# The regulation of "hate speech"; the meaning of "incitement" under the case-law of the European Court of Human Rights and the jurisdictions of the European Union, the United Kingdom and Greece

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# Contents

# Abstract

The present study deals with the interpretation of "incitement" in European criminal bans on "hate speech". Through a comparative analysis of relevant regional and national law and case-law the various standards defining "incitement" are traced. Following an examination of the evolving understanding of the term at the UN level, the case-law of the European Court of Human Rights on "hate speech" and violent-prone speech is critically analyzed. The examination of the regional framework is complemented by an analysis of the EU's approach. It is argued that under regional standards the interpretation of "incitement" in "hate speech" laws remains confused and incoherent with the result of largely diverging laws and judicial practices at the national level.

This argument is further supported by a comparative analysis of the British and Greek criminal bans on "hate speech" and the way they have been implemented so far. In view of the lack of a common standard and the negative repercussions it has on the exercise of individual rights and freedoms, regional and national authorities are urged to follow the efforts made at the international level for the adoption of a refined common standard on "incitement" on the basis of minimal interference with the exercise of the right to freedom of expression. The study concludes that notwithstanding important shortcomings characterizing criminal bans on "hate speech", regulation of discriminatory speech is valuable and needed.

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# Introduction

The notion of "hate speech" has become the object of growing debate internationally over the past years. The term itself is of fairly recent use, said to have appeared first in the 1980's in the United States[1]. It refers to types of expression that target groups on the basis of certain characteristics that they are identified by, such as race, nationality and religion, aiming to harass, intimidate or abuse their members[2]. "Hate" may refer, in general, to emotions or beliefs of the utmost negativity and its expression is explained by different disciplines in different ways[3]. Legal and philosophical approaches to "hate speech", typically, link it to the problems of racism, social prejudice, political violence and coercion and, in particular, the way the latter has shaped the history of the past century, through intolerance and mass murder[4].

The more precise notion of "incitement to discrimination, hostility or violence"[5], delimits the legally imprecise, broad notion of "hate speech" in international as well as in the domestic criminal law of many national jurisdictions[6]. Acting as a threshold notion for the qualification of punishable speech, "incitement" sets the limits of permissible public debate and discourse[7]. Two important, not always reconcilable, state interests are perceived to be at stake in the prohibition of incitement: equality and public order[8]. Equality and dignity as individual rights and legal principles at the heart of the human rights claim for the regulation of "hate speech"[9] are

[1] Eric Heinze, "Cumulative Jurisprudence and Hate Speech: Sexual Orientation and Analogies to Disability, Age and Obesity", in Ivan Hare and James Weinstein (Eds.), *Extreme Speech and Democracy* (Oxford:OUP 2010) 267.
[2] Article 19, "Prohibiting Incitement to discrimination, hostility or violence", Policy Brief, December 2012, 5 http://www.article19.org/data/files/medialibrary/3572/12-12-01-PO-incitement-WEB.pdf. accessed 24/03/2015.
[3] Michael Waltman and John Haas, *The Communication of hate* (Peter Lang 2010) 2.
[4] *See* Nancy L. Rosenblum, "Memory, Law and Repair" in Martha Minow, *Breaking the Cycles of Hatred* (Princeton University Press 2002) 10-13.
[5] International Covenant on Civil and Political Rights 1966 (ICCPR) art 20(2).
[6] Article 19 (n 2) 5-6.
[7] Ibid.
[8] Toby Mendel, "Does International Law Provide for Consistent Rules on Hate Speech?" in Michael Herz and Peter Molnar(eds.), *Rethinking Regulation and Responses* (Cambridge: CUP 2012) 417, *see* also Stefan Sottiaux, "'Bad Tendencies' in the ECtHR's 'Hate Speech' Jurisprudence" (2011) European Constitutional Law Review, 7: 40–63, 47.
[9] Eric Barendt, "Why Protect Free Speech?" in *Freedom of Speech* 2nd edition (Oxford: OUP, 2005) 31-34.

counterbalanced by the right to freedom of expression and the democratic principle of tolerance[10].

The question I address in my thesis concerns the way in which a regional intergovernmental human rights organization like the Council of Europe (CoE), a regional supranational organization like the EU and two national legal systems, subject to their jurisdiction, namely the United Kingdom and Greece, respond to the problem of "hate speech". In my examination of those jurisdictions I focus on the interpretation of "incitement" and the way the relevant legislation is applied. More specifically, my focus is on domestic criminal law and the ways it has interacted with and/or been reshaped by regional standards.

Intolerance and overt discrimination against minority groups seem to be gaining central stage in the political arena across Europe, while, at the same time, more restrictive, expansive "hate speech" laws are being enacted in the name of equality[11]. In Greece what used to be a marginal neo-Nazi organization, Golden Dawn, became in over a few years one of the key players in the political field, influencing and shaping governmental policies[12]. At the same time, in the UK, a state with a long but not uncontested tradition of multiculturalism, a party setting an anti-immigrant agenda as a central component of its speech, UKIP[13], polled first in the European Elections of 2014, while under the current Conservative government domestic human rights standards are presented as a threat to national sovereignty and their protection is severely challenged[14].



[10] Ibid.
[11] Miklos Haraszti, "Foreword: Hate Speech and the Coming Death of the International Standard before it Was Born (Complaints of a Watchdog)" in Herz and Molnar (n 8).
[12] Human Rights First, *We' re not Nazis but…The rise of hate parties in Hungary and Greece and why America should care*, August 2014, 89-109 http://www.humanrightsfirst.org/sites/default/files/HRF-report-We-Are-Not-Nazis-But.pdf. accessed 26/03/2015, *see* also Daphne Halikiopoulou, "Why the Golden Dawn is a Neo-Nazi party" Huffington Post, 23 June 2015 http://www.huffingtonpost.co.uk/daphne-halikiopoulou/golden-dawn_b_7643868.html accessed 15/11/2015.
[13] *See* Patrick Wintour, "Ukip's manifesto: immigration, Europe – and that's it", The Guardian, 20 May 2014 http://www.theguardian.com/politics/2014/may/20/ukip-manifesto-europe-immigration accessed 8/10/2015.
[14] *See* Tabby Kinder, "Human Rights Act to be scrapped under Conservative Government", Lawyer (Online Edition), 8 May 2015.

The European legal and political landscapes appear to be undergoing rapid and profound changes. During the year of research that I conducted for the present study a series of momentous events, like the refugee crisis and the deadly Paris attacks, shook Europe, shifting public debate over human rights and democracy to different directions. Although, very different in their legal traditions and their social and political histories the examples of Greece and the UK can, in my view, offer an understanding of contemporary challenges associated with "hate speech" regulation at European level. In this respect, I also examine the way in which the CoE has approached the issue through the relevant case-law of the European Court of Human Rights (ECtHR), while I also examine related developments at EU level.

I argue that the regulation of "hate speech" in Europe and particularly the interpretation of the threshold notion of "incitement" fall short of a common and clear standard. Important differences among national legislations and the rather inconsistent approach of the ECtHR to the problem do not always meet the requirements of legal certainty, thus failing to fully respect the right to equality while allowing for unjustified interferences with the right to freedom of expression. Moreover, the current regional and national legal frameworks are not always effective with regard to their stated goals of protecting vulnerable members of minority groups. Despite important drawbacks I argue that the regulation of "hate speech" is necessary and that international efforts to refine the notion of "incitement" are of great value.

To support my argument I look at the way the issue has been dealt with in international law and particularly at recent efforts made in the framework of the UN human rights system for the development of a universal standard on the basis of minimal interference with the right to free speech[15]. Having that as a point of reference, I proceed with the examination of the two national jurisdictions in terms of criminal legislation and its implementation, as reflected in the case-law of courts. With regard to the regional framework my analysis consists mainly in the examination of the case-law of the ECtHR, while CoE instruments and EU legal standards are also addressed. The context of the enactment of "hate speech" laws, the debate or its absence before, and after, is also part of my analysis. For the purpose of my research I

[15] Ibid.

use various sources, such as books, journals, newspaper articles, current and former legislation and case-law in the English, French and Greek language. Legal developments are reflected up until 10 November 2015.

# 1. The debate over "hate speech" and the evolving international standard

The debate over the regulation of "hate speech" is as old as international human rights law itself. Conflicting and evolving views on racism, individual rights, the state and democracy have shaped existing legal standards. As recent developments at the UN level show the debate over "hate speech" has intensified over the past years creating expectations for a uniform response to what has already been identified by the international community as a global problem. In this chapter after setting out my theoretical perspective on "hate speech" bans and following a brief overview of the history of international responses to "hate speech", I proceed with an examination of the relevant UN framework and the efforts made in recent years for the adoption of a common international standard.

## 1.1. Why ban "hate speech"?

Before examining the existing international, regional and national standards on the regulation of "hate speech" it is important to set out the theoretical framework supporting such regulation. As I stated in the introduction I consider the regulation of "hate speech" to be necessary and I shall present here some arguments, as have been advanced by Jeremy Waldron and Jean-Luc Nancy, in this direction. The theoretical defense of "hate speech" regulations advanced by these authors concerns not so much specific treaties or laws but rather the core rationale underlying restrictions placed on freedom of expression on the basis of equality and non-discrimination.

It is important to note at the outset that the very term "hate speech" can be distracting as it implies that the aim of such regulation is to correct passions or emotions[16]. Siding with Jeremy Waldron, I argue that although emotions are inevitably engaged in that, or in fact in any, type of regulation, they are not central to the problem. What is instead at stake in this type of regulation is human dignity as "a status sustained by law in society in the form of a public good"[17]. Dignity in Waldron's formulation is not to be understood as personal honor or self-esteem but as the sense of entitlement to be

[16] Jeremy Waldron, *The Harm in Hate Speech*, (Cambridge, Mass.: Harvard: HUP 2012) 34-35.
[17] Ibid 106.

regarded in society as an equal and in good standing[18]. "Hate speech" regulation does not thus aim to redress subjective or partial accounts of harm but objective harms, which affect every member of society[19].

On the basis of the Rawlsian concept of a "well-ordered society", of a society willing to be governed by principles of justice, Waldron argues that a public good of assurance exists, that is that members of such a society are assured of the ways they are likely to be treated as equals by other fellow members of that society. This assurance which is general and not always explicit is undermined by "hate speech", which aims to deprive members of society from their basic entitlement to be regarded as equals on the basis of certain group characteristics with which they are identified by. As Waldron notes because of the abstract and diffuse character of the commitment to equality "hate speech" even as a marginal or incidental phenomenon may have disproportionate effects[20]. Moreover, apart from undermining the public good of assurance and the sense of entitlement of the individuals targeted, "hate speech" actively seeks to establish a rival public good of inequality and exclusion on the basis of certain group characteristics[21].

As Jean-Luc Nancy points out "hatred" and more precisely racial hatred as has historically been conceived and demonstrated in Europe may be viewed as solidifying the meaning of one's existence in ways which are essentially contrary to the openness with which human dignity as a sense is associated. Dignity, according to Nancy, contrary to naturalist and egoistic perceptions, can never be reduced to a single meaning. "Hate speech" either in the form of racism, anti-Semitism or homophobia aims to freeze the perpetual social and cultural movement and put an end to the uncertainty and ambivalence inherent in every individual or collective identity[22].



[18] Ibid 105-108, 136-143.
[19] Ibid.
[20] Ibid 65-69, 78-89, 94.
[21] Ibid 95-96.
[22] Jean-Luc Nancy, "Hatred**,** A Solidification of Meaning" (2014), Law & Critique; Vol. 25 Issue 1, 15-24.

In a similar vein, Waldron compares "hate speech" laws with environmental regulation and views "hate speech" as a form of pollution in an "ecology of respect, dignity and assurance"[23] that the state legitimately aims to maintain. As in the case of environmental harms where no immediate and demonstrable causation is required to justify the regulation of automobile emissions for instance, "hate speech" harms need not be reduced only to these cases where violence is imminent as is nowadays the prevalent view in the U.S. Supreme Court[24]. Moreover, similarly to the commitment of preserving a viable environment, commitment to equality in a legal order claiming to be a democracy is not just a matter of the state but also of its citizens[25]. In fact this commitment to equality on the part of both the state and its citizens is a precondition for the exercise of any of the individual rights and freedoms[26].

According to Nancy "hate speech" regulation should not be viewed as an attempt to ban differences, conflicts or incompatibilities between the different social and cultural identities but rather as an acknowledgment of these conflicts and even of the impossibility of their resolution[27]. In his view this impossibility should be viewed as "a non-exhaustive but formative condition of universality"[28]. The collective commitment to equality which underlies "hate speech" regulation is of universal value and the acknowledgment of existing limitations in the way this commitment is realized does not counsel against but rather underscores this value and its universal character[29]. "Hate speech" regulation is thus neither about eradicating conflicts nor about correcting passions but rather about affirming the value of equality in view of existing conflicts and heated emotions.

With these abstract remarks in mind I proceed with the examination of the past and present of the regulation of "hate speech" at the UN level. The complex problems arising from this type of regulation in international law are common to human rights



[23] Waldron (n 16) 96.
[24] Ibid 96-97.
[25] Ibid 98-100.
[26] Ibid.
[27] Nancy (n 22) 23-24.
[28] Ibid 24.
[29] *See* Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (Oxford: OUP, 2005) 397-398.

discourse[30]. The relation between individual and state action, the reconciliation of competing rights and duties, challenges posed by cultural relativism are some of the issues that stirred controversy among states and gave rise to long deliberations over the adoption of provisions in international instruments limiting freedom of expression on the grounds of equality[31]. Nonetheless the post-WWII shared conviction that forms of public expression can have deleterious effects on democracy and the principle of equality proved to be stronger than the various objections, ultimately leading to the first international treaties explicitly requiring states to adopt "hate speech" bans[32].

## 1.2. Historical overview

The claim for suppressing "hate speech" is inextricably linked to the roots of contemporary international human rights discourse, to the period that followed the Holocaust and the crimes committed on a massive scale during the Second World War[33]. "Hate speech" was held to constitute a crime against humanity by the Nuremberg Tribunal in two of its judgments[34] while the UN Declaration of Human Rights of 1948 (UDHR) provided for an entitlement to "protection… against any incitement to… discrimination"[35]. In 1949, in an early attempt of the Commission on Human Rights, chaired by Eleanor Roosevelt, to draft an International Bill of Rights on the basis of the principles enshrined in the UDHR, disagreement on the issue of "hate speech" led to a gap in the enumeration of the proposed articles[36]. In place of article 21, which in a version proposed by France prohibited incitement to violence through "advocacy of national, racial, or religious hostility"[37], a notation was left for the postponement of discussion on the issue[38].



[30] Stephanie Farrior, "Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech" (1996) 14:1 Berkeley Journal of International Law 1–98, 5-9.
[31] Ibid.
[32] *See* ibid 96-98.
[33] Mari J. Matsuda, "Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich. L. Rev. 2320, 2341-2343.
[34] *See* Donna E. Arzt, "Book Review: Nuremberg, Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal" (1995) 12 N.Y.L. Sch. J. Hum. Rts. 689, *see* also Gregory S. Gordon, "The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law" (2014) Ohio State Law Journal, Vol. 75, No. 3, about a third, according to the author, overlooked judgment, issued by the U.S. Nuremberg Military Tribunal.
[35] Universal Declaration of Human Rights 1948 (UDHR) art 7.
[36] Matsuda (n 33) n108.
[37] Ibid.
[38] Ibid.

This early division among states on how "hate speech" should be regulated is reflective of broader theoretical and ideological conflicts, which to a certain extent persist to this day[39]. An outburst in anti-Semitism in different parts of the world in the early 1960's brought the discussion again to the fore resulting in the inclusion in UN treaties of specific provisions targeting "hate speech"[40]. These provisions, namely article 4 of the International Convention on the Elimination of All forms of Racial Discrimination (ICERD) and article 20(2) of the International Covenant on Civil and Political Rights (ICCPR), are a result of compromise of the conflicting worldviews and state interests of the two main adversaries of the Cold War[41].

With regard to article 4 of the ICERD for instance, the U.S. on the one hand agreed that incitement to racist violence should be prohibited and racist groups should not enjoy government support but rejected a sweeping prohibition of all "propaganda of superiority"[42] and of participation in racist groups, which was proposed by the USSR and Poland[43]. Foreign policy concerns equally played their role in the drafting process of the ICERD. A proposal for explicit prohibition of anti-Semitic expression was rejected by the then socialist and Arab governments, who feared that such a provision could be used politically against them in the frame of their strained relations with Israel[44]. Nonetheless article 4 of the ICERD survived the controversy accommodating both the "socialist" and "liberal" views on the issue[45]. Although several states, including the U.S., ratified the Convention with an explicit reservation to article 4, the basic premise of the article that the promotion of racism is a threat to human rights and should thus be subject to regulation, was never directly contested and has indeed been endorsed by the international community[46].



[39] Ibid 7-9.
[40] Ibid 7-9.
[41] Ibid, although disagreement over the drafting of the equal protection clause of the UDHR did not always occur along strictly Cold War lines *see* Farrior (n 30) 16.
[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Ibid.

What remains a subject of debate to this date at the UN level are the limits of such regulation and not whether there should be regulation or not[47]. Over the past decades, debate over "hate speech" at the UN level has centered on the problem of religious intolerance[48]. Although article 20(2) of the ICCPR explicitly targets "advocacy of … religious hatred that constitutes incitement to discrimination, hostility or violence"[49], it was not until 1981 that the UN General Assembly adopted a "Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief"[50]. This Declaration received little attention in the following years and at the turn of the century the issue became highly politicized, causing a new division within the international community[51]. Although during the past four years a certain consensual approach seems to prevail due to concerted efforts of UN experts[52], controversy over the various aspects of the problem is not likely to end soon.

The increasing recognition of sexual orientation as a non-discrimination ground and its inclusion under the protective scope of "hate speech" legislation in various national jurisdictions has created tensions with advocates of religious freedom, most notably in the U.S. but also in Europe[53]. Moreover this year's Paris and Copenhagen deadly attacks carried out by religious fanatics have reheated existing tensions worldwide around freedom of expression and its limits with regard to religious freedom[54]. While

[47] Ibid.
[48] Brett G. Scharffs, "International Law and the Defamation of Religion Conundrum" (2013) The Review of Faith & International Affairs, Volume II, Number 1.
[49] International Covenant on Civil and Political Rights 1966 (ICCPR) art 20(2).
[50] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief A/RES/36/55, adopted by the UN General Assembly on 25 November 1981.
[51] Marc Limon, Nazila Ghanea, and Hilary Power, "UN strategy to combat religious intolerance - is it fit for purpose?", OpenDemocracy, 28 January 2015 <https://www.opendemocracy.net/openglobalrights/marc-limon-nazila-ghanea-hilary-power/un-strategy-to-combat-religious-intolerance-i> accessed 9/10/2015.
[52] Ibid, *see* also Article 19, "UN HRC adopts resolution on combating religious intolerance, but test remains in implementation" 27 March 2015 <https://www.article19.org/resources.php/resource/37919/en/un-hrc-adopts-resolution-on-combating-religious-intolerance,-but-test-remains-in-implementation> accessed 9/10/2015.
[53] *See* Ian Leigh, "Homophobic Speech, Equality Denial, and Religious Expression", in Ivan Hare and James Weinstein (Eds.) *Extreme Speech and Democracy* (Oxford, OUP 2009) 375-399 and Alon Harel, Hate Speech and Comprehensive Forms of Life, in Michael Herz and Peter Molnar(eds.) *The Content and Context of "Hate Speech"* (Cambridge: CUP 2012) 306-326 and Paul Johnson and Robert Vanderbeck, *Law, Religion and Homosexuality* (Routledge 2014) 153-173.
[54] Sejal Parmar, "The Paris Attacks and Global Norms on Freedom of Expression", Tom Lantos Institute, Public Lecture Series, "From the Courtroom to the Street", Eötvös Loránd University, Faculty of Education and Psychology, Budapest, 17 February 2015, Lecture transcript, 5 http://www.tomlantosinstitute.hu/files/tli_lecture_sejalparmar_17.02.2015.pdf accessed 9/10/2015.

an international campaign is seeking to abolish blasphemy laws worldwide[55], including many European states where such laws are still persistently enforced, a divisive bigoted discourse presenting freedom of expression as an exclusively Western ideal is gaining ground on both sides of the polemic on religious freedom[56]. In face of these complex issues the pursuit of consensus over a common "incitement" standard at the UN level becomes of even greater value.

## 1.3. The UN Treaties and international standards defining "incitement"

The Universal Declaration of Human Rights (UDHR) in article 7 provides that "[a]ll are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination". It is noteworthy that in this early reference to the need of regulating hate speech the entitlement to protection against "incitement to … discrimination"[57] was introduced in relation to the right to equality before the law and non-discrimination and not as a limitation to the right to freedom of expression, which is enshrined in a different provision[58]. Moreover, article 30 provides that "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein"[59], making it difficult to derive any guidance as to how the right to protection against incitement and freedom of expression can be reconciled[60].

The ICCPR, a legally binding instrument drafted on the basis of the principles expressed in the Declaration, contains a more specific provision. In article 20 paragraph 2 of the ICCPR state-parties are required to prohibit "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence"[61]. This provision follows article 19, which guarantees freedom

[55] *See* "End Blasphemy Laws" campaign of the International Humanist and Ethical Union and European Humanist Federation http://end-blasphemy-laws.org/ accessed 9/10/2015.
[56] Ibid.
[57] UDHR art 7.
[58] Ibid, art 19.
[59] Ibid, art 30.
[60] Erik Bleich, *The Freedom to Be Racist?* (Oxford: OUP 2011) 21-22.
[61] ICCPR art 20(2).

of expression, addressing in this way the compatibility of the requirements to protect freedom of expression and at the same time prohibit incitement. One year before the adoption of the ICCPR, in 1965 the ICERD was adopted and opened for signature by the United Nations (UN) General Assembly. Article 4 of the ICERD also prohibits incitement to racial discrimination and while it does not cover national or religious discrimination, its scope is much broader than the respective provision of the ICCPR.

More precisely, article 4 of the ICERD requires states-parties to the Convention to "condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form". Furthermore states-parties are required to "adopt immediate and positive measures designed to eradicate all incitement to, or acts of… discrimination"[62]. Article 20(2) of the ICCPR and article 4 of the ICERD form the core international legal framework for the regulation of hate speech. The number of reservations however to those provisions manifests reluctance on the part of many states to accept and be bound by such a framework[63]. Although many states have enacted relevant legislation, the idea of common international legal standards governing the regulation of unacceptable forms of expression is still met with much resistance[64].

In recent years efforts have been made by civil society and UN bodies in the direction of refining the international legal framework in order to provide a clear guidance to states in the regulation of "hate speech". General Comment 34 issued in 2011 by the Human Rights Committee, the body of experts monitoring the implementation of the ICCPR by the Contracting States[65] and the Rabat Plan of Action (RPA) adopted by experts in 2012 following an initiative of the Office of the High Commissioner of Human Rights[66] offer important guidance in this respect. In General Comment 34 the

[62] International Convention on the Elimination of All forms of Racial Discrimination 1965 (ICERD) art 4.
[63] Article 19 (n 2)13.
[64] Sejal Parmar, *The Rabat Plan of Action: a global blueprint for combating "hate speech"*, European Human Rights Law Review 2014, 23-24.
[65] Human Rights Committee (CCPR), "General Comment No. 34" (GC 34) http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf accessed 23/11/2014.
[66] Report of the United Nations High Commissioner for Human Rights (UNHCHR) on the expert workshops on the prohibition of incitement to national, racial or religious hatred, 11 January 2013

complementary relation between articles 19 and 20 of the ICCPR is emphasized[67]. Equality and freedom of expression are not to be interpreted as competing rights but instead as complementary, in the sense that the one presupposes the other[68].

This position informs the RPA as well, where certain common standards for regulating "hate speech" in conformity with article 20(2) of the ICCPR are set out[69]. Firstly, it is underlined that criminal sanctions should be a last resort measure for states, reserved for cases of incitement to hatred that attain a certain level of severity[70]. Secondly, intent to provoke "discrimination, hostility or violence"[71] should always be a required element for speech to qualify as criminal incitement[72]. Thirdly, "incitement" should be clearly defined in law and in any case the three-part test of legality, proportionality and necessity, applying to any restriction of the right to freedom of expression, should also apply to incitement to hatred[73]. Lastly, an impartial and independent judicial system which is up-to-date with the relevant international law and practice should be in place[74], while sufficient and effective remedies should be provided to the victims[75].

The RPA proposes a detailed six-part threshold test for the qualification of incitement, which involves a cumulative assessment of the speaker, the context, extent, intent, content and form of the speech act, as well as the likelihood of the harm to occur[76]. This test is proposed as a basis for the assessment of the severity of the hatred, which according to the RPA should be "the underlying consideration of the thresholds"[77]. When it comes to context, both intent and causation may have to be engaged while "the social and political context prevalent at the time"[78] should be examined[79]. In this

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-17-Add4_en.pdf accessed 24/03/2015.

[67] CCPR GC 34 (n 65).
[68] Ibid.
[69] UNHCHR (n 66).
[70] Ibid para 29, 34.
[71] ICCPR, art 20(2).
[72] UNHCHR (n 66) para 29.
[73] Ibid para 22.
[74] Ibid para 27.
[75] Ibid para 34.
[76] Ibid para 29.
[77] Ibid.
[78] Ibid.
[79] Ibid.

direction the speaker's authority within the given context and in relation to the audience to which the speech is directed should be taken into consideration[80]. This point is reflective of significant literature on the importance of the speaker's standing in the assessment of harmful utterances[81]. It is further stressed that "the mere distribution or circulation of material"[82] is not sufficient to establish intent[83].

An assessment of the content of the speech is not precluded by the test but it is required that it is accompanied by an assessment of the form and it may include an analysis of "the balance struck between arguments deployed"[84]. As to the extent of the speech, the size of the audience, the means by which the speech is conveyed as well as the potential of the audience to act on the incitement are relevant considerations[85]. Lastly, an assessment of the likelihood of the harm to occur may be oriented towards a standard of "reasonable probability" and in any case the causal link between the speech and the resulting harmful action should be "rather direct"[86].

The above considerations may be found in various legislations, policies and judicial practices across the globe[87]. The novelty of the test proposed by the RPA consists in their codification and in the requirement that they are to be assessed jointly in order to allow for the imposition of criminal sanctions which restrict the right to freedom of expression[88].The RPA has been fully endorsed by a number of actors within the UN human rights system and by major NGOs[89] and has the potential of providing a solid basis for responding to the challenges presented by the regulation of hate speech globally[90].

