Equality Coalition

Incitement to Hatred in Northern Ireland

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I RANTED to the knave and fool,

But outgrew that school,
Would transform the part,
Fit audience found, but cannot rule
My fanatic heart.

I sought my betters: though in each
Fine manners, liberal speech,
Turn hatred into sport,
Nothing said or done can reach
My fanatic heart,

Out of Ireland have we come.
Great hatred, little room,
Maimed us at the start.
I carry from my mother's womb
A fanatic heart.

WB Yeats 'Remorse for Intemperate Speech

Contents

Terms of Reference

This research was commissioned by the Equality Coalition. The terms of reference for the paper were:

- To produce a report critiquing the application and effectiveness of current implementation of human rights obligations in Northern Ireland to tackle expression[1] that constitutes advocacy of hatred on protected grounds (ethnicity, religion, sexual orientation, disability).[2]

- To set out the intended scope of provisions in international human rights standards regarding combating incitement to hatred on protected grounds, including:

    - Article 20 International Covenant on Civil and Political Rights (ICCPR) and the UN Rabat Programme of Action;
    - Article 4 International Convention on the Elimination of all forms of Racial Discrimination (ICERD) and General Recommendation 35;
    - Key Council of Europe mechanisms including European Commission against Racism and Intolerance (ECRI) and European Court of Human Rights (ECtHR) case law;

- To set out the scale of the problem of advocacy of hatred on protected grounds in Northern Ireland, and current threats of continuation and exacerbation, including in the contexts of paramilitary involvement and Brexit;

- To set out the evolution of incitement to hatred legislation in Northern Ireland with the Prevention of Incitement to Hatred Act (Northern Ireland) 1970 and subsequent Part III Public Order (NI) Order 1987; and critique the application of the 1987 Order;

- To examine and critique the broader processes related to activities involving or following incitement to hatred on protected grounds:
    - The use of public funds or facilities for activities and organisations;
    - The use and financing of paramilitary informants in activities;
    - The processes used to deal with threats for housing eviction;
    - Executive action to remove offending materials;

- To make recommendations for reform of the scope and application of Part III of the Public Order NI Order along with other duties including the 'good relations' duty, to ensure compliance with international standards and increase effectiveness;

- To present the report at a forthcoming Equality Coalition conference.

[1] Speech but also other forms of expression regarded as problematic in Northern Ireland including that linked to assemblies, bonfires, online expression.

[2] The report was to focus specifically on the issue of countering expression and not for the increased sentencing for offences aggravated by hostility under Article 2 of the Criminal Justice (No. 2) (Northern Ireland) Order 2004 often referred to informally as hate crimes legislation.

Introduction

The concept of incitement to hatred has a long and complex genealogy. Historically it was identified as a core element of the crimes against humanity associated with Nazism. Most early jurisprudence focussed on this kind of specifically racist incitement – and the notion that it resulted in profound and systemic acts of violence including genocide. Increasingly, however, the term gets conflated with a raft of actions characterised as both 'hate crime' and 'hate speech'. More recently it has become increasingly permissive in reference – overlapping race with a whole range of other protected characteristics – sexuality, age, physical appearance and so on – as well as addressing incidents that appear comparatively trivial. In this context, it is often the target of populist attacks on 'political correctness gone mad'. Moreover, in this guise, it is often counterpoised with 'freedom of expression'.

None of these wider developments or complexities makes the issue of addressing incitement to hatred in Northern Ireland a simple task. We can, however, emphasise from the first that a key element in any assessment of what to do about incitement to hatred is the process of defining and delimiting that which is to be addressed as incitement. Moreover, in terms of the seriousness with which such expression is regarded, we can identify a continuum of constructions from 'banter' to 'crimes against humanity'. A key task for any human rights intervention on incitement is the assessment of where on that continuum any speech acts sit – whether in Northern Ireland or elsewhere in the world.[3]

Incitement to Hatred has been unlawful in Northern Ireland since 1970. Despite this, there have been few prosecutions – and even fewer convictions. Of course, this might be taken as an indication of the effectiveness of the legislation as *deterrence* from incitement to hatred. This argument, however, does not bear much scrutiny – whatever perspective is adopted, there is a broad consensus that there is a volume of 'hatred' in Northern Ireland. On an historical scale, Irish history is often regarded as being defined by hatred. Thus, the whole of recorded Irish history can be characterised as, 'a heritage of hate' and thirty years of conflict in Northern Ireland as 'mirror hate'. This meme permeates both culture and politics. We find WB Yeats' characterisation, 'Out of Ireland have we come. Great hatred, little room, maimed us at the start.' reprised as Jonathan Powell's 'Great Hatred, Little Room' and Boney M's 'Belfast'.[4] Thus from the sublime to the ridiculous it has been routine to characterise Northern Ireland as a place defined by hate.

[3] BBC News 2015. 'Donald Trump: Free speech v hate speech' 8 December 2015 http://www.bbc.co.uk/news/world-us-canada-35041402

[4] 'When the hate you have for one another's past … You can try to tell the world the reason why'.

Nor has this reality been transformed by the peace process and the Good Friday Agreement (GFA). If anything, there has been a greater focus on hatred and hate crime *since* the GFA than before it. This reflects reality 'on the ground'.[5] Recent PSNI figures suggested that there were nearly eight hate crimes per day in Northern Ireland.[6] Amnesty International made a specific intervention on this issue.[7] This recent 'surge' compounded ongoing concerns around racist violence in Northern Ireland over the last fifteen years. This has seen Northern Ireland routinely presented as the 'race hate capital of Europe' with Belfast characterised as 'the most racist city in the world'. In 2009 a series of attacks on migrant workers included an episode that was characterised as an anti-Roma pogrom. In the wake of these attacks, 'up to 30 PSNI members took part in the pioneering anti-fascist training seminar' at which it was reported that the trainer suggested, 'there was a danger of a new war to replace the old one'.[8] In other words some observers – including the police – were lending their support to the contention that racial hatred had reached critical levels. Over the same period, homophobic and disablist hate crime was also being addressed for the first time.[9]

Alongside these new developments, there was a continued integrity to more traditional hatreds. Most obviously in terms of incitement to hatred, we find the 'genocidal imperative' – 'KILL ALL HUNS' and 'KILL ALL TAIGS' routinely graffitied across Northern Ireland. In short, it would be difficult for anyone to argue that there is not a 'problem' with hate and hatred in contemporary Northern Ireland. In other words, it is not the absence of hatred in Northern Ireland that explains the absence of prosecutions for incitement to hatred. There is obviously something else going on – if the law is intended to prevent the profusion of hatred, it is not working very well.

This reality has already been widely recognised. Both the Human Rights Commission and PSNI have called for the law to be reviewed, as have CAJ and other NGOs. In September 2015, the Chief Constable told the Northern Ireland Policing Board that the PSNI wanted a review of the legislation with a view to the legal regime being simplified. The Chief Constable urged the 'legislative authority in Northern Ireland to consider this matter urgently.'

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[5] *Irish News* 'Ulster Awake leaflets distributed in Co Antrim branded racist' 13 September 2016 http://www.irishnews.com/news/2016/09/13/news/ulster-awake-leaflets-branded-racist-692396/

[6] *ITV News* 'Almost eight hate crimes per day in Northern Ireland' 30 August 2016. http://www.itv.com/news/utv/2016-08-30/almost-eight-hate-crimes-per-day-in-northern-ireland/

[7] 'Northern Ireland: Amnesty International concern at hate crime figures' *Press Release* 26 August 2016. https://www.amnesty.org.uk/press-releases/northern-ireland-amnesty-international-concern-hate-crime-figures

[8] *Observer* 'Northern Ireland at risk of a 'race war', anti-fascist campaigner warns police' 6 September 2009.

[9] *Irish News* 'PSNI probe homophobic leaflets distributed in Derry' 4 February 2016 http://www.irishnews.com/news/2016/02/04/news/psni-probe-homophobic-leaflets-distributed-in-derry-405538/

The Justice Minister set that process of review in train before the most recent collapse of the Northern Ireland Executive.

But can the prohibition on incitement to hatred be made to work more effectively? And what would this new intervention look like? This is core problematic of our research.

The nexus of incitement and hatred

It is at least possible that there is lots of hatred but little incitement in Northern Ireland. If hate is generated through means other than incitement - for example education or culture - then it might have little to do with incitement at all. Unless we argue that incitement is a necessary condition for hatred, we must begin to identify the causal relationship between incitement and hatred before we can attempt to address incitement. Thus, we must ask to what extent is the specific notion of *incitement* connected to the undoubted ubiquity of hate-related violence in Northern Ireland? In other words, how central is the specific function of 'stirring up' to the broad sociology of hatred and violence?

The law around incitement to hatred is complex. The term is also becoming more permissive as it is extended to cover more and more grounds including sexuality and disability. Furthermore, differences within domestic and international legislation mean that the notion of incitement to hatred can signify different things in different contexts. At its heart, however, incitement to hatred was problematised in the context of Nazism and its specific connection to racist violence. This history provides a necessary corrective to the notion that one person's incitement to hatred is another person's 'banter'. The original jurisprudence on incitement to hatred was a consequence of racism and its relationship to genocide and crimes against humanity. This focus has been sometimes lost in recent developments with the ever-widening use of 'hate' to both problematise and explain a whole range of different social tensions.

This new sensitivity toward different forms of 'hate crime' is reflected in the notion that states have begun to take violence or inequality seriously simply by undertaking research or public relations work around 'hate'. Commonly this imagined vigorous state response sees the bundling of *three* elements: 'hate incidents', 'hate crime' and 'hate speech'.

"A CRIME AGAINST HUMANITY"

Founder and publisher of *Der Stürmer*, Julius Streicher did not take part in planning the Holocaust or in Nazi war crimes. Yet his pivotal role in inciting the extermination of the Jews was sufficient for him to be indicted as one of the Major War Criminals before the International Military Tribunal at Nuremberg: 'For his 25 years of speaking, writing and preaching hatred of the Jews, Streicher was widely known as "Jew-Baiter Number One." … he infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution. ... Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes, as defined by the Charter, and constitutes a crime against humanity'. Streicher was found guilty and hanged 16 October 1946.

These phenomena can and do overlap with incitement to hatred – but this often leads to the implicit or explicit conclusion that they are *the same thing as* incitement to hatred. Here the complexity of issues bundled around 'hate' begins to cause significant problems.

This research specifically addresses incitement to hatred legislation. It does not address the wider issues and criticisms attached to criminal justice responses to 'hate crimes' in general and 'race hate crimes' in particular.[10] It does, however, bear emphasis that these are connected phenomenon – incitement to hatred legislation is intended to address and prevent what have come to be known as 'hate crimes'. Moreover, however widely the net of hate crime is extended, it is important to remember that human rights interventions on incitement to racial hatred emerged in the specific context of a European continent that had seen the most grotesque consequence of incitement in the crimes of Nazi period. Here the synergy between incitement to racial violence and the enactment of racial violence was all too apparent. The focus on incitement to hatred emerged from the aspiration to develop a human rights infrastructure that would ensure that genocide and crimes against humanity would never happen again.

The post-war focus on human rights saw another defining feature of discussion around incitement to hatred. Rights discourse also made a durable commitment to protecting 'freedom of expression'. Expression had also been compromised profoundly in the Nazi period. From the outset, therefore, there was a dialogue in international rights discourse between 'freedom from hatred' and 'freedom of expression'. This obviously poses immediate challenges for any rights-based analysis of incitement to hatred. Very few rights can be regarded as 'absolute' or 'unqualified' (perhaps the right not to be tortured is the only clear absolute right in this context). But with incitement to hatred there is a focus on the tension between incitement and freedom of expression. This holds in both international law and UK domestic legislation. (For example, a provision protecting freedom of speech was inserted into the *Racial and Religious Hatred Act 2006* in England and Wales.)

Certainly, when these issues are in tension, they both tend to be expressed in rights terms (rather than as rights versus responsibilities or rights versus security.) Partly in consequence of this, the threshold for incitement is routinely placed fairly high. But it bears emphasis that this is not unique – all rights are negotiated in the context of different qualifications and it remains important to situate the discussion of incitement to hatred within broader rights discourse. In other words, preventing incitement to hatred is primarily an issue of human rights rather than public order. It follows that domestic intervention on incitement to hatred should be situated in the context of the many international human rights standards that address this issue.

[10] See Haynes et al (2017) for a comprehensive contemporary overview of different theoretical and practical perspectives on 'hate crime in Ireland, north and south.

International human rights standards

The basic obligations on the UK regarding incitement to hatred are clear under the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of all forms of Racial Discrimination (ICERD). Comprehensive legislation is a minimum requirement of combating incitement to racial hatred, and reporting obligations are an important part of the Convention.[11]

There are several broad themes within these international law provisions. It bears emphasis, however, that the focus is on racial and religious incitement – some of the other grounds protected in UK law are missing from these standards. In the context of the UK this difference is particularly significant in terms of sexuality since this *is* protected in domestic legislation. Northern Ireland legislation also specifically and unusually protects on the grounds of disability. But this broader point obviously extends to other alleged incitement to hatred grounds - including gender and gender identity - that have either been protected in domestic legislation or where there is an ongoing demand for such protection.

Article 20 ICCPR and the UN Rabat Programme of Action

The International Covenant on Civil and Political Rights (ICCPR) enshrines protection from incitement to hatred in Article 20:

> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The ICCPR also enshrines freedom of expression in Article 19. Limitation on freedom of expression is legitimate if it falls within the very narrow conditions defined in the three-part test in Article 19(3) of the ICCPR: it should be 'provided by law'; it should have a 'legitimate aim'; and it should be 'a necessity'. The interplay between Article 19 and 20 protections is further examined in ICCPR caselaw.[12] It also forms a key challenge for human rights discourse (Article 19 2008).

The broad ICCPR commitment on incitement to hatred is interpreted in the UN Office of the United Nations High Commissioner for Human Rights (OHCHR) *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence* (2013). Its, 'conclusions – in the area of legislation, judicial infrastructure, and policy – aim to better guide all stakeholders in implementing the international prohibition of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. The Rabat Plan of Action provides comprehensive UN-backed expert guidance on how states should interpret and implement their obligations on incitement to hatred. Importantly, it makes clear that criminal law should only be used in the most extreme cases and as a last resort.

[11] CERD Recommendation No. 35 [9] CERD/C/GC/35.

[12] See, for example, ICCPR jurisprudence http://hrlibrary.umn.edu/undocs/html/VWS55058.htm.

It sets out a six-factor test to assist judges to make a case-by-case analysis of whether this high threshold has been met.[13]

Article 4 ICERD and General Recommendation 35

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) includes a prohibition of incitement to racial discrimination and condemns propaganda and organisations which promote ideas of racial superiority. In Article 4:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end … (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The Committee recommends States to include in their legislation as punishable offences 'incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent or national or ethnic origin',[14] as well as 'participation in organisations and activities which promote and incite racial discrimination'.[15] The Committee recognises, however, that there are contextual factors that should inform the classification of certain related acts as incitement offences punishable by law.[16]

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[13] (a) *Context* is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group…. (b) *Speaker*: The speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed; (c) *Intent:* Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for 'advocacy' and 'incitement' rather than the mere distribution or circulation of material. (d) *Content and form*: The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. (e) *Extent of the speech act*: Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience…. (f) *Likelihood, including imminence*: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct. (11)

[14] CERD Recommendation No. 35 [13b] CERD/C/GC/35.

[15] CERD Recommendation No. 35 [13e] CERD/C/GC/35.

[16] CERD Recommendation No. 35 [15] CERD/C/GC/35.

Effective implementation of legislation includes 'investigation of offences' and 'prosecution of offenders'.[17] 'The Committee regards the adoption by States parties of 'targets and monitoring procedures to support laws and policies combating racist hate speech to be of the utmost importance'.[18]

In August 2013, the Committee on the Elimination of Racial Discrimination (CERD) adopted its General Recommendation No. 35, 'Combating racist hate speech'.[19] This recommendation recognises that the Convention does not use or define the term 'hate speech', but suggests ICERD remains a useful tool to combat such speech.[20] States party to the Convention are encouraged to recognise the many forms in which racist hate speech can manifest, and 'take effective measures to combat them'.[21] It provides a broad definition of such speech:

> Racist hate speech can take many forms and is not confined to explicitly racial remarks. As is the case with discrimination under Article 1, speech attacking particular racial or ethnic groups may employ indirect language in order to disguise its targets and objectives. In line with their obligations under the Convention, States parties should give due attention to all manifestations of racist hate speech and take effective measures to combat them. The principles articulated in the present recommendation apply to racist hate speech, whether emanating from individuals or groups, in whatever forms it manifests itself, orally or in print, or disseminated through electronic media, including the Internet and social networking sites, as well as non-verbal forms of expression such as the display of racist symbols, images and behaviour at public gatherings, including sporting events'.[22]

This is significant since it broadens the international law commitments on incitement to hatred to include a wider notion of 'hate speech':

> The Committee regards the adoption by States parties of targets and monitoring procedures to support laws and policies combating racist hate speech to be of the utmost importance. States parties are urged to include measures against racist hate speech in national plans of action against racism, integration strategies and national human rights plans and programmes.[23]

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[17] CERD Recommendation No. 35 [17] CERD/C/GC/35.
[18] CERD Recommendation No. 35 [47] CERD/C/GC/35.
[19] ICERD's 'Combating Racist Hate Speech' also provides a Rabat type test on the issue of 'threshold'. It differs in important ways – not least the absence of a need for 'intent': 'On the qualification of dissemination and incitement as offences punishable by law, the Committee considers that the following contextual factors should be taken into account: the content and form of speech…; the economic, social and political climate….; the position or status of the speaker in society….; the reach of the speech….; and the objectives of the speech. CERD Recommendation No. 35 [15] CERD/C/GC/35.
[20] CERD Recommendation No. 35 [5] CERD/C/GC/35.
[21] CERD Recommendation No. 35 [7] CERD/C/GC/35.
[22] CERD Recommendation No. 35 [7] CERD/C/GC/35.
[23] CERD Recommendation No. 35 [47] CERD/C/GC/35.

Article 7 also addresses the 'root causes of hate speech' and provides a template for proactive engagement to reduce its incidence.[24]

Council of Europe mechanisms including ECRI and ECtHR case law

The principles of protection from incitement to hatred contained in the ICCPR and ICERD are supplemented by key Council of Europe mechanisms including the European Convention on Human Rights (ECHR), European Court of Human Rights (ECtHR) case law and the European Commission against Racism and Intolerance (ECRI). ECHR guarantees the right to freedom of expression under Article 10. That article includes a caveat for exceptions and limitations to the freedom of expression under 10(2), although these are quite specific in nature. The clear direction of travel of the jurisprudence, however, is to use the legitimate aim of the 'rights of others' as a counterpoise to absolute freedom of expression. For example, the court has held that rights under Article 8 ECHR (family and private life) are engaged by any subjection to racist discourse.[25]

The most significant Council of Europe intervention in this area is the ECRI *General Policy Recommendation No. 15 on Combating Hate Speech* (2016). (It bears emphasis in the present context that this explicitly addresses hate speech rather than incitement to hatred.[26]) The policy is situated in terms of European history but is much wider in its reference than ICCPR and ICERD:

> Recalling moreover that Europe derives from its history a duty of remembrance, vigilance and combat against the rise of racism, racial discrimination, gender-based discrimination, sexism, homophobia, transphobia, xenophobia, antisemitism, islamophobia, anti-Gypsyism and intolerance, as well as of crimes of genocide, crimes against humanity or war crimes and the public denial, trivialisation, justification or condonation of such crimes;

This wider reach is also captured in the definition of hate speech employed and the grounds to be protected:

[24] CERD Recommendation No. 35 [30] CERD/C/GC/35.

[25] The Framework Convention for National Minorities also carries a similar obligation in Article 6(2). This is significant in Northern Ireland since it explicitly extends to protect the Irish speaking community.

[26] It is also worth noting that in this conceptualisation 'speech' is clearly not limited to the spoken word but rather covers all forms of expression – indeed there is the ECHR case law that covers parading.

Considering that hate speech is to be understood … as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status….

The policy makes a series of recommendations for member states and these provide a useful template for possible changes in Northern Ireland (ECRI 2016: 6-10).

More generally, ECtHR caselaw develops the understanding of the tension between freedom of expression and freedom from hate speech. For example, in Surek v Turkey (No. 1) the court finds, 'where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression'.[27] While the Court is careful to point out that mere offence is not enough of a reason to limit the freedom of expression, it notes, 'What is in issue in the instant case, however, is hate speech and the glorification of violence'.[28]

ECHR jurisprudence has long made clear that free expression is protected when it 'shocks, offends or disturbs'[29] or is capable of 'creating a feeling of uneasiness in groups of citizens or because some may perceive them as disrespectful'.[30]

"SILLY JOKE"

Paul Chambers was found guilty of sending a menacing tweet: "Crap! Robin Hood airport is closed. You've got a week and a bit to get your shit together otherwise I'm blowing the airport sky high!!" Chambers had been hoping to fly to Belfast to meet his girlfriend. A week later he was arrested. Chambers subsequently lost his job as a financial supervisor. He was prosecuted under the Communications Act 2003. In May 2010 Chambers was convicted and fined £1,000. The crown court dismissed his appeal, saying that the electronic communication was "clearly menacing". He subsequently won his high court appeal against his conviction: "We have concluded that, on an objective assessment, the decision of the crown court that this 'tweet' constituted or included a message of a menacing character was not open to it. "

[27] Surek v Turkey (No.1), ECHR Grand Chamber Judgement [61] http://hudoc.echr.coe.int/eng#{"appno":["26682/95"],"itemid":["001-58279"]
[28] Surek v Turkey (No. 1) [62]
[29] Handyside v UK 1976[49].
[30] Vajnai v. Hungary 2008 [57].

But it draws a distinction between this and expression which 'spreads, incites, promotes or justifies hatred based on intolerance'[31] or matters such as 'the promotion of discrimination or ethnic division'[32] Article 10 includes the 'rights of others' as one of its grounds for legitimate restriction. The rights of others include other ECHR rights. It has been held under Article 8 of the ECHR (right to private and family life) that there is, under certain circumstances, a positive duty on the state to protect persons from racist expression, providing both permissive powers and duties on the state to intervene to protect the rights of others in several contexts.[33]

EU mechanisms

There are also two European Union measures that address hate speech. First the 2008 Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.[34] This places the UK under a duty in EU law to legislate against incitement of hatred directed towards a group defined by race, colour, religion, descent or national or ethnic origin. This directive defines hate speech as 'publicly inciting to violence or hatred'. The 2010 Directive of the European Parliament and the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (Audiovisual Media Services Directive) also addresses incitement to hatred.[35] This includes Article 6:

> Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.

The Fundamental Rights Agency (FRA) of the EU (formerly EU Monitoring Centre) on also plays a key role in combatting hate crime across the EU (FRA 2013). This work has specifically addressed the issue of incitement to hatred (FRA 2016).

Counterpoising freedom of expression and incitement to hatred

As we have already seen, rights discourse on incitement to hatred almost inevitably generates a concomitant discussion on balancing freedom of expression and incitement to hatred. This approach runs through all the substantive discussion in international law. For example, CERD suggests:

> The relationship between proscription of racist hate speech and the flourishing of freedom of expression should be seen as complementary and not the expression of a zero-sum game where the priority given to one necessitates the diminution of the other.

[31] Erbakan v Turkey 1999[57].
[32] Vona v Hungary (application no. 35943/10), (2013) [66].
[33] Aksu v. Turkey [GC], application nos. 4149/04 and 41029/04, § 58, ECHR 2012.
[34] 2008/913/JHA
[35] 2010/13/EU

> The rights to equality and freedom from discrimination, and the right to freedom of expression, should be fully reflected in law, policy and practice as mutually supportive human rights.[36]

Likewise, in the Rabat Plan:

> It is often purported that freedom of expression and freedom of religion or belief are in a tense relationship or can even be contradictory. Instead they are mutually dependent and reinforcing. The freedom to exercise or not one's religion or belief cannot exist if the freedom of expression is not respected as free public discourse depends on respect for the diversity of deep convictions which people may have. Likewise, freedom of expression is essential to creating an environment in which a constructive discussion about religious matters could be held. Indeed, free and critical thinking in open debate is the soundest way to probe whether religious interpretations adhere to, or rather distort the original values that underpin religious belief.

Despite this, the UK and US (along with a few other states) continue to support a dissenting 'free speech primacy' position regarding international standards on incitement to hatred. This is demonstrated by their reservations to Article 20 of the ICCPR and Article 4 of ICERD. The Committee routinely asks the UK to withdraw the reservation and fully implement the provisions. The ECRI also calls on Council of Europe states to withdraw their reservations to articles 4 and 20. It bears emphasis that this dissent is a devolved matter. There is nothing to prevent the Northern Ireland Assembly legislating beyond the UK state reservation, which is limited to stating it reserves the right not to legislate further if it so chooses.

More broadly, it remains the case that all rights standards and protections involve a dialogue between overlapping principles. Ideally, of course, this dialogue should lead to a synergy between different rights. While much of the discussion about incitement and free speech is presented as a 'zero sum' game, for the human rights and equality constituencies, this notion of 'mutually supportive human rights' remains the first principle.

It also bears emphasis that 'hate speech' is often used very specifically to *silence* its targets – in other words, in this instance the counterpoise is less between freedom and incitement but rather competing rights to freedom of expression – one person's right to say 'shut up or I'll kill you' against another person's right not to be 'shut up' by such threats.

[36] CERD Recommendation No. 35 [45].

This was highlighted by the experience of Caroline Criado-Perez. Criado-Perez led a campaign on the absence of women on Bank of England bank notes. She argued that the Equality Act 2010 commits public institutions to 'eliminate discrimination'. The campaign, which gained the support of 35,000 petitioners proved successful when Mark Carney, the Governor of the Bank of England, announced a change of plan with the image of Jane Austen on the £10 note. This decision resulted in numerous threats, including threats of rape and murder, made against Criado-Perez and other women on Twitter. Ultimately three people associated with the threats received prisons sentences for improper use of a communications network.[37]

Criado-Perez makes the key point that the content of much of this abuse was encouraging her to 'shut up' – in other words the actions that were defended in terms of free speech were simultaneously denying her free speech.[38] Criado-Perez said the campaign of abuse, provoked by a small issue, 'shows it's not about what women are doing, not about feminism. It's that some men don't like women, and don't like women in the public domain.'[39]

We find a similar dynamic at play in Ireland. For example, after Pavee Point had raised concerns about the failure to prosecute what they had identified as incitement to hatred against Travellers[40], the first response in the discussion blog suggested:

> pavee point would be well advised to shut the f### up on the matter. If people are not allowed to openly discuss problems in society for fear of offending some people then those issues will

'Rape?! I'd do a lot worse things….

On 7 January 2014, John Nimmo (25) and Isabella Sorley (23) pleaded guilty to improper use of a communications network to send tweets threatening rape and murder. A second man, Peter Nunn, 33, was found guilty of sending threatening tweets to Caroline Criado-Perez and MP Stella Creasy who had been involved with the banknote campaign, and was imprisoned for 18 weeks and banned from contacting either woman. Nimmo went on to receive a further sentence for racist 'trolling' of a Jewish MP. Sorley said subsequently: "I spent six weeks of my life in a prison cell trying to figure out why I sent those tweets and how it made me feel. I guess I'd be lying if I said you didn't kind of have the upper hand against the victim. But I didn't do it for a reaction. It's the sort of stuff I'm prone to say when drunk and social media allowed me to use my vile mouth in a different outlet."

[37] Once of these went on to receive a further conviction for 'trolling' after he sent two emails to MP Luciana Berger in which he said she would 'get it like Jo Cox' and 'watch your back Jewish scum'. http://www.bbc.co.uk/news/uk-england-tyne-38934379

[38] 'Hate Speech' *The Philosopher's Arms* BBC Four 21 Dec 2015

[39] Twitter troll: What I said was utterly appalling and disgusting http://www.bbc.co.uk/newsbeat/article/30075370/twitter-troll-what-i-said-was-utterly-appalling-and-disgusting

[40] Brenda Power's article, 'If Travellers want ethnic status, they ought to get rid of those slash hooks and settle', *Irish Daily Mail* 8 April 2014.

> never get addressed. They are right it's a victory for free speech and common sense.[41]

In other words, there is often no sense of irony in the simultaneous act of defending 'free speech' and demanding forcefully that some else refrain from speaking. Clearly any impartial implementation of the law should be intolerant of these kinds of contradictions. The ubiquity of such paradoxical interventions on speech serves to remind of the importance of universal principles rather than *ad hominem* arguments in human rights protections.

It remains the case, however, that freedom of expression impacts significantly on discussions and interventions on incitement and hate speech, particularly in arguments drawing on the US model.[42] The 'Skokie case' is the most famous example in which both the state and human rights constituencies combined to defend 'hate speech'. But much of the dynamic around freedom of expression is situated expressly in a rights-based approach. For example, the rights organisation ARTICLE 19 suggests that all incitement cases be assessed under a six-part 'incitement test' consisting of context, speaker, intent, content, extent and magnitude, and likelihood and imminence of advocated action occurring (Article 19 2012: 27). They also emphasise the ICCPR three-part test on the legitimacy of restrictions on freedom of expression: 'any restriction must be provided by law, must pursue a legitimate aim and must conform to the strict tests of necessity and proportionality' (Article 19 2012: 10).

This provides the trope of 'legality, proportionality and necessity' which is endorsed by the Rabat Principles among others: 'States should ensure that the three-part test for restrictions of freedom of expression – legality, proportionality and necessity – also applies to cases of incitement to hatred'.

THE SKOKIE CASE

In 1977 the National Socialist Party of America, announced its intention to march through Skokie, Illinois. In this predominantly Jewish community, one in six residents was a Holocaust survivor or was directly related to one. On behalf of the NSPA, the American Civil Liberties Union challenged an injunction that prohibited marchers at the proposed Skokie rally from wearing Nazi uniforms or displaying swastikas on behalf of the NSPA. They argued that the injunction violated the First Amendment rights of the marchers to express themselves. In the *National Socialist Party of America v. Village of Skokie,* the United States Supreme Court ruled that the use of the swastika is a symbolic form of free speech entitled to First Amendment protections and determined that the swastika itself did not constitute "fighting words' (words intended to incite hatred or violence'). This ruling allowed the National Socialist Party of America to march - although in the event the NSPA did not march in Skokie.

[41] http://www.thejournal.ie/brenda-power-article-2435584-Nov2015/

[42] The American Convention on Human Rights includes protections based on language group, but only protects against incitement to 'lawless violence' (Article 19 2009: 16).

Since there is no international law definition of 'hate speech' (Article 19 2012: 5), ARTICLE 19 recommends that Article 4(a) of CERD be interpreted considering Article 20(2) of the ICCPR (Article 19 2012: 2). As we have seen, Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) requires states to prohibit only severe forms of 'hate speech', specifically 'any advocacy of national, racial or religious hatred that constitutes incitement to hostility, discrimination or violence'. At this point, however, it bears emphasis that freedom from hatred is upheld in the context of any competing right to freedom of speech. If expression constitutes incitement to hatred, it is not 'protected freedom of speech'.

Summary: International Human Rights Standards and Incitement

In combination, international standards establish a template for any national or regional intervention on incitement to hatred. This was summarised in the Rabat Plan:

> Under international human rights standards, which are to guide legislation at the national level, expression labelled as "hate speech" can be restricted under articles 18 and 19 of the ICCPR on different grounds, including respect for the rights of others, public order, or even sometimes national security. States are also obliged to "prohibit" expression that amounts to "incitement" to discrimination, hostility or violence (under article 20.2 of the ICCPR and, under some different conditions, also under article 4 of the ICERD).

These standards are supported by interventions by the work of the various related institutions – like CERD, ECRI, FRA and the Office for Democratic Institutions and Human Rights (OSCE) - which continue to emphasise the importance of combatting incitement to hatred (FRA 2017).

These standards and institutions also make clear that the outlawing of incitement to hatred is only one element of the duty; other duties include a range of other obligations on public authorities. These additional obligations remain immediately relevant in Northern Ireland. For example, the prohibiting of, 'provision of any assistance to racist activities, including the financing thereof' could become a statutory duty on public authorities.

"UPSET AND OFFENCE"

On 30 April 2014, two days after teacher Ann Maguire was stabbed to death by a pupil in Leeds, Jake Newsome, a 21-year-old man posted on his Facebook page: "Personally im glad that teacher got stabbed up, feel sorry for the kid… he shoulda pissed on her too". After his post had been shared more than 2,000 times, West Yorkshire police arrested and charged Newsome under the **2003 Communications Act** with having sent "by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing nature". Newsome was jailed for six weeks, after pleading guilty, with the judge quoting his post back to him and saying: "I can think of little that could be more upsetting or offensive".

It also bears emphasis that the conceptualisation of 'speech' is clearly not limited to the spoken word but covers all forms of expression – indeed there is ECHR case law that covers parading. In other words, many of the issues connected to cultural expression which have been sites of conflict in Northern Ireland – including flags and parades – clearly fall within the ambit of incitement.

In short, the many different international mechanisms create an unambiguous obligation to address and prevent incitement to hatred. Even though the threshold on what constitutes incitement is regarded as high, it remains broad in the sense that it extends well beyond incitement to violence. For example, incitement to *discrimination* is clearly above the threshold. Thus, its reach is not confined to violence or other expressly criminal acts. This is not an abstract point – some of the highest profile international cases on incitement – for example, the prosecution and conviction of Geert Wilders in the Netherlands - have addressed this kind of incitement to discrimination.[43]

"MORE OR FEWER MOROCCANS?"

Geert Wilders, leader of the Freedom party (PVV) in the Netherlands, was convicted for statements made to a rally of supporters in a café in 2014. Asking whether those assembled wanted 'more or fewer Moroccans' in the Netherlands, he responded to chants of 'fewer' by saying that he would 'take care of that'. The rally was broadcast on television. The conviction was under two provisions of the Dutch Criminal Code: for 'intentionally making an insulting statement about a group of persons because of their race' and for 'inciting discrimination against a group because of their race'. Wilders was cleared of 'inciting hatred against persons because of their race'. Prosecutors had sought a fine of 5,000 Euros (the maximum sentence is two years imprisonment) but the judge declined to impose any sentence beyond the guilty conviction.

[43]https://www.article19.org/resources.php/resource/38589/en/netherlands:-wilders%E2%80%99-%E2%80%98hate-speech%E2%80%99-conviction-will-not-advance-tolerance

Defining ‘incitement’ and ‘hatred’

What is incitement?

While incitement to hatred legislation in Northern Ireland has assumed a specific form, its evolution is inseparable from the process of addressing incitement to hatred within wider UK law. Perhaps the most interesting and elusive element in this dynamic is the notion of *incitement* which is less well disaggregated than some of the other constituent elements. To further complicate matters, the broader concept of incitement has recently been *removed* from UK law.

Historically ‘Incitement’ was an offence in common law in England and Wales. It was an *inchoate offence* – alongside conspiracy and attempt - covering an offence which is yet to be committed. (All three inchoate offences require a *mens rea* or intent, and upon conviction, the defendant is sentenced as if they had succeeded in committing the inchoate crime in question.) In this context incitement consisted of persuading, encouraging, instigating, pressuring, or threatening to cause someone else to commit a crime. Incitement was abolished in England and Wales in 2008 when Part 2 of the Serious Crime Act 2007 came into force, replacing it with the offences of *encouraging* or assisting crime. To add further ambiguity, the term incitement was also removed from the Public Order Act 1986 and the Public Order (NI) Order 1987 - leaving the more colloquial notion of *stirring up* hatred as the key term.

We can already sense a tension between the element of incitement that is best characterised as ‘encouraging’ and the bit that is best characterised as ‘stirring up’. At least by implication, the ‘encouraging’ suggests a nexus between individuals, one person exhorting another to do something; ‘stirring up’ in contrast is holistic, it is – like a wave – setting something in motion that moves beyond that individual nexus. This aspect is explicit with incitement to hatred since it is focussed on a ‘group’.

Given the changes in UK terminology, it might be argued that any human rights intervention in the UK context should avoid engaging with the concept of incitement and focus on the notion of ‘stirring up’ - or indeed ‘encouraging’ - hatred. As we have seen, however, the term incitement retains its predominant position in international human rights standards. Moreover, given the tensions around balancing freedom of speech and thresholds for prosecution, incitement continues to convey a sense of the *seriousness* of the offence described. Part of the process of reaching the necessary threshold is precisely this sense of the gravity of the acts involved – this at least hints at the dangerous consequences of failing to address incitement.

More broadly, we can identify some further key elements of incitement. First, the notion of encouraging other people to commit crime remains a clear element. Second, the power dynamic behind such encouragement is raised.

Here the legacy is much clearer in terms of the origins of the prohibition on incitement to hatred and the association with Nazism.

It was not simply that the Nazi state encouraged its own employees to commit crimes; but also, that it had enormous capacity to force this action. Both positively through rewards and negatively through sanctions, its 'encouraging' was grounded in the whole system of power to make sure that its crimes were indeed committed. This principle of the power to incite held across the prosecution for war crimes. Julius Streicher was convicted of 'crimes against humanity' and received the death penalty as punishment – but his cartoonist Philipp Rupprecht or *Fip*s – who had drawn most of antisemitic cartoons in the paper for its duration – received ten years hard labour and became a painter and decorator. Other staff on *Der Stürmer* received no punishment at all.

In other words, it is at least implied that there is a hierarchy of incitement – the greater the capacity to incite, the wider the impact of incitement, the more serious the crime. This dynamic is less easy to formalise in law or executive action. Nevertheless, there is a clear distinction between a teenage racist and a head of state saying 'Kill all Xs'. There is equally a clear distinction between a youth writing this on a gable wall and a mass circulation newspaper – like *Der Stürmer* – writing this in a banner headline.[44] Thus the term incitement conveys the seriousness of the offence as well as suggesting that this seriousness correlates with the power of the individual or organisation committing the offence. This complex and sensitive interface must be balanced in any context in which the state is mediating between freedom from discrimination and violence and freedom of expression.

International standards also specifically proscribe *incitement to discrimination.* This acknowledges symbolically the seriousness of incitement within wider patterns of discrimination. In other words, the act of discriminating – for example, not employing a person because he is an X - is unlawful but it is not criminal; but incitement to discriminate – saying 'Don't Employ Xs' may well be a criminal act. (It bears emphasis, however, that this is not what is conveyed in UK law. Even through protection from 'incitement to hatred' was introduced through the Race Relations Act 1965 and retained in subsequent race relations legislation with a primary focus on discrimination, the incitement section makes no reference to 'incitement to discriminate'.)

[44] It bears emphasis in this context that people had little 'choice' about reading the paper in Nazi Germany. The paper was displayed in *Stürmerkasten,* - public display boards erected in every town across Germany on Hitler's order to disseminate the message.

The issue of the legacy of crimes against humanity also raises other philosophical and jurisprudential questions. Most strikingly, it begins to expose the tension between incitement and command responsibility/'just-following-orders', especially in the political context. For example, we can regard *Der Stürmer* as a classic example of incitement. But once we turn to the German state under Nazism and examples of profound antisemitism like the Nuremberg laws or Kristallnacht, the issue is not so much that people are being incited to violence but rather being 'ordered' to carry it out in the most grotesque and institutionalized way. In other words, what starts as 'classic' incitement in *Der Stürmer* in 1923, ends with people with a whole range of institutionalised and bureaucratised roles 'following orders' as they commit genocide in Nazi death camps.[45] There is something both interesting and problematic in this evolution that is not always captured in international or domestic law on incitement. There is a focus on the role of politicians in incitement but less analysis on the role of politicians and bureaucrats *in power*. In other words, although this rarely features in wider discourse on incitement, we might suggest that incitement takes on a profoundly different character when committed by state - as opposed to non-state - actors. The notion of *institutionalised incitement* – like institutionalised racism – should be an element in any wider discussion of incitement to hatred.

What is Hate Crime? Unpacking Hate Crime, Hate Incidents, Hate Speech and Incitement to Hatred

Just as the notion of incitement raises a whole series of jurisprudential questions, so too does the notion of 'hate crime' which often overlaps or encompasses incitement to hatred in UK law.

KRISTALLNACHT

On 9 November 1938, on the anniversary of the Beer Hall putsch and in professed response to the killing of a German diplomat, Goebbels announced that "the Führer has decided that … demonstrations should not be prepared or organized by the Party, but insofar as they erupt spontaneously, they are not to be hampered." SA and Hitler Youth units throughout Germany and its annexed territories engaged in the destruction of Jewish-owned homes and businesses. Despite the appearance of spontaneous violence, the central orders Heydrich relayed gave specific instructions: the "spontaneous" rioters were to take no measures endangering non-Jewish German life or property; they were not to subject foreigners to violence; and they were to remove all synagogue archives prior to vandalizing properties of the Jewish communities and to transfer that archival material to the Security Service (SD).

[45] There is abundant evidence of this causal chain. For example, Albert Forster, Gauleiter of Danzig (later himself executed as a war criminal), wrote in 1937: 'With pleasure I say that the *Stürmer*, more than any other daily or weekly newspaper, has made clear to the people in simple ways the danger of Jewry. Without Julius Streicher and his Stürmer, the importance of a solution to the Jewish question would not be seen to be as critical as it actually is by many citizens.' (cited in Thompson, 2007: 334).

Amidst the plethora of new analysis and intervention on 'hate crime' around the world, it is sometimes difficult to identify just what is being addressed by the emotive coupling of 'hate' and 'crime'. This connects with the widespread fallacy that states have begun to take racist - or other 'bias-related' - violence seriously simply by undertaking public relations work around 'hate'. This state response often sees the bundling of three elements which profess to represent 'hate crime'.

First, we find the recording of incidents by the police framed as 'hate crime'. Confusingly, these may not involve a crime at all in any legal sense – it is simply a methodology by which police record *incidents* which are reported by or to them that are connected to 'hate' in some way. *Second*, we find the concept of 'racial aggravation' – the recognition that something is made worse because it is motivated by racism (or homophobia or some other protected characteristic). This aspect of aggravation *is* sometimes legislated as a crime. In Northern Ireland, however, this is *not* the case: evidence of racial or religious or homophobic motive allows for increased sentencing but it is not a separate crime. In this context, it contrasts starkly with other jurisdictions within the UK.

Finally, cutting across these categories, we find the notion of 'hate speech'. In some discussions of human rights standards, 'hate speech' is defined narrowly as speech that constitutes incitement to hatred. (This is way in which Article 19 and the Camden Principles use the term (2012: 12)). At other times, however, the term 'hate speech' is used indiscriminately to identify a whole set of speech acts that are regarded as offensive by someone but which may or may not constitute crimes. Crucially in terms of incitement, a hate speech act – just saying something offensive in public about a group - is not sufficient to constitute a crime. The element of 'stirring up' hatred against a group has also to be present.

There has been a further confusion in terminology in Northern Ireland. There has been a flurry of activity around 'hate crime' in terms of both criminal justice and wider campaigning.[46] In part, this was a response to the identification of Northern Ireland as 'the race hate capital of Europe' and Belfast as the 'most racist city in the world'. In practice, however, the criminal justice system in Northern Ireland responded to the 'race hate capital' accusation by doing surprisingly little. As the Northern Ireland Policing Board (NIPB) recently made clear, '*there is no such thing as a 'hate crime' in Northern Ireland*' (NIPB 2017: 46). Bizarrely given the amount of discussion there is around 'hate crime' across Northern Ireland, there is no legislation criminalising such behaviour. In reality, the response to racial violence put in place an infrastructure based on foregrounding a particular construction of 'hate crime' which is not a crime at all. (It is not defined as such in law and it is bundled around events that are explicitly defined as 'incidents' rather than 'crimes'.)

[46] See, for example, Unite Against Hate http://www.uniteagainsthate.org.uk and PSNI 'Hate Crime' https://www.psni.police.uk/crime/hate-crime/

Even when issues of race are not lost in the wider sweep of more general discussions of 'hate crime', this does nothing to address the specificity of racist or sectarian violence (McVeigh 2017).

Thus, this whole new paradigm of 'hate crime' is confused and confusing. There is a series of ambiguities across different constructions of 'hate crime' in different international, national and regional contexts – the definitions contradict each other; the 'protected characteristics' vary hugely both across different jurisdictions and different elements of international law; finally, most bizarrely of all, it emerges that many of the incidents addressed by the police as 'hate crime' are not crimes at all. At whatever level we engage with the concept – internationally, at UK or Irish level or within Northern Ireland - we find 'incitement to hatred' sitting uneasily alongside this confusing bundle of 'hate crime'. At this point, however, it bears emphasis that incitement to hatred *is* more clearly defined in law, at Northern Ireland, UK and international level. Thus, any ambiguity around broader 'hate crime' should not be allowed to confuse the relative clarity on incitement. Moreover, we can identify a broad definitive aspect of incitement that distinguishes it from the expanding and shapeless 'hate crime' paradigm.

First, incitement retains the quality of an *inchoate offence* - it involves encouraging somebody else to do something criminal. Hate crime – however constituted – involves actual incidents – things that have happened that may or not in theory or practice lead to prosecution for some type of behaviour. This behaviour may not be criminal or unlawful but it is sufficiently unpleasant to lead to someone reporting it to the police. Crucially, in the terminology of Antonin Scalia (who insisted that the neologism 'choate' was not an antonym for inchoate) it is *no longer inchoate.* Put less technically incitement to hatred involves some action that encourages others to both hate and to act criminally (or at least unlawfully) based on that hatred. It follows, of course, that if hating is itself defined as a criminal act, then that would be sufficient to constitute incitement – (i.e. saying 'you should hate Xs' would be an inchoate offence if hating Xs were an offence) – but the reality is that no intervention has sought to outlaw hate itself in this way. We might suggest that the law is really criminalising, 'incitement to hatred *sufficient* to cause others to commit a crime against members of a protected group'.

But the speech act of incitement also has the quality of an illegal act. In other words, in the appropriate circumstances the speech act involved – not the likely or actual consequences – is a criminal act. If it was not then incitement could only be identified *retrospectively* - as it was with Julius Streicher, after the genocide which he incited had been committed. Human rights standards were, however, clearly trying to effect more than this – they were seeking to criminalise incitement as a prelude to further crimes against humanity. It is this dual quality of incitement to hatred that causes some of the confusion around broader notions of hate and hatred.

We can take as given the criminality of the element that is clearly inchoate – if I say 'kill all Xs' (whether or not somebody then goes and kills an X) because killing an X would be a criminal act. Moreover, we can take as given the criminality of many things that people do because they are motivated by hatred – from name-calling to murder. These are all criminal acts, whatever the motivation. There is, however, something less exact about interface between speech act and crime - the 'stirring up hatred' bit in the middle of these two types of criminal action – which is what incitement in both international and UK law ostensibly seeks to address. Because hating itself is not criminal, saying 'you should hate all Xs' is not inchoate – unless hating all Xs implies that others should commit some criminal act against them.

Some of the recent case law which has most problematized 'hate speech' has moved in this direction. But this is profoundly contested. Moreover, it is not just contested by those who want to defend certain speech acts as 'banter' or regard the profusion of 'hate speech' as 'political correctness gone mad' but also human rights-based interventions. For example - and not unexpectedly given its commitment to freedom of expression - Article 19 has made a series of interventions challenging limitations on what others have identified as 'hate speech'. According to both Article 19 and the Camden Principles, 'hostility' would require an action that would be the 'manifestation of hatred' and legislation would be best understood if there were a consistent use of definitions of terms surrounding incitement to hatred legislation (Article 19 2009: 12.1; 2012:19). Moreover, the contradictions between these two dynamics is not made clear by statute. In other words, we engage with existing legislation acknowledging that the law is not clear on the mechanism of incitement to hatred. This is further confused by media and public discussions – the terms 'hate crime', 'hate speech' and 'incitement to hatred' are used carelessly as if they mean the same things when legally they do not.

The development of the Camden Principles was motivated by a desire to promote greater consensus globally about the proper relationship between respect for freedom of expression and the promotion of equality. While tensions can arise between competing visions of these rights, the focus has been disproportionately on these potential tensions rather than the positive relationship between them. Furthermore, international law provides a basis for resolving the tensions through a return to the focus on incitement to hatred as defined in international human rights standards. In other words, despite their focus on freedom of expression, the Principles recognise that certain speech, for example intentional incitement to racial hatred, is so harmful to equality that it should be prohibited.[47]

[47] Principle 12 'Incitement to Hatred' (2009:12)

Incitement to Hatred Legislation in Northern Ireland

Legislation against incitement to hatred in Northern Ireland is framed by the *Public Order (Northern Ireland) Order 1987*. Part III of the Public Order Order 1987 is entitled 'Stirring up hatred or arousing fear' – unlike earlier legislation, it does not use the term 'incitement'. This legislation criminalises 'acts intended or likely to stir up hatred or arouse fear' in relation to groups defined by reference to 'religious belief, colour, race, nationality (including citizenship) or ethnic or national origins'.[48] It also provides a definition of both fear and hatred: 'fear' means fear *of* a group of persons in Northern Ireland defined by reference to religious belief, colour, race, nationality (including citizenship) or ethnic or national origins; 'hatred' means hatred against a group of persons in Northern Ireland defined by reference to religious belief, colour, race, nationality (including citizenship) or ethnic or national origins'. Sexual orientation and disability were added as protected categories by the Criminal Justice (No.2) (Northern Ireland) Order 2004.

The categorisation of activities prohibited is: 'Use of words or behaviour or display of written material'; 'Publishing or distributing written material'; 'Distributing, showing or playing a recording'; 'Broadcasting or including programme in cable programme service'; 'Possession of matter intended or likely to stir up hatred or arouse fear'.

Over the period 1 January 2006 - 31 December 2016, 96 people were arrested and processed through police custody for an offence under Part III of the Public Order (Northern Ireland) Order 1987; of these, 46 people were subsequently charged with an offence.

"IF TAIGS ARE MEANT FOR KILLING"

In 1971 John McKeague, then of the Shankill Defence Association, was prosecuted along with two others for his part in publishing the *Loyalist Orange Songbook*. This was the only prosecution ever taken under the Prevention of Incitement to Hatred Act. The publication was replete with unambiguous sectarian epithets and abuse including the infamous: 'I was born under a Union Jack, if guns were made for shooting, then skulls are made to crack, you'll never see a better taig than with a bullet in his back'. It was accepted that the words used were threatening and abusive but defence counsel requested that the jury consider the words in context and to ask whether the song was meant to be taken seriously. The defendants were all acquitted.

[48] The Public Order (Northern Ireland) Order 1987, s 8.

Of these 43 were charges under article 9 ('use of words or behaviour or display of written material') while the other three were under article 10 ('publishing or distributing written material').[49]

These charges rarely result in a criminal conviction, some are dropped while others resolve in informed warnings or summary prosecutions.[50] We can broadly trace these cases as they have processed through the CJSNI (Criminal Justice System Northern Ireland).[51] PPS analysis of their role is summarised as:

> Our current position on cases considered under Part III of the Public Order (NI) 1987 is as follows: Since 1 January 2011, PPS has directed prosecution against 26 defendants (three on indictment and 23 summarily) for offences under Part III of the Public Order (NI) Order 1987 – either Articles 9(1) or 10(1). Over the same period, 14 persons have been convicted in respect of these offences – two in the Crown Court and 12 in the Magistrates' Courts.[52]

The most recent data from the NICS indicates six convictions over four years. The DoJ records:

> In the years 2012 - 2016, there were 6 convictions at courts for offences under the legislation…. For these cases, the main disposals were: 1 custodial sentence, 2 suspended sentences, and 3 community disposals.[53]

Broadly, therefore, there are very few investigations, prosecutions and convictions of 'stirring up' offences in Northern Ireland. Moreover, the implication of current CJSNI practice is that incitement to hatred is a relatively minor offence – resulting in only one custodial sentence over the last four years.

"BURN ALL CATHOLICS"

In 1984 DUP politician George Seawright, during a meeting of the Belfast Education and Library Board and in response to a discussion about Catholic parents unhappy at the playing of the British national anthem at a joint ceremony between Protestant and Catholic schools, commented that all Catholics and their priests ought to be burned. He was convicted of using, at a public meeting, 'threatening, abusive or insulting words' which were likely to cause a breach of the peace in violation of article 6(1)(a) of the Public Order (NI) Order 1981. He was fined £100 and given a six-month jail sentence, suspended for three years.

[49] PSNI Statistics Branch (information request).
[50] Prosecutions under Public Order (NI) Order 1987 and Criminal Justice (No.2) Order 2004. FOI #37090. 'Prosecutorial Decisions Issued by PPS relating to Incitement to Hatred Offences (2006/07 - 2008/09)'
[51] http://www.thedetail.tv/articles/calls-for-more-to-be-done-to-address-low-conviction-rate-for-inciting-hate-in-northern-ireland
[52] The Detail 11/10/2017. Research Communication.
[53] Department of Justice, Analytical Services Group 17/12/2017. Research Communication.

This said, incitement to hatred legislation appears to be more obviously on the radar of the PSNI and the CJSNI recently – with high-profile investigations of an anti-DUP placard[54] and prosecutions of Britain First activists.[55]

One of the obvious conclusions of our research is that there should be greater clarity on use of the legislation across the CJSNI. This is probably best provided by any Department of Justice review of the incitement legislation. Such a statutory review is more likely to get the necessary clarity than a series of Freedom of Information requests or further NGO research. The outcome should track these 'stirring up offences' to provide a holistic sense of how the CJSNI presently engages with incitement to hatred - from the PSNI through PPS to NICS sentencing.

The evolution of legislation against incitement and 'hate speech' in Northern Ireland

The current 'stirring up offences' legislation has its origins in the *Prevention of Incitement to Hatred Act (Northern Ireland) 1970*, which made it an offence to intend to stir up hatred or arouse fear of any section of NI community 'on grounds of religious belief, colour, race or ethnic or national origins'.[56] There was only one prosecution under this legislation – of John McKeague and two others for publishing the *Orange Loyalist Songbook.* This prosecution was unsuccessful.[57]

The Incitement to Hatred Act was replaced by the *Public Order (Northern Ireland) Order* 1981 which integrated incitement to hatred into wider public order legislation (and retained the use of the term 'incitement').[58] George Seawright was famously prosecuted in 1984 under the 1981 Order for his 'Burn Roman Catholics and their priests' speech.[59] This was, however, for 'provocative conduct at a public meeting' rather than 'incitement to hatred'. There were no prosecutions for incitement to hatred under the 1981 Order.

The wording in Northern Ireland legislation has often interested UK-based work on incitement since it includes the element of 'arousing fear' as well as 'stirring up hatred'. This element is absent from the UK legislation. The difference is significant – however it bears emphasis that it refers to arousing fear among those who might be incited not those who are the targets of the incitement. (For example, in recent discussions on anti-Muslim interventions in Northern Ireland it was suggested that public statements had caused fear *within* the Muslim community.

54 BBC News 2017. 'Belfast Pride: Woman questioned over anti-DUP sign' http://www.bbc.co.uk/news/uk-northern-ireland-41571107

55 BBC News 2017. 'Britain First's Paul Golding and Jayda Fransen arrested' 14/12/2017http://www.bbc.co.uk/news/uk-northern-ireland-42351026

56 The Prevention of Incitement to Hatred Act (Northern Ireland) 1970, s 1

57 *Belfast Telegraph* 14 December 1971.

58 The Public Order (Northern Ireland) Order 1981, s 13.

59 BBC News 2006. ''Burn Catholics' man was in UVF' 23 August 2006. http://news.bbc.co.uk/1/hi/northern_ireland/5279276.stm

This, however, would not be sufficient for incitement – it would have to be demonstrated that the statements aroused fear *of* Muslims within the non-Muslim community.)

The 1987 legislation is also different from its earlier incarnations as it softens the requirement on 'intent' – this was essential in the earlier legislation but the 1987 legislation allows for the offence if, 'he intends thereby to stir up hatred or arouse fear; or (b) having regard to all the circumstances *hatred is likely to be stirred up* or *fear is likely to be aroused* thereby'. The restriction on prosecutions being approved by the Attorney General was also removed in 1987.

It bears emphasis that – despite the common confusion of the terms - the legislation in Northern Ireland specifically addresses the incitement to hatred and arousal of fear against a *group of people* in public, rather than a specific 'hate crime' committed against an individual. The latter type of 'hate crime' is described in the Criminal Justice Order 2004 and is used primarily as an aggravating factor for another crime, if the crime involved is motivated by hostility towards members of a racial, religious or sexual orientation group, or those with a disability.[60]

Section III 'stirring up' legislation overlaps with other legislation that has been used in Northern Ireland in the context of expression that has been regarded by some as offensive or 'hate'. This includes the *Malicious Communications (Northern Ireland) Order 1988* – which includes the category: 'Offence of sending letters etc. with intent to cause distress or anxiety':

> 3.—(1) Any person who sends to another person— (a) a letter or other article which conveys— (i) a message which is indecent or grossly offensive; (ii) a threat; or (iii) information which is false and known or believed to be false by the sender; or (b)any other article which is, in whole or part, of an indecent or grossly offensive nature, is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within sub-paragraph (a) or (b), cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.

The *Communications Act 2003* also includes a section on 'Improper use of public electronic communications network':

[60] Criminal Justice (No.2) (Northern Ireland) Order 2004, s 2(3).

> A person is guilty of an offence if he— (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or (b) causes any such message or matter to be so sent.

This was the legislation under which Pastor James McConnell was prosecuted. Despite this, Pastor McConnell's intervention was repeatedly examined through the prism of 'incitement to hatred' – even though he was not charged in this context but rather 'improper use of a public electronic communications network'.[61]

Finally, the *Justice Act (Northern Ireland) 2011* s37 outlaws a different form of expression characterised as 'chanting':

> 37—(1) It is an offence for a person at any time during the period of a regulated match to engage or take part in chanting …. [where] 'chanting' means the repeated uttering of any words or sounds (whether alone or in concert with one or more others)…. if— (a) it is of an indecent nature; (b) it is of a sectarian or indecent nature; or (c) it consists of or includes matter which is threatening, abusive or insulting to a person by reason of that person's colour, race, nationality (including citizenship), ethnic or national origins, religious belief, sexual orientation or disability.

This addressed behaviour at football matches in Northern Ireland. While there was much discussion during passage about defining sectarianism – among other matters – in the end the word sectarian is used without a definition.

"CELLS OF MOSLEMS"

Pastor McConnell both made and broadcast anti-Islam statements from a Church in Belfast. "Today we see powerful evidence that more and more Moslems are putting the Quran's hatred of Christians and Jews alike into practice…. Enoch Powell was right…. Enoch Powell was a prophet when he told us that blood would flow on the streets and it has happened. Fifteen years ago Britain was concerned with IRA cells right throughout the nation. They done a deal with the IRA because they were frightened of being bombed. Today a new evil has arisen. There are cells of Moslems right throughout Britain – can I hear an Amen? – right throughout Britain. And this nation is going to enter into a great tribulation and a great trial". He was prosecuted under the Communications Act 2003 but the court found that the threshold for the comments to be 'grossly offensive' was not met and he was acquitted.

61 See for example, *Belfast Telegraph* 6 August 2015 'Pastor James McConnell solicitor argues preacher 'did not incite hatred or encourage violence against Muslims''

Finally, there are also the 'good relations duties' that should address racism and other expressions of hatred across Northern Ireland.[62] While there is little evidence of this happening - at least in policy appraisal - this should form part of the 'soft law' approach to incitement. The statutory duties on public authorities to tackle racism and sectarianism should encourage them to engage with examples of incitement to hatred - remove graffiti, qualify funding for events that tolerate incitement and so on.[63]

The law in England and Wales, Scotland and Ireland

The specific crime of incitement to hatred emerged as part of the broader package of anti-racist measures embedded in the various race relations acts.[64] The term appeared first in Race Relations Act 1965:

> A person shall be guilty of an offence if, with intent to stir up hatred against any member of the public in Great Britain distinguished by colour, race, or ethnic or national origins (a) he publishes or distributes … or uses … matter or words likely to stir up hatred against that section on [those] grounds….

The Act also limited prosecution on incitement to hatred to - or with the consent of - the Attorney General.

This legislation was amended by the *Race Relations Act 1976* with the addition of section on 'incitement to racial hatred':

"ONE DOWN – A MILLION TO GO"

In 1978 the then chairman of the British National Party John Kingsley Read delivered a speech at a BNP meeting where he referred to "niggers, wogs and coons" and commented on the racist murder of Sikh schoolboy with the phrase "One down, a million to go". He was charged under the incitement provisions of the RRA 1976. Judge Neil McKinnon instructed the jury that "reasoned argument in favour of immigration control of even repatriation" was not covered by the law on incitement. On acquitting the defendant, he advised him to "use moderate language to propagate his views" and that he "wished him well". The judgement was controversial and McKinnon was removed from further race discrimination cases.

[62] In this context it is useful to note that ECRI have included a definition of Good Relations in their revised General Recommendation on the role of Equality Commissions: "Promoting good relations between different groups in society entails fostering mutual respect, understanding and integration while continuing to combat discrimination and intolerance" http://hudoc.ecri.coe.int/eng#{"ECRIIdentifier":["REC-02rev-2018-006-ENG"]}

[63] See CAJ 2013 for a more detailed discussion.

[64] There is currently a series of legislation used to prosecute racist and religious crime in England and Wales: Racially or religiously aggravated offences - Crime and Disorder Act 1998 (amended by Anti-terrorism, Crime and Security Act 2001); Incitement to racial hatred - sections 17-29 Public Order Act 1986; Incitement to religious hatred - sections 29B-29G Public Order Act 1986; Football Offences - s.3 Football Offences Act 1991 (amended by s.9 Football (Offences and Disorder) Act 1999).

> A person commits an offence if—(a) he publishes or distributes written matter which is threatening, abusive or insulting; or (b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting, in a case where, having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question.

This approach avoids the issue of intent completely by using the term 'likely to be stirred up'.

Currently, the relevant legislation in England and Wales is the *Public Order Act 1986*, Part III of which is entitled 'Racial Hatred'. Originally this Act did not include the grounds of religious belief or sexual orientation. Religious grounds were added in 2006 through the *Racial and Religious Hatred Act 2006*. The *Criminal Justice and Immigration Act 2008* criminalised inciting hatred on the grounds of sexual orientation.

Significantly, the 1986 Act does not include the 'arousing fear' provision included in the 1987 Northern Ireland Order but is limited to 'acts intended or likely to stir up racial hatred'.[65] The legislation in England and Wales also make a distinction between the levels of intent required. For racial hatred, this duplicates the approach in the Public Order Order – so it includes 'intent …. to stir up racial hatred' and the wider, 'having regard to all the circumstances racial hatred is likely to be stirred up thereby'. But this second context is not extended to 'sexual orientation' or 'religious hatred' grounds.

Scottish courts have long-standing powers to increase punishment for 'hate crime' through common law powers to consider aggravating factors when sentencing (as in Northern Ireland).[66] In recent years, new statutory hate crime powers have been added to complement these common-law powers.

"WHY DON'T YOU GO HOME?"

In Scotland in 2009. a Rangers fan was found guilty of breach of the peace, aggravated by religious and racial prejudice. He was given two years' probation and a football banning order for singing the 'Famine Song'. His appeal was represented by Rangers' former vice-chairman, Donald Findlay, who resigned from the Ibrox club in 1999 after he was filmed singing sectarian songs. During the appeal, Mr Findlay argued that the Famine Song - which contains the chorus "the famine is over, why don't you go home" - was not racist, but an expression of political opinion permitted under the European Convention on Human Rights. Referring to the Famine Song, the senior judge Lord Carloway said: "The lyrics … are racist in calling upon people native to Scotland to leave the country because of their racial origins. This is a sentiment which... many persons will find offensive."

[65] Public Order Act 1986, Part III.

[66] http://www.gov.scot/Topics/Justice/policies/reducing-crime/tackling-hate-crime

The *Public Order Act 1986* introduced offences relating to the incitement of racial hatred. In addition, the *Crime and Disorder Act 1998* introduced offences of pursuing a racially-aggravated course of conduct which amounts to harassment of a person. The 1998 Act also provides for any offences to be racially aggravated where it can be demonstrated they were racially motivated and requires courts to take this into account when determining sentence. Similar provision for religiously aggravated offences is provided in the *Criminal Justice (Scotland) Act 2003*.

The *Offences (Aggravation by Prejudice) (Scotland) Act* 2009 provides for statutory aggravations for crimes motivated by malice and ill will towards an individual based on their sexual orientation, transgender identity or disability. Where offences are proven to be a result of such malice or ill-will, the court must take that into account when determining sentence. The *Criminal Justice and Licensing (Scotland) Act* 2010 further strengthened statutory aggravations for racial and religiously motivated crimes.

The *Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012* criminalises behaviour which is threatening, hateful or otherwise offensive at a regulated football match including offensive singing or chanting.[67] It also criminalises the communication of threats of serious violence and threats intended to incite religious hatred, whether sent through the post or posted on the internet.[68] The comparison with Northern Ireland legislation is interesting in a number of ways. First – although it does not use the term – the legislation addresses Protestant/Catholic sectarianism in Scotland. It was a specific intervention aimed at addressing sectarianism associated with soccer. It also retains use of the term 'incitement'; it uses the terms 'cause … fear or alarm' (so, in contrast to other legislation, it addresses fear in the potential victim); it requires 'intent or recklessness'; and includes a specific clause protecting freedom of expression. This legislation has been controversial in Scotland – particularly since it was regarded as only targeting soccer supporters. But broader rights issues associated with freedom of expression and free speech have also been raised widely. Its operation also illustrates some of the complexity involved in the decisions to be made around different forms of 'hate speech'.[69]

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[67] Although, as of March 2018, it seems likely that this legislation is about to be repealed http://www.parliament.scot/parliamentarybusiness/Bills/105269.aspx

[68] As part of a statutory requirement following the Act's implementation, the Scottish Government laid a report in Parliament on the operation of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 on the 12 June 2015. The report includes an external evaluation on Section 1 of the Act (offensive behaviour at football) by University of Stirling and an evaluation of Section 6 of the Act (threatening communications) undertaken by Scottish Government Justice Analytical Services. The results of a YouGov poll on the Act were also published in 2015.

69 *Daily Record* 'Bigotry Bill: Fans told the songs they can't sing' 11 December 2011 http://www.dailyrecord.co.uk/news/politics/bigotry-bill-fans-told-the-songs-1089573

Irish legislation is limited to the *Prohibition of Incitement to Hatred Act 1989*.[70] This was an example of international standards having a direct bearing on national legislation – it was introduced specifically so that Ireland could meet its obligations under the ICCPR. The protected characteristics are similar to those in the UK: 'hatred' means hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation'. These were progressive at the time – for example, both 'membership of the travelling community' and 'sexual orientation' were included before these were protected in UK legislation. The definition on intent is also similar involving expressions that, 'are intended or, having regard to all the circumstances, are likely to stir up hatred'.

The 1989 Act is generally regarded as ineffective. It has been used relatively few times in nearly 30 years (Taylor 2010: 29-33). Despite ongoing campaigning on the issue, there is no provision in Irish law to ensure that bias as a motivating factor in relation to the commission of a criminal offence (i.e. a hate crime) is considered when sentencing, beyond the discretion of the judge. In its fourth monitoring cycle on Ireland, the ECRI strongly encouraged Irish authorities to improve and to supplement the existing arrangements for collecting data on racist incidents. (Rights Now 2016)

In the absence of any other 'hate crime' legislation, there is what Taylor characterises as 'an expectations gap' and 'a frustration gap' between community aspirations from this legislation and the reality of its limited application and implementation to date (2010: 31). In this context, the Office for the Promotion of Migrant Integration issued a 'Clarification' on the Prohibition against Incitement to Hatred Act 1989 in 2013:

> This Office is concerned that there may be a possible misunderstanding concerning the Prohibition against Incitement to Hatred Act 1989 Act and the way in which the criminal law in Ireland addresses racially motivated crime. The… 1989 Act is only directed at addressing incitement to hatred. It cannot and was never intended to address racist crime more generally. Nor can it address racial abuse which is not intended or likely to stir up hatred…. With regard to inciting hatred, the Act allows for two possibilities in terms of prosecution – intention to stir up hatred; and the likelihood (irrespective of intention), in all the circumstances, of stirring up hatred. The States prosecutorial authorities have not brought to the Department's attention any difficulties in bringing prosecutions under the 1989 Act in appropriate cases.

Even with regard to incitement to hatred, however, the legislation has long been criticised as unworkable in practice because it sets an unattainably high threshold for prosecutions.

[70] Prohibition of Incitement To Hatred Act, 1989
http://www.irishstatutebook.ie/eli/1989/act/19/enacted/en/html

Despite periodic undertakings to review it by the Department of Justice, it still has not been revised, up-dated or clarified.[71] Meanwhile human rights organisations continue to highlight:

> The pressing need to render this legislation more robust in order more effectively to combat future manifestations of hate speech. The ICCL would like to see far clearer legal guidance demarcating the line between freedom of expression and hate speech so that people can engage freely in debate while also respecting the rights of protected groups not to be subjected to hate speech. (ICCL 2015)

In addition, the *Defamation Act 2009* defines an indictable criminal offence of 'publication or utterance of blasphemous matter'. Conviction can result in a maximum fine of €25,000. In practice, this has been effectively unenforceable.[72]

Case law and Guidance

There is very little case law from Northern Ireland under Section III of the 1987 Order. As we have seen there has been a very small number of prosecutions and convictions for incitement to hatred in Northern Ireland since 1970. There have been no prosecutions on the grounds of sexuality or disability. Perhaps more strikingly given the intensity of sectarian conflict over the past fifty years, there have been no successful prosecutions on the grounds of sectarian identity. This obviously focuses attention on the most high-profile conviction – the 'Ballycraigy Bonfire' case of 2016. This successful prosecution was brought on the grounds of race. This was widely reported as a 'landmark case' – although, as indicated above, subsequent research has shown that there have been a small number of other prosecutions and convictions under the 1987 Order. Nevertheless, the case – alongside the wider discussions it provoked - remain significant.

In this case the defendant was convicted on displaying 'racist slogans' on a 12th of July bonfire in 2014.There had been significant controversy around the bonfire and related criticism of the PSNI - which had supported funding for the bonfire despite its inclusion of a range of offensive and inciteful displays.[73] He was found guilty of 'displaying written material which was threatening, abusive or insulting, intending thereby to stir up hatred or arouse fear'.[74]

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[71] (http://www.irishtimes.com/news/review-of-incitement-to-hatred-law-announced-1.1099640

[72] In 2016, professor of law at TCD Neville Cox said, 'My view is the 2009 act fulfilled a constitutional obligation on the crime of blasphemy, but skilfully rendered the law completely unenforceable. I am not saying that was the intention.' http://www.irishtimes.com/culture/film/why-ireland-won-t-ban-louis-theroux-s-scientology-film-1.2807475

[73] *Irish News* 2015. Landmark 'hate crime' prosecution over loyalist bonfire http://www.irishnews.com/news/2015/08/17/news/landmark-hate-crime-prosecution-over-loyalist-bonfire-230609/

[74] *BBC News* 'Colin White convicted over racist slogan on loyalist bonfire', 8 December 2015 <http://www.bbc.co.uk/news/uk-northern-ireland-35038751>

"We're not racist, just don't like niggers."

On 8 December 2015 Colin White was convicted by District Judge Alan White of inciting hatred by placing offensive material on the 11th night bonfire in the Ballycraigy estate in Antrim. White had graffitied "We're not racist, just don't like niggers" on a divan bedstead placed on the bonfire. The court was told a man took photos of the Ballycraigy bonfire and noticed the divan with no writing on it. After three people approached it, he could see that White was the only person whose arms were moving and afterwards there was graffiti. White did not deny being present at the bonfire but denied he had written the message. Speaking when he convicted him, the judge said White was guilty of "pernicious conduct" in a society where there are almost weekly race attacks with people being put out of their homes, adding that such incidents can be "stirred up by this type of behaviour". On 12 January 2016, White was sentenced with an 18-month probation order. In his plea in mitigation, defence barrister Aaron Thompson revealed that father-of-one White now admitted his guilt, suggesting that he "will do anything that makes him think he will fit into his peer group". Describing the incident as "unsavoury," the lawyer further suggested that as a result of his conviction, White had lost his job and would suffer the consequences "for many years". "It was a stupid act" said Mr Thompson, adding that White had been "stupid enough to go in front of a photographer in daytime and spray this ... nothing explains away the public horror in this". Judge Alan White told the teenager: "Notwithstanding the serious nature of the charges, you were led and influenced by others and their hateful agenda. Perhaps by your personal difficulties you didn't understand the implication of it." Imposing the probation order, Judge White told the defendant that if he cooperated with probation, "you can get back on track and get away from this hateful behaviour which is causing so much distress in this community".

The prosecution was in connection to a slogan that attacked black people but it overlooked the Irish tricolours on the bonfire with slogans such as 'Keep Antrim Tidy' (KAT could also be read as 'Kill All Taigs'). The conviction provides precedence for the use of the 1987 Order to address incitement to hatred. It recognised that displaying written material – on a bonfire – constituted incitement to hatred or arousal of fear. This conviction can be regarded as progress for the utilisation and understanding of the 1987 Order. But it also raises questions of 'free speech' and exposed contradictions within the operationalisation of incitement to hatred legislation in Northern Ireland. The conviction immediately begged the question of why racist graffiti was inciteful but sectarian graffiti – alongside the burning of rainbow flags and Irish tricolours - was not.

There was a plurality to the offense caused by the bonfire in question which, alongside the gratuitous racism that invited prosecution,

included genocidal sectarian slogans and attacks on individuals including Gerry Adams. It also attacked targets less often associated with loyalist bonfires – including the PSNI and the DUP. This said, however, there was nothing significantly egregious about the offensive racist statement. These are found routinely on bonfires as well as graffitied across Northern Ireland.

In other words, the prosecuted 'speech act' was no worse than thousands of other examples that have not been prosecuted. But this begs the question of why it was prosecuted. Our engagement with the PSNI in the course of the research suggested that this was solely explained in terms of the availability of evidence identifying the perpetrator.

But this bears emphasis – this specific example of incitement to hatred was prosecuted not because it was particularly 'bad' but simply because there was witness evidence which might secure a conviction. As the defence barrister suggested White had been, 'stupid enough to go in front of a photographer in daytime and spray this'.[75]

The judgement was grounded in terms of the international standards addressed earlier. It focussed on the 'stirring up' elements of events surrounding the case. In other words, the court found that the offensive expression clearly met the threshold to qualify as 'incitement to hatred'. This has significant implications in terms of the routine expression of incitement to hatred across Northern Ireland. There have been thousands of comparable cases of 'speech acts' at least as egregious as the 'Ballycraigy Bonfire' but none of these have been prosecuted – either because of 'lack of evidence' or for some other reason.

Beyond this judgement there has been a series of recent high-profile episodes that, while they have not been prosecuted as 'stirring up' offences, are characterised or understood in terms of notions of incitement to hatred. For example, judgement in the *DPP v James McConnell* was handed down on 5 January 2016. Pastor McConnell broadcast anti-Islamic statements from a Church in Belfast. He was prosecuted under the Communications Act 2003, but the threshold for the comments to be 'grossly offensive' was not met, and he was acquitted. It is unclear why the Public Order (Northern Ireland) Order 1987 was not used in this case. It was acknowledged that the comments were broadcast, and thus would have fallen under s12 of the Order 'broadcasting or including programme in cable programme service'. The threshold here would have been if the comments were 'threatening, abusive or insulting' rather than 'grossly offensive'.

[75] *Newsletter* 2016. 'Antrim man freed on bonfire 'race hate' charge' 12 January 2016. http://www.newsletter.co.uk/news/crime/antrim-man-freed-on-bonfire-race-hate-charge-1-7156432http://www.newsletter.co.uk/news/crime/antrim-man-freed-on-bonfire-race-hate-charge-1-7156432

In this context, the judge cited the Crown Prosecution Service (CPS) guidelines on 'grossly offensive' comments and the ECHR case *Handyside v UK* in support of the freedom of expression balance with this charge. The ECHR noted that 'freedom of expression includes the right to say things or express opinions 'that offend, shock or disturb the state or any section of the population'.[76] The judge also drew on the 'Chambers' case, where it was stated 'courts need to be very careful not to criminalise speech which, however contemptible, is no more than offensive'.[77]

Although offensive, the Pastor's comments were ruled not to be 'grossly offensive'. However, if analysed through the lens of the 1987 Order, the words of McConnell's sermon would likely have been accepted as stirring up hatred or arousing fear, particularly in drawing parallels between the IRA and 'cells of Moslems right throughout Britain' which he described as a 'new evil'.[78] Likewise his comment that, 'Islam is heathen, Islam is satanic, Islam is a doctrine spawned in hell' implies religious hatred in unambiguous terms. In other words, while the 1987 Order is more limited in precedent, it seems it might prove more useful in charging – and convicting – persons for incitement to hatred, rather than allowing instances to go unanswered because they do not meet the threshold required under other legislation.

Case law in *England and Wales*

Additional case law under the Public Order Act 1986 as well as previous legislation provides useful context for any discussion of incitement to hatred in Northern Ireland. The majority of the caselaw relates to incitement to racial hatred. The extensions to the legislation to cover incitement on the grounds of religious hatred and sexual orientation have seen a small number of cases brought on these grounds.[79]

"LET'S SHOW THESE ETHNICS THE DOOR"

In 2006, BNP leader Nick Griffin and party activist Mark Collett were cleared of inciting racial hatred after a retrial at Leeds Crown Court. Griffin and Collett were charged in April 2005 after the BBC showed a secretly-filmed documentary *The Secret Agent* in 2004. Griffin made a speech in which he described Islam as a "wicked, vicious faith" and said Muslims were turning Britain into a "multi-racial hell hole". Collett said: "Let's show these ethnics the door in 2004." The defence argued these words were part of a "campaign speech of an official and legitimate party". After the acquittal, Chancellor Gordon Brown said race laws might have to be tightened. The Crown Prosecution Service said it was satisfied there had been sufficient evidence for a "realistic prospect of conviction" and it had been in the public interest to proceed.

[76] *DPP v McConnell* [2016] [22]
[77] *DPP v McConnell* [23]
[78] McConnell's sermon, as quoted in [2] of the judgement.
[79] The first sexual orientation case in England and Wales, R v Ali (Ihjaz) was prosecuted under that Act in 2013. *BBC News* 'Derby men guilty over gay hate leaflets' 20 January 2012. http://www.bbc.co.uk/news/uk-england-derbyshire-16656679

The tension in the legislation between public order and protection from racism is striking in this caselaw. This was explicit in the evolution of the legislation – it started as anti-discrimination legislation and ended up as public order legislation. The operation of the legislation also raises wider human rights concerns in terms of its differential impact. As Pesinis suggests:

> The convictions of Islamist extremists for incitement to racial hatred can be viewed as examples of the politically charged application of the relevant legislation.
>
> To be sure, the speeches, for which they were convicted, can hardly be said to fall out of the standard meaning of racial incitement. The way, however, in which the prosecutions were carried out, in an anti-terrorist context … can be viewed as indicative of the priority public order interests have been accorded over the protection of minorities in the application of the law. As in the case of [the unsuccessful prosecutions of BNP leaders] Griffin and Collett, the cases received much publicity from the media giving the impression that [incitement to racial hatred] not only fails to protect minorities but instead is used against them. (2015: 93)

The volume of caselaw under legislation since 1965, allows some conclusions to be drawn (Pesinis 2015). As Pesinis suggests, 'incitement legislation has set certain clear limits on public expression, which have *reshaped* rather than eradicated racist speech in Britain' (2015: 98, emphasis added). Thus:

> The requirement of consent of the Attorney General for the validity of any prosecution means that political considerations have influenced greatly the way incitement law has been used. This is apparent in the early prosecutions brought during the 1960s and 1970s with the rather imbalanced decisions to prosecute Black Power activists but not high profile anti-immigration campaigners like Enoch Powell. Also, courts have generally proven more willing to convict members of minorities than organised racist groups that express a more "normalized" form of hate speech. This could be said for the early prosecution with the acquittal of the members of the RPS and the Kingsley Read, as well as for the more recent ones, with the acquittal of Nick Griffin. This has been the case, of course, as long as the speech of organised racists has remained within certain limits. Public incitement to hatred by Neo-Nazis has in most cases been treated with zero tolerance by the authorities, from the time of the conviction of Colin Jordan until today. This is perhaps the only standard pattern in the use of law and it has had a profound effect on the way the British far-right operates, pushing overt anti-Semitism out of the mainstream. (2015: 98-99)

This restricted change, while not insignificant, suggests some of the limitations to the use of criminal law as an intervention against incitement. This British precedent should be used to inform any more engaged use of legislation in Northern Ireland. Such an initiative certainly could change discourse but – if more profound social change is expected – it will need to be grounded in broader equality measures.

Guidance

There is some statutory guidance on the use of incitement to hatred legislation at international and UK level.[80] For example, CPS England provides some further guidance on the term 'hatred'. The CPS notes: 'Hatred is a very strong emotion. Stirring up racial tension, opposition, even hostility may not necessarily be enough to amount to an offence'. There is a clear attempt to balance this offence, and even the conceptualisation of this offence, with freedom of expression. The goal is not to criminalise insulting words, but instead the incitement to hatred or arousal of fear of a group.

There is, however, little guidance on the use of Section III of the 1987 Order; this is arguably one of the reasons it is underused in arrests and convictions. The Public Prosecution Service (PPS) provides 'Hate Crime: PPS guidelines Northern Ireland' (2010). There is no statutory definition of hate crime, so the PPS guidance adopts the definition: 'Any incident which constitutes a criminal offence perceived by the victim, or any other person, to be motivated by prejudice or hate towards a person's race, religion, sexual orientation or disability'.[81] The PSNI website groups 'hate and signal crimes and incidents' together, defining them as: 'any crime or incident where the perpetrator's hostility or prejudice against an identifiable group of people is a factor in determining who is victimised'.[82] The test for whether a crime is a hate crime is the perception test; this can be the perception of the victim or any other person.[83] Despite this substantial PPS/PSNI guidance on 'hate crimes', however, there is virtually nothing regarding 'incitement to hatred'.

Arguably this lack of guidance leaves the current legislation interpreted as setting a high threshold and neither the Public Prosecution Service (PPS) nor PSNI have any specific written guidance themselves on how to interpret its provisions. This reinforces the lack of legal certainty over the scope of Part III offences. The PSNI does have a Hate Crime Incidents Service Procedure and a Manual of Conflict Management, but there are only passing references to the 'stirring up offences'. The PPS Hate Crime Policy 2010 is similar; the PPS provides a short analysis entitled the 'stirring up offences' under the Order but does not reference any of the international law contextual tests.

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[80] Other guidance is also available through statutory organisations and NGOs. For example, in the Press Council of Ireland Code of Practice, Principle 8 'prejudice' provides a detailed template for its members: 'The press shall not publish material intended or likely to cause grave offence or stir up hatred against an individual or group on the basis of their race, religion, nationality, colour, ethnic origin, membership of the travelling community, gender, sexual orientation, marital status, disability, illness or age.' This kind of non-statutory intervention is obviously part of the movement towards 'zero-tolerance' of incitement to hatred.

[81] 'Hate Crime: PPS Guidelines Northern Ireland' 2.1.1

[82] 'What is Hate Crime?' https://www.psni.police.uk/crime/hate-crime/disability-related-hate-crime2/

[83] 'The Perception Test' https://www.psni.police.uk/crime/hate-crime/the-perception-test/

In 2014, however, the office of the Attorney General for Northern Ireland issued statutory human rights guidance for the PPS which did reference these standards.[84] This guidance references the UN Rabat Plan and includes the six-stage threshold test for incitement to hatred within the guidance. This provides a framework for the PPS when considering charges under Part III of the 1987 Order. Finally, the most comprehensive review of policing race hate crime in Northern Ireland appeared in the NIPB *Thematic Review of Policing Hate Crime* (2017). This broad review of policing and race hate included a specific review of incitement to hatred (2017: 46-50).

Finally, it is important to recognise that further guidance is also available through non-statutory organisations and NGOs. For example, in the Press Council of Ireland Code of Practice, Principle 8 'prejudice' provides a detailed template for its members: 'The press shall not publish material intended or likely to cause grave offence or stir up hatred against an individual or group on the basis of their race, religion, nationality, colour, ethnic origin, membership of the travelling community, gender, sexual orientation, marital status, disability, illness or age.' Likewise, major internet companies recently committed to an EU code on hate speech.[85] While none of this replaces the need for statutory action, this kind of non-statutory intervention is obviously part of the broader movement towards 'zero-tolerance' of incitement to hatred.

[84] Attorney General for Northern Ireland 2014. 'Human Rights Guidance for the Public Prosecution Service' https://www.attorneygeneralni.gov.uk/sites/ag/files/human-rights-guidance-public-prosecution-service.pdf
[85] *Guardian* 'Facebook, YouTube, Twitter and Microsoft sign EU hate speech code' 31 May 2016. https://www.theguardian.com/technology/2016/may/31/facebook-youtube-twitter-microsoft-eu-hate-speech-code

The scale of the problem in Northern Ireland: Talking about what should not be said

A recent well-orchestrated campaign of Islamophobic leafleting in South Belfast suggests that incitement to hatred presents a dangerous – and escalating - threat in contemporary Northern Ireland.[86] Yet, what is most striking about the 'Ballycraigy Bonfire Case' is that it highlights the thousands of cases of incitement to hatred in Northern Ireland that have not resulted in prosecution or conviction. While the expression in this case was carefully considered in the judgment and met the threshold established in international human rights standards, more egregious and extreme expressions have avoided investigation, let alone prosecution or conviction.

Most of the time most statutory organisations have operated a de facto 'toleration' policy on incitement to hatred. There has been little attempt to problematise or remove even the most egregious and straightforward examples of incitement to hatred in Northern Ireland – the genocidal imperative found routinely graffitied in public spaces: 'KILL ALL TAIGS', 'KILL ALL IRISH', 'KILL ALL HUNS' and 'ALL TAIGS ARE TARGETS'. Notwithstanding the recognition of a need for a wider discussion on what should and should not be said in contemporary Northern Ireland, sentiments are routinely expressed that clearly constitute incitement to hatred in both international and domestic legislation.

Any review of contemporary graffiti is sufficient to suggest that post-GFA Northern Ireland is far from being a 'hate-free' society. While Northern Ireland may well be in conflict transformation mode, it remains a place in which we can expect there to be ongoing expressions of hatred and in which we might expect the state to respond appropriately to this reality. It follows from this that it is also reasonable to suggest that the current system is not working – neither the police nor the criminal justice system nor the wider community regards it as functioning adequately. The key question, therefore, is what might a more proactive intervention on incitement to hatred in Northern Ireland look like?

At one end of the continuum, we could have a permissive reading of the international human rights standards and the existing legislation. This approach might pursue prosecutions and convictions for every youth painting an incitement slogan - alongside a sustained intervention on any expression associated with parading and bonfire activity that meets the threshold for incitement in international guidelines. This immediately raises civil libertarian concerns. Furthermore, the British precedent on race and incitement also reminds us that any prosecutions policy may itself raise issues of bias. As we have seen, in the UK incitement to racial hatred was

[86] BBC News 2018. 'Anti-Islam leaflets distributed on lower Ravenhill Road' 05/04/18 http://www.bbc.co.uk/news/uk-northern-ireland-43652898

historically more likely to be used against black radicals than white racists, for example. This pattern has continued in more recent years with successful prosecutions for incitement to hatred against British Muslims juxtaposed with acquittals for white racists prosecuted under the same legislation.

So, we might want a more balanced and nuanced approach to addressing incitement to hatred across Northern Ireland.

There has been relatively little informed discussion on how the issue of incitement to hatred might be better addressed in Northern Ireland. Often the discussion is precluded completely with the assertion of 'free speech' principles – in other words people assert their right to say anything they want about another group and, on this basis, refuse to engage with any dialogue about incitement to hatred. Insofar as the issue is discussed, there is a fair degree of sectarian tit-for-tat. For example, discussion of the Druids episode was characterised by the assertion that the banning of the Famine Song in Scotland was sufficient to justify the prosecution of the band.[87] This kind of engagement means that there is little discussion of the substance of the alleged incitement involved nor any more nuanced consideration of the consequences.

Broadly we can suggest that the approach should move towards a 'zero-tolerance' approach to incitement to hatred. There needs to be a broader conversation around what is and is not and what should or should not be *expressed*. Despite the arguments for synergy rather than contradiction, it seems inevitable that this conversation with be carried out in the shadow of concerns about freedom of speech.

There are a number of resources to aid this conversation. The classic liberal position is the JS Mill 'harm principle'. In *On Liberty* (2010) MIll argued that, 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against [their] will, is to prevent harm to others'. In

"FUCK OFF BACK TO ENGLAND"

In August 2013, footage was taken of a performance by The Druids at the annual Ardoyne Fleadh, an event licensed by Belfast City Council. One band member said: "It's about time that they took down their little Union jacks, it's about time that they got all their Orange comrades together, it's about time that they loaded up the bus and it's about time that they all fucked off back to England where they came from." The DUP submitted a formal complaint to the PSNI about what is described as "the anti-British and anti-Protestant hate speech and the glorification of terrorism at this event". Organisers said "it was wrong, regrettable, disappointing and should not have happened". In September the PSNI said they had conducted a "full and thorough investigation" and presented their evidence to the Public Prosecution Service which advised no criminal offence had been committed.

[87] This song was also central to the parading outside St Patrick's church issue.

other words, there cannot be any justification for limiting freedom of expression unless is it harming someone else.

Related to this point is the maxim on the difference between harm and offence that informs human rights discourse on the issue - it bears repetition at this point that *speech that harms is different from speech that offends*. This principle is embedded across international law.

It also runs through the tensions around recent caselaw – particularly internet communications. There are many speech acts that cause offence on different grounds – but the key question is are they harming anyone?

Another key tool is to emphasise that expression is what Austin (1962) called an 'illocutionary act' – 'by saying something, we do something'. Thus we need to regard things that are said (and by implication printed, broadcast and so on) as 'speech acts'. In this context, we can ask of any speech act, what is 'doing' – is it inciting? Is it offending? Is it critiquing? Is it entertaining? and so on.

There is also key question around responsibility for the speech act. More particularly, there is a question around intentionality. As we have seen, neither all international standards nor domestic legislation require intentionality. But is the claim of non-intentionality -'I did not intend to harm anyone by saying X' - really an adequate defence, particularly if people have been harmed? (As we have seen this tension is reflected in international standards. The Rabat plan of action indicates that intent is necessary as part of its threshold test but ICERD and ECRI do not and are more like the UK legislation.)

Anonymity is also a key issue. If someone is prepared to take responsibility for offensive speech this may appear preferable to expression which is unattributed – not least because this makes public examination of any possible incitement to hatred much easier. Again, this issue has been key to recent internet related discussions – particularly the issue of 'internet trolling'. Is it better to know who is making the speech act that is offensive or potentially harmful? Authorship makes people more immediately open to sanction than anonymity. But is there a more substantive difference?

The Rabat Plan suggests these broad distinctions which help to frame the discussion:

> In terms of general principles, a clear distinction should be made between three types of expression: expression that constitutes a criminal offence; expression that is not criminally punishable but may justify a civil suit or administrative sanctions; expression that does not give rise to criminal, civil or administrative sanctions but still raises a concern in terms of tolerance, civility and respect for the rights of others. (4)

Using these tools, we can engage with some of the historical and contemporary expression in Northern Ireland that might qualify as 'incitement to hatred' in the context of international and domestic legislation. And then we can ask if we want to see a context in which such expression is criminalised or not.

Despite the absence of casework, there have been a series of 'incidents' across the history of Northern Ireland which help identify the scale and challenge of incitement to hatred interventions.

While most of the incitement to hatred issues do not involve public figures (but 'sites' of incitement like graffiti, the erection of flags, parades, bonfires and evictions), some do. Recently, of course, this involved the example of Peter Robinson speaking as First Minister about Muslims. Often these cases involving politicians have engendered most public discussion on 'hate speech' and most public discussion on the counterpoise between freedom of expression and freedom from incitement.[88] In all these the notion of incitement to hatred has been utilised with differing degrees of accuracy and differing degrees of reference to international standards. In combination, they suggest the kinds of expression that remain contested and that need to be addressed in the context of a 'zero-tolerance' approach to incitement to hatred in Northern Ireland.

Historically perhaps the most notorious speech act in the history of Northern Ireland was made by Basil Brooke, later to become Lord Brookeborough and Northern Ireland Prime Minister. On 12 July 1933, Sir Basil Brooke, then junior Unionist government whip, spoke at an Orange rally. The speech was subsequently reported:

"DON'T EMPLOY CATHOLICS"

On 12 July 1933, Sir Basil Brooke Unionist Party, then junior government whip, spoke at an Orange rally: 'He appreciated the great difficulty experienced by some of them in procuring suitable Protestant labour, but he would point out that the Roman Catholics were endeavouring to get in everywhere and were out with all their force and might to destroy the power and constitution of Ulster. ... He would appeal to loyalists, therefore, wherever possible to employ good Protestant lads and lassies.' A year later on 19 March 1934 - now speaking as Minister of Agriculture - Brooke said: "When I made that declaration last 'twelfth' I did so after careful consideration. What I said was justified. I recommended people not to employ Roman Catholics, who were 99% disloyal.

[88] See, for example, Suzanne Breen, 'It's not only Pastor McConnell in the dock, freedom of speech is there as well' *Belfast Telegraph* 6 August 6 2015.

‘There was a great number of Protestants and Orangemen who employed Roman Catholics. He felt he could speak freely on this subject as he had not a Roman Catholic about his own place (Cheers). He appreciated the great difficulty experienced by some of them in procuring suitable Protestant labour, but he would point out that the Roman Catholics were endeavouring to get in everywhere and were out with all their force and might to destroy the power and constitution of Ulster. ...

He would appeal to loyalists, therefore, wherever possible to employ good Protestant lads and lassies'.[89]

A year later speaking as Minister of Agriculture on 19 March 1934 Brooke said: ‘When I made that declaration last ‘twelfth’ I did so after careful consideration. What I said was justified. I recommended people not to employ Roman Catholics, who were 99% disloyal’.[90] In response to these statements, Sir James Craig, as Prime Minister of Northern Ireland, was asked the Government's policy in relation to the employment of Catholics. He responded, ‘[Sir Basil Brooke] spoke [on 12 July 1933 and 19 March 1934] as a Member of His Majesty's Government. He spoke entirely on his own when he made the speech … but there is not one of my colleagues who does not entirely agree with him, and I would not ask him to withdraw one word he said’.[91]

It would difficult to find a clearer example of the notion of *incitement to discriminate* which was subsequently prohibited in international standards. There are many points about this episode that lend it contemporary saliency. First, it bears emphasis that it occurred before there were any international or domestic prohibitions on incitement to hatred. Nevertheless, it was widely reported, and it became a touchstone for concerns about equality in Northern Ireland. Second it is an example of incitement to discriminate – something which is included in international human rights standards but rarely features in domestic legislation. Third, it anticipates particularly the ‘arousing fear’ section of Northern Ireland legislation – Catholics are ‘99% disloyal’ and ‘out with all their force and might to destroy the power and constitution of Ulster’. Fourth, it is an archetypal example of incitement from a position of power – the speaker was a major employer and a member of the government; moreover, the sentiments were endorsed by his Prime Minister.

These considered, is this the kind of thing that could and should be said in post-GFA Northern Ireland?[92]

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[89] Reported in *Fermanagh Times* 13 July 1933; Quoted in: Hepburn, A. C. (1980), The Conflict of Nationality in Modern Ireland, London: Edward Arnold (Documents of Modern History series). Page 164.

[90] Reported in *Belfast News Letter*, 20 March 1934]; Quoted in: Commentary upon The White Paper (Cmd.558) entitled 'A Record of Constructive Change' (1971).

[91] Reported in Parliamentary Debates, Northern Ireland House of Commons, Vol. XVI, Cols. 617-618

[92] This is not a moot point – recent examples have included a similar incitement to discriminate in housing http://www.newsletter.co.uk/news/let-s-get-these-houses-filled-up-with-unionists-1-8160143

Of course, the Brookborough statement was made before there were any international standards on incitement and long before the original Incitement to Hatred Act was introduced in 1970 in the context of deepening political crisis at Stormont and worsening violence across Northern Ireland. But there has also been a volume of expression since 1970. While it was modelled on the UK incitement to racial hatred legislation, it was clearly aimed at 'sectarian' Protestant/Catholic tensions. Not surprisingly, therefore, the early cases that involved reference to incitement to hatred were 'sectarian' - such as those involving John McKeague and George Seawright. These involved varying combinations of religious, political, racial, national and ethnic incitement but these could all be bundled with the shorthand 'sectarian'. More recent examples of this kind of putative sectarian incitement include the Ruth Patterson case and the Gregory Campbell 'Irish Language' case.[93] While these examples predominantly involve statements by Loyalist and Unionist politicians, they are other contexts. Most recently, the St Patrick's Church parading issue raised the issue of sectarian parading and 'provocation'. This was subsequently mirrored by the Druids case – which was investigated as anti-Protestant incitement. More recently, race cases have emerged – most notably, of course, the Ballycraigy bonfire case.

There has been a particular trope of Islamophobia cases – often regarded as 'race' cases but where the toxic combination of ethnic and religious hatred often mirrors the sectarian cases. These include the aforementioned Pastor McConnell case and the Fred Crowe case alongside the statements on Muslims by former First Minister Peter Robinson.

"NO OFFENCE INTENDED"

In 2015 thirteen members of a loyalist band successfully appealed convictions for playing a sectarian tune outside a Catholic church. The Young Conway Volunteers members were prosecuted over their conduct outside St Patrick's Chapel on Donegall Street, north Belfast, on 12 July 2012. They denied playing the Famine Song as they marched in circles at the site and claimed they were performing the Beach Boys hit 'Sloop John B'. The outcome was reached after each of the defendants agreed to being bound over to keep the peace and be of good behaviour for two years. The County Grand Orange Lodge of Belfast welcomed the successful appeal. "We are glad that justice has finally been achieved for these band members who had been wrongly vilified by the media and nationalism," it said. "There never was an intent to cause offence."

[93] BBC News 2014. 'Curry my yoghurt': Gregory Campbell, DUP, barred from speaking for day' 4 November 2014 http://www.bbc.co.uk/news/uk-northern-ireland-29895593

Defending Pastor McConnell, Mr Robinson said he would not trust Muslims involved in violence or those devoted to Sharia law but that he would 'trust them to go to the shops' for him.[94] Robinson was not prosecuted but he was widely and heavily criticised for his comments and subsequently apologised to the Muslim community.[95] Fred Crowe – a UUP Councillor – suggested that using a small bungalow in Craigavon as an Islamic centre would 'wipe out Christianity' and reportedly suggested, 'a Mosque would devalue the area and introduce people to the area who don't actually live there'.[96] His party leader issued him with a written warning but there was no prosecution in this case.

More recently, new forms of incitement to hatred were recognised by reforms to the legislation – particularly the addition of the grounds of sexuality and disability. Probably the most high-profile incident involved former MP and MLA Iris Robinson's homophobic comments. These were subject to a police investigation, but this did not result in any prosecution.[97] Finally, it bears emphasis that the integration of disability as a ground in Northern Ireland legislation establishes an important principle. While there is yet to be any police investigation or test case on the issue, the recognition of disability as a ground for hate crime sets an important precedent well beyond Northern Ireland.[98]

The Iris Robinson episode raised the issue of incitement and homophobia directly for the first time in Northern Ireland. Robinson was MP for Strangford and the chair of the Northern Ireland Assembly's health committee at the time. Speaking on BBC Radio's *Nolan Show*, she was asked to comment on a homophobic assault that took place in Newtownabbey. The police identified the incident as homophobic in nature. While she condemned the attack, Robinson suggested that the victim should consider therapy to 'cure' him of his homosexuality.

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[94] *BBC News* 2014. 'Peter Robinson under fire for backing Pastor James McConnell's Islamic remarks' 28 May 2014 http://www.bbc.co.uk/news/uk-northern-ireland-27604841

[95] *BBC News* 2014. 'First Minister Peter Robinson in public apology to Muslims' http://www.bbc.co.uk/news/av/uk-northern-ireland-27697444/first-minister-peter-robinson-in-public-apology-to-muslims

[96] http://sluggerotoole.com/2003/01/14/unionist-opposition-to-portadown/ http://news.bbc.co.uk/1/hi/northern_ireland/3188678.stm

[97] http://www.pinknews.co.uk/ 2008/06/07/police-to-investigage-iris-robinson-over-ex-gay-comments/

[98] This may well play a wider role in the process of addressing expressions of hate against people with disabilities. This was a key issue for the United Nations Convention on the Rights of Persons with Disabilities Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention. Its recommendation Eight included *inter alia* that, 'the UK adopt measures to address complaints of harassment and hate crime by persons with disabilities, promptly investigate those allegations, hold the perpetrators accountable and provide fair and appropriate compensation to victims'.

She also commented: ‘Homosexuality is not natural. My Christian beliefs tell me that it is an abomination and that is very clear. It is an offence to God, an offensive act and something that God abhors.’

This episode also serves to remind of a wider obligation on media. In this context, the broader discussion of unambiguously homophobic views led to a context in which the terms in which the reporter framed his questioning might itself have been regarded as incitement. The portion of Robinson’s radio interview that was reported to the police as a hate crime illustrates this:

> Stephen Nolan: Do you think for example that homosexuality is disgusting?
> Iris Robinson: Absolutely
> Stephen Nolan: Do you think that homosexuality should be loathed?
> Iris Robinson: Absolutely
> Stephen Nolan: Do you think it is right for people to have a physical disgust towards homosexuality?
> Iris Robinson: Absolutely

In other words, insofar as this regarded as incitement to hatred, the ‘work’ of incitement was done by the framing of the questions. The only speech act made by Robinson was ‘Absolutely’.

When we bundle these examples, we already have a series of ‘speech acts’ made in Northern Ireland, which have caused considerable offence to sections of the community on protected grounds and which have either been reported to the police, investigated by the police, prosecuted or secured convictions. It is possible to return to these and ask whether they meet the threshold for incitement to hatred and, if they do, how best to ensure that such expression is no longer tolerated. This is might be characterised as ‘how to talk about what should not be said’. Part of the conversation must be an assessment of the kind of things that should and should not be said and the contexts in which these things can and cannot be said. It bears emphasis, of course, that this process is not without its own contradictions – we need to repeat a whole series of offensive and possibly inciteful speech acts in order to decide whether they should or should not be made.

It is possible to suggest some possible guiding principles. First, given the ‘tit for tat’ discourse around much of the previous discussion of incitement to hatred, it bears emphasis that protection is reciprocal. In other words, ‘Kill all Taigs’ cannot be banned while ‘Kill all Huns’ is tolerated. This notion is not so ridiculous in terms of historical precedent. For example, blasphemy laws are usual enacted to protect only one religion – which is why international law tends to oppose these on both freedom of speech and non-discrimination grounds.

Likewise, the old Northern Ireland *Flags and Emblems Act* was clearly directed against one section of the community.[99] It is also clearly not a defence against incitement to suggest that the response should be balanced as the PSNI did in response to the Billy Wright banner incident in Dungannon. The police treated the banner as a 'hate incident' but were widely criticised for failing to remove it. There was further criticism when a senior officer said in response that police 'must attempt to achieve a balance between the rights of one community over another'.[100]

Second, there is always a degree of 'reading' to be done. Often expressions assume very different meanings in different contexts. For example, the 'Famine Song' is straightforwardly racist and has been identified as such by a Scottish court. But its tune is 'Sloop John B' – a Beach Boys song based on an African Caribbean folk song. So, when it is being played outside a Catholic Church, is it only the singers of the lyrics who are causing offence or inciting hatred or can the tune do the same 'work'? And the Tina Turner song 'Simply the Best' is regarded as a theme song of the UVF – but is it to be read as 'Simply the best at sectarian murder' when the original song clearly did not have that connotation? In other words, the banning of straightforward incitement to hatred like 'KILL ALL TAIGS' may simply result in a reframing as 'KEEP ALL TIDY' or 'SIMPLY THE BEST' which can be read as having the same message but is less easy to prosecute. Thus, we must ask if incitement by proxy is any less acceptably than overt incitement to hatred?

"A GREAT SERVICE TO NI AND THE WORLD"

Ruth Patterson – a former DUP deputy mayor of Belfast - was charged with sending a grossly offensive electronic communication in August 2013 when she commented about an imaginary attack in which marchers, including Sinn Féin figures, are killed. The DUP said that the remarks were not in keeping with the DUP's values and ethos'. They also asked why the 'police chose to conduct a sensationalist arrest'." In response, police said that when a report is made to them "regarding … social media sites, … where a criminal offence has occurred, appropriate action will be taken". Earlier, the police said they had "arrested a 57-year-old female in relation to offences concerning the sending of grossly offensive communications and other serious criminal offences in relation to intimidation and encouraging criminal acts". The charge was withdrawn after she was given an informed warning by police.

[99] A blasphemy law remains a statute in force in NI but, in effect, this applies to no one since the Church of Ireland was disestablished in 1869.

[100] *Irish News* 2016. 'PSNI refusing to comment further on Billy Wright poster in Dungannon' 28 July 2016. http://www.irishnews.com/news/northernirelandnews/2016/07/28/news/psni-refusing-to-comment-further-on-billy-wright-poster-in-dungannon-626541/

In short, therefore there is plenty of material to inform a broad discussion of what should and should not be said in Northern Ireland. Moreover, if we focus on the key distinction between speech that offends and speech that harms, we can begin to frame a novel response to incitement to hatred here. The key intervention might be strategic litigation with an emphasis on the importance of the power to incite (i.e. the recognition that it is substantively worse/ontologically different if a government minister rather than a misguided youth is saying something inciteful about Muslims). This notion is explicit in CERD/Rabat but it is not unproblematic. This does, however, connect with the broader issue of institutional racism. It is standard to accept the notion of institutional racism particularly as it impacts on policing and criminal justice. This arguably has implications in terms of incitement – where some aspect of the incitement is institutionalised it assumes a significantly more serious character.

We might term this *institutional incitement.* The point here is that it is not just the speech act but the institutional context – the power nexus in which it takes place – which determines whether incitement is a likely outcome. Again, it bears emphasis that the speech act 'Don't Employ Catholics' scrawled on a lamppost is qualitatively different from the same speech act made by the Prime Minister of Northern Ireland. Likewise, 'Immigrants Out' graffiti may seem little different in tone and much less far-reaching in effect than something like the 'Go Home or Face Arrest' billboards recently resourced by the British Government.[101]

We have provided a set of real examples of situations to encourage engagement with the question of when a speech act is or is not appropriate. It bears emphasis, however, that disagreeing with something that is said – indeed finding something offensive or hurtful – is not the same as believing that the speech act involved should be criminalized. There needs to be clarity in terms of the threshold on criminality – and each of these examples bears re-examination from this perspective. In terms of the examples we already know, do we think that someone *should* be criminally sanctioned for saying 'incinerate Catholics' or 'Orange Brethren go home' or 'Don't trust Muslims', or indeed 'Kill all Huns' or 'Kill all Taigs'?

In terms of contexts it is often stated or implied that incitement is less egregious in 'unshared spaces' – a variation of the table manners of mixed company approach to sectarianism. But this is problematic for a couple of reasons. First, the functionality of the incitement may actually increase in this context – if someone incites 'Kill all Taigs' to a roomful of loyalist paramilitaries, this may not offend anyone who hears the speech act but might equally entail a probability of sectarian violence being incited; second, it is very difficult to guarantee this degree of segregation – who could ever be sure that the company is not mixed, that there is not one member of the target group who has been 'passing' in a particular community?

[101] *Guardian* 'Go home' billboard vans not a success, says Theresa May https://www.theguardian.com/politics/2013/oct/22/go-home-billboards-pulled

For them, the offence (and the danger) may be heightened by their minority status in such a context.

In contrast, it seems reasonable to suggest that the toleration of these kinds of unambiguously inciteful speech acts in public space should end. First, examples of incitement to hatred - such as the ubiquitous 'Kill All' graffiti - should be removed as and when they occur. Second, there should be no use of public funds or facilities to make or frame such expression. Finally, in addition to criminal sanction, there should be a robust policy aimed at ending any further manifestation of incitement to hatred. The Rabat Plan offers a whole series of strategies towards this end:

> Criminal sanctions related to unlawful forms of expression should be seen as last resort measures to be applied only in strictly justifiable situations. Civil sanctions and remedies should also be considered, including pecuniary and non-pecuniary damages, along with the right of correction and the right of reply. Administrative sanctions and remedies should also be considered, including those identified and put in force by various professional and regulatory bodies. (2012: 12)

Put simply, we should expect a zero-tolerance approach to incitement to hatred to adopt a similar template for Northern Ireland.

Broader processes related to activities involving or following incitement to hatred

The terms of reference for this research framed a specific engagement with 'broader processes' connecting with incitement to hatred. These were: the use of public funds or facilities for activities and organisations; the use and financing of paramilitary informants in activities; the processes used to deal with threats for housing eviction; and executive action to remove offending materials. The terms of reference also made explicit reference to 'threats of continuation and exacerbation' to incitement to hatred related to two further issues: paramilitarism and Brexit.

The reference to these wider processes reminds us that incitement to hatred occurs within a specific context. As we have already seen, the issue of speech and speech acts continues to feature in many aspects of conflict in Northern Ireland. But this analysis also has wider implications in terms of many other aspects of expression in contemporary Northern Ireland which also bear directly on rights and conflict. Many expressions might be regarded as incitement to hatred in the context of international human rights standards. For example, it would be difficult not to regard at least some of the use of flags, bonfires and parading as examples of 'stirring up' hatred in the sense identified in legislation. These classically involve 'non-verbal forms of expression such as the display of racist symbols, images and behaviour at public gatherings' and are often 'sites' of incitement. In other words, we can begin any discussion by suggesting that contested expression is hard-wired into the social dynamics of rights and conflict in Northern Ireland. Beyond this, the two identified 'broader processes' in the research brief suggest a specificity to current analysis in Northern Ireland and both – paramilitarism and the Brexit process – will no doubt influence the forms assumed by incitement and the challenges of addressing it.

Clearly, the legacy of paramilitarism adds a further dimension to the dynamics of incitement. The embedded culture of paramilitarism lends a particular dynamic to the reality of incitement to hatred. The continued existence of illegal, paramilitary organisations with an established capacity for violence has immediate implications in any situation in which an expression of 'hate speech' is reinforced by the threat of such violence. We noted the key difference between state and non-state actors. But it is also clearly the case that in the case of non-state actors, paramilitary capacity to add tangible threat to any incitement. In other words, in the situations in which paramilitary violence is seen to 'reinforce' more general incitement, the likely consequences are obvious. For example, this has been clearly identified in the PSNI identification of the UVF as being involved in racist intimidation.[102]

[102] *BBC News* 'UVF 'behind racist attacks in Belfast'' 3 April 2014. http://www.bbc.co.uk/news/uk-northern-ireland-26871331

This takes on a specific form in terms of housing intimidation – this has been a key element in the dynamics of equality throughout the history of Northern Ireland.

We can suggest therefore that the processes used to deal with threats for housing eviction should be centred in the engagement with incitement to hatred. Almost by definition, housing intimidation has been targeted at groups rather than individuals. This process has been characterised as 'ethnic cleansing' and results in segregated residential neighbourhoods which do not in any way reflect the ethnic composition of the wider community. This reality has also been at least 'tolerated' by institutions like the Housing Executive and the police as well as by the wider community. But our analysis suggests that this represents a form of institutionalised incitement to hatred and cannot be regarded as appropriate under international human rights standards.

Our discussions with the PSNI on incitement to hatred suggested that their reading was that such incitement was less problematic in areas that were effectively entirely of 'one community'. But here incitement to hatred seems likely to be one of the key mechanisms through which areas become or are kept institutionally segregated. In other words, any toleration policy of incitement becomes a toleration policy for segregation as well as for criminality.[103] This approach needs to change radically if Northern Ireland is to meet its obligations on prohibiting incitement to hatred. Rather a 'zero tolerance' approach should be adopted with regard to any expression – including graffiti, flags and murals – that meets the threshold on incitement to hatred.

The ongoing dynamics around 'Brexit' create a novel context for issues related to incitement. Whatever the long-term consequences of Brexit, the decision to leave the EU has been associated with a rise in offensive and hate speech across Northern Ireland. There is, therefore, a general 'mood music' associated with Brexit – for many people support for leaving the EU was 'about' race and immigration. There is clear evidence that the decision to leave operated as a 'green light' in terms of open expressions of racism.[104] While it is difficult to attribute direct causality, there has been expression that situates recent racist abuse across Northern Ireland precisely in this context. It becomes more complex in terms of the question of what is to be done about this. But clearly grounding Brexit within the international standards is one key element in this intervention. It also remains the case that there will be a need for intervention against incitement to hatred whether Brexit happens and, if it does, whatever form it takes.

[103] *BBC News* 'Belfast Catholic families flee 'sectarian threats'' 28 September 2017. http://www.bbc.co.uk/news/uk-northern-ireland-41424906

[104] See, for example, anti-EU migrant worker racism at the extreme end – 'EU RATS OUT' accompanied by a swastika – which appeared in Banbridge in 2017. BBC News 'Banbridge hate crimes 'could be linked'' 5 October 2017 http://www.bbc.co.uk/news/uk-northern-ireland-41505935

The issue of use of public funds or facilities for activities and organisations is particularly live at present in the context of a broader debate around the toleration of bonfires and related activities. Such bonfires are routinely associated with expression that constitutes racist, sectarian and homophobic incitement to hatred.

Although the Ballycraigy bonfire case was prosecuted on the basis of a racist footnote to the bonfire, it had been associated with a broader package of incitement to hatred. In fact, the PSNI was criticised for supporting funding for the bonfire as the case for incitement to hatred was being investigated.

International standards establish that the prohibition on incitement to hatred is only one element of the duty; the rest are a range of other specific duties on public authorities that are very relevant to the Northern Ireland context – e.g. the duty not to sponsor racist/sectarian events ('provision of any assistance to racist activities, including the financing thereof'). This could be formulated as a statutory duty on public authorities for example. This is in effect what that existing good relations duty is supposed to do. We would expect a much more robust response to examples of incitement to hatred in this context.

Finally, there is also a specific local context in terms of the issue of executive action to remove offending materials. At present, there often appears to be a policy and practice vacuum in which no organisation is prepared to accept responsibility for removing materials – even when there is a broad acceptance that the materials are inciteful or unlawful. A central element in all of this is the need for a radical overhaul of executive action on incitement to hatred. Clearly the *de facto* toleration policy should cease. This means that executive action to remove offending materials should be prioritised. The existing toleration is often premised on the belief by both police and councils that they are unable to act. This is clearly not the case. If offending materials are required for evidence, they should be recorded and removed with appropriate speed.

Conclusions

The current approach to addressing incitement to hatred in Northern Ireland is not working. There is copious evidence of hatred – particularly racism, sectarianism and homophobia – and its consequences – most obviously evidenced in what is characterised as 'hate crime'. Moreover, there is ample evidence of incitement to hatred as it is characterised in international human rights standards. Generally, this incitement is being tolerated rather than prohibited by the state. Despite the widespread concern around hate in Northern Ireland, the criminal justice system in Northern Ireland has responded to the ubiquitous 'hate capital of Europe' accusation by doing little to reduce either manifestations of hatred *or its root cause*.

In response to rising racist violence, the state put in place an infrastructure based on foregrounding a particular construction of 'hate crime' *which has done little to address the seriousness of the violence involved*. Even when the seriousness of incitement to violence is not lost in the wider sweep of more general discussions of 'hate crime', this does nothing to address the specificity of incitement. This focus on 'hate crime' to the exclusion of incitement to hatred is the Northern Ireland variant of a wider fiction – the notion that states have begun to take violence seriously simply by undertaking public relations work around 'hate'.

In Northern Ireland, the state response sees the bundling of three elements represented as 'hate crime'. The most high-profile of these is not a crime at all in any legal sense – it is simply a methodology by which police record *incidents* which are reported by or to them in some way. This is supplemented by the concept of 'racial aggravation' which is also *not a crime in Northern Ireland.* In Northern Ireland, racial aggravation allows for increasing sentencing but it is not a distinct crime. (As we have seen, this contrasts starkly with other jurisdictions within the UK.) Alongside this confusing jumble of 'hate crime' we find incitement to hatred often bundled with notions of 'hate speech' without any recognition of the complexity of the actions involved. In other words, what first appears a tough and comprehensive intervention to address the emotively charged coupling of 'hate' and 'crime' emerges as a straw person that has failed to adequately address either hatred or crime.

The consequence is that there is a miniscule number of successful prosecutions for *any* 'hate crime'. The recent Thematic Review of Policing Hate Crime helpfully clarifies this situation: *'there is no such thing as a 'hate crime' in Northern Ireland'* (2017: 46). This reality must be the starting point for any assessment of the success or otherwise of combating 'hate' across Northern Ireland. There is, as we have seen, specific legislation on incitement to hatred - but this legal intervention has hardly been any more successful.

As we have seen, the specific crime of incitement to hatred has secured very few convictions in nearly fifty years in the 'hate capital of the world' in which a gable wall in almost every community contains the incitement to 'Kill all Taigs' or 'Kill all Huns'. In this context, the prosecutions that have taken place under existing incitement to hatred legislation take on a very specific significance. It bears emphasis that these were not perverse prosecutions or convictions. The acts involved met the threshold for incitement to hatred and both prosecution and conviction were appropriate. But it also bears emphasis that the speech acts involved have not been notably egregious. In the 'Ballycraigy Bonfire' case the PSNI assessment of why the prosecution was successful is that there was sufficient evidence – in this case photographic evidence supplied by a private citizen – to support prosecution and secure conviction. But this means that there are hundreds – if not thousands – of similar cases of incitement taking place across Northern Ireland annually. Even if we restrict this to hate speech associated with bonfires, they are routinely sites for racist, sectarian and homophobic incitement at this threshold.

Fortuitously, there is a broad recognition across sectors that the approach needs to change. Essentially the key intervention should be to change the terms of the debate and move from a 'toleration' towards a 'zero-tolerance' policy on incitement to hatred. There are international obligations on this that are being ignored and there is not sufficient delegitimisation of the 'words and behaviour' and the impacts that such expression has. Rather there is a tendency to defend free speech primacy and downplay the harms on target groups. The risk that power to limit expression will be turned on its head and the powers misused is a genuine concern for human rights defenders but the emerging international tests are designed to counterweight against this and are explicitly codified in relation to the issue of the power of the speaker.

The recognition that there are thousands of instances of incitement to hatred across Northern Ireland is not to suggest that there should be thousands of correlated prosecutions and convictions. Mass imprisonment should not be the intended outcome – but neither should we see an extension of the current practice that downgrades 'incitement' as a 'minor offence'. The Rabat Plan of Action, for example, makes it clear that criminal sanctions should be a 'last resort' but this does nothing to downplay the *seriousness* of incitement. If we agree that current levels of incitement to hatred in Northern Ireland should no longer be tolerated, this implies a concerted intervention in response. This will involve prosecution but also include executive action of different kinds.

This broad intervention should ensure that incitement to hatred is named for what it is and signal that it can no longer be tolerated. One clear element of this would be a new, integrated policy to remove instances of incitement to hatred as soon as they appear. The current 'buck-passing' between different agencies must stop and be replaced with an integrated response to manifestations of incitement to hatred across Northern Ireland.

The widespread recognition across different statutory agencies of the need for change provides a positive starting point. The first principle is the need to separate incitement to hatred from the broader bundle of hate crime and hate speech which, as we have seen, remain ambiguous entities. Hate speech has come to be understood as any statement making offensive remarks about an increasingly amorphous series of 'protected' groups and, sometimes, individuals. The rights and wrongs of making such statements are of course appropriate subjects in human rights discourse. But the key point in the present context is that incitement to hatred is of a different nature. The recognition of the need to protect against incitement to hatred did not emerge from general concerns about hate and hatred but as a specific response in post-war Europe to the palpable consequences of racist incitement. The focus on 'stirring up' hatred confirms the broad societal impact. In other words, it is something which clearly and unambiguously has generated, or is likely to generate, attendant unlawful behaviour. In this sense, the archetype for incitement to hatred remains Julius Streicher rather than an anonymous child making offensive statements in an online chatroom.

Once the distinction between 'incitement to hatred' and 'hate crime' is made, there needs to be a broad conversation about what kind of 'hate speech' should be unlawful and what kind should remain tolerated – however vehemently disliked. This conversation also need to recognise the breadth of expression involved – in this context expression includes not only things that are said or written but also other forms of expression like flags and emblems, bonfires and parades. Once the elements of expression that are not to be tolerated are established – the broad threshold of what constitutes incitement to hatred - then the process of making sure that they are not made needs to be established. For example, if we decide the injunctions to 'Kill all Xs' should be regarded as incitement to hatred and should not be tolerated, the immediate question is whose job is it to remove the speech act? And, who is to resource the process of removal? And who is responsible for an education programme that ensures the appropriateness and consequences of the speech act 'Kill all Xs' are understood?

In tentative answer to these questions, we have suggested a series of broad recommendations. Broadly the kind of incitement that should be unlawful is sometimes straightforwardly inchoate – it is encouraging someone to commit a crime or to do something unlawful – 'Kill all Irish', 'Kill all Protestants' and 'Don't employ Catholics' would be real examples from Northern Irish history. Most of us do not have to travel very far to encounter such examples of incitement to hatred. More generally in the 'grey zone' of offensive 'hate speech' we would expect local communities and councils and good relations officers to be making decisions around what is tolerable and what is not. But it bears emphasis that this grey zone does not extend to incitement – if it constitutes incitement, it should be addressed by the criminal justice system.

With this approach, we should begin to see a response in which the specific obligations on incitement to hatred – rooted in international standards – which apply to government at both UK and NI level are not lost amidst general – and completely understandable – concerns around different expressions of ‘hate’.

Recommendations

The research brief included a commitment, 'to make recommendations for reform of the scope and application of Part III of the Public Order NI Order along with other duties including the 'good relations' duty, to ensure compliance with international standards and increase effectiveness'. In response, we make the recommendations below. It bears emphasis, however, that these are tentative – one the key recommendations emerging from the research is there is broader discussion around what can and cannot - and what should and should not be said - about different groups in Northern Ireland. It would be wrong to predetermine this discussion by being too prescriptive. We can, however, offer a template for further discussion.

Essentially, the core recommendation of this analysis is that the law as presently constituted is recognised more widely and applied more robustly. There is adequate guidance in international standards to ensure that the seriousness of the prohibition on incitement to hatred is understood by both state actors and the wider community. There is also appropriate guidance on making sure the grounds are read widely enough, the issue of threshold is understood and assessed appropriately, and that freedom of expression is protected in this context.

In terms of the specific offence of 'incitement to hatred', it is important that this remains a crime in Northern Ireland – not least because the freedom of expression limitations on expression use this as one key indicator of the seriousness of such limitations. Even if the incitement is encouraging behaviour that is unlawful rather than criminal – here we can stick with the 'Don't employ Catholics' example – the incitement should be prohibited. This is clearly required in international standards and confirms the seriousness of the wrongdoing. On this specific point, the prohibition on incitement to discrimination which is pervasive in international human rights standards, is missing in UK domestic law as well as in Northern Ireland in the Public Order Order 1987. Any review of incitement to hatred legislation should commit to explicitly integrating incitement to discriminate on protected grounds as a criminal offence.

Any review should also remove the ambiguity around the prohibition of incitement to hatred on the grounds of gender and gender identity. In this regard, there is already an anomalous situation in terms of gender identity as a ground in Northern Ireland. The PSNI have identified transphobic attacks as one specific form of 'hate crime'. But gender identity is not a ground in the Public Order Order and should be included as such in the legislation. (It is also missing as a 'protected ground' from the Criminal Justice (No. 2) (Northern Ireland) Order.) In terms of gender, the exclusion of gender as a protected ground reflect broader issues with gender-based violence as being somehow 'outside' the hate crime paradigm.

This acknowledged however, there is no good reason for *not* including gender as a ground to be protected from incitement to hatred. It should be included as a protected ground in the 'stirring up offences' in Northern Ireland. (Gender is already integrated in the broader inclusive approach to 'hate speech' adopted by ECRI among others.)

There should also be clarity on the use of different elements in legislation. We would expect a broader understanding across the CJSNI and the media of the differences between 'incitement to hatred' and other aspects of 'hate speech' – such as 'provocative conduct' and 'improper use of a public electronic communications network' – that have been criminalised or made unlawful. Moreover, we would equally expect a clearer understanding of the differences between incitement to hatred and other issues bundled around 'hate crime'. The fluidity between the use of labels like 'incitement to hatred' and 'hate speech' and 'hate crime' makes it more difficult to underline the seriousness of incitement to hatred. This process of education should be grounded in international guidelines.

Beyond this aspect, there are a range of executive actions that would signal the seriousness of such behaviours without requiring criminal sanction. In terms of goods, facilities and services there is an obvious responsibility for the Equality Commission to address and review ongoing issues with incitement to discriminate.

Simultaneously, there needs to a broader societal engagement with the question of what should and should not be said in the context of 'hate speech'. We can suggest a broad trichotomy between expression that, 1) constitutes incitement to hatred and is therefore subject to criminal sanction, 2) does not meet this threshold but is sufficiently problematic to be denied public support, and 3) is offensive but tolerated in the context of an open, democratic society. In the 'grey area' between prohibition and toleration there are a whole range of behaviours – including breaching standards of professional behaviour in relation to authority, respect and courtesy, equality and diversity, and failing to challenge inappropriate behaviour. On this issue, there is clearly a need for a wider public debate on what can or cannot and should or should not be said about different groups. It is important that this is conducted in a context in which there is the broadest commitment to freedom of opinion and expression.

This is not, of course, without its paradoxes – for example, in this discussion we have reproduced many speech acts that constitute incitement to hatred and many others that are offensive to different individuals and groups. As the international standards make clear, context is crucial. Part of having a proper dialogue across Northern Ireland is finding a way of talking about this issue that addresses complex, divisive expression without retreating into the more traditional safety of a 'whatever you say, say nothing' approach. The core point of international standards obtains, however: once the threshold for incitement to hatred is reached, 'freedom of speech' is not a defence and inciteful expression can and should be prohibited.

Section 75 (2) of the Northern Ireland Act 1998 places a Good Relations Duty on public authorities. A public authority must have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group when carrying out its functions relating to Northern Ireland. It is important that this duty reflects the prohibition on incitement to hatred. It should be self-evident that any public authority tolerating incitement to hatred in its functions cannot be promoting good relations.

We would expect much offensive expression that falls below the threshold on incitement to hatred to contradict the promotion of good relations. Many of the examples cited in this research fall into this category. In other words, many offensive expressions should be discouraged by the operation of the good relations duty - even when these have failed meet the threshold on incitement. But this suggests with stronger reason that anything that constitutes incitement to hatred is *de facto* in breach of the good relations duty. This reality should have wide implications in terms of different contested expression in Northern Ireland - including parading and bonfires as well as the spoken and written word.

There should be a red line regarding the use of public funds or facilities for activities and organisations. There should be a clear shift from a 'toleration' policy to a 'zero-tolerance' policy on any activity that meets that threshold on incitement to hatred. There is also a broader point to be made about any public support for activities associated with incitement to hatred. Public funds or facilities should not be used by or for activities and organisations that involve incitement to hatred. The use and financing of paramilitary informants in activities should also be a red line issue. The obvious implication is that, if paramilitary informants are involved in incitement to hatred, there can be no justification for this activity. In other words, any use and financing of paramilitary informants in activities constituting incitement to hatred should cease.

Finally, it bears emphasis that an integrating element in any new approach is the need for a radical overhaul of executive action on incitement to hatred. Executive action to remove offending materials should be prioritised. The existing toleration policy is often premised on the belief by different elements of the statutory sector – especially police and government departments and councils - that they are unable to act. This is clearly not the case. If offending materials are required for evidence, they should be recorded and removed with appropriate speed. This requires a novel intervention whereby all relevant parties establish a protocol on responsibility and process for the removal of materials constitution incitement to hatred.

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