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Online hate and the contentious case of stirring up hatred offences

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Abstract

In 2016, as requested, the UK Government submitted written evidence to the Home Affairs Committee's inquiry into hate crime and its consequences. Among all the offences listed as part of what was called a robust legal framework to combat online hate, there was one set of offences surprisingly missing. The stirring up hatred offences (ss. 18-23 and 29B-29G of the Public Order Act 1986), at least comparable to those envisaged in Article 510 of the Spanish Criminal Code (that is, punishable hate speech), were laid incomprehensibly out of play. Hence, this research study first aims to determine whether this decision is understandable. Then, we will focus on some legal hotspots concerning those offences to visualise better how they operate in practice. Finally, by way of conclusion, a comparative endeavour will be made with the Spanish legal system, bringing to the forefront the conflict points already dealt with.

Key words

Stirring up hatred; hate crimes; hate speech; incitement; cybercrime

Resumen

En 2016, tal y como le había sido requerido, el Gobierno del Reino Unido facilitó pruebas documentales a la investigación en curso sobre delitos de odio y sus consecuencias llevada a cabo por la Home Office Affairs Committee (comité multipartidista de parlamentarios que trata asuntos de estado). Entre todos los delitos enumerados como parte de lo que se denominó como un marco jurídico sólido para combatir el odio online, sorprendentemente faltaba un conjunto de delitos. Los delitos

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de fomento del odio (arts. 18-23 y 29B-29G de la Public Order Act 1986), cuando menos equiparables a los previstos en el artículo 510 del Código Penal español (es decir, el discurso de odio punible), quedaron incomprensiblemente fuera de foco. De ahí que el presente estudio de investigación pretenda, en primer lugar, comprobar si esta decisión es o no entendible. A continuación, nos centraremos en algunos aspectos legales conflictivos relativos a dichos delitos para visualizar mejor cómo operan en la práctica. Finalmente, a modo de conclusión, se realizará un esfuerzo comparativo con el ordenamiento jurídico español, poniendo sobre la mesa los puntos conflictivos ya tratados.

Palabras clave

Fomento del odio; delitos de odio; discurso de odio; incitación; ciberdelito

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1. Introduction

There are no reliable statistics on the number of hate crimes that occur online, albeit it is worth mentioning the first-ever attempt with experimental data published by the Home Office in *2016/17 England and Wales report on hate crimes* (O'Neill 2017). The resulting figures are based on police officers' practice of ticking a box (or applying a flag) on their system for a crime that comes to their notice.[1] Among other aggravating factors that have a tick box enabled, one has to do with crimes motivated by a hate crime strand (race, sexual orientation, religion, disability and transgender identity), and a different one has to do with crimes involving an online constituent (that is, a crime committed, whether wholly or partially, through a computer, computer network or other computer-enabled devices). The cross-correlation of data is shown in the 2016/17 and 2017/18 bulletins.[2] The data is embryonic, can be misleading and will likely not reflect the full extent of online hate crime incidents.[3] Still, the data represents the first official effort for revealing an estimation of this kind in the UK. Bearing this in mind:

- In 2016/17, there were 80,393 offences recorded with one or more monitoring strands (race, religion, sexual orientation, disability and transgender identity) for each, but barely 1,067 offences (2%) were flagged as being committed online.[4]
- In 2017/18, there were 94,098 offences recorded with one or more monitoring strands (race, religion, sexual orientation, disability and transgender identity) for each, but barely 1,605 offences (2%) were flagged as being committed online.[5]

Finally, despite being a dubious representative sample and even if have done following the police criteria for setting crime categories, it will gain importance for this study to note now that 84% and 86% of the hate crimes committed online in 2016/17 and 2017/18 involved offences such as harassment, stalking and malicious communications. At the same time, only 13% and 14% of the hate crimes committed online in 2016/17 and 2017/18 involved public order offences. Stirring up hatred offences are also located within the catch-all category of public order offences. However, in 2020, the UK Government acknowledged that there is not adequate data yet on the scale and scope of cyberhate, being this fact a significant handicap (Home Office 2020, par. 8.8). Briefly, the fact that

[1] The online flagging practice for all police forces was made mandatory in 2015. The idea was to provide data for a *"national picture of the levels of online hate crime"* (Home Office 2016, pars. 16 and 73).

[2] In the 2018/19 bulletin, however, the analyses were not so repeated due to the uncertainties of the data quality (O'Neill 2017, 18–22; Home Office 2018, 30–34; 2019, 3).

[3] In 2016/17, only 23 out of 44 police forces from England and Wales submitted adequate data on online flagging. In 2017/18, the number increased to 30 out of 44. However, even in the case of those police forces that supplied data, it is recognised that the appropriate flags have not always been applied when necessary (O'Neill 2017, 19; Home Office 2018, 33).

[4] As noted, a crime could be flagged with more than one monitored strand. The total number of motivating factors in those 1,067 online offences amounted to 1,171, of which 671 were due to race, 199 to sexual orientation, 140 to disability, 132 to religion and 29 to transgender identity (O'Neill 2017, 19).

[5] As noted, a crime could be flagged with more than one monitored strand. The total number of motivating factors in those 1,605 online offences amounted to 1,784, of which 928 were due to race, 352 to sexual orientation, 225 to disability, 210 to religion and 69 to transgender identity (Home Office 2018, 33).

the phenomenon is underrepresented and scarcely worked on statistical bulletins is the symptom that further focused research is still needed in the field.

Other policy initiatives have also failed to achieve the expected results in light of public scrutiny. In April 2017, Sadiq Khan, the Mayor of London, launched a pioneering UK's first expert unit to tackle online hate crimes (BBC News 2017). The Scotland Yard's online hate crime hub was funded and designed for that end. Any reported online hate crime in London was to be transferred to the hub.[6] Up to August 2019, the results obtained were extremely frustrating. Far from expected, there were logged 1,851 hate incidents, and the police brought charges (formal accusations of a crime by the police) barely for 17 (0.92%). Furthermore, only seven of those charges finally led to prosecution.[7]

In August 2021, new research revealed an interesting poll involving 1,512 people considered representative of the UK public. Among other issues, 74% of the respondents agreed with the following statement: "I do not trust social media companies to decide what is extremist content or disinformation on their platforms". As the research notes, this suggests a significant degree of distrust about policing activities carried out by social media companies. What is more, there is a "real public hunger" for legislation to take control over this subject (Hope Not Hate *et al.* 2021, 6–7).

Contributing to this idea from a legal-criminal approach, the research study at hand will deal exclusively with criminal liability that arises for acts carried out by an Internet user and concerning self-generated content (content producer). As we will see, the focal point will be stirring up hatred offences. Still, before looking more deeply into the subject and long before delving ourselves into comparative law domains[8] as a way of conclusion, it is worth being familiar with English law's general framework when coping with online hate.

2. Online hate in the English law: a legal landscape in a jigsaw pattern

The UK Government acknowledged in 2016 that no single solution was devised for online hate. Quite the opposite, a "robust legislative framework" has been developed to prosecute that sort of crime over time (House of Commons 2016, 3–4). Among parliament-made law, there are legal remedies to which much attention has been paid, like Protection from Harassment Act 1997 (ss. 2, 2A, 4 and 4A of the PHA),[9] Malicious

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[6] In October 2017, Home Secretary Amber Rudd (2016–2018) launched a homologous online hate crime hub for a national level, hosted by the Greater Manchester Police. As advanced by the UK Government, the aim was to "ensure" online hate cases were being duly investigated and to "help" increase prosecutions for online hate crimes. This time, the National Police Chiefs' Council developed a website (www.report-it.org.uk/) to report online hate material. The reports are automatically sent to the online hate crime hub, operative since January 2018. There, they will be assessed on a case-by-case basis and referred, where appropriate, to the relevant local police for further investigation. See Home Office 2017.

[7] See: "Less than 1% of cases reported to online hate crime unit resulted in charges" (Vaughan 2019).

[8] Note that the prohibition of hate speech through criminal law is a highly debated topic within the OSCE region, of which the UK and Spain are part. It will be interesting to point at the different problems and dilemmas that lie behind such legal systems, which will show very different approaches to the same phenomenon. The wording and scope of hate speech provisions vary widely across states.

[9] These are offences concerning harassment and stalking that have a racially or religiously aggravated counterpart offence (s. 32 of the Crime and Disorder Act 1998). Although these aggravated counterpart offences were first introduced under the Crime and Disorder Act 1998 (CDA), some legal scholars point to a "modern precursor" of them. That is the offence of reprisals against witnesses, jurors and others (s. 51(2)

Communications Act 1988 (s. 1 of the MCA) and Communications Act 2003 (s. 127 of the CA). On the one hand, based on the statistics seen above, it seems logical, as harassment, stalking and malicious communications stand out as criminal categories in the forefront when it comes to combatting hate online. On the other hand, the s. 127(1) of the Communications Act 2003,[10] combined with the penalty enhancement sentencing provision of the s. 66 of the Sentencing Act 2020 (that is, taking *hostility* into account as an aggravating factor in the sentencing stage),[11] is by far the provision that captures the highest number of convictions concerning offensive comments online. In addition, the Government listed three more pieces of "relevant legislation". Two of them (Computer Misuse Act 1990 and Sexual Offences Act 2003), which appear to be randomly selected among many others,[12] are very anecdotal.[13] Finally, a simple and rather confusing

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of the Criminal Justice and Public Order Act 1994) (Card and Ward 1998, par. 8.18). According to the UK Government, intriguingly, this is also a statute that may appear here and there as a testimonial basis to combat online hate. In fact, the s. 4A joined the Public Order Act 1986 (POA) through the s. 154 of the Criminal Justice and Public Order Act 1994. In brief, s. 4A of the POA makes an offence the intentional causation of harassment, alarm or distress by using threatening, abusive or insulting words or behaviour, or disorderly behaviour, or by displaying any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing that or another person harassment, alarm or distress. The s. 4A of the POA also has its racially/religiously aggravated counterpart offence (s. 31(1)(b) of the CDA).

[10] As a conduct crime, the actus reus of the offence rests exclusively in making a communication (s. 127(1)(a) of the CA), which necessarily involves a grossly offensive, indecent, obscene or menacing message, or making such a communication to be so sent (s. 127(1)(b) of the CA), with complete disregard for the recipient. Even if there were no recipients, criminalising the speech would still be possible. Despite likewise dealing with improper use of a public electronic communications network, there is a different offence under s. 127(2) of the CA, according to which it is punishable to send a message by a public electronic communications network that the offender knows to be false, or causes such a message or matter to be sent, or persistently makes use of a public electronic communications network, if it is done to cause annoyance, inconvenience or needless anxiety to another (s. 127(2) of the CA).

[11] Note that this is exactly the same as what would happen with the aforementioned s. 1 of the Malicious Communications Act. The s. 1 of the MCA deal with sending to another person a letter, an electronic communication, or an article which (1) conveys an indecent or grossly offensive message, a threat, or false information and is known or believed to be false by the sender; (2) whether in whole or in part, is of an indecent or grossly offensive nature. What lies behind any sending is the sender´s intention to cause distress or anxiety (a) to the recipient or (b) to any other person to whom he intends that it or its contents or nature should be communicated.

[12] Despite not being alluded to by the UK Government, other peripheral legal remedies may also include the Obscene Publications Act 1959 or the Serious Crime Act 2007. The s. 2(1) of the Obscene Publications Act 1959 prohibits publishing an obscene article, whether for gain or not, or to have an obscene article that would be for publication and gain to oneself or another. The ss. 44–46 of the Serious Crime Act 2007, covering acts of encouraging and assisting an offence, has been regarded to be fully applicable to the messages placed on social media platforms. Hence, giving stimulus to online communications offences will amount to a new offence under the Serious Crime Act 2007, including supporting someone to carry out a collective and aggravated harassment campaign against an individual or posting grossly offensive messages.

[13] If they were of any use, which is doubtful, they would surely serve in exceptional circumstances. In fact, they have not even received the slightest attention in the literature written by prominent scholars on hate crimes. The Computer Misuse Act 1990 was amended in 2015 to insert an offence under the s. 3ZA (s. 41(2) of the Serious Crime Act 2015). This provision now outlaws unauthorized acts concerning a computer causing or creating a significant risk of serious damage of a material kind, whether intentionally or recklessly (s. 3ZA(1) of the Computer Misuse Act 1990). Moreover, it is an offence: (i) making, adapting, supplying or offering to supply any article intending to be used to commit or assist in the commission of the previous offence (s. 3A(1) of the Computer Misuse Act 1990); (ii) supplying or offering to supply any article believing that it is likely to be used to commit, or to assist in the commission of the previous offence (s. 3A(2) of the Computer Misuse Act 1990); or (iii) obtaining any article intending to use it to commit, or to assist in the

reference is made to “breach of peace”, with no additional information provided by the UK Government. This is a common law offence (judge-made law) of exceptional value for having played a significant role in Scotland historically. In Northern Ireland, the Public Order (NI) Order 1987 still has some statutory offences under ss. 18–19 that rest on this legal formula.[14] Unlike in Northern Irish law, the allusion contained in s. 5 of the Public Order Act 1936[15] for the English law vanished when it was repealed by the Public Order Act 1986 (s. 40(3) and Sch. 3 of the POA).[16] In short, breach of the peace is not a common law offence, as is in the Scottish case. Secondly, the concept is no longer used as a statutory formula for any crime, as is in the Northern Irish case. However, this is not to say that citizens from England & Wales have no duty to preserve the peace, or that the police officers do not have preventive powers and special responsibilities associated

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commission of the previous offence, or with a view to being supplied for use to commit, or to assist in the commission of the previous offence (s. 3A(3) of the Computer Misuse Act 1990). These offences are all referring to “articles”, which includes “any program or data held in electronic form” (s. 3A(4) of the Computer Misuse Act 1990). As regards to the serious damage, it can take the following forms: (a) damage to human welfare in any place; (b) damage to the environment of any place; (c) damage to the economy of any country; or (d) damage to the national security of any country (s. 3ZA(2) of the Computer Misuse Act 1990). One can easily imagine that such extreme damages, whether for a loss in human lives or a provoked failure in critical infrastructures, could be part of a terrorist attack. Logically, as may happen with many other crimes, it is within the realm of possibility that the severity of the sentence is increased due to hostility grounds. The same is true for s. 15 of the Sexual Offences Act 2003, targeting paedophiles as earliest as possible in their criminal itinerary (e.g. sexual grooming on the Internet). It is an offence for a person over 18 who has already met or communicated with another person under 16 on one or more occasions that then (i) intentionally meets that child, or (ii) either one or the other person travels for doing so, or (iii) the person over 18 arranges to meet the child, if in any of these previous cases exist the intention to commit a relevant sexual offence (e.g. rape or causing sexual activity without consent) against the person under 16 either during or after the meeting.

[14] According to s. 18 (1) of the Public Order (NI) Order 1987, a person shall be guilty of an offence for using in any public place disorderly behaviour or “behaviour whereby a breach of the peace is likely to be occasioned”. Instead, according to s. 19(1) of the Public Order (NI) Order 1987, a person shall be guilty of an offence if in any public place or at –or concerning– any public meeting or public procession: (a) uses threatening, abusive or insulting words or behaviour; or (b) displays anything or does any act; or (c) being the owner or occupier of any land or premises, causes or permits anything to be displayed or any act to be done thereon, “with intent to provoke a breach of the peace or by which a breach of the peace or public disorder is likely to be occasioned (whether immediately or at any time afterwards)”.

[15] As originally enacted, a person shall be guilty of an offence if in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour “with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned” (s. 5 of the Public Order Act 1936).

[16] To better understand why was decided to drop the concept of breach of peace away, see what Law Commission for England and Wales said: “The desire for clarity and reconsideration of possibly unsatisfactory concepts have also led us to abandon the concept of ’breach of the peace’ (…) , the formulation adopted by section 5 of the Public Order Act 1936 (…) has its own drawbacks. It is now apparent that if in consequence of such behaviour there is no likelihood of a breach of the peace by any persons affected by the behaviour, even if, for example, they are put in fear that violence will be used against them, no offence is committed. Some other concept is therefore required in any new offence which both ensures that any threats which are likely to cause a fear of violence are effectively penalised by the criminal law and discourages the notion that a breach of the peace is in contemporary circumstances an acceptable or likely reaction to threatening behaviour by others. Consequently we now recommend that threatening, abusive or insulting words or behaviour should be penalised if they are intended or likely to cause a fear of immediate violence or to provoke the immediate use of violence” (Law Commission 1983, par. 2.6).

to this very same end.[17] Apart from this, it seems to be widely accepted today that some statutory offences against public order involve breaches of the peace. Therefore, it is most likely that the UK Government intended to refer us to public order offences[18] when listing *breach of peace* among the relevant legislation to combat online hate. However, it is more dubious that the UK Government would have labelled stirring up hatred offences under the Public Order Act 1986 (POA) as a breach of peace, since they constitute a distinctive self-ruling area of public order law (Part III of the POA). As the Law Commission for England and Wales intriguingly holds examining those offences, "almost all" could be committed online (Law Commission 2018, par. 9.27). More recently, by shifting the doubts elsewhere (Part I of the POA), the Law Commission has been more categorical in this regard: "[W]hereas other public order offences [that is, those included in ss. 4, 4A and 5 of the POA] are primarily concerned with physical, public spaces, the stirring up hatred offences can equally be committed in an online context, and in this respect are of an appreciably different character" (Law Commission 2020, par. 9.22). The stirring up hatred offences will be the ones receiving further attention henceforth.

In fact, are stirring up hatred offences of any utility despite not being mentioned by the UK Government? What aspects of online conduct make these offences workable/fallible? If made, how might these insights assist in a comparative attempt with Spain's equivalent –and lengthy– Article 510 of the Spanish Criminal Code (SCC)?

3. Stirring up hatred. A selected range of current controversial issues

Let us now turn to a concatenation of five ideas that will allow us to visualise how stirring up hatred offences[19] work in practice. Then, in comparative terms, the idea is to

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[17] As a contentious and delicate subject, since rights and freedoms of the citizenry may be at stake, the common law power of breach of the peace has given rise to a huge amount of literature around it (Phillipson 2020).

[18] Among others, see ss. 4, 4A and 5 of the Public Order Act 1986. These are offences that have a racially/religiously aggravated counterpart offence (s. 31 of the CDA) within the English law. Note that, year after year since the CDA was passed, half of all prosecutions concerning aggravated offences on hostility grounds had to do with them. However, in contrast with these promising statistics, there have been very few successful prosecutions on cyberhate. Actually, up to now, it appears as though only s. 4A of the POA has been ever applied to online expressive activities. Nevertheless, we can safely say that ss. 4, 4A and 5 of the POA are almost entirely useless on social media (Barker and Jurasz 2019, 49–55). These offences were originally aimed to address any behaviour or expressive activities uttered in the victim's physical proximity, either by mouth (spoken) or by hand (written). When drafting the law, face-to-face communications in public spaces were meant to be so effectual that they deserved a more tailored legal response. The foundational rationale of public order offences runs the risk of becoming blurred if we extend their applicability to digital speech and, therefore, to any impersonal and non-immediate way of acting (e.g. sending a voice message via WhatsApp and listening to it time after).

[19] Part III of the POA contains six offences related to words, behaviour, written material or visual images or sounds that are threatening, abusive or insulting and which are intended or likely to stir up racial, if: i) using such words or behaviour or displaying such material (s. 18 of the POA); ii) publishing or distributing such material (s. 19 of the POA); iii) presenting or directing a public play which involves such words or behaviour (s. 20 of the POA); iv) distributing, showing or playing a recording of such visual images or sounds (s. 21 of the POA); v) including in a programme service a programme which involves such visual images or sounds (s. 22 of the POA); and vi) possessing such material or recording of visual images or sounds with a view to (a) display, publish, distribute or include in a programme service such material, whether by himself or another, or to (b) distribute, show, play or include in a programme service such recording, whether by himself or another (s. 23 of the POA).

end by looking at Spanish criminal law in order to highlight certain inspiring –or not so inspiring– characteristics of English law in this field.

3.1. Stirring up hatred as a public order affair

The leading role of the repertoire of legal measures to combat the promotion of hatred was, at most times in the past, to maintain or preserve public order. Interestingly, in the wake of the Second World War and until the Race Relations Act 1965 was passed (1945–1965), the Home Office had only intervened on ethnic minorities´ behalf to protect them from racial abuse in very exceptional cases, such as public order threats (Thurlow 1998, 284). When incitement to hatred offence was statutorily introduced through the s. 6 of the Race Relations Act 1965,[20] it was done so because inciting to hatred which was not likely causing a threat of the peace was thought to be an incomprehensibly unattended area of law.[21] In other words, it was about punishing certain abuses and insults that were poisoning the social environment. It was thought that, through these minor acts, more fuel was added to the fire, which usually had its violent echo on the occasion of Fascist meetings (Card 2000, par. 5.1). At the exact time passing the current sections of the POA, the public order argument appeared to be, along with the political commitment to combat racism, the unique governmental basis. The point is that such justification by itself may not be sufficient for criminalising speech acts that are connected to dubiously envisioned risk scenarios (Wolffe 1987, 93–95). What is sure is that neither the incitement to hatred provision of that first moment nor the current ones settled down in the POA have been designed or intended to confront the challenges of the online era.

Part 3A of the POA contains similar offences (ss. 29B-29G of the POA) related to words, behaviour, written material or visual images or sounds that are threatening and which are intended to stir up religious hatred, or hatred on the grounds of sexual orientation.

[20] The creation of an offence of incitement to racial hatred was rejected in the parliamentary debates that preceded the Public Order Act 1963. Still, it was passed shortly afterwards with the Race Relations Act 1965 and was firmly anchored in the Race Relations Act 1976 (Neller 2023, 115–153). Following its original wording, "a person shall be guilty (...) if, with the intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins: 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, being matter or words likely to stir up hatred against that section on grounds of colour, race, or ethnic or national origins" (s. 6(1) of the Race Relations Act 1965).

[21] Until s. 6 of the Race Relations Act 1965 came into force, there were indictable basically those who intended to provoke a breach of the peace or, alternatively, in situations in which that outcome was likely to occur. According to the incitement to hatred offence of s. 6 of the Race Relations Act 1965, first the accused must have intended to stir up hatred, without alternative; and, secondly, those whose words were not likely causing a breach of the peace would no more benefit from absolute impunity. Until this change of heart, the prevailing legal culture in the UK was trying, by all means, to prevent the mere expression of ideas, without affecting or threatening peace, from being punishable. In fact, "such a contention has deep roots in English history. Certainly since the eighteenth-century Parliament has deliberately steered clear of legislation against the expression of particular views, and prosecuting authorities have consistently been under pressure to avoid using widely drafted or widely defined laws (...) against the expression of particular views" (Williams 1967, 171). In tune with this historically rooted perspective, the Conservative government was appalled by the mere idea that freedom of expression could ever be limited in a case other than when a risk to public order was involved. The racial problem had to be addressed from a purely educational perspective, away from the law. In contrast, the Labour Party has been pressing since the 1950s to make racial discrimination and incitement to racial hatred part of the law (Dickey 1968, 11–14).

3.2. The intention/endangerment dichotomy

Incitement represents a body of preparatory offences across the UK, denoting that criminal liability is set much further than what actually is in attempts. It refers to pre-criminalise, even more, the risky and uncertain behaviour taking prospective harmful conduct as a reference point. Preparatory offences and attempts are both parts of the broader category of inchoate offences, which precisely means incipience, beginning or initial stages. Due to their different remoteness to the tangible harm-doing (completed offence), preparatory offences imply a more tangential risk creation than its equivalent in criminal attempts. Even so, there do exist secondary harms that are harmful if and only if they are linked to the tangible or primary harm.[22] That is, we have the expectation of injury as secondary harm (e.g. being afraid due to the threats made towards the Black community) because the primary injury (e.g. racial violence on the street) is already a tangible harm. However, the intensity of such connections varies greatly depending on a previous sub-classification of inchoate offences. The inchoate offences, as we are about to detail, might be common law or statutory offences.

There are three overarching groups of inchoate offences. The first contains the offences of intention, which are those incorporating an intention-based element to commit a substantive offence or to ensure its commission. Here the law does refer to three main categories: attempt, conspiracy and incitement. Incitement, in particular, has been abolished as a common-law offence in the English law since 2008,[23] even though some statutorily designed substantive inchoate offences are still scattered in law (e.g. incitement to hatred[24] offences[25] in Part III of the POA). The second group contains the

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[22] As we will see, this is the restraint not to make a hateful speech act, by its mere virtuality of being so, an offence by law. Besides the hatred performance, there must be a kind of attachment between the ongoing conduct and the forthcoming outcome, whether it is finally achieved (consummated offence) or not (non-consummated offence). This attachment involves a causal nexus (or a causal nexus plus an intentional element). Lacking this attachment possibly means witnessing noncriminal incivility (Duff and Marshall 2018, 140–143).

[23] See s. 59 of the Serious Crime Act 2007, in force on 1 October 2008, abolishing "inciting the commission of another offence" as a common law offence.

[24] *Hatred* is not statutorily defined and requires to be decided as a matter of fact by the judge. If possible, and even if the ordinary meaning prevails, the judge should always consider the legislative intention (legal meaning) to narrow the possibilities. Setting aside the vast literature efforts to refine or contest the term, it is held to have stronger significance than *hostility* (Law Commission 2014, pars. 2.40–2.41). The threshold is set higher than mere conduct or material stirring up ridicule or dislike, or which offends (CPS 2023).

[25] The nature or core element of the inchoate offence of incitement is "parasitic" on the hate incitement law (or substantive offence of incitement to hatred) (Sumner 2011, 26–27). There must still be a connection and contribution to a remote and unlawful second act. The problem here is that the general inchoate offence was surely addressing the incitement to commit a specific crime [*R. v Whitehouse (Arthur)* [1977] EWCA Crim 2], whereas in the incitement to hatred substantive offence seems to be an unlawful emotion or state of mind what is addressed. As a chain of sequences, to persuade someone to get on such a condition, to prompt him to lose his temper and, just maybe and not necessarily, to commit a criminal act, seems like an anomaly or great intrusiveness of criminal law in the private sphere of the individual. Incitement leading to engender hatred on others (first sequence above) or any communicative act not intending nor expecting to enact a criminally meaningful effect (second sequence above) are not conclusive in terms of criminal liability. For the third sequence, note that advocating –racial, homophobic, etc.– violence or other criminal action is also a crime, whether it is still covered by common law offences (incitement) or a statutory offence (encouraging or assisting crime under the Serious Crime Act 2007). So now, the question should be why to have a distinctive offence of incitement to hatred when there are some other undisputed alternatives. The answer

offences of explicit endangerment, which are those incorporating a specified primary harm risk that must be created (e.g. dangerous driving). The third group contains the offences of implicit endangerment, which are those that do not specified the referential completed-offence or the kind of primary harms that are heading to (e.g. driving with alcohol excess). Finally, those three groups of inchoate offences could be, in some respects, regrouped into two. Offences of endangerment (or offences of risk prevention/creation), whether explicit or implicit, demand a proper causal nexus between the conduct that is criminalised through the inchoate offence and the primary harm. The awareness –or any expectable/logical awareness– of such a relationship is what should be punished for making any coming events more likely to happen. If explicit endangerments are based on standards (unreasonable risk scenarios established by courts over time), implicit endangerments are based on rules (legal certainties as the one and only steady scenario). In the offences of intention, by contrast, the intentional element is superimposed to causality nexus. For self-evident reasons, the intentional element becomes a matter of proof, providing to these offences a more heightened proportionality concerning their seriousness and in contrast with a dangerously way of acting (Duff 1996, 128–133; 2007, 166–174).

Even if we have already associate incitement to hatred offences with offences of intention, some of them could appear –and they do appear– as endangerment offences.[26] Indeed, they are not mutually exclusive. For instance, the s. 18 of the POA criminalises the use of threatening, abusive or insulting words or behaviour, or to display any written material which is threatening, abusive or insulting if (a) intending thereby to stir up racial hatred [offence of intention] or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby [endangerment offence]. Surprisingly though, the very same offence –despite omitting the abusive and insulting references– but on religious and sexual orientation grounds (s. 29B of the POA), includes the intentional-element and no endangerment clause.[27]

The offences under ss. 23 and 29G of the POA involve the remotest harms possible. The individual conduct may generate no risk at all. However, despite being remote and uncertain, the act sets in the chain of causal processes. These offences outlaws possessing

might be "to highlight the distinctive civic character of the wrongs committed". It is not a matter of seriousness, but perhaps one of fair labelling (Duff and Marshall 2018, 146).

[26] Now, we need to make clear if, as an endangerment offence, incitement to hatred should be regarded as *explicit* or *implicit* endangerment. Indeed, it is not really challenging to fathom out what is the primary harm to which the incitement to hatred offences are pretending to prevent us. However, there might remain "a slight lack of clarity" for the exact end (e.g. racially aggravated violence, ensuring assured citizenship of members of a racial minority group, etc.), but that would be all, so we can say that incitement to hatred should be regarded as an offence of explicit endangerment (Duff 2007, 145, Bock and Stark 2020, 62).

[27] Attending to the legal predecessors of the current stirring up hatred offences, it is well noticing that the Race Relations Act 1976 drove the intentional-element out in the past, causing discord between the two chambers of Westminster Parliament. The point was that the intention-based stipulation was difficult to prove and thus was continuingly making prosecutions failing (Leopold 1977, 403). In the opposite case, it seems clear to me that maintaining a stirring up offence through the endangerment clause alone also carries its risks, especially in the digital age. In fact, "any extension of stirring-up offences to speech merely likely to lead to hatred will inevitably have a chilling effect on what people feel safe in saying, especially online in blogs and social media, and lead to a degree of self-censorship. In the nature of things, popular discussion of this kind involves strong views and strong propensities to take offence" (Free Speech Union 2020, par. 11.5).

written material or recording of visual images or sounds with a view to (a) display, publish, distribute or include in a programme service such written material, and whether by himself or another, or to (b) distribute, show, play or include in a programme service such recording, and whether by himself or another. Criminalising the mere possession of material is not justified by what arises from the isolated act, but because such an act may contribute to a culture of hatred. In fact, societies making "freely available" this kind of material are societies that somehow promote its use. Hence, making the possession of the material criminal means reacting at an early stage to a "slippery slope leading to the routine use" of it, which is also prompt to configure a criminal activity at any moment (Wilson 2020, 46–47). In fact, it is impossible to ignore the existing feedback loop between online-offline hate crimes (Kamenova and Perliger 2023, 285–286).

However, this picture-perfect legal landscape for addressing online behaviour does not match with the very few successful prosecutions on a yearly basis. In 2018/2019, there were 13 prosecutions and 11 convictions for stirring up hatred offences in England and Wales (Crown Prosecution Service – CPS – 2019, 18–19 and 47). The threshold to prove someone is guilty is so high that successful convictions are infrequent. This type of crime makes a minimal contribution to the fight against hate crimes. Year after year, within the approx. 9,000–10,000 charges that result in convictions in England and Wales, only about ten are connected to hate speech (stirring up hatred). This means 0.1% of all charges that are brought.

3.3. Protection of vulnerable groups

These set of offences contend with "hatred against a group of persons" (ss. 17, 29A and 29AB of the POA). That said, note that a *group of persons* as a target must be one defined by reference to a closed-list of markers (race, religion or sexual orientation). Apparently, the law is not meant to focus exclusively on vulnerable groups in society. As a result, any dominant group defined by some strands are, reasonably or not, within the scope of stirring up hatred offences. Albeit the law was passed that way, there is nothing but to reinforce confidence in the judiciary for implementing correcting mechanisms. The purposive approach to interpreting legislation is one of the appropriate methods of judicial interpretation. The intention at the time of drafting the law must be preserved[28], and it should guide any pronouncement. Even if this is commonly overlooked, it must be understood that a dominant group´s member would have acted with an incomparable hatred impulse. In particular, that would be the awareness of being in a privileged position within a governmental system that somehow backs, if not rewards, abusing those privileges (Duff and Marshall 2018, 148). By contrast, the value of free-flowing speech does not outweigh its heartrending consequences (e.g. damaging considerably intergroup relations, or a sense of being more vulnerable than expected and so feeling unprotected). The aim of hate crime/speech laws is to protect and preserve "broader societal values" (Bakalis 2021, 74–75). Crimes committed against certain groups are far more harmful to society than those directed at others.

[28] The DNA of these legislations is to protect minorities and vulnerable group members of society. The chances of a threatening effect with a supra-individual impact are extremely remote in the case of attacks committed against dominant group members.

3.4. The consent of the Attorney General and cases involving mild-language

The fear of any superfluous interference with civil liberties (e.g. legitimate speech) is surely a disincentive for prosecutors. It is not for nothing that there is a clause in the law requiring the consent of the Attorney General for a stirring up hatred prosecution to move forward (s. 27(1) and 29L(1) of the POA). The clause was said to operate as a corrective mechanism to achieve results that are more precise.[29] Even if there are grounds for a successful prosecution, the Attorney General has to decide whether to allow criminal proceedings or to prevent the system from giving a self-defeating boost to the case. In particular, in doing the latter, the criminal justice system evades the risk of creating martyrs due to the rampant spread of the news (Bindman 1977, 9). However, in quite another view, this is a very sensitive issue since the law is actually giving discretionary decision powers to a politically persuadable actor[30] on offences that often have "political overtones" (Card 2000, par. 5.53).

Maybe, more than the consent clause itself, it is the deterring effect that the actus reus of these offences inflicts on Attorneys General what matters most. Either requiring the language to be *"threatening, abusive or insulting"* (ss. 18–23 of the POA) or simply *"threatening"* (ss. 29B–29G of the POA), this legal prerequisite has resulted on discouraging Attorneys General from bringing prosecution to dubious cases (Bindman 1997, 466–468). These are the cases involving mild-language; in other words, cases that do not contain explicit or blatantly asserted threats, abuses or insults. In fact, there is outside the scope of ss. 18–23 of the POA "the most insidious type of incitement not involving such conduct [that is, racist propaganda expressed in threatening, abusing or insulting terms] but 'dressed up' as apparently rational argument [that is, racist propaganda expressed in moderate terms]" (Card 2000, par. 5.3). Moreover, the criminal sanction runs regardless of the truthfulness of what is alleged. As a result, this is probably adulterating (if not over-restricting) stirring up hatred offences. Otherwise, it could just be that the aim of the law was no more than changing the style of racist discourse to make it more respectable –and non-punishable– but without putting an end to it (Robertson 1993, 98; Card 2000, par. 5.14).

3.5. Conduct crimes

The stirring up offences are all conduct crimes (Law Commission 2018, par. 9.24), and this has some important consequences in a double direction. First, the objectionable (or threatening, abusive or insulting) words, behaviour, materials, etc., must be of such a nature once tested in abstract or theoretical terms. They should be of this nature according to the impact they have on a reasonable person of public. Then, the subjective feelings of the audience receiving the message, or the effect perceived by them, is not decisive. Secondly, it is sufficient that racial hatred is intended or likely to occur regarding all circumstances, without the defendant even having to be aware of it

[29] In particular, the law was passed this way in order to avoid "trivial, frivolous, spurious, malicious and unsuccessful prosecutions" (Wolffe 1987, 93).

[30] The Attorney General "is usually a Member of Parliament of the ruling party and holds ministerial office, although he is not normally a member of the Cabinet. He is the chief legal adviser of the government, answers questions relating to legal matters in the House of Commons, and is politically responsible for the Crown Prosecution Service, Director of Public Prosecutions, Treasury Solicitor, and Serious Fraud Office" (Law 2022, 60–61).

(objective test of likelihood). Here, even if there is not result required, it will have to be proved that there were readers or listeners (at least one person) from a theoretical audience and that they were likely to be persuaded by the speech. Interestingly, to persuade at least one person from the audience or readership that was likely to be stirred up racial hatred is more than mere exposure of such a person among the audience. In order to correct possible deviations from the scope of stirring up hatred offences, the allusion to "having regard to all circumstances" contained in these offences (s. 18–23 of the POA) is a kind of filter to elucidate who would be the type of person to which the speech would be reaching. What is more, those who already are "depraved" (that is, those who already have racist beliefs), are those who might be, within a clearer realm of possibility, the ones subjected to a more advanced stage of hatred (Card 2000, pars. 5.8, 5.11–5.12 and 5.14).[31]

If the intentional element cannot be proved on cases involving *religious hatred* or *hatred on the grounds of sexual orientation*, the Court has to grant an acquittal on all those charges brought.[32] However, on cases involving *racial hatred* but with that same missing element (intent), the likelihood clause would remain. Even so, there is yet a chance for the accused to avoid responsibility. The defendant might raise a defense, that is, a legal protection provided by law (s. 18(5) of the POA). In return, the defendant must prove that he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.

4. The current state of play in Spain: insulting/defamatory speech

According to Article 510(3) of the SCC, "the penalties outlined in the previous Sections [that is, Sections concerning stirring up hatred offences] shall be imposed in the upper half if the deeds are committed via the social media, via the Internet or by using the

[31] The following example is clearly in tune with what Richard Card suggested. In February 2017, Sean Creighton (45) was sentenced to 5-years´ imprisonment after pleading guilty to several public order offences (4-years´ imprisonment), and a terrorism offence (5 years´ imprisonment). These sentences were said to run concurrently, which means that both sentences would serve at the same time and, hence, that the length of the longest sentence –that is, the sentence passed for the terrorism offence– would prevail. As for public order offences, he admitted six counts of publishing or distributing written material with intent or likelihood to stir up racial, religious and homophobic hatred (ss. 19 and 29C of the POA), and one more count of possessing racially inflammatory material for displaying, publishing or distributing purposes with the intent or likelihood to stir up racial hatred (s. 23 of the POA). Creighton was a devoted neo-Nazi extremist and a member of the National Front. He had used the *VKontakte* (VK), a Russian social media platform, to prolifically post threatening, abusing or insulting self-explanatory messages and visual representations. On Creighton´s vast activity online, here we have a few posting examples: a) an image of Hitler along with the caption "kill the Muslims"; b) a picture of a gun alongside a Swastika with the words "Jews prepare to die"; c) pictures of a man brandishing a rifle in front of a black child; d) a picture of a number of trees, from each of which is hung one or more Jewish people with the word "Jew" placed upon them by way of a sign; e) the caption "no more fucking mosques" superimposed over the cross of St George and the death´s head insignia of Combat 18, which is a neo-Nazi terrorist organization; and f) a message that reads "You will never catch me shedding a tear for a nigger, Jew, commie or queer". Apparently, even though the defendant considered his messages harmless for being exchanged with people sharing similar views, it seems like this precise argument turned against him. The Judge observed what follows: "Your intention was to incite and reinforce extremist views with similar views". See: Robinson 2017.

[32] As noted earlier, the likelihood test would not apply for religious hatred or hatred in the grounds of sexual orientation, in which there are no alternative but to prove intention (ss. 29B–29G of the POA).

information technologies in a manner that makes them accessible to a high number of persons".

Among Sections concerning stirring up hatred, the one making insulting/defamatory speech an offence (Article 510(2)(a) of the SCC) clearly stand out online. The punishable conduct consists in harming the dignity of persons through actions that entail humiliation, disregard or discredit of a group, or of a part thereof, or against a certain person for belonging to such a group, for reasons of racism, anti-Semitism, anti-Roma, or for other reasons related to ideology, religion or beliefs, family circumstances, the fact that the members belong to an ethnicity, race or nation, national origin, sex, sexual orientation or gender identity, or due to gender, aporophobia, illness or disability, or who produce, prepare, possess with the purpose of distributing, provide third parties access to, distribute, publish or sell documents or any other type of material or medium that, due to the content thereof, are liable to harm the dignity of persons because they represent serious humiliation, disregard or discredit of any of the aforementioned groups, or part thereof, or of a certain person for belonging to such a group (Article 510(2)(a) of the SCC). A prison sentence of six months to two years and a fine of six to twelve months shall be imposed on those cases concerning Article 510(2)(a) of the SCC (insulting/defamatory speech), without yet considering the aggravation of Article 510(3) of the SCC.

The insulting/defamatory speech is based on messages aimed at demonising a vulnerable group, attributing social ills to it, or even caricaturing its members. Thus, in the eyes of public opinion, the image of a common enemy to be fought is created. Also, the speech inciting hatred (510(1)(a)-(b) of the SCC)[33] will more easily penetrate the mainstream as the group has already been spotlighted. The idea, therefore, is to tackle as soon as possible the slippery slope that leads to fatal or unforeseeable consequences of a prejudiced kind (e.g.: pre-genocidal scenario).

We are therefore dealing with conduct crimes, or so it should be, because the only offence that is surprisingly accepted to be a result crime is foreseen in Article 510(2)(a) of the SCC referring to insulting/defamatory speech. Article 510(2)(a) of the SCC goes against effective or factual harm that is not done on the dignity of the group but rather on the right of each individual to have as their own the ideals or values of the group to which they belong and to feel as part of their dignity the collective dignity of that same group (Quintero Olivares 1996, 156).

If we turn now to a case that appeared in the media on 14 September 2021, we will see the first person to be formally charged in Spain for having committed an offence under Article 510(2)(a) of the SCC by disseminating fake news about unaccompanied foreign minors.[34] The description of the facts given in elDiario.es (digital media), which is said to have had access to the prosecution's indictment, is as follows:

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[33] There is an offence envisioned for those who, directly or indirectly, foster, promote or incite hatred, hostility, discrimination or violence, in the same terms mentioned above for the insulting/defamatory speech offence. The speech inciting hatred is punishable by one to four years of imprisonment and a fine of six to twelve months, setting aside the aggravation of Article 510(3) of the SCC.

[34] This example also ties in with another piece of information. According to the Spanish Observatory on Racism and Xenophobia (OBERAXE) in September 2021, speeches directed at migrant minors accounted for 30% of all online hate speech that could be monitored online during the months of July/August 2021. In

> The woman posted a video on her Twitter account in June 2019 of a fight between a group of pupils and their teacher. The youngsters shout and throw papers at the teacher and throw and knock over tables and chairs in the classroom while shouting and laughing in mockery of the teacher. Although the scene in the video actually took place in Brazil and had nothing to do with unaccompanied foreign minors, the accused accompanied the video with a text against migrants: 'I am sending a video of an educational centre for illegal migrants; look how grateful they are for our welcome'. (Solé Altimira 2021)

The prosecution argues that the dissemination of the video together with the above message shows that the defendant tried to "generate animosity" against a group. Specifically, as is well known, the unaccompanied foreign minors pose a unique problem due to their dual status as illegal immigrants and minors. In any case, the Public Prosecutor's Office continues, the tweet aimed to "associate violent behaviour in the classroom with all unaccompanied minors who come to our country" through a "manifest disregard for the truth and in a massive and indiscriminate manner among all potential users of the social network Twitter". The latter seems to have served as a legal basis for the purposes of requesting the aggravated subtype of Article 510(3) of the SCC to be applied. The aim, according to the public prosecution, was to "discredit" the minors and "contribute to awakening, strengthening or increasing prejudices and stereotypes" against the whole group among the population, with the risk, it is said, of generating feelings of rejection and social animosity towards them. All of this having been verified that the video in question was actually recorded in Brazil, which is why it is a hoax that has been circulating on social networks. As could be expected, the prosecution decided to bring charges against the tweeter for insulting/defamatory speech (Article 510(2)(a) of the SCC).

In this case, we are dealing with an expressive manifestation of a collective nature, which is why the tweet oozes a certain symbolic character. In other words, irregular immigrants represent something that *you*, irregular immigrant, should feel alluded to. The expression does not point directly to what someone is individually, but to what he or she represents.

Although these cases rarely succeed, they tend to be resounding. Notwithstanding, it is still true that there are cases in which a conviction is secured when the defendant's acquiescence comes into play. That is, the parties moved for a judgment of conviction based upon the defendant's agreement with the indictment. On 11 April 2023, precisely speeding up procedural channels through this way, the above-mentioned tweeter was convicted of one year's imprisonment, a six-month fine and six years' disqualification from the exercise of professions related to teaching (Maldita.es 2023).

The tendency to accelerate procedural channels to end with the acquiescence of the accused is not due to an actual increase in criminality but rather to the "relentless increase in the criminalisation of conducts" (Varona Gómez 2021, ix), such as that of offensive remarks made online.[35] In short, there is a propensity to over-criminalise

other words, anti-immigration discourse is consolidating as the prevalent motivation on the Internet (see: Ministry of Inclusion, Social Security and Migration 2021).

[35] For another similar conviction case involving *fake news* and immigrant minors, see the Judgement of the Provincial Court of Barcelona No. 674/2022, 8th November 2022.

conduct that should never be punishable under Article 510 of the SCC, because it does not reach the required level of seriousness.

5. Conclusions: a comparative attempt

In English law, stirring up hatred offences have an extraordinarily high threshold. Hence, these offences –which do not demand any further aggravating factor, as hostility/prejudice is already embedded in them– discourage bringing manifestly unfounded prosecutions. The problem is that there seems to be a lack of context-sensitive assessment, so dubious cases involving mild language are not dealt with as they should. In Spain, however, it seems that Article 510 of the SCC absorbs almost any kind of offensive speech online, no matter how much it is disguised in seemingly rational words. Thus, Spanish judges and courts hardly ever leave out the mild-language, which may also indicate a problem of casuistic over-inclusion. As for the note of vulnerability[36] of the victim, this is a far less controversial issue in Spain, although there are still a few high-profile cases in which the courts oppose it.[37] In any case, it could be said that Spanish judges are becoming increasingly sensitised on this matter.[38]

Turning back to English law, an apparent asymmetry by strand also persists. There is no endangerment clause for stirring up hatred on religious and sexual orientation grounds, unlike what happens with race and religion. This is hardly justifiable insofar as it presumably makes it easier to prosecute those who commit a crime against certain categories of victims than those who commit crimes against others. In any case, the general idea is that, as the consent of the Attorney General is necessary for prosecutions to go ahead, the criminal justice system uses this procedural step as a first barrier. No one within the criminal administration of justice nor the Attorney General wants to risk creating free speech martyrs with such controversial exposure to penalties and the subsequent rampant spread of the news. In Spain, the most widespread perception is that the latter is trivialised, thus breaking down the barriers that should contain accusations that have no reason to exist. In theory, the inadmissibility of charges for non-criminal acts derives from the obligation of the judicial authority to ensure that the defendant's rights are respected. The claimant in criminal proceedings has only the right to receive a reasoned response from the competent judicial authority. More often than

[36] Note that this can be seen as unfair labelling. This is because such labelling maintains certain connotations that are often assumed to be attached to the victim; that is, the connatural vulnerability that members of these groups irretrievably carry with them (Laurenzo Copello 2013, 75–88).

[37] For instance, according to the Spanish Supreme Court, "[The offences included in the catalogue of hate crimes] protect all citizens as long as the person or persons concerned fit into one of the discriminatory grounds properly established by the legislator, whether or not they are minorities, whether or not they are vulnerable, or whether or not they are disadvantaged groups" (Supreme Court Judgement No. 437/2022, 4th May 2022).

[38] As also stated by the Spanish Supreme Court, "(...) whatever the offence modality provided for in Article 510 of the Spanish Criminal Code whose application is claimed, it is certain that the provision, in any case, extends its scope of protection to the groups detailed therein, or the persons who belong to them. These groups need special protection insofar as the vectors capable of generating discrimination are projected onto them (...)". It is all about combating social inequalities "to protect groups that may be described as historically vulnerable" (Supreme Court Judgement No. 252/2023, 11th April 2023). In a similar vein, see: Supreme Court Judgement No. 458/2019, 9th October 2019; Supreme Court Judgement No. 185/2019, 2nd April 2019; Supreme Court Judgement No. 47/2019, 4th February 2019; Supreme Court Judgement No. 646/2018, 14th December 2018.

not, there is what we may represent as a breach in the dam; that is, the attempt made to prosecute someone through Article 510 of the SCC goes ahead, even if it is well known beforehand that it will indeed have little judicial progress. As incredible as it sounds, the reason behind this logic has to do with senseless punitivism. Spain tends to seek a "more intense" (e.g. implementing Article 510 of the SCC for minor offensive comments online instead of other alternatives) and a "more extensive" (e.g. not expressly claiming the law the intentional-element for the stirring up hatred offences) application of the judicial responses designed to combat the acts of expression (Cancio Meliá 2021).

Apart from the above, Article 510(2)(a) of the SCC (insulting/defamatory speech) is agreed by almost all legal scholars to contain result crimes. Apparently, it seeks to protect the dignity of the person belonging to a group. Instead, the various stirring up hatred offences are regarded as conduct crimes under the POA. In any case, the most immediate aspiration in Spain on Article 510 of the SCC should be to reach a state of maturity similar to that already known to exist at the beginning of this century in the UK. For instance, on the occasion of the parliamentary process that would lead to the modification of stirring up hatred offences in English law, the Assistant Chief Constable Robert Beckley was asked in 2005 about the police's view of the high expectations that would generate to extend the scope of application of Part III of the POA to religious concerns (that is, going beyond stirring up racial hatred). Robert Beckley's response was, in our view, a very significant one, since it represents the general public opinion at that time: "I think we have managed, over time, the expectations on the incitement to racial hatred. This has become an area where the rational debate has gone out of the window slightly; people are not actually discussing it, it has become slightly polemic. The reality of it is, as with many pieces of legislation, it is one bit of the jigsaw that provides protection to our communities in general. It is only a small bit, but, nevertheless, what we regard as quite an important piece".[39] Unfortunately, we are still far from subscribing to these words in Spain. There is still a long way to go. In any case, bearing in mind the low numbers of prosecutions and convictions for stirring up hatred offences in England and Wales, it is clear from Beckley's words that abusive or offensive comments that are not extremely serious are not forced to fit into stirring up hatred offences. Unlike Spain, those comments are usually diverted to other legal remedies involving a racially/religiously aggravated version of an offence (ss. 28–32 of the Crime and Disorder Act 1998) or via penalty enhancement sentencing provision on hostility grounds (s. 66 of the Sentencing Act 2020).

In contrast with the legal solution mentioned above for the Spanish case, we can now bring up another real example concerning anti-immigration speech (Beever 2021) to illustrate how English law has managed a similar issue. On 20 August 2021, South Yorkshire police in the UK arrested a 42-year-old woman for posting racist comments online. The comments concerned a 5-year-old Afghan refugee, Mohammed Munib Majeedi, who had just arrived in the UK and fell out of the hotel window in a ninth-floor room where he was staying with his mother as asylum seekers, dying on the spot. Such comments, as the police acknowledged, could constitute a speech offence to which the aggravation on racist grounds could be added. That speech offence would be a malicious communication offence (s. 1 of the MCA) and, although not specified that clearly, a

[39] HC Select Committee on Home Affairs, Minutes of evidence, Question 401 (January 25, 2005).

public order offence among those on ss. 4, 4A and 5 of the POA. Regarding malicious communications, *hostility* would be taken into account as an aggravating factor in the sentencing stage, according to s. 66 of the Sentencing Act 2020. For the public order offences, they have a racially or religiously aggravated separate offence in s. 31 of the CDA. In any case, the point is that the aggravation technique prevails. We can restate that the Spanish legal system had a pending challenge here. This is an unexplored path with enormous untapped potential, avoiding the more comfortable route of seeking a judgment of conviction based on the defendant's agreement with an indictment containing an offence under Article 510 of the SCC.

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