

Kantor Centre

The 14th International TAU Seminar on Contemporary Antisemitism

Can Europe combat antisemitism?

Michael Whine

Belatedly, European agencies are starting to combat antisemitism in a more effective way, but it is the Member states that have to apply the agreements and laws, and this presents a weakness.

The 2008 Framework Decision on combating racism and xenophobia required EU Member states to establish a minimum legal level for criminal incitement based on racial and religious grounds, and denial or gross trivialisation of genocide, including the Holocaust. Governments were required to transpose the Decision into domestic legislation by November 2010, and the European Commission was subsequently given powers to launch infringement proceedings against those states that had not done so, or had done so inadequately.

The 2012 Victims Directive established minimum standards on the rights, support and protection of victims of crime, and while not referencing antisemitism directly, nevertheless strengthened protections, as victims were placed at the heart of the criminal justice process.

Two further developments strengthened the legal protections against antisemitism.

The 2003 Additional Protocol on Cyberhate to the Council of Europe Cybercrime Convention required signatory states to criminalise racism, xenophobia and denial of justice, including the Holocaust, committed through computer systems. This too was later given the legal power of a Directive by the European Union, which required governments to transpose it into domestic law.

Second, the European Court of Human Rights has upheld a series of judgements by national courts against inciting antisemitism and denial of the Holocaust.

In *Garaudy v. France*, in 2003, the Court upheld the judgement against a Holocaust denier who had disputed the existence of the extermination camps. It noted that denying crimes against humanity was a serious defamation of Jews and was an incitement to hatred. His real purpose was to rehabilitate the Nazi regime and accuse the victims of falsifying history.

In *M'Bala M'Bala v. France*, the Court upheld the conviction against the notorious performer who had invited Robert Faurisson, another Holocaust denier, to join him on stage to receive a prize from an actor dressed in concentration camp pyjamas with a stitched on yellow star bearing the word 'Jew'. The court declared M'Bala M'Bala's appeal invalid as his 'performance' was not entertainment but a provocative political statement designed to demonstrate hatred and degrade Jewish victims.

The latest judgement concerned Udo Pastors, a member of the Mecklenburg-Western Pomerania parliament who had argued that the Holocaust is being used by

Jews for political and commercial purposes. The Court defined the expression of Holocaust denial as “intentionally stated untruths in order to defame the Jews and the persecution they had suffered”.

Council of Europe Member states are required to follow the case law of the Court and its judgements provide a valuable set of legal precedents. They are also obliged to adopt the guidelines contained in the General Policy Recommendations published by the European Commission against Racism and Intolerance.

GPR No. 9 provides guidelines to states on ‘The Fight Against Antisemitism’, including the need to enact and enforce robust antisemitism legislation which penalises all intentional antisemitic acts against actual or ‘presumed’ Jews including public incitement to violence, hatred or discrimination; public insults and defamation, public denial, trivialisation, justification or condoning of the Holocaust, desecration of Jewish religious institutions and monuments. This particular GPR was published in 2004 and it is due to be updated in 2020.

GPRs have historically been sent only to governments and the intergovernmental agencies for their guidance in legislating and formulating policies. This is now regarded as a weakness as they have been inadequately publicised, and were often unseen by civil society, who were thereby disadvantaged in holding their governments to account.

In December 2018, the Council of the EU, its highest body, adopted the Council Declaration on the fight against antisemitism and invited Member states to adopt and implement holistic strategies to prevent and fight all forms of antisemitism as part of their strategies on preventing racism, xenophobia, radicalisation and violent extremism.

It called on those that had not yet done so to endorse the IHRA Working Definition of Antisemitism, improve the recording of hate crime by law enforcement authorities, fully implement the 2008 Framework Decision, reinforce the protection of Jewish communities, finance and implement security measures for Jewish communities, improve education on the Holocaust and antisemitism and invited the EC to maintain its focus on combating antisemitism.

Countering any human rights breach requires that it first be defined. The need to define antisemitism became apparent in the late 1990s when its growth forced Jewish bodies to demand that their governments and the intergovernmental agencies take counter action. The first of these to do so was the European Monitoring Centre on Racism and Xenophobia, which found that antisemitism was coming from new and different directions, and that a working definition was needed to enable criminal justice agencies and human rights defenders to monitor, and record it.

The definition had to be easily understood by first responders, that is police officers and prosecutors, rather than be a definition for academic use. Also it had to be used for guidance rather than as a legal instrument, which would have required changes in the laws of each member state and when the 2008 Framework Decision provided

the basic law anyway, albeit one which represented only a limited consensus, and which some Member states had been reluctant to sign.

In 2016, the International Holocaust Remembrance Alliance adopted a modified version of the EUMC Definition of Antisemitism to sit alongside its 2013 Working Definition of Holocaust Denial.

At the time of writing, twenty two states have adopted the Definition, albeit in different ways. In June 2017, the European Parliament adopted it, and in December 2016, the Council of the EU called on all states to endorse it, if they had not already done so. In his September 2019 report, the UN Special Rapporteur on freedom of religion or belief also recommended its use as a critical non-legal, educational tool that should be applied in line with the guidance provided by the Rabat Plan of Action, UN Human Rights Committee, and CERD.

Adopting the Working Definition however is not the end of a process but the beginning, even if it is not designed to be legislated. Justice is delivered locally and it is at this level that the Definition needs to be used. In the UK, the first to adopt it were the police in 2014 in their hate crime guidance for all police forces. They were followed in 2017 by the Crown Prosecution Service, and latterly in 2018 by the judiciary. More than one hundred and fifty devolved elected bodies have also adopted it including the Greater London Assembly, the Greater Manchester Combined Authority and the Welsh Assembly. Recently, the Secretary of State for Communities announced his intention to persuade every UK local authority to adopt it. The Berlin police have also adopted it.

Measuring antisemitism to consistent and properly evidenced criminal justice standards, remains a problem but one which the European agencies are only now beginning to tackle. The EU High Level Group was established to support effective implementation of the rules to prevent and combat hate crime, and in 2016 asked FRA to coordinate a subgroup of practitioners to develop methodologies for recording and collecting data on hate crime. The agency has complained about the lack of consistent disaggregated hate crime data, which is necessary to formulate strategy, since it began operations.

The failure of states to provide such data has been recognised by the other agencies as well.

Following the 2004 Berlin Conference, the OSCE agreed that participating states should enact specific laws to combat hate crime and encourage victims to report such crimes. Subsequent OSCE conferences in Cordoba, Bucharest and Astana expanded these agreements to include the collection and publication of official data on antisemitic incidents, and to facilitate training for law enforcement officials to provide such data.

The OSCE Office for Democratic Institutions and Human Rights was tasked with training police officers and prosecutors to do so via two ongoing programmes: Training Against Hate Crimes for Law Enforcement, and Prosecutors and Hate Crimes Training. A third recent ODIHR programme, Information against Hate Crimes

Toolkit provides further information and suggested workshop programmes for police officers to reinforce the importance of collecting data.

A second High Level Subgroup was tasked with the monitoring the EU Code of Conduct on countering illegal hate speech online, which had been agreed with the major platforms in 2016. The implementation of the Code is evaluated through regular monitoring exercises set up in collaboration with a network of civil society organisations using a commonly agreed methodology. The IT companies have agreed terms of service and community standards, which include removing criminal antisemitic incitement and are required to remove such content within 24 hours of notification. The civil society groups involved include Jewish community monitors such as the Community Security Trust in the UK and the International League against Racism and Antisemitism in France, and their monitoring of antisemitic content is producing substantial results.

Recognising that victims, especially from minority groups, may be reluctant to report hate crimes led the EC, the Dutch Humanitarian Fund and the Open Society Initiative to fund the Facing Facts programme. Initially the programme trained civil society representatives to monitor hate crimes, and to engage more effectively with their governments in fighting hate crime. The later iteration of the programme, Facing all the Facts, funded by the EC with OSCE assistance, is focussed on enhancing police officers' understanding of hate crime and their abilities to collect hate crime data. The original partners in the project were Belgian, Dutch and UK Jewish community agencies, but they were joined latterly by three national police agencies, and some anti-racist groups.

The inter-governmental agencies now recognise the need to focus on the specificity of antisemitism, to provide enforcement mechanisms and to assist states to enforce them.

In his recent report on antisemitism, the UN Special Rapporteur on Freedom of Religion stated that

“States should enact and enforce hate crime legislation that recognizes antisemitism as a prohibited bias motivation and that is clear, concrete and easy to understand. States should impose systems, routines and training in place to ensure that relevant officials recognize antisemitic hate crimes and record them as such.”

He went on to recognise the IHRA Working Definition of Antisemitism as a valuable guide, recommend its use in education, awareness-raising and monitoring incidents of antisemitism and that it should be used as a critical educational tool that should be applied in line with guidance provided by the Rabat Plan of Action and CERD. He added that states should establish data collection systems to document information on antisemitic hate crimes and that such data must be accurate and disaggregated to enable policy makers and law enforcement authorities to understand the scope of the problem, discern patterns, allocate resources and investigate cases more effectively.

After the publication of the European Council Declaration, the EC First Vice President and Justice Commissioner jointly invited Member States, and the EC itself

“to take concrete steps to better protect the Jewish community in Europe and to continue their fight against Antisemitism. We cannot have a common fight without a common definition of what we are fighting against. Member States are called to use the International Holocaust Remembrance Alliance’s definition of Antisemitism as a guidance tool, which would be an important step in the fight against Antisemitism.”

To illustrate the seriousness of its intent and to enable EU Member States to apply the Framework Decision, the High Level Group published guidance in November 2018, which was not legally binding but it was intended to act as a checklist for Member states.

Universal and European human rights legislation has not in itself, led to any reduction in antisemitism. Laws need practical and effective enforcement mechanisms that are open to public scrutiny, and an understanding that antisemitism was coming from new and different directions. States and the intergovernmental agencies needed to measure its growth and impact, and this therefore a definition which explains how antisemitism manifests itself in the twentieth and twenty first centuries. For all its failings, the IHRA Working Definition has now been accepted as the best instrument for doing so.

It has taken European institutions many years to recognise what Jewish communities have long recognised. Establishing and applying policies and laws that recognise and take action against new antisemitism will need to be complemented with more effective education, which not only teaches about the Holocaust but which recognises and overcomes two millennia of religious, racial, political and cultural antipathy towards Jews. Education must also focus on Jews’ religious needs and contributions to Europe and its culture and science over the ages.

For laws and agreements to be effective they have to be applied, and consistently. Criminal justice agencies need practical advice to apply them and governments need moral leadership to ensure that they are applied. They also need to be accompanied by long term educational programmes that reach beyond the elites.

Combating antisemitism is not a short term programme. Given 2000 years of anti-Jewish hatred and prejudice it will take a gargantuan effort. And I’m not sure that Europe is ready to face this challenge given all its other problems.