Conclusion

Nineteenth century law is not necessarily bad law. But there have been significant changes in the way elections are contested and the expectations of the public since the provisions regarding election petitions were instituted.

There is a strong case for considering whether changes are required to the existing means of challenging election results, in particular:

- Whether costs and procedural barriers could be reduced.
- Whether the scope of misconduct challenges needs to be expanded, administrative challenges simplified, and appeal rights improved.
- Whether the distinction between election challenges and criminal proceedings is sufficiently clear.

The Law Commissions' review is considering these matters further, and the review will provide an opportunity for those interested to contribute their own views.

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Free speech and incitement to hatred on grounds of disability and transgender identity: the Law Commission's proposals

EU law; Freedom of expression; Inciting hatred on the grounds of sexual orientation; Inciting racial hatred; Inciting religious hatred; Law Commission; Protected characteristics; Racially aggravated offences; Religiously aggravated offences

A Law Commission report which does not recommend changing the current law might be thought an unlikely candidate for anyone's essential reading list.[1] However, it is revealing to examine the route by which the Commission reached its final view that the law on incitement to hatred should not be extended, especially when its earlier Consultation Paper identified a case in principle for doing so.[2]

As its name suggests, the Report covers a good deal more than extending the existing offences of incitement to hatred[3] on grounds of race, religion and sexual orientation to the new grounds of disability and transgender[4] identity. Indeed, a

[1] Law Commission, *Hate Crime: should the current offences be extended?* (May 2014), Law Com. No.348, Cm.8865. The project was referred to the Commission by the Ministry of Justice. The background to the reference is the Government's action plan: *Challenge it, Report it, Stop it: the Government's plan to tackle hate crime* (March 2012). In parallel to the hate crime action plan, the Government's *Prevent Strategy* (2011), Cm.8092, is designed to combat extremism. Plans to provide statutory guidance to specified authorities (including universities) on the duty to have "due regard to the need to prevent people being drawn into terrorism" under Pt 5 of the Counter-Terrorism and Security Act 2015 have been delayed until after the May 2015 general election.

[2] Law Commission, *Hate Crime: the case for extending the existing offences* (June 2013), Consultation Paper 213.

[3] The Commission describes these crimes as the "stirring up offences".

[4] The Commission explains that the reference to gender identity in its terms of reference was clarified to mean transgender identity (Law Commission, *Hate Crime: should the current offences be extended?*, p.2, fn.7). "Transgender" is generally understood to describe those whose gender identity, expression or behaviour is different from that typically associated with their assigned sex at birth. I shall refer to the grounds of race, religion, sexual orientation, disability and transgender identity collectively as the protected characteristics. These are not the only potentially protected

majority of the Report is not concerned with the incitement to hatred provisions at all, but with the aggravated offences in the Crime and Disorder Act 1998 (the 1998 Act) and the enhanced sentencing provisions in the Criminal Justice Act 2003 (the 2003 Act). Aggravated offences arise where a defendant has committed one of a list of offences of general application (such as assault, harassment or criminal damage) and that offence was either motivated by hostility towards a protected group or involved the expression of hostility to that group at or around the time of the commission of the offence. Under the existing terms of the 1998 Act, if hostility on the grounds of race or religion is demonstrated, the defendant is convicted of aggravated assault, harassment or criminal damage (as the case may be) and is then at risk of a higher maximum penalty in the form of a longer prison sentence or a higher fine. In these parts of the Report, the Commission considers extending the aggravated offences beyond the current grounds of race and religion to cover the protected characteristics of sexual orientation, disability and transgender identity. The principal alternative to extending the grounds of hostility under the existing aggravated offences is the sentencing regime established by the 2003 Act. The 2003 Act presently covers all five protected characteristics. The 2003 Act requires the court to treat hostility on these grounds as an aggravating feature of the crime in sentencing. However, the 2003 Act does not lead to a conviction for a distinct criminal offence (such as racially aggravated assault) and does not increase the *maximum* sentence available to the court.

