

# Hate Crimes and Hate Speech: A Comparative Study

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**ABSTRACT:** Dignity is a precious asset that not only identifies us as free and equal human beings, but also allows us to live together in society. In fact, human dignity, together with the inviolable rights that are inherent to it, is an essential aspect of human civilization. For this reason, acts based on discrimination on various grounds (race, nationality, ethnicity, gender, sexual orientation, religion, social category or disadvantaged group, disability, political opinion or any other grounds) have taken on a new approach as hate crimes. The future will decide and demonstrate whether there is a need for separate criminalization, with its own *nomen juris*, of these offences or if the regulation provided by the states to date is sufficient, given that it is eclectic. The paper examines the legal landscape regarding hate crimes and hate speech in the European context, emphasizing the importance of a coordinated effort in hate crime prevention.

**KEYWORDS:** hate crimes, hate speech, offences, list of acts criminalized by the European Union

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## Introduction

In recent years it has been observed that offences based on discrimination on various grounds (race, nationality, ethnicity, gender, sexual orientation, religion, social or disadvantaged group, disability, political opinion or any other grounds) have gained a new approach as hate crimes. Hate speech is also referred to in the doctrine. Thus, theorists have argued that this is a new area of criminal law, that of crimes committed out of feelings of hatred towards other people (Abhjit 2017, 1-9), as well as the special needs of the victim of this category of crime.

At the European level, there are discussions about drafting legislation on the subject, although the procedure is rather laborious. The question arises, however, as to whether it is really necessary to create this category of crime in a somewhat artificial way, given that such offences are criminalized in the legislation of the Member States and in the legislation of all democratic states.

It is undeniable that any type of social relations (in the broad or narrow sense) must be characterized by the principle that every person must have a correct and equitable chance in life, not necessarily equal to the rest of the members of society. This equality of chances is, of course, premised on equal situations of studies, education, intelligence, but it also raises the legitimate questions: What are the barriers imposed by hatred or prejudice? What prevents some people from progressing, and are some of the obstacles represented by these prejudices? Is it necessary to create a new category of offences, or are those that already exist in national legislation sufficient? Can the idea of a specialized court to deal with hate or prejudice crimes be envisaged? Of course, it is not possible to provide answers to all these questions in this scientific approach, as opposed to the extensive answers required and based on a huge amount of research. Still, we will try to draw some conclusions on current trends and the need for a new category of offences.

### **1. Opinion of the European Committee of the Regions of 1 December 2022 - inclusion of hate speech and hate crimes in the list of offences criminalized by the European Union**

It is an obvious fact that during the SARSCOV-2 pandemic in particular, but also as a result of the exponential increase in the use of the internet and

social media platforms, hatred towards fellow human beings, for whatever reason, has progressively increased, which is a negative and unworthy aspect of human personality. Of course, this increase has been taking place for at least two decades, at least in Europe, but the situation is the same throughout the world. Hate feelings are not only directed at individuals, but also at groups of people who share a certain characteristic - for example, ethnicity, race, nationality, religion, gender, sexual orientation, etc.

In the context of the lockdowns during the pandemic, the sense of frustration experienced by so many people led to the explosion of hatred generated by fear, isolation, frustration, insecurity, disappointment, and dissatisfaction. As the European Union promotes multiple values, including inclusion, it is easy to see that hatred is not one of them, but on the contrary, criminal acts based on feelings of hatred must be vigorously repressed, including at European level and through criminal law. This is the political and social context in which the European Commission, in December 2021, proposed extending the list of offences provided for by EU law and listed in Article 83(2) of the Treaty on European Union. (1) TFEU (Treaty on the Functioning of the European Union) with hate crimes and hate speech (European Commission 2021, COM(2021) 777 final). A year later, the Opinion of the European Committee of the Regions of 1 December 2022 on the inclusion of hate speech and hate crime in the list of offences criminalized by the European Union was adopted (European Union 2022).

Both the Commission Communication and the Opinion are part of the cumbersome procedure laid down in Article 17(1) TEU (Treaty on European Union) proposed by the Commission to extend the list of offences referred to in Article 83(1) of the TFEU. The explanatory memorandum of the opinion refers to the fact that the way in which these offences are committed differs from one Member State to another and that there is a need for a strengthened response at European level to prevent and combat this type of offence. As in the case of the other offences referred to in Article 83(3), the Commission is proposing to set a minimum standard regarding the requirement of typicality of offences, as well as to impose a minimum or maximum limit on the applicable penalty. This effectively means defining these offences at (at least) a minimum level, by adopting directives for each specific area of regulation.

