

Summary

BACKGROUND TO THE RESEARCH

On 25 April 2018, the Dutch House of Representatives put questions to the Minister of Justice and Security on whether aggravating circumstances in acts of violence with a racist, anti-Semitic, or homophobic motive, should be included in the law. In response, the Minister proposed having comparative research conducted on the presence and application of the discriminatory motive in the criminal justice system of other countries. The current research responds to the Minister's proposal.

RESEARCH AND METHOD

The research provides an answer to the following question:

In what way is discrimination in certain Member States of the European Union considered as a circumstance that contributes to sentencing, and what benefits and problems does this give rise to in practice?

The main research question is split into the following sub-questions:

1. *To what extent, and in what way, does the law and/or (secondary) legislation in the EU Member States studied, provide for a consideration of the discriminatory aspect in sentencing (in contrast to the penalization of discriminatory defamation, incitement of hatred, spreading discriminatory text, etc.)?*
 - a. *Do statutory provisions exist? If so,*
 - i. *how is the discriminatory aspect referred to in the provisions? Does it only involve a motive or is it formulated more broadly?*
 - ii. *to what extent does the discriminatory aspect cause the maximum penalty to be raised?*
 - iii. *does the discriminatory aspect apply to all offences?*
 - iv. *if not, what offences does it apply to? Does it also apply to defamation, libel, and slander?*
 - b. *Do statutory provisions exist? If not,*
 - i. *is the discriminatory aspect considered in a different manner when determining the penalty? If so, how?*

Research question 1

Belgium, France, and Italy have statutory provisions in place which make it possible to punish an offence that was carried out with a discriminatory motive more severely. The way in which the motive is defined varies per country. In each case, the discriminatory motive is defined somewhat objectively. This is more evident in certain countries (e.g. France) compared to others (e.g. Italy). Because of the relatively objective definitions of the intended purpose in each case, proving the motive is perhaps less problematic than with a purely subjective definition. In fact, only the provisions in Belgium contain a specific qualification in relation to a discriminatory motive. Once the motive is established, the offence is qualified as a 'hate crime'.

Statutory provisions in Belgium, France and Italy are designed in such a way that a discriminatory motive is a circumstance that raises the statutory penalty. Raising the statutory penalty can entail that the maximum and/or the minimum penalty of an offence is raised. In Italy, the presence of a discriminatory aspect can lead to an increase in the penalty constituting at most half of the actual penalty imposed by the court.

In French law, circumstances that raise the maximum penalty have general applicability. In principle, they apply to all crimes and offences (crimes and délits), though not to petty offences (contraventions). In the case of offences where the discriminatory aspect was already included in the description of the offence, those circumstances do not lead to the maximum penalty being raised. The same exception applies in Italian statutory provisions. The discriminatory motive does also not apply to criminal offences where the sentence is life imprisonment. In Belgian law, aggravating circumstances do not have a general applicability. An aggravating circumstance is also not formulated in the same way for each offence; for instance, in the case of offences such as manslaughter and assault the definition is formulated more conclusively than for the other offences or groups of offences. Aggravating circumstances cannot be applied in the case of murder, since the most severe punishment in Belgian law can be imposed for that offence (life imprisonment).

In France, the determination of the discriminatory motive of an offender is included in the statement and particulars of the offence. When a discriminatory motive is proven, the statutory maximum sentence is raised. This is therefore not left to the discretion of the courts. The law provides the courts with certain substantive criteria when deciding on the penalty. That said, French courts do have wide discretionary powers in relation to sentencing decisions. The same applies to courts in Belgium. Where the application of the discriminatory motive as a circumstance raising the maximum sentence is included in the law as an obligation, Belgian criminal courts also appear to use these powers to apply the provisions in practice. Still, the importance of applying these provisions should be acknowledged in court decisions.

Italian courts, by virtue of principles in criminal law known as 'legal clarity' (*tassatività*) and 'obligation' (*obbligatorietà*), are required to determine circumstances defined by the legislature as having an impact on the punishment, including the discriminatory motive. Courts are required to reflect these circumstances in the punishment as provided in the law. Even if the prosecutor qualifies a circumstance that would raise the maximum penalty inaccurately, the court must examine it, establish the facts, and take it into account in the severity of the sentence.

The German Criminal Code (*Strafgesetzbuch*) contains no specific provision on discrimination as a motive that would lead to the maximum penalty being raised. The law states that a motive that displays contempt for humanity can be taken into consideration by the courts when deciding the penalty. This counts as an aggravating circumstance applicable in principle to all criminal offences. So in cases where the maximum penalty is considered, the motive 'evidencing contempt for humanity' is reason to impose a higher sentence. The motive can also have an impact on the qualification of a criminal offence. For example, a motive that displays contempt for humanity can have an impact in a murder case or be significant in cases involving more serious types of manslaughter. This impact, however, is limited; the components of an offence must allow for taking account of that motive. If the motive was already considered when the offence was qualified, it cannot be considered again at the time of sentencing. The law does not oblige the courts in any way to take account of motive at the time of sentencing.

Ireland (as yet) has no statutory provisions in place concerning a discriminatory motive. Irish criminal courts have wide discretionary powers when sentencing; wider than the other countries examined in this study and wider than its fellow common law courts, something that can be explained by the lack of sentencing guidelines. These discretionary powers mean that criminal courts in Ireland can decide themselves whether the discriminatory aspect gives reason to raise the maximum penalty. That said, the fact that this motive or aspect is not provided for in a statutory provision means that if a court wants to pass a higher sentence to reflect these circumstances, it cannot pass a sentence that is higher than the legal maximum. A review of Irish case law reveals that discrimination does play a role in sentencing, though no clear system can be identified.

For all countries studied, with the exception of Ireland, the standard of proof the courts must apply to establish a discriminatory motive is more or less the same as the standard of proof that is applied to the (alleged) body of facts in a criminal case. In Germany, there are no additional requirements for proving the discriminatory motive compared to those for proving other circumstances that can affect sentencing. In the case of Ireland, no specific standard exists in the legal system that is necessary to prove the discriminatory motive. It is clear, however, that the mere presumption of the likelihood that

a discriminatory motive is present, is insufficient to accept the motive and take it into consideration in sentencing. But what is sufficient, remains unclear.

Research question 2

In all countries studied, tackling discrimination using criminal law is clearly a priority for national (and in Germany also regional) authorities. This appears in the first place from the level of the legislation. For instance, the French statutory provisions of 2003 were revised in 2017. Perhaps the most important revision was that the scope of circumstances that raise the maximum penalty was expanded to include the discriminatory motive as a general aggravating circumstance. It can be applied to many criminal offences (*crimes* and *délits*), except for criminal offences where the discriminatory aspect was already included in the definition of the offence. Lack of clarity was also removed concerning the role of the objectified definition. In Belgium, the legislation was also revised on several occasions. A new revision is included in the legislative bill to introduce a new Belgian Penal Code. In this bill, the aggravating circumstance is no longer defined as a circumstance that raises the maximum penalty. In Italy, a legislative bill to expand the definition of discriminatory grounds is pending in parliament. In Germany, a legislative bill was recently adopted which explicitly includes anti-Semitism as a motive evidencing contempt for humanity. In Ireland, the new government decided to introduce a statutory provision that would add the discriminatory aspect as an aggravating circumstance to existing legislation.

Attention is also paid to the discriminatory motive in practice. This was very clear in the case of Belgium. Not only has policy been established there that aims, among other things, to have a criminal investigation conducted into the presence of aggravating circumstances, it also appears that case law considers circumstances that raise the maximum penalty. Applying these circumstances, however, does not mean that manifestly stiffer penalties are imposed. Nevertheless, this practice is praised in the literature which views the consideration of circumstances as being a method to affirm or establish standards. The Italian courts also consider aggravating circumstances, though no clear policy could be identified in this area. Policy does appear to exist in Germany, both in the police force and the German Public Prosecution Service, and is intended to ensure that the discriminatory motive is investigated. The impact of this policy, however, appears to be relative. We found few examples of case law where the motive of contempt for mankind was referred to in the sentence. Statistical data from the French Ministry of Justice reveals that the discriminatory motive is applied in legal practice as an aggravating circumstance of the offender. However, insufficient data is available to confirm that the statutory provisions in place indeed contribute to attaining the objective of tackling violence that has a discriminatory motive.

Opinions in the countries examined about the discriminatory motive in practice are mixed. France and Belgium appear to be generally satisfied with the current design of their legislation. The research identified no clear benefits in the other countries studied. It found no critical remarks concerning the applicable legislation in Italy. To the extent that further amendments are required on how discrimination is tackled, these would be more at the level of the police and the Public Prosecution Service. Certain issues in France and Belgium were identified in relation to how provisions are applied in practice. For example, barriers exist that inhibit victims from reporting criminal offences with a discriminatory motive to the police. Offences that are reported are not always forwarded to the Public Prosecution Service, so these cases do not come before the courts. If proceedings are initiated, the discriminatory motive is often difficult to prove despite the objectification of this motive in the law. This problem is mainly caused by a lack of in-depth investigation and therefore a lack of proper evidence, coupled with a shortage of skilled investigators. In France, criticism is also voiced about the imposition of custodial sentences instead of alternative penalties aimed at educating the offender, such as citizenship courses. The lack of attention given to the discriminatory motive led to a ministerial circular from the French Minister of Justice. It called for a more vigilant and proactive attitude from the Public Prosecution Service, including specific instructions for investigative services on how to assist victims and the methods to use, and the need for an immediate and appropriate response under criminal law. Problems were also identified in Belgium, including the limited competence of correctional courts in relation to crimes involving discrimination. Several problems were also identified in the existing statutory provisions, combined with the other requirements drawn up by the Court of Cassation based on these provisions. These issues will perhaps be addressed in the proposed revision of the Penal Code. Although this was not considered an issue, the new legislation also includes an amendment concerning the impact of the discriminatory motive on the statutory minimum and maximum penalty. The discriminatory motive in the new legislation will only have an impact on the severity of the penalty *within* the existing statutory provisions, without the provisions being extended to include the discriminatory motive. In Germany, the inclusion of a motive evidencing contempt for humanity in the law is considered above all to be a matter of symbolism.

Criticism in relation to current practice is most evident in Ireland where the lack of statutory provisions is considered to be a major problem. Not only is the discriminatory motive not properly addressed by courts when passing sentence, it is also seen as an important reason why the police force and the Public Prosecution Service pay so little attention to offences that involve discrimination. The new Irish government has now decided to introduce legislation to address this, but what this will involve is unclear at present.

CONCLUSIONS

Chapter 8 provides general conclusions.

First, it is important to consider how statutory provisions on sentencing are designed and the discretionary powers of courts when passing a sentence. Whether including the discriminatory aspect as a statutory ground to raise the maximum sentence will have the desired effect, depends to a large extent on the national legal system and the sentencing customs and practices based on this system. How great the impact of statutory provisions on the discriminatory aspect will actually be in relation to sentencing, depends in part on the relationships that already exist between the legislature and the judiciary.

Second, the manner in which a case is brought before the court and whether it actually even reaches the court, is a decisive factor in relation to whether the discriminatory aspect is considered, or may be considered, in the sentence. Punishment is imposed at the end of the criminal justice chain. The research provides sufficient grounds to conclude that when answering the question on whether the discriminatory aspect should be included in the law (legislation and regulations) as a circumstance that raises the maximum sentence, it is essential to clearly consider policy and practice in the links in the chain leading up to sentencing. Providing legal status to the discriminatory aspect as a circumstance causing the maximum sentence to be raised, offers no guarantee that this aspect will be duly considered when it comes to determining the sentence.

The current research illustrates the importance of always considering this final link in the criminal justice chain from the perspective of the constant interaction between all other links in the chain, such as the police, the Public Prosecution Service, and the victim. Influencing court decisions via a statutory provision can act as a signal and motivation to the other links in the chain to pay due attention to the discriminatory aspect. Vice versa, specific policy aimed at links further back in the chain – for instance when a victim reports a crime, in the collection of specific evidence by the police, or the policy of the Public Prosecution Service when prosecuting – could enable the courts to pay due attention to the discriminatory aspect when determining the penalty. By considering all links in the chain together, a picture emerges of the level of attention a country pays in its approach to discrimination – or the action that is needed for a country to ensure that combating discrimination receives the attention it deserves.