. O'Dwyer and K. Z. S. Schwartz, 'Minority Rights after EU Enlargement: A Comparison of Antigay Politics in Poland and Latvia', *Comparative European Politics*, 8, 2: 220–43).

⁹ Actually, even the broad catalogue discussed above is critiqued as creating an unnecessary hierarchy of victims. In the opinion of some authors, such as Chakraborti and Garland, hate crime should be seen through the lens of vulnerability and difference rather than group identity and history of marginalisation (N. Chakraborti and J. Garland, 'Reconceptualising Hate Crime Victimisation through the Lens of Vulnerability and 'Difference'' *Theoretical Criminology* 16, 4: 499–514). This reconceptualisation would allow to treat crimes targeting people because of their alternative looks (e.g. Goths), or homelessness, as hate crimes. For a recent discussion, see Mason, 'Victim Attributes in Hate Crime Law'. Some jurisdictions, e.g. England and Wales, have already adapted this view and monitor other strands of hate crime, even if they are not yet protected in the criminal law (P. Giannasi, 'Hate Crime in the United Kingdom', in Nathan Hall et al., ed., *The Routledge International Handbook on Hate Crime*, 2014).

¹⁰ Grattet and Jenness 2001; F. M. Lawrence, *Punishing Hate: Bias Crimes under American Law*, London, Harvard University Press, 1999.

which law conditions the environment for homophobic hate crimes.¹¹ According to Lawrence, the '[f]ailure to include sexual orientation implies that gays and lesbians are not as deserving of protection as racial, religious or ethnic minorities, and that sexual orientation is not as serious a social fissure line as race, religion, and ethnicity'.¹²

From the perspective of sexual citizenship, Richardson and May argue that not including sexual orientation in hate crime legislation means that gay people are denied full citizenship.¹³ This is because they do not have the right to freedom from violence by those who deny them personhood and the right to existence, especially in heterosexualised public spaces. They observe that if anti-gay hate offences are seen as 'normal' and understandable (due to restricted homosexual citizenship), it is much more difficult to argue for protection in criminal law. On the contrary – through laws and policies which encourage the heteronormative cultural context, the state reinforces and reproduces the vision of gay people as 'deserving victims'.¹⁴

When it comes to arguments against inclusion, some opponents, mostly non-academic, argue that expanding the protection traditionally granted to black, Asian and minority ethnic (BAME) people will dilute the efforts to combat racism. Those claims are dismissed however by proponents, who argue that '[t]he same bigotry that fuels racism fuels other types of hate' and therefore '[w]e must seek to provide the same high degree of service to all hate crime victims'.¹⁵

¹¹ Gerstenfeld 2004, 241; Perry 2001; see also: K. T Berrill and G. M. Herek, 'Documenting the Victimization of Lesbians and Gay Men: Methodological Issues', in G. M. Herek and K. T. Berrill, ed., *Hate Crimes: Confronting Violence Against Lesbians and Gay Men*, Newbury Park, London, and New Delhi, Sage Publications, 1992, 293.

¹² Lawrence, 1999, 20.

¹³ D. Richardson and H. May, 'Deserving Victims? Sexual Status and the Social Construction of Violence,' *Sociological Review* 47, 2: 327

¹⁴ *ibid.*, 237.

¹⁵ Giannasi 2014, 7–8.

Anti-LGBT hate crime laws are further critiqued for stigmatising BAME groups. According to reports, many anti-gay offenders are actually BAME youths¹⁶, coming from low-income, marginalised backgrounds. Treating bias based on sexual orientation as an aggravating circumstance results in harsher sentences, reinforcing inequalities based on race and social class.¹⁷ In this sense, hate crime laws, invented to protect BAME people, now seem to act against them.

Critical queer scholars, such as Meyer, argue that, instead of focusing on sexual orientation as a protected category (thus perpetuating the picture of an implicitly white, middle class gay man attacked by a hateful, implicitly low-income person), hate crime discourse should concentrate on the experiences of marginalised queer groups, such as low-income transgender people of colour.¹⁸ But while the underprivileged situation of those communities is unquestionable, it is not clear how Meyer proposes to address this problem. Furthermore, his analysis seems to create another hierarchy of more and less 'deserving' victims – differentiated by their economic situation. It is unclear how policy should be developed in practice, and how the system should determine who is 'underprivileged enough' to be a 'legitimate' victim.

