

Thomas Lam: Scots Hate Crime Bill: A Commodity of a “Modern” Society or an Attack on Fundamental Values? - An Objective Analysis

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Introduction

The Hate Crime and Public Order (Scotland) Bill (hereafter “the Bill”) has undoubtedly caused contention.¹ This article will not only seek to consolidate what has been discussed before, but evaluate both sides of the debate and thereafter, reach a plausible proposition.

Proposing the Bill

Perhaps the ruling in *Baczkowski v Poland*,² inspired Lord Bracadale and Secretary for Justice Humza Yousaf’s proposal of the Bill. In *Baczkowski*, the Mayor of Warsaw was in breach of Art 11 (freedom of assembly and association) of the European Convention, as he banned a gay pride march without giving any justifiable reason and so he was seemingly motivated by prejudice. Consequently, the ECHR stated that the harmonious interaction of persons and groups with varied identities is the hallmark of a democratic society which is indispensable to achieve social cohesion.³ Therefore, it can be alluded that Bracadale and Yousaf sought to establish the Bill to transform and modernise Scotland into a society, where all citizens’ backgrounds, beliefs and circumstances will not be discriminated against but be equally valued. Because of this, it can be submitted that the Bill did have “good intentions”, as Bracadale and Yousaf were seeking to transmute Scotland into a more-democratic country.

¹ Richard Percival and Tom Martin, ‘SNP’s hate crime law now officially the “most controversial” legislation since devolution’ *Express* (London, 13 September 2020).

² (2009) 48 EHRR.

³ *ibid* [62] - [63].

Evidently, the Bill will prevent certain groups from suffering prejudice, as it provides that Scots hate crime⁴ would be extended to include the identity-based protected characteristics such as transgender identity, sexual orientation, race, disability and religion. Notably, as the LGBTQ+ community experience discrimination habitually resulting in a high number of suicides yearly,⁵ as well as suffer from violence and harassment,⁶ it can be affirmed that enacting the Bill would prevent them from being victims of injustices and hate crime, thus decreasing their high numbers of suicide rates and harassment levels. Moreover, based on the COPFS 2019 study,⁷ there were 3,038 racial hate crimes, 1,486 sexual orientation aggravated crimes, 660 religiously aggravated charges, 387 disability aggravated charges, and 41 transgender identity charges. Ergo, it can be purported that enacting the Bill would stop this increase of hate incidents and transform Scotland into a more “modern” society where all citizens’ backgrounds, beliefs and circumstances will be valued and not discriminated against. Given this evidence so far, it can be concluded that Bracadale and Yousaf’s proposal seemed *ex facie* logical and laudable.

Opposing the Bill

However, numerous critics have argued that the Bill would contravene Art 9 (freedom of thought, conscience and religion) and Art 10 (freedom of expression) of the European

⁴ Per the National Police Chiefs’ Council, Hate Crime is defined as ‘any incident which may or may not constitute a criminal offence, which is perceived by the victim or any other person as being motivated by prejudice or hate.’

⁵ K. Schreiber, ‘Why are Suicide Rates Higher Among LGBTQ Youth?’ (*Psychology Today UK*, 12 October 2017)

<[⁶ L. Hollins and S. McCalla, ‘Bullied Back into the Closet: Displacement of LGBT Employees Facing Workplace Bullying’ \(2013\) 4 *Journal of Psychological Issues in Organizational Culture*, 6.](https://www.psychologytoday.com/us/blog/the-truth-about-exercise-addiction/201710/why-are-suicide-rates-higher-among-lgbtq-youth#:~:text=Various%20theories%20abound%20as%20to%20why%20rates%20of,psychological%20theory%20of%20suicide%20%28Russell%20%26%20Fish%2C%202016%29.> accessed 17/9/20.</p></div><div data-bbox=)

⁷ Crown Office & Procurator Fiscal Service, ‘Hate Crime in Scotland, 2019-20’ (*COPFS*, 12 June 2020) <

Convention.⁸ The debate arises, since the Bill introduces but does not clearly define the new offences of ‘stirring up hatred’,⁹ and ‘possessing inflammatory material’,¹⁰ which have caused fears, especially among the Roman Catholic Bishops’ Conference of Scotland who expressed its thoughts that the Bill may prohibit some aspects of the Bible.¹¹ Even though it can be suggested that this a clear affront to Art 9 and 10,¹² Yousaf maintained that it will not prevent individuals from expressing controversial or offensive views, rather it will only prevent views which are communicated in threatening or abusive ways that are ‘likely to stir up hatred.’¹³ Nonetheless, critics have contended that this explanation is nebulous since according to the Bill, whether an incident is hateful or not would depend on the perception of either the victim with the particular protected characteristic or a reasonable objective person.¹⁴ Furthermore, Andrew Doyle asserted that this could leave the system open to the abuse of state power since there would be no need to show that ‘stirring up hatred’ had been intended or actually happened.¹⁵ Doyle’s view has been supported by the Scottish Police Federation who contended that the Bill would force officers to police what people think or feel which would

⁸ These rights also include not only the right to hold and express political views but also the right not to be forced to hold or express political views that one does not hold or wish to express.

⁹ Section 3 of the Bill defines this as ‘behaving in a threatening, abusive or insulting manner, or communicating threatening, abusive or insulting material to another person.’

¹⁰ Section 5 of the Bill provides that a person commits this offence if ‘the person has possession of threatening, abusive or insulting material with a view to communicating the material to another person.’

¹¹ According to Romans 1:27, God sees Homosexuality as a sin as He intended sexual relations to be between a man and woman.

¹² For a further discussion of the contention see Stephen Daisley, ‘Scotland’s Hate Crime Bill would have a chilling effect on free speech’ *Spectator* (London, 22 August 2020); see also Daisley, ‘Scotland’s chilling new blasphemy law’ *Spectator* (London, 12 May 2020).

¹³ Humza Yousaf, ‘Thread Klaxon’ (*Twitter*, 24 July 2020)

<<https://twitter.com/HumzaYousaf/status/1286690052479877123>> accessed 18/9/20.

¹⁴ Therefore, there would be no need to show that stirring up hatred had been intended or actually happened.

¹⁵ Andrew Doyle, ‘Could possession of the Bible become an offence in Scotland’ *Spectator* (London, 8 August 2020)

devastate their public legitimacy.¹⁶ Therefore, based on this evidence, it can be confirmed that the Bill needs to be amended with its provisions clearly redefined.

Fascinatingly, the seminal *Ashers Case*¹⁷ affirmed that the freedom of expression and conscience can in some cases take precedence over the relevant discrimination law. Here, the Supreme Court stated that if the discrimination law penalised the appellants for refusing to decorate the cake with words they disagreed with, then that would amount to the law forcing them to express a political opinion that they do not hold, which would be an infringement of both Art 9 and 10. Mainly because, Lady Hale held that ‘nobody should be forced to have or express a political opinion in which he does not believe.’¹⁸ Given this evidence, it can be avowed that under a modified Bill, some of the protected characteristics like sexual orientation would have higher thresholds for what constitutes a hate crime. This would mean that the victim would have to prove that the perceived offender was motivated by prejudice; like the Mayor in *Baczkowski*, which would in turn keep the “floodgates of liability” closed.

Conclusion

Overall, based on the above analysis, it can be averred that the Bill should be extensively modified before it is passed. It can be concluded that as some of the identity-based protected characteristics are evidently immutable such as race, then they should be protected under an amended Bill with a lower threshold for what constitutes a hate crime.¹⁹ This submission becomes more convincing as the Public Order 1986 (as amended by the Racial and Religious

¹⁶ BBC News, ‘New Scottish hate crime laws “could devastate legitimacy of police”’ (*BBC News*, 28 July 2020) <<https://www.bbc.co.uk/news/uk-scotland-scotland-politics-53567229>> accessed 17/9/20.

¹⁷ *Lee v Ashers Baking Company Ltd* [2018] UKSC 49.

¹⁸ *ibid* [52], echoing Lord Dyson’s belief in *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38 [42].

¹⁹ (n 7) as it is the highest reported hate crime in the COPFS 2019 study.

Hatred Act 2006) already introduced the racial stirring offence, thus there should be lower thresholds on what is to be deemed a racial hate crime. Since other characteristics are merely chosen like political and religious beliefs, then it can be proposed that they should either have higher thresholds or no restrictions at all under an amended Bill based on the ruling in *Ashers*. Otherwise, Art 9 and 10 would be subverted and the “floodgates of liability” would fall open, because then a hate crime victim could simply perceive that the relevant incident was motivated by prejudice when a reasonable person would not. And, if this was the case, then it can be attested that based on the supporting evidence from above, Scotland’s autonomous society would not become a “modern” one but an archaic heteronomous one.

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