Thus, this text states: “(1) *The European Parliament and the Council, acting by means of directives in accordance with the ordinary legislative procedure, may establish minimum rules concerning the definition of criminal offences and sanctions in areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. (2) These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer-related crime and organized crime. (3) Depending on the development of crime, the Council may adopt a decision identifying other areas of crime meeting the criteria set out in this paragraph. The Council shall act unanimously after obtaining the consent of the European Parliament.*” (Treaty on the Functioning of the European Union 2012).

We note that this category provided for in the Treaty includes offences of a very serious nature and, without disputing the seriousness of hate crimes, we would point out that they are regulated in the legislation of all Member States and in the legislation of all democratic states governed by the rule of law. This is because such offences are premised on discrimination within the meaning of criminal law (Bitanga, Franguloiu, and Sanchez-Hermosilla 2018, 7). In addition, the question arises as to how the impact of criminalizing these offences will be assessed. The assessment is necessary in order to analyze the multiple options available for determining the anti-legality and typicality of the offences and the penalty regime.

Last but not least, the question arises of determining the impact of criminalization on fundamental rights (as laid down in the Charter of Fundamental Rights of the European Union), with particular reference to freedom of expression and freedom of the press and the media, which are the solid foundations of a democratic society, given that the SLAPP Directive (‘Strategic Lawsuits against Public Participation’) is in the process of being adopted; the package consists of the Proposal for a Directive on the protection of individuals involved in public mobilization actions against manifestly unfounded or abusive legal proceedings {“Strategic Lawsuits against Public Mobilization”}, accompanied by the Recommendation on the protection of journalists and human rights defenders engaged in public mobilization against manifestly unfounded or abusive legal proceedings, the two documents being complementary. It is true that this legislative package concerns civil law sanctions and the subject matter is slightly different, but we

should note that there are certain common points which cannot be analyzed in this paper, but which will be the subject of a future study by the authors).

## 2. Brief comparative analysis

### 2.1. USA

In the USA, there is a regulation of these types of offences in the Code & 249: “(1) OFFENCES INVOLVING RACE, COLOR, RELIGION OR ACTUAL OR PERCEIVED NATIONAL ORIGIN. *Whoever, whether or not acting under color of law, intentionally causes bodily injury to any person or, by the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person because of the actual or perceived race, color, religion, or national origin of any person: (A) is punishable by imprisonment for not more than 10 years, a fine under this title, or both; and (B) is punishable by imprisonment for any term of years or for life, a fine under this title, or both, if (i) the offense results in death; or (ii) the offense includes kidnapping or attempted kidnapping, aggravated sexual abuse or attempted aggravated sexual abuse, or attempted murder.*

(2) THE OFFENSE INVOLVES ACTUAL OR PERCEIVED RELIGION, NATIONAL ORIGIN, SEX, SEXUAL ORIENTATION, GENDER IDENTITY, OR DISABILITY.

(A) *In general. Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), intentionally causes bodily injury to any person, or by the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily harm to any person because of the actual or perceived religion, national origin, sex, sexual orientation, gender identity or disability of any person (i) shall be liable to imprisonment for a term not exceeding 10 years, a fine under this title, or both; and (ii) is punishable by imprisonment for any term of years or for life, a fine under this title, or both, if (I) the offense results in death; or*

*(II) the offense includes kidnapping or attempted kidnapping, aggravated sexual abuse or attempted aggravated sexual abuse, or attempted murder.*

(B) *Circumstances described. For purposes of subparagraph (A), the circumstances described in such subparagraph are as follows*

*(i) the conduct described in subparagraph (A) occurs during or as a result of the defendant’s or victim’s travel (I) across a State line or national border; or (II) using a conduit, facility, or instrumentality of interstate or foreign commerce;*

(ii) the defendant uses a conduit, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);

(iii) in connection with the conduct described in subparagraph (A), the defendant uses a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) the conduct described in subparagraph (A)(I) interferes with the business or other economic activity in which the victim is engaged at the time of the conduct; or (II) otherwise affects interstate or foreign commerce.” (US Department of Justice. 2009. Hate Crimes Prevention Act of 2009, 18 U.S. Code § 249).