The importance of the RPA is manifest in the frame of the previously mentioned ongoing debate over religious intolerance. In March 2011, Resolution 16/18 on

[80] Ibid.
[81] *See* Sarah Sorial, "Free Speech, Hate Speech and the Problem of (Manufactured) Authority" (2014) Canadian Journal of Law and Society, Volume 29, Number 1, pp. 59-75, 61.
[82] UNHCHR (n 66) para 29.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Ibid para1.
[88] *See* Parmar (n 64) 29.
[89] Parmar (n 64) 1.
[90] Ibid.

"combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence, and violence against persons based on religion or belief" of the UN Human Rights Council marked a breakthrough in the international approach to the problem of religious intolerance[91]. This resolution meant the abandonment of a series of resolutions "on combating defamation of religions"[92], which were consecutively adopted over the past decade polarizing the international community[93]. The new approach, reiterated every year since[94], by placing emphasis on non-discrimination and incitement to violence instead of the broad notion of defamation brings the debate in line with the framework set by General Comment 34 and the RPA.

## 1.4. Conclusion

The regulation of "hate speech" affirms a collective commitment to equality and aims at the protection of human dignity, a concept which however vague or indeterminate has universal resonance[95]. The UN legal framework is a starting point for regional and domestic responses to "hate speech". The core ideas underlying the relevant provisions of the ICCPR and the ICERD have not been defeated. At the same time, however, diverging regional and national norms continue to hinder the adoption of a more refined common standard. In Europe, the interpretation and application of the European Convention on Human Rights (ECHR), the basic regional human rights instrument which is modeled on the UDHR and precedes both the ICCPR and ICERD, have to a certain degree been autonomous from the international framework. Similarly at the national level the scope of the legislation adopted on the basis of the UN legal instruments is affected by diverging constitutional norms and legal traditions.

General Comment 34 and the RPA offer important guidance for a uniform normative approach to the problem. The real challenge, however, concerns the implementation of the commitments undertaken by states at the UN level and the extent to which they



[91] Scharffs (n 48) 69.
[92] The last such resolution was A/HRC/RES/13/16 adopted by the Human Rights Council on 15 April 2010.
[93] Ibid.
[94] This year resolution A/HRC/28/L.4 was adopted by the Human Rights Council on 19 March 2015.
[95] *See* Waldron (n 16) 136-143.

will respect the calls for self-restraint made in both General Comment 34 and the RPA[96]. Both documents stress that the imposition of criminal sanctions in cases of incitement should be a last resort measure that should be accompanied with specific safeguards preventing abuse[97]. Although, many issues are left unaddressed by these documents like the exclusive focus on the three grounds protected under the ICCPR or the differences between relevant provisions of the ICCPR and ICERD, they nonetheless provide a common denominator for the regulation of "hate speech" against the vagueness and potential for abuse that speech regulation inherently carries[98].

On the other hand, the more substantive requirements of these documents, like the call for abolition of blasphemy laws and, in the case of General Comment 34, of memory laws, that is laws prohibiting certain types of expression about historical facts[99], seem to require political agreements, which are for now missing at the international level. As the following chapters show regional and national legal standards on "hate speech" in the jurisdictions examined here follow in many respects their own path and are still far from the approach proposed by the RPA and General Comment 34 in both normative and empirical terms.



[96] Article 19 (n 52).
[97] CCPR GC 34 (n 65) para 47 and UNHCHR (n 66) para 34.
[98] Ibid.
[99] Ibid, about the term see e.g. Josie Appleton, "Freedom for history? The case against memory laws", FreeSpeechDebate, 3 April 2003 < http://freespeechdebate.com/en/discuss/freedom-for-history-the-case-against-memory-laws/> accessed 29/08/2015.

## 2. The regional European framework

It was around the same period that the ICERD and ICCPR were adopted at the UN level that legislation restrictive of "hate speech" was enacted by Western European states[100]. Apart from Austria and Germany where narrow laws targeting propaganda of the Nazi ideology were enacted immediately after the war in a process of "denazification"[101], the rest of Western Europe remained largely inactive in this matter until the 1960's[102]. This could be explained by the fact that until that time colonial rule over parts of Africa and Asia was still an accepted reality and theories of racial superiority not only had not been discredited but rather informed public opinion and state policy in these countries[103]. In Eastern Europe, on the other hand, with proletarian internationalism being part of the official state ideology and censorship of the press a standard state practice, "hate speech" had been criminalized earlier[104]. It has interestingly been argued that a relevant provision in the Criminal Code of Yugoslavia of 1952 has been the basis of "hate speech" laws in several Western states today[105].

The end of the Cold War brought with it the resurgence of an aggressive nationalism throughout Europe[106], which together with the post-9/11 domination of the anti-terrorism discourse created new dynamics for the perception and regulation of the problem[107]. Over the past years, particularly following the economic crisis of 2008,

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[100] Bleich (n 60) 20.

[101] According to Part II, sec. A, par. 3 (iii) of the Potsdam Agreement of August 1945 signed by the USSR, U.S.A. and the U.K. one of the purposes of the occupation of Germany by the Allied Forces was to "destroy the National Socialist Party and its affiliated and supervised organizations, to dissolve all Nazi institutions, to ensure that they are not revived in any form, and to prevent all Nazi and militarist activity or propaganda" http://www.nato.int/ebookshop/video/declassified/doc_files/Potsdam%20Agreement.pdf accessed 8/10/2015, *see* also Elmer Plischke, "Denazification Law and Procedure" (1947) The American Journal of International Law, Vol. 41, No. 4, 807-827.

[102] Bleich (n 60) 20.

[103] Gavin Schaffer, "Legislating against Hatred: Meaning and Motive in Section Six of the Race Relations Act of 1965" (2014) Twentieth Century British History, Vol. 25, No. 2, 251-275, 264, *see* also Mathias Möschel, "Race in mainland European legal analysis: towards a European critical race theory" (2011) Ethnic and Racial Studies, 34:10, 1648-1664,1651.

[104] Jacob Mchangama, "The Sordid Origin of Hate Speech Laws", Hoover Institution, Policy Review December 2011&January 2012 http://www.hoover.org/research/sordid-origin-hate-speech-laws accessed 21/11/2014.

[105] *Vejdeland and others v. Sweeden*, no. 1831/07, ECHR 2012, concurring opinion of Judge Bostjan M. Zupancic, para 6.

[106] Philippa Watson: EU Social and Employment Law -Policy and Practice in an Enlarged Europe (OUP, 2009) Chapter 28: The Race Directive, 476-477.

[107] Bleich (n 60) 41-43.

the growing popularity of nationalist and racist parties in Europe has offered legitimacy to the broad diffusion and reproduction of negative stereotypical representations of immigrants, refugees and other minority groups[108]. At the same time, many European states have adopted, or expanded existing, "hate speech" legislation[109]. Despite this proliferation of "hate speech" laws, however, the term itself does not seem to have gained any significant definitional clarity[110].

While European "hate speech" laws reflect the post-WWII consensus on the need to combat racism and the gradual abandonment of race as a scientifically valid concept[111] their interpretation and implementation has been greatly conditioned by the different legal traditions and the social and political history of each state[112]. Notably, the British approach to the problem of racism has had important differences from the French or Italian[113]. Contrary to the colorblind approach of the latter, in Britain the existence of different racial communities was explicitly recognized by anti-discrimination laws in the direction of overcoming racism[114]. This difference in approach between continental and common law traditions informs the interpretation and application of "hate speech" provisions constituting an important challenge to the development of a common standard both at the regional and the international level[115].

The use of abstract language in regional legal instruments like the 2008 EU Framework Decision "on combating certain forms and expressions of racism and xenophobia by means of criminal law"[116] is unlikely to resolve these tensions[117]. The

[108] Human Rights First (n 12).
[109] The Legal Project, "European Hate Speech Laws" http://www.legal-project.org/issues/european-hate-speech-laws accessed 9/10/2015, *see* also Mike Harris, "Europe's rules on freedom of information and hate speech", Index on Censorship, 6 January 2014 https://www.indexoncensorship.org/2014/01/eus-commitment-freedom-expression-freedom-information-hate-speech/ accessed 31/10/2015.
[110] Ibid.
[111] Möschel (n 103) 1651-1652.
[112] *See* ibid 1650 and Costanza Hermanin, Mathias Möschel and Michele Grigolo, "How does race 'count' in fighting racial and ethnic discrimination in Europe?" in Costanza Hermanin, Mathias Möschel and Michele Grigolo (eds) *Fighting Discrimination in Europe, The Case for a Race-Conscious Approach* (Routledge 2013) 5-6.
[113] Ibid.
[114] Ibid.
[115] Ibid.
[116] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

common regional standard imposed by the latter tends towards a model of extensive, content-based speech restrictions on the background of a rather fragile and confused commitment to the fight against racism[118]. The same hold for the CoE and the ECtHR in particular, which seem to be endorsing a similar approach[119].Although attentive to related developments at the international level, the regional legal framework seems to follow its own path. Similarly but opposite to how "American exceptionalism"[120] is often invoked in order to justify First Amendment absolutism, the existence of a distinctly European history is often presented as a justification for moving towards extensive speech regulation.

The focus of my analysis of the regional framework is the ECtHR's case-law on "hate speech". The Court is only one of the Council of Europe's institutions that have addressed the issue. As the Council's judicial organ, however, charged with the interpretation and application of the ECHR, it holds significant authority. The ECHR is the first intergovernmental human rights instrument of regional character, adopted in 1950, almost immediately after the adoption of the UDHR. Its authority formally transcends the boundaries of the CoE, especially after the adoption of the 2009 Lisbon Treaty, which set the legal basis for the accession of the EU to the ECHR[121]. In this regard I briefly examine towards the end of this chapter the EU's approach to the regulation of "hate speech", an approach which is parallel to the approaches at the level of the CoE but which has proven to be a catalyst for legal developments in EU Member States like Greece.

## 2.1. The Council of Europe

The Council of Europe has addressed the issue of "hate speech" through various legal instruments[122]. The most important treaties of the Council supporting strategies

[117] *See* Uladzislau Belavusau, "Fighting Hate Speech Through EU law" (2012) Amsterdam Law Forum Vol 4:1 Winter Issue, 29.
[118] Ibid, *see* also Möschel (n 103) 1650-1655 and Hermanin, Möschel and Grigolo (n 112) 1-6.
[119] *See* Möschel (n 103) 1650-1655 and Hermanin, Möschel and Grigolo (n 112) 1-6.
[120] *See* Robert A. Kahn, "Why Do Europeans Ban Hate Speech? A Debate between Karl Lowenstein and Robert Post" (2013), Hofstra Law Review: Vol. 41: Iss. 3, Article 2.
[121] Treaty on European Union (TEU) art 6(2).
[122] Tarlach McGonagle, "A Survey and Critical Analysis of Council of Europe Strategies for Countering 'Hate Speech' " in Michael Herz and Peter Molnar, *The content and context of hate speech : rethinking regulation and responses* **(**Cambridge: CUP 2012) 456.

against "hate speech" are the ECHR, the Framework Convention for the Protection of National Minorities (FCNM), the European Convention on Transfrontier Television (ECTT) and the Additional Protocol to the Convention on Cybercrime[123]. Apart from the treaties, a series of non-binding texts have been adopted in the same direction[124]. Those texts consist mainly of Recommendations and Declarations adopted by the Committee of Ministers, which aim to draw attention on particular subjects and set standards for the Member States[125]. The first reference to the term "hate speech" in the frame of the Council of Europe was made in such a Recommendation adopted by the Committee of Ministers in 1997[126]. This Recommendation provided a rather wide definition of the term, stating that:

"the term 'hate speech' shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."[127]

Since then the issue has gained prominence in the activities of the Council's institutions[128]. The Parliamentary Assembly of the Council of Europe (PACE)[129], the European Court of Human Rights and the European Commission Against Racism and

[123] Ibid 458.
[124] Ibid 474-487.
[125] Ibid 474-483.
[126] Ibid 457.
[127] Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech" (Adopted by the Committee of Ministers on 30 October 1997 at the 607th Meeting of the Minister's Deputies).
[128] McGonagle (n 122) *see* e.g. Manual on hate speech, Strasbourg, Council of Europe Publishing, 2009 http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Hate_Speech_EN.pdf accessed 9/10/2015, issue discussion paper by the Council of Europe Commissioner for Human Rights on "Ethical journalism and human rights", doc. CommDH (2011)40, 8 November 2011 https://wcd.coe.int/ViewDoc.jsp?id=1863637&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679 accessed 9/10/2015, website of the Conference on "Tackling hate speech: Living together online" organized by the Council of Europe in Budapest in November 2012 http://www.coe.int/en/web/portal/hate-speech-conference/2012 accessed 9/10/2015 accessed 9/10/2015, website of the Conference "The hate factor in political speech – Where do responsibilities lie?" organized by the Council of Europe in Warsaw in September 2013 http://www.coe.int/en/web/portal/hate-speech-conference accessed 9/10/2015.
[129] *See* Recommendation 1805 (2007) of the Parliamentary Assembly of the Council of Europe on "blasphemy, religious insults and hate speech against persons on grounds of their religion", 29 June 2007.

Intolerance (ECRI)[130] are part of this multifaceted effort of countering hate speech while at the same time ensuring respect of the right to freedom of expression[131]. The diversity in the Council's approaches to the problem is a reflection of the wide spectrum of speech that can be categorized as "hate speech" and the different ways in which certain fundamental rights can appear to be in conflict with such a regulation[132]. From incitement to hatred and violence to religious blasphemy and Holocaust denial there is no uniform stance adopted by the Council and the need to treat those issues in a special manner has been recognized[133]. This has been particularly apparent in the rich case-law of the European Court of Human Rights (ECtHR)[134].

### 2.1.1. Case-law of the European Court of Human Rights on "hate speech" and "incitement"

In the Court's 1976 *Handyside* judgment it was stated that:

"Freedom of expression constitutes one of the essential foundations of [a "democratic society"], one of the basic conditions for its progress and for the development of every man… applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"[135].

This statement has consistently been repeated in the Court's subsequent Article 10 judgments and reflects the core values underlying its free speech jurisprudence[136].

[130] *See* General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI) on "national legislation to combat racism and racial discrimination", 13 December 2002.
[131] McGonagle (n 122) 484-493.
[132] Ibid 457.
[133] Ibid.
[134] Factsheet-Hate speech, Press Unit, European Court of Human Rights, June 2015 http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf accessed 04/09/2015.
[135] *Handyside v UK* App no. 5493/72 (ECHR, 7 December 1976) para 49.
[136] Mario Oetheimer, "Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Rights Case Law" (2009) Cardozo J. of Int'l & Comp. Law [Vol. 17:427 428] 427-443.

Restrictions placed by states on the exercise of the right to freedom of expression in cases of "hate speech" have also been assessed on the basis of these values[137].

"Hate speech" cases before the ECtHR have engaged two provisions of the Convention, Article 17 and Article 10[138]. In recent jurisprudence, notably in the recent Grand Chamber *Aksu* and *Perinçek* judgments, Article 8 has also been engaged[139]. On the basis of Article 17, which prohibits the abuse of rights enshrined in the Convention, certain forms of racist speech and Holocaust denial in particular have been considered as running contrary to the Convention's fundamental values and the relevant applications have been deemed inadmissible[140]. On the basis of Article 10, on the other hand, the impugned expressions have been deemed to enjoy the protection of Article 10(1) and an examination of the merits based on an interpretation of the limitation clause of Article 10(2) has disclosed the violation or non-violation of Article 10 by the Contracting State[141].

The way these articles have been interpreted and applied by the Court reveals two distinct approaches to the regulation of "hate speech": a wholesale a priori rejection of certain expressions on the one hand and a balancing of the rights and interests involved on the other[142]. In most cases the Court has proceeded with a balancing exercise and has applied Article 17 "only… on an exceptional basis and in extreme cases"[143]. The standard test that the Court applies to determine whether an interference with the exercise of the right to freedom of expression is compatible with the Convention consists of an assessment of the three requirements contained in the limitation clause of Article 10 (2), namely whether the interference was "prescribed by law", whether it served a legitimate aim and whether it was "necessary in a democratic society".



[137] Ibid.
[138] Factsheet (n 116).
[139] *See Aksu v. Turkey* App nos. 4149/04 and 41029/04 (ECHR, 15 March 2012) and *Perinçek v Switzerland* App no 27510/08 (ECHR, 15 October 2015) paras 198-203.
[140] Ibid.
[141] Ibid.
[142] David Keane, "Attacking Hate Speech Under Article 17 Of The European Convention on Human Rights" (2007) 25 Neth. Q. Hum. Rts. 641.
[143] *Perinçek* (2015) para 114.

The Court has declared itself to be traditionally strict when applying the test, stating that any exceptions to the right to freedom of expression "must be narrowly interpreted and the necessity for any restrictions must be convincingly established"[144]. On the other hand, the Court has recognized a broader or narrower margin of appreciation to be enjoyed by national authorities when they determine the existence of "a pressing social need"[145] in order to limit the exercise of the right, depending on the particular circumstances of the case and the legitimate aim pursued[146].

When it comes to offensive speech, the legitimate aim of protecting the "reputation or rights of others"[147] is mostly invoked to justify the interference, although public order concerns are also important, particularly in cases attaining the level of incitement to violence[148]. In the landmark *Perinçek* judgment recently delivered by the Grand Chamber, the Court interpreted "the rights of others" as rights protected under Article 8 of the Convention[149]. More precisely the Court made reference to the right to the protection of dignity of members of the group targeted by the impugned speech and balanced between what it perceived as conflicting rights and freedoms enshrined in Article 8 and 10 of the Convention[150]. This interpretation marks an important shift in the Court's "hate speech" jurisprudence with potentially important repercussions for the future.

The Court has ruled inter alia on cases of public incitement to violence, hatred and discrimination on the grounds of race, ethnicity, religion and sexual orientation[151]. Although the Court has not attempted to provide a precise definition of "hate speech" or "incitement", it seems to endorse the wide definition given by the 1997 Recommendation of the Council of Ministers[152]. Moreover, the significance of the



[144] *Observer and Guardian v the UK* App no. 13585/88 (ECHR, 26 November 1991) para 59.
[145] Ibid.
[146] Ibid.
[147] ECHR art 10(2).
[148] *See* subchapter ii below.
[149] *Perinçek* (2015) paras 251-254.
[150] Ibid.
[151] Factsheet (n 116).
[152] Recommendation No. R (97) 20 (n 109), *see* e.g. *Perinçek* (2015) para 170, *Gündüz v Turkey* App no 35071/97 (ECHR, 4 December 2003) paras 21-22, *see* also Oetheimer (n 136), Antoine Buyse, "Dangerous Expressions: the ECHR, Violence and Free Speech" (2014) I.C.L.Q., 63(2), 491-503, 493, Sottiaux (n 8) 53.

doctrine of autonomous concepts[153] in the Court's jurisprudence is particularly apparent in its "hate speech" judgments[154]. The scope of the terms "hate speech" or "incitement" differs greatly among judgments, something which has given rise to criticism towards the Court for producing a confusing and incoherent case-law, thus allowing for extensive interferences with the right to freedom of expression[155].

**i. Article 17 of the Convention and applications deemed manifestly ill-founded**

An important feature of Article 17 is that it can be invoked both by individuals claiming an unwarranted State interference with their rights and by the State claiming that an interference is justified[156]. This feature implies that states may justifiably interfere with the exercise of the right to freedom of expression by placing content-based restrictions[157]. In this case, contrary to an Article 10 assessment of the merits the burden of proof shifts from the interference to the impugned expression and thus there is no need to examine the proportionality of the interference or to balance between conflicting rights or interests[158].

In early cases before the Commission the relation between Articles 17 and 10 was rather unclear and in some cases both articles were relied on by the Court[159]. Although this approach has been adopted in some of the Court's recent decisions as well, in the more recent cases the scope of application of Article 17 seems to have been narrowed down and most forms of "hate speech" are examined exclusively under Article 10[160]. This means that in most cases the Court engages in a balancing exercise in order to find or not a violation of the Convention while in relatively few the same exercise leads to a finding of inadmissibility of the application[161].



[153] Oetheimer (n 136) 429, s*ee* George Letsas, "The Truth in Autonomous Concepts: How to Interpret the ECHR" EJIL 2004, Vol. 15 No. 2, 279-305.
[154] Oetheimer (n 136) 429.
[155] *See* e.g. Oetheimer (n 136), Buyse (n 152), Sottiaux (n 8).
[156] Keane (n 142) 643, 656.
[157] Ibid.
[158] Ibid.
[159] Ibid 643-647.
[160] Ibid.
[161] Ibid.

### a. Early Commission decisions

The 1979 Commission admissibility decision in *Glimmerveen and Hagenbeek v. the Netherlands* was the first to interpret Article 17 with regard to the right to free speech[162]. In *Glimmerveen* the Commission deemed inadmissible under Article 17 the application of the president and vice-president of a political party, who were convicted of incitement to racial discrimination for attempting to distribute leaflets advocating for the ethnic homogeneity of the population and against "racial mixing"[163]. In its decision the Commission noted that the complaints fall under the scope of Article 10 and recalled the landmark *Handyside* judgment[164]. The Commission then stressed "the duties and responsibilities"[165] which come with the exercise of the right to freedom of expression and which are "reflected in particular by Article 17 of the Convention"[166]. In this case the advocacy of racial discrimination was deemed "contrary to the text and spirit of the Convention"[167].

In the subsequent *Kühnen* decision the Commission adopted a similar but not identical reasoning[168]. The applicant was a leading figure of a neo-Nazi party in Germany and was convicted "inter alia, of having prepared and disseminated propaganda material appertaining to an unconstitutional organisation"[169]. As in *Glimmerveen* the Commission interpreted Article 10(2) but this time it went further by making a thorough assessment of the merits of the case on the basis of this provision[170]. More precisely, it found that the interference with the applicant's right was justified under Article 10(2)[171]. The Commission linked the necessity of the interference with the application of Article 17 of the Convention, stating that freedom of expression "may not be invoked in a sense contrary to Article 17"[172].



[162] Ibid.
[163] *Glimmerveen and Hagenbeek v the Netherlands* App nos 8348/78 and 8406/78 (Commission Decision, 11 October 1979).
[164] Ibid.
[165] ECHR art 10(2).
[166] *Glimmerveen and Hagenbeek* (1979).
[167] Ibid 196.
[168] Keane (n 142) 643-647.
[169] *Kühnen v Germany* App no 12194/86 (Commission Decision, 12 May 1988).
[170] Ibid.
[171] Ibid.
[172] Ibid.

In this case the impugned material advocating the reinstatement of National Socialism ran counter to one of the basic values underlying the Convention as expressed in its fifth preambular paragraph, namely that the fundamental freedoms enshrined in the Convention 'are best maintained ... by an effective political democracy'"[173]. Moreover, the material contained "elements of racial and religious discrimination"[174], which led the Commission to the conclusion that the applicant was pursuing activities "contrary to the text and spirit of the Convention"[175]. The same approach was adopted in the subsequent *Remer, Honsik* and *Marais* cases, which originated in convictions for Holocaust denial in Germany, Austria and France respectively[176].

In all these cases the Commission relied on Articles 10 in conjunction with Article 17 to decide on the admissibility of the applications. The Commission examined the cases on the basis of Article 10 having Article 17 as a guiding provision[177]. While one can see the basic components of this analysis present in the *Glimmerveen* case, the latter clearly differs from *Kuhnen* or *Remer* in that in this case the emphasis is placed on the content of the material per se and not on the justifiability of the state interference for the decision on admissibilty to be reached[178]. The Court adopted again the *Glimmerveen* rationale but narrowed the scope of application of Article 17 in the late 1990's, in a series of cases originating in France, the first of which was *Lehideux and Isorni v. France*[179].

**b. The (contested) special treatment of Holocaust denial cases**

The *Lehideux* judgment in 1998 established the threshold for the application of Article 17, which until the recent Grand Chamber *Perinçek* judgment remained unchallenged in cases of negationism and historical revisionism[180]. In *Lehideux*, the applicants had been convicted in France after they issued a newspaper advertisement, which defended the memory of Marshal Petain, the Head of State of Vichy France who was

[173] Ibid.
[174] Ibid.
[175] Ibid.
[176] Keane (n 142) 643-647.
[177] Ibid.
[178] Ibid.
[179] Ibid.
[180] *See* Keane (n 142) 647-651 and *Perinçek* (2015) paras 209-212.

sentenced to death for treason after WWII ended[181]. The applicants claimed that their conviction by the French courts violated their rights under Article 10 while the French Government asked that their application be dismissed on the basis of Article 17[182]. The Court did not apply Article 17 in this case reasoning that the subject of the impugned material "does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17"[183].

The Court noted that the applicants aimed to contribute to an "ongoing debate among historians"[184], on which the Court had no competence to rule[185]. It then proceeded to assess whether the requirements of Article 10(2) had been met, concluding that there had been a violation of Article 10 by France[186]. In his concurring opinion to the judgment Judge Jambrek tried to delineate the type of expressions that might fall under the scope of Article 17, stating that:

"the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others"[187].

He then concluded that:

"while I would firmly agree that the requirements of Article 17 of the Convention should be applied with strict scrutiny, the spirit in which that Article was drafted should be respected, and its relevance upheld"[188].

The significance of *Lehideux* was made apparent in subsequent judgments and decisions and most notably in *Garaudy*[189]. Roger Garaudy, a writer and former

[181] *Lehideux and Isorni v France* App no 24662/94 (ECHR, 23 September 1998) paras 10-23.
[182] Ibid paras 31-32.
[183] Ibid para 47.
[184] Ibid.
[185] Ibid.
[186] Ibid para 58.
[187] Ibid Concurring Opinion of Judge Jambrek para 2.
[188] Ibid para 4.

politician, was convicted in France of denying crimes against humanity, of publishing racially defamatory statements and of inciting to racial hatred, on the basis of the content of his book *The Founding Myths of Israeli Politics*[190]. The Court unanimously declared the application inadmissible[191]. Concerning the parts of the book which constituted Holocaust denial the Court reasoned on the basis of Article 17[192]. Elaborating on its findings in *Lehideux* the Court noted that:

"There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention."[193]

In this case Article 17 was applied directly to remove the impugned expression from the scope of Article 10. Contrary to *Lehideux* the Court considered itself as competent to decide upon the legality of expressions questioning "clearly established historical facts"[194]. On the other hand, concerning the other aspects of the book, which do not involve Holocaust denial but gave rise to the incitement and group defamation charges against the applicant in France, the Court applied indirectly Article 17. The "proven racist aim"[195] of the applicant that was ascertained by his denial of "clearly established historical facts, such as the Holocaust" dispeled the Court's "serious



[189] Keane (n 142) 647-651.
[190] *Garaudy v France* App no 65831/01 (ECHR, 24 June 2003).
[191] Ibid.
[192] Ibid, *see* Oetheimer (n 136) 432-433.
[193] Ibid.
[194] Ibid.
[195] Ibid.

doubts as to whether the expression of such opinions could attract the protection of the provisions of Article 10 of the Convention"[196]. It could be inferred from this that the finding of Holocaust denial always trumps the application of Article 10 of the Convention not only for those expressions which are found to amount to Holocaust denial but for other accompanying expressions as well, which are prima facie protected under article 10(1)[197].

