

# Legal Responses to Racially Motivated Hate Crimes

Mary Cousey summarises some of the wide range of international responses to racially motivated hate crime and hate speech.

**R**acially motivated hate crime generates considerable public and political concern and debate across a wide range of jurisdictions. Yet, despite the apparent consensus about its social undesirability, there exists a wide range of legal responses to the problem.

The main international basis for legislation is the *UN Convention on the Elimination of all Forms of Racial Discrimination* (CERD), Article 4 of which defines racially motivated hate activities as: "all those which are based on ideas or theories of superiority of one race or group of one colour or ethnic origin, which justify or promote racial hatred or discrimination." CERD requires signatories to make it an offence to disseminate such ideas, and to incite discrimination or violence. It also requires signatories to prohibit organisations and organised activities that incite racial hatred and discrimination.

Two key questions arise with regard to the choice of legal strategies to deal with racially motivated hate crime. The first is whether to tackle hate activities

collection, and the differences in legislation (EUMC, 1998). Only the incidence of different (non-comparable) offences as reported by each member state could be listed.

## Hate speech

Until recently, certain western European countries have put greater emphasis on specific regulations against hate speech and racist organisations than they have on legislating against racial discrimination. These countries tend to be influenced by their experience of the Nazis in the Second World War. For example, the criminal codes in France, Germany, Italy and Austria allow the banning of certain extremist organisations, Holocaust denial, inciting racial discrimination, hatred or violence, or vindicating war crimes. In France it is an offence to wear or display Nazi badges or emblems and to wear uniforms associated with organisations involved with crimes against humanity. Spain also bans incitement to racial hatred and Holocaust denial (EUMC, 1998).

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under existing criminal and civil legislation, or whether to enact specific legislation. The second is which activities to ban. Should disseminating racially derogatory or offensive material be banned or does this conflict with the right to freedom of expression? Should disseminating material and activities which incite racial hatred, violence or discrimination be banned, or should racist organisations be banned? Does the latter conflict with the right to freedom of association?

Approaches to both of the above questions seem to depend on the particular recent history and experience of the country concerned. There may already exist generic offences of disseminating racist propaganda, racial harassment or violence, or specified offences such as Holocaust denial. Alternatively, some countries allow unrestricted freedom of expression or freedom of association, and racist activity only becomes an offence when linked to violence or threatened violence.

The EU, when it attempted to monitor racism and xenophobia, found it impossible to make any comparisons because of the differences in classifications of offences, differences in data

Most other western European countries have created general criminal offences against incitement to racial hatred. For example, this is the approach in Great Britain, Ireland, the Netherlands and Sweden. England and Wales prohibit the chanting of racist slogans at football matches. Several western countries including Denmark, Great Britain, the Netherlands, Norway and Sweden do not ban extremist groups, but rely on legislation to control their activities.

The United States is restrained from taking action against hate speech and material by potential conflicts with the First Amendment in the Constitution which protects the right to free speech. Exceptions to this include threatening words which promote action towards violence and breaches of the peace.

Although many states in the US have enacted laws against racist or hate crimes, some of these laws have been ruled to be in conflict with the right to free speech. In other instances specific prosecutions have been overturned on these grounds (Cowl, 1995). There are provisions in some states against burning religious symbols (crosses) and wearing masks and hoods except for theatrical and carnival dress. The Supreme Court is due to consider whether state laws

banning the burning of crosses violate the right to free speech.

Canada's federal criminal code covers the dissemination of hate propaganda, incitement of hatred and wilful promotion of hatred. There is no federal legislation against hate speech, although this is currently the subject of public debate. Several provinces have enacted legislation against vilification on racial grounds. *The Race Relations Act* includes civil prohibition of insulting, humiliating or intimidating behaviour on racial grounds.

South Africa's constitution includes a right to human dignity, and an independent Human Rights Commission promotes observance of the constitution. A debate is currently in progress on the balance between freedom of expression and speech enshrined in the constitution, and the need to prevent racist material and speech.

### Racial violence

There are three approaches to dealing with racist violence. It can be treated as a general criminal offence; or there can be increased penalties for offences in which a racial motivation is established; and thirdly there can be specific racially-motivated offences.

The advantage of treating racial violence as a general offence is that there is no need to prove that the action was racially motivated. Such evidence is often difficult to obtain, and may make a successful prosecution more difficult. The advantage of having specific offences or increased penalties for racial motivation is that it makes it clear that the authorities regard them as particularly serious and unacceptable.

Germany, Norway, Spain, and Sweden do not have specific offences, but have increased penalties for offences in which racial motivation is an aggravating factor. Austria has promotion of National Socialist aims as an aggravating factor in the criminal code (Council of Europe, 1998).

Great Britain has some specific racially aggravated offences and provisions for evidence of racial motivation to be considered as an aggravating factor in other offences. Belgium too has specific offences of incitement to racial hatred or violence. Some states in the USA have enhanced penalties for hate crimes. However, some countries such as Australia, Canada, France and Denmark have no legislative basis for putting forward a racist motivation for violent offences.

### Recording and monitoring

There is no internationally comparable system for comparing racially motivated incidents. England and Wales have recently adopted a definition based on the perception of the victim as the basis for the collection of information on racist incidents. In Germany the Federal Criminal Police Agency and state police agencies record offences motivated by xenophobia, defined as acts committed against individuals because of their ethnic origin, colour or appearance. Coordination of detailed information about the incidence and nature of racist offences has been used to monitor and prevent the development of organised violent racist activities.

In the Netherlands, Anti-Discrimination Bureaux in over 40 cities collect information on racial harassment, violence and extremist activities, which are reported to the police. Regular liaison can enable the police to take preventive steps (Oakley, 1997). Norway's Centre for Combating Ethnic Discrimination monitors racially motivated crimes and the outcomes. Several

countries including Austria, France and Germany also monitor the activities of extremist groups (Oakley, 1996).

Keeping statistics is essential for prevention and reviewing the effectiveness of action, but it can also reveal uncomfortable facts about the extent of hate crimes. Because of the sensitivity of this data, some countries, for example, the Netherlands, do not publish it. There can also be considerable differences between the number of racist incidents reported to the authorities and those perceived to be racist by the victims. (For example see the 1996 British Crime Survey.) However, as reports by the Council of Europe show, many member states do not have adequate systems for recording and monitoring hate crimes.

In the United States, monitoring is required under the federal *Hate Crimes Statistics Act*. The data from states and law enforcement agencies is collated and published annually by the Federal Bureau of Investigation – although there is known to be substantial under-recording. There is no monitoring of hate groups themselves, as this would be perceived as an interference in the right of assembly (Cowl, 1995). Australia does not yet have a regular monitoring system for hate crimes, and considers that it has not reached crisis proportions. Although South Africa's recent main concern has been preventing politically motivated violence, there has been a history of state-sponsored racial violence under the apartheid system. The government has been considering the possibility of legislating to make incitement to racial hatred a criminal offence.

In summary, an international survey of legislation shows that there are few comparable statistics about hate activities because of the wide variety of different approaches to these matters. Legislation has tended to be enacted in response to specific outrages and not as a result of a coherent strategy or to implement the CERD obligations. Many countries allow the dissemination of racially insulting or derogatory material and intervene only when it becomes incitement to discriminate or to racial violence. A few countries ban specific extremist organisations and emblems, but most do not. Most allow racial motivation to be an aggravating factor in general criminal cases, and a few have specific racially motivated crimes.

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