The Commission concludes against extending the list of protected characteristics in the 1998 Act to create additional aggravated offences. Instead, the Commission favours improved guidance on using the sentencing regime, better recording of enhanced sentencing and a broader review of the aggravated offences.[5] The proposed review of aggravated offences is significant in relation to the Commission's proposals on incitement to hatred and I shall return to it.

Crimes motivated by, or involving the expression of, hostility towards particular groups undoubtedly raise complex questions of principle and criminal justice policy. However, the impact of such offences on free speech concerns (although present) is peripheral.[6] My concern in this paper is therefore with the Commission's proposals on incitement to hatred which plainly have a direct impact on freedom of expression. As stated above, the Report concludes that the existing offences should not be extended. The Commission's reasoning, in outline, was that there is no "clear evidence of the widespread existence of conduct intended or likely to stir up hatred on grounds of transgender identity or disability" and that such examples as do exist "would be capable of being prosecuted (and adequately sentenced) under the existing law".[7] I shall discuss two elements of the Report: first, the Commission's decision not to recommend a broader review of the incitement offences (which stands in marked contrast to its proposals relating to

characteristics for the purposes of hate crime laws generally and this issue is discussed further at fnn.33–34 below and associated text.

[5] Law Commission, *Hate Crime: should the current offences be extended?*, Ch.5. The recommendation of a "full-scale review" was not presaged in the Consultation Paper. The Commission's justification for a review is based on the narrowness of its terms of reference which did not include "the underlying rationale for the existing offences, … whether they should be amended prior to extension, or repealed rather then extended … [or] … whether the current legislation should be extended to include characteristics other than the five currently recognized ones" (Law Commission, *Hate Crime: should the current offences be extended?*, para.5.5).

[6] I. Hare, "Legislating Against Hate: the Legal Response to Bias Crimes" [1997] 17 O.J.L.S. 415, 426–431.

[7] Law Commission, *Hate Crime: should the current offences be extended?*, para.1.67.

the aggravated offences)[8]; and, secondly, the reliance placed upon European law to support the Commission's conclusions.

The decision not to recommend a broader review of the incitement offences

The Commission's terms of reference were limited to examining the case for extending the existing incitement offences to include stirring up hatred on grounds of disability or transgender identity.[9] These limitations severely circumscribed the Commission's field of inquiry. Thus, the Commission was not entitled to address: first, the question of whether the existing offences of incitement to hatred on grounds of race, religion or sexual orientation were themselves justified and should be maintained, amended, consolidated or repealed[10]; and secondly, whether there was a case for extending the offences to cover other protected characteristics beyond disability and transgender identity, the most obvious of which are gender and age.[11] This is particularly unfortunate since the incitement offences have never previously been the subject of the Commission's analysis and their introduction and extension has been piecemeal and inconsistent.[12]

History and rationale of the existing incitement offences

As is well-known, the offence of incitement to racial hatred was originally enacted in the Race Relations Act 1965 (the 1965 Act). The 1965 Act was principally concerned with racial discrimination and was introduced after a period of increased immigration to this country from the Indian sub-continent and the Commonwealth Caribbean.[13] The offence migrated in 1976 to the Public Order Act 1936 which

[8] Such a review in relation to incitement on the ground of disability was recommended in the Equality and Human Rights Commission's *Hidden in Plain Sight: Inquiry into disability-related harassment* (2011), p.154.

[9] Law Commission, *Hate Crime: should the current offences be extended?*, para.1.7.

[10] There are, of course, other models for dealing with hate speech than the use of the criminal law. For example, in Australia, the principal mechanism for addressing hate speech is through the use of the civil law: K. Gelber and L. McNamara, "Private litigation to address a public wrong: a study of Australia's regulatory response to 'hate speech'" [2014] C.J.Q. 307, 312–320. Other commentators advocate state-sponsored anti-hate and anti-discrimination policies which promote tolerance and the dignity of other ethnic and religious groups without banning any speech (for example, "Interview with Robert Post" in M. Herz and P. Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012), pp.22–26). See further, E. Heinze, "Hate Speech and the Normative Foundations of Regulation" (2013) 9 Int. J.L.C. 590, 604–606.