We note that in the US, hate crimes have been regulated in the federal criminal code for quite some time, with hate motives related to race, color, religion, national origin, sex, sexual orientation, gender identity, or disability. The typicality requirements of the offence in either form are precisely described, although the offence can be committed in different forms, and the serious ones require a result, i.e., bodily harm or death of the person/ attempted murder or sexual abuse on these grounds.

## 2.2. United Kingdom

Similarly, in the UK (Crime and Disorder Act 1998 and section 66 of the Sentencing Act 2020), five types of hate crime are recognized with reference to race, religion, disability, sexual orientation, transgender identity. For the offence to exist, it is necessary simply to show hostility on the basis of any of these grounds, without the need to produce a result harmful to the person’s physical integrity or health, as in the USA.

## 2.3. Canada

In Canada, only hate speech is regulated: “Public incitement to hatred: 319 (1) Any person who, by statements made in a public place, incites hatred against an identifiable group, where such incitement is likely to lead to a breach of public order, is guilty of:

(a) an offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

Side note: Intentional promotion of hatred

(2) Any person who, by communicating statements, other than in private conversation, deliberately promotes hatred against an identifiable group, is guilty of:

(a) an offence and shall be liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

Side note: Intentionally promoting anti-Semitism

(2.1) Any person who, by communicating statements, other than in private conversation, deliberately promotes anti-Semitism by condoning, denying or minimising the Holocaust is guilty of:

(a) an offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.” (Minister of Justice Canada 2023. Criminal Code (R.S.C. (1985), ch. C-46).

It should be noted that in Canada there is no regulation of hate crimes, only hate speech in the sense noted by the concept “hate speech”.

However, in June 2021, the Minister of Justice and the Attorney General proposed a legislative amendment (from our research it has not yet been adopted) aimed at more effectively and efficiently combating both hate speech and hate crimes. In addition, the legislative amendment also addresses the need to provide more effective remedies for victims and for holding perpetrators criminally liable for the harm they cause by spreading hate. The bill also proposes amendments to the Canadian Human Rights Act and the Criminal Code and introduces related amendments to the Youth Criminal Justice Act.

We note that in Canada there is no express regulation of hate crimes with their own *nomen juris*, as there is in the USA and the UK.

#### 2.4. The Kingdom of Spain

In the Kingdom of Spain, hate crimes are regulated in Article 510 of the Criminal Code, in Section I, “Crimes committed in the exercise of fundamental rights and freedoms guaranteed by the Constitution,” Chapter IV “On rights relating to the exercise of fundamental rights and public freedoms”.

It is important to note that the Spanish legislation is also quite complex, in the sense that the typical offence describes multiple acts of conduct: “Those who encourage, promote or publicly incite, directly or indirectly, hatred, hostility, discrimination or violence against a group, part of a group or a specific person for reasons of: Group membership, racism, anti-Semitism, anti-Gypsyism or other grounds related to ideology, religion or belief, family status, member-

ship of an ethnic group, race or nation, national origin, sex, sexual orientation or gender identity or on grounds of gender, aporophobia, disease or disability.

Those who produce, prepare, hold for distribution, give third parties access to, distribute, disseminate or sell writings or any other material or media which, by reason of their content, are likely to encourage, promote or incite, directly or indirectly, hatred, hostility, discrimination or violence against a group, part of a group or a particular person, for the same reasons as in the previous point.

Those who publicly deny, grossly trivialize or glorify crimes of genocide, crimes against humanity or crimes against persons and property protected in armed conflict or glorify the perpetrators thereof, when committed against a group or part of a group or against a specific person for the same reasons as above, when doing so promotes or encourages a climate of violence, hostility, hatred or discrimination against them” (Ministerio de Justicia 2016, Criminal Code).

It should be noted that the Spanish system offers a unique, but also comprehensive regulation, in that it includes both hate crimes and hate speech, with a broad tipicity.

### 2.5. France

In France, hate crime does not have its own *nomen juris*, in the sense that it does not correspond to a certain legal qualification, on the grounds that the presence of a discriminatory motive for the act constitutes a circumstance which aggravates crimes and offences. The idea underlying the French system is based on the fact that the rationale of hate crimes has a special dimension and thus requires a technical legal approach. In criminal law, it is often said that motive is irrelevant, which means that, although it can sometimes shed light on the crime, it is rarely a factor in the legal qualification of the offence.