The special treatment of Holocaust denial, as attested in *Lehideux* and *Garaudy* was further consolidated in subsequent cases involving revisionist speech[198]. In *Chauvy and Others v France* the facts were very similar to *Lehideux*[199]. The case originated in a conviction for a book which was accused of modifying the chronology of events involving the Resistance movements in Lyon[200]. The Court examined the case under Article 10 and found no violation[201]. Citing *Lehideux* the Court made again the distinction between offending material which is protected under Article 10(1) and material which might engage Article 17[202].

It is important to note, however, that although in all cases involving Holocaust denial the Court has deemed the applications inadmissible Article 17 has not always been applied directly[203]. In three out of the five Holocaust denial cases, which have come before the Court since the abolishment of the Commission in 1998 the Court adopted the "combined approach"[204] deeming the relevant applications inadmissible as manifestly ill-founded by applying jointly Articles 10 and 17[205]. In fact it was in only one other Holocaust denial case other than *Garaudy* that Article 17 was directly applied[206]. This means that while Holocaust denial cases have never been examined



[196] Ibid.
[197] *See* Oetheimer (n 136) 432-433.
[198] Keane (n 142) 647-651.
[199] *Chauvy and Others v France* App no 64915/01 (ECHR, 29 June 2004).
[200] Ibid paras 8-29.
[201] Ibid holding.
[202] Ibid para 69.
[203] *Perinçek* (2015) paras 210-212.
[204] *Perinçek* (2015) Additional Dissenting Opinion of Judge Silvis, Joined by Judges Casadevall, Berro and Kūris para 4.
[205] *Schimanek v. Austria* App no 32307/96 (ECHR, 1 February 2000), *Witzsch v. Germany (no. 2)* App no 7485/03 (ECHR, 13 December 2005), *Gollnisch v. France* App no 48135/08 (ECHR, 7 June 2011).
[206] *Perinçek* (2015) 210-212, *see Witzsch v. Germany (no. 1)* App no 41448/98 (ECHR, 20 April 1999).

on their merits, most of them have not been excluded from the scope of Article 10, as a combined reading of *Lehideux* and *Garaudy* would lead one to believe[207].

This overlooked aspect of the Court's jurisprudence was emphasized by the recent Grand Chamber *Perinçek* judgment, which concerned the sensitive issue of the denial of the Armenian Genocide[208]. Perinçek is the chairman of a Turkish political party, who in a series of public events in Switzerland denied that there had been genocide of the Armenians by the Ottoman Empire[209]. For these statements, he was fined and convicted of racial discrimination by Swiss courts[210]. In 2013 the Second Section of the ECtHR found a violation of Article 10 reasoning on the basis of a number of considerations[211]. What is important here is the distinction made by the Court between Holocaust denial and denial of other genocides. The Court noted that:

"a clear distinction can be made between the present case and cases concerning denial of crimes relating to the Holocaust… Firstly, the applicants in those cases had not disputed the mere legal characterisation of a crime but had denied historical facts, sometimes very concrete ones, such as the existence of gas chambers. Secondly, their denial concerned crimes perpetrated by the Nazi regime that had resulted in convictions with a clear legal basis, namely Article 6, sub-paragraph (c), of the Charter of the (Nuremberg) International Military Tribunal, annexed to the London Agreement of 8 August 1945… Thirdly, the historical facts challenged by the applicants in those cases had been found by an international court to be clearly established"[212].

Moreover, the Court went on to note that:

"Holocaust denial is nowadays the main vehicle of anti-Semitism. The Court considers that this is a phenomenon which is still prevalent and which calls for

[207] *See Perinçek* (2015) Additional Dissenting Opinion of Judge Silvis, Joined by Judges Casadevall, Berro and Kūris para 4.
[208] *Perinçek v Switzerland* (2015).
[209] Ibid para 7.
[210] Ibid paras 8-13.
[211] Ibid holding.
[212] Ibid para 117.

firmness and vigilance on the part of the international community. It cannot be maintained that the rejection of the legal characterisation of the tragic events of 1915 and subsequent years as "genocide" could have similar repercussions"[213].

The Chamber *Perinçek* judgment illustrates, on the one hand, the consistency of the Court's approach to Holocaust denial, an approach which has been justified as a sort of necessary partiality stemming from the text and spirit of the Convention, and on the other hand, a tendency to widen the boundaries of Article 10(1) when it comes to cases of disputed historiography in favor of free public debate. The Grand Chamber judgment that followed affirmed this tendency but adopted a different approach with regard to Holocaust denial cases, which may be viewed as a breakthrough in the Court's overall "hate speech" jurisprudence. More precisely, in its analysis of the context of the impugned speech the Grand Chamber argued against the necessity of the interference at hand by adding a factor, entirely absent from the Chamber's judgment, that is "[t]he respective State's historical experience" [214]. It then went on to note that:

"This [factor] is particularly relevant with regard to the Holocaust. For the Court, the justification for making its denial a criminal offence lies not so much in that it is a clearly established historical fact but in that, in view of the historical context in the States concerned – the cases examined by the former Commission and the Court have thus far concerned Austria, Belgium, Germany and France …–, its denial, even if dressed up as impartial historical research, must invariably be seen as connoting an antidemocratic ideology and anti-Semitism. Holocaust denial is thus doubly dangerous, especially in States which have experienced the Nazi horrors, and which may be regarded as having a special moral responsibility to distance themselves from the mass atrocities that they have perpetrated or abetted by, among other things, outlawing their denial"[215].

A similar rationale was adopted by the Court a few years back in *Peta*, where the prohibition in Germany of an advertising campaign, which compared the Holocaust to

[213] Ibid para 119.
[214] *Perinçek* (2015) para 242.
[215] *Perinçek* (2015) para 243.

industrial livestock production, was found to be compatible with Article 10[216]. In this case the Court placed emphasis on "the historical and social context in which the expression of opinion takes place"[217] and observed that "a reference to the Holocaust must also be seen in the specific context of the German past"[218]. In view of this special context the different approach of other jurisdictions on similar issues was irrelevant[219]. This reasoning was criticized as relativistic by concurring judges Zupančič and Spielmann[220] .

The adoption of the *Peta* rationale by the Grand Chamber in *Perinçek* with regard to Holocaust denial seems to allow for the abandonment of what was until recently viewed as the exemplary type of justified content-based speech restriction under the Court's case-law[221]. Although the Court was careful not to challenge the core rationale supporting its previous Holocaust denial decisions, namely that Holocaust denial is a guised advocacy of National Socialism and anti-Semitism, it attached this rationale to context and more precisely to the fact that all such dismissed applications have originated in states, which have a particular historical connection to "the Nazi horrors"[222] and bear a "special moral responsibility"[223] with regard to the Holocaust and its memory[224]. This remarkable shift in reasoning was criticized by all eight judges, who dissented or partly concurred to the finding of violation of Article 10[225].

In his partly concurring and partly dissenting opinion Judge Nussberger criticized both the Chamber's and the Grand Chamber's approach to the issue as generating an inconsistent case-law[226]. As he pointed out the compatibility of the prohibition of Holocaust denial or of any other denial of genocide with the Convention should not

[216] *Peta Deutschland v Germany* App no 43481/09 (ECHR, 8 November 2012).
[217] Ibid para 49.
[218] Ibid.
[219] Ibid.
[220] Ibid Concurring Opinion of Judge Zupančič, Joined by Judge Spielmann.
[221] *See* Keane (n 142) 646-647.
[222] *Perinçek* (2015) para 243.
[223] Ibid.
[224] Ibid.
[225] *Perinçek* (2015) Partly Concurring and Partly Dissenting Opinion of Judge Nussberger, "Distinction between the Court's case-law on Holocaust denial and the present case", Joint Dissenting Opinion of Judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis and Kūris, "Impact of geographical and historical factors".
[226] Ibid Partly Concurring and Partly Dissenting Opinion of Judge Nussberger, "Distinction between the Court's case-law on Holocaust denial and the present case".

rely on "the validity of knowledge about historical facts"[227] nor on context. In his view the legislative aim of vindicating "the rights of victims of mass atrocities regardless of the place where they took place"[228] offers sufficient justification for such prohibitions. Memory laws constitute "a choice of society… in accordance with its vision of historical justice"[229], which the Court is bound to respect[230]. Apart from certain procedural requirements to be met, such as the transparency, openness and democratic character of the debate supporting such legislation as well as the latter's forseeable character, the Court is not competent, in his view, to assess the necessity of the criminalization of the denial of historical events as such.

The Grand Chamber's contextual approach was equally criticized by the seven judges, who jointly dissented to the finding of a violation of Article 10[231]. Dissenting judges attacked the majority's reasoning by stating that "[m]inimizing the significance of the applicant's statements by seeking to limit their geographical reach amounts to seriously watering down the universal, erga omnes scope of human rights – their quintessential defining factor today"[232]. It is noteworthy however that the dissenting judges distanced themselves also, albeit not explicitly, from the Chamber's reasoning as they argued against its own initial finding of violation of Article 10 in this case[233]. Moreover, four of them extensively argued that Article 17 should have indirectly been applied[234]. This lack of support for the *Garaudy* rationale, as was advanced in the Chamber *Perinçek* judgment, indicates a strong tendency within the Court to abandon the special treatment of Holocaust denial cases.

This development might be read as part of an effort to consolidate uniform standards in an area of the Court's case-law that has often been accused as inconsistent[235]. On the other hand, this undermining of the special treatment of Holocaust denial cases

[227] Ibid.
[228] Ibid.
[229] Ibid.
[230] Ibid.
[231] *Perinçek* (2015) Joint Dissenting Opinion of Judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis and Kūris, "Impact of geographical and historical factors".
[232] Ibid.
[233] Ibid "Balancing of the rights at stake".
[234] Ibid Additional Dissenting Opinion of Judge Silvis, Joined by Judges Casadevall, Berro and Kūris.
[235] *See e.g. Perinçek* (2015) para 189 and Partly Concurring and Partly Dissenting Opinion of Judge Nussberger, "Debates on history as part of freedom of expression".

has happened on the basis of a clear division among the Court's judges between those supporting a more context-driven assessment of every and any type of speech and those arguing for the justifiability of content-based restrictions, again, on potentially every and any type of speech. Although surely the Chamber's rationale is far from being beyond reproach, this polarized approach by the Court creates more problems than the ones it solves.

Could it be said that the "geographical and historical factors"[236] to be considered in Holocaust denial cases are the same in all Contracting States? And if not would the Court not have to resort to possibly contested historical accounts of the "respective State's historical experience"[237] and of its "moral responsibility"[238]? On the other hand is the justifiability of memory laws, irrespective of their content, merely a matter of procedure? Are there indeed universally valid criteria to define the limits of freedom of expression with regard to the denial of any genocide? The Court is, in my view, likely to be faced with such questions in the future.

In any event in the recent decision concerning the French comedian Dieudonné M'Bala M'Bala, the Court made no reference to the *Perinçek* rationale but instead reiterated the standard position that negationism is never protected by Article 10[239]. In this case the Court applied directly Article 17 holding that "a blatant display of hatred and anti-Semitism disguised as an artistic production was as dangerous as a head-on and sudden attack"[240]. This decision indicates that the special treatment of Holocaust denial by the Court has not been abandoned and that the *Perinçek* rationale might have limited implications for this area of the Court's jurisprudence.

**c. Other "hate speech" cases**

Holocaust denial is not the only type of restricted speech to have triggered the direct or indirect application of Article 17[241]. In a few other cases involving "a direct or

[236] *Perinçek* (2015) paras 242-248.
[237] Ibid para 242.
[238] Ibid para 243.
[239] *M' Bala M' Bala v France* App no 25239/13 (ECHR, 10 November 2015).
[240] Ibid para 40, as translated in the Press Release issued by the Registrar of the Court.
[241] *See* Oetheimer (n 136) 431 and Keane (n 142).

indirect call for violence or … a justification of violence, hatred or intolerance"[242] the Court has declared the applications inadmissible rationae materiae or as manifestly ill-founded. Shortly after *Garaudy* the Court directly applied Article 17 in *Norwood*[243]. The applicant in this case, a member of the far-right British National Party (BNP), displayed in the window of his flat a poster of his party where a depiction of the Twin Towers in flames was accompanied by the words "Islam out of Britain– Protect the British People" and a symbol of a crescent and star in a prohibition sign[244]. For this he was fined and convicted of the aggravated offence "of displaying, with hostility towards a racial or religious group, any writing, sign or other visible representation which is threatening, abusive or insulting, within the sight of a person likely to be caused harassment, alarm or distress by it"[245].

The Court deemed the application incompatible *ratione materiae* with the provisions of the Convention and did not proceed to an assessment of the merits of the case[246]. It reasoned that "[s]uch a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination"[247]. A few years later, in 2007, the Court directly applied Article 17 in *Pavel Ivanov* by employing a similar reasoning[248]. The case originated in the conviction of the owner and editor of a newspaper in Russia of "public incitement to ethnic, racial and religious hatred through the use of mass-media"[249] for writing and publishing a number of anti-Semitic articles[250]. The Court noted "the markedly anti-Semitic tenor of the applicant's views"[251] and reiterated its finding in *Norwood* with regard to the "general and vehement"[252] character of the attack, this time "on an ethnic group"[253].



[242] *Perinçek* (2015) para 206.
[243] *Norwood v UK* App no 23131/03 (ECHR, 16 November 2004).
[244] Ibid.
[245] Ibid.
[246] Ibid.
[247] Ibid.
[248] *Pavel Ivanov v Russia* App no 35222/04 (ECHR, 20 February 2007).
[249] Ibid.
[250] Ibid.
[251] Ibid.
[252] Ibid.
[253] Ibid.

More recently in the *Kasymakhunov and Saybatalov* decision the Court invoked Article 17 to dismiss the complaint of members of an Islamist organization in Russia, who alleged violations of their rights under inter alia Article 10, as being incompatible ratione materiae with the provisions of the Convention [254]. In reaching this conclusion the Court assessed the overall activity and discourse of the organization in which the applicants belonged and found it to be anti-Semitic, pro-violent, profoundly undemocratic and thus undeserving of the Convention's protection[255].

The same conclusion was reached by the Court with regard to the same organization one year back in its *Hizb Ut-Tahrir and Others* decision[256]. The case had originated in the ban imposed on the applicant organization in Germany[257]. The ban was found by the Court to be compatible with Article 11 of the Convention on the basis of Article 17[258]. With regard to the applicant's complaint under Article 10 the lack of exhaustion of domestic remedies rendered it automatically inadmissible[259]. The Court stressed however that irrespective of the existence of this procedural limitation the organization's discourse is removed by virtue of Article 17 of the Convention from the protective scope of Article 10[260].

As four of the Court's judges noted in their additional dissenting opinion in the Grand Chamber *Perinçek* judgment the way the Court has applied Article 17 has not been uniform[261]. The judges identified in this respect "four categories"[262] of cases "with four different approaches"[263]. As previously mentioned with regard to Holocaust denial cases apart from those where Article 17 has been directly applied, the Court has employed a "combined approach", where a standard Article 10(2) analysis is followed with Article 17 acting as a guiding provision[264].



[254] *Kasymakhunov and Saybatalov v Russia* App no 26261/05 and 26377/06 (ECHR, 14 March 2013) paras 113-114.
[255] Ibid paras 106-114.
[256] *Hizb Ut-Tahrir and Others v Germany* App no 31098/08 (ECHR, 12 June 2012).
[257] Ibid paras 2-31.
[258] Ibid paras 74-75.
[259] Ibid para 78.
[260] Ibid.
[261] *Perinçek* (2015) Additional Dissenting Opinion of Judge Silvis, Joined by Judges Casadevall, Berro and Kūris para 2.
[262] Ibid.
[263] Ibid.
[264] *See* Keane (n 142) 646.

A notable fairly recent example of this approach can be found in *Seurot*[265]. In *Seurot* the applicant was convicted of incitement to discrimination and hatred as well as of racial defamation of people of North-African descent for an article he wrote in a school newspaper of a private college where he was teaching[266]. In the article Muslims of North-African descent living in France were presented as a threat and described in a demeaning language[267]. The Court invoked Article 17 when examining the necessity of the interference with the applicant's rights and declared the application inadmissible as manifestly ill-founded[268].

A different form of "combined approach" can be found in the more recent *Molnar* decision[269]. In this case the applicant was convicted of "nationalist chauvinist propaganda"[270] for placing posters on the streets of a Romanian town, which inter alia contained anti-Roma and homophobic references[271]. The Court focused on these latter references and found that they are removed by virtue of Article 17 from the scope of Article 10[272]. It then however proceeded with a brief Article 10(2) analysis noting that "even assuming"[273] that there had been an interference with the applicant's rights this had been justified[274]. This peculiar reasoning led the Court to dismiss the application as manifestly ill-founded[275].

Lastly, in at least two cases the Court has used the more standard "combined approach", found in *Kühnen* or *Seurot*, albeit in an implicit manner. In *Le Pen*, the leader of the French far-right political party "Front National" was fined and convicted twice of provocation to discrimination, hatred or violence for subsequent statements he made in the press where he targeted Muslims living in France, presenting them as a



[265] *Seurot v France* App no 57383/00 (ECHR, 18 May 2004).
[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] *Molnar v Romania* App no 16637/06 (ECHR, 23 October 2012).
[270] Ibid paras 10-15.
[271] Ibid para 23.
[272] Ibid.
[273] Ibid para 24, *see* also *Perinçek* (2015) Additional Dissenting Opinion of Judge Silvis, Joined by Judges Casadevall, Berro and Kūris para 5.
[274] Ibid.
[275] *Molnar* (2012) para 26.

threat to the non-Muslim French citizens[276]. In his application to the Court he complained on the basis of his second conviction of a violation of Article 10 by France[277]. Again the Court unanimously deemed the application inadmissible as manifestly ill-founded but this time without even mentioning Article 17 of the Convention[278]. Instead the Court proceeded with a substantive assessment of the merits of the case under Article 10(2) and concluded that the interference with the applicant's right to freedom of expression was "necessary in a democratic society"[279].

The reasoning of the Court in Le Pen is indicative of a persistent confusion with regard to the relation between Article 10 and 17. This is particularly true considering the fact that just one year before this decision the Court found the non violation of Article 10 in *Féret*, where the facts were almost identical to *Le Pen*[280]. Prior to *Le Pen* the Court employed a similar formula to reject an application as manifestly ill-founded in *Gündüz,* a case concerning the conviction of the leader of an Islamic sect in Turkey for incitement to violence[281]. In its decision the First Section of the Court stressed that:

"statements which may be held to amount to hate speech or to glorification of or incitement to violence, such as those made in the instant case, cannot be regarded as compatible with the notion of tolerance and run counter to the fundamental values of justice and peace set forth in the Preamble to the Convention"[282].

It is not clear in which of the four categories identified by the dissenting judges in *Perinçek* the *Le Pen* and *Gündüz* decisions could fall into. While they seem to follow the rationale of a "combined approach" there is no mention of Article 17. In any event, dissenting judges in *Perinçek* placed *Féret* and the similar *Soulas* judgments in a fourth category, where the application of Article 17 was rejected by the Court only



[276] *Le Pen v France* App no 18788/09 (ECHR, 20 April 2010).
[277] Ibid.
[278] Ibid.
[279] Ibid.
[280] *See* below section "Cases under Article 10 of the Convention".
[281] *Gündüz v Turkey* App no 59745/00 (ECHR, 13 November 2003).
[282] Ibid.

after a thorough assessment of the merits under Article 10(2)[283]. This categorization of cases was used by the judges to support their argument that the Court should keep "its options open"[284] with regard to Article 17[285]. They do not offer however much insight into the reasons why the one or the other approach was used in particular cases, especially given the similarity of the facts in some of the above mentioned differently treated cases.

The current interpretation and application of Article 17 seems to face the same challenges as in the past. This is especially so after the landmark *Perinçek* judgment delivered by the Grand Chamber recently. *Perinçek* was a blow to the Holocaust denial related case-law as it introduced a new rationale for deciding such cases. This new rationale broadens instead of restricting the scope of Article 17 by affirming different ways of interpreting it and applying it, while essentially depriving it from its typical function as a basis for narrow content-based speech restrictions. Although it remains a rarely used provision and the *Perinçek* judgment seems supportive of that[286], an examination of the existing case-law provides few indications as to its future use. Indeed Article 17 has been applied in a wide spectrum of "hate speech" cases in a number of different ways.

Under current standards it remains unclear why *Glimmerveen* for instance would not be decided under an Article 10(2) analysis like most cases originating in convictions for racist speech have been. Equally unclear is why the more recent *Norwood* case was not decided in this way either or why an examination of the merits was excluded in *Seurot* and *Le Pen* while the impugned speech was considered as prima facie protected under Article 10. The "case-specific"[287] approach endorsed by the majority of judges is rather favorable to the flexible approach to Article 17 proposed by part of



[283] *Perinçek* (2015) Additional Dissenting Opinion of Judge Silvis, Joined by Judges Casadevall, Berro and Kūris para 7.
[284] Ibid para 8.
[285] Ibid.
[286] *Perinçek* (2015) para 114.
[287] *Perinçek* (2015) para 220.

the dissenting judges. An approach which however fails to provide clear criteria and thus leaves the doors open for abuse of the "abuse clause"[288].

**ii. Cases under Article 10 of the Convention**

Things look even more complicated when examining the Court's Article 10 jurisprudence with regard to "hate speech". The Court has ruled on various types of "hate speech" ranging from incitement to violence, discrimination, hatred, hostility or religious intolerance to the propagation of homophobia, the condonation of terrorism, the display of controversial symbols and more recently online "hate speech"[289]. For some types of expression the Court has set certain standards, which do not seem to hold for other types. In what follows I examine some of the standards developed by the Court over the decades with regard to the regulation of "hate speech". As this examination shows the various standards used transcend the limits of the loosely defined categories of cases as well as the limits of the equally loosely defined notions of "hate speech" and "incitement".

I examine first some of the most important judgments concerning incitement to hatred and discrimination. I then move to an examination of a series of cases, which have been brought before the Court against Turkey and which involve violence-prone speech. In the latter cases the Court has tended to emphasize more on the probable effects of the impugned expression and less on its inherent qualities although overall there is considerable overlap between the two types of cases[290]. Lastly I focus on the test introduced by the Grand Chamber *Perinçek* judgment and particularly on the balancing between Article 10 and Article 8, which may be viewed as undermining the free-standing, fundamental character of the right to freedom of expression in "hate speech" cases[291].



[288] *See* Jonathan Horowitz, "Case Watch: Europe's Broad View on Acceptable Limits to Free Speech", Open Society Justice Initiative, April 26 2013 https://www.opensocietyfoundations.org/voices/case-watch-europes-broad-view-acceptable-limits-free-speech accessed 18/10/2015.
[289] *See Delfi AS v Estonia* App no 64569/09 (ECHR, 16 June 2015).
[290] Sottiaux (n 8) 60, Buyse (n 152) 493.
[291] Gavin Millar, "Whither the spirit of Lingens?" (2009) European Human Rights Law Review, 3, 277-288, 278.

### a. Incitement to hatred and discrimination

The first "hate speech" case to pass the admissibility stage and reach the Court was *Jersild*[292]. The case originated in the conviction of a journalist in Denmark of aiding and abetting the expression of racist ideas, punishable under the Danish Penal Code, after he took an interview from members of a racist gang that was broadcast on television[293]. In its assessment of the case the Grand Chamber declared "at the outset that it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations"[294]. The Court also affirmed that Article 10 must be interpreted "to the extent possible"[295] in a manner compatible with the ICERD[296]. In this direction it was noted that the statements for which the interviewees were convicted at the domestic level do not enjoy the protection of Article 10[297].

However, a balancing of the conflicting rights at stake led the Court to find a violation of the applicant's rights under Article 10. The privileged position as "public watchdog"[298] that the media enjoy from a human rights perspective outweighed "the potential impact of the medium concerned"[299] and the legitimate aim of protecting "the reputation or rights of others"[300]. According to the majority, even though the journalist may even have encouraged the expression of racist statements, there were "counterbalancing elements"[301] such as his introduction to the interview, which placed it as part of a public debate on racism in Denmark, or the fact that the conduct of the interviewees was marked negatively and that the program was intended for a "well-informed audience"[302].

Dissenting judges, among whom the current President of the Court, Judge Spielmann, argued that not only the interviewees shall not benefit from the protection of Article

[292] Keane (n 142) 655, Oetheimer (n 136) 430.
[293] *Jersild v Denmark* App no 15890/89 (ECHR, 23 September 1994) paras 9-18.
[294] Ibid para 30.
[295] Ibid.
[296] Ibid.
[297] Ibid para 35.
[298] Ibid.
[299] Ibid para 31.
[300] Ibid.
[301] Ibid para 34.
[302] Ibid.

10 but also the journalists, who are responsible for the dissemination of such racist remarks and manifestly approve of them[303]. Although, according to the judges, this could not be said for the applicant, in their view the Court accorded too much weight to journalistic freedom in this case while it should have deferred to the judgment of the Danish Supreme Court instead, the ruling of which in this case could not be said to have overstepped the margin of appreciation enjoyed by Denmark[304].

*Jersild* is illustrative of some of the tensions existing within the Court's "hate speech" jurisprudence to this day. Although the Court affirmed the principle that racist speech is not protected by Article 10, contextual factors outweighed the judgment of the domestic authorities in favor of journalistic freedom[305]. This was not however the case in the two subsequent *Féret* and *Vejdeland* judgments, which concerned "incitement to hatred" against ethnic/religious and sexual minorities respectively[306]. While contextual factors were also considered in these cases, they were not decisive for their outcome. Instead there was a deferential approach towards the judgments of domestic courts and an outweighing of context by the inherent negative qualities of the expression at hand[307].

