



**Public consultation on  
Hate speech & hate crime – inclusion on list of EU crimes**

***A contribution***

***by the  
Secretariat of COMECE  
(Commission of the Episcopates of the European Union)***

## **1. General remarks**

Hate crimes are more and more common and are cause for increasing concern. As the Holy See has recently underlined, the **internet and social media often become a place to put others down or incite hatred** of cultural, national, and religious groups, while the **Covid-19 pandemic has worsened the trend**, due to people spending more time online during lockdowns<sup>1</sup>.

**Hate crimes are a grave phenomenon to be condemned without reservations.** The Church is committed at the national and global level to contributing to find answers and effective policies.

In its recent **Encyclical Letter "Fratelli Tutti"**<sup>2</sup>, Pope Francis stressed that *"The way many platforms work often ends up favouring encounter between persons who think alike, shielding them from debate. These **closed circuits facilitate the spread of fake news and false information, fomenting prejudice and hate**" (§ 45). He went on to add that *"As religious leaders, we are called to be true **'people of dialogue'**, to cooperate in building peace not as intermediaries but as authentic mediators... Each one of us is called to be an artisan of peace, by uniting and not dividing, by extinguishing hatred and not holding on to it, by opening paths of dialogue and not by constructing new walls"* (§ 284)<sup>3</sup>.*

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<sup>1</sup> Statement made by Mgr. Janusz Urbańczyk, Holy See Permanent Representative to the Organization for Security and Co-operation in Europe (OSCE) at the 25-26 May 2020 event on intolerance against Christians <https://www.vaticannews.va/en/vatican-city/news/2020-05/holy-see-osce-discrimination-religious-liberty-coronavirus.html>.

<sup>2</sup> The text of the Encyclical Letter is available at the link [http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco\\_20201003\\_enciclica-fratelli-tutti.html](http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.html).

<sup>3</sup> Cf. also the Statement by H.E. Archbishop Bernardito Auza, Apostolic Nuncio, Permanent Observer of the Holy See at the UN, Seventy-third Session of the United Nations General Assembly, Third Committee, Agenda Item 72: *Elimination of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, New York, 30 October 2018, available at the link <https://holyseemission.org/contents/statements/5bd8ed3b42974.php>. The Statement recalls Pope Francis' Address at the international conference on *"Xenophobia, Racism and Populist Nationalism in the Context of Global Migration"* (20 September 2018): *"In our globalized world, he lamented,*

In the same text, Pope Francis speaks more specifically of a "cultural covenant": "*Genuine social encounter calls for a dialogue that engages the culture shared by the majority of the population... A realistic and inclusive social covenant must also be a "cultural covenant", one that respects and acknowledges the different worldviews, cultures and lifestyles that coexist in society*" (§ 219).

At the national level, among recent examples, the **Italian Bishops' Conference** has organised a high-level webinar on **online hate speech**, together with the MEDIAVOX observatory on online hatred and the Catholic University of the Sacred Heart (26 March 2021)<sup>4</sup>. In that context, it was stressed that **communicating and informing well**, while respecting ethical and deontological standards, is the first step. Furthermore, the organisers highlighted that citizens, associations and communities can contribute to creating a real "**online ecology**".

Effective and regular **data collection covering all groups**; and sound **reporting mechanisms** at the national level are key. At the EU level, a close monitoring of the implementation of the **Victims' Rights Directive** (especially provisions on secondary and repeat victimisation) can also support efforts for this area.

## 2. Reservations on the extension of the list of EU crimes to hate crimes/hate speech

COMECE is **not convinced of the necessity to extend the list of "EU crimes"** to hate crimes and hate speech.

In the Member States, there is a great **diversity of legal approaches to the area**. This diversity does not derive from fragmentation or incoherences, but from **national legal traditions and sensibilities**.

The **concrete definition of key concepts** for this field have also led to heated national discussions, including at the academic level. National legislative initiatives and texts have raised **considerable controversy**, also in the European context<sup>5</sup>. These concerns have focused especially on the possible **restrictive impact on core fundamental rights** such as the ones to **freedom of expression and information** and to **freedom of thought, conscience and religion**.

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*there appears to be an upsurge of feelings of suspicion, fear, contempt and even hatred towards individuals or groups judged for their ethnic, national or religious identity and, as such, are considered not sufficiently worthy of being fully part of society's life. Such sentiments all too often inspire acts of intolerance, discrimination or exclusion".*

<sup>4</sup> <https://comunicazionisociali.chiesacattolica.it/le-risposte-ai-discorsi-dodio-online>.

<sup>5</sup> Cf. the current discussions in Italy on Draft bill no. 2005, containing *Measures on prevention and contrast to discrimination and violence for reasons grounded on sex, gender, sexual orientation, gender identity and disability*. In this regard cf. F. Ognibene, *Omofofia. Otto motivi per dire «no» alla cosiddetta legge Zan*, *Avvenire*, 5 November 2020, available at the link <https://www.avvenire.it/opinioni/pagine/otto-motivi-per-dire-no-alla-cosiddetta-legge-zan>. Furthermore, see the Submission of the Catholic Parliamentary Office of the Bishops' Conference of Scotland with regard to the recent national hate crime reform, available at the link [https://archive2021.parliament.scot/S5\\_JusticeCommittee/Inquiries/JS520HC321\\_The\\_Catholic\\_Parliamentary\(1\).pdf](https://archive2021.parliament.scot/S5_JusticeCommittee/Inquiries/JS520HC321_The_Catholic_Parliamentary(1).pdf).

**Respect for the human dignity of every person** is a fundamental and essential value that cannot be put into question. The same applies to the **firm rejection of any type of discrimination or violence**. However, the establishment of provisions to criminalise hate crimes raises concerns and requires attentive assessments with regard to **respect for fundamental rights and freedoms**: especially the one to freely manifest one's opinions, but also freedom of science, freedom of teaching, freedom of education - primarily on the part of parents - and, with specific regard to the Church, freedom to exercise its magisterium. Through the **criminalisation of** hate crimes, criminal sanctions may strike at the **mere expression of an idea**, actions carried out by the **Church in the exercise of its magisterium, teaching activities** - and this regardless of consideration for the intentions of the speaker, the expressions used or the context.

The risk of a **chilling effect on democratic debates and open discussions in society** is always present, precisely due to the unsure borders for conduct and expression. While aiming at promoting tolerance and prudence, the relevant laws often entail the **danger of fostering self-censorship**. In some cases, such initiatives even harbour **ideological and political aspects**.

Issues of **legal certainty** are often invoked when it comes to the interpretation and application of the relevant concepts in line with national fundamental rights and Constitutional standards. Legal certainty is invariably quite **flimsy with regard to any concept based on the idea of 'phobia'**: the expression vaguely evokes an irrational and disproportionate fear, lending itself to pervasive applications and instrumentalisations, with consequent prejudice to critical discussion or expression of opinion on issues and groups in society.

For these reasons, we would consider **not advisable future harmonising efforts at the EU level** on hate crimes and hate speech **or establishing a legal basis** in this regard.

Among the general provisions of EU primary law applicable to the area of judicial cooperation in criminal matters, Article 67.1 TFEU recalls that "*The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the **different legal systems and traditions of the Member States***".

In our view, the **principle of subsidiarity** should be prioritised in this regard, allowing the national level to address the relevant, highly sensitive, legal questions. It is significant that subsidiarity is explicitly recalled among the general provisions applicable to judicial cooperation in criminal matters (Article 69 TFEU).

### 3. Recommendations in case the list of EU crimes is extended to hate crimes/hate speech

Should the initiative of extending the list of EU crimes be pursued, we would recommend integrating the following elements (including in the legislative initiatives that would subsequently be adopted on that basis):

#### a) Covering 'hate crimes', not 'hate speech'

The term 'hate speech' is **generic** and has **no official, globally agreed definition in international human rights documents**. Uncertain and vague notions that put legal certainty at risk should be attentively avoided in particular in the area of criminal law. For this reason, **expressions such as "bias", "intolerance", "stirring up hatred" should not be used**.

The Holy See has stressed in various contexts that **"hate speech" regulation may be used as a pretext for censorship and other abuses**; and that *"...some regulations define "hate speech" not only on the basis of race, ethnicity, national origin or religious affiliation, but also on ideologically biased criteria"*, leading to possible discriminatory or repressive measures against actors e.g. for their position on marriage and the family<sup>6</sup>.

As underlined by high-level religious leaders in a stance taken vis-à-vis a recent national hate crime reform, it is important to **distinguish between hateful, nasty, vicious, or malevolent attacks on the person on one hand, and disagreement or dispute with an ideological position on the other**<sup>7</sup>.

#### b) Inclusion of robust and not merely symbolic clauses to protect the fundamental rights to freedom of expression and information and to freedom of thought, conscience and religion

In this regard, the **European Parliament resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity** makes a welcome effort, but suggests a still **insufficient solution**, in stating that: *"...freedom to express and display one's beliefs and opinions in keeping with the principle of pluralism of ideas, and provided that it does not incite to hatred, violence or discrimination, should be respected"* (§ 6). The **same applies to certain legislative options currently being debated in some Member States (e.g. Italy)**<sup>8</sup>.

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<sup>6</sup> Statement by H.E. Archbishop Bernardito Auza, Apostolic Nuncio, Permanent Observer of the Holy See at the UN, Seventy-third Session of the United Nations General Assembly, Third Committee, Agenda Item 72: *Elimination of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, New York, 30 October 2018, available at the link <https://holyseemission.org/contents//statements/5bd8ed3b42974.php>.

<sup>7</sup> <https://scmo.org/news-releases/perma/1613120400/article/church-leaders-urge-withdraw-of-controversial-sect.html>.

<sup>8</sup> Draft bill no. 2005, containing *Measures on prevention and contrast to discrimination and violence for reasons grounded on sex, gender, sexual orientation, gender identity and disability* - currently under discussion in Italy - would include a clause on "Pluralism of ideas and freedom of choices". This provision aims at safeguarding the free expression of convictions or opinions, as well as legitimate conducts linked with the pluralism of ideas or freedom of choices, provided that they may not create the concrete danger of discriminatory or violent acts. While this provision acknowledges the risks criminal law provisions for this area may entail for freedom of expression, it would deserve further improvement and strengthening.

It is to be recalled that - in accordance with the **jurisprudence of the European Court of Human Rights**<sup>9</sup>

*"Freedom of expression constitutes **one of the essential foundations of [a democratic society]**, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable **not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference**, but also to those that **offend, shock or disturb the State or any sector of the population**. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued".*

Furthermore, the fundamental right to **freedom of religion** includes the right to manifest religion publicly and in private, not only in worship, but also **"...in teaching, practice and observance"** (Article 9.1 of the European Convention on Human Rights, Article 10.1 of the EU Charter).

Relevant **thresholds must be equal for all protected characteristics**: expression should be allowed to the same degree with regard to each ground and cannot entail differentiations or discriminations. For instance, it would **not be acceptable if certain protected characteristics (e.g. religion) were to be held to a higher standard of accountability** than others.

### **c) Avoid prioritising certain grounds and characteristics over others**

The Roadmap seems to emphasise in particular certain grounds (sex, sexual orientation, age and disability). While this may be related to the fact that Council Framework Decision 2008/913/JHA on racism and xenophobia covers only some grounds, any future EU legislative initiative in this regard should **not create any hierarchy among protected characteristics**.

### **d) Inclusion of religion among the grounds protected by the relevant EU legislation**

**Hate crimes grounded on religion deserve attention**, as they represent - even in Europe - a rather widespread, although underestimated, issue.

Persons belonging to any religion should be protected by hate crime provisions and **care should be taken that a minorities vs. majorities dynamic** - according to which protection would be primarily aimed at the former - **is not fostered**.

According to Recommendation 1805 (2007) of the PACE Assembly on *Blasphemy, religious insults and hate speech against persons on grounds of their religion*<sup>10</sup>, it should be ensured that **"...members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences"** (§ 11).

<sup>9</sup> Cf. *Handyside v. The United Kingdom* (1976) 1 E.H.R.R. 737, § 49.

<sup>10</sup> <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17569&lang=en>.

At the same time, the PACE Assembly text highlights that *"...in a democratic society, religious groups must tolerate, as must other groups, critical public statements and debate about their activities, teachings and beliefs, provided that such criticism does not amount to intentional and gratuitous insults or hate speech and does not constitute incitement to disturb the peace or to violence and discrimination against adherents of a particular religion"* (§ 5).

The Holy See recently stated at the OSCE level<sup>11</sup> that *"...as agreed by all participating States, "victims of hate crimes may belong to both minority and majority communities," and, as a wide group statement highlighted in the closing plenary session of the Tirana High-Level Conference on Tolerance and Non-Discrimination, "it has become outdated to talk about minority and majority religions," since "all religions or beliefs are concerned, often in ways that go unnoticed." On the other hand, too often the term 'minorities' is used as a synonym of 'victims,' as if the victims could belong only to minority groups". In the same context "The poor attention given to hate crimes committed against majority communities and the fact that hate crimes motivated by religious bias or prejudice are under-reported and under-recorded..." was underlined.*

In this regard, OSCE publishes **Reports on hate crimes carried out against Christians** for reasons linked with religion (offences towards religious feelings, acts of vandalism, theft, profanation of tombs). Such Reports offer an unexpected picture on episodes of intolerance against Christians in Europe.

#### **e) Possible inclusion of 2012 Rabat Plan for Action criteria**

The 2012 *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*<sup>12</sup> indicates **six parameters** to verify whether a statement may constitute a form of incitement that would require the adoption of restrictive measures: (a) Context; (b) Speaker; (c) Intent; (d) Content and form; (e) Extent of the speech act; and (f) Likelihood, including imminence.

We would **recommend considering the inclusion of an explicit reference** to such criteria in EU texts for this area.

#### **f) Adopt a terminology that strictly adheres to the formulations of EU primary law**

**Terminology used in the Treaties and in the EU Charter** should form the basis for the formulations of eventual initiatives in this regard. For instance, we would not recommend the use of the expression "gender" and encourage using the expression "sex", in line with the terminology contained in EU primary law texts.

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<sup>11</sup> Statement of the Holy See at the 2019 OSCE Human Dimension Implementation Meeting, Working Sessions 15 on Hate crime (Warsaw, 25 September 2019), available at the link [https://www.osce.org/files/f/documents/c/a/433025\\_0.pdf](https://www.osce.org/files/f/documents/c/a/433025_0.pdf).

<sup>12</sup> [https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf).

### **g) Establishment of specific aggravating circumstances as a possible option**

We would caution against creating new, autonomous hate crimes based on specific categories of persons, rather advocating for the **less radical establishment of aggravating circumstances** related to protected grounds.

*Brussels, 19 April 2021  
COMECE Secretariat*