Deserving victims? Case of Poland

After providing a brief account of the theoretical debate, I will now move on to analysing the factors that condition the understanding of hate crime, and, at the same time, the protection granted to victims of racist and homophobic violence in Poland. The choice of country is not accidental. While anti-LGBT victimisation

¹⁶ N. Chakraborti, J. Garland, and S. Hardy, *The Leicester Hate Crime Project. Briefing Paper 3. Homophobic Hate Crime*, Leicester, University of Leicester, 2014; D. Gadd, B. Dixon, and T. Jefferson, *Why Do They Do It? Racial Harassment in North Staffordshire*, Keele, Keele University, 2005, 2.

¹⁷ D. Meyer, 'Resisting Hate Crime Discourse: Queer and Intersectional Challenges to Neoliberal Hate Crime Laws', *Critical Criminology* 22, 1: 113–25.

¹⁸ *ibid.*

persists in Poland¹⁹, the authorities refuse to include sexual orientation as a protected ground, granting the protection only to victims of violence based on race, ethnic or national origin, religion, and political affiliation. Furthermore, while there is a growing body of literature on hate crime policies in the west of Europe, little is known about this topic in other parts of the continent. For this reason, this study, even though limited in size, makes a contribution to the understanding of hate crime in Central and Eastern Europe.

Similar crimes – different responses

The next part of this section contains analyses of the rationale of sentencing in two recent hate crime cases. They were chosen because, except for the motivation of the perpetrators (either racism or homophobia), they are quite similar cases of street assaults. They are analysed based on the text of the court judgements and press accounts. The analysis sets out the key frames through which hate crime is understood in Poland. The discussion then moves to further explaining the factors that conditions hate crime policy in Poland.

¹⁹ In a research conducted by the EU FRA among LGBT people living in the European Union, 35% of respondents from Poland reported having been attacked or threatened with violence in the five years preceding the question, compared to the European average of 26% (EU FRA 2013). Results of another survey, conducted in 2011 by a Polish LGBT advocacy group, KPH (Campaign Against Homophobia), show that more than a half of respondents (54.4%) have experienced violence based on their sexual orientation at least once in their lives (J. Świerszcz, 'Przemoc motywowana homofobią – badanie i wyniki [Violence motivated by homophobia - research and results]', in *Przemoc motywowana homofobią. Raport 2011 [Violence motivated by homophobia. Report 2011]*, M. Makuchowska, ed., Warsaw, Kampania Przeciwko Homofobii, 2011, 63).

Case 1

The first incident is a case of a racially motivated attack that happened in 2013 in Białystok, a medium-sized town in north-east Poland.²⁰ Rogers Cole-Wilson is a black man, and on a February afternoon, was entering his building, when someone approached him and shouted racist abuse. Rogers did not react, and a moment later, he felt a pat on his shoulder. When he turned back, he was hit in the face with a fist, badly injuring his eye. He was struck again, but managed to shield himself with his arms. He then called for help, which caused the assailant to flee. After the incident Rogers called the police, who identified the alleged perpetrator as Tomasz G., a white 24-year old skinhead and football hooligan, with prior history of offences, and arrested him a few days later. During the arrest G. was wearing a T-shirt with the words 'White Power'.

In the court, G., who pleaded not guilty, was charged with public insult and aggravated assault based on race. The court found G. guilty and sentenced him to two years and eight months in prison. G. appealed. As a result, his sentence was lowered to one year. At the time of writing, the decision is not final, and can still be appealed (December 2014).

²⁰ *Case of TG* [2014] Appellate Court in Białystok [III K 121/13]; J. Klimowicz, 'Prawie trzy lata odsiadki za znieważenie i pobicie Rogersa Cole-Wilsona [Almost three years of jail-time for insulting and beating of Rogers Cole-Wilson]', *Gazeta Wyborcza*, November 25, 2013; 'Sąd odwoławczy ma wątpliwości, kto pobił czarnoskórego prezentera [The appeals court has doubts over who beat the black news anchor]', *Gazeta Wyborcza*, February 25, 2014; 'Białystok: Wyrok Za Pobicie Czarnoskórego Prezentera', *Poranny.pl*, December 2, 2014.

Case 2

The second case is of a street gay bashing that took place on New Year's Eve 2012/2013 in Warsaw, the capital of Poland.²¹ A couple of gay men were walking back home in the night, holding hands. From the opposite direction came three people, one of whom pushed himself between the gay men, making them let go of their hands. When asked by the couple what he was doing, he started to beat them. His companions joined in. They beat the couple severely, using homophobic slurs during the attack. After the assault, the victims called the police who caught the perpetrators.