Daniel Féret was the chairman of the Belgian far-right party "Front National-Nationaal Front" and an active MP when in the early 2000's he was charged and subsequently convicted of incitement to hatred, discrimination and violence for anti-immigrant and islamophobic leaflets and posters disseminated in the context of his party's electoral campaign[308]. The leaflets and posters targeted non-European immigrants and particularly Muslims living in Belgium, associating their presence in the country with criminality rates, presenting them as a burden to the welfare system as well as holding them to ridicule for cultural practices attributed to them[309]. Féret received a 10-month suspended prison sentence and had to serve 250 hours of



[303] Ibid Joint Dissenting Opinion of Judges Ryssdal, Brenhardt, Spielmann and Loizou para 2.
[304] Ibid para 5.
[305] *See* Oetheimer (n 136) 438.
[306] *Féret v. Belgium* App 15615/07 (ECHR, 16 July 2009), *Vejdeland and others v. Sweden* App no. 1831/07 (ECHR, 9 February 2012).
[307] *See* Sottiaux (n 8) 50-51.
[308] *Féret v. Belgium* paras 6-41.
[309] Ibid paras 7-17.

community service relevant to immigrant integration[310]. Moreover he was declared ineligible for a period of ten years[311]. The Court ruled with a marginal majority of four votes to three that there had been no violation of Article 10 of the Convention[312].

Similarly to *Jersild*, where the privileged position of journalists was stressed, the Court in *Féret* affirmed that political parties must enjoy broad freedom of expression having the right to publicly defend their positions even if they offend, shock or disturb part of the population[313]. Political speech is thus rightly privileged over other forms of expression through parliamentary immunity, which in the case of Féret had to be and was indeed lifted by the House of Representatives[314]. Nonetheless, in this case the Court found that the applicant had "clearly"[315] overstepped the limits[316].

Firstly, in the Court's view, the interference by the State served the legitimate aims of preventing disorder and protecting the rights of others[317]. Secondly, the Court stressed the importance of "combating racial discrimination in all its forms and manifestations"[318], as emphasised in the Council of Europe's legal instruments[319]. It then went on to stress that "inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts"[320]. The right to freedom of expression may not be protected, according to the Court, when exercised in an irresponsible manner which undermined people's dignity and safety[321]. On the basis of these considerations the position of the applicant as the head of a political party and an MP could not be considered as a counterbalancing element[322]. Instead it was because of this position that he was obliged to "avoid comments that might foster intolerance"[323] considering

[310] Ibid para 34.
[311] Ibid.
[312] Ibid holding.
[313] Ibid para 77.
[314] Ibid para 24, 77.
[315] Ibid para 78.
[316] Ibid.
[317] Ibid para 59.
[318] Ibid para 72.
[319] Ibid.
[320] Ibid para 73.
[321] Ibid.
[322] Ibid para 75.
[323] Ibid.

the duty of politicians to defend democratic principles as their ultimate aim is to take office[324].

Moreover the fact that the impugned material was disseminated in the context of an electoral campaign made the impact of the speech even more harmful as the party aimed at reaching the electorate at large that is the entire Belgian population[325]. The Court noted that not any public discussion of "the problems linked to immigration"[326] could be considered as off limits for political parties but only this type of speech that is capable of causing reactions which are incompatible with a peaceful social climate and of undermining people's confidence in the democratic institutions[327]. State interference in this case responded to "a pressing social need"[328] while the principle that restraint must be displayed in resorting to criminal proceedings was also respected by domestic authorities[329].

In his dissenting opinion, Judge Sajó, joined by two other judges, argued against the suppression of speech on the basis of the long-term impact it might carry[330]. Instead he argued for a higher threshold to be met for speech to qualify as incitement, which would resemble the "clear and present danger" test adopted by the US Supreme Court[331]. On the basis of this test the focus would be on real instead of potential threats posed by speech[332]. Judge Sajó rejected any content-based restrictions and challenged the rationale adopted by the Court in Article 17 cases that certain forms of expression go "against the spirit of the Convention"[333]. In his own words "'spirits' do not offer clear standards and are open to abuse"[334]. He was careful however to set apart certain areas of expression, the prohibition of which is mandated by "the history

[324] Ibid.
[325] Ibid para 76.
[326] Ibid para 77.
[327] Ibid.
[328] Ibid para 78.
[329] Ibid para 80.
[330] Ibid Dissenting Opinion of Judge Sajó Joined by Judges Vladimiro Zagrebelsky and Nona Tsotsoria.
[331] Ibid, *see* also Sottiaux (n 8) 61. The first reference to this test was made in *Schenck v. United States* 249 U.S. 47 (1919).
[332] Ibid.
[333] *Féret v. Belgium* Dissenting Opinion of Judge Sajó Joined by Judges Vladimiro Zagrebelsky and Nona Tsotsoria.
[334] Ibid, as cited in *Vejdeland and others v. Sweden* Concurring Opinion of Judge Spielmann Joined by Judge Nussberger para 1.

of Europe"[335], referring obviously to the Court's jurisprudence with regard to Holocaust denial.

The same dilemma facing the Court in *Jersild* between context and content, or between consequentialist and deontological considerations[336] was clearly put forward in this dissenting opinion, which had an important impact on the subsequent *Vejdeland* judgment. In *Vejdeland* the applicants, members of a far-right organization called "National Youth" had distributed approximately 100 leaflets at an upper secondary school by leaving them in or on the pupils' lockers[337]. The leaflets concerned the "morally destructive effect"[338] of homosexuality on "the substance of society"[339] and were alleging the propagation of "this deviant sexual proclivity"[340] by "anti-Swedish teachers"[341]. They were convicted and fined of "agitation against a national or ethnic group"[342] under a law specifically prohibiting "agitation against homosexuals as a group"[343]. The Court held unanimously that there had been no violation of Article 10 of the Convention[344]. In its reasoning the Court noted that "although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations"[345]. It then reiterated that incitement to hatred does not necessarily mean incitement to violence or to other offences[346].

Citing *Féret* the Court noted that when freedom of expression is exercised "in an irresponsible manner"[347] different forms of attacks on individuals or groups may be prohibited by authorities in the direction of combating racist speech[348]. Being the first case involving homophobic speech to reach the Court, the latter took the opportunity to stress that "discrimination based on sexual orientation is as serious as



[335] Ibid.
[336] *See* Buyse (n 152) 501.
[337] *Vejdeland and others v. Sweden* para 8.
[338] Ibid.
[339] Ibid.
[340] Ibid.
[341] Ibid.
[342] Ibid paras 9-17.
[343] Ibid para 19.
[344] Ibid holding.
[345] Ibid para 54.
[346] Ibid para 55.
[347] ibid
[348] ibid

discrimination based on race, origin or colour"[349]. Again contextual factors were important to the Court's reasoning. The leaflets were distributed to pupils "at an impressionable and sensitive age"[350], in a manner that left them no choice "to decline to accept them"[351] and at a school, "which none of the applicants attended and to which they did not have free access"[352].

In separate concurring opinions three judges expressed their "hesitation"[353] in supporting the finding of non violation of Article 10[354]. Judges Spielmann and Nussberger, citing Judge Sajó's dissenting opinion in *Féret*, criticized the majority of employing "a rather vague test"[355] for classifying the statements as "inciting to hatred"[356]. The two judges argued that:

"the offending statements should have been defined more precisely, bearing in mind that, by virtue of Article 17 of the Convention, 'hate speech', in the proper meaning of the term, is not protected by Article 10. A careful, in-depth analysis of the aim of the speech would have been necessary"[357].

They agreed however with the finding of non violation of article 10 on the basis that the distribution of the leaflets took place at a school, making particular mention of the problem of homophobic and transphobic bullying at schools[358]. Concurring Judge Zupančič adopted a similar approach. After making extensive reference to the relevant U.S. jurisprudence he concluded that the regulation of "hate speech" is "a culturally predetermined debate"[359]. However, the fact of the distribution of the leaflets at a school was also decisive for him to agree with the judgment[360]. Judge Yudkivska, on the other hand, making again reference to the divergence between the European and

[349] ibid
[350] Ibid para 56.
[351] ibid
[352] ibid
[353] Ibid Concurring Opinion of Judge Spielmann Joined by Judge Nussberger para 1 and Concurring Opinion of Judge Zupančič para 1.
[354] Ibid.
[355] Ibid Concurring Opinion of Judge Spielmann Joined by Judge Nussberger para 5.
[356] Ibid Concurring Opinion of Judge Spielmann Joined by Judge Nussberger para 3.
[357] Ibid Concurring Opinion of Judge Spielmann Joined by Judge Nussberger para 4.
[358] Ibid Concurring Opinion of Judge Spielmann Joined by Judge Nussberger paras 6-8.
[359] Ibid Concurring Opinion of Judge Zupančič para 7.
[360] Ibid Concurring Opinion of Judge Zupančič para 10.

American approaches on the issue, argued that the Court should have taken a more decisive position towards hate speech targeting LGBT people[361].

*Vejdeland* offers an overview of the conflicting views existing among the Court's judges as to how "hate speech" in the form of "incitement to hatred" should be regulated. On the one hand the view that this type of cases should be assessed on the merits is prevalent but not undisputed as the dissenting opinions in *Vejdeland* and some of the cases analyzed in the previous sub-chapter manifest. A further division then exists between those who argue that more weight should be accorded to contextual factors over a substantive assessment of the content of expression. In all three cases examined here the majority avoided to take a clear stance as to these dilemmas.

While context proved to be crucial in *Jersild* for the finding of non-violation in the case of the applicant journalist, it was deemed irrelevant with regard to the interviewees, the speech of who was deemed a priori as undeserving of protection. In *Féret* on the other hand while the case was examined entirely under Article 10, the content of the expression and the broad social dangers associated with it took precedence over context. Lastly in *Vejdeland*, the most recent and the only unanimous judgment of the three, there was a balanced consideration of both content and context.

The reference to the U.S. Supreme Court jurisprudence in both concurring opinions in *Vejdeland*, triggered by Judge Sajó's dissent in *Féret* confirms that it is unlikely that the Court will follow anything close to so-called "First Amendment absolutism"[362]. However, this reference also indicates openness to international and comparative law, which makes it unlikely that the Court will adopt a dogmatic approach in this area of jurisprudence and will probably continue to rule on a case-by-case basis[363]. Judge Sajó's dissent remains however crucial in one more important respect, which has remained unanswered and this is the danger of paternalism and abuse of "hate speech"

[361] Ibid Concurring Opinion of Judge Yudkivska.
[362] *See* Sottiaux (n 8) 61.
[363] *See* ibid 46 and Oetheimer (n 136) 428-429.

laws[364]. The Court had no difficulty extending its findings in *Féret* to *Vejdeland* with an added consideration of the "impressionable and sensitive age"[365] of the audience. Indeed for two of the concurring judges this was the most important consideration which balanced against finding a violation of the Convention in this case. But what does that signify for *Féret*?

The reasoning of the majority in *Féret* pointed at "the less informed members of the public"[366] as being particularly vulnerable to the hateful messages contained in the impugned material[367]. This statement along with the overall assessment of the context by the majority was criticized by Judge Sajó as being essentially contrary to the concepts of freedom of expression and democracy, which presupposes that human beings are reasonable enough to make their own informed choices[368]. Instead of perceiving elections as a source of danger the Court should, in his view, recognize the crucial role of freedom of expression that allows responsible participation in political life[369]. To be sure, Judge Sajó did not reject any concept of militant democracy but insisted on the lack of both justification and effectiveness of speech restrictions on the basis of their feared long-term impact[370].

Another important point of Judge Sajó's dissent was his criticism of the broad definition given by the majority to the terms "racism" and "racial discrimination"[371]. In his view the imprecise way in which these terms are used in the judgment ignores their particular historical weight and their distinct position in the ICERD among other forms of discrimination[372]. Is anti-immigrant speech always racist? Judge Sajó hints to a negative answer, stressing the fact that discrimination on the basis of nationality is not covered by the ICERD[373]. Moreover he argues against what he sees as a broad definition of racism in the judgment, as in his view, such an expansive interpretation

[364] *See Féret v Belgium* Dissenting Opinion of Judge Sajó Joined by Judges Vladimiro Zagrebelsky and Nona Tsotsoria and Sottiaux (n 8) 50.
[365] *Vejdeland and others v Sweden* para 56.
[366] *Féret v Belgium* para 69.
[367] Ibid.
[368] Ibid Dissenting Opinion of Judge Sajó Joined by Judges Vladimiro Zagrebelsky and Nona Tsotsoria
[369] Ibid.
[370] Ibid.
[371] Ibid.
[372] Ibid.
[373] Ibid.

runs the risks of trivializing racism and allows for the adoption of excessively restrictive measures[374]. The issue is particularly pertinent in the context of EU anti-discrimination law, which is discussed towards the end of this chapter.

### b. Incitement to violence and hostility

In cases concerning incitement to violence the Court had to assess the alleged causal link between speech and potential or actual violence in order to rule on whether Article 10 of the Convention had been violated or not by the State[375]. Most of these cases involve alleged terrorism and originate in applications against Turkey[376]. As the following analysis shows the Court does not always conceptually distinguish between "incitement to violence" and other forms of "hate speech" and there is an overlap between these types of cases[377]. Again the lack of distinction stems from a particular approach to the regulation of "hate speech" and an interpretation of "incitement", with which many of the Court's judges are not always at ease.

The first in a series of Turkish cases concerning violence-prone speech related to the Kurdish issue was the Grand Chamber *Zana* judgment[378]. Mehdi Zana, former mayor of the city of Diyarbakir in south-east Turkey, was interviewed in 1987 by a major national newspaper while he was serving several sentences in a military prison[379]. At the time most of the south-east provinces of Turkey were under emergency rule due to the ongoing conflict between state security forces and the Workers' Party of Kurdistan, the PKK[380]. In the interview Zana expressed his support for the PKK while distancing himself from its violent actions against civilian population, which he characterized as "mistakes"[381]. For this statement he received a sentence of twelve months imprisonment for having "defended an act punishable by law as a serious crime" and for "endangering public safety"[382].



[374] Ibid.
[375] Sottiaux (n 8) 60-62, Buyse (n 152) 496-503.
[376] Ibid.
[377] Sottiaux (n 8) 60, Buyse (n 152) 493.
[378] *Zana v Turkey* App 69/1996/688/880 (ECHR, 25 November 1997).
[379] Ibid paras 9-12.
[380] Ibid para 11.
[381] Ibid para 12.
[382] Ibid para 26.

The Court, first, recognized that the interference was prescribed by law and served the legitimate aims of maintaining national security and public safety[383]. It then proceeded with assessing the necessity of the interference on the basis of a joint consideration of both content and context. With regard to content the Court found the impugned statement to be "both contradictory and ambiguous"[384]. Noting that "[t]he statement cannot, however, be looked at in isolation"[385], the Court placed particular emphasis on context[386]. The "extreme tension at the material time", the place in which the utterance occurred, the position of the applicant as former mayor and the medium used to convey his statement were factors offering in the Court's view sufficient justification for the State to intervene[387]. The Court found that States enjoy a wider margin of appreciation when curtailing speech supportive of acts of terrorism threatening their territorial integrity than when the speech is negatively affecting individuals[388]. Ultimately it was held by a narrow majority that there had been no violation of Article 10 of the Convention[389].

Eight judges dissented to the judgment[390]. Seven of them focused their criticism on the finding of proportionality of the sentence[391]. The judges considered a number of mitigating factors with regard to the impugned statement, which in their view indicate that less intrusive measures should have been used by the Turkish authorities to prevent or restrict the feared harm[392]. Among these considerations was the fact that the applicant in his statement expressed support for a political organization and that he was already imprisoned at the time[393]. Judge Vilhjálmsson, on the other hand, contested the finding that the interference served any legitimate aim, pointing at the fact that the interview containing the statement was published in a newspaper in Istanbul[394].



[383] Ibid paras 47-50.
[384] Ibid para 58.
[385] Ibid para 59.
[386] Ibid paras 59-62.
[387] Ibid.
[388] Ibid.
[389] Ibid holding.
[390] Partly Dissenting Opinion of Judge Van Dijk, Joined by Judges Palm, Loizou, Mifsud Bonnici, Jambrek, Kuris and Levits and Dissenting Opinion of Judge Thór Vilhjálmsson.
[391] Partly Dissenting Opinion of Judge Van Dijk, Joined by Judges Palm, Loizou, Mifsud Bonnici, Jambrek, Kuris and Levits.
[392] Ibid.
[393] Ibid.
[394] Dissenting Opinion of Judge Thór Vilhjálmsson.

Shortly after *Zana* the Court had to adopt a more cautious approach towards expansive definitions of "hate speech". In *Incal* the Court stressed that "the closest scrutiny"[395] is called for when it comes to interferences with the freedom of expression of a politician, who is a member of the opposition[396]. In this case the applicant, a member of an opposition party, was convicted of an attempt to incite to hatred and hostility "through racist words"[397] for attempting to distribute leaflets criticizing national and local authorities for their policies in Izmir negatively affecting the city's Kurdish inhabitants[398]. The leaflets were never distributed as they were seized according to an injunction issued shortly after official permission was requested by the party[399]. Following a joint assessment of the content and context of the prohibited leaflets the Court placed particular emphasis on the "radical nature of the interference at hand"[400], namely "[i]ts preventive aspect"[401], which could not be considered as justified[402]. It was thus unanimously held that there had been a violation of Article 10[403].

Following *Incal* on the 8th of July 1999 the Grand Chamber ruled on thirteen cases originating in convictions delivered by Turkish courts for incitement to violence[404]. In these so called "clone cases"[405] the Court employed with few exceptions an identical reasoning[406]. In one of these judgments, *Sürek*, the Court followed a similar analysis to the one it had adopted in *Zana* [407].The case originated in the conviction of the owner of a weekly magazine of "disseminating propaganda against the indivisibility of the State"[408] after readers' letters were published in the magazine, where the



[395] *Incal v Turkey* App no 22678/93 (ECHR, 9 June 1998) para 46.
[396] Ibid.
[397] Ibid para 15.
[398] Ibid paras 9-13.
[399] Ibid paras 11-13.
[400] Ibid para 56.
[401] Ibid.
[402] Ibid para 58.
[403] Ibid holding.
[404] Oetheimer (n 136) 435-436.
[405] Ibid 434.
[406] Ibid.
[407] *Sürek v Turkey* App 26682/95 (ECHR, 8 July 1999).
[408] Ibid paras 15-20.

Turkish army was characterized as "fascist", a "murder gang" and as "hired killers of imperialism" for its actions in south-east Turkey[409].

The Court noted that both the content, the fact that persons were identified by name and there was an appeal to "bloody revenge"[410], as well as the context of the impugned letters were capable of stirring violence[411]. It also considered however, contrary to *Zana*, the intention of the applicant, who may not have directly associated himself with the views expressed in the letters but had nonetheless provided an outlet for the authors of the letters to stir up violence and hatred[412]. The Court thus found that there had been no violation of Article 10 of the Convention in this case[413].

The judgment was met with the dissent of six judges[414]. Judges Palm and Bonello in separate dissenting opinions criticized the test applied by the Court in cases of violence-prone speech[415]. They both argued that an assessment of the short-term risks associated with the impugned speech is needed, with Judge Bonello making express reference to the "clear and present danger" test of the U.S. Supreme Court and related American jurisprudence[416]. The four of the other judges did not go as far but also required that a higher threshold should be met in this type of cases for a non-violation of Article 10 to be found[417]. More precisely, the four judges pointed to two other Grand Chamber judgments *Arslan* and *Ceylan*, delivered on the same day, where the Court ruled on almost identical facts reaching the opposite conclusion[418]. As the other judgments delivered on that day, like *Arslan*, *Ceylan* and *Gerger*, indicate, the reasoning in *Sürek* was indeed rather exceptional.



[409] Ibid para 11.
[410] Ibid para 62.
[411] Ibid.
[412] Ibid para 63.
[413] Ibid holding.
[414] Ibid.
[415] Ibid Partly Dissenting Opinion of Judge Palm and Partly Dissenting Opinion of Judge Bonello.
[416] Ibid.
[417] Ibid Joint Partly Dissenting Opinion of Judges Tulkens, Casadeval and Greve and Partly Dissenting Opinion of Judge Fischbach.
[418] Ibid.

In *Arslan* a book on the conflict in south-east Turkey was seized and its author was convicted of disseminating propaganda against "the indivisible unity of the State"[419]. In the book the Kurdish people were described as the victims of constant oppression by the Turkish nation, which was characterized as "barbarous"[420]. In *Ceylan*, on the other hand, the president of a worker's union was convicted of non-public incitement of "the population to hatred and hostility by making distinctions based on ethnic or regional origin or social class"[421] after he wrote an article published in an Istanbul weekly newspaper where the acts of the Turkish army were described as "State terrorism" amounting to "genocide"[422]. Similarly in *Gerger* a journalist was convicted of "disseminating separatist propaganda" for a speech read at a memorial ceremony of two of his deceased friends where he expressed, according to the Government, support for the Kurdish independence movement[423].

All three applicants had received a sentence of one year and eight months imprisonment and were also fined[424]. In all three judgments the Court ruled that the convictions were disproportionate to the aims pursued and thus not "necessary in a democratic society"[425]. To reach this conclusion the Court employed a similar reasoning. It accorded particular weight to the fact that the expression at hand was political and criticized the government[426]. While the Court referred to its previous case-law which granted a wide margin of appreciation to the state with regard to violence-prone speech[427], it affirmed the heightened protection that must be enjoyed by political speech critical of the government[428]. In this direction the Court found that the expression at hand did not qualify, in terms of either content or context, as "incitement to violence"[429].



[419] *Arslan v Turkey* App 23462/94 (ECHR, 8 July 1999) paras 17-20.
[420] Ibid para 10.
[421] *Ceylan v Turkey* App 23556/94 (ECHR, 8 July 1999) para 11.
[422] Ibid para 8.
[423] *Gerger v Turkey* App 24919/94 (ECHR, 8 July 1999) paras 9-17.
[424] *Arslan* para 19, *Ceylan* para 11, *Gerger* para 13.
[425] *Arslan* para 50, *Ceylan* para 38, *Gerger* para 52.
[426] *Arslan* para 46, *Ceylan* para 34, *Gerger* para 48.
[427] Ibid.
[428] Ibid.
[429] *Arslan* para 48, *Ceylan* para 36, *Gerger* para 50.

In *Arslan* the position of the speaker as a private individual and the medium used, a literary work, were considered as factors limiting the potential harmful impact of the expression[430]. In *Ceylan,* on the other hand, the Court made reference in an elliptic manner only to the position of the speaker as "a player on the Turkish political scene"[431], without explaining why in this case this consideration narrowed the state's margin of appreciation, while it widened it in *Zana*[432]. Lastly in *Gerger* the Court pointed at the small size of the audience and the non-public character of the ceremony as restricting considerably any potential impact on "national security", public "order" or "territorial integrity"[433].With regard to content, in all three cases "the virulence of the style"[434] of the expression was not found to offer sufficient justification for suppressing it as incitement to violence[435].

It is noteworthy that in *Arslan* the finding of violation was unanimous while in *Ceylan* and *Gerger* there was only one dissent[436]. In all three cases the judges that dissented in *Sürek* submitted concurring opinions to the judgment where they argued again for a "more contextual approach"[437] and in the case of Judge Bonello for the adoption of the American "clear and present danger" test[438]. As Judges Palm, Tulken, Fischbach, Casadeval and Greve stressed:

"It is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between language which is shocking and offensive – which is protected by Article 10 – and that which forfeits its right to tolerance in a democratic society."[439]



[430] *Arslan* para 48.
[431] *Ceylan* para 36.
[432] Ibid Dissenting Opinion of Judge Gölcüklü.
[433] *Gerger* para 50.
[434] *Arslan* 45, *see Ceylan* 36, *Gerger* para 47.
[435] *Arslan* para 48, *Ceylan* para 36, *Gerger* para 50.
[436] Ibid holding.
[437] Ibid Joint Concurring Opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve.
[438] Ibid Concurring Opinion of Judge Bonello.
[439] ibid Joint Concurring Opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve.

On the contrary, dissenting Judge Gölcüklü in *Gerger* and *Ceylan* argued that the two cases are indistinguishable from *Zana* and the Court should thus have applied the same test[440].

Judge Gölcüklü was not the only one to disagree in the finding of a violation of Article 10 in "clone cases" decided on the 8th of July 1999 by the Grand Chamber. The dissenting opinion adopted by four and five judges in *Karataş* and in *Sürek and Özdemir* respectively is noteworthy. Dissenting judges in these two cases argued that when it comes to incitement to violence "the nature of speech itself"[441] poses a risk to democracy and the margin of appreciation for the state is thus wider[442]. According to these judges when the right to life or physical integrity conflicts with the right to freedom of expression, the former should always prevail over the latter[443]. Moreover, in their view, incitement to violence is not to be considered as protected by Article 10 in the first place as it essentially means "the denial of a dialogue … in favour of a clash of might and power"[444]. This emphatic defense of content-based restrictions on violence-prone speech is another indication of the existence of diametrically opposed views within the Court as to the weight to be accorded on either content or context when deciding hate speech cases.

### c. Between Content and Context, Hatred and Violence; the Grand Chamber *Perinçek* judgment and the (private) harm in "hate speech"

As has been shown the Court in most hate speech cases proceeds with a joint assessment of both content and context, however in some cases its analysis is almost exclusively based on either one of the two. Notable examples of this type of one-sided approach are the *Gündüz* decision and judgment delivered in 2003 by the Court's First Section. In its *Gündüz* decision the Court deemed the application of a leader of an Islamic sect manifestly ill-founded and declared the application inadmissible



[440] *Ceylan* and *Gerger* Dissenting Opinion of Judge Gölcüklü.
[441] *Karataş v Turkey* App no 23168/94 (ECHR, 8 July 1999) Joint Partly Dissenting Opinion of Judges Wildhaber, Pastor Ridruejo, Costa and Baka, *Sürek and Özdemir v Turkey* App nos 23927/94 and 24277/94 (ECHR, 8 July 1999) Joint Partly Dissenting Opinion of Judges Wildhaber, Kūris, Strážnická, Baka and Traja.
[442] Ibid.
[443] Ibid.
[444] Ibid.

following an Article 10 analysis[445]. To come to this conclusion the Court reasoned solely on the content of the impugned statement, which was assessed as a direct call to violence[446].

The statement was published in a weekly Islamist newspaper and contained the following phrases:

"All that is needed now is for one brave man among the Muslims to plant a dagger in their soft underbelly and run them through twice with a bayonet to show just how empty they are ... There is nothing else left ..."[447].

The Court found that the statement at hand, purely because of its content, is incompatible "with the notion of tolerance"[448] and contrary to the Convention's fundamental values[449]. Less than a month later the same Section of the Court delivered a judgment on a different application submitted by the same applicant finding a violation of his rights under Article 10[450]. In this latter case, the applicant was convicted of incitement "to hatred and hostility on the basis of a distinction founded on religion"[451] for some of the statements he made during a live TV show, where he was invited to speak in his capacity as the leader of the sect[452]. This time the Court reasoned almost entirely on the basis of context[453].

