

HATE CRIME AND HATE SPEECH

AN ANALYSIS OF THE LAW AND NEW DEVELOPMENTS
IN FOUR EUROPEAN JURISDICTIONS



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Foreword

Freedom of speech is one of the most relational and demanding fundamental freedoms. Freedom of speech is at the same time essential if we take human dignity seriously in practice.

Free speech can only be relational. It exists only thanks to a speaker and listener. It exists only where two human beings talk or shout or even yell at each other (be that in person or online).

Freedom of speech means that every individual has an equal right to express his or her opinion without being subject to any approval beforehand. Freedom of speech therefore cannot exist without the notion of equal human dignity. In a sense freedom of speech is 'human dignity in action' because it presupposes full equality of each human being vis a vis any other human being.

That also means that it requires a lot of resilience from those listening to speech they vehemently disagree with. Deeply held convictions and beliefs can be expressed but these convictions and beliefs can fundamentally contradict the convictions and beliefs of those listening.

Nevertheless, this resilience is a requirement to keep democracy alive. Excluding opinions, beliefs and convictions does not just eliminate several positions or points of view, it also eliminates the people holding these views from the democratic debate. They will have been 'silenced' through public coercion, aggressive attacks or otherwise. The way this 'silencing' is happening is already incompatible with democracy.

At the same time freedom of speech indeed presupposes the respect for human dignity, otherwise it cannot exist. Here we see the great paradox of free speech as it also requires that human dignity is protected and upheld. Speech that denigrates and denies human dignity of other people is ultimately undermining the same freedom of speech.

As noted, free speech is inherently relational. That means that it demands respect and resilience at the same time. Respect for the dignity of the other human being and resilience in accepting to hear that what you cannot stand. Because that resilience is also respect for equal human dignity.

In practice we are carried away by our emotions and the sad reality is that not all people accept equal human dignity. That is where the law comes in where the

lofty principles are protected by enforceable legislation.

Precisely at this point it is essential that the balance between respect and resilience is maintained. That in and of itself is a never-ending task as no amount of legislation can cover every debate and every situation.

One thing is clear however, without maintaining the principle of free speech itself it is not possible to protect human dignity in free speech. Moreover, without maintaining free speech as principle it is not possible to maintain democracy as democracy cannot exist without debate.

This publication tries to outline how four European jurisdictions deal with hate speech and freedom of speech and draws some conclusions based on these comparisons. For some the content may be challenging but it is essential that we do not only speak about the freedom of speech and hate speech in theoretical sense but also see how these issues boil down in actual laws and legislation. Only on that basis it is possible to come up with the concrete recommendations that can be taken into consideration by those responsible for legislation on these issues.

Only on that basis it is possible to come up with the concrete recommendations that can be taken into consideration by those responsible for legislation on these issues. We hope that this publication will prove helpful for all these policy makers in Europe.

Johannes de Jong

Director Sallux | ECPM Foundation



Credits: **UN Photo**; Eleanor Roosevelt holds an English version poster of the Universal Declaration Human Rights (November 1949).

1. Introduction

Rarely has any case by the Finnish Public Prosecution drawn so much global interest as their case against sitting MP Päivi Räsänen over quotations on homosexuality and the bible in a booklet that she published in 2004¹.

Räsänen was accused of hate-speech against homosexuals in this booklet and in social media posts related to the issue. Moreover, the main person responsible for the publication of the booklet, Lutheran Bishop Juhana Pohjola, was prosecuted in the same case.

This case brought the issue of hate-speech legislation in Europe into sharp focus. It was, however, not an isolated case. Already for decades fierce debates and court cases have been fought over hate-speech and the limits of freedom of expression.

This has become a truly European subject with the rise of the social media given that any remark or debate has become accessible for any global audience. Even language barriers do not shield these debates anymore to one national sphere thanks to automatic translation and the international use of English as global language.

What made the case against Räsänen unique was that it was not just about her public statements as such but equally against the theological concepts that underpinned these statements². That meant that the prosecution moved from prosecuting an opinion or statement to prosecuting a belief or theological conviction. This raised the stakes considerably and created a plethora of fundamental questions.

Can the state determine exegesis and theological interpretation? Is the role of the state that of an umpire in religious affairs? Even if the state does consider that, does the state have the theological and exegetical competence to execute that role? Can theology be determined by political debate?

The fact that a conviction based on theology and exegesis was one ground for this

¹ 'Päivi Räsänen case in Finland leads to heated freedom of speech debate both in media and churches', Evangelical Focus, 5 May 2021

² This came in sharp focus during the actual trial where the prosecutor stated that "Simply quoting Bible passages is not a crime. Instead, if someone interprets the Bible in a certain way and publishes their own opinions with reference to them, it can be a crime if they offend an individual or a group of people": 'Päivi Räsänen trial: Prosecutor demands fines, defense sees factual errors in the prosecution' Evangelical Focus, 25 January 2022

case by the Finnish Prosecution raises one more question: which convictions are allowed, and which ones are not and what are the grounds for any such decision?

The reverse questions can of course also be asked. Is all speech tolerable? The very fact that we have a debate over hate-speech does imply that there is some minimal consensus that not every expression of any opinion can be tolerated. Deliberately and purposefully dehumanising speech by which people or groups of people are deemed less than human and/or calls for violence against them is usually understood as crossing the line. But while we can find and imagine examples of such expressions, it is much harder to translate this in objective legal definitions. Much jurisprudence and debate is needed to come to a refined and applicable positioning and the current debates are evidence of that fact.

The same can be asked of certain convictions. Can we tolerate all convictions to be shared in public? Racism, nazism or islamist extremism are usually understood as convictions that undermine our society as they deny the principles of human dignity and democracy themselves. But even if that is obvious, it is less obvious how to translate that reality into objective definitions and legislation.

As long as these fundamental questions are not fully answered there is a clear risk that prosecutors open cases based on their personal attitudes and majority opinions in a given society at a given moment. There is a high risk of arbitrariness over which cases are and are not being opened at any given moment.

The lack of clarity on definitions and the lack of clarity on what falls within and outside the reach of a prosecutor creates a host of other questions. In the case against Räsänen the prosecution asserted that this was a case of hate-speech against LGBTI people. The question is whether the state will put the same effort in those situations that Christians or Muslims deem to have been the target of hate-speech. Could the many occasions on which Christians and their convictions are ridiculed be considered as hate speech? Or is it allowed to insult one group and not another and (if so) on what grounds? The fact that these questions can be asked underline the risk of arbitrariness as long as clarity is insufficiently available in any given legal context.

These considerations are of eminent weight for the EU now. At 9 December 2021, the Commission announced a new legislative initiative with the purpose to extend the list of 'EU crimes' to hate speech and hate crime³. The basis for this

³ Press release European Commission 9 December 2021 'The Commission proposes to extend the list of 'EU crimes' to hate speech and hate crime'

initiative is the existing framework decision of 2008 on 'combating certain forms and expressions of racism and xenophobia by means of criminal law'. This meant that EU Member States agreed to implement legislation against hate-speech in their penal codes at the national level. The new proposal from the Commission would make hate-speech a crime within EU legislation. Moreover the Commission cited the fact that online hate-speech is almost by definition a cross-border phenomenon given the global reach of the internet and social media.

This initiative from the Commission demands very careful consideration in terms of fundamental rights and definitions as well as a great deal of cross-cultural sensitivity. What is deemed permissible in one society is seen as beyond the pale in another and vice versa. Subjects that are seen as open for a free debate are seen as xenophobic in another. The differences within the EU are truly serious and much depends on culture and correct understanding of language.

What is important therefore to consider legal concepts, existing legislation in Europe as well as fundamental rights and freedoms. This is why this publication compares four legislative frameworks in four different Member States before considering the Commission initiative and presenting recommendations.

Europe needs to find a balanced approach in this sensitive issue and the only way to achieve that balance is to ensure that many relevant factors are taken into account.

2. Legal concepts

It has been said that hate speech and hate crimes are social constructs which have multiple meanings to different actors and which are subject to a myriad of interpretations.⁴

In a broad sense, hate crimes are considered to be acts of violence and/or intimidation directed towards marginalised groups, and/or communities or both.⁵ Hate crime laws are a state's attempt to address this, by creating criminal offences that are comprised of two essential elements:

- (i) a criminal act,
- (ii) which has been committed with a bias motive.

As such, it is more accurate to think of hate crime a concept, rather than a specific legal offence.

Even within a single jurisdiction there can be a notable variation between how hate crime is legislated for and how practitioners record hate crime, with England and Wales being an example of this (see below).

The OSCE defines hate crime as:

“... criminal acts committed with a bias motive. It is this motive that makes hate crimes different from other crimes. A hate crime is not one particular offence. It could be an act of intimidation, threats, property damage, assault, murder or any other criminal offence. The term “hate crime” or “bias crime”, therefore, describes a type of crime, rather than a specific offence within a penal code.”

When legislating for hate crime, different jurisdictions use terms such as hostility, ill will, prejudice, intolerance rather than “hate”. By its nature this means that the number of potential offences which are captured by hate crime laws can vary wildly between countries due to the large difference in meaning between these phrases. In some jurisdictions hate crime is very broadly defined and can encompass general anti-discrimination provisions, as is the case in Sweden, or it can be seen in the context of politically motivated crime, as is the case in Germany (see details on both of these countries below).

⁴ N Chakraborti (ed) Hate Crime: Concepts, Policy, Future Directions (2010), p 66.

⁵ Perry, B. (2001). In the name of hate: Accounting for hate crime, New York, NY: Routledge.

Types of hate crime legislation

There are three primary means of legislating against hate crime:

- Sentence enhancement
- Substantive offences
- A hybrid of both approaches

Sentence enhancement

Sentence enhancement is the most widely used means of legislating against hate crime. Under this model, an accused person is charged with a basic offence and then, after conviction and at the sentencing stage, the “hate” element of the offence is introduced as an aggravating factor, thereby allowing for a stronger penalty to be imposed

This model is said to be easy to understand and implement and to have the advantage of allowing any criminal offence to potentially be treated as a hate crime.⁶ However, it would appear to be unsuitable for legal systems that have narrowly defined set of offences, or offences which have a narrow range of possible sentences, which constrains the possibility for enhancement.⁷

It also appears to be unfair to the rights of an accused person for the allegation of hate or bias to be raised once the trial has already ended, therefore giving them no meaningful opportunity to rebut the claim. It is also the case that, in jurisdictions where this approach is used, the “hate” element of the offence is often not recorded, meaning that this information may not be passed from police to prosecutors and so may not be pursued in court. In Germany and Sweden, for example, researchers have found it difficult to obtain statistics on how sentence enhancement actually increased the severity of sentences in practice.

Substantive offences

Some jurisdictions, most notably England and Wales, have substantive hate crime offences in addition to sentence enhancement. These are essentially enhanced versions of certain pre-existing offences, such as assault and criminal damage, which carry stiffer penalties owing to the “hate” element. It is said that

6 Granström and Åström (2017). Life cycle of a hate crime - Country report for Sweden.

7 Walters et al., (2017). Hate crime and the legal process. University of Sussex.

substantive offences help to focus police and law enforcement agencies on the hate or bias aspect of the offence, since under this model it forms an essential proof of the offence itself which is necessary to secure a conviction, rather than being a peripheral consideration as may occur with sentence enhancement. The UK Home Office has suggested that this can increase the likelihood of these offences being applied, as well as the likelihood that hate crime will be properly recorded and monitored.

Negatives, however, include those substantive offences are often more complex, which in turn can increase the burden on police during investigations and on prosecutors during a trial as they must prove the basic offence alongside the alleged bias element. Also, cases involving hate crime in the UK often turn into trials of the defendant's character, i.e. whether they are racists.⁸ In such instances, if the hate element of the offence is disproved, then the entire case can quickly be undermined.

Hybrid systems

An alternative approach to both of these established means of legislating for hate crime is often referred to as the "hybrid model", such as the approach is used in Scotland. Rather than creating new substantive offences with new maximum sentences for each offence, prosecutors are permitted to add the "hate" element to the basic offence which must then be proved at trial. If proved, the judge must then apply an increased sentence. This means that aggravation can be added to all criminal offences.

The key distinction between sentence enhancement and the hybrid model is that the offence is effectively re-labelled in law after conviction and must be recorded as such. This approach is rather new in comparison to either substantive offences or enhanced sentencing and is not widely used. It may also be the case that judges are constrained by the maximum sentence available in the primary offence.

Legal thresholds for proving "hate"

Internationally, the legal threshold for proving hate, bias or prejudice has proven to be important. Legal thresholds which are based solely on proving hate-based motivation on the part of the alleged perpetrator are problematic as proving

⁸ Owusu-Bempah et al. (2019) Racially and Religiously Aggravated Offences: 'God's Gift to Defence'? *Criminal Law Review* (6). pp. 463-485, Ontario Hate Crime Working Group. (2006). *Addressing Hate Crime in Ontario: strategy recommendations priorities for action* p.18.

motivation is extremely difficult, and so the motivation test is very rarely used.⁹ Countries such as Canada and Australia have legislation which is based primarily on proving hate-based motivations and is viewed as being ineffective.

Jurisdictions whose threshold relies on demonstrations of hatred are more successful in terms of the level of prosecutions and convictions for hate crimes. England and Wales is one such example, as their legislation covers both motivation and demonstration of hatred as the threshold for proving hate crime (see below), and the motivation test is rarely relied on.¹⁰ However, one of the difficulties however in relying on outward manifestations of hatred is that a slur or insults uttered in the heat of the moment out of anger may not in fact amount to hatred.

Wording of the “hate” element

Hate crime can often be broadly defined and does not always require reference to the word hate. In fact, it might be argued that “hate” is such an extreme and often subjective term that it may not be suitable for incorporation into the criminal code. The Northern Territory in Australia uses the word “hate” in its legislation and has relatively few convictions for hate crime. Other jurisdictions use a variety of terms including; hostility (England and Wales), prejudice (Canada, some Australian Territories), and bias (Canada). Dictionary or common sense definitions of phrases such as hostility can be very broad and may capture issues which do not necessarily fall under hate crime. The Law Society in Scotland has noted that to adopt the word “hostility” in Scots law on hate crimes would potentially open it, via a literal interpretation, to include “unfriendliness”, which would clearly be far too broad.

Protected Characteristics

The discussion of the four jurisdictions later in this paper notes that each country seeks to protect certain characteristics regardless of how legislation is framed. As will be seen, these generally include race (often interpreted to include ethnicity, nationality and citizenship), religion (including non-believers), and increasingly, sexual orientation (often confined to heterosexuality, homosexuality and bisexuality). More recently, it is being argued that gender identity and gender expression (i.e., protecting individuals who identify as so-called “transgender”) ought to be included, as in one report compiled by an Irish group.¹¹

9 The Law Commission (2014) “Hate Crime: Should the Current Offences be Extended?” at para 2.33

10 Walters et al (2017), *ibid*.

11 Scheppe et al. (2018) *Lifecycle of a Hate Crime: Comparative Report*. Dublin: ICC Lifecycle of a

The question as to why some groups should be protected and not others – or why any groups should be protected at all - is the subject of debate and serious disagreement. It is difficult to determine what rationale lies behind the selection of protected groups, and the inclusion of some and not others on a piecemeal basis suggests that the list of protected characteristics depends on the prevailing popular political moods of the day. Many experts and commentators have expressed concerns about expanding protected status to ever larger number of groups as this may dilute the concept of hate crime and protected characteristics to such a degree as to make it meaningless.¹²

Hate Crime: Comparative Report (ICCL 2018).

¹² The Law Commission (2014), *ibid.*

3. Comparative legal situations in europe

The following is a summary of legal the legal frameworks which are in place in relation to hate crime in four European jurisdictions:

- England and Wales
- Sweden
- Germany
- Ireland

England and Wales is quite similar to Ireland culturally, and shares its common law system. Sweden and Germany have civil law systems. By illustrating the current legal situation across this range of countries, it is intended to compare and contrast the approaches being taken.

The examination of these countries will consider a number of general issues:

- The current legal provisions in relation to hate crime
- The standard definition of hate crime, either within legislation or informally used by legal authorities or state agencies
- Characteristics which are protected by the existing legislation
- How the number of such crimes is compiled and reported
- Problems which have arisen in respect of the implementation of the existing law
- Other non-legislative measures which are taken to address hate crime.

A brief summary of the international frameworks which exist in relation to hate crime will also be included.

England and Wales

Legislative provisions

Hate crime was originally defined by sections 28-32 of the Crime and Disorder Act 1998¹³, which was repealed in December 2020¹⁴, and sections 145 and 146 of the Criminal Justice Act 2003¹⁵

¹³ <http://www.legislation.gov.uk/ukpga/1998/37/section/28?view=extent>

¹⁴ Ss. 142-154 repealed (1.12.2020) by s. 416 (1) of the Sentencing Act 2020

¹⁵ <https://www.legislation.gov.uk/ukpga/2003/44/section/145>

Section 66 of the Sentencing Act 2020 states:

“66 Hostility

(1) This section applies where a court is considering the seriousness of an offence which is aggravated by—

- (a) racial hostility,*
- (b) religious hostility,*
- (c) hostility related to disability,*
- (d) hostility related to sexual orientation, or*
- (e) hostility related to transgender identity.*

This is subject to subsection (3).

(2) The court—

- (a) must treat the fact that the offence is aggravated by hostility of any of those types as an aggravating factor, and*
- (b) must state in open court that the offence is so aggravated.*

(3) So far as it relates to racial and religious hostility, this section does not apply in relation to an offence under sections 29 to 32 of the Crime and Disorder Act 1998 (racially or religiously aggravated offences).

(4) For the purposes of this section, an offence is aggravated by hostility of one of the kinds mentioned in subsection (1) if—

- (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—*
 - (i) the victim’s membership (or presumed membership) of a racial group,*
 - (ii) the victim’s membership (or presumed membership) of a religious group,*
 - (iii) a disability (or presumed disability) of the victim,*

(iv)the sexual orientation (or presumed sexual orientation) of the victim, or (as the case may be)

(v)the victim being (or being presumed to be) transgender, or

(b)the offence was motivated (wholly or partly) by—

(i)hostility towards members of a racial group based on their membership of that group,

(ii)hostility towards members of a religious group based on their membership of that group,

(iii)hostility towards persons who have a disability or a particular disability,

(iv)hostility towards persons who are of a particular sexual orientation, or (as the case may be)

(v)hostility towards persons who are transgender.

(5)For the purposes of paragraphs (a) and (b) of subsection (4), it is immaterial whether or not the offender’s hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

(6)In this section—

(a)references to a racial group are to a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins;

(b)references to a religious group are to a group of persons defined by reference to religious belief or lack of religious belief;

(c)“membership” in relation to a racial or religious group, includes association with members that group;

(d)“disability” means any physical or mental impairment;

(e)references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment;

(f)“presumed” means presumed by the offender.

Definition of hate crime

On foot of these legislative provisions, the police and the Crown Prosecution Service (CPS) have agreed the following definition for identifying hate crimes:

“Any criminal offence which is perceived by the victim or any other person, to be motivated by hostility or prejudice, based on a person’s disability or perceived disability; race or perceived race; or religion or perceived religion; or sexual orientation or perceived sexual orientation or transgender identity or perceived transgender identity.”¹⁶

Since there is no legal definition of “hostility”, the CPS use the everyday understanding of the word which it defines to include ill-will, spite, contempt, prejudice, unfriendliness, antagonism, resentment and dislike.

Protected Characteristics

In England and Wales, the protected characteristics for the purposes of hate crime laws include:

- Race
- Religion
- Disability
- Sexual orientation
- Transgender identity

How is hate crime legislated for?

Legislation provides for a combination of both substantive offences and viewing the “hate” element as an aggravating factor at sentencing. In terms of substantive offences, the Crime and Disorder Act 1998 establishes aggravated versions of offences which had previously existed, such as criminal damage, grievous bodily harm, and harassment. These offences apply when the accused demonstrated hostility or was motivated by hostility based on race or religion. These aggravated offences carry more serious penalties than their non-aggravated versions, with the maximum sentences being approximately 40-50% longer, on average. The most serious categories of crime, such as homicide, are not aggravated by the 1998 Act as they already carry a maximum sentence.

¹⁶ <https://www.cps.gov.uk/hate-crime>

The Criminal Justice Act 2003 also allows for hostility to be taken into consideration as an aggravating factor at the sentencing stage.¹⁷ Judges are required to consider hostility on the basis of race, religion, disability, sexual orientation or transgender identity as an aggravating factor which goes to the seriousness of the offence and which can, therefore, attract a higher penalty. This applies to all criminal offences aggravated by racial or religious hostility that are not specified under the Crime and Disorder Act 1998, discussed above.

The dual application of the Crime and Disorder Act 1998 and the Criminal Justice Act 2003 means that only those offences covered by the former can be classified in criminal law as “aggravated offences”, while those covered by the latter statute are recorded as the basic offence (e.g. an assault). The 2003 Act is therefore more far-reaching, covering all five hate crime strands – race, religion, sexual orientation, disability and transgender identity – for all types of offence, while the 1998 Act covers only race and religion in relation to specific categories of crime.

Recording of hate crime

There is no single crime recording system in use across the UK, however a universally accepted and used hate crime recording policy is in place on foot of the efforts of criminal justice bodies and police organisations.

Official crime statistics are maintained by the Home Office. The official statistics relating to sentencing, criminal court proceedings, offenders brought to justice, the courts and the judiciary are maintained by the Ministry of Justice.

The primary sources of statistics include

- Crime Survey for England and Wales¹⁸
- Police data
- Crown Prosecution Service and sentencing data

Data-sharing schemes are also in place between the police and some NGOs - including Tell MAMA (which monitors anti-Muslim incidents), the Community Security Trust, and GALOP. They also share information about homophobic and so-called “transphobic” hate crime.¹⁹

¹⁷ Sections 145 and 146

¹⁸ <https://www.ons.gov.uk/surveys/informationforhouseholdsandindividuals/householdandindividualsurveys/crimesurveyforenglandandwales#what-is-the-crime-survey-for-england-and-wales>

¹⁹ https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-hate-crime-recording_en.pdf

There is no definitive source of hate crime statistics in England and Wales. However, in comparison to other jurisdictions, England and Wales has the most extensive data available. The main sources in England and Wales are the Crime Survey of England and Wales (CSEW) which has national statistical status, the Police Recorded Crimes series (PRC) and the statistics produced by the Crown Prosecution Service.

The CSEW is considered to be a more reliable indicator of long-term crime trends than the PRC, particularly for more common everyday offences. However, it does not capture all categories of crime, for example crimes against businesses, crimes against homeless people, serious crimes such as homicide and crimes which are considered to be “victimless” such as the possession of drugs.

There is a significant disparity between the number of hate crimes recorded in the CSEW and the PRC. An overview of hate crime figures from the CSEW from 2007 to 2018, suggests that there was a 40% reduction in hate crime over the period, which is in direct contradiction to data recorded by the PRC which shows that hate crime has been increasing.

Unlike the CSEW, the PRC statistics are available annually. They also cover public order offences which make up the majority of recorded hate crimes. However, the PRC has many limitations. For example, it is far more reliant on public reporting, and there are questions as to whether the police always accurately record such offences.

The available data for 2017/18 from 31 police force areas shows that

- 13% of alleged offences which are classified as that crimes ended with a charge or summons.
- 74% of cases did not result in further action due to a lack of evidence, because the victim did not want to pursue the matter, or because a suspect was not clearly identified.
- 7% of cases were either settled out of court, further investigation or action was deemed to not be in the public interest or action was taken by another body or agency.
- 6% of offences were waiting to be assigned an outcome.

When compared to non-hate crime offences, hate crime offences are more likely to lead to a charge or summons.

Prosecutions and Convictions

The Crown Prosecution Service (CPS) prosecutes cases referred to it by the police. The conviction rate has remained relatively stable over the last several years with a conviction rate in excess of 80% for cases prosecuted by the CPS. This is in line with the general conviction rate.²⁰

Problems in applying the law

The authorities in England and Wales have problems proving the hostility element, which is a necessary proof in hate crime cases.²¹ Verbal utterances by the accused are the main evidence required in these cases, however CPS prosecutors often fail to seek this type of information from the police, this can result in police officers failing to collect sufficient evidence in order to secure a conviction in hate crime cases.

The complexity of hate crime legislation often causes some confusion and uncertainty, with the potential for inconsistent practices and unfair outcomes.²² Charging decisions, the trial process, and the interpretation of hate crime laws at each stage, appear to cause issues for officials at all levels.

As one judge has said:

“You’ve got lots of different permutations or combinations available to you by virtue of the legislation ... In any particular case you might have a religiously aggravated offence, you might have a racially aggravated offence, you might have a s. 145 or s. 146 ... aggravation. And there are knock-on legal consequences as a result of that. You might be looking at alternative charges in some cases and not alternative charges in other cases. Within the cases that are charged you might be looking at what I call the first limb of racial or religious aggravation, or the second limb which is the displaying of hostility or the motivation. Or both. So there are lots of bits and bobs you’ve to think about ... It’s certainly a complicated picture to consider. I wouldn’t say it would give me necessarily problems, but complexity tends to create error or misunderstanding as a general principle, and therefore there’s always a possibility in a complex environment of somebody in the process making a mistake that is not made in a more straightforward environment.”²³

20 <https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Annual-Report-2017-18.pdf>

21 <https://www.cps.gov.uk/sites/default/files/documents/publications/Hate-Crime-what-it-is-and-how-to-support-victims-and-witnesses.pdf>

22 Walters et al, (2017), *ibid*.

23 Interview with an unnamed District Judge, quoted in Walters et al (2017), *ibid*.

Interpreting hostility

This confusion appears to lead to differing opinions and practices regarding the interpretation of “hostility” in the courts. One piece of research has noted that while the courts have emphasised that while the law requires an outward manifestation of hostility, which is objectively assessed and which does not require an appraisal of the inner thinking of the defendant, in practice, prosecutors, judges, and juries, are rejecting evidence of what might be considered an “objective” demonstration of hostility, having inquired into the defendant’s true intentions”²⁴

This suggests that there is an absence of clear guidance as to when, or if at all, an objective demonstration of hostility ought to be considered a “hate crime”.

Substantive offences & aggravating factors

The fact that hate crime is dealt with under two separate pieces of legislation is also a cause of problems. The severity of sentences for the dedicated sentences under the Crime and Disorder Act 1998 are more punitive than those available under the Criminal Justice Act 2003. This has led to a disparity between hostility based on nationality and/or religion (covered under the 1998 Act) and other hate crime streams covered under the 2003 Act. While both Acts are in theory mutually exclusive of each other, confusion arises in instances where the 1998 Act could have been the preferred option, but was not applied.

Recent developments

Hate crime legislation in England and Wales is currently being reviewed by the Law Commission, the statutory body with responsibility for reviewing certain areas of the law. The review is examining whether a sufficient range of characteristics are protected by the existing legislation. The Commission has already recommended that the Sentencing Council provide formal sentencing guidance for hostility-based offending under the 1998 Act CDA and for enhanced sentencing under the 2003 Act.²⁵ It has also recommended that all types of hate crime should be recorded on the Police National Computer and noted on the offender’s criminal record.²⁶

²⁴ Walters et al, (2017), *ibid*.

²⁵ Chara Bakalis, ‘Legislating against hatred: the Law Commission’s report on hate crime’ [2015]

²⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316103/9781474104852_Print.pdf

Hate Speech

In England and Wales and Scotland, the Public Order Act 1986 prohibits, by its Part 3, expressions of racial hatred and in 3A Hatred against persons on religious grounds or grounds of sexual orientation²⁷.

Racial hatred is defined as follows:

In this Part “racial hatred” means hatred against a group of persons. . defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

Religious hatred is defined as follows:

In this Part “religious hatred” means hatred against a group of persons defined by reference to religious belief or lack of religious belief.

Hatred on the grounds of sexual orientation is defined as follows:

In this Part “hatred on the grounds of sexual orientation” means hatred against a group of persons defined by reference to sexual orientation (whether towards persons of the same sex, the opposite sex or both).

For all three categories of hate speech the legislation applies prohibition to intentionally spread this hate speech via:

- Use of words or behaviour or display of written material.
- Publishing or distributing written material.
- Public performance of play.
- Distributing, showing or playing a recording.
- Broadcasting or including programme in cable programme service.

The intentional element is underlined through explicit legislation in every case that clarifies that if it can be proven that there was no intent to hate speech, the accused goes free. This point underscores the difficulty in finding proper balance in hate speech legislation.

²⁷ <https://www.legislation.gov.uk/ukpga/1986/64/contents>

Specific Protections of Freedom of Expression

Most interesting for this publication are the exceptions in 29J and 29JA that protect freedom of expression:

Section 29J:

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

Section 29JA

In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.

In this Part, for the avoidance of doubt, any discussion or criticism of marriage which concerns the sex of the parties to marriage shall not be taken of itself to be threatening or intended to stir up hatred.

The wording of Section 29J is evidence of the difficulty in maintaining a balance between prohibiting hate speech and protecting freedom of speech. The most interesting aspect of it is that it makes a distinction between the believers and their belief. It is prohibited to stir hatred against a religious group but it is allowed to ridicule or insult their religious convictions.

Section 29JA is basically protecting free speech by explicitly allowing public discussion, debate or expression of opinion over both sexual behavior and all forms of marriage. 29JA allows for debate on for example gay marriage, polygamy or any other form of marriage and clarifies that this debate as such does not constitute hate speech. 29JA (as 29J) underscores both the importance and difficulty in finding a balance between prohibiting hate speech and maintaining free speech.

Both 29J and 29JA might be legal concepts for elsewhere in Europe and for the EU to ensure proper balance. Having these explicit protections of freedom of speech may prove very helpful for prosecutors in the sense that they do not create the impression of arbitrariness in dealing with cases related to hate speech. Repeti-

tion of cases like the Räsänen case and all the questions that arose from that case may be prevented in this way.

One other interesting aspect of 29J and 29JA is that both 29J and 29JA allow for freedom of expression based on or against specific convictions while such a provision is not applied to racial hatred. Part 3 of the Public Order Act 1986 has no such provision.

The logic behind this is fairly obvious. A distinction is made between convictions on issues that can be debated as such, separate from an individual person. ‘Christianity’ is a religion that always has and always will be subject of both debate and ridicule. ‘Gay marriage’ is both a phenomenon and a legal provision that even has to be debated as it is otherwise not possible to make it subject of legislation. There can be no legislation that is placed outside democratic debate.

The difference with racial hatred is clear. Racial hatred will always be indistinctive from the individual. Race is not a belief, behavior or any legal provision. Race can never be categorized as a conviction or religion or a form of marriage or related institution. As stated, race is defined as ‘*colour, race, nationality (including citizenship) or ethnic or national origins*’. Race is literally who someone is without any possibility for an individual to escape from that fact. There can therefore be no clear provision that would allow for a protection of free speech that would not immediately allow for demeaning of a person based on race (and therefore violate human dignity).

These notions coming from the description of UK legislation on hate speech are important notions for further consideration.

Sweden

Legislative provisions

Sweden’s hate crime laws are comprised of an aggravating factor / penalty-enhancement provision only.²⁸The relevant provision states that:

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

²⁸ Chapter 29, Section 2(7) of the Swedish Criminal Code (CC). <https://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf>

Operational definition

A hate crime consists of:

“.....

- *agitation against a population group: Criminal code Ch. 16 § 8*
- *unlawful discrimination: Criminal code Ch. 16 § 9*
- *and all other crimes where a motive has been to aggrieve a person, a population group or another such group of persons because of race, colour, national or ethnic origin, creed, sexual orientation or another similar circumstance (as per the penalty enhancement rule in Criminal code Ch. 29 §2 point 7).²⁹*

Protected characteristics

Protected characteristics include:-

- race
- colour
- national or ethnic origin
- religion
- sexual orientation or other similar circumstance

Other “similar circumstances” are not specifically defined, however Swedish law-makers have said that so-called transgender identity is one such example.³⁰

Recording of hate crime

Details of an offence are recorded on the electronic police recording system on the basis that it may be a potential hate crime, and it is compulsory for police to do so. Hate crime data is collected by the Swedish National Council for Crime Prevention. Details such as motive, location and relationship between offender and victim, are all recorded and these are subsequently used to produce hate crime statistics.

29 <https://www.government.se/government-policy/judicial-system/the-swedish-criminal-code/>

30 Hate crime recording and data collection practice across the EU, European Union Agency for Fundamental Rights, 2018

Hate crime data in Sweden is based entirely on police reports. However, as detailed above the data is collected and reported by the Swedish National Council for Crime Prevention. Figures show an increase in hate crime recorded by the police between 2014 and 2018.³¹ However, the number of prosecutions has declined overall during the reporting period.

Problems implementing these laws

Sweden is similar to England Wales in that it experiences difficulties in implementing its own policies, procedures and legislation.

As in England and Wales, there is a tendency for police to focus more on the primary offence rather than the hate motive behind it. This can lead to a number of problematic issues such as insufficient evidence being gathered from the crime scene concerning the potential hate motive or hate crime being incorrectly identified when there is no evidence of such. In an effort to address this, police have focused on the perpetrators background and other factors such as the wearing of overtly racist symbols etc. However, this places additional strain on police resources, and has led to criticism that alleged perpetrators are being pre-judged by these factors. The failure to properly document evidence of a hate crime at an early stage can place prosecutors at a disadvantage when later trying to prove hate motivation in court.³²

Swedish prosecutors have noted that they face a dual challenge when pursuing hate crime in the court. Firstly, they must prove the original offence in addition to the hate element and secondly, they must prove the hate motivation, which may not be obvious.³³ Legal practitioners agree that it is easier for the defence to deny a hate motivation than it is for the prosecution to prove it. It is not enough for the prosecutor to prove intent, they must also be able to show beyond a reasonable doubt that a hate motivation exists.

The point in the trial at which the hate motivation is raised by the prosecution is also important. Despite clear procedures in relation to this, disagreements arise between judges, lawyers and prosecutors as to how this should occur in practice. Raising the alleged hate motivation at the later stages of a trial has been found to have implications for the defence's ability to refute such claims and often leads to a trial being postponed to allow the defence time to respond.³⁴

31 <https://hatecrime.osce.org/sweden>

32 Granstrom & Astrom (2017), *ibid*.

33 *Ibid*.

34 *Ibid*.

Sentencing

Sweden uses an aggravated sentencing model to punish hate crime. However, it is difficult to evaluate the actual impact of this on the severity of sentencing because of the lack of data on court outcomes.³⁵ This creates challenges for the collection and publication of data on sentencing.

Other initiatives undertaken to combat hate crime

The Swedish police hold regular national and local consultative forums with civil society stakeholders to coordinate its action against hate crimes, which has helped the police identify potential new developments in hate crime. The Swedish National Council for Crime Prevention also consults widely when proposing substantial changes to the methods of collating statistics.

Hate Speech

Hate speech is defined as follows under chapter 16, section 8 of the Swedish Penal Code:

A person who, in a statement or other communication that is disseminated, threatens or expresses contempt for a population group by allusion to race, colour, national or ethnic origin, religious belief, sexual orientation or transgender identity or expression is guilty of agitation against a population group and is sentenced to imprisonment for at most two years or, if the offence is minor, to a fine. If the offence is gross, the person is guilty of gross agitation against a population group and is sentenced to imprisonment for at least six months and at most four years. When assessing whether the offence is gross, particular consideration is given to whether the communication had particularly threatening or offensive content and was disseminated to a large number of people in a way that was liable to attract considerable attention.

This is a very broad definition of hate speech that however needs to be read and understood in connection with the basic law on freedom of speech that (as basic law) supersedes this legislation on hate speech. Meaning that in principle freedom of speech and expression has primacy over this legislation against hate speech.

³⁵ Ibid.

The Fundamental Law on Freedom of Expression creates strong protection on freedom of speech and gives clear guidance to prosecutors on how to weigh in cases involving possible hate speech and/or potential abuse of freedom of speech.

Article 1 in the first chapter of the Swedish Fundamental Law on Freedom of Expression states:

Art. 1. Every Swedish citizen is guaranteed the right under this Fundamental Law, vis-à-vis the public institutions, publicly to express his or her thoughts, opinions and sentiments, and in general to communicate information on any subject whatsoever on sound radio, television and certain similar transmissions, through public playback of material from a database, and in films, videorecordings, sound recordings and other technical recordings.

This is further being elaborated and defined in the articles that follow. As noted, there is a specific stipulation in article 5 of the same chapter that clarifies the relation between freedom of speech and potential abuse of freedom of speech/accusations of hate speech.

Art. 5. Any person entrusted with passing judgment on abuses of the freedom of expression or otherwise overseeing compliance with this Fundamental Law should bear in mind that the Freedom of Expression is fundamental to a free society. He or she should direct his or her attention always to the aim rather than the manner of presentation. In case of doubt, he or she should acquit rather than convict.

This specific Article 5 is very helpful as it gives clear guidance to both prosecution and the judiciary in finding a proper balance between combating hate speech and protection of freedom of speech. Article 5 in the Swedish Fundamental Law on Freedom of Expression as well as the specific primacy of freedom of speech are therefore important points of consideration going forward.

Germany

Legislative provisions

The Criminal Code of Germany 1998 (as amended in 2015) contains sentencing provisions applicable to any crime in the code. It states explicitly that

“when weighing the seriousness of the offence, courts shall give particular consideration to the motives and aims of the offender, particularly where they are of

a racist or xenophobic nature or where they otherwise show contempt for human dignity".³⁶

The hate crime element of an offence is assessed at sentencing. The courts give consideration to the motives and aims of the offender, particularly where they are of a racist or xenophobic nature or where they show a particular contempt for human dignity.³⁷

Hate crimes are defined as follows for reporting purposes:

*"Hate crime comprises politically motivated crimes, when – in recognition of the circumstances of the offence and/or the attitude of the offender – there are indications that the offence has been directed against a person because of his/her nationality, ethnicity, race, skin colour, religion, origin, appearance, disability, sexual orientation or social status. The act has to be committed in a cause-effect relationship with one of these motives, and be directed against an institution or an object."*³⁸

As in other jurisdictions there are several protected characteristics in place, with politically-motivated crimes, under which hate crimes fall, assigned to five categories relating to the presumed motivation of the perpetrator:

- right-wing politically-motivated crimes
- left-wing politically-motivated crimes
- crimes motivated by foreign ideology
- religious motivated crimes
- and politically-motivated crimes that cannot clearly be assigned to any of these categories

The inclusion of both right-wing and left-wing politically motivated crimes is particularly noteworthy here.

Hate crime is considered to be a subset or "thematic field" within politically-motivated crimes. Hate crimes are defined as those targeting a person on the basis of:

- nationality

³⁶ German Criminal Code, Section 46. <https://dejure.org/gesetze/StGB/46.html>

³⁷ <https://dejure.org/gesetze/StGB/46.html>

³⁸ <http://hatecrime.osce.org/germany>

- ethnic origin
- skin colour
- religion
- social status
- physical or intellectual disability or impairment
- sexual orientation and/or sexual and gender identity or
- external appearance³⁹

Recording of hate crime

In Germany, hate crimes are recorded as a separate category within “politically-motivated crime”. All politically-motivated crimes - including hate crimes - are recorded from the first moment by the frontline police officers, with the victim’s sex, nationality, asylum status, status as a victim or injured party, and, where relevant to the offence, other victim-specific characteristics. The following information may also be recorded

- the legal basis
- a description of the incident
- time and place of the crime and characteristics of the perpetrators or suspects, including membership of specific groups or organisations

The following subcategories of bias motivation may also be recorded:

- racism
- xenophobia
- antisemitism
- religion
- anti-Islamism
- anti-Christianism
- antiziganism
- disability
- sexual orientation and sexual and gender identity
- social status and
- other ethnicity

In order to ensure consistent recording methods, guidelines are in place which are enforced by the Federal Criminal Police Office (BKA) and the police forces at state level (the “Länder”) with detailed explanation of the data which is required

³⁹ <https://polizei.nrw/sites/default/files/2017-11/Definitionssystem%20PMK.pdf>

to be recorded. Local police report politically-motivated crimes to the Länder police offices, who in turn clarify any possible additional information which might be required. After this initial quality control process, the information is passed on to the BKA, who analyse the nationwide data, in order to inform public policy on hate crime. The criteria used for defining politically-motivated criminal offences and the thematic areas are reviewed and adjusted regularly.

The Federal Ministry of Interior publishes annual statistics, with data on hate crimes broken down by bias motivation (xenophobic, anti-Semitic, racist, religion, social status, sexual orientation and gender and sexual identity, disability) and by whether they are violent or non-violent crimes. Crimes against reception facilities for asylum seekers, with an extremist background or crimes with Islamic background are also covered.

Difficulties in adequately recording hate crime

Germany is an example of the difficulties which can be encountered in obtaining accurate statistics on hate crime. Official statistics suggest that there has been a significant increase in the number of hate crimes in recent years, but closer examination shows that much of the difference is down to how hate crime is recorded, particularly in relation to the demarcation or merger of hate crime and hate speech offences. Figures for 2018 suggest an increase in the number of hate crimes, however this is a result of the amalgamation of hate crime with hate speech offences.

An examination of 2018 police recorded figures shows that when hate speech related offences are filtered out, the number of recorded hate crime drops significantly. Of the recorded hate crimes that remain, racism and xenophobia is the largest group, followed by hate crimes related to anti-Semitism.

Challenges in prosecuting hate crime

Similar to other jurisdictions, confusion can arise between hate crimes and crime motivated by political views. In some instances, when the ideological motivations of the perpetrator are unclear, the crime may not be recorded as a hate crime. Police sometimes fail to investigate or record the hate element of a crime focusing instead on the principal offence. A lack of trust and suspicion of the police among some sections of the community can hinder the reporting and therefore the investigation of hate crime.⁴⁰

⁴⁰ Human Rights Watch (2011) - Briefing Paper: The State Response to “Hate Crimes” in Germany.

The handling of hate crime case by the courts is perceived to have improved in recent years, with state governments now having specially trained prosecutors for such cases.⁴¹ Failure of the police to document hate crime at the outset of the investigation can affect a later trial since the prosecution is not likely to pursue the alleged hate element of the case, which in turn means that it is unlikely to be taken into account during sentencing. Germany recently began collecting and publishing judicial data regarding court outcomes for such cases.

Recent developments

In 2015, experts appointed at Federal and Länder level have recently reviewed the system used for defining politically motivated crimes. As a result, since 2017 anti-Islamic, anti-Christian and offences targeting the Roma community are now recorded as separate subcategories of hate crimes.

The Federal Ministry of the Interior has conducted research into cooperation on hate crime between civil society organisations and the police at the local, regional and federal levels in Germany, with a view to identifying recommendations for further action, in particular in relation to the recording of hate crime and intervening to prevent it.⁴²

Hate Speech

Section 130 of the German Criminal Code states⁴³:

Incitement to hatred

(1) Whosoever, in a manner capable of disturbing the public peace

1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or

2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population,

⁴¹ Ibid.

⁴² German Federal Ministry of the Interior: “Best practice in LEA - NGO cooperation in the field of prejudice-related crime”

⁴³ https://sherloc.unodc.org/cld/en/legislation/deu/german_criminal_code/special_part_-_chapter_seven/section_130/section_130.html

shall be liable to imprisonment from three months to five years.

(2) Whosoever

1. with respect to written materials (section 11(3)) which incite hatred against segments of the population or a national, racial or religious group, or one characterised by its ethnic customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group

(a) disseminates such written materials;

(b) publicly displays, posts, presents, or otherwise makes them accessible;

(c) offers, supplies, or makes them accessible to a person under eighteen years; or

(d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of Nos (a) to (c) or facilitate such use by another; or

2. disseminates a presentation of the content indicated in No 1 above by radio, media services, or telecommunication services

shall be liable to imprisonment not exceeding three years or a fine.

(3) Whosoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6 (1) of the Code of International Criminal Law, in a manner capable of disturbing the public peace shall be liable to imprisonment not exceeding five years or a fine.

(4) Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three years or a fine.

(5) Subsection (2) above shall also apply to written materials (section 11(3)) of a content such as is indicated in subsections (3) and (4) above.

(6) In cases under subsection (2) above, also in conjunction with subsection (5) above, and in cases of subsections (3) and (4) above, section 86(3) shall apply mutatis mutandis.

There is clear consistency with hate crimes in general and legislation against hate speech with specific reference to national socialism. Aside from this specific issue it is noteworthy that there is a specific emphasis on human dignity. This is of importance, especially in the European context. The reference to human dignity provides a basis for legislation against hate speech that is grounded in the core values of Europe. This may be helpful to avoid arbitrariness in how cases are being dealt with by the prosecution and judiciary. It provides a rationale that is more lasting than a majority opinion on hate speech at a given moment in a given society. Moreover this emphasis on the protection of human dignity is an important consideration for the European Commission with regard to their proposal on hate speech as an EU crime.

As in Sweden, the freedom expression is enshrined in basic law which in principle means that it supersedes provisions related to hate speech. The German Basic Law states in Article 5.1 the following⁴⁴:

(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

Unlike in Sweden however there is no specific clarification in Basic Law for prosecution and judiciary for cases involving abuse of freedom of expression and/or hate speech.

Ireland

Constitution

The Irish Constitution guarantees the right to freedom of expression as follows:-

the state guarantees liberty for the exercise of the following rights, subject to public order and morality: –

- i. *The right of the citizens to express freely their convictions and opinions.*

The education of public opinion being, however, a matter of such grave import to the common good, the state shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful

⁴⁴ https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0100

liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the state.

The publication or utterance of seditious or indecent matter is an offence which shall be punishable in accordance with law.⁴⁵

The right to free expression can, therefore, be restricted in order to protect “public order and morality”. This allows significant scope for the restriction of the right, however the Irish courts and constitutional scholars have found that this caveat may only be used in order to protect life, the security of the state, and to prevent violence or a breach of the peace. However, it is likely to greatly constrain any attempt to introduce laws against “hate speech”.

Legislation

Ireland does not currently have specific legislation dealing with hate speech or hate crime. However, a hate motive can be considered to be an aggravating factor which judges can take into account at sentencing for any criminal offence. This is applied on a non-statutory basis, and as a result there are few available records of when this is applied.

The only legislation in force in Ireland which deals with hate-based offences is the Prohibition of Incitement to Hatred Act 1989.⁴⁶

A hate crime occurs where a crime is committed (for example a common assault) but in circumstances where the victim was targeted because of their association, in the mind of the perpetrator, with one of a number of specified identity characteristics, including their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community and sexual orientation. This Act prohibits threatening, abusive or insulting conduct which is intended or likely to stir up hatred against a group of persons on account of these characteristics.

The threatening, abusive or insulting conduct can take the form of:

- Actions likely to stir up hatred – the publication or distribution of written material; the use of words, behaviour or display of written material outside of a private residence; and the distribution, showing or playing of a recording of

⁴⁵ Bunreacht na hÉireann (Constitution of Ireland), Article 40.6.1 <https://www.gov.ie/en/publication/d5bd8c-constitution-of-ireland/>

⁴⁶ <https://www.irishstatutebook.ie/eli/1989/act/19/enacted/en/html>

sounds or visual images⁴⁷

- Broadcasts likely to stir up hatred – this covers broadcasts to the general public of images or sounds,⁴⁸ and
- Preparation and possession of material likely to stir up hatred covers making or possessing hateful material⁴⁹

To secure a conviction for any of the offences under the 1989 Act, the prosecution must show that the defendant engaged in conduct which either (i) was intended to stir up hatred; or (ii) having regard to all the circumstances, was likely to stir up hatred. The 1989 Act contains provision for serious consequences, potentially up to and including a lengthy prison sentence.

The principal reason for introducing this Act seems to have been that Ireland could not ratify the International Convention on Civil and Political Rights without having provisions of this nature on its statute book.

Is change needed?

A view has grown among the political and media establishment in Ireland that existing legislation is insufficient, since it is poorly worded and overly complicated, and does not allow sufficient numbers of prosecutions. This has resulted in very few successful prosecutions being mounted under the Act, with approximately 50 convictions in total.

Calls for the 1989 Act to be reformed have been widespread over the last decade, on the basis that the Act does not deal with any forms of hate speech other than incitement, and prohibits actions stirring up hatred against groups, not individuals. This campaign has been led by NGOs and lobby groups who are active in this area.

The fact that the hate motivation may be applied at sentencing on a non-statutory basis means that few records of such cases are maintained. The hate element is not be reflected in the charge against the accused, meaning that it may never be raised in front of the jury, and cannot be defended in court during the trial process.

From the perspective of deterring incitement to hatred, the Act has been shown

⁴⁷ Section 2

⁴⁸ Section 3

⁴⁹ Section 4

to be almost totally deficient, with just 44 prosecutions have been taken under the Act since 1989, with just 5 resulting in convictions.⁵⁰

On many other levels, however the 1989 Act is deeply flawed, and arguably it goes too far as it stands. There are significant constitutional issues with the existing 1989 Act, with convictions under the Act likely to infringe the Irish Constitutional protections on freedom of expression, and the right to a fair trial.⁵¹

In any laws relating to hate speech and hate crime, a balance must be struck with the right to freedom of expression, as protected under the Irish Constitution and the European Convention on Human Rights. It is clear that spreading, inciting or justifying hatred or violence receive little rights protection, as discussed by the European Court of Human Rights in cases such as *Gunduz v. Turkey*⁵² and *Vejdeland v. Sweden*.⁵³ However, far more care must be taken in restricting expression which, though shocking or abhorrent, falls short of inciting hatred or violence. This could represent too great an encroachment on freedom of expression. This raises significant problems with any legal provisions which seek to criminalising efforts at instilling emotions such as “hostility”, “prejudice” and “vilification”, which is a significantly lower legal threshold.

The 1989 Act also appears to criminalise behaviour of an accused person, whether or not they fully envisage or realise that their actions will incite hatred.

Mens rea (the requirement for a “guilty mind” on the part of the accused) is a fundamental component of any criminal offence in Ireland. A statutory provision which allows a person to be convicted without any adequate appreciation that his or her actions were wrongful is likely to be in breach of the Irish Constitution.⁵⁴ The 1989 Act is therefore insufficient in this regard, since it allows a conviction where it is proved that the conduct of the accused was likely to stir up hatred against a particular group, and where the motives or mind of the accused are irrelevant.

50 “Courts Service reveals five convictions for hate crime since 1989”, The Irish Times, 19 June 2017.

51 See Submission by the Council of The Bar of Ireland on the Review of the Prohibition of Incitement to Hatred Act 1989 (2019) <https://www.lawlibrary.ie/app/uploads/securepdfs/2021/05/Submission-on-the-Review-of-the-Prohibition-of-Incitement-to-Hatred-Act-1989-13Dec2019-1.pdf>

52 App. No. 35071/97, 4th December 2003.

53 App. No. 1813/07, 9th February 2012.

54 *CC v Ireland*, [2006] IESC 33, [2006] 4 IR 1.

Recent legislative proposals in Ireland

As an example of how legislation in Europe is evolving it is helpful to include the recent proposals in Ireland on this subject.

In the Spring of 2021, the Irish Government published a General Scheme of the Criminal Justice (Hate Crime) Bill 2021.⁵⁵ A “General Scheme” is an outline of the legislation, showing the intended policy outcomes from the Bill, before formal legislative drafting has been completed.

Essentially, the intention is to repeal the 1989 Act in its entirety, and replace it with a new streamlined method for dealing with hate crime. The main features of the proposed new legislation are as follows:-

Definition of Hatred

“Hatred” would be defined in the legislation as:-

“significant ill will or hostility, of a magnitude likely to lead to harm or unlawful discrimination against a person or group of people due to their association with a protected characteristic”

“Protected characteristic” is further defined to refer to race, colour, nationality, religion, ethnic or national origin, sexual orientation, gender or disability.

Incitement to Hatred

The General Scheme states that the Bill will:-

Provide that:

(1) A person is guilty of an offence who – communicates to the public or a section of the public by any means, for the purpose of inciting, or being reckless as to whether such communication will incite, hatred against another person or group of people due to their real or perceived association with a protected characteristic.

....

⁵⁵ [https://www.justice.ie/en/JELR/General_Scheme_Criminal_Justice_\(Hate_Crime\)_Bill_2021.pdf/Files/General_Scheme_Criminal_Justice_\(Hate_Crime\)_Bill_2021.pdf](https://www.justice.ie/en/JELR/General_Scheme_Criminal_Justice_(Hate_Crime)_Bill_2021.pdf/Files/General_Scheme_Criminal_Justice_(Hate_Crime)_Bill_2021.pdf)

(3) Subject to paragraph (5), a person is guilty of an offence who - publishes or otherwise disseminates, broadcasts or displays to the public, or a section of the public, images, recordings or any other representations of a communication the subject of paragraph (1) above.

.....

(5) in a prosecution for an offence under paragraph (3), it shall be a defence to prove that –

(a) the material concerned consisted solely of - a reasonable and genuine contribution to literary, artistic, political, scientific, or academic discourse, material which has a certificate from the authorising body, in the case of a film or book, or - a communication necessary for any other lawful purpose, including law enforcement or the investigation or prosecution of an offence under this Act

.....

(c) In the case of dissemination or distribution of material by an individual, - that they were unaware and had no reason to suspect that the communication concerned was intended or likely, in all the circumstances including the manner in which they either obtained or disseminated it, to stir up hatred.

(7) A person may be found guilty of an offence under this section irrespective of;

(a) whether or not the communication the subject of the offence was successful in inciting any other person to hatred, and,

(b) whether or not any actual instance of harm or unlawful discrimination is shown to have occurred, or to have been likely to occur, as a result.

Paragraphs (1) and (3) create new offences of incitement to hatred. These are to replace the offences in the 1989 Prohibition of Incitement to Hatred Act, which is being repealed.

Paragraph (5)(a) contains an exception for publication or distribution of communications which consist solely of a reasonable and genuine contribution to certain fields such as literary, artistic or scientific discourse, or are necessary for lawful purposes such as the reporting or prosecution of an offence under this Act. These exceptions apply only to offences under paragraph (3), and there is no exception

where the person communicating is deliberately or recklessly.

Paragraph 5(c) contains a defence for an individual charged with a distribution offence, where they can show that they did not know, and had no reason to suspect, in all the circumstances that the material was intended or likely to incite. Such circumstances might include the manner in which they received the material, and the manner in which they distributed it. Under paragraph (6) the prosecution does not have to prove that a person knew what their material contained. Unless the person can show that they didn't know what the material contained, then it can be presumed that they did. Secondly, the prosecution does not have to prove that the person knew what their material meant, and thirdly, where a person posts material on a public forum (for example on a website or on their social media) the court is entitled to presume that the person knew it would be public.

Under paragraph (7), it appears that a person can still be found guilty of incitement to hatred even if no imminent harm to any other actual person occurred as a result of their actions. The offence of incitement to hatred is composed of the mental element (intent or recklessness) and the act (communicating with the public or a section thereof) and does not require any actual consequences as a result of that act in order for the person to be guilty.

New Offences

The Bill incorporates a number of new offences into the following existing statutes:-

Existing Legislation	Crimes prohibited
Non-Fatal Offences Against the Person Act 1997 ⁵⁶	All offences against the person
Criminal Damage Act 1991 ⁵⁷	Offences against property
Criminal Justice (Public Order) Act 1994 ⁵⁸	Public order offences

The approach being taken is that new offences will be inserted to the existing

⁵⁶ <https://www.irishstatutebook.ie/eli/1997/act/26/enacted/en/html>

⁵⁷ <https://www.irishstatutebook.ie/eli/1991/act/31/enacted/en/html>

⁵⁸ <https://www.irishstatutebook.ie/eli/1994/act/2/enacted/en/html>

legislation alongside existing offences and which mirror them, but which are aggravated by prejudice. These new offences are:-

Non-Fatal Offences Against the Person Act 1997

- Assault aggravated by prejudice
- Assault causing harm, aggravated by prejudice
- Causing serious harm, aggravated by prejudice
- Threats to kill or cause serious harm, aggravated by prejudice
- Coercion aggravated by prejudice
- Harassment aggravated by prejudice
- Endangerment aggravated by prejudice

Criminal Damage Act 1991

- Damaging property, aggravated by prejudice

Criminal Justice (Public Order) Act 1994

- Threatening, abusive or insulting behaviour in a public place, aggravated by prejudice
- Distribution or display in a public place of material which is threatening, abusive, insulting or obscene, aggravated by prejudice
- Entering building, etc. with intent to commit an offence, aggravated by prejudice
- Assault with intent to cause bodily harm or commit an indictable offence, aggravated by prejudice

Aggravating Factor to Existing Offences

Aside from the new offences which the Bill would create, it The Bill also provides for

“In a prosecution for any offence listed in Schedule 1 of this Act, the court shall, in determining the appropriate sentence, take account of evidence presented to the court during the trial which may indicate to the court that the motive of the perpetrator in committing the offence consisted in whole or in part of prejudice on the part of the perpetrator against a protected characteristic within the meaning of this Act.

Where the court determines in accordance with this provision that the perpetrator

was so motivated, the court shall treat this as an aggravating factor in determining the appropriate sentence, and the fact that the offence concerned was thus aggravated by prejudice shall be reflected clearly in the record of the proceedings.”⁵⁹

Effectively, this mirrors provisions in other jurisdictions mentioned above, where, in addition to the new offences which will be created, a number of other scheduled offences – which has not yet been published – may be aggravated by “prejudice”, with an increased sentence applying accordingly.

“Prejudice” is not defined in the General Scheme, however it does say the following:-

“In addition to any other relevant evidence, any or all of the following factors may be considered in seeking to determine whether an offence was motivated by prejudice for the purposes of this Act:

- 1. Evidence of the perception of any victim or witness to the event as to the motivation of the defendant*
- 2. Evidence of comments, written statements, gestures or other indications by the defendant of hostility toward a protected characteristic immediately before, during or after the event*
- 3. Ethnic, religious or cultural differences between the perpetrator and the victim*
- 4. Evidence of the defendant’s affiliation with or membership of any organised hate group*
- 5. Whether the location or timing of the offence has any particular significance in terms of a protected characteristic*
- 6. Patterns or similarities to any frequent previous crimes or incidents which were motivated by prejudice*
- 7. The nature of the incident itself and whether any aspects of this suggest a bias motivation*
- 8. The absence of any other credible motive.*

⁵⁹ Head 7.

None of the above shall be taken to be proof of motivation in and of itself, however the presence of several of the indicators listed may be given weight in determining the likelihood that the incident was motivated by prejudice on the part of the perpetrator, which must be demonstrated beyond a reasonable doubt. In determining motivation by prejudice for the purposes of this Act, it shall not be necessary to show that prejudice was the only, or the principal motivation for the offence.”⁶⁰

Observations on the new Irish government proposals

Definition of “hatred”

As noted above, the General Scheme proposes that hatred should be defined as

*“significant ill will or hostility, of a magnitude **likely** to lead to harm or unlawful discrimination against a person or group of people due to their association with a protected characteristic”*

(Emphasis added)

This is problematic, since it may allow convictions to be secured where it is proved that a particular statement or conduct was likely to lead to harm or unlawful discrimination. This is a departure from the normal standards of intention or recklessness and raises several issues.

First, it seems that it is irrelevant that the accused may lack appreciation of the potential consequences of his or her actions. In other words, whether the accused intended that harm or discrimination would take place, or whether they were reckless as to whether that might occur, are irrelevant. It need only be likely that such harm or discrimination might occur, therefore allowing a conviction based on the potential – rather than the actual - consequences of their conduct, even where there is no appreciation of same. Secondly, it does not seem that there is any need that there be a substantial risk of harm or discrimination occurring: mere likelihood suffices. This would appear to come close to allowing a criminal conviction on grounds of negligence, which would appear to be an infringement of the Irish constitutional rules in relation to criminal law, and fair trials.

Incitement to Hatred

While the proposed law makes clear that no negative consequences (for example

⁶⁰ Head 8

violence or criminal acts) need to have resulted in order for a conviction under this section, there appears to have been no consideration of whether “hatred” was aroused in the intended targets of the communication or not.

Defences not available in all circumstances

The exception in paragraph (5)(a) in respect of the publication or distribution of communications which consist solely of a reasonable and genuine contribution to certain fields such as literary, artistic or scientific discourse applies as a defence for offences under paragraph (3) of this Head, but not under paragraph (1). This seems illogical, since there can clearly be circumstances where a person communicates to the public, not intending to incite, but for another bona fide reason, but is similarly reckless as to whether incitement occurs.

Religious discourse

Paragraph (5)(a) says that it shall be a defence to show that the communications concerned are “*a reasonable and genuine contribution to literary, artistic, political, scientific, or academic discourse*”. It is curious that there is no defence in circumstances where a person who makes a reasonable and genuine contribution to religious discourse. A defence of reasonable and genuine contribution to religious discourse should surely be included here.

Regrettably, we now live in a world where even the mildest expressions of religious faith or ideals are often construed by persons of another faith or of no faith to be expressions of hatred against them or their beliefs. This makes it even more important that the State should protect genuine and reasonable expressions of religious faith, dogma or teaching, while restricting any expression which is designed to be immoral or incite breach of public order.

Religious expression and discourse on religious ideas are vital in any democratic society, but this is particularly so in Ireland where according to the 2016 census 86% of the population subscribe to a religious faith.⁶¹ Furthermore, religious expression is given express protection in the Constitution at article 44.2.1, which states that

“Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.”

⁶¹ <https://www.cso.ie/en/releasesandpublications/ep/p-cp8iter/p8iter/p8rrc/>

The Irish Supreme Court said that the Irish Constitution “*guarantees freedom of conscience and of expression to those of all religions and none*”.⁶² Clearly, a reasonable and genuine contribution to religious discourse would therefore be protected speech under these Constitutional provisions. (In fact, given the provisions of Article 44.2.1, it may be that even *unreasonable* contributions might also be protected speech – so long as they do not contravene public order or morality.)

For that reason, it would be quite a serious omission not to include it as a defence under Head 3, paragraph 5. The result might be that any successful prosecution for any statement which could arguably be a genuine contribution to religious discourse would seem to be vulnerable to constitutional challenge, as a defence which ought to have been afforded to a person by the Act was not provided for in the legislation. This would amount to a considerable deficiency in any law which is passed by the Oireachtas.

Clearly any extreme communications masked as religious speech dogma which explicitly incited crime or violence directed at any class of persons could never reach the threshold of being “genuine and reasonable contributions to religious discourse”, so we need have no fear of any defence being availed of by people with such intentions.

Prejudice

The guidance proposed by the Bill in relation to how to assess “prejudice” seem unduly nebulous. The list of factors are based on based on a list of internationally accepted ‘bias indicators’ published by the Office for Democratic Institutions and Human Rights of the OSCE, however they appear to be very open-ended and may allow “prejudice” to be found in a very wide range of potential prosecutions. It is a principle of Irish constitutional law that all criminal laws must be sufficiently certain so that citizens know how to order their behaviour so as to avoid prosecution for their conduct. It is not clear that this long and somewhat vague list of factors would meet this standard.

In Conclusion

There is a growing trend internationally to press for additional laws which criminalise so-called hate speech and hate crimes. As this paper shows, significant and wide-ranging provisions are already in place in some of the larger European jurisdictions.

⁶² *Corway v Independent Newspapers (Ireland) Limited* (1999),

The proposals to extend this raise a number of serious questions, specifically:-

- Is there evidence that these laws needed in the first place?
- Do they represent an unacceptable curb on the right to freedom of expression?
- Do they compromise or prejudice the rights to the presumption of innocence and to a fair trial?

Having reviewed the new proposals from the Irish government, and the literature comparing the proposals with Germany, Sweden and England and Wales, it is not clear that proposals to extend Irish law to the extent that they already exist in those countries is sufficient or proportionate.

They may in fact represent a significant erosion of rights and freedoms enjoyed by Irish people, who may be exposed to increased criminal sanction unfairly. For those reasons, it is time for the Irish government to rethink and revisit these proposals urgently.

Moving forward, it is clear that when legislation on hate speech is under consideration, it is of the essence to provide sufficient clarity on the definitions used in such legislation. Clarity on the definitions is in and of itself already necessary to provide sufficient balance between protecting freedom of speech and combating hate speech.

4. International frameworks and the commission legislative initiative

Hate crime is now monitored officially at international and European level, with data collected by numerous agencies.

The United Nations (UN), the European Commission against Racism and Intolerance (ECRI) (which is an agency of the Council of Europe) and the Organisation for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) all monitor hate crime trends and report regularly in relation to the adequacy of hate crime recording.

Internationally

The principles of equality and non-discrimination are outlined in numerous international documents, including the Universal Declaration of Human Rights; the International Covenant of Civil and Political Rights; the International Convention of the Elimination of all forms of Racial Discrimination (CERD); and the European Convention on Human Rights (ECHR).

Article 4 of CERD requires ratifying states to

“declare an offence punishable by law [...] all acts of violence [...] against any race or group of persons of another colour or ethnic origin”.

The Committee on the Elimination of Racial Discrimination monitors the convention and also makes recommendations.⁶³

The OSCE has made commitments on hate crime which call on States to:

1. Collect, maintain and make public, reliable data and statistics in sufficient detail on hate crime and violent manifestations of intolerance.
2. Enact, where appropriate, specific, tailored legislation to combat hate crime.

⁶³ Its reports are available here: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TB-Search.aspx?Lang=en&TreatyID=6&DocTypeID=29

3. Encourage victims to report hate crime, recognising that underreporting of hate crime prevents States from devising efficient policies. This may include measures for facilitating the contribution of civil society to combat hate crimes.
4. Introduce or further develop professional training and capacity building activities for law enforcement, prosecution and judicial officials dealing with hate crime.
5. Explore ways to provide victims of hate crime with access to counselling, legal and consular assistance and effective access to justice.
6. Promptly address hate crime and ensure that the motives of those convicted of hate crime are acknowledged and publicly condemned by the relevant authorities and by the political leadership.
7. Ensure co-operation where appropriate, at the national and international level, including with the relevant international bodies and between police forces, to combat violent organised hate crime.
8. Conduct awareness-raising and education efforts particularly with law enforcement authorities, directed towards communities and civil society groups that assist victims of hate crimes.⁶⁴

Existing EU and ECHR frameworks

In the European Union, Council framework decision 2008/913/JHA applies across Europe and requires member states to treat racist motivation as an aggravating factor of existing offences.⁶⁵ The needs of the victims of hate crime are recognised by Article 22 of what is known as the “Victims Rights Directive”⁶⁶ which states that victims of hate crime are entitled to specialist support. It also mandates adequate data collection is essential and requires member states to communicate statistical data from public bodies to the European Commission in this regard.⁶⁷

⁶⁴ OSCE Ministerial Council Decision No. 9, “Combating Hate Crimes”, Athens, 2 December 2009, <https://www.osce.org/files/f/documents/d/9/40695.pdf>

⁶⁵ Council of the European Union (2008), Council Framework Decision 2008/913/JHA Decision of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ 2008 L 328

⁶⁶ European Union Directive 2012/29/EU

⁶⁷ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Victims’ Rights Directive).

In this framework decision some very generic definitions of hate crime and hate speech were included as can be seen in Article 1 of this framework decision:

1. *Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:*

- (a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;*
- (b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;*
- (c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;*
- (d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.*

However, the above does not constitute an EU-wide definition of hate-speech as it is (in essence) for the Member-States to implement specific legislation that will define what hate speech is in that Member State. The framework decision merely describes in generic terms what such legislation at minimum would entail.

In 2013, Council conclusions on “combating hate crime in the EU” stressed the need for the proper collection of data on hate crimes, including the number of such incidents reported and recorded by the authorities and the motive behind these crimes.⁶⁸ In its country reports, the ECRI identifies gaps and recommendations for improvements in recording and collecting data on hate crime.

⁶⁸ see OSCE, ODIHR (2014), Hate Crime Data-Collection and Monitoring: A Practical Guide, 29 September 2014, p. 18

In its rulings, the European Court of Human Rights (ECtHR) has developed principles which are binding on all ratifying states. Member states must “take all reasonable steps to unmask any racist motive” when investigating violent incidents⁶⁹, and that ensure that its state authorities “are responsible for objectively investigating bias indicators”.⁷⁰

Article 14 of ECHR states that

*“the enjoyments of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”*⁷¹

The ECtHR has also found that national legislation did not need to contain specific hate crime provisions for states to investigate and prosecute hate crimes.⁷² The Court also ruled that

*“..not only acts based solely on a victim’s characteristic can be classified as hate crimes. For the Court, perpetrators may have mixed motives, being influenced by situational factors equally or stronger than by their biased attitudes towards the group the victim belongs to.”*⁷³

The Legal Initiative of the Commission to make hate speech an EU crime

The European Commission announced at 9 December 2021 its intention to make hate speech an EU crime⁷⁴. This would be the next step after 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 as described above.

The difference between this framework and hate speech as an EU crime would be that the EU would set out binding minimum definitions on hate speech for the whole EU. Article 83(1) TFEU sets out what current EU crimes are and the proce-

69 Angelova and Iliev v. Bulgaria, ECtHR application no. 55523/00, para. 15, 26 July 2007

70 Nachova and others v. Bulgaria, ECtHR applications nos. 43577/98 and 43579/98, para. 157, 6 July 2005

71 https://www.echr.coe.int/documents/convention_eng.pdf

72 Angelova and Iliev v. Bulgaria, ECtHR application no. 55523/00, para. 104, 26 July 2007

73 Balázs v. Hungary, ECtHR application no. 15529/12, para. 70, 14 March 2016.

74 https://ec.europa.eu/info/sites/default/files/1_1_178542_comm_eu_crimes_en.pdf

sure on how to arrive at legislation that adds more crimes as EU crimes.

It is not the purpose of this paper to discuss this procedure and the grounds on which the EU Commission came to the conclusion to make an attempt to add hate speech to the list of EU crimes. This paper rather focuses on the proper balance between protecting freedom of speech and combating hate speech. The Charter of Fundamental Rights of the EU as well as the existing framework decision and the notions emerging from chapter 3 of this paper will provide direction in this regard.

At this point there is no proposed legislation from the Commission. There is only the announcement of a legal initiative. Only after the Council has adopted a unanimous decision that hate speech needs to be added to the list of EU crimes it will be possible for the Commission to propose concrete legislation at some point in the future. The questions here are: ‘what guidance gives the Charter of Fundamental Rights on this issue?’, ‘what notions from chapter 3 are important to include?’ and ‘how far should the Commission proposal go beyond the framework decision?’

The Charter of Fundamental Rights of the European Union begins with its foundational Article 1 ‘Human dignity is inviolable. It must be respected and protected.’ On this basis the first chapter is assigned with the title ‘Dignity’. Protecting dignity is cited by the Commission as a ground for this initiative. Moreover the Commission is citing Article 2 TEU several times as a ground for its initiative which reads:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The second chapter of the Charter of Fundamental Rights of the EU is titled ‘Freedom’. In the framework of this paper Article 10.1 and Article 11.1 are relevant as well as Article 21 that is cited by the Commission as a ground for its initiative.

Article 10.1:

1. *Everyone has the right to freedom of thought, conscience and religion. This*

right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

Article 11.1:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Article 21:

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

It is regrettable that the Commission in its extensive announcement of this legal initiative only cites the importance of freedom of expression at one moment and only refers to Article 52 of the Charter of Fundamental Freedoms of the EU. Although it is indeed important as Article 52 provides guardrails that give some guidance regarding imposing limitations on fundamental rights and freedoms.

52.1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

However where the Commission does cite Article 21, it does not cite Article 10.1 or 11.1. Overall, in the announcement there is not much consideration for the need to find a proper balance between protecting freedom of expression and combating hate speech.

Article 2 TEU is insufficient in that regard as it cites both freedom and equality as well as the protection of minorities. On the basis of Article 2 TEU it is therefore not possible to elaborate over how these rights relate to one another. A broader and deeper reflection will be necessary.

5. Conclusions and recommendations

The Commission will need to take a broader approach than outlined so far in the announcement of its legal initiative.

It will be necessary to have a robust debate over the relation between Article 1, Articles 10.1 & 11.1 and Article 21 of the Charter. Human dignity is the basis for both the protection of freedom of thought and expression as well as the principle of non-discrimination. One may argue that in the framework of combating hate speech, the freedom of thought and expression have precedence over non-discrimination on the basis that non-discrimination only protects against abuse of freedom of expression. If however non-discrimination would get precedence, it would become censorship as the question 'what am I allowed to say?' would become more important than the notion 'I am free to say what I think'. Moreover, it would create significant tensions as the question 'who determines what I am allowed to say?' would become more important than the freedom of expression itself. The freedom of expression would in this way become a very conditional freedom and would no longer be a fundamental freedom. Such a development would create a serious impediment for democratic debate.

As we have seen, Germany and Sweden give explicit precedence to freedom of thought and expression before combating hate-speech. In that sense they follow the reasoning that combating hate-speech is in essence about combating abuse of freedom of expression. The Commission would do well to take this into consideration and give similar precedence to freedom of expression.

Moreover as we have seen in the considerations over hate-speech legislation in the UK as well as Sweden, it is important and necessary to include specific guidelines that protect freedom of thought and speech and debate. Articles 29J and 29JA in the UK Public Order Act 1986 provide good examples on how protecting democratic debate can be ensured in legislation focused at combating hate speech.

The developments in Ireland demonstrate the need to give very precise and clear definitions throughout any future concrete legislative proposal that the Commission may send to the European Parliament and the Council in case the Council gives consent to add hate speech to the list of EU crimes. This is even more important given the fact that EU legislation would encompass all 27 EU Member States and therefore encompass a very wide bandwidth of debating cultures.

For example, the debate on Islam as phenomenon in European societies is different between Member States. In The Netherlands and Denmark for example the debate is very robust to the point that it may be deemed xenophobic in Sweden and Germany. The debate on gay marriage is almost absent in The Netherlands while in Poland and Hungary the same issue is subject to public debate to the point that it is almost considered hate speech in Western Europe.

‘Hot button’ issues that define culture cannot and should not be suppressed but at the same time any intentional abuse of these debates to hurt a specific group of people has to be avoided.

One specific issue therefore that the Commission will have to take into account is the issue of ‘intent’. ‘Intent’ is a critically important notion in all legal frameworks in Europe, especially in criminal law. It will have to have a clear place in any future proposal from the Commission on making hate speech an EU crime.

The Commission can in that regard follow the existing framework decision. In this Council Framework Decision 2008/913/JHA, the legal principle of intent is a foundational principle. The Commission will have to be considerate of all of the issues raised previously in this paper if it intends to significantly broaden the scope of hate speech in comparison with this framework decision.

In addition to the factors that the Commission announced to take into account it will have to enter into discussion with civil society at large in the Member States. It is imperative that not only activist NGO’s are included in these discussions but also Churches and generic CSO’s and political parties and foundations that represent the whole spectrum of opinion in society.

Ultimately the Commission will have to make sure that its well-intended initiative will not have unintended consequences for the freedom of thought, religion and speech.

The same considerations can be applied to any Member State. The same balance between protecting free speech and combating hate crimes and hate speech is necessary in all 27 Member States. There can be no Member State that has significant less freedom than other Member States if we aim for a truly democratic and free Europe.

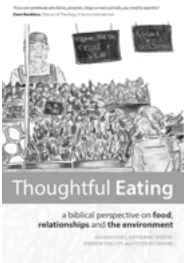
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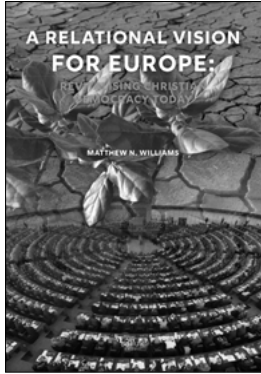


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