The offenders were charged with aggravated assault.²² Additionally, one of the men, who shouted that he was going to 'knock out the faggots' teeth when he gets out', was also charged with punishable threats. The homophobic character of the crime was not taken into consideration in sentencing. The offenders were found guilty, and they were given a suspended sentence of one year in prison. Additionally, they each had to pay 100 PLN (roughly £20) damages to each of the victims. The judgement is final, but the anti-hate charity KPH is planning to take the case to the European Court for Human Rights.

Analysis of the cases

On the face of it, both cases are similar, unprovoked attacks, leading to grievous bodily harm and committed with clear discriminatory motivations. But while the brutal character was considered in both cases, the different discriminatory motives led to treating the two crimes differently by the criminal justice system.

²¹ *Case of Melnyk, Bednarek, Dureyko* [2013] Sąd Rejonowy dla Warszawy-Śródmieścia II K 114/13; 'Prokuratura będzie ścigać doręczycieli, którzy pobili Biedronia [Lettermen who attacked Biedroń will be prosecuted]', *Gazeta Wyborcza*, February 27, 2014.

²² As the hate crime provisions in Poland do not provide protection to victims of crimes motivated by homophobia, the case was not treated as a hate crime in the legal sense.

From the analysis of the first case, it is clearly visible that the victim's belonging to a racial minority was an important aspect of the case's merit and argumentation. The discriminatory character was established through the choice of victim, unprovoked character and use of racially charged language. Furthermore, the fact that the offender was a skinhead, affiliated with right-wing extremists, helped build the prosecution case, and persuaded the judge to convict. Those two elements – race and extremism – can be seen in the justification of the sentence, which emphasised that the attack was particularly deplorable, as it was caused by the offender's belief that 'there was no place for people different than himself [white, Polish] in Polish society'.

In the second case, even though the victims emphasised the unprovoked and homophobic nature of the assault, the case was not recorded as a hate crime, because the law does not recognise sexual orientation as a protected characteristic. The homophobic nature was not only went unrecognised, it was explicitly dismissed as a motivation for the attack. In justifying the sentence, the judge argued that, by separating the two gay men, the first assailant only meant to 'tease' them. The actual attack was sparked by the couple's reaction to this attempted joke, rather than by their sexual orientation. The verbal abuse was considered only because a threat of violence is punished regardless of the motivation. This all resulted in less severe sentencing than in the racist case.²³

²³ A suspended sentence given to the offenders by the judge is commonly seen as a nuisance rather than an actual punishment.

Broader policy justifications

Poland is a country with an almost homogenous population, where the vast majority of people are white, ethnically Polish, and Catholic.²⁴ The specificities of the Polish society explain the high level of anti-gay prejudice²⁵, which has been attributed to the strength of the Catholic Church, nationalist narratives that see homosexuality as a threat to national reproduction, and association of homosexuality with 'degenerate' European influences.²⁶ This can also account for the relatively high level of victimisation reported by LGBT people in surveys.²⁷

But while the suspicion with which Poles treat sexual diversity can explain the unwillingness of the government to legislate anti-LGBT hate crime law, the protection granted to victims of racist and xenophobic violence is more difficult to explain. According to surveys, national and religious minorities, particularly Jews, the Roma and Muslims, are also characterised by a high level of social distance.²⁸ Why then the selective protection granted to victims of racist and xenophobic crimes?

²⁴ According to the recent census, among over 38 million residents of Poland, about 99.7% hold Polish citizenship, 93.7% declare Polish ethnic/national belonging, and about 95% declare Catholic faith. Most people belonging to a minority group (either national, ethnic or religious), are white, Poland-born citizens who declare connection with one of the neighbouring states, or declare another Christian religion (mostly Orthodox). The number of Jews, the Roma, as well as non-white people is very low ('Ludność. Stan i struktura demograficzno-społeczna. Narodowy Spis Powszechny Ludności i Mieszkań 2011 [Population. Status and socio-demographic structure. National Census of Population and Housing 2011]', *GUS Warsaw*, 2013).

²⁵ Only 12% of Poles think that homosexuality is something 'normal'. 63% believe gay people should not be allowed to publicly express their sexual orientation, 68% are against the legalisation of same-sex marriage and 87% are against adoption of children by gay couples ('Stosunek Polaków do gejów i lesbijek oraz związków partnerskich [The attitude of Poles towards gays and lesbians and civil partnerships]', *CBOS Warsaw*, 2013).

