

Summary

Our remit

We have been tasked with reviewing the criminal law regulations regarding racist and similar symbols and, if necessary, proposing amendments. The remit includes:

- conducting a review of practice by the courts and the Chancellor of Justice on how criminal liability for agitation against a population group has been applied so far in matters concerning symbols;
- deciding whether the current criminal law regulations regarding racist and similar symbols are appropriately designed;
- considering the need for, and possibilities of, clarifying or supplementing current legislation; and
- presenting legislative proposals if we conclude that the legislation should be amended.

Background and premises

It must be possible to combat racist symbols

For a society to be well-functioning, safe and democratic, it must be possible to combat hate crime. This requires that the legislation, such as that on agitation against a population group, is appropriately designed. It is important that the legislation can effectively combat such racist and similar expressions as those addressed by the legislation on agitation against a population group, even in cases where the expression is comprised of the use of symbols. At the same time, criminalising agitation against a population group and other prohibitions

against expressing opinions entail restrictions on freedom of expression, which is a cornerstone of a democratic society.

The criminal law regulations on agitation against a population group are central to the Swedish legislation against racism and other forms of intolerance. In brief, it is punishable to spread messages that express threats against, or contempt for, a population group with allusion to race, colour, national or ethnic origin, religious faith, sexual orientation or transgender identity or expression. The regulation is not limited to oral or written expressions, but also covers expressions such as symbols.

Increased activity in the white power environment

Activity in extremist environments has increased in recent years. Extremist organisations including in the white power environment have become increasingly prominent in public spaces. This increased visibility contributes to the feeling that the threat that extremist environments represent is increasing as more people are exposed to their intimidation capital.

This has resulted in a discussion on how the penal provisions on agitation against a population group can be applied concerning racist and similar symbols. The discussion has primarily focused on the Tyr rune. The Tyr rune is used by the Nordic Resistance Movement (NMR), which is a national socialist organisation. It has organised several demonstrations and other rallies that have attracted major media attention.

Insecurity is spread among individuals when certain organisations conduct demonstrations or in some other way express themselves, with or without symbols. However, the use of certain racist and similar symbols is currently punishable as agitation against a population group. Furthermore, we consider that it is not primarily the symbols as such that are the problem, but rather the above-mentioned organisations' ideologies and intimidation capital, and their behaviour in the form of public disturbances and use of violence, threats and harassment.

Possibilities of amending current legislation

Under our terms of reference, we are to consider the possibilities of clarifying or supplementing current criminal law legislation regarding symbols. An amendment of this kind can be done in two ways. One option is to adjust the criminal liability for agitation against a population group in some regard. The other option is to introduce a specific prohibition against the public use of certain symbols as a supplement to the criminal liability for agitation against a population group.

Regardless of how such an amendment is implemented, it would – based on our remit – focus on expanding the punishable area or in some other way clarify current legislation. This means that an amendment is only necessary if the use of symbols that should be punishable has not already been designated as such, or if a clarification regarding the punishable area is otherwise necessary.

Expanding the criminalised area is a measure that requires extensive consideration. Criminalising something that was not previously punishable should require that there is an obvious need for doing so. In addition, a clarification of, or a supplement to, the criminal law regulations regarding racist and similar symbols would affect fundamental rights and freedoms, primarily freedom of expression, but possibly also freedom of association, freedom to demonstrate, freedom of assembly and freedom of religion. A possible benefit of clarifying or supplementing the criminal law regulations must be balanced against the interest of not limiting these rights and freedoms.

What are racist and similar symbols?

Our remit deals with reviewing the criminal law legislation regarding *racist and similar symbols*. The question is what this concept includes.

We consider that the term *racist and similar symbols* should cover symbols that can express threats against, or contempt for, any of the groups protected by the provisions on agitation against a population group; i.e., in addition to racist and xenophobic symbols, this includes anti-Semitic, homophobic and other symbols.

The term *symbol* can have many different meanings and is not easy to define. It can have a very broad meaning. Regarding racist and similar symbols, it may be reasonable to also include symbolic actions, such as Nazi salutes, and symbolic expressions, such as *sieg heil*, and

also the extensive imagery available on such media as the internet. For practical reasons, we limited our examination of practice to symbols comprised of illustrations, images and signs. Accordingly, our examination did not include the above-mentioned actions and expressions, and imagery was only included to a very limited extent.

Our examination of practice

We conducted an extensive examination of court practice from the past 20 years regarding how criminal liability for agitation against a population group has been applied regarding symbols. We examined some 130 judgments, of which 15 or so referred to the offence ‘agitation against a population group’ as expressed in freedom of the press or freedom of expression. In addition, we examined some 120 decisions on symbols handed down by the Chancellor of Justice. The Chancellor of Justice is the sole prosecutor in cases concerning offences against freedom of the press and freedom of expression.

Besides being criminalised in the Swedish Penal Code, agitation against a population group is an offence under the Freedom of the Press Act and the Fundamental Law on Freedom of Expression. Agitation against a population group can thus constitute an offence under freedom of the press or freedom of expression if the opinion expressed falls under the scope of the above-mentioned fundamental laws. For example, if the act is comprised of wearing a t-shirt on which there is a symbol that has been portrayed in printed press, the act is to be assessed under the Freedom of the Press Act, but if the symbol has instead been drawn on the t-shirt, the act is only to be assessed under the Penal Code.

The Supreme Court has only handed down one judgment regarding agitation against a population group involving symbols (case NJA 1996 p. 577). The decision shows that the use of symbols may constitute agitation against a population group, provided that the symbol clearly conveys a punishable message.

When assessing whether the use of a symbol comprises agitation against a population group, account must be taken of the context. It is therefore not possible to categorically say that using a certain symbol is illegal. That said, there are still symbols that courts basically

assume to be illegal to use unless the circumstances indicate otherwise. The clearest example of such a symbol is the swastika.

Below are some of the other findings produced by our examination of court practice:

- Some thirty different symbols have been examined by the courts. The most prevalent symbol in court practice is the swastika.
- To a great extent, courts examined symbols linked to national socialism, but even the spread of other symbols, such as those linked to the Ku Klux Klan, have been examined and considered to constitute agitation against a population group.
- In most judgments that we examined, the defendant was convicted of agitation against a population group.
- In cases where the defendant was acquitted, it was often due to evidentiary issues, such as that it was not considered proven that the defendant painted a swastika on a wall. There have also been cases where the symbol, seen in its context, was not considered to constitute agitation against a population group.
- In only a few judgments was the defendant acquitted on the grounds that the court did not consider that spreading the relevant symbol did not involve a threat or contempt. This often concerned symbols that in other judgments and contexts were considered to constitute agitation against a population group.
- Questions have arisen in some judgments as to whether criminal liability requires that a symbol's message is known to a wider public or to the persons with whom the symbol has been spread. Different assessments have been made in these cases. Most judgments do not consider this issue whatsoever. We consider that to establish criminal liability, it is at least sufficient that it must be assumed that the persons to whom the symbol has been spread had knowledge of its message.
- The Tyr rune has only been examined by a court once, and that case was dismissed. The symbol now figures once again in a case that will be examined by a court.
- The Chancellor of Justice has decided to initiate legal proceedings with regard to only a few symbols. The Chancellor has considered

the Tyr rune in many cases and consistently concluded that spreading the symbol did not constitute agitation against a population group.

- The Chancellor of Justice's assessments are made in the area of freedom of the press and freedom of expression, and the Chancellor must take account of the special conditions that apply there. Besides the fact that freedom of expression has particularly strong protection in this area, this means that the Chancellor is not able to make the same overall assessment as can be made when it comes to the offence 'agitation against a population group' under the Swedish Penal Code.

The current regulations are appropriate

If the current legislation is to be amended, there should be an obvious need for doing so. An amendment of this kind must be compatible with the protection for the basic rights and freedoms contained in our fundamental laws and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Based on our examination of practice, it is our assessment that the current criminal law regulations on racist and similar symbols are appropriately designed. It follows from this that the provisions on agitation against a population group should not be amended and that a special prohibition against the use of certain symbols should not be introduced.

The area of application for the provisions on agitation against a population group is already broad, and it is clear that symbols can be covered by them. With the exception of purely evidentiary issues, such as whether the defendant spread a certain symbol, most legal proceedings for spreading racist and similar symbols have resulted in convictions. We consider the existing punishable area to be sufficient, and have therefore not submitted any legislative proposals.