

With the increasing population heterogeneity and rising tensions in Western nations, the governments of those countries have sought ways to manage conflict between different groups. This often comes in the form of laws criminalizing certain speech, and numerous Western nations, such as the UK, Sweden, the Netherlands, Canada, and France, have either passed or are attempting to pass bills that would strengthen their existing laws or add previously unprotected groups to the laws. In addition, international treaty organizations such as the Council of Europe and international governments such as the European Union have also proposed treaties and laws to criminalize speech. These organizations often cite the increased travel and communication technology (such as the internet) that accompany globalization as a justification for harmonizing national policies on such laws, henceforth called hate speech laws.

The combination of each nation's history and political lobbying have shaped the strictness of the law and who is included as a victim. For example, in the U.S. lobbyists and activists were able to get some states to pass laws that increased penalties for crimes based on racial hatred, but they could not protect only minorities as desired due to the equal protection provisions in American law (Jenness and Grattet 2001). In the EU, however, it should be noted that often the European Union creates, funds, and contacts groups with which it agrees (Beetham and Lord 1998; Danese 1998).

Hate speech laws take different forms in the various nations that pass them due to their different cultures, legal systems, and previous laws that have shaped the paths each country may take. However, while individual nations have a uniqueness that creates disparity in legal solutions, globalization is a homogenizing force on those laws, in part due to the growing number of international treaties (Jacobson and Ruffer 2003).

Sometimes countries willingly bow to such pressure so as not to be seen as “backwards” or a laggard on some issue.

### **The development of the EU proposal**

In general, the first hate speech legislation in European nations in the 20<sup>th</sup> century was aimed at stopping political racism, specifically fascism and generally (though not always) was enacted after World War II (Rosenfeld 2003; Fennema 2000). Those early laws used racism and anti-Semitism as proxies for fascism to stop fascist parties (Fennema 2000). After the war, the United Nations, through various declarations and treaties, sought to fight racist regimes in Africa and the United States (Fennema 2000; Banton 1998). In its International Convention on the Elimination of All Forms of Racial Discrimination (IECRD) the UN linked racial discrimination with racism, in an effort to outlaw not only discriminatory treatment but also hate speech and other elements of racism that might not fall under the definition of racial discrimination.

However, while the UN was seeking to eliminate racism by *governments*, in Western Europe the ICERD was used against racism by individual citizens and political movements—it was interpreted to mean that individuals should not be racist (Fennema 2000). This was especially true after 1970, when anti-immigrant parties did not always have a link with fascism, and could therefore not be easily charged under anti-fascist legislation.

On July 15, 1996 adopted a Joint Action that encouraged action from Member States to prevent perpetrators of racist acts from moving to States with more lenient laws by either criminalizing certain behaviors or by agreeing to remove the requirement for double criminality. However, the EU decided it wanted more cooperation from Member States in this area, and on November 28, 2001 the European Commission submitted the

Proposal for a Council Framework Decision on combating racism and xenophobia. A Framework Decision is binding on the result to be achieved but allows the Member State to decide the methods to achieve the goal.<sup>1</sup> With regard to speech, it sought to criminalize racist and xenophobic speech that involved public insults and “any other racist behavior”, with “racism and xenophobia” defined as “the belief in race, color, descent, religion or belief, national or ethnic origin as a factor in determining aversion to individuals or groups.”<sup>2</sup> The reasons for the framework decision, as stated in the proposal, involved the need to fight neo-Nazi and other extremist groups<sup>3</sup>, the desire to stop such groups from moving to countries with less restrictive laws, and the desire for the EU to have a “common approach on this issue” that would strengthen the EU position in negotiations on international treaties such as the Council of Europe’s Cyber-Crime Convention, which aimed, among other goals, to criminalize racism on the internet (the United States disagreed with that aspect of the treaty on First Amendment grounds).

The framework decision, as initially proposed, was highly restrictive of biased statements, as both critics and proponents acknowledged.<sup>4</sup> The reason for this was the belief by those involved in writing the law that the best results were obtained with the strongest measures, and that a wide-ranging criminal law would reduce racism more than other measures, such as group-libel laws.

The proposal, like previous international agreements, included many categories in the proposal aside from just race, such as xenophobia and religion, and treated bias

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<sup>1</sup> Green Paper on the approximation, mutual recognition, and enforcement of criminal sanctions in the European Union, April 30, 2004

<sup>2</sup> Proposal for a Council Framework Decision on combating racism and xenophobia

<sup>3</sup> Though this proposal was submitted approximately two months after the 9-11 attacks, the focus was not on hate speech by Islamic radicals, but on far-right groups and neo-Nazis, as can be seen in the proposal (the discussion of which started before 9-11). The issue of hate speech was originally conceived at the EU level as being basically a problem of the far-right (interview with MEP A of Justice and Home Affairs).

<sup>4</sup> Interviews with MEP A and MEP B on the Justice and Home Affairs, interview with the European Network Against Racism (ENAR) director. ENAR is funded in part by the European Commission.

against people on the basis of these groups as the same as racism. One question this raises is to what extent political speech could be criminalized, such as in the immigration or terrorism debates. In much of continental Western Europe, political parties and individuals were charged under national laws for making statements against immigration, despite lacking racial content (Fennema 2000). The implications of outlawing such speech will be explored later.

In addition, the lack of a distinction between racial discrimination and expressing racist thoughts can be seen in both the Joint Action of 1996 and in the European Parliament's report on the framework decision.<sup>5</sup>

New institutionalism, a theoretical approach often used by sociologists and political scientists, can shed light on this development. Institutions are seen as more than the sum of their parts and, contrary to previous organizational theories, can include cultural, historical, and ideological components in addition to the previous rules and regulations in the institutions (DiMaggio and Powell 1991). In addition, new institutionalism notes the homogeneity of institutional processes, whether in a certain industry, nation, or at the international level (DiMaggio and Powell 1991; Meyer and Rowan 1991). As one political entity or organization adopts a certain practice, others will find it compelling to do so as well, often to gain legitimacy as the practice becomes seen as "the way things are done". This process of increasing conformity is referred to as institutional isomorphism. As will be seen, the institutional structures, political cultures, and historical events at the national and international level shaped the development and debate over the EU's proposed hate speech law.

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<sup>5</sup> See Report on the proposal for a Council framework decision on combating racism and xenophobia, May 24, 2002

The history of international treaties on hate speech in Europe provided a framework to develop its own hate speech law.<sup>6</sup> However, the national traditions of many Member States are not as strict as the proposed framework decision, and the EU could have chosen to follow those models. Lobbying by NGOs and the culture and ideologies of EU bureaucrats and MEPs that the best results are obtained by using strong measures<sup>7</sup> determined which of the various models of hate speech laws to adopt.<sup>8</sup> Though European Union officials to some extent consist of either directly elected politicians, as in the case of the European Parliament, or officials appointed by Member States, as in European Commissioners, they often (though not always) reflect the interests of the European Union instead of their nations (Pollack 1997). Not surprisingly, many Member States were opposed to the proposed law.

### **The debate over the law**

The United Kingdom has less restrictive hate speech laws, prosecutes very few cases, and does not have religion as a protected category.<sup>9</sup> Interestingly, the UK has punished racial *discrimination* for longer than continental European countries, indicating the UK sees speech issues differently from actions (Geddes 2002). The UK, along with other Member States, expressed strong concern about this law as it would change their laws. However, as part of the EU, the UK must negotiate in the EU framework.

Under the co-decision requirement, the European Parliament reviewed the proposal. Despite concerns with the law in many Member States, all MEPs except for

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<sup>6</sup> International agreements such as the ICERD and Convention on Cybercrime are mentioned throughout the debates on the proposed framework decision.

<sup>7</sup> Interview with MEP B of the Justice and Home Affairs committee

<sup>8</sup> It should be noted that it is often the EU that determines which NGOs to consult on the writing of a law, and to some extent at least the groups known to have an influence on the law are possibly reflective of the EU's opinion.

<sup>9</sup> Amid much debate there is currently a proposal to add religion to the UK's hate speech laws, and there have been numerous attempts to do so in the past. The current proposal would include only England and Wales, as the Scottish executive opted out and Northern Ireland already has such a law (interview with UK Home Office official).

one present on the Justice and Home Affairs committee approved the proposal with minor changes (some of which made the law more strict). Not surprisingly, the MEPs from Germany, where the hate speech laws are quite strong, had little problem with the EU proposal.<sup>10</sup>

However, certain institutional features of the EU and national political situations gave Member States opposed to the framework decision advantages in negotiations, notably in the European Council, which represents the Member States' interests in the EU.<sup>11</sup> First, the framework decision was in the Justice and Home Affairs directorate,<sup>12</sup> which is in the third pillar of the European Union. This requires unanimous agreement on proposed laws, and thus gives Member States who are critical of the proposal a stronger position. As noted in a UK House of Lords debate:

Chairman: This being a proposal on which unanimity is going to be necessary, there is no problem about the government standing its ground on these matters?

Lord Filkin: That is a robust statement. Clearly we have leverage and we would want to exercise that as vigorously and positively as we could.<sup>13</sup>

European Commission informal power is believed by some political scientists to be at its greatest when information about a topic is vague or when the Commission has more information than Member States (Pollack 1997). Then Member States will agree to a proposal as there is no clear reason to not do so or enough knowledge to prefer another option. This sometimes occurs in complex economic proposals. However, this proposal did not involve highly technical details that the Member States could not clarify, and

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<sup>10</sup> Interview with MEP A of Justice and Home Affairs

<sup>11</sup> With the proposed EU Constitution, some of these realities will change. For example, the pillar system will be eliminated and unanimous voting will no longer be required in Justice and Home Affairs.

<sup>12</sup> Now known as the Security, Freedom and Justice directorate. As most discussion on the framework decision occurred while this area was still known as Justice and Home Affairs, that is the name that will be used.

<sup>13</sup> UK House of Lords debate, June 26, 2002

therefore they knew what would be illegal. This was especially important for some Member States, such as Italy, that have parties in the ruling coalition that are often accused of xenophobia (with good reason) and therefore have a special interest in seeing the proposal, which repeatedly notes the rise of far-right in politics, defeated.<sup>14</sup>

Once discussion commenced in the European Council, many Member States expressed concern over the limiting of freedom of speech and the UK also expressed concern over the addition of religion as a protected category. In an attempt to reach an agreement, numerous concessions were made, including allowing for making hate speech based on religion illegal only if it was a pretext for racial hatred, and allowing states to have less strict laws than was originally proposed. However, Italy, due to concerns expressed by the anti-immigrant Lega Nord, placed a general reservation on the proposal, thus stalling it in the Council until February 2005, with brief discussions in 2003.<sup>15</sup> In February, after criticism over Prince Harry wearing a Nazi uniform to a costume party and German requests that the EU ban Nazi symbols, the Council again addressed the framework decision. However, the UK, Denmark, and Italy expressed the same concerns over freedom of speech as before and the proposal is again stalled.<sup>16</sup>

### **What hate speech laws could mean**

If the law is passed in its present form, it will not have much direct effect on national laws due to the compromises made in Council discussions. However, the proposal is seen as a “first step” and the direction the EU wishes to take in the

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<sup>14</sup> Interestingly, the Racial Equality Directive, passed in 2000, was passed in part because of the “Austrian situation”, in which the far-right Freedom party came to power. This was used by lobbyists to push through the law, as Austria would not oppose it out of fear of further ostracization and the other Member States would pass the law out of horror of election of the Freedom party (Niessen and Chopin 2004). This “policy window” (Kendon 1985) and fear of ostracization appears to have passed.

<sup>15</sup> Council of the European Union, Interinstitutional File 2001/0270 (CNS), interviews with MEP A of Justice and Home Affairs and ENAR director

<sup>16</sup> EU Observer, 2-24-2005

criminalization of biased speech. As such, the potential effects of such laws should be analyzed.

As noted earlier, the EU conceives of the problem of hate as stemming mainly from right-wing racist and xenophobic parties, and as a majority-on-minority problem. Aside from ignoring the increasing problem on minority-on-minority violence and hate<sup>17</sup>, this view focuses often on restricting political speech, the results of which may have unintended consequences.

In looking at electoral behavior Pierre Salmon (2002) found if an issue was particularly important to a voter, he or she will often vote for that candidate regardless of the candidate's other views. Issues relating to immigration are often important to many voters, and a hate speech law that causes respectable politicians to fear being prosecuted by a strict racism and xenophobia law will leave only extremists to address the population's fears. In addition, by prosecuting extremists, they can be seen by the population as martyrs, particularly if that population agrees with them on one or two core issues.

As noted, only some categories were included in the proposal. Other categories, such as sex and sexuality, were not included in the proposal. When asked if there was an interest in adding these groups, a representative from an EU funded anti-racism group replied that "women aren't killed because they are women", and she then referenced the Holocaust.<sup>18</sup> This Euro-centric view ignores the somewhat recently discovered phenomenon of "honor-killings" among some immigrant populations.<sup>19</sup> By privileging some categories of citizens over others,

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<sup>17</sup> Numerous MEPs have submitted questions to the Commission asking if any plans are underway to specifically address minority-on-minority violence, and the Commission has said it has no plans to do so.

<sup>18</sup> Interview with ENAR director.

<sup>19</sup> "Police chiefs try to end 'honour killings' with review of 100 murders", June 23, 2004, Daily Telegraph, UK <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/06/23/nmurd23.xml>