²⁶ C. O'Dwyer, 'Does the EU Help or Hinder Gay-Rights Movements in Post-Communist Europe? The Case of Poland,' *East European Politics* 28, 4: 332–52; O'Dwyer and Schwartz 2010.

²⁷ See footnote 18.

²⁸ According to research conducted by CBOS, 34% of Poles declare antipathy towards Jews, 52% towards the Roma, and over 30% towards Chinese, Vietnamese and Palestinian nationals ('Stosunek Polaków do innych narodów [The attitude of Poles towards other nations]', *CBOS Warsaw*, 2013). According to another report, 'surprisingly many Poles accept the use of hate speech – especially against Jews, the Roma, Muslims and non-heterosexual people – and not see it as anything offensive'

The answer to this question is grounded in history. Hate crimes (and attendant policies) do not occur in vacuum, and the history and nature of each society is key to understanding them.²⁹ In Poland, this understanding is grounded in the genocide of ethnic minorities that happened on Polish lands in the 20th century.

Because of the Holocaust and anti-Jewish pogroms after WW2³⁰, the concept of hate crime in Poland is associated with the genocide of ethnic minorities. The hate crime provisions in the penal code, were introduced in the 1960s, and have remained unchanged ever since. They are grounded in the 'Never Again' movement that gave birth to international instruments aimed at the protection of ethnic minorities, such as the International Convention on the Elimination of All Forms of Racial Discrimination and European Convention on Human Rights. In Poland's penal code, provisions aimed at combatting hate crime are therefore intertwined with the banning of hate speech, incitement to hatred, genocide and extermination of categories of people based on their race or religion.

The memory of genocide, coupled with the rising visibility of the neo-Nazi movement³¹, leads to hate crimes being placed high on the political agenda.³² As the aim of the policy is to prevent history from repeating itself, the majority of resources

(M. Bilewicz et al., *Mowa nienawiści. Raport z badań sondażowych [Hate speech. Report from survey]*, Warsaw, Fundacja im. Stefana Batorego, 2014, 4.

²⁹ J. and N. Chakraborti, 'Divided by a Common Concept? Assessing the Implications of Different Conceptualizations of Hate Crime in the European Union', *European Journal of Criminology* 9, 1: 38–51; Gerstenfeld 2004; Perry 2001.

³⁰ A. Grabski and G. Berendt, *Studia z historii Żydów w Polsce po 1945 roku [Studies of the history of Jews in Poland after 1945]*, Warsaw, Żydowski Instytut Historyczny, 2000.

³¹ For example, extreme-right groups, such as the National Renaissance of Poland (NOP) or National Radical Camp (ONR), take part in the organisation of the annual Independence March in Warsaw, which always leads to riots and devastation of the town centre.

³² Wojciech Czuchnowski and Mariusz Jałoszewski, 'Seremet: Antysemityzm u mnie nie przejdzie', *Gazeta Wyborcza*, February 1, 2014; Ministry of the Interior, 'min. B. Sienkiewicz w @Radio_TOK_FM - najważniejszy cel w 2014 - walka z przestępstwami rasowymi na podłożu ksenofobicznym [Minister B. Sienkiewicz in Radio TOK FM: The most important goal for 2014 is combatting racist and xenophobic hate crimes]', Twitter, @MSW_RP, January 1, 2014.

are put into prevention and intelligence gathering, rather than repairing harm.³³ As a result, support for victims is very limited³⁴, and little attention is paid to restorative justice, used successfully in other countries.³⁵

It also results in the focus on the extremist dimension of the crime. The training of police in investigating hate crimes³⁶ emphasises this component, advising investigators to look for the presence of hate speech or evidence of affiliation with a neo-Nazi or white supremacist movement. As a result, in criminal justice practice, if the extremist element is not established, incidents can slip through the cracks and may not lead to a prosecution.³⁷ As the analysis of the two cases suggest, it may also