More precisely, in its reasoning the Court accorded particular weight on the fact that the impugned statements were made orally and were broadcasted live and as a result the applicant had "no possibility of reformulating, refining or retracting them before they were made public"[454]. Moreover emphasis was placed on the fact that the aim of the TV show was to present the sect, which the applicant lead and that the extremist views he expressed were already known to the public, while others taking part in the

[445] *Gündüz v Turkey* App no 59745/00 (ECHR, 13 November 2003.
[446] Ibid.
[447] Ibid.
[448] Ibid.
[449] Ibid.
[450] *Gündüz v Turkey* App no 35071/97 (ECHR, 4 December 2003).
[451] Ibid paras 13-17.
[452] Ibid paras 9-13.
[453] *See* Oetheimer (n 136) 439.
[454] Ibid para 49.

show had the chance to intervene and challenge his views[455]. To be sure, the Court was careful to distinguish mere support of undemocratic views from incitement to violence, as in the latter case a wider margin of appreciation would be allowed to the state, particularly in placing content-based restrictions[456].

Dissenting Judge Türmen focused his criticism of the judgment on the word "bastards"[457], which was used by the applicant to describe children born outside religious marriage[458]. In his view the Court should have accorded more weight on this utterance, which constitutes "hate speech" not deserving of the protection of Article 10[459]. By not doing so the Court failed to assess appropriately a case of incitement to hatred on religious grounds, a form of "hate speech", which is not less serious than other forms[460]. Interestingly to support his argument the dissenting judge relied on the Court's blasphemy jurisprudence and more specifically on the finding in *Wingrove* that a wider margin of appreciation is to be enjoyed by the states when "intimate personal convictions within the sphere of morals or, especially, religion" are offended[461]. "Hate speech" targeting secular values should, according to the dissenting Judge, receive the same treatment as blasphemous speech[462].

Three years later in *Erbakan* the Court adopted a similar approach to *Gündüz*. The case originated in the conviction of the president of an Islamist party of incitement to hatred and hostility on the basis of race for a public speech he delivered in a city in south-east Turkey[463]. The Court assessed the content and context of the impugned speech, finding inter alia that it is "of crucial importance"[464] that politicians, in their public appearances, "avoid comments that might foster intolerance"[465], a dictum that, as previously mentioned, was later reiterated in *Féret*[466]. What proved crucial, however, in this case was once more context. More precisely, the late prosecution of

[455] Ibid para 51.
[456] Ibid.
[457] Ibid Dissenting Opinion of Judge Türmen.
[458] Ibid.
[459] Ibid.
[460] Ibid.
[461] Ibid.
[462] Ibid.
[463] *Erbakan v Turkey* App no 59405/00 (ECHR, 6 July 2006) paras 8-37.
[464] Ibid para 64.
[465] ibid.
[466] *Féret* (2009) para 75.

the applicant, almost five years after he had delivered the impugned speech, solely on the basis of a video recording of contested authenticity was one of the main considerations that lead the Court to find a violation of Article 10 in this case[467].

As the Court noted the Government failed to establish that there was any "actual risk"[468] or "imminent danger" [469] caused by the prohibited speech[470].Because of this latter reference the Court's approach in *Erbakan* may be viewed as the "most contextual" ever adopted by the Court in "hate speech" cases[471]. Such a view however disregards the rather broad definition of "duties and responsibilities"[472] of politicians given a few paragraphs back, that would later be used in *Féret* to support the finding of non violation of Article 10[473]. Anyhow, a defense of content-based restrictions on incitement to religious hatred in particular was equally advanced in this case, similarly to Judge Türmen's dissent in *Gündüz*, by dissenting Judge Steiner[474].

Looking back at the Turkish cases concerning incitement to violence, as the analysis of the 1999 Grand Chamber "clone" judgments has already indicated, the prevailing tendency within the Court has been to narrow the wide margin of appreciation it had accorded to Turkey in *Zana*[475]. Indeed the weighting of factors similar to the ones considered in *Zana* led to an opposite conclusion in the 2010 *Bingöl* judgment[476]. This is not to say that *Zana* has been "overruled"[477]. The Court remains largely divided when faced with cases of incitement to violence[478]. Moreover there is no binding precedent for the Court in the strict sense of the term[479]. Instead the Court has proceeded on a case by case basis making use of its previous judgments in a rather flexible manner[480].



[467] Ibid para 67.
[468] Ibid para 68.
[469] Ibid para 68.
[470] Ibid para 68.
[471] *See* Oetheimer (n 136) 439.
[472] ECHR art 10(2).
[473] *Féret* (2009) para 75.
[474] *Erbakan* (2006) Dissenting Opinion Judge Steiner.
[475] *see* Buyse (n 152) 496-497.
[476] Bingöl v Turkey App No 36141/04 (ECtHR, 22 June 2010), ibid.
[477] *See* Buyse (n 152) 496-503.
[478] Ibid.
[479] *See* Oetheimer (n 136) 427-429.
[480] Ibid.

A rather paradoxical use of the Court's rationale in *Zana* can be found, for instance, in *Leroy*[481]. The case originated in a fine imposed on a cartoonist and the publishing director of a local newspaper in the French Basque region for a drawing published two days after 9/11, where a depiction of the attack on the World Trade Center was followed by the caption "We have all dreamt of it…Hamas did it"[482]. Similarly to *Zana* the Court reasoned on the basis of the timing and place of the publication to find that there had been no violation of Article 10[483]. The French Basque region was characterized as "politically sensitive"[484], notwithstanding the fact that no violent act justifying such characterization had actually occurred[485]. A vague potential for violence was found to offer in this case sufficient justification for an interference with the applicant's freedom of expression[486].

The standard established in *Zana* was also restated in broader terms and as applicable to all types of "hate speech" cases in the recent Grand Chamber *Perinçek* judgment[487]. Recalling its previous case-law the Court in this judgment identified three factors, which it has considered when ruling on the necessity of interferences with the right to freedom of expression in cases "concerning statements, verbal or non-verbal, alleged to stir up or justify violence, hatred or intolerance"[488]. The factors enumerated are broadly formulated and concern indistinclty both "calls for violence and 'hate speech'", as the relevant section of the judgment is entitled[489].

The first such factor is the existence of "a tense political or social background"[490], which has generally offered justification to state interferences[491]. As examples of such background the Court referred to cases linked to the conflict in South-east Turkey, namely *Zana* and *Sürek*, as well as cases regarding riots that occurred in Turkish

[481] *See* Buyse (n 152) 499-500.
[482] *Leroy v France* App no 36109/03 (ECHR, 2 October 2008) paras 4-17.
[483] Ibid para 45.
[484] Ibid.
[485] Buyse (n 152) 499-500.
[486] Ibid.
[487] *Perinçek* (2015) para 205.
[488] Ibid para 204.
[489] Ibid paras 204-208.
[490] Ibid para 205.
[491] ibid

prisons[492]. Citing *Soulas* and *Le Pen*, the Court also referred to "problems relating to the integration of non-European and especially Muslim immigrants in France"[493]. This latter reference is indicative of the confusing overlap of different types of "hate speech" cases in the Court's case-law[494].

The equation of situations of armed conflict and "deadly prison riots"[495] with "problems relating to the integration of … especially Muslim immigrants"[496] is problematic on different levels. The very formulation of the latter reference is not only vague but absurd. Both cases cited indeed concern anti-immigrant and anti-Muslim speech, the background of allegedly problematic integration of immigrants is not however logically inferred from these judgments, at least no more than a background of endemic racism rooted in the French colonial past[497]. Moreover, contrary to the other two examples provided, no concrete instances of violence or other harmful conduct were associated with the speech restricted in these cases. Such a broad definition of a politically or socially tense background is indeed capable of accommodating every situation framed as a problem by the Court[498].

The second factor identified by the Court as pertinent to the assessment of the necessity of the interference in "hate speech" cases is "whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance"[499]. This also appears to be an all-encompassing standard and the cases cited range from *Incal* to *Kasymakhunov and Saybatalov*[500]. The Court noted that a special consideration in this regard has been the "sweeping" character of statements which attack or cast "in a negative light entire ethnic, religious or other groups"[501]. Again a

[492] Ibid.
[493] Ibid.
[494] Buyse (n 152) 493-494.
[495] *Perinçek* (2015) para 205.
[496] Ibid.
[497] *See* Möschel (n 103) 1661.
[498] *See* Buyse (n 152) 500.
[499] *Perinçek* (2015) para 206.
[500] Ibid.
[501] Ibid.

number of different cases were cited from *Norwood* to *Vejdeland*, where this rather content-centered consideration was identified as pertinent[502].

The third factor, which the Court identified, was "the manner in which the statements were made, and their capacity – direct or indirect – to lead to harmful consequences"[503]. This factor offers some more precision in comparison with the previous ones although again a wide range of cases is cited, from *Karataş*, where violent-prone speech contained in poetry was found to have a lesser impact, thus narrowing the scope for interference, to *Vona* where Hungary's historical context allowed for broader restrictions on the expression of anti-Roma militia groups[504]. Lastly, making it even harder to discern any concrete guidelines, the Court concluded its enumeration of the relevant factors by noting that:

"In all of the above cases, it was the interplay between the various factors rather than any one of them taken in isolation that determined the outcome of the case. The Court's approach to that type of case can thus be described as highly context-specific."[505]

Despite this indeterminacy, the enumeration and subsequent application of these factors on the facts of the *Perinçek* case is important in that it signals a move on the part of the Court towards greater uniformity of its case-law on "hate speech". Indeed, in addition to the above, the Court recalled factors considered in its case-law on Holocaust denial and on "historical debates"[506] and considered them jointly in its judgment in order to find a violation of Article 10[507].

Another noteworthy aspect of the judgment is the balancing exercise that the Court introduced between Article 10 and Article 8 of the Convention[508]. This approach is



[502] Ibid.
[503] Ibid para 207.
[504] Ibid.
[505] Ibid para 208.
[506] Ibid paras 209-220.
[507] Ibid para 226 onwards.
[508] Ibid paras 198-199.

not entirely new as cited recent cases indicate[509]. The fact however that it is endorsed for the first time by the Grand Chamber in a "hate speech" case and is accompanied by an analysis of the Court's overall approach in this area of its jurisprudence is telling of its significance. To engage Article 8 in its analysis, the Court first interpreted "the rights of others"[510], sought to be protected by the interference, as "the dignity, including the identity, of present-day Armenians as … descendants"[511] of the victims "of the events of 1915 and the following years"[512].

The Court then went on to reiterate the general principles governing the balancing of the right to freedom of expression under Article 10 against the right to respect for private life under Article 8[513]. It recalled two judgments and two decisions, which it considered relevant to the case at hand as they concerned they issues of "group identity and the reputation of ancestors"[514]. At a later stage the Court measured "for the purposes of the balancing exercise … the extent to which the applicant's statements affected those rights"[515]. It found in this respect and on the basis of the general principles and the case-law it had analyzed previously that the statements could not be considered as "so wounding to the dignity and identity … as to require criminal law measures in Switzerland"[516] nor "as having the significantly upsetting effect sought to be attributed to them"[517].

In a last step, the Court sought to ascertain that a proper balance was struck between Article 10 and Article 8 by focusing on whether the balancing exercise undertaken by the domestic authorities was in conformity with the Court's case-law[518]. An affirmative answer to this latter question would broaden Switzerland's margin of appreciation and would thus justify the interference at hand[519]. The Court found however that the relevant judgments delivered by the Swiss courts fell short of the

[509] Ibid.
[510] ECHR art 10(2).
[511] *Perinçek* (2015) 155.
[512] Ibid.
[513] Ibid paras 198-199.
[514] Ibid paras 251.
[515] Ibid.
[516] Ibid para 252.
[517] Ibid.
[518] Ibid para 274.
[519] Ibid.

Court's established standards, while its own balancing exercise revealed that there had been a violation of the applicant's rights[520]. Irrespective of the issue whether the Court rightly balanced in this case, the significance of this approach lies in that it introduces a new conception of private harm in "hate speech" cases[521].

The test used in *Perinçek* has already marked a shift in the Court's free speech jurisprudence with regard to defamation cases and has been criticized as overly restricting the protective scope of Article 10[522]. Indeed in *Perinçek* two of the cases cited by the Court when elaborating on the test are cases where the Court had to rule on the limits of the free speech rights of tabloid press towards the private lives of celebrities[523]. The more relevant Grand Chamber *Aksu* judgment, also cited, is significantly different from other "hate speech" cases in that it did not concern an interference with an individual's right to freedom of expression but rather the lack of it[524]. In *Aksu* a Turkish Roma brought a complaint under Article 8, alone and in conjunction with Article 14, alleging that his Convention rights had been violated by anti-Roma expressions contained in three Government-sponsored publications, a book on the Turkish Roma and two dictionaries intended for children[525].

The Court dismissed the complaint under Article 14 ruling that the applicant had "not succeeded in producing prima facie evidence that the impugned publications had a discriminatory intent or effect"[526]. It then proceeded with balancing Article 8 against Article 10 and held that there had been no violation of the applicant's rights under the former provision[527]. The Court's overall approach in this case was criticized by dissenting Judge Gyulumyan, who opposed both the interpretation given by the majority to Article 14 and the balancing exercise, which presumed a conflict between Article 8 and Article 10[528]. His criticism of the interpretation of Article 14 was based

[520] Ibid paras 275-281.
[521] *See* Millar (n 291) 280-282.
[522] Ibid.
[523] The two Grand Chamber judgments cited in *Perinçek* (2015) para 198 are *Von Hannover v. Germany (no. 2)* App nos 40660/08 and 60641/08 (ECHR, 7 February 2012) and *Axel Springer AG v. Germany* App no 39954/08 (ECHR, 7 February 2012).
[524] Ibid, *Aksu (*2012).
[525] *Aksu* (2012).
[526] Ibid para 45.
[527] Ibid holding.
[528] Ibid Dissenting Opinion of Judge Gyulumyan.

on existing criticism of the Court's case-law on hate crimes and concerned in particular the high standard of proof required in these cases by the Court[529]. The criticism is noteworthy as in this case the Court drew an analogy between "hate speech" and defamation while making proof of discrimination impossibly hard for the applicant[530].

In any event, the Court linked *Aksu* to *Perinçek* by reiterating a principle on the balancing of Article 10 and Article 8 of the Convention, namely that "the outcome should not vary depending on whether the application was brought under Article 8 by the person who was the subject of the statement or under Article 10 by the person who has made it, because in principle the rights under these Articles deserve equal respect"[531]. It did not explain however which were the similarities between the two cases and why this balancing, so far absent from the Court's "hate speech" jurisprudence, was the appropriate approach to these cases in the first place[532].

As Dirk Voorhoof notes the judgment came after a series of judgments that left a broad margin of appreciation to Contracting States to interfere with the right to freedom of expression and just one day after the end of a CoE conference questioning the place of freedom of expression as a precondition for democracy in Strasbourg. The Court's reiteration of the heightened protection enjoyed by political speech and the emphasis placed on the right "to express opinions that diverge from those of the authorities or any sector of the population"[533] is welcome in this context as enhancing the protection of freedom of expression[534].



[529] Ibid, *see Anguelova v. Bulgaria* App no 38361/97 (ECHR, 13 June 2012) Partly Dissenting Opinion of Judge Bonello, *see* also Mathias Möschel, "Is the European Court of Human Rights' Case Law on Anti-Roma Violence 'Beyond Reasonable Doubt'?" (2012) Human Rights Law Review 12:3, 479-507, for a criticism of Judge Gyulumyan's dissenting opinion in *Aksu see* Sottiaux (n 8) 56-57.
[530] Ibid.
[531] *Perinçek* (2015) para 198.
[532] Similarly no explanation was given for the shift in approach in defamation cases, *see* Millar (n 291) 280-281.
[533] *Perinçek* (2015) para 271.
[534] Dirk Voorhoof, "Criminal conviction for denying the Armenian genocide in breach with freedom of expression, Grand Chamber confirms", Strasbourg Observers, 19 October 2015 http://strasbourgobservers.com/2015/10/19/criminal-conviction-for-denying-the-armenian-genocide-in-breach-with-freedom-of-expression-grand-chamber-confirms/#more-3005 accessed 25/10/2015, *see* also Council of Europe Conference "Freedom of Expression, Still a Precondition for Democracy?" http://www.coe.int/t/dghl/standardsetting/media/Conf-FoE-2015/default_en.asp accessed 25/10/2015.

The new test introduced however and the conception of private harm it carries should also call for caution[535]. The idea that group or individual dignity collides with the right to free speech undermines the free-standing character of Article 10 and will potentially have far-reaching implications in the future[536]. By privatizing the harm caused by the applicant's statements the Court failed to distance itself from these statements in the way it has done in previous cases concerning negationist and revisionist speech[537]. Presenting Perinçek's statements as an "Armenian problem", the Court failed to acknowledge the potential harms of the applicant's revisionist speech for the wider society[538]. Moreover such a presumed conflict constitutes also a challenge to the basic premise of the current international and regional framework with regard to "hate speech" regulation, namely that freedom of expression and equality are not conflicting but rather compatible and complementary rights. Instead of advancing the protection of either one of the two the endorsement of this rationale may be at the expense of both.

## 2.2. The European Union

### 2.2.1. The 2008 Framework Decision on Racism and Xenophobia

At the level of the European Union the issue of "hate speech" regulation has also been addressed[539]. In 2008 the Framework Decision "on combating certain forms and expressions of racism and xenophobia by means of criminal law"[540] was adopted by the Council of the European Union requiring all member states to criminalize "publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin"[541]. It is further specified that the same act is to be



[535] *See* Millar (n 291).
[536] Ibid.
[537] Uladzislau Belavusau, "*Perinçek v. Switzerland*: Between Freedom of Speech and Collective Dignity", ECHR Blog, 11 November 2015 < http://echrblog.blogspot.gr/2015/11/guest-commentary-on-grand-chamber.html?spref=fb> accessed 15/11/2015.
[538] Ibid.
[539] Bleich (n 60) 23.
[540] Council Framework Decision 2008/913/JHA (n 98).
[541] Ibid art 1(a).

criminalized when committed "by public dissemination or distribution of tracts, pictures or other material"[542].

Furthermore, article 1(1)(c) and (d) of the Decision provides that "publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes defined", in either the Statute of the International Criminal Court or the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, should also be penalized when "directed against" or "carried out in a manner likely to incite to violence or hatred against" a group or an individual member of that group defined by one or more of the above mentioned protected grounds.

According to point 10 of the preamble Member States may adopt "provisions in national law which extend Article 1(1)(c) and (d) to crimes directed against a group of persons defined by other criteria … such as social status or political convictions". This declaration came as a result of the inconclusive efforts of some Member States, particularly from the Baltic region, to explicitly extend these provisions to crimes of Stalinism[543]. This has allowed the adoption of more expansive memory laws not only by post-communist states but also by Member States like Greece, the legislation of which is examined below.

Agreement over a harmonized EU ban on "hate speech" was reached after seven years of deliberations between the Member States[544]. The initial proposal came in 2001 just two months after 9/11 but its focus was not on Islamic radicals but rather on the European anti-Semitic and anti-immigrant far-right[545]. The aim of the proposal was to replace a 1996 Joint Action "concerning action to combat racism and xenophobia"[546], which had a similar content with the "hate speech" provisions of the Framework



[542] Ibid art 1(b).
[543] Justinas Žilinskas, "Introduction of 'Crime of Denial' in the Lithuanian Criminal Law and First Instances of its Application" (2012) Mykolas Romeris University, Jurisprudence, 19(1): 315–329, 319-320.
[544] Belavusau (n 117) 29.
[545] Ibid.
[546] Joint Action 96/443/JHA of 15 July 1996, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia.

Decision currently in force[547]. Joint Actions were the result of efforts for criminal law harmonization prior to the adoption of the Amsterdam Treaty[548]. Their legal force was a subject of controversy and they were not included as third pillar instruments in the Amsterdam Treaty[549].

Despite this lack of binding force Member States, among them the UK and Greece, had inserted declarations expressing their reservations with regard to certain provisions of the Joint Action[550]. More precisely, Greece expressed its reservation with regard to the requirement not to regard the conduct described in the Joint Action as political offences, something that would justify the refusal of mutual assistance[551]. Greece stated that it would interpret this provision in conformity with the Greek Constitution's provisions on political prosecutions[552]. The UK on the other hand stated that it would apply certain provisions only to the extent that they conform with its domestic incitement legislation[553]. These early objections are indicative of the extent of controversy surrounding the adoption of a uniform EU criminal standard on "hate speech"[554].

Following the adoption of the Amsterdam Treaty, controversy over the issue contributed to the long duration of deliberations as well as in the vague wording finally adopted in the 2008 Framework Decision[555]. As has been the case with the ECtHR's approach to the problem examined above, a major source of controversy stems from the blurry distinction between "incitement" and legitimate political speech[556]. In this direction a provision in the 1996 Joint Action requiring the criminalization of participation in racist groups, in accordance with article 4(b) of the ICERD, was omitted from the 2008 Framework Decision[557].

[547] Ibid.
[548] Valsamis Mitsilegas, "The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?" (2009) 34 EUR. L.R. 523-524, 527.
[549] Ibid.
[550] Ibid 530, Joint Action 96/443/JHA of 15 July 1996 (n 505) Annex, Declarations Referred to in Title II.
[551] Joint Action 96/443/JHA of 15 July 1996 (n 505) Annex, Declarations Referred to in Title II.
[552] Ibid.
[553] Ibid, Mitsilegas (n 548) 530.
[554] *See* Mitsilegas (n 548) 530.
[555] Ibid 530-531, Belavusau (n 117) 29.
[556] Ibid.
[557] Joint Action 96/443/JHA of 15 July 1996 (n 505) Title I, A (e).

Similarly a broad exception, reflecting the UK's concerns, was introduced with regard to article 1(1) in article 1(2) of the Framework Decision allowing Member States "to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting". The provision of article 1(1) explicitly covers only "intentional conduct". Given that in the UK intent is not a requirement for the qualification of the offences of racial incitement the provision of article 2(2) may be read as broadening instead of narrowing down the scope of speech regulation[558].

Controversy over religion, as a protected ground, is reflected in the provision of article 1(3), where it is specified that minimal harmonization is required with regard to this ground[559]. More precisely it is provided that "the reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin"[560].

Moreover, unlike other third pillar instruments, the Framework Decision allows considerable discretion to Member States when it comes to penalty levels[561]. Paragraph 2 of article 3 of the Framework Decision provides that the conduct to be proscribed as "hate speech" shall be "punishable by criminal penalties of a maximum of at least between 1 and 3 years of imprisonment". Apart from the wide discretion granted to Member States, this provision raises issues of proportionality under the ECtHR's jurisprudence[562], while it clear contravenes General Comment 34 of the HRC, where it is underlined that the use of criminal law should be a last resort measure for states when regulating "hate speech" while imprisonment is always inappropriate[563].



[558] On the UK legislation *see* the following chapter.
[559] Mitsilegas (n 548) 531.
[560] Council Framework Decision 2008/913/JHA (n 98) art 1(3).
[561] Mitsilegas (n 548) 530-531, Council Framework Decision 2008/913/JHA (n 98) art 3(2).
[562] *See* e.g. *Perinçek* (2015) paras 272-273.
[563] HRC GC 34 (n 48) para 47, *see* also UNHCHR (n 66).

In addition to the above, article 7 of the Framework Decision provides that the Decision shall not affect the Member States' "obligation to respect fundamental rights and fundamental legal principles, including freedom of expression and association, as enshrined in Article 6 of the Treaty on European Union". It is uncertain how this vaguely worded "compromise clause"[564] will potentially affect the implementation of the Framework Decision[565]. It is in any event an indication that legal certainty with regard to "hate speech" regulation and a common understanding of the problems of racism and xenophobia at EU level are still far from being reached[566].

Indicative in this respect is also the fact that although "racism and xenophobia"[567] are among the 32 offences, for which the requirement of dual criminality was abolished by mutual recognition instruments, like the European Arrest Warrant, an exception introduced by Germany holds for the European Evidence Warrant[568]. Moreover the three-year threshold required for dual criminality to be abolished might not always be met given the above mentioned provision of article 3 of the Framework Decision on penalty levels[569].

### 2.2.2. The *Feryn* judgment

The regulation of "hate speech" at EU level comes at the backdrop of the evolving significance of fundamental rights in EU law[570]. The protection of fundamental rights at EU level is complementary to the existing protection at the national level as well as at the level of the CoE[571]. According to article 2 of the Treaty on European Union (TEU) "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". Moreover paragraph 3 of article 6 TEU refers to fundamental rights as protected by the ECHR and the common constitutional

[564] Mitsilegas (n 548) 532.
[565] Ibid 531-532.
[566] Ibid.
[567] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, art 2(2).
[568] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, art 23 (4), *see* Mitsilegas (n 548) 532.
[569] Mitsilegas (n 548) 532, n 61.
[570] Ibid 22-25.
[571] Ibid, *see* also Sionaidh Douglas Scott, "The EU and Human Rights after the Treaty of Lisbon" (2011) 11 (4) *Human Rights Law Review* 645-682, 647.

traditions of Member States as "general principles of the Union's law". All EU Member States are bound by the ECHR and states wishing to join the Union are required by the Copenhagen Criteria to sign up to the Convention[572].

The Lisbon Treaty further reinforced fundamental rights protection by recognizing the binding force of the EU Charter of Fundamental Rights, while it enhanced the link to the ECHR by inserting a specific provision, paragraph 2 of article 6 TEU, providing the legal base for the future accession of the EU to the ECHR[573]. On the other hand, article 19 of the Treaty on the Functioning of the European Union (TFEU) has provided the basis for four directives which proscribe discrimination on the grounds enumerated therein, namely "sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation"[574]. The case-law of the Court of Justice of the European Union (CJEU) has played a pivotal role in the development of the Union's anti-discrimination legislation already from the period of the European Economic Community (EEC)[575].

In this background "hate speech" regulation at EU level raises similar issues to those at the level of the CoE, albeit in a more complex way[576]. This is apparent in the landmark *Feryn* judgment, delivered in 2008 by the ECJ, current CJEU[577]. The case concerned the interpretation of the "Race Directive", which prohibits discrimination "on the grounds of race and ethnic origin" in the fields of employment, social protection, education and access to goods and services[578]. Mr. Pascal Feryn, the director of a company in Belgium, publicly stated that his company could not employ Morrocan immigrants because of the reluctance of his company's customers to give them access to their private residences[579].



[572] According to the Accession Criteria set out by the Copenhagen European Council of 21-22 June 1993.
[573] Belavusau (n 117) 25.
[574] Treaty on the Functioning of the European Union (TFEU) Article 19 para 1.
[575] Evelyn Ellis-Philippa Watson, *EU Anti-Discrimination Law* (Oxford: OUP 2012) 24.
[576] Belavusau (n 117) 20-22.
[577] Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestnijding v. Firma Feryn NV, [2008] ECR I, at 5187.
[578] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, art 3.
[579] C-54/07, *Feryn* (2008) para 16, *see* also Belavusau (n 117) 29-31.

The "Centre for equal opportunities and combating racism", an anti-racist organization, brought the case before the Belgian labor courts arguing that Feryn's statements are in violation of the directive. The case was then referred to the ECJ for a preliminary ruling on whether the statements could be considered as constituting discrimination within the meaning of Directive 2000/43/EC[580]. The organization was allowed by Belgian law to initiate legal proceedings on the basis of the national law transposing the "Race Directive" even in the absence of an identifiable complainant[581]. The Court affirmed at the outset that a finding of discrimination on the basis of the Directive does not presuppose an identifiable victim and domestic law rightly grants the right to associations to bring such a complaint before courts[582].

More importantly, the Court held that:

"The fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of [the Directive] such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market"[583].

Furthermore the Court held that such public statements create a presumption of discrimination, which shift the burden to the employer to prove that the principle of equal treatment was not violated[584].

As Uladzislau Belavusau notes, although there was no discussion of the right to freedom of expression and its limits, *Feryn* sets an important precedent with regard to "hate speech" regulation at EU level as it concerns precisely the discriminatory effects of public speech. The Court indeed did not make a distinction between the statements themselves and their potential discriminatory effects, as the lower Brussels Court did



[580] Ibid para 18.
[581] Ibid paras 21-28.
[582] Ibid.
[583] Ibid para 28.
[584] Ibid para 34.

but held that the utterances themselves constitute direct discrimination[585]. As Advocate General Maduro put it:

"He is not merely talking about discriminating, he is discriminating. He is not simply uttering words; he is performing a 'speech act'. The announcement that persons of a certain racial or ethnic origin are unwelcome as applicants for a job is thus itself a form of discrimination"[586].

Another important aspect of the judgment is that it endorsed a broad understanding of the grounds protected under the Directive[587].Although discrimination on the basis of nationality in EU law is allowed with regard to third-country nationals in a number of areas and most notably when it comes to security and border controls leading often to de facto racial profiling[588], the Court in its judgment read the reference to a particular nationality, i.e. Moroccans, as a reference to "race or ethnic origin"[589]. This interpretation challenges the narrow understanding of race in the European and particularly the EU context as it identifies anti-immigrant speech, at least in the areas covered by the Directive, as a form of direct discrimination[590].

It is important to note however that although the Court affirmed the possibility of a group claim alleging the violation of the Directive at the same time it stressed that such a possibility rests upon the discretion of Member States[591]. Indeed article 13 of the Directive only requires Member States to set up "body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin" while the procedural rights of these bodies are left to be determined by the national authorities[592]. It will therefore be more difficult to initiate proceedings on the basis of similar facts in Member States where an identifiable complainant is required by the law[593]. This divergence among Member States with regard to the



[585] Belavusau (n 117) 29-31.
[586] Opinion of Maduro AG in Case C-54/07, *Feryn* (2008) para 16.
[587] Hermanin, Möschel and Grigolo (n 112) 5-6.
[588] Ibid, *see* Council Directive 2000/43/EC of 29 June 2000 (n 551) para 3(2).
[589] Council Directive 2000/43/EC of 29 June 2000 (n 551).
[590] Ibid.
[591] Ibid 26-27.
[592] Ibid, *see* Belavusau (n 117) 33-34.
[593] Belavusau (n 117) 33-34.

application of the "Race Directive" is characteristic of the inherent perplexity of the project of European integration more broadly and is indicative of the difficulties that the 2008 Framework Decision on the regulation of "hate speech" has to face in this regard[594].

On a different note, it is worth noting that another Framework Decision engaging the notion of "incitement" was adopted by the Council of the European Union on the same day the Framework Decision on racism and xenophobia was adopted[595]. Framework Decision 2008/919/JHA on terrorism calling for the criminalization of incitement to terrorist acts attracted similar criticism with the Framework Decision on racism and xenophobia[596]. More precisely, the Decision has been criticized for creating a "broad and amorphous standard"[597] on incitement to terrorism, which runs contrary to the principle of legal certainty and the protection of fundamental rights[598].

An extensive analysis of EU anti-terrorism law and policy goes beyond the scope of this study. It suffices to note here the lack of definition of "incitement" in either of the two Framework Decisions. This lack of definition is particularly problematic given the lack of distinction between incitement to violence and incitement to hatred in the Framework Decision on racism and xenophobia as well as in the case-law of the ECtHR, which as previously mentioned is authoritative in the EU context[599]. Although it is true that anti-racism and anti-terrorism cannot always be conceptually distinguished, it is important to strive towards separate and clear incitement standards, given the potential for abuse with which post-9/11 anti-terrorism legislation has been associated in several states[600].



[594] Ibid.
[595] Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism.
[596] Ezekiel Rediker, "The Incitement of Terrorism on the Internet: Legal Standards, Enforcement, and the Role of the European Union" (2015) 36 Mich. J. Int'l L. 321-351, 337-342.
[597] Ibid 338.
[598] Ibid 337-338.
[599] *See* ibid 342-345.
[600] *See* Briefing Paper of the Directorate-General, "Human Rights Concerns Relevant to Legislating on Provocation or Incitement to Terrorism and Related Offences", Internal Policies, Policy Department C, Citizens' Rights and Constitutional, March 2008 http://www.statewatch.org/news/2008/apr/ep-incitement-to-terrorism-paper.pdf accessed 23/10/2015.

## 2.3. Conclusion

The ECtHR case-law examined above is indicative of some of the contradictions broadly characterizing the Court's free speech jurisprudence. The lack of clear definition of the notions of "hate speech" and "incitement" means that there are no clear boundaries between this area of the Court's case-law and other areas of its Article 10 jurisprudence[601]. Equally confused are the boundaries between the different forms of expression identified as "hate speech" and/or "incitement"[602]. With the exception of Holocaust denial that has been more or less consistently treated separately so far, the Court's case-law with regard to the different forms of discriminatory, violent-prone or offensive expressions characterized as "hate speech" or "incitement" seems rather confused and inconsistent[603].

In an abstract and often elliptic manner the Court has justified or rejected restrictions placed on the exercise of the right to freedom of expression on the basis of a joint or separate consideration of its alleged inherent qualities or of its context, which in any case provides little guidance for the future. To be sure, I am not arguing that the Court's "hate speech" jurisprudence is unprincipled. On the contrary valuable principles have been elaborated, like the recognition of the privileged position of politicians and journalists and the principle that restraint must be displayed in resorting to criminal proceedings when it comes to speech offences. What appears problematic instead is the inconsistent and contradictory application of these principles[604].

A fixed and automated interpretation of the law is not expected by any court, much less a human rights court[605]. What is expected though is consistency, especially when it comes to charged notions like racist violence, discrimination or intolerance, which describe grave social harms in urgent need of redress[606]. It is understandable that a judicial body which monitors respect for the human rights of approximately 800 million people residing in 47 vastly different states may at times opt for a more

[601] Buyse (n 152) 493.
[602] Ibid, Sottiaux (n 8) 57-58, 61-63.
[603] *See* ibid.
[604] *See* Sottiaux (n 8) 57-58.
[605] See Letsas (n 153).
[606] *See* Möschel (n 529) and Sottiaux (n 8) 61-63.

consensual approach over consistency[607]. On the other hand, human rights law is not consent-based in the sense that other areas of international law are[608].

The ECHR is of course the result of agreement among sovereign states but its force is premised on the morally objective and universal character of the individual rights and freedoms it protects[609]. In this sense judicial discretion was accorded to Strasbourg Judges precisely to safeguard the Convention rights and freedoms against majority conceptions that tend to limit them in one or more Contracting States[610]. The problem with the ECtHR's "hate speech" jurisprudence is not thus that it lacks certainty and predictability in the sense that these features are required in other areas of law but that it lacks coherent reasoning[611]. The Court's approach oscillates between deontological and consequentialist interpretations of Article 10 in ways that often undermine the principles that the Court has developed over time.

This lack of coherence in the Court's approach is troubling in light of the important influence it exercises at the regional level. The harmonized EU criminal ban on "hate speech" reflecting the Court's jurisprudence covers the same loosely defined areas of proscribed speech. At the same time, however, as *Feryn* shows the evolution of EU anti-discrimination law through the jurisprudence of the Court of Justice goes beyond the ECtHR's standards allowing for more concrete responses to the problem. The ECtHR's case-law provides little help with the interpretation of "incitement" in the 2008 EU Framework Decision on racism and xenophobia. In fact the ECtHR's interpretation is so broad so as to extend to the EU's harmonized ban on "incitement to terrorism".

The breadth and ambiguity of the notion of "incitement" in regional and domestic criminal bans on "hate speech" is particularly problematic considering the international efforts of narrowing down the notion in the direction of minimal interference with the right to freedom of expression. It is also problematic with regard

[607] Ibid 295-302.
[608] Ibid 305.
[609] Ibid 294.
[610] Ibid 302-305.
[611] *See* ibid 305.

to the stated goal of such regulation to serve equality and anti-racism. In the absence of specific criteria for the definition of these terms, dangerous racists may find ways around the application of the law while members of minority groups may find themselves in the position of defendants[612]. The examination below of the way incitement legislation has been used in the UK is indicative of some of these problems.

On the other hand, despite important shortcomings, the regional norms on "hate speech" and "incitement" as reflected in the CoE's legal instruments and policies, the ECtHR's case-law and EU criminal law are of great symbolic importance. The regulation of "hate speech" at European level affirms a commitment to the post-war legacy of militant democracy and anti-racism in a context of intense debates across the continent over European identity and immigration[613]. The symbolic function of "hate speech" regulation" is not to be underestimated particularly in states like Greece, where, as discussed below, this commitment has been, even at the symbolic level, rather superficial and fragile.



[612] UNHCHR (n 66) para 11.
[613] Belavusau (n 117) 34.

# 3. The United Kingdom

The past and present of the UK's hate speech legislation illustrate broader European trends in the area but are also as reflective of national particularities, which make it distinct from continental approaches. Contrary to the largely colorblind continental approach to racism the UK has a long tradition of fighting racism by explicitly acknowledging it as a problem, an acknowledgment which included the categorization and naming of races[614]. Because of this distinct approach the UK has played a leading role in the evolution of the current regional anti-discrimination framework, as its relevant legislation has served as a model for EU anti-discrimination law[615]. In what follows, I examine the content and scope of the legislation regulating "hate speech" in Britain and the way it has been implemented from the 1960's to the present.

## 3.1. Overview of the UK's incitement legislation

The roots of "hate speech" legislation in the UK may be traced back to the common law offences of seditious libel and public mischief[616]. Both offences proscribed expression that posed a risk to public order[617]. In the interwar period, legislation targeting organized fascist activity was for the first time enacted[618]. The Public Order Act 1936 criminalized the use of "threatening, abusive or insulting words or behaviour, with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned"[619]. This early legislation provided the basis for the current incitement laws[620]. However, as Mahleila Malik notes, incitement laws may be found even earlier in colonial criminal codes with their function being, in some cases, to censor voices among the colonial subjects, which were critical of the established order[621]. In any event, it was not until the 1960's that race was recognized as a protected ground against incitement to hatred and not until the first decade of the 21st century that religion and sexual orientation gained such status.

[614] Hermanin, Möschel and Grigolo (n 112).
[615] Ibid 3, *see* also Bob Hepple, "Race and Law in Fortress Europe" (2004) 67(1)MLR1-15, 3.
[616] Kenneth Lasson, "Racism in Great Britain: Drawing the Line on Free Speech" (1987) 7 B.C. Third World L.J. 161, 162-165.
[617] Ibid.
[618] Maleiha Malik, "Speech Control", Index on Censorship, No. 4/ 2007, 20.
[619] Public Order Act (POA) 1936, s 5.
[620] Malik (n 618) 20.
[621] Ibid, *see* also Lasson (n 616) 162-165.

The basis of "hate speech" legislation currently in force in the UK is the Race Relations Act (RRA), enacted in 1965[622]. Under Section Six of the Act, a person was guilty of incitement to racial hatred if:

"with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, or ethnic or national origins: (a) he publishes or distributes written matter which is threatening, abusive or insulting, or (b) he uses in any public place or at any public meeting words likely to stir up hatred against that section on grounds of colour, race or ethnic or national origins".

For the qualification of the crime both "intent" and "likelihood" were required[623]. The Act was subsequently amended two times, in 1968 and 1976 and the scope of application of the law was extended, mainly in relation to its anti-discrimination clauses[624]. With regard to the incitement clause, Section Six, the 1976 amendment removed the requirement of proof of the intent to incite racial hatred[625]. On the basis of this amendment only proof of likelihood was required to secure a conviction[626].

The Public Order Act (POA) of 1986 further relaxed the evidentiary burden of the prosecution by requiring either intent or likelihood to exist for the qualification of the crime, instead of requiring the presence of both of these elements[627]. The Act also made it an offence to possess "written material…or a recording of visual images or sounds which are threatening, abusive or insulting"[628] with the intention of displaying, publishing, distributing, or broadcasting if there is intent to stir up racial hatred or when "having regard to all the circumstances, racial hatred is likely to be stirred up thereby"[629].



[622] Bleich (n 60) 20.
[623] Ibid.
[624] Schaffer (n 103) 256.
[625] Lasson (n 616) 171, *see* also Richard Abel, *Speech and Respect*, The Hamlyn Lectures Fourty-Fourth Series (London: Steven & Sons/ Sweet & Maxwell 1994) 84.
[626] Ibid.
[627] Ibid, Public Order Act (POA) 1986 Part III.
[628] POA 1986, s 23.
[629] Ibid.

In the first years of the post-9/11 era, as recorded by Neil Addison, a long heated debate on extending protection against incitement to "religious hatred" culminated in the adoption of the Racial and Religious Hatred Act (RRHA) of 2006. The RRHA 2006 met strong opposition by atheists, comedians but also Evangelical Christians, who, for different reasons, viewed it as a threat to their freedom of speech. On the opposite side, the Muslim Council of Britain was strongly in support of the Act considering as unfair the fact that Muslims, unlike Jews and Sikhs, were not protected from incitement to hatred under the legislation on racial incitement. The main argument of the opposition to the Act was that race and religion are fundamentally distinct concepts, with the latter, unlike the former, being the subject of choice of individuals, and therefore deserving of different protection. This strong opposition to the government's proposals, which aimed to afford religion the same protection against incitement to hatred as the one afforded to race, resulted in the House of Lords amendments, which shaped the Act in its current form. The fact that the final form of the Act is not the one intended by the government of the time means that courts have to rely entirely on its text and cannot refer to the proceedings before the House of Commons and the House of Lords as recorded in Hansard[630].

The RRHA 2006 amended the POA 1986 by inserting to it new "offences involving stirring up hatred against persons on religious grounds"[631]. The Act applies only to England and Wales[632]. However similar legislation has been enacted in Northern Ireland as early as 1987, due to its particular context of national/religious conflict[633]. The offences created by the RRHA have similar structure and scope with the offences related to inciting racial hatred but have, also, certain crucial differences, which create a hierarchy between the two pieces of legislation[634].



[630] Neil Addison, *Religious Discrimination and Hatred Law* (London : Routledge-Cavendish 2007) 139-141.
[631] Racial and Religious Hatred Act (RRHA) 2006, s 1.
[632] RRHA, s 3(4).
[633] Addison (n 630)140.
[634] As is stated in the Memorandum to the Home Affairs Committee on the Post-Legislative Scrutiny of the Racial and Religious Hatred Act 2006, August 2011, para 32: "it is clear that the Act provides a different level of protection for religious groups than that afforded to racial groups, it nonetheless offers a level of protection to the former that they did not have before." https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238156/8164.pdf accessed 26/03/2015.

Firstly, in the case of religious hatred there is a requirement of intent for the offences to be established[635]. Secondly, the offences related to incitement to racial hatred cover "words or behaviour" and "material" that are "abusive" and "insulting" and not just "threatening" as in the case of religious hatred[636]. Thirdly, a saving provision was introduced for the "protection of freedom of expression"[637] in the case of incitement to religious hatred, while no such provision exists for incitement to racial hatred[638]. These differences reflect the extent of controversy surrounding the creation of these new offences and are a result of compromise.

As analyzed by Paul Johnson and Robert Vanderbeck, the most recent reform of the UK's hate speech legislation was no less controversial and confirmed the existence of a hierarchy between the protected grounds. In 2008, the Criminal Justice and Immigration Act (CJIA) amended the Public Order Act 1986 to include sexual orientation in the protected grounds against incitement to hatred. Again, the newly created offences have the same structure as the other incitement offences and the provisions inserted to the POA 1986 regarding sexual orientation are almost identical to those proscribing incitement to religious hatred. The only difference between the two Bills can be found in their respective saving provisions. In the case of sexual orientation the saving provision introduced by the CJIA uses a narrower wording than the one used in the case of religion[639].

Before the enactment of the CJIA 2008, debate in Parliament centered on the possible conflict between the law and freedom of religious speech[640]. The inclusion of a saving provision in the Act was presented as a way of avoiding privileging the protection afforded to sexual orientation over that afforded to religion[641]. Opponents of the saving provision often resorted to essentialist arguments to demonstrate that sexual orientation, unlike religion, is not a choice[642]. However, there was a general consensus that a certain ranking should exist between the different grounds, with race being on

[635] Addison (n 630) 143-144.
[636] Ibid 142-143.
[637] RRHA 2006, s 29J.
[638] Addison (n 630) 144-145.
[639] Paul Johnson and Robert Vanderbeck (n 53) 153-173.
[640] Ibid.
[641] Ibid 157-161.
[642] Ibid.

top[643]. The debate concluded with the creation of a "middle-ranking"[644] threshold for the offences relating to sexual orientation as the wording of the relevant saving provision seems to allow for fewer exceptions in the application of the law compared to the one contained in the RRHA 2006[645].

A common feature of the different pieces of incitement legislation is that the prohibited words, behavior or material have to be directed at groups and not individuals for the crime to qualify. It is "hatred against a group of persons defined by reference to"[646] certain characteristics that is the object of the legislation. These characteristics are "colour, race, nationality (including citizenship) or ethnic or national origins"[647] in the case of racial hatred, "religious belief or lack of religious belief"[648] and "sexual orientation (whether towards persons of the same sex, the opposite sex or both)"[649] in the case of the other two protected grounds. This feature distinguishes incitement legislation from other hate-motivated offences, like "racially or religiously aggravated harassment"[650].

As regards the 2008 EU Framework Decision, the UK, together with Sweden and Denmark objected to its full implementation, in particular in the matter of the requirement to criminalize Holocaust denial[651]. In a Commission Report on the implementation of the Framework Decision, it is argued by the UK that a specific provision criminalizing Holocaust Denial would be redundant since there have been relevant convictions under the existing incitement legislation. Moreover, it is stated that the notion of "hatred" under UK law includes the notion of "violence" and no change in the wording is needed for domestic legislation to be in compliance with the Decision[652].

[643] Ibid.
[644] Ibid 161.
[645]Ibid 153-173.
[646] POA 1986, part 3 and 3A, s 29, 29A, 29AB.
[647] POA 1986, part 3, s 29.
[648] POA 1986, part 3A, s 29A.
[649] POA 1986, part 3A, s 29AB.
[650] Protection from Harassment Act 1997, s 2 and 4.
[651] Harris (n 109).
[652] Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, Brussels, 27.1.2014, COM(2014) 27 final, 3 http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf accessed 21/03/2015.

## 3.2. Implementation of the incitement legislation

### i. The Race Relations Act 1965-1978

It is widely argued that the implementation of incitement laws in the UK has been from the outset rather disappointing in countering racism and discrimination[653]. Critiques of the legislation have pointed to its rare and paradoxical implementation, as already under the Race Relations Act of 1965, among the first to be prosecuted were members of racial minority groups[654]. However, as Gavin Schaffer notes, prosecutions under the incitement section of RRA 1965 were not as marginal as commonly perceived and were brought against different kind of speakers, immediately after the Act's enactment[655].

The first prosecutions under the RRA are, according to Schaffer, reflective of a complex government policy with regard to racism and immigration. As he points out, the decision for someone to face criminal charges for incitement has always been a governmental one, since any prosecution requires the consent of the Attorney General. Although there is no consensus among historians as to the exact political motives behind the enactment of the RRA 1965 and its actual effect, Schaffer identifies "three patterns of criminal prosecution" which reveal a concern of the authorities that had to do more with the containment of political violence rather than the fight against racism and the protection of racial minority groups. Prosecutions under the RRA 1965 were brought against three categories of speakers: fascists, "moderate" racists and Black Power activists, and had different outcomes[656].

Among the first to be prosecuted under Section Six, the incitement clause of the RRA 1965, were fascists[657]. The first prosecution was brought against Christopher Britton, a young fascist convicted at first instance for placing at the front door of the house of

[653] Schaffer (n 103) 273, *see* also Abel (n 625) 82 and Paul O' Higgins, *Censorship in Britain* (Nelson 1972) 21-24.
[654] Ibid.
[655] Ibid 251-258.
[656] Ibid.
[657] Ibid.

a Member of Parliament a pamphlet entitled "Blacks not wanted here"[658]. Britton's conviction was overturned on appeal[659]. His actions were not deemed by the Court to constitute "distribution" within the meaning of Section 6(2) RRA 1965 and the fact that he attempted to communicate his views to an MP could not be considered to constitute incitement of the population to racial hatred[660].

Shortly after Britton's prosecution, two other fascists were convicted under Section Six of the RRA 1965 for "distributing insulting written matter which was likely and intended to stir up hatred against a section of the public in Great Britain"[661]. The two men, Collin Jordan and Peter Pollard, were sentenced to 18 months in prison and 3 years probation respectively for distributing a leaflet, which targeted black immigrants and had the title "The Coloured Invasion"[662]. Jordan was the leader of a neo-Nazi party, the National Socialist Movement (NSM) and had been convicted for his political activities already before the RRA 1965 was enacted[663]. Pollard, on the other hand, was a simple member of the NSM[664]. Aware of being a potential target of the recently enacted legislation, Jordan had included in the leaflet a disclaimer that there was no intention of promoting racial hatred[665]. Before the Court he argued that he merely wished to address "grave national dilemmas"[666]. In determining his intent to stir up racial hatred, the jury was instructed to "consider the policy and purposes of the National Socialist Movement"[667]. A few months later another member of the NSM was convicted for urging two young people to distribute racist material[668].

The convictions of Jordan and of the two members of his party, as opposed to the overturning of Britton's conviction are indicative of the unwillingness of the Courts of the time to apply the RRA 1965 to "small-scale isolated incidents of group libel"[669]

[658] Lasson (n 616) 168 and Schaffer (n 103) 258.
[659] Lasson (n 616) 168.
[660] Ibid.
[661] Schaffer (n 103) 258-263.
[662] Ibid.
[663] Ibid.
[664] Ibid.
[665] Ibid.
[666] Lasson (n 616) 168.
[667] Ibid.
[668] Ibid.
[669] Ibid.

but rather to organized activity, which potentially posed a threat to public order[670]. Jordan and his party, with its unapologetic anti-Semitism, were seen as such a threat and the prosecutions brought against him and his party members were part of the legacy of anti-fascist policies of the interwar and Second World War period[671]. As Schaffer notes, the need to fight against anti-Semitism and protect the Jewish communities had been recognized since the 1930's by most Parliamentarians and provided the main motivation for the enactment of incitement legislation[672]. With a renewed wave of anti-Semitism almost immediately after the end of WWII in the UK[673], the RRA 1965 was seen as a way of ensuring that the horrors of the Holocaust would never be repeated[674].

Emphasis was, also, placed on the need to protect black immigrant communities, which were growing at the time[675]. The need to protect black immigrant communities was linked by Parliamentarians to the need of taking action against anti-Semitism, as the growth of immigrant communities was perceived to pose a risk of rising racism[676]. This line of reasoning is apparent in the statement of the Solicitor-General at the time:

"What we seek to do in the Bill is to prevent arising in this country in relation to the coloured immigrants the kind of situation which arose in relation to the Jews in this country in 1935 and 1936"[677].

Nonetheless, at the same time with the RRA 1965, restrictive legislation with regard to immigration was also enacted[678]. Indeed, the ambiguous stance of the authorities towards the immigrant communities of the time is made obvious by the first prosecutions carried out under the RRA 1965. In 1967, not only fascists but also activists of the Black Power movement were prosecuted[679]. The first Black Power

[670] Ibid.
[671] Schaffer (n 103) 258-263.
[672] Ibid.
[673] Lasson (n 616) 163.
[674] Schaffer (n 103) 258-263.
[675] Ibid.
[676] Ibid.
[677] Ibid.
[678] Ibid 251-258, see also Abel (n 625) 83.
[679] Lasson (n 616) 169.

activist to be convicted for incitement to racial hatred was Michael Abdul Malik[680]. He was sentenced to twelve months imprisonment[681] for giving a speech in a Black Power gathering, where among other things he stated "[i]f you ever see a white laying hands on a black woman, kill him immediately"[682]. Shortly after his conviction, four other Black Power activists were fined for "anti-white speeches" that they gave at Hyde Park[683].

Schaffer notes that the importance and influence of the Black Power movement in the UK was at the time exaggerated by the media. Fears that the militancy and violent resistance of the black communities in the United States (US) could spread to the other side of the Atlantic turned rather marginal figures within the black communities into heroes. These convictions gave the RRA a bad reputation among racial minorities and persuaded many of the biased character of its implementation. This perception was reinforced by the fact that while the convicted activists did not have any significant influence on the public, at the same time, MPs, like Enoch Powell, could publicly make racist speeches without being prosecuted[684].

In confirmation of this perception came in 1969 the *R v Hancock* judgment, delivered by the Lewes Crown Court[685]. In *Hancock*, five members of a racist organization, the Racial Preservation Society (RPS), were acquitted of intending to stir up racial hatred under the amended RRA 1968[686]. The five members of the RPS were charged after a liberal MP found a copy of their newspaper, the "Southern News" in his mailbox[687]. The newspaper contained allegations about the potentially damaging impact of immigration and "racial mixing"[688] on Britain and manifested the commitment of the group to prevent the black population from rising[689]. As in the case of Jordan, the

[680] Also known as Michael X because of his association with Malcolm X, *see* Schaffer (n 103) 269-274.
[681] Lasson (n 616) 169.
[682] Schaffer (n 103) 269-274.
[683] Ibid.
[684] Ibid, *see* Enoch Powell's "Rivers of Blood Speech" http://www.telegraph.co.uk/comment/3643823/Enoch-Powells-Rivers-of-Blood-speech.html accessed 22/03/2015.
[685] Lasson (n 616) 169.
[686] Ibid.
[687] Ibid.
[688] Schaffer (n 103) 263-268.
[689] Ibid.

leaflet contained a disclaimer "Not hate"[690]. Moreover, any obviously threatening language was avoided and expert-like language was used[691].

The use of moderate language by the RPS proved decisive, as the Court accepted that intent to stir up racial hatred could not be proven[692]. As had happened before and would happen after this case[693], the acquitted members of the RPS had the opportunity to portray themselves as martyrs, reprinting the impugned issue under the banner "The Paper the Government Tried to Suppress"[694]. The judgment confirmed what had become evident to organized racist and fascist groups already from the time of Jordan's conviction, that as long as violence is not present in their rhetoric and anti-Semitism is not overt, the expression of racism would not bring them any trouble with the authorities[695].

This approach of the British Courts was affirmed in 1978, in the controversial acquittal of John Kingsley Read, then chairman of the British National Party (BNP)[696]. Kingsley Read was charged under the amended RRA 1976 after delivering a speech in a BNP gathering, where he referred to "niggers, wogs and coons"[697] and commented on the racist murder of a Sikh schoolboy with the phrase "One down, a million to go"[698]. Judge Neil McKinnon, who delivered the judgment, instructed the jury that "reasoned argument in favour of immigration control or even repatriation" was not covered by the law on incitement[699]. Moreover, he advised the defendant, following his acquittal, to "use moderate language"[700] when propagating his views[701].

[690] Ibid and Lasson (n 616) 169.
[691] Ibid.
[692] Ibid.
[693] Philip Johnston, "Prosecutors may face problems over BNP charges", The Telegraph, 15 Dec 2004 http://www.telegraph.co.uk/news/uknews/1479013/Prosecutors-may-face-problems-over-BNP-charges.html accessed 22/03/2015.
[694] Lasson (n 616) 169.
[695] Schaffer (n 103) 268.
[696] Lasson (n 616) 170, *See* also Abel (n 625) 83-84.
[697] Ibid.
[698] Ibid.
[699] James Kelman, *And the Judges Said: Essays* (Polygon 2008), *see* also Abel (n 625) 83-84.
[700] Lasson (n 616) 170, according to Kelman (n 699) and Abel (n 625) 84 the judge said: "try to avoid involving the sort of action which has been taken against you".
[701] Ibid.

Following protests from black and Asian barristers, judge McKinnon was disallowed to hear cases involving race relations[702].

The same year Read was acquitted, another prosecution brought against two members of the "British Movement" who had ranted the Warwick marketplace with racist messages also led to their acquittal on the basis of a rather odd rationale[703]. The two activists had employed similar language with Read stating inter alia that "[it] was shocking that white nurses should have to shave the lice ridden hair of these people…a nurse wiping froth off a coon's mouth and, as a result, dying of rabies. That is what these black bastards are doing to us"[704]. The jury in this case accepted the argument of the defense that because the views expressed were so extreme "what was stirred up more than anything was sympathy for the coloured people"[705].

Although the removal of the requirement of intent aimed, according to the Home Office, precisely at capturing the "less blatantly bigoted"[706] racist speech the cases of Kingsley Read and the two British Movement members indicate that the amended legislation was not particularly successful in this respect[707]. During the first four years after the 1976 amendment 15 out of the 21 prosecutions ended with a conviction[708]. The penalties imposed consisted mainly in fines and suspended prison terms[709]. Moreover, during the same period the Attorney General denied to prosecute in two cases of publication anti-Semitic and racist material reasoning that "enforcement will lead inevitably to law breaking on a scale out of all proportion to that which is being penalised or to consequences so unfair or so harmful as heavily to outweigh the harm done by the breach itself"[710].



[702] LBC/IRN, "Judge McKinnon race controversy" <http://bufvc.ac.uk/tvandradio/lbc/index.php/segment/0000500305013> accessed 19/03/2015, *see* also "Lawyers react to UK judge decision", The Sydney Morning Herald – 16 Jan 1978 https://news.google.com/newspapers?id=YZ9WAAAAIBAJ&sjid=I-cDAAAAIBAJ&pg=1928%2C4561641 accessed 19/03/2015.
[703] Abel (n 625) 84.
[704] Ibid.
[705] Ibid.
[706] Ibid.
[707] Ibid.
[708] Ibid 84-85.
[709] Ibid 85.
[710] Ibid.

The implementation of the Race Relations Act is indicative more of a public order rather than an equality-oriented agenda on the part of the authorities. Although the Act has been to a certain extent successful in containing neo-Nazi speech, it targeted members of minority groups and offered a status of martyrdom to advocates of racialist theories. It is perhaps this precedent of unsuccessful prosecutions under the RRA that made the Attorney General cautious, in the following decades, to bring cases before the courts[711]. In recent years, prosecutions brought under the Public Order Act 1986 interestingly seem to follow to a certain extent those early patterns of the 1960's and 1970's.

### ii. Recent cases under the Public Order Act 1986

The Public Order Act (POA) 1986 was enacted at a period of social turmoil in the UK and provided police with enhanced powers to contain protests and riots[712]. In this context, the further relaxation of the evidentiary standard with regard to racial incitement was criticized as being part of a broader strategy on the part of the government to stifle free association and expression and for leaving room to arbitrariness in the application of the law[713]. However the easing of the Crown's evidentiary burden under POA 1986 did not bring more prosecutions for incitement to racial hatred[714]. Instead, according to a report by the Home Affairs Select Committee, only eighteen prosecutions were brought under the incitement provisions of the POA 1986 until 1994[715], two less than the reported prosecutions brought under the RRA 1965 and 1968[716], both of which retained a higher threshold for prosecution.

In the 2000's and the first years of the current decade the number of prosecutions for racial incitement does not seem to have increased in comparison with previous decades. In 2005 and 2006, two rather low-profile cases ended with the convictions of two individuals, in separate proceedings, for stirring up racial hatred after they



[711] Lasson (n 616) 170-172.
[712] Helsinki Watch, The Fund for Free Expression, *Restricted Subjects* (1991) 18-19.
[713] Ibid.
[714] Frederick M. Lawrence, "Memory, Hate, And Bias Violence" in Minow (n 4) 144.
[715] Richard Collins, Cristina Murroni, *New Media, New Policies: Media and Communications Strategy for the Future* (Polity 1996) 104-105.
[716] Lasson (n 616) 170.

published hateful messages in the public space and on the internet respectively[717]. In the first case, a man named Stephen Dempsey placed racist notes on public spaces in the small English town where he was living[718]. His messages were posted near schools, inside magazines and books sold in bookstores, in phone booths, on bus stops and outside houses[719]. He was sentenced to three years imprisonment[720]. In the second case, a man named Neil Martin was convicted for incitement to racial hatred after posting racist messages on a website dedicated to the memory of a victim of a racially motivated hate crime[721]. He received a sentence of two years and eight months imprisonment[722].

In 2006 the BNP leader, Nick Griffin, and an activist of the party, Mark Collett, were acquitted by the Leeds Crown Court on charges of inciting racial hatred[723]. The charges were brought against them after the BBC showed in 2004 a secretly filmed documentary with the name "The Secret Agent"[724]. In this documentary the two men were shown saying that Islam is a "wicked, vicious faith" and that Muslims are turning the UK into a "multi-racial hell hole"[725]. Moreover Collett was shown repeatedly referring to asylum-seekers as "coakroaches"[726]. During the trial, defense relied mainly on the fact that the audience of the impugned statements was like-minded partisans and that the statements that made headlines were taken from the context of otherwise wholly legitimate political speech, arguments that proved persuasive for the jury[727].

[717] *See* "Stephen Dempsey" and "Neil Martin" in The Crown Prosecution Service (CPS), "Violent Extremism and Related Criminal Offences" http://www.cps.gov.uk/publications/prosecution/violent_extremism.html#a5 accessed 22/03/2015.
[718] "Man put hate mails in mags", The Chester Chronicle, 26 Oct 2005 http://www.chesterchronicle.co.uk/news/chester-cheshire-news/man-put-hate-mail-mags-5279666 accessed 22/03/2015.
[719] CPS (n 717).
[720] Ibid.
[721] Ibid.
[722] Ibid.
[723] "BNP Leader cleared of race hate", BBC News, 10 Nov 2006 http://news.bbc.co.uk/2/hi/uk_news/england/bradford/6135060.stm accessed 22/03/2015.
[724] Ibid.
[725] "Tougher race hate laws considered", BBC News, 11 Nov 2006 http://news.bbc.co.uk/2/hi/uk_news/politics/6137722.stm accessed 22/03/2015.
[726] "Cabinet rethinks race hate laws after jury frees BNP leaders", The Guardian, 11 Nov 2006 http://www.theguardian.com/media/2006/nov/11/broadcasting.farrightpolitics accessed 22/03/2015.
[727] Ibid.

The case provoked public debate regarding the effectiveness of the incitement legislation and Government officials pointed to the need of its reform[728]. However, with the acquitted Griffin having the opportunity to portray himself as a martyr of state censorship, concerns were raised as to whether more bad than good was done by incitement laws in the direction of combating racism[729]. The television coverage of the moments the two men exited the court cheered by their supporters has been described by the BNP as its "greatest publicity coup ever"[730]. The widely publicized acquittal of Griffin and Collett, almost three decades after the acquittal of Kingsley Read, offered a confirmation to the view that convicting organized racists on incitement charges was not an easy task[731].

Instead, in the context of the post-9/11 anti-terrorism campaigns, members of minority groups would become anew the target of the incitement legislation. This time Islamist extremism was put on the spot. The first such prosecution and conviction in the UK came in 2003, against a Jamaican-born Muslim cleric, Abdullah el-Faisal, who, in his speeches, urged his audience to wage a holy war against those that he deemed as non-believers[732]. The charges against him were brought after a tape of one of his lectures was found in his car during an anti-terrorist operation[733]. El-Faisal received a harsh sentence that gave the tone of zero-tolerance on the part of the state towards similar prospective cases. More precisely he was sentenced "to seven years for soliciting murder, 12 months to run concurrently for using threatening and insulting words and a further two years - to run consecutively - for using threatening and insulting recordings"[734].

Two years later, in 2006, another Muslim cleric, Abu Hamza al-Masri, would face trial on charges of racial incitement[735]. Abu-Hamza is widely known for being one of



[728] Ibid.
[729] Malik (n 618) 19-20.
[730] Nigel Copsey and Graham Macklin, *British National Party: Contemporary Perspectives* (Routledge 2011) 98.
[731] Malik (n 618) 19-20.
[732] "Hate preaching cleric jailed", BBC News, 7 Mar 2003 http://news.bbc.co.uk/1/hi/england/2829059.stm accessed 22/03/2015.
[733] *R v El-Faisal* [2004] EWCA Crim 456.
[734] BBC (n 705).
[735] *R v. Abu Hamza* [2006] EWCA Crim 2918.

the applicants in the ECtHR case of *Babar Ahmad and Others v. UK*[736], which delayed his removal to the US and strained relations between the UK and the ECtHR[737]. Similarly to El-Faisal, Abu Hamza was charged after recordings of some of his speeches were found in his possession together with volumes of the "Afghani Jihad Encyclopaedia"[738], a manual on how to make explosives, containing recommendations on where to target terrorist attacks[739]. The same year, three men were prosecuted for stirring up racial hatred, after they took part in an unauthorized protest outside the Danish embassy in Central London concerning the Muhammad cartoons controversy[740]. The racial hatred charges brought against them concerned chants and banners during the protest that called for the murder of British soldiers in Iraq and the commission of terrorist acts in Europe and the US[741]. The following year, the men received sentences on charges of racial incitement ranging from three to four years imprisonment, sentences, which were subsequently reduced on appeal[742].

The convictions of Islamist extremists for incitement to racial hatred can be viewed as examples of the politically charged application of the relevant legislation. To be sure, the speeches, for which they were convicted, can hardly be said to fall out of the standard meaning of racial incitement[743]. The way, however, in which the prosecutions were carried out, in an anti-terrorist context, at least in the cases of El-Faisal and Abu Hamza, can be viewed as indicative of the priority public order interests have been accorded over the protection of minorities in the application of the law. As in the case of Griffin and Collett, the cases received much publicity from the media giving the impression that Part 3 POA 1986 not only fails to protect minorities but instead is used against them[744].

[736] *Babar Ahmad and Others v. the United Kingdom*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, ECtHR 2012.
[737] "A tangled, telling legal saga concludes in a New York court", The Economist, 24 May 2014.
[738] *Abu Hamza* (n 735).
[739] Jeremy Britton, "Key to proving Hamza's hate", BBC News, 7 Feb 2006 http://news.bbc.co.uk/2/hi/uk_news/4670906.stm accessed 22/03/2015.
[740] Dominic Casciani, "The angry young men jailed over protest" http://news.bbc.co.uk/2/hi/uk_news/6903445.stm accessed 22/03/2015.
[741] "Cartoon Protest Muslims jailed for six years" http://www.telegraph.co.uk/news/uknews/1557867/Cartoon-protest-Muslims-jailed-for-six-years.html accessed 22/03/2015.
[742] *See* "Cartoon Protesters" in CPS (n 717).
[743] As mentioned above anti-Semitism has historically been the primary target of racial incitement legislation and in most cases of prosecution against Islamist extremists, anti-Semitism has been present.
[744] Malik (n 618).

Nonetheless, contrary to the perception that far-right speakers are no longer targeted by the legislation, recent prosecutions seem to confirm the limits that have been set by the courts on far-right hate speech already from the 1960's. In 2009 and 2010, in two separate proceedings, four neo-Nazis were convicted for inciting racial hatred[745]. Simon Sheppard and Stephen Whittle are said to be the first in the UK to be convicted for stirring up racial hatred online, through a foreign website[746]. The two men printed leaflets and managed websites in the US containing racist material. The impugned online and printed material targeted Jews, blacks, Asians and other groups but emphasis was placed mostly on the anti-Semitic material during trial[747]. The denial and trivialization of the Holocaust and the "obnoxious and abhorrent"[748] character of the overall material determined the outcome of the case[749].

It is noteworthy that the defendants tried to escape punishment by travelling to the US to request asylum[750]. Hoping to take advantage of an assumed lack of jurisdiction of the UK over publications made on a foreign website, the two men were finally returned to the UK to serve their sentences[751]. Setting apart the irony of two racists attempting to take advantage of the asylum-seeking system, the case sets an important precedent with regard to online hate speech[752]. With regard to online publications, the High Court of Justice noted that "the offences of displaying, distributing or publishing racially inflammatory written material do not require proof that anybody actually read or heard the material"[753]. A year later, two other neo-Nazis were convicted by the Liverpool Crown Court for creating and administering a racist and anti-Semitic



[745] Jon Kelly, "The neo-Nazi 'asylum seekers", BBC News, 10 Jul 2009 http://news.bbc.co.uk/2/hi/uk/8010537.stm accessed 22/03/2015, and "Neo-Nazis jailed over anti-Jewish Internet posts", BBC News, 25 Jun 2010 http://www.bbc.co.uk/news/10413611 accessed 22/03/2015.
[746] Ibid, although the conviction of Neil Martins discussed above which also concerned online activity precedes theirs.
[747] Ibid.
[748] Ibid.
[749] Ibid.
[750] Ibid.
[751] Ibid.
[752] Ibid.
[753] *R v. Sheppard* [2010] EWCA Crim 65, para 35.

website with the name Aryan Strike Force (ASF), whose stated goal was "the eradication of ethnic minorities from Britain"[754].

Recent convictions under Part 3 of the POA 1986 concern Facebook users, who, during the riots of August 2011, posted comments like "[l]et's do our riot different. Let's burn all the Paki shops and takeaways"[755] and "bring the kkk"[756]. The same year, a man was also convicted for "possessing threatening, abusive, or insulting material likely to stir up racial hatred with a view to distribution of the material contrary to section 23 Public Order Act 1986"[757], after he ordered CDs of neo-Nazi music bands[758]. In January 2014, a 24-year-old man received a sentence of 12 months imprisonment by the Wolverhampton Crown Court for posting on Youtube and Facebook footage of himself in a far-right demonstration and concert where he was wearing a Ku Klux Klan costume and was holding a large golliwog doll[759]. He was convicted of "distributing a recording of visual images intended to stir up racial hatred"[760].

More recently, in September 2015 a young man from Somerset was charged with publishing or distributing written material intended to stir up racial hatred"[761] after he allegedly posted on Twitter material related to a neo-Nazi march planned to take place in an area of North London with a significant Jewish community[762]. The march was later moved to Central London and the defendant was remanded in custody awaiting trial set to take place in December this year[763]. Although, the new millennium brought

[754] CPS, "Michael Heaton and Trevor Hannington convicted", 25 Jun 2010. http://www.cps.gov.uk/news/latest_news/124_10/ accessed 22/03/2015.
[755] *See* "Hartshorn" in CPS (n 717) and "Grimsby man jailed over Facebook race-hate posts", BBC News, 4 November 2011 http://www.bbc.com/news/uk-england-humber-15600667 accessed 22/03/2015.
[756] *See* "Burgess" in CPS (n 717).
[757] *See* "Michael Cowen" in CPS (n 717).
[758] Ibid.
[759] Steven Morris, "Jail for man who wore Ku Klux Klan outfit and posed with lynched golliwog", The Guardian, 8 January 2014 http://www.theguardian.com/uk-news/2014/jan/08/jail-klu-klux-klan-golliwog-christopher-philips accessed 30/10/2015.
[760] Ibid.
[761] Steven Morris and agency, "Man denies inciting racial hatred before planned Golders Green march", The Guardian, 21 September 2015 http://www.theguardian.com/uk-news/2015/sep/21/man-denies-inciting-racial-hatred-before-planned-golders-green-march accessed 30/10/2015.
[762] Ibid, *see* also "Somerset man denies inciting racial hatred ahead of march", BBC News, 21 September 2015 http://www.bbc.com/news/uk-england-34314349 accessed 30/10/2015.
[763] Ibid.

new challenges to the implementation of the POA 1986, like the rise of Islamic terrorism and the increasing influence of the Internet in social life, the basic logic, under which prosecutions are brought and judgments delivered in cases of racial hatred, does not seem to have changed significantly. Rather, standards developed under the RRA 1965 still appear to be valid. It is interesting to see how these standards will affect the implementation of the more recent incitement legislation with regard to religion and sexual orientation.

### iii. Prosecutions under the new offences relating to incitement to hatred on the grounds of religion and sexual orientation

Islamophobia and the lack of protection for Muslims under the existing incitement legislation had been addressed by the government already from 2001 and had been the object of a number of failed legislative attempts before the enactment of the RRHA 2006[764]. Griffin's acquittal for racial incitement was presented by legislators as providing justification to criminalize incitement to religious hatred[765]. However the implementation of the RRHA 2006 so far shows that its enactment aimed rather at providing the authorities with a clearer basis for prosecuting Islamist extremists. The first and only successful prosecution so far under the RRHA 2006 was brought against a young radical Muslim, Bilal Ahmad, in 2011[766].

In 2010, Ahmad published on a US based website threats against British MPs who had voted in favor of the war in Iraq[767]. He called on Muslims to "raise the knife of jihad" against those MPs, providing a full list of their names and personal contact details[768]. His messages were posted on the website the day Roshonara Choudhry, the attempted murderer of a British MP, was convicted[769]. The conviction of Ahmad is

[764] Addison (n 630) 139.
[765] The Guardian (n 726).
[766] Caroline Davies, "Radical Muslim jailed for calling for jihad against MPs", The Guardian, 29 Jul 2011 http://www.theguardian.com/world/2011/jul/29/radical-muslim-bilal-ahmad-jailed accessed 22/03/2015, *see* also CPS, "CPS statement on Bilal Ahmad", 29/07/2011 http://www.cps.gov.uk/news/latest_news/cps_statement_on_bilal_ahmad/ accessed 22/03/2015.
[767] Ibid.
[768] Ibid.
[769] Ibid, about the case of R. Choudhry *see* Vikram Dodd, "Profile: Rochonara Choudhry", The Guardian, 2 Nov 2010 http://www.theguardian.com/uk/2010/nov/02/profile-roshonara-choudhry-stephen-timms accessed 22/03/2015.

indicative of the breadth of the notion of "religious hatred"[770]. Section 29A of the RRHA 2006 defines "religious hatred" as "hatred against a group of persons defined by reference to religious belief or lack of religious belief".

As Neil Addison notes, the words "lack of religious belief" refer not only to atheists but to anyone, who does not share "a specific interpretation of religious belief held"[771] by the perpetrator of the crime[772]. In this way the RRHA 2006 aims, at the same time, to punish the vilification of religious groups and the calls for hatred and violence by religious fundamentalists. According to the Memorandum to the Home Affairs Committee on the implementation of the RRHA 2006, until 2011, apart from the case of Ahmad there have only been one acquittal and a drop of charges[773]. This may be explained, according to the same document, by the amendments introduced by the House of Lords, which narrowed considerably the scope of the Act and made convictions difficult to achieve[774].

Lastly, implementation of the most recent legislation criminalizing stirring up "hatred on the grounds of sexual orientation"[775] has also resulted in one sole conviction so far[776]. Three Muslim men, who distributed leaflets advocating the death penalty for those engaging in homosexual acts, were convicted by the Derby Crown Court in 2012[777]. They received custodial sentences ranging from fifteen months to two years[778]. Although a sole conviction cannot lead to any safe conclusions, it is noteworthy that it concerns members of a religious group, taking into account the focus on the freedom of religious speech in Parliamentary debate prior to the CJIA's enactment[779].



[770] RRHA 2006, s 29A.
[771] Addison (n 630) 141-142.
[772] Ibid.
[773] Memorandum (n 634) 7-9.
[774] Ibid.
[775] CJIA 2008, s 74.
[776] Johnson and Vanderbeck (n 53) 156.
[777] Ibid.
[778] "Derby men jailed for giving out gay death call leaflets" BBC News, 10 Feb 2012 http://www.bbc.com/news/uk-england-derbyshire-16985147 accessed 22/03/2015.
[779] Johnson and Vanderbeck (n 53) 161-163.

## 3.3. Conclusion

A quick overview of the incitement legislation in the UK and its implementation allows for certain general conclusions to be reached. Firstly, the particular historical context is crucial for understanding what may and may not be included under the notion of "incitement to hatred". As has been demonstrated above, in different periods and according to the prevailing public order concerns, different speech acts may be identified as "incitement" and different speakers may be held liable for the related offences. Secondly, although largely contingent on historical and political shifts, the interpretation and application of the relevant legislation has followed certain standard patterns, which are reflective of the roots of this legislation in the period of formation of contemporary international human rights law. From the enactment of the Race Relations Act 1965 to the present, incitement legislation has set certain clear limits on public expression, which have reshaped, rather than eradicated racist speech in Britain[780].

The requirement of consent of the Attorney General for the validity of any prosecution means that political considerations have influenced greatly the way incitement law has been used. This is apparent in the early prosecutions, brought during the 1960's and 1970's, with the rather imbalanced decision to prosecute Black Power activists but not high profile anti-immigration campaigners like Enoch Powell[781]. Also, courts have generally proven more willing to convict members of minorities than organized racist groups that express a more "normalized"[782] form of hate speech. This could be said for the early prosecutions, with the acquittal of the members of the RPS and Kingsley Read, as well as for the more recent ones, with the acquittal of Nick Griffin.

This has been the case, of course, as long as the speech of organized racists has remained within certain limits. Public incitement to hatred by Neo-Nazis has in most cases been treated with zero tolerance by the authorities, from the time of the conviction of Colin Jordan until today. This is perhaps the only standard pattern in the

[780] Schaffer (n 103) 262-263.
[781] Schaffer (n 103) 274.
[782] I borrow the term from Maleiha Malik in "Religious Freedom, Free Speech and Equality: Conflict or Cohesion?", Springer Science + Business Media B.V, 28.

use of the law and it has had a profound effect on the way the British far-right operates, pushing overt anti-Semitism out of the mainstream. Otherwise, the early tendency of the courts to be lenient on small-scale cases, like in the case of Britton, is no longer observed, as is evident in the convictions of Dempsey and the more recent convictions of individual Facebook users.

The above remarks concern racial incitement legislation and not the more recently created offences of religious hatred and hatred on the grounds of sexual orientation. With regard to the latter offences, it is hard to assess whether the scarcity of prosecutions and convictions is due to the higher threshold that has to be met or to other factors. In any case, the two existing convictions do not seem to confirm the fears and expectations of Parliamentarians, which were expressed prior to the enactment of these pieces of legislation[783]. Rather they could be viewed as indicative of contemporary public order concerns and the broader targeting of radical Islamist speech.



[783] Johnson and Vanderbeck (n 53) 161-163 and Addison (n 630) 139-141.

# 4. Greece

## 4.1. Overview of the Greek "anti-racism" legislation

The current Greek "hate speech" legislation is one of the most recently amended in Europe. It was in September 2014 and with long delay that the commonly referred to as the new "anti-racism bill" was enacted in order for Greece to be in compliance with the 2008 EU Framework Decision on racism and xenophobia[784]. Law 4285/2014 replaced legislation dating back to 1979[785]. The previous law was enacted during the period of democratic transition that the country went through following the fall of the military junta in 1974 and aimed to implement the ICERD, which the Greek state had signed in 1966 and ratified in 1970 during the rule of the junta[786].

Article 1 paragraph 1 of law 927/1979 provided for the criminalization of public incitement to discrimination, hatred or violence against individuals or groups on the basis of race or ethnic origin[787]. Furthermore the law punished the creation of and participation in racist organizations[788] as well as the dissemination of "offensive ideas"[789] against individuals or groups on the same grounds[790]. It was provided that public incitement and the dissemination of offensive ideas may be committed "either orally or through the press or through written texts or visual depictions or by any other means"[791]. Intent was a requirement only by article 1, in the case of incitement[792]. The law was amended in 1984 to include religion among the protected grounds[793] and in 2001 to grant the public prosecutor the power to act ex officio upon learning of a potential offence[794].

[784] Council Framework Decision 2008/913/JHA (n 98).
[785] Law 927/1979 (mod. 1419/1984 et 2910/2001 et 4285/2014).
[786] Takis Katsimardos, "Greek anti-racism legislation: 'Born' in 1979, but still has not matured..." [in Greek], Imerisia 1 June 2013 http://www.imerisia.gr/article.asp?catid=26510&subid=2&pubid=113053207 accessed 23/11/2014.
[787] Art 1 para. 1 law 927/1979.
[788] Art 1 para. 2 law 927/1979.
[789] «ιδέας προσβλητικάς».
[790] Art 2 law 927/1979.
[791] Art 1 and 2 law 927/1979.
[792] Art 1 para. 1 law 927/1979.
[793] Art 24 law 1419/1984.
[794] Art 39 para.4 law 2910/2001.

The recently enacted legislation in some respects extended and in others limited the scope of the previous law[795]. The new law provides for a number of protected grounds against incitement[796], covering in addition to race, ethnic origin and religion, skin color, descent, sexual orientation, gender identity and disability[797]. The basic formulation of article 1 paragraph 1 was retained with the addition of three synonyms to the original verb signifying "incitement"[798]. This addition indicates perhaps an intention to broaden the scope of the law although the differences in meaning between the words used are very subtle. As to the ways in which these offences may be committed the formulation of the previous law is retained with the addition of the internet among the non-exhaustive ways mentioned[799]. Furthermore the law provides that there should be a threat either to public order or to the life, liberty or physical integrity of the targeted persons for incitement to qualify as a crime[800].

Incitement to damage or to destruction of things used by persons with protected characteristics is also punishable under the new law[801] while if a crime was committed following the incitement there is a heavier sanction that may amount to the deprivation of political rights[802]. A heavier sanction is provided also in case the perpetrator is a public officer or civil servant[803]. In case the perpetrator is the legal representative of a legal person or association acting to its benefit or on its behalf a heavy fine is foreseen by the law as well as the exclusion of the legal person or association from any kind of public funding or commission of public work[804].



[795] Panayote Dimitras, "Anti-racism 'valse-hésitation'" [in Greek], The Books' Journal, 13 September 2014 http://booksjournal.gr/slideshow/item/564-%CE%B1%CE%BD%CF%84%CE%B9%CF%81%CE%B1%CF%84%CF%83%CE%B9%CF%83%CF%84%CE%B9%CE%BA%CF%8C-%C2%ABvalse-h%C3%A9sitation%C2%BB%3E? accessed 28 August 2015.
[796] Art 1 para. 1 law 4285/2014.
[797] Ibid.
[798] «υποκινεί, προκαλεί, διεγείρει ή προτρέπει».
[799] Art 1 para. 1 law 4285/2014.
[800] Art 1 para. 1 law 4285/2014.
[801] Art 1 para. 2 law. 4285/2014.
[802] Art 1 para. 3 law 4285/2014.
[803] Art 1 para. 5 law. 4285/2014.
[804] Art 4 law. 4285/2014.

Article 2, the group libel provision of the previous law is replaced by the prohibition of publicly condoning, denying or trivializing of the Holocaust and of the crimes recognized under international law. The wording used in this new provision is almost identical to that of the Framework Decision[805]. However, new article 2 goes even further by including crimes recognized by the Greek Parliament and not only by International Tribunals in the list of crimes for which "publicly condoning, denying or grossly trivializing" is prohibited[806]. This extension of the already disputed criminalization of denial of historical events has been subject to particular criticism[807], while the introduction of new article 2 was opposed in its entirety by the then main opposition party and current Government, as well as by academics for restricting impermissibly freedom of expression and censoring historical inquiry in particular[808].

It is in any event provided by the new provision that the public condonation, denial or trivialization of those crimes must be "manifested in a way that is capable of inciting hatred or violence or that is threatening or insulting towards a group or person defined by one or more of the protected grounds provided by the law[809]. Again a heavier sanction is provided in case the perpetrator is a public officer or civil servant[810]. As opposed to old article 2 the new provision requires intent for the qualification of the crime[811], as is the case with all other provisions of the new law.

On a different note, the removal of old article 2 has been criticized for creating an unequal standard with regard to the prosecution of the offences of insult and defamation[812]. Contrary to the UK, in Greece there are no special criminal provisions in place to protect individuals against racist or homophobic speech directed at

[805] Ibid.
[806] Art 2 para. 1 law 4285/2014.
[807] *See* e.g. Nikos Sarantakos, "Genocides and criminalization" [in Greek], 05/09/2014 https://sarantakos.wordpress.com/2014/09/05/genocide/ accessed 28/08/2015.
[808] "Historians and academics against article 2 of the anti-racism draft law" [in Greek], Kathimerini , 03/09/2014 < http://www.kathimerini.gr/782132/article/epikairothta/politikh/istorikoi-kai-panepisthmiakoi-kata-toy-ar8roy-2-toy-antiratsistikoy-nomosxedioy> accessed 23/11/2014.
[809] Art 2 para. 1 law 4285/2014.
[810] Art 2 para. 2 law 4285/2014
[811] Art 2 para. 1 law 4285/2014.
[812] GHM, "Third supplementary submission to UN HRC on Greece's compliance with the International Covenant on Civil and Political Rights, Greece: Note on anti-racism legislation" 19 October 2015.

them[813]. In the absence of such provisions and given that the offences of libel and defamation are not prosecuted ex officio the new law makes it harder, if not impossible, to prosecute racist or homophobic insult or defamation than when the same offences are committed without discriminatory motive[814]. With the new law unless racist or homophobic insults directed at individuals reach the very high incitement threshold they are not to be prosecuted[815].

It is also noteworthy that the new law does not include the prohibition of organized dissemination of racist propaganda, which, although never applied, was nonetheless enshrined in article 1 paragraph 2 of the previous law[816]. Instead of prohibiting the organized dissemination of racist speech, the new law sets a higher threshold by prohibiting the organized and systematic incitement to discrimination, hatred or violence as is defined in the first two paragraphs of article 1 of the new law[817]. This change has gone rather unnoticed despite its importance in the light of the long ignored[818] but still existing obligations of Greece under the ICERD and in the context of the ongoing criminal proceedings against the political party Golden Dawn as a merely criminal and not racist organization[819].

## 4.2. Implementation of the "anti-racism" legislation

The implementation of the Greek "anti-racism" legislation has been rather poor and fragmented. The first ever known trial on the basis of law 927/1979 took place in 2003 while the first final conviction was obtained in 2008, almost thirty years after



[813] Ibid.
[814] Ibid.
[815] Ibid.
[816] Dimitras (n 795).
[817] Art 1 para. 4 law 4285/2014.
[818] Dimitris Psarras, "When 'there were no neo-Nazis in Greece'" [in Greek], Efimerida ton Syntakton, 20/08/2014 http://archive.efsyn.gr/?p=226236 accessed 23/11/2014, see also Dimitris Christopoulos and others, *Mapping Ultra-Right Extremism, Xenophobia and Racism within the Greek State Apparatus*, Rosa Luxemburg Stiftung 2014 < http://rosalux-europa.info/userfiles/file/RightWing_A4_WEB.pdf> accessed 23/11/2014.
[819] Although the Nazi ideology of the party has been recognized as the basis of the crimes committed by Golden Dawn by the prosecutorial finding, *see* Ioanna Tourkochoriti, "Bans of Political Parties and the Case of Golden Dawn's Right Wing Extremism in Greece", VerfBlog, 31 October 2013 http://www.verfassungsblog.de/bans-of-political-parties-and-the-case-of-golden-dawns-right-wing-extremism-in-greece/ accessed 28/08/2015.

the law's enactment[820]. Again the 2008 conviction concerned a violation of article 2 of the law, the group libel and not the incitement provision of article 1 paragraph 1[821]. It was only in 2014 that a conviction for racial incitement was delivered by a Greek court[822]. The law's disuse for over two decades may be explained by the fact that before the 2001 amendment a complaint by an individual personally wronged was required for the public prosecutor to be able to press charges for a violation of the law. By allowing for the ex officio prosecution of the relevant offences by the public prosecutor, the 2001 amendment opened the way for certain NGOs, most notably Greek Helsinki Monitor (GHM), to litigate cases on the basis of 927/1979[823].

In what follows I examine the trail of this litigation effort. After examining the first cases that made it to the courtroom, I focus on the landmark *Plevris* case and its potential implications for the implementation of the "anti-racism" legislation currently in force. The importance of the *Plevris* case lies on the fact that it is the only case under the "anti-racism" legislation which has made it to the Supreme Court. It is perhaps also the only such case to have attracted scholarly attention in Greece and beyond[824]. I then move to the examination of other recent cases decided by Greek courts before and after *Plevris*. Most notably I focus on the *Plomaritis* case, the first ever conviction to be obtained on the basis of the incitement clause of the previous law. I then briefly review the ongoing *Richter* case, the first ever prosecution under article 2 of the recently enacted law. Ultimately I draw certain conclusions as to the application of the Greek "anti-racism" legislation and its prospects.



[820] Greek Helsinki Monitor (GHM), "Parallel Report on Greece's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination", April 2009, 39, 51 <http://cm.greekhelsinki.gr> accessed 23/11/2014.
[821] Ibid.
[822] "Golden Dawn candidate found guilty of inciting racist violence", Ekathimerini.com, 16 September 2014 < http://www.ekathimerini.com/163074/article/ekathimerini/news/golden-dawn-candidate-found-guilty-of-inciting-racist-violence> accessed 28/08/2015.
[823] GHM (n 820) 50.
[824] See e.g. Michal Navoth, "Antisemitism in Greece: The trial of Konstantinos Plevris", Stephen Roth Institute for the Study of Contemporary Antisemitism and Racism, Tel Aviv University, Topical Brief No. 8, 2011, 1http://humanities.tau.ac.il/roth/images/ANTISEMITISM_IN_GREECE_-THE_TRIAL_OF_KONSTANTINOS_PLEVRIS.pdf accessed 24/06/2015 and Clio Papantoleon, "The Judiciary" in Christopoulos and others (n 818).

### 4.2.1. The first cases before courts

The aforementioned first case to make it to the courtroom in June 2003 concerned a letter signed by residents' associations, which was published in a local newspaper in the Patras area, in western Greece[825]. In their letter the residents' association targeted the local Roma community by associating it with criminality in the area and asked the University of Patras, the owner of the land on which the Roma settlement was built, to evict the community[826]. Two representatives of the Roma community filed a criminal complaint against the authors and signatories of the letter as well as against the owner and editor of the newspaper and they were subsequently allowed during trial to join the criminal proceedings as civil claimants[827].

They claimed that the defendants committed the offences of publicly expressing offensive ideas and of inciting to discrimination, hatred or violence against the residents of the Roma settlement on account of their racial origin[828]. The trial ended with an acquittal. The court reasoned that it could not be proven that the defendants had the intent to commit the acts for which they were accused[829]. Furthermore, the consideration of a communication based on these proceedings by the Human Rights Committee (HRC) in 2009 disclosed no violation of the ICCPR by Greece[830]. More precisely the HRC found no violation of article 26 taken in conjunction with article 2 of the ICCPR, while it deemed the claim of the authors of the communication under article 20(2) to be inadmissible[831].

The second trial on the basis of law 927/1979 took place in December 2003[832]. The case concerned a column in the daily "Ependytis", in which Albanian immigrants living in Greece were indistinctly accused for the criminality rates and were referred

[825] GHM (n 820) 51-53, *see* also *Vassilari v. Greece*, Views, 1570/2007 (HRC, Mar. 19, 2009) and Jeroen Temperman, *Religious Hatred and International Law* (Cambridge: CUP 2015) 101-104.
[826] Ibid, the forced eviction later actually took place, *see* "Forced evictions of Roma communities in Patras", 21 June 2005 http://www.minorityrights.org/1240/advocacy/forced-evictions-of-roma-communities-in-patras.html accessed 28/08/2015.
[827] Ibid.
[828] Ibid.
[829] Ibid.
[830] *Vassilari v. Greece* (HRC 2009).
[831] Ibid.
[832] GHM (n 820) 51-53.

to as the "Albanian plague"[833]. Contrary to the previous case, an Albanian woman who asked to join the proceedings as civil claimant was not allowed to do so by the court[834]. This case also ended with an acquittal[835]. Prior to this trial, complaints were lodged against major newspapers routinely publishing readers' letters, which expressed extreme anti-immigrant and anti-Semitic views as well as advertisements for rentals and jobs with the disclaimer "no foreigners"[836]. Although in some of those cases, charges were pressed against the newspapers by the public prosecutor, the cases never reached the courts either because the charges were quashed by the indictment chambers or the referral to trial was done too late, after the case had prescribed[837].

Complaints were also lodged during the same time period against mayors from various parts of Greece for publicly making anti-Roma statements[838]. Only one of those cases involving the mayor of Nea Alikarnassos in Crete made it to the courtroom in 2004 and ultimately concluded with his acquittal[839]. In their evaluation of those early cases on February 2005, the NGOs GHM and Minority Rights Group - Greece (MRG-G) concluded that there is "a lack of will among prosecutors and judges to hold trials or convict persons for statements that would universally be considered as racist"[840]. To a similar conclusion came ECRI, which in its *Third Report on Greece*, published on June 2004, noted that:

"ECRI is concerned over reports from non-governmental organisations indicating that racist incidents have occurred in Greece - including racist statements made in public or reported in the press, and acts of racist violence - and that such incidents have not been prosecuted or indeed given all due attention by the Greek authorities. This problem may not necessarily be the result of a deficiency in terms of criminal law provision, but rather of an interpretation of the notion of racism by certain judicial



[833] Ibid.
[834] Ibid.
[835] Ibid.
[836] Ibid.
[837] Ibid.
[838] Ibid.
[839] Ibid.
[840] Ibid 50.

authorities, leading to either no charges being brought, or charges being dropped in these cases."[841]

In the following years this early pattern of impunity persists, with the first conviction in 2008 being rather the exception that proves the rule. In 2009 three acquitting judgments are issued on the basis of law 927/1979[842]. Among them, the most discussed concerned the patently anti-Semitic book of a seminal figure of the Greek far-right, Konstantinos Plevris.

### 4.2.2. The *Plevris* case

#### i. Facts, procedural history and background

K. Plevris is a lawyer, who has for several decades been active in the Greek far-right political scene and is considered by many as the "father" of Greek neo-fascism[843]. In the 1960's he founded the fascist organization "4th of August"[844] while during the period of the military junta (1967-1974) he worked as an instructor in the Greek army[845]. He later held positions in the Greek police and intelligence services[846]. In 2000 he co-founded the far-right political party LAOS[847]. LAOS entered the Greek Parliament for the first time in 2007 and in 2011 it became part of a transitional, unelected coalition government that lasted only a few months and was charged with implementing the drastic austerity measures imposed by the IMF, ECB and EC[848] in return for the financial aid the country received by those institutions. The son of K. Plevris, Thanos Plevris, also a lawyer, was an elected MP with LAOS from 2007 until

[841] ECRI, *Third Report on Greece*, adopted on 5 December 2003, para. 16 <http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/GRC-CbC-III-2004-24-ENG.pdf> accessed 28/08/2015.
[842] GHM (n 820) 38-41.
[843] Francisca de Pers and Achilleas Fotakis, *Antisemitism, Historical and Theoretical approaches and the example of the Plevris trial in Greece*[in Greek] (Isnafi 2014) 52.
[844] A reference to the fascist regime established in Greece on the 4th of August 1936 headed by dictator Ioannis Metaxas and which lasted until the Nazi invasion of 1941.
[845] Ibid.
[846] Ibid.
[847] Ibid.
[848] Also known as the troika of lenders.

2012, when together with two other prominent party members moved to the previously governing party of New Democracy[849].

The case against K. Plevris originated in December 2006, after criminal complaints were filed against him and the newspaper "Eleftheros Kosmos" by the GHM, the "Anti-Nazi Initiative", a small leftist group, and four members of the Central Board of Jewish Communities in Greece (KIS)[850]. The complaints were based on the content of his 1,400-page book *Jews, the Whole Truth*, which had only been published a few months before, as well as on related articles published in the newspaper[851]. Plevris and the newspaper were charged with a violation of both the incitement and group libel provisions[852]. More precisely, in the indictment it was stated that the defendants "publicly, through the medium of the press, with intent and acting in concert, incited deeds and actions that could provoke discrimination, hatred and violence against persons and groups of persons, solely because of their racial and ethnic origins, and expressed offensive ideas against a group of persons because of their racial and ethnic origin and specifically against Jews in general; the first of them (Konstantinos Plevris) carried out these actions persistently"[853].

Several hundreds of anti-Semitic and racist excerpts from the book were included in the indictment. Some of the most discussed during the court hearings are the three following:

"That's what Jews want. It's the only thing they understand: an execution squad within 24 hours" (P. 742)



[849]*See* Amanda Borschel-Dan, "Is Greece's New Democracy party whitewashing neo-Nazis?", The Times of Israel, July 2, 2013 http://www.timesofisrael.com/is-greeces-new-democracy-party-whitewashing-neo-nazis/ accessed 24/06/2015.
[850]De Pers and Fotakis (n 843) 53.
[851]Ibid.
[852] Greek Helsinki Monitor (GHM), Press Release: "Greece: Trial of Kostas Plevris and "Eleftheros Kosmos" for anti-Semitism on 5 September 2007. LAOS party spokesperson supports Kostas Plevris and libels Jewish leaders and GHM", August, 12, 2007 http://cm.greekhelsinki.gr/uploads/2007_files/ghm914_katigoritirio_plevri_elkosmou_english.doc accessed 24/06/2015.
[853]Ibid.

"Hitler was blamed for something that did not actually take place. Later the history of humanity will blame him for not ridding Europe of the Jews, though he could have… My dear Jews, I do not ask you to suffer all the things that your holy books tell you that we should suffer from you… You are criminals because that is what your religion has taught you to be. You are murderers because crime is instilled in you from an early age. Therefore we others have the right to deal with you. And that is what we will do" (P. 852)

"They are right to maintain the camp in good condition because no one knows what might happen in the future" (P. 1075) (A comment on the caption to a photograph taken in Auschwitz: 'The barbed wire of Auschwitz remains in place to remind the whole world of the Nazi atrocities of 1939-1945'). [854]

The author made no effort to hide his beliefs. In page 600 of the book, he declares: "I am a Nazi and a fascist, a racist, anti-democratic and an anti-Semite"[855].

On December 2007 K. Plevris was convicted to a suspended prison sentence of 14 months by the Second three-member Misdemeanor Appeal Court of Athens, which serves as a Court of First Instance when at least one of the defendants is a lawyer[856]. He was acquitted of the charges relating to an article he wrote in the newspaper and the newspaper was acquitted as well[857]. On March 2009 an Athens Five-Member Appeals Court reversed the judgment delivered at first instance and acquitted Plevris of all charges[858]. About a year later the Supreme Court dismissed by twenty two votes to two the cassation appeal of the public prosecutor and upheld the acquitting judgment[859].

The proceedings against Plevris were marked by considerable controversy. At first instance the composition of the bench changed twice following complaints made by

[854] Ibid.
[855] Navoth (n 824).
[856] Ibid.
[857] Amnesty International (AI), Public Statement: "Greece: Concerns over trial of human rights defenders", 21 January 2011 http://www.amnesty.ca/news/news-item/greece-concerns-over-trial-of-human-rights-defenders accessed 24/06/2015.
[858] Ibid.
[859] Navoth (n 824) 5.

the "Anti-Nazi Initiative"[860]. There were also complaints about the public prosecutor's prejudiced stance towards the witnesses for the prosecution[861]. Before the acquittal of Plevris at second instance complaints about the composition of the bench were again made while at the same time the case gained international attention with Jewish organizations from the U.S. and Europe making a plea to the Greek government to ensure a fair trial[862].

Following the acquitting judgment and after the Rapporteur of the CERD submitted a relevant question to Greece, the file of the case was assigned to the Supreme Court's senior deputy prosecutor, who filed a special motion for cassation on the grounds of a lack of "special reasoning required by the Constitution, and erroneous interpretation and application of the substantive criminal provision"[863]. At the same time the Greek government denounced the acquittal in a statement, which drew no attention by the media[864].

It is noteworthy that the Supreme Court ruling on *Plevris* resolved an issue that had arisen from the until then judicial practice, namely whether members of the protected groups have standing as civil claimants in cases under the "anti-racism" law, an issue which has wide implications as to the law's use. The practice of Greek courts in this regard had been contradictory so far. In at least two second instance hearings of cases under the "anti-racism" law civil claimants who were admitted at first instance were subsequently expelled[865]. Similarly, in the *Plevris* case the Jewish civil claimants were not admitted at none of the instances[866].

The Supreme Court resolved the issue by ruling that anyone who can claim and prove her/his belonging to a group defined by one of the protected grounds listed in the law has standing as civil claimant[867]. This was an important ruling given the effect that the

[860] Ibid 52-55.
[861] Ibid.
[862] Ibid.
[863] Navoth (n 824) 4-5.
[864] Ibid 7.
[865] GHM (n 820) 38-39.
[866] Ibid.
[867] Judgment 3/2010 of the Supreme Court of Greece (Areios Pagos), published on the 15th of April 2010.

admission of civil action has on the procedure[868]. It was also important for the interpretation of the law as it was established that the law aims to protect not only public interests but also private ones, namely the constitutionally recognized rights to equality and dignity of the individual.

### ii. Freedom of expression, anti-Zionism and racism in … Judaism

One of the main arguments of the defense of Plevris was his right to freedom of expression, as enshrined in articles 14 of the Greek Constitution and 10 of the ECHR. At the first instance hearing, the public prosecutor readily endorsed this argument of the defense. He characterized the book as a work of scholarly value and reminded the witnesses for the prosecution that Plevris is as a historian free to make his own historical enquiry[869]. But the public prosecutor went beyond the free speech argument. He equated the reference in the Old Testament to Jews as the chosen people to the anti-Semitic expressions contained in the book, deeming them equally racist[870]. Moreover Plevris was allowed by the bench to examine the knowledge of the witnesses for the prosecution of the "crimes committed by the Jews against the Greeks"[871].

This attack on Judaism, which at some point was referred to by the public prosecutor as "the other side of Nazism"[872], was complemented by references to Israeli foreign policy and Zionism[873]. Despite the fact that Plevris was ultimately convicted at first instance, it became clear already from the first hearing that instead of him, those who would have to defend themselves before court were the witnesses for the prosecution. Indicative of the climate in the second instance hearing is the fact that witnesses from KIS were asked questions about their political beliefs on the Macedonian issue[874].

[868] According to the Greek Code of Criminal Procedure, the civil claimant has an active role in the criminal proceedings as s/he is vested with rights to counsel, receive copies of the case file, present evidence, request investigating acts, appoint experts on her/his behalf, examine witnesses at the trial etc, *see* para. 11 in "Procedure Before Criminal Courts" http://www.greeklawdigest.gr/topics/judicial-system/item/16-procedure-before-criminal-courts accessed 29/08/2015.
[869] A transcript of the first instance court hearing can be found in Greek in the following link:http://www.cohen.gr/trial/ accessed 25/06/2015.
[870] Ibid.
[871] Ibid.
[872] Ibid.
[873] Ibid.
[874] The official Greek foreign policy to deny recognition of the constitutional name of the neighboring Republic of Macedonia.

More precisely, the witnesses were asked by the bench to answer why they did not show similar sensitivity with books opposing the official Greek position on the Macedonian issue as if such expressions are comparable to Holocaust denial[875].

Moreover they were shown by Plevris photos of victims of the 2009 Israeli attack on Gaza and asked whether they condemn the civilian casualties that had occurred[876]. So hostile was the attitude of the bench in the second instance hearing towards the witnesses for the prosecution that the defense attorney, the son of the defendant and MP, Thanos Plevris, referred twice by mistake to them as defendants[877]. What is perhaps most surprising in the reasoning of the judgment delivered by the Athens Five-Member Appeals Court and upheld by the Supreme Court is that the emphasis was not on whether the impugned expressions met a level of severity required by articles 1 and 2 of the previous law but whether discrimination, hatred or violence were incited and group defamation was expressed "on the basis of race or ethnic origin"[878]. The court reasoned that:

"The defendant does not revile the Jews solely because of their racial and ethnic origin, but mainly because of their aspirations to world power, the methods they use to achieve these aims, and their conspiratorial activities… The actual incidents and quotes from historical persons that the author uses to support his views are based on historical sources, which he cites, and which merely underscore some of his harsher phrases. The author has used these phrases with the intention of emphasizing the points he makes in the book, so as to make clear to the reader that which he considers to be the aforementioned aspirations of Zionist-Jews. Taken as a whole, the content of the book does not demonstrate that the defendant had the intention of using it to incite the reader to actions that could cause discrimination, hatred or violence against Jews, nor does he express offensive ideas against [the Jews] solely because of their racial or ethnic origin– i.e. without the support of other reasons. This is because he does not revile all Jews collectively, but only those Zionist-Jews who implemented the specific

[875] De Pers and Fotakis (n 843) 57-59.
[876] Ibid.
[877] Dimitris Psarras and others (The Virus), "The vindication of a Nazi" [in Greek], Eleftherotypia, April 1, 2009 http://www.iospress.gr/extra/extra20090401.htm accessed 25/06/2015.
[878] Law 927/79.

acts he cites in the book, and whom he castigates with very harsh expressions, pointed comments and characterizations"[879].

### iii. The banality of Greek anti-Semitism

All in all there has been notable absence of public debate surrounding the *Plevris* trial in Greece. In the media sphere a shining exception is the investigative group of journalists "the virus", which through subsequent articles published in the daily "Eleftherotypia" from the first day of publication of the book drew attention to its content. In December 2010, one day before the trial of the members of the "Anti-Nazi Initiative", the journalists revealed that the dissenting judge to the first instance judgment, who had written a 32-page memorandum to present her arguments in favor of the defendant[880], maintained a personal blog where she made extreme anti-Semitic comments and reported from the trial as if she was a member of the audience[881]. This revelation was a blast to the already contested impartiality of the bench and indicates the extent to which the Greek judicial system is eroded by the far-right[882].

The case itself and the lack of public debate surrounding it illuminates what may be viewed in the European context as a Greek exception with regard to the public perception and regulation of anti-Semitic speech. While the post-WWII regional and international legal framework for the regulation of hate speech has primarily targeted anti-Semitic speech, in Greece public incitement to discrimination, hatred, violence and even genocide against the Jews continues in most cases to be tolerated. One might see as an indication of wide protection of free speech the fact that daily dedicated anti-Semitic newspapers such as "Eleftheros Kosmos" are displayed and can be purchased by virtually every kiosk in Greece. Although "Eleftheros Kosmos" is commonly identified as a marginal far-right voice and in 2008 was the subject of the first ever final conviction under the previous anti-racism law for publishing an anti-



[879] Judgment 913/2009 of the First Five-Member Appeals Court of Athens, 27 March 2009, *see* GHM, Press Release: "Greek Supreