

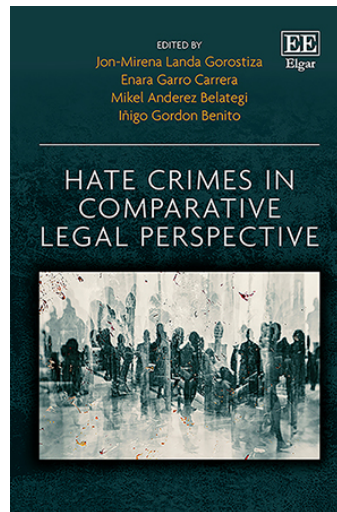
Hate Crimes in Comparative Legal Perspective

Edited by Jon-Mirena Landa Gorostiza, Full Professor of Criminal Law, Enara Garro Carrera, Professor of Criminal Law, Mikel Anderez Belategi, Lecturer in Criminal Law and Iñigo Gordon Benito, Lecturer in Criminal Law, University of the Basque Country (UPV/EHU), Spain

Hate Crimes in Comparative Legal Perspective expertly analyses the current legislative, jurisprudential and statistical trends in hate crimes across Europe, comparing them with the evolution of international standards and with the dominant legislative model in common law countries.

'Professor Landa and his colleagues have produced a timely and critical examination of hate crime and hate speech laws across Europe, including a rich exploration of both case law and empirical data. This book will serve as an indispensable reference for anyone engaged in hate crime scholarship or policy development.'
– Mark Walters, University of Sussex, UK

'This book goes some way towards filling an odd lacuna in the hate crime literature, pulling together as it does scholarship on the emerging developments and debates on the hate crime canon across Europe. It features analyses of disparate nations and allows for the identification of both parallel and distinct approaches to the phenomenon. Hate Crimes in Comparative Legal Perspective lays a strong foundation for ongoing comparative analyses.'
– Barbara Perry, Ontario Tech University, Canada



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OGH	Austrian Supreme Court of Justice
OL	Organic Law
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
POA	Public Order Act 1986
PTSD	Post-traumatic stress disorder
RIS	Legal information system of the Republic of Austria
Rz	Margin number
ss	Sections
SA	Sentencing Act 2020
SC	Spanish Supreme Court
SCC	Spanish Criminal Code
StGB	German Criminal Code / Austrian Criminal Code
UN	United Nations
VerbotsG	Austrian Constitutional Law of 1945 on the Prohibition of the Nazi Party

Introduction to *Hate Crimes in Comparative Legal Perspective*

Jon-Mirena Landa Gorostiza and Enara Garro Carrera

Hate crimes are at the nerve centre of any criminal map in any democratic society, due to their enormous potential to disrupt peaceful coexistence among groups and to transform the social and political dynamics of tolerance into contexts that are destructive and toxic for healthy pluralism and diversity. The increased social visibility of these conducts and the legislative frameworks established to combat them have simultaneously led to a growing scientific and doctrinal debate on the best way to articulate anti-hate crime prohibitions and apply them through case law. Equally, significant efforts have been made to collect statistical records of both police incidents and judicial decisions, in order to render the pathway from hateful conduct to judicial conviction more transparent. The traceability of hate incidents is another crucial element for readjusting preventive and reactive policies based on this information, in the search for greater effectiveness in the fight against this scourge. In short, the debate on the legislative model, the doctrinal and jurisprudential debate and the empirical reality of this phenomenon are all elements vital to the optimal design of public policies in this field.

In the field of common law, this debate is undoubtedly a privileged framework for a fruitful exchange of knowledge and comparisons, fostering a kind of cross-fertilisation of ideas between countries. The present monograph humbly seeks to contribute to this debate by making the latest trends in the European discussion on the subject available to the English-speaking reader. In Europe, a continent characterised by differing civil law and anti-hate legislation models, the debate on how best to combat the most serious forms of intolerance and discrimination has its own framework. Finding an up-to-date description of these debates in English can be challenging. This monograph therefore aims to provide a snapshot of the current state of the art in terms of the debate on legal models, the doctrinal debate, the dominant schools of thought in case law and the configuration of statistics regarding police incidents and/or court rulings on hate crimes in the old continent. The aim is to present a complete, multilevel overview of the phenomenon of hate crime in

Europe, along with its evolution, conception, protected groups and interpretative or statistical difficulties. Furthermore, through the bridge represented by the situation in the United Kingdom, our aim is also to open up what is sometimes a rather siloed debate segregated into isolated geographical spaces, to scholars on both sides of the Atlantic.

The book is a study of European comparative law that also takes into consideration, and takes as a reference, the direction followed by criminal policy in other countries, particularly the United States. European legislative references, their application in case law and the statistical distribution of hate crimes in the states selected as references are all analysed in the light of dominant trends within common law. Regional and international/universal standards both allow for and facilitate this cross-comparison. However, due to obvious constraints, the book does not analyse all European countries, focusing instead on a selection that represent the key types of legal system: Spain, as a representative of Latin countries, as well as one of the most recently-established but also most widespread anti-hate legislative models in the field; France, as a key representative of a country with a much longer tradition of immigration and more extensive legislative experience; Germany and Austria, as central European examples and countries that promoted and inspired the international standard based on the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, which ended up at the centre of the European experience of propaganda crimes; and finally, the United Kingdom, a country always halfway between continental Europe and the trends of criminal policy in the United States. This is not a sample of countries chosen at random. Rather, the aim was to compile a collection of chapters that would represent the state of affairs in countries with an established tradition in terms of dealing with criminal problems linked to the difficulties of peaceful coexistence in multi-ethnic societies (Germany, the United Kingdom, France, etc.). However, at the same time, the aim was also to compare the fundamental references of continental Europe (France, Germany, Austria) with common law countries or more emergent models with a shorter tradition of immigration, such as states located in southern Europe.

To this end, the monograph is arranged in the following order. Chapter 1, written by Professor of Criminal Law Jon-Mirena Landa Gorostiza (University of the Basque Country/Euskal Herriko Unibertsitatea UPV/EHU), is dedicated to exploring how hate crimes are regulated in Spain. The aim is to conduct a multilevel diagnosis and outline the current situation regarding hate crimes from four complementary angles. To this end, the first and longest section focuses on characterising the legislative model adopted by Spain in this area and comparing it with international standards and the principal political-criminal models of the United States and Europe. The questions that this initial section seeks to answer are: What type of legislation does Spain have? Does its model

resemble others in its legal environment? And does it adequately integrate international standards? Second, the chapter gives an account of the state of the doctrinal debate, focusing particularly on the points that are currently at the centre of the controversy: What exactly are hate crimes? How should they be interpreted? How are criminal sentencing enhancements (article 22.4 of the Spanish Criminal Code) articulated in relation to propaganda crimes (article 510 of the same Code)? The third section outlines the principal ways in which case law has been applied to criminal offences, a field heavily influenced by the 2015 Reform, which has led to an increasing number of convictions. Finally, the statistical picture painted by official data will be examined: How many police incidents are recorded? How many offenders are actually convicted? What types of offence are most common? And which protected groups are most commonly targeted? Finally, the last section will draw a series of conclusions. In short, the chapter presents an updated overview of this criminal reality on four levels: legislation, doctrinal debate, case law and statistical data.

The book then continues with a study of German criminal law and criminology in this field, divided into two distinct chapters. Chapter 2, entitled 'Hate crimes and hate speech in Germany: mapping of legal provisions and the interpretation of case law', written by Professor of Criminal Law Enara Garro Carrera (University of the Basque Country/Euskal Herriko Unibertsitatea UPV/EHU), examines the most relevant provisions of the German Criminal Code on hate crimes. The chapter includes, firstly, a brief study of § 46 (2) StGB, a general provision for fixing penalties which, since 2015, has been subject to successive reforms that have included the express mention of prejudicial motivations in offenses committed against certain vulnerable groups, the aim being to render them visible as aggravating circumstances, thus sending a message to legal operators to ensure the systematic enhancement of penalties whenever they are present. Secondly, the main section of the chapter focuses on the twists and turns undergone by § 130 StGB, a complex and oft-amended provision of the criminal code that has evolved in Germany from its original conceptualisation as a provision to prohibit incitement to class struggle, to become the flagship provision for combating hate speech with the potential to disturb the public peace. The chapter offers an in-depth analysis of protected groups and prohibited conducts, together with an explanation of how the criminal code is interpreted in current German case law. Also, in relation to speech crimes, the author focuses on the relatively new offence of inflammatory insult that is outlined in § 192a StGB. This offence was introduced with the specific intention of serving as an interface between the offence of insult outlined in § 185 StGB and that stipulated in § 130 StGB, in order to avoid possible loopholes providing impunity for statements that concern vulnerable groups, but are not public enough to be considered incitement of the population.

Chapter 3, by Dr Michael Kilchling, senior researcher at the Max Planck Institute in Freiburg, is entitled 'Legal and Criminological Perspectives of Hate Crime and Hate Crime Control in Germany' and complements the previous chapter by providing an eminently practical overview of the reality of this criminal phenomenology in this Central European country. The chapter explores how hate crimes are categorised and registered by the authorities as politically-motivated crimes whenever there are indications that their commission was prompted by prejudice against people on the grounds of their nationality, ethnicity, skin colour, religion, social status, disability, sexual orientation, gender/gender identity or external appearance. The author focuses on interesting victimological aspects related to the characteristics of the different groups, as well as the specific impact that hate crime has on the people who suffer it directly and on the group to which they belong. Furthermore, as well as taking an in-depth look at the reasons for the high number of hate crimes committed, the chapter also explores the distribution of these crimes, providing updated data from police statistics that reflect the percentages pertaining to the different protected groups, broken down by type of crime. It also provides empirical information on the judicial application of penal provisions and includes interesting references to legislative initiatives in the administrative sphere that have been introduced to enhance the effectiveness of said provisions, especially in the area of hate speech on the Internet.

As a concluding contribution to the study of the Central European model, in Chapter 4, Professor of Criminal Law Lyane Sautner and Dr Siegmund Lengauer, both from the Johannes Kepler Universität Linz, provide a detailed overview of the situation in Austria, entitled 'Hate Crimes in Austria. Legal Developments and Statistical Findings'. While having notable similarities to the German model, the Austrian model has its own particularities, and the chapter provides a detailed breakdown of the arsenal of criminal provisions that the legislator has established to deal with hate crimes. The chapter examines the generic aggravating circumstance outlined in § 33 (1) (5) StGB, which applies to practically all crimes committed with an underlying prejudicial motivation and discusses the emerging debate on the possible categorisation of femicide as a manifestation of hate crime. The chapter also explores 'crimes of expression', dealing comprehensively with the crime of 'incitement to hatred' as outlined in § 283 StGB, and the crimes defined in the Prohibition Act of 1947 (more commonly known as Verbotsg 1947), as a direct consequence of the prohibition of the National Socialist Party by the Austrian Constitution. It also examines provisions that aim to respond to more recent phenomenologies linked to online forms of commission. These include 'persistent persecution' under § 107a StGB, 'continuous harassment by means of telecommunications or a computer system' under § 107c StGB and 'unauthorised image recording' under § 120a StGB, which are often committed for prejudicial motives. The

final section of the chapter provides a wealth of statistical data on hate crimes (which the Ministry of the Interior began to collect in a disaggregated manner in 2019), showing the prevalence of attacks motivated by the victim's ideology or national or ethnic origin.

Chapter 5, by Amane Gogorza, Professor of Criminal Law at the Université Toulouse Capitole and currently Deputy Public Prosecutor at the Court of Agen, outlines the French perspective in a contribution entitled 'Criminalisation and Judicial Treatment of Hate Speech in France'. The chapter provides an overview of the various legal instruments established to combat this phenomenon, including the general aggravating circumstance, which, since 2017, can be applied to any crime if committed for prejudicial motives, as well as to offences that can be considered hate crimes in themselves due to the fact that discrimination forms an inherent part of their criminal elements. The contribution also analyses the regulation of hate speech, the origins of which can be traced back to the Freedom of the Press Act of 1881, which has historically provided a more protective system of intervention, striving to avoid any possible illegitimate interference of the criminal system in the key area of freedom of speech. This act currently punishes defamation on prejudicial grounds, as well as incitement to hatred, discrimination and violence against a list of groups that, over the years, has been extended beyond racial considerations to include questions such as sex, gender, sexual orientation and disability also. The chapter concludes by providing statistical information on the occurrence and prosecution of these crimes in France. After highlighting the relevance of the 'dark figure' of crime, the chapter points to the clear prevalence of ethnic/racial communities as the most victimised groups in the 'light figure', with most cases involving speech rather than action.

The book culminates with Chapter 6, entitled 'Hate Crime and Hate Speech in England and Wales: Law and Statistics' by Chara Bakalis, Principal Lecturer in Criminal Law at Oxford Brookes University. The chapter is an apt synthesis that explores the complex nature of the legislative framework for hate crime and hate speech in England and Wales, and in which the author discusses the intricate workings of the penalty enhancement provisions that lie at the heart of the system. Aggravating elements are sometimes deployed as higher criminal frameworks (maximum penalty in the abstract) and sometimes as penalty enhancement factors at the stage of judicial sentencing. The model also includes hate speech prohibitions, although as shown by the statistical data presented in the study, penalty enhancements are, in practice, imposed in an almost monopolistic way and it is around them that the most important interpretative problems are also centred. The contribution points out that the organic and incremental manner in which hate crime legislation has been developed has created a set of inconsistent rules, resulting in a system that is unfair to some victims. The chapter outlines existing data on the implemen-

tation of the legislation through the judicial system, but also reveals a much more prominent 'dark figure' of hate crime, which is rendered visible through the use of police data and victimisation surveys on hate crime incidents. This analysis demonstrates that, although legislation in England and Wales is relatively successful compared to other countries worldwide, there remains a significant gap between the number of hate incidents experienced by victims and their successful prosecution in the courts.

Having outlined the structure of the work, its chapters, the countries selected for analysis, the common content criteria and the affiliation of each author, we will conclude this introduction with a brief reference to the joint work experience of the team responsible for writing the monograph. This work represents one of the key outcomes of a research project entitled 'Hate Crimes in Spain: Pending Challenges' (Reference: PGC Type B I+d+I Project, PID2020-115320GB-100 of the Ministry of Science and Innovation MICIN/EU ERDF). The Principal Investigator in the project is Prof. Jon-Mirena Landa, Professor of Criminal Law and Director of the UNESCO Chair in Human Rights and Public Authorities at the University of the Basque Country/Euskal Herriko Unibertsitatea (UPV/EHU), and team also includes a number of experts in the field from different European universities and research centres. All the authors of this book participate formally and actively in the aforementioned project and, moreover, have at least a decade of experience in conducting joint research in previous similar projects. This book therefore represents the culmination of the joint work carried out by the team, the most immediate antecedents of which can be found, above all, in the event 'Hate Crimes', held on 7 October 2022 in Bilbao (in which all the authors of this book took part, along with other colleagues), as well as in the event 'Hate Crimes: Current state of Jurisprudence (with special attention to the aggravating factor of gender)', which took place on 21 April 2023, also in the city of Bilbao. In addition to the contributions made by the speakers, the contribution of those attending both events and their critical enrichment of the debate should also be highlighted. Of special relevance were the contributions made by representatives of the entities that support the aforementioned research project, particularly judges (High Court of Justice of the Basque Country), prosecutors (Public Prosecutor's Office of the Basque Autonomous Community) and representatives of the Basque Government Department of Security (Ertzaintza-Basque Police Force), the Basque Government Department of Equality, Justice and Social Policies, Emakunde (Basque Institute for Women-Basque Government), the Government of Navarre Department of Justice, the Ombudsman of the Basque Country (Ararteko), the Provincial Council of Gipuzkoa, and the Spanish Observatory on Racism and Xenophobia (Oberaxe, Ministry of Inclusion, Social Security and Migration, Spanish Government), as well as lawyers, NGO representatives and other strategic stakeholders. All should

be acknowledged for their contributions and involvement in completing this work, and for helping guarantee that this scientific project and its results reflect a comprehensive view of the phenomenon in order to enable the development of better public policies for combating intolerance.

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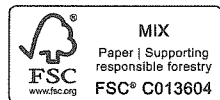
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