It is true that in the case of hate crimes the most important thing is to be able to objectify the motive and to establish, through identification and evidence, an intention which is sometimes a matter of feeling, which is quite difficult to prove objectively.

### 2.6. Romania

In Romania, similarly to the French system, there is not yet a separate regulation, in the sense of a proper *nomen juris* of hate crimes, but acts based on acts of discrimination, prejudice, are found in various incriminations, such as: the crime of torture provided for in Art. 282 para. (1) (d) of the



Criminal Code: “*The act of a public official who performs a function involving the exercise of state authority or of another person acting at the instigation of or with the express or tacit consent of the public official to cause physical or mental suffering to a person...on a ground based on any form of discrimination*”; the offence of abuse in the exercise of official authority provided by Art. 297 para. (2) of the Criminal Code – “*the act of a public official who, in the exercise of his duties, restricts the exercise of a right of a person or creates a situation of inferiority on the grounds of race, nationality, ethnic origin, language, religion, sex, sexual orientation, political affiliation, wealth, age, disability, chronic non-contagious disease or HIV/AIDS infection*”; and the offence of incitement to violence, hatred or discrimination provided for in Article 369 of the Criminal Code. – “*inciting the public, by any means, to violence, hatred or discrimination against a category of persons or a person on the grounds that he or she belongs to a particular category of persons defined on the basis of race, nationality, ethnicity, language, religion, gender, sexual orientation, political opinion or affiliation, property, social origin, age, disability, chronic non-contagious disease or HIV/AIDS infection, considered by the perpetrator as a cause of the person’s inferiority in relation to others*”. Before the amendment of article 369 of the Romanian Criminal Code, it stipulated that only incitement to hatred and discrimination, by any means, against a category of persons are considered crimes. In the current regulation of the Romanian Criminal Code, the legislator considered that the term *incitement* is much broader than that of *instigation* (Hegheş 2023, 82).

Regardless of how they are regulated, it is clear that these offences are committed simply in consideration of who the victim is, regardless of the reason - race, color, nationality, religion, gender or sexual orientation and other such reasons. In fact, these types of crimes are committed in consideration of the person who is injured, with regard to older or newer patterns of discrimination or prejudice against certain persons or communities of persons.

## Conclusions

The rights of all persons were enshrined long ago in the Universal Declaration of Human Rights (1948), which states in Article 1: “*all human beings are born free and equal in dignity and rights (...)*” and in Article 2 that “*everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*”

Subsequently, Protocol No 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR) provides in Article 1.1 that “*the enjoyment of all rights recognized by law shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*”, thus reflecting a description similar to that contained in Article 14 of the said Convention.

The Charter of Fundamental Rights of the European Union (2007), which has the same legal value as the Treaties, devotes the first article to stating that: “*Human dignity is inviolable. It must be respected and protected*”, while the principle of equality before the law is recognized in Article 20 and in Article 21(1) states that “*any discrimination based on any ground such as sex, race, color, 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*”

This teleological and systematic approach highlights the fundamental nature of dignity, which must be understood as the respect due to and the value to be accorded to every human being for the simple fact of being a human being. We are therefore talking about an inherent quality, which is recognized and protected, but not granted, and which is the premise for the free development of personality. This means, in fact, the free choice that each individual has to opt for a dignified life project, using his or her natural or acquired qualities, regardless of and independently of any other criteria.

Similarly, the Constitutional Court of the Kingdom of Spain has ruled in a judgment relevant to our approach, in which it stated that “*human dignity shapes the framework within which fundamental rights must be exercised*” (JTS No 235/2007).

However, we are obliged to recognize that a proper exegesis of the origin and basis of hate crimes cannot ignore the fact that equality and non-discrimination can only be seen as an expression of human dignity itself.

Seen from another perspective, dignity is a precious asset that not only identifies us as free and equal human beings, but also enables us to live together in society. In fact, human dignity, together with “*the inviolable rights inherent in it, the free development of the personality, respect for the law and for the rights of others*”, according to the Convention, is the basis of human civilization. Therefore, any criminal act motivated by hatred is and must be considered as affecting the whole system of rights and freedoms inherent in a democratic society.

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