[11] Law Commission, *Hate Crime: should the current offences be extended?*, para.1.8. Incitement to hatred on grounds of gender is, for example, included the relevant French law (Loi 2004-1486 of December 20, 2004 portant creation de la haute autorite de lutte contre les discriminations et pour egalite).

[12] The introduction of the offence of incitement to religious hatred was preceded by the Select Committee on *Religious Offences in England and Wales*, First Report, Religious Offences in England and Wales (2002–2003 HL 95-I, April 10, 2003). The Select Committee was unable to reach a firm conclusion on whether incitement to religious hatred should be criminalised. The Public Order Act 1986 was preceded by a Law Commission report (*Criminal Law: Offences Relating to Public Order* (1983), Law Com. No.123), but it did not address the incitement offences. The Law Commission's 1985 report recommending the abolition of the offence of blasphemy included a dissent which proposed a new offence of publishing grossly abusive or insulting material relating to a religion with the purpose of outraging religious feelings (*Criminal Law: Offences against Religion and Public Worship* (1985), Law Com No.145). The proposal therefore protected religious feelings rather than individuals or groups from hatred. No aspect of the report was implemented. See further, I. Hare, "Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine" in I. Hare and J. Weinstein (eds), *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009), pp.289–305 and J. Temperman, "Blasphemy, Defamation of Religions and Human Rights Law" (2008) 26 *Netherlands Quarterly of Human Rights* 517. The Consultation Paper contains an extremely useful "History of hate crime legislation" at Appendix B, paras B.54–B.260 of which address the stirring up offences.

[13] The background to the offence of incitement to racial hatred is described in greater detail in P. Leopold, "Incitement to Hatred-The History of a Controversial Criminal Offence" [1977] P.L. 389; D. Williams, *Keeping the Peace: the Police and Public Order* (London: Hutchinson, 1967), pp.169–178; and A. Lester and G. Bindman, *Race and Law* (Harmondsworth: Penguin, 1972), pp.344–360 (who point out, at p.344, that the purpose of the 1965 Act cannot for

may suggest that its rationale had more to do with discouraging public disorder than combating discrimination.[14] The offence itself does not, of course, require any consequential action by the audience (whether in terms of discriminatory action or disorder), but merely that the expression was likely to stir up feelings of hatred towards the relevant group. The mixed motives which underlie the incitement offences stretch back to what is usually regarded as their common law antecedent in the law on seditious libel. For example, *The King v Osborne*[15] concerned a scurrilous paper stating that a group of Portuguese Jewish immigrants had burned a woman and her child because the father was a Christian. The court held that the publication tended to

> "raise tumults and disorders among the people, and inflame them with a spirit of universal barbarity against a whole body of men".[16]

Proposals to introduce an offence of incitement to religious hatred date back to 1936, but it was a further 70 years before the offence came into force.[17] The Government's justification for the new offence was an amalgam of arguments based on the alleged collective and individual effects of incitement to hatred: "discrimination, abuse, harassment and ultimately crimes of violence".[18] A further element of the argument in favour of extending incitement to cover religious hatred was that the existing common law offence of blasphemy (which covered only the Church of England) discriminated against other non-established religions.[19] An irony of this argument is that the law of blasphemy was swept away by a

long have been that of prohibiting incitement to discrimination as this became a distinct wrong shortly thereafter by virtue of s.12 of the Race Relations Act 1968). The offence of incitement to racial hatred in fact includes a number of distinct offences, covering the use of: words or behaviour; visual images; sounds; theatrical productions; and other material.

[14] The Race Relations Act 1976 replaced the 1965 Act and transferred the offence to s.5A of the 1936 Act. The offence then moved to Pt III of the Public Order Act 1986 (the 1986 Act) where it presently resides. D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn (Oxford: Oxford University Press, 2002), p.1049 describes s.18 of the 1986 Act (acts intended or likely to stir up racial hatred) as "a public order offence only in the loosest sense, since it can be committed in private premises, and need not lead to any (or any immediate) disorder". This is true although if the defendant is in a dwelling, the words or behaviour must be audible or visible from outside that or another dwelling. The MacPherson Report into the death of Stephen Lawrence recommended that the offence should be extended to conduct which took place and was perceived entirely in a dwelling (*Report of an Inquiry by Sir William MacPherson of Cluny* (1999), CM.4262I, p.331, recommendation 39).

