

從國際法論我國仇恨犯罪之立法必要性—兼論德國、瑞典、英國、加拿大之法制與實踐

A study on the necessity of criminalizing hate crime from the Perspective of International Law – Concurrently discuss the legal system and practice in Germany, Sweden, the United Kingdom, and Canada

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摘 要

國際法針對出於偏見的暴力是否必須受到特別立法的懲罰，或者是否可以通過普通刑法進行加重懲罰，尚無定論。然而，有一些國家採取制定仇恨犯罪立法來遏止偏見暴力行為，其主要有三種立法方式，亦即加重量刑、實質罪行、加重其刑。德國及瑞典均是規定量刑加重條款，瑞典另規定有對人口群體的煽動罪及非法歧視罪，但均無「仇恨罪」之立法。加拿大、英格蘭和威爾士之立法規定則採實質性犯罪和加重量刑合併，蘇格蘭則採取加重其刑。就我國目前法院判決僅有少數判決會將「外籍移工」作為加重量刑之因素，至於其他受保護因素則未見於判決中受到斟酌，故我國實有必要參照國際法及各國立法例選定受保護因素，再採取上揭任何一種方式來立法。不過，臺灣因為自身之歷史，原本即存在所謂省籍衝突、或統獨政治立場的衝突，若欲於未來進行仇恨犯罪法之立法，即應對我國社會文化脈絡先進一步的考察與評估，再參考外國之立法及經驗，俾建立符合本土且普世可行之仇恨犯罪法制。

關鍵字：

仇恨犯罪、偏見動機型犯罪、加重因素、加重量刑、實質罪行、加重其刑。

Abstract

Whether bias-motivated crime must be punished by special legislation, or it can be aggravated by ordinary criminal law remains an open question in international law. However, some countries have adopted hate crime legislation to deter bias-motivated crime. There are three main types of legislation, including aggravated punishment, substantive offense and sentence uplift. Both Germany and Sweden provide for aggravated punishment. Sweden also provides for the crime of incitement to a population group and the crime of illegal discrimination, but there is no "hate crime" legislation. Legislations in Canada, England and Wales provide for a combination of substantive offences and aggravated punishment. Scotland has adopted sentence uplift. As far as our current court's judgments are concerned, only a few judgments have used "foreign migrant workers" as an aggravating factor, and other protected factors have not been considered in the judgment. Therefore, it is necessary for us to select protected factors and then adopt any of the above-mentioned legislative model after making reference to the legislations of International organizations and advanced countries. However, because of its own history, Taiwan originally had the so-called conflict between Mainlanders and Native Taiwanese or political position of unity and independence. If we want to enact a hate crime law in the future, we should first conduct further investigation and evaluation of our social and cultural context, and then refer to foreign legislations and experience so as to establish a native but universal and feasible hate crime legislation.

Keywords:

hate crime, bias-motivated crime, aggravating factor, aggravated punishment, substantive offense, sentence uplift