³³ For example, the government launched a special programme aimed at preventing racist attacks in Białystok, which has recently been a scene of multiple hate incidents and has been in the media spotlight because of it ('Od września w Białymstoku program przeciwdziałania rasizmowi [Program to combat racism in Białystok starts in September]', *Dziennik Wschodni*, June 17, 2013). There are two reasons why this town was chosen: (1) large numbers of reported crimes targeting Jews, the Roma, and new BAME immigrants or refugees ('Wyciąg ze sprawozdania dotyczącego spraw prowadzonych w I półroczu 2013 r. w jednostkach organizacyjnych prokuratury z pobudek rasistowskich lub ksenofobicznych (tj. spraw zarejestrowanych, wszczętych w tym okresie oraz kontynuowanych w tym okresie a wszczętych, czy też zarejestrowanych we wcześniejszym okresie) sporządzony na podstawie danych przekazanych przez prokuratury apelacyjne [Extract from the report on the cases motivated by racism and xenophobia in the first half of 2013, in the organisational units of the prosecutor's office (ie cases registered, initiated during this period, and continued in this period but initiated or registered in the previous period) drawn up on the basis of data submitted by the appeal prosecutor's offices]', *Prokuratura Generalna*, November 2013); and (2) some surprising justifications given by prosecutors reluctant to recognise the racist motivation. For example, in a case where the symbol of swastika was painted on a synagogue, the prosecutor declined to prosecute, explaining that 'in Asia, it is a commonly used symbol of happiness and prosperity', therefore, 'there is no way to see that a painted sign depicting a swastika promotes a fascist state system'(J. Medek and J. Klimowicz, 'Białostocka prokuratura daje zielone światło neonazistom [Białystok Prosecutor's Office gives green light to neo-Nazis]', *Gazeta Wyborcza*, June 24, 2013).

³⁴ This is different than in the UK, for example, where the victim is in the focus of attention of the government. see Giannasi 2014; HM Government, *Hate Crime: The Cross-Government Action Plan*, London, HM Government, 2009.

³⁵ M. A. Walters, *Hate Crime and Restorative Justice: Exploring Causes, Repairing Harms*, Clarendon Studies in Criminology, Oxford, Oxford University Press, 2014.

³⁶ 'Przestępstwa z nienawiści. Materiał pomocniczy dla trenera [Hate crimes. Trainer support materials]', *MSWiA*, 2010.

³⁷ In cases of common assaults not leading to GBH, the prosecution may decide to drop the charges. If this happens, the victim has an option to file a private complaint, which, in hate crime cases, is unlikely. To avoid this situation, and to prove commitment to combatting racism and xenophobia, hate crimes in Poland are always prosecuted *ex officio* (which means that there is a public duty to prosecute), irrespective of the gravity of the assault. Nevertheless, the lack of evidence of extremism

result in seeing extremist offenders as more 'culpable' than others, and punishing them more harshly than non-extremist ones.

This is different from the understanding developed in the West. Initially, Western hate crime policies, following the common-sense perception of targeted violence, also saw hate crimes as brutal acts perpetrated by extremist groups³⁸. This, however, has been challenged by scholars.³⁹ Research from both the UK and the US shows that most offenders are average citizens, 'people like us', who are not affiliated with extremist groups.⁴⁰ A small percentage of offenders are of course members of hate groups, but the 'extremist component', or even presence of hate speech, is not necessary to recognise a hate crime⁴¹. This has policy implications - when analysing the UK system, we can see that the rights of the victim are central in the response of the government to hate crimes. According to the cross-government hate crime plan⁴², the aim of the system is to ensure that the victim of crime receives the necessary support. Other objectives, such prevention and the punishment for the offender, are less important.

In Poland, the narrow understanding of hate crime as only those motivated by racism and xenophobia, coupled with the homophobic attitudes discussed above, leads to the harm caused by anti-LGBT violence being overlooked (or even trivialised). As a result, claims made by anti-hate groups to include sexual orientation and gender identity as protected characteristics are systematically rejected by the

may result in the inability to prove the racist character of the incident, which, in turn, may result in the charges being dropped, or in the accused being acquitted. This example of bad policing is, however, not only a Polish problem. Police forces in other countries, such as the US and the UK, have also been criticised for doing it (J. Bell, *Policing Hatred: Law Enforcement, Civil Rights, and Hate Crime*, New York, New York University Press, 2002; N. Hall, *Hate Crime*, Cullompton, Willan, 2005).

³⁸ J. Levin and J. McDevitt, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed*, New York and London, Plenum, 1993.

³⁹ Jacobs and Potter 2001.

⁴⁰ P. Iganski, *Hate Crime and the City*, Bristol, Policy Press, 2008.

⁴¹ Bell 2002.

⁴² HM Government 2009.

government, which argues that victims of homophobic crimes do not deserve the same level of protection as victims of racist violence, because homophobia is not as serious a social fissure as racism, and because the current level of protection is sufficient.⁴³

The model of understanding of hate crime in Poland

From the above analysis emerges a specific model of understanding hate crime. It is characterised by an exclusive catalogue of protected characteristics, and by a focus on extremism.

Due to the memory of the genocide of ethnic minorities, rising visibility of nationalist movements, and homophobic attitudes that pervade society, the catalogue of protected characteristics in Polish hate crime law is reserved only to victims of racist and xenophobic crimes. Propositions to expand the catalogue by adding other grounds are met with opposition from the government, which does not see them 'worthy' of protection. This understanding of victim categories is different to the broader understanding which has developed in the West. Furthermore, as the aim of the policy is to prevent history from repeating itself, the majority of the efforts are put in preventing and combatting the extremism on a large scale, rather than on repairing harms of individual victimisation.

As I mentioned in the beginning of this paper, the possibility of generalising from just two cases, even backed up by analysis of various other sources, is limited. For this reason, this model is certainly open to critique.

⁴³ M. Makuchowska, ed., *Przemoc motywowana homofobią. Raport 2011 [Violence motivated by homophobia. Report 2011]*, Warsaw, Kampania Przeciwko Homofobii, 2011; 'Pismo [Letter] DL-P-I-076-2/09', *Ministry of Justice*, April 17, 2009.

One of the possible criticisms is the fact that Poland may be just be in an 'early' stage in it's understanding of hate crime. After all, as discussed above, the catalogue of protected characteristics in the West has not always been so inclusive. Furthermore, early hate crime policies in the West also emphasised the extremist component. While this claim is true, it is important to see the influence that specific features of each society (diverse / homogenous society, history, religiosity etc.) have on the shape of its policies, in order to avoid simplistic explanations and over-generalisations. As Verloo and Lombardo suggest, an analysis of the differences in policies 'should aim at grasping the nuances and eventual inconsistencies of policy discourses, rather than over-simplifying conclusions'.⁴⁴ As much as the Eastern model is likely to evolve, gradually include other groups and the rights of victims are taken into account, the reality in Poland is simply different from the reality of the US or the UK, and the model of understanding reflects that.⁴⁵

Conclusions

The above analysis illustrates the model of understanding of hate crime developed in Poland. This model, I argue, is different from the one developed in the west. The difference is manifested in the catalogue of protected grounds, in the understanding of offenders and in the focus of the policy.

While the homophobic attitudes of society have already been used to explain why the protection of LGBT people in Poland is weak, this study shows that there is more

⁴⁴ M. Verloo and E. Lombardo, 'Contested Gender Equality and Policy Variety in Europe: Introducing a Critical Frame Analysis Approach', in M. Verloo ed., *Multiple Meanings of Gender Equality: A Critical Frame Analysis of Gender Policies in Europe*, Budapest, CEU Press, 2007, 30–31.

⁴⁵ In fact, the model is already changing. In 2013 the Polish government has started to monitor (although not systematically) crimes motivated by other characteristics (including sexual orientation and gender identity) than those listed in the criminal code ('Pismo [Letter] DKSiW-ZPC-078-10/14', Ministry of the Interior, June 24, 2014). While the quality of the monitoring, which seems to be based mostly on media accounts, is questionable, it is a step towards creating a comprehensive hate crime policy.

to it. The emphasis on racism and xenophobia, and understanding hate crime through the lens of genocide explains the reluctance of the government to include other groups which are commonly victimised, such as LGBT. It results in unequal protection and may lead to differences in the quality of policing/prosecuting (by dropping cases where the motivation was impossible to establish) and sentencing of crimes (by lower degree of punitiveness of crimes motivated by homophobia). This is important in the light of the evidence from jurisdictions that have expanded hate crime laws, which suggests that the criminal justice response is much better in countries that see hate crimes more broadly.⁴⁶

As acknowledged above, the ability to generalise from such a small study is limited. More research, including a thorough analysis of policy justifications, and possibly interviews with policy makers, as well as activists, is needed to strengthen these findings. Furthermore, this study raises some more questions. For example, how is the protection granted to LGBT people conditioned by the actions of those groups that are already protected (e.g. Jews)? Do they support or object adding sexual orientation and gender identity to the list of protected characteristics? While this question has already been asked in the context of the US, the above analysis shows that the answer in Poland may be quite different.

⁴⁶ Giannasi 2014.