[15] *The King v Osborne* (1732) Kel. W. 230.

[16] *Osborne* (1732) Kel. W. 230, as quoted in The Law Report at p.230 states, that the publication tended to create: "a Breach of the Peace, in inciting a Mob to the distruction [sic] of the whole Set of People … it will be pernicious to suffer such scandalous Reflections to go unpunished". In rejecting an appeal against sentence for publishing a comic strip which was found to incite racial hatred contrary to the Race Relations Act, Lawton LJ stated that the publication was "also contrary to the common law of England because it amounts to sedition, in the sense that it arouses hatred against one section of Her Majesty's subjects": *R. v Edwards* (1983) 5 Cr. App. R. (S.) 145 at 148.

[17] The Religious Hatred Act 2006 introduced new ss.29A–29N to the 1986 Act. It entered into force on October 1, 2007. The background is described in I. Hare, "Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred" [2006] P.L. 520, 522–526.

[18] Paragraph 69 of the letter from Caroline Flint MP, Parliamentary Under Secretary of State for the Home Office (February 3, 2005) in response to the Joint Committee on Human Rights' Fourth Report, *First Progress Report* (2004–2005 HL 26/HC 224).

[19] A further argument was that the law on incitement to racial hatred provided protection for those religious groups which constitute an ethnic group (such as Jews or Sikhs), but not for Muslims, Christians or Sikhs whose ethnic origins are more diverse. *R. v Chief Metropolitan Stipendiary Magistrate Ex p. Choudhury* [1991] 1 Q.B. 429; (1990) 91 Cr. App. R. 393. See J. Waldron, "Rushdie and Religion" in J. Waldron (ed.), *Liberal Rights-Collected Papers 1981–1991* (Cambridge: Cambridge University Press, 1993) and C. Munro, "Prophets, Presbyters and Profanity" [1989] P.L. 369.

combination of judicial decision and legislative abolition within two years of the passing of the Religious Hatred Act 2006.[20]

Proposals for an offence of incitement to hatred on grounds of sexual orientation were first mooted in 2001 and were enacted in 2008 along similar lines to the religious hatred provision.[21] In the debates on the new offence, the Government appeared to have been impressed with the evidence put forward by the campaign group Stonewall that the amount of homophobic abuse and violence had increased and that there was a gap in the existing law.[22]

In the course of the debates about the introduction of each of these offences, no coherent account has been given as to why protection against incitement to hatred should be confined to the three characteristics of race, religion and sexual orientation.

Equally, there has been no clear enunciation of the principled basis for the incitement offences and their consistency with the right to freedom of expression. To its credit, the Commission sought to address this: by producing an appendix to the Consultation Paper on the European Convention on Human Rights (ECHR); and by commissioning a paper by Dr John Stanton-Ife on the "underlying theoretical, mainly normative, arguments *for* the extensions" of the existing incitement offences.[23] However, neither document addresses the core of the free speech case against the incitement provisions.

As is described elsewhere,[24] the ECHR provides very limited protection for hate speech for a number of reasons related to its specific structure and development (and to the history of international human rights law in general). In particular, the origins of the ECHR as a bulwark against the rise of fascism, the presence of art.17 (which prohibits the abuse of rights contained in the Convention) and the doctrine of the margin of appreciation combine to produce thin and inconsistent protection for extreme speech.[25] Although the Commission's reliance on the ECHR as a statement of positive law is understandable, the ECHR doctrine provides a poor guide to any normative assessment of what the appropriate limits on hate speech

[20] *R. (on the application of Green) v City of Westminster Magistrates' Court* [2007] EWHC 2785 (Admin); [2008] E.M.L.R. 15 (concerning the staging of *Jerry Springer: The Opera*) and s.76 of the Criminal Justice and Immigration Act 2008.

[21] The proposals were made in the debates which preceded the Anti-Terrorism, Crime and Security Act 2001. The offence was inserted in Pt IIIA of the 1986 Act by the Criminal Justice and Immigration Act 2008.

[22] See Maria Eagle MP in *Hansard*, HC cols 681–710 (November 29, 2007). The Government previously rejected the suggestion that the incitement offences should be extended to cover disability and transgender status on the basis that there was insufficient evidence that hatred was being stirred up against them: Ministry of Justice, *Circular 2010/05-Offences of Stirring up Hatred on the Grounds of Sexual Orientation* (2010), para.20.

[23] Appendix A: *Hate Crime and Freedom of Expression under the European Convention on Human Rights* and J. Stanton-Ife, "Criminalising Conduct with special reference to potential offences of stirring up hatred against disabled or transgender persons", para.2 (available on the Commission's website, *http://lawcommission.justice.gov.uk/docs /Hate_Crime_Theory-Paper_Dr-John-Stanton-Ife.pdf* [Accessed April 29, 2015]).

[24] I. Hare, "Extreme Speech under International and Regional Human Rights Standards" in Hare and Weinstein (eds), *Extreme Speech and Democracy* (2009), pp.76–79.

[25] For example, the European Court of Human Rights relied on art.17 to hold that displaying a poster in the window of one's house with an image of the World Trade Centre in flames, a crescent and star surrounded by a prohibition sign and the words "Islam out of Britain" and "Protect the British People" was excluded from the scope of art.10 of the ECHR altogether (*Norwood v United Kingdom* (2005) 40 E.H.R.R. SE11). See J. Weinstein, "Extreme Speech, Public Order and Democracy: Lessons from The Masses" in Hare and Weinstein (eds), *Extreme Speech and Democracy* (2009), pp.44–52. On art.17, see M.E. Villiger, "Article 17 ECHR and Freedom of Speech in Strasbourg Practice" in J. Casadevall, E. Myjer, M. O'Boyle and A. Austin (eds), *Freedom of Expression: Essays in honour of Nicolas Bratza* (Wolf Legal Publishers, 2012), pp.321–329 and, more generally, T. McGonagle, "A Survey and Criticial Analysis of Council of Europe Strategies for Countering 'Hate Speech'" in Herz and Molnar (eds), *The Content and Context of Hate Speech* (2012), pp.22–26.

should be as a matter of domestic law. I shall return briefly to the Commission's reliance on the ECHR below.

Dr Stanton-Ife's paper provides an admirable account of the basis in traditional criminal law theory for extending the incitement offences to cover disabled or transgender persons, but contains very little on free speech. The paper does refer to Mill's defence of free speech in *On Liberty* based on the advancement of truth.[26] However, this is a very limited account of free speech theory. The paper does not address other and more relevant theories of free speech, in particular, those based on the individual right to participate in democratic governance which are generally inconsistent with prohibitions on hate speech.[27] A further benefit of a full-scale review of the incitement offences would have been the opportunity for the Commission to engage with the re-invigorated debate about the desirability of hate speech laws.[28]

Another effect of the incremental growth of the incitement offences is that they are now inconsistent in various ways.[29] The offences of incitement on the grounds of religion and sexual orientation are significantly narrower than incitement to racial hatred at least three significant ways. First, they require proof of "threatening" words or behaviour (rather than the broader "threatening, abusive or insulting" formula).[30] Secondly, they require proof that the defendant "intends … to stir up … hatred" by use of the relevant words or behaviour (without the alternative to intention that "hatred is likely to be stirred up" by the words or behaviour). Thirdly, they contain a clause intended to protect freedom of expression.[31] The free speech clause relating to religious hatred provides:

> "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."[32]

Despite these important differences (which might suggest that incitement to hatred on grounds of religion and sexual orientation are more serious offences), the penalty

[26] Stanton-Ife, "Criminalising Conduct with special reference to potential offences of stirring up hatred against disabled or transgender persons", paras 81–110. J.S. Mill, *On Liberty* (Harmondsworth: Penguin, 1985) on which, see P. Wragg, "Mill's dead dogma: the value of truth to free speech jurisprudence" [2013] P.L. 363.

[27] For general accounts of free speech theory, see F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982) and E. Barendt, *Freedom of Speech*, 2nd edn (Oxford: Oxford University Press, 2005).

[28] See Hare and Weinstein (eds), *Extreme Speech and Democracy* (2009); Herz and Molnar (eds), *The Content and Context of Hate Speech* (2012); and J. Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press, 2012).

[29] Consistency (and its corollary, certainty) is generally considered to be a desirable characteristic of the law in general (G.P. Fletcher, *Basic Concepts of Legal Thought* (Oxford, Oxford University Press, 2012), Ch.12) and criminal law in particular (see A. Ashworth and J. Horder, *Principles of Criminal Law*, 7th edn (Oxford: Oxford University Press, 2013), Ch.3).

[30] The breadth of this formula is now even more striking since the word "insulting" was removed from the phrase in s.5 of the 1986 Act by the Crime and Courts Act 2013.

[31] Compare s.18 to s.29B of the 1986 Act.

[32] Section 29J of the 1986 Act. The equivalent provision on sexual orientation (s.29JA) provides: "(1) 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. (2) 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."

for all incitement provisions is the same: a maximum of seven years imprisonment for conviction on indictment.[33]

More broadly, there is a further level of inconsistency in the protected characteristics covered by hate crimes. As we have seen, the aggravated offences under the 1998 Act are limited to race and religion; whereas the sentencing provisions of the 2003 Act and the police, prosecution and other agencies' policies on recording hate crimes also cover sexual orientation, disability and transgender.[34]

The equality argument for extending the incitement offences

As stated above, the second effect to the Commission's limited terms of reference was that it could not address the merits of extending the list of characteristics protected from incitement to more closely mirror the list of prohibited grounds under the Equality Act 2010 (which also covers gender and age). There is a substantial body of evidence that incitement to hatred on grounds of gender is a significant phenomenon.[35] There is less material on incitement to hatred on grounds of age. However, this may simply reflect the fact that age has relatively recently been added to the list of protected characteristics and, in contrast to the range of statutory and voluntary organisations who deal with discrimination issues on grounds of race, gender, sexual orientation or disability, there is not yet a developed body of research to support campaigning. In any event, the argument as a matter of principle is clear: if Parliament has considered that individuals and groups should be protected from suffering detriment in relation to employment and other social goods on the grounds of gender and age, why should they not also enjoy the equal protection of the criminal law in relation to discriminatory incitement to hatred against them? The corollary of this is that certain characteristics are perceived as more worthy of protection if there is any inconsistency in the scope of the conduct prohibited by equality and incitement laws.[36]

The Commission did address a version of the argument based on equal coverage for the protected characteristics within the field of hate crimes generally. Thus, some of those who responded to the Commission's consultation argued that the incitement offences should mirror the sentencing regime under the 2003 Act which extends to all five of the protected characteristics.[37] The Commission did not accept this argument on the grounds: that the 2003 Act constituted its own unified regime and incitement offences developed separately; that new incitement offences would involve criminalising conduct which was not already criminal; and that there were free speech concerns about extending the incitement offences. All other things

[33] Sections 27 (race) and 29L (religion and sexual orientation).

[34] For example, Crown Prosecution Service, *Hate crime and crimes against older people report 2013–2014* (2014), *http://www.cps.gov.uk/publications/docs/cps_hate_crime_report_2014.pdf* [Accessed April 29, 2014]. As is clear from its title, although not included in the CPS' formal definition of hate crimes, this report also provides data on crimes against older people.

[35] For example, K. Weston-Scheuber, "Gender and the Prohibition of Hate Speech" (2012) 12 Q.U.T. Law and Justice Journal 132, 139–143.

[36] I do not advocate extending incitement to hatred to other protected characteristics. However, the present inconsistency of coverage between the equality legislation and the incitement provisions is further reason to reconsider whether the existing provisions are justified. Some commentators reject the argument based on equal coverage in favour of an argument that extending the law to cover, for example, incitement to hatred on the grounds of disability is required by other legal norms, such as art.16 of the (unincorporated) United Nations Convention on the Rights of Persons with Disabilities (A. Dimopoulos, "Balancing Disability Protection Against Freedom of Speech: Should an Offence of Incitement to Disability Hatred be Introduced?" [2015] P.L. 79).

[37] Law Commission, *Hate Crime: should the current offences be extended?*, paras 7.12–7.16.

being equal, it might be thought that the piecemeal development of the incitement offences was an argument in favour of introducing greater consistency, rather than an argument against it and that this provides a further reason for recommending a broader review of the incitement offences generally. The other reasons relied on by the Commission for distinguishing incitement from the aggravated offences lead on to the second part of this paper.

The Commission's reliance on European law

By European law, I mean both the law of the EU and art.10 of the ECHR.

As regards EU law, the most relevant provision is the Council of the European Union's Framework Decision on racism and xenophobia (the Framework Decision).[38] The Commission relies on this document as requiring the UK to criminalise incitement to hatred on grounds of race and religion and as part of its justification for not recommending the further extension of the incitement offences.[39] I consider that the Commission over-stated what the Framework Decision actually requires and that this undermines the distinction drawn by the Commission between incitement to hatred on grounds of race and religion and the other protected characteristics for the following reasons.

First, it is at best (and obviously) only a retrospective and partial justification for the domestic offence of incitement of racial hatred: retrospective because, as we have seen above, incitement to racial hatred has been on the statute book for almost fifty years; and partial because, unlike the Framework Decision, the offence is not confined to "intentional conduct". Secondly (and just as obviously), it provides no justification for the existing offence of incitement to hatred on grounds of sexual orientation. Thirdly, it does not require criminalising incitement to religious hatred except where the conduct is "a pretext for … acts against … [those] … defined by reference to race, colour, descent, or national or ethnic origin".[40] As explained above, the current English law is not subject to this limitation. More importantly, and fourthly, it is not clear that the Framework Decision requires there to be separate offences of incitement to hatred at all. It is true that art.1(1)(a) requires each Member State to take measures to ensure that "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 origins" shall be punishable. However, this is subject to two crucial caveats in the Framework Decision itself.

First, art.1(2) preserves a discretion for Member States to choose to punish only conduct which is "carried out in a manner likely to disturb public order".[41] As such, it would be entirely open to the UK to maintain that its existing public order

[38] Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal was adopted unanimously on November 28, 2008 after seven years of negotiations. The origin of the Framework Decision lies in the attempt to provide more coherent criminal laws across the Member States (see the *Council of the European Union's Joint Action* (96/443/JHA)).

[39] Law Commission, *Hate Crime: should the current offences be extended?*, para.7.22.

[40] Article 1(3) expresses this as the minimum level of protection required.

[41] This provision provides a choice between two options: either conduct likely to disturb public order or which is threatening, abusive or insulting. The latter option was presumably inserted at the insistence of the UK. However, it highlights the anomaly that the domestic law on incitement to hatred on grounds of religion and sexual orientation may only be committed by the use of threatening words or behaviour (and not, in addition, abusive or insulting words or behaviour as are sufficient for the offence of incitement to racial hatred).

offences (with enhanced sentencing for those motivated by hostility towards racial or religious groups) fulfil its obligations under the Framework Decision. This is how the UK has chosen to implement the Framework Decision in relation to its additional requirement to criminalise "publicly condoning, denying or grossly trivializing" crimes of genocide, crimes against humanity, war crimes and crimes against peace directed against groups or persons defined by race or religion and where such conduct is likely to incite violence or hatred against such a group or its members.[42] The UK has discussed and rejected laws prohibiting, for example, Holocaust denial. The UK has explained that it punishes such conduct conformably with the Framework Decision by means of its existing public order offences read with the enhanced sentencing provisions of the 2003 Act.[43] There is no reason why this response would not hold true for incitement to racial and religious hatred too.

The second caveat is that art.7(2) makes clear that the Framework Decision shall not have the effect of requiring Member States to take measures "in contradiction to fundamental principles relating to … freedom of expression". It is therefore open to a state to maintain that legislating against incitement to hatred which is not likely to lead to public disorder would be contrary to its commitment to the protection of free speech.

As such, it is at least questionable whether the Framework Decision in fact requires there to be specific laws against incitement to racial and religious hatred. If so, the Commission's reliance on this obligation as part of its justification for declining to recommend an expansion of the protected characteristics is misplaced.

The Commission also relies on arguments about the impact of extending the incitement offences on freedom of expression. As stated above, the Commission takes art.10 of the ECHR as its guide to the appropriate limits of free speech. The Commission then proceeds to analyse the proposal to extend the incitement provisions by reference to the familiar ECHR method: identifying whether there would be an interference with the right in art.10(1); considering justification by reference to the list of legitimate aims in art.10(2) (in this case, securing public safety, preventing disorder and crime and protecting the rights of others); and then, whether the new offences are necessary in the democratic society in the sense that they fulfil a pressing social need and go no further than is necessary to fulfil that need. It is in relation to this last stage of justification that the Commission's reasoning reveals a paradox. The Commission stated (no doubt correctly on the current law) that the new offences would not infringe art.10 of the ECHR. However, the Commission then goes on to conclude that

> "as a matter of general principle, it would be undesirable to introduce further restrictions on freedom of expression in the absence of a clearly demonstrated practical need".[44]

[42] These obligations are contained in art.1(1)(c) and (d) of the Framework Decision and defined by reference to arts 6, 7 and 8 of the Statute of the International Criminal Court and art. 6 of the Charter of the International Military Tribunal (appended to the London Agreement of August 8, 1945). See M. Whine, "Expanding Holocaust Denial and Legislation Against It" in Hare and Weinstein, *Extreme Speech and Democracy* (2009).

[43] *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law* (COM (2014) 27 final) (January 27, 2014).

[44] Law Commission, *Hate Crime: should the current offences be extended?*, para.7.52.

In other words, the Commission took the view that there was no "pressing social need" for the new offences while at the same time accepting that test of justification under the ECHR would be made out. This demonstrates that, even on the Commission's own reasoning, the ECHR jurisprudence does not provide sufficient protection for free speech.

Conclusion

In light of the inconsistencies in the current law and the limitations of its terms of reference, it is very surprising that the Commission did not recommend a full-scale review of the incitement provisions as well as of the aggravated offences. If anything, for the reasons given above, the case for such a review is even more compelling in relation to the incitement offences. This is a missed opportunity, especially if the Commission's proposal for a review of the aggravated offences is accepted by the Government. It would be extremely undesirable for the link between the aggravated offences and the incitement provisions (which the present Report affirms) were to be broken. Such a review would also allow for a more detailed and principled consideration of the impact of incitement offences generally on the protection of free speech in the context of the UK's international legal obligations.

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The Supreme Court's renewed interest in autochthonous constitutionalism

Common law rights; Constitutional Acts; Constitutional law; EU law; Human rights; Supreme Court

Over the past three decades, the UK Constitution has undergone a series of significant changes to accommodate the "incoming tide" of European law.[1] The judiciary has often played a leading role in this regard, modifying or supplementing longstanding constitutional principles to strengthen the effectiveness of European law in the domestic sphere. In the *Factortame* cases,[2] the House of Lords exempted the European Communities Act 1972 (ECA) from the doctrine of implied repeal to ensure that the UK would comply with its obligations under European Community law. In cases such as *R. v A (No.2)*[3] and *Ghaidan v Godin-Mendoza*,[4] the House of Lords departed from the standard approach to statutory interpretation, adopting an expansive construction of s.3 of the Human Rights Act 1998 (HRA), to enlarge the ability of UK courts to provide domestic remedies to victims of rights violations under the European Convention on Human Rights (ECHR).

[1] *HP Bulmer Ltd v J Bollinger SA (No.2)* [1974] Ch. 401 at 418; [1974] 2 C.M.L.R. 91 (Lord Denning MR).
[2] *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.1)* [1990] 2 A.C. 85; [1989] 3 C.M.L.R. 1; *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.2)* [1991] 1 A.C. 603; [1990] 3 C.M.L.R. 375.
[3] *R. v A (No.2)* [2001] UKHL 25; [2002] 1 A.C. 45; [2001] 2 Cr. App. R. 21.
[4] *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557; [2004] H.R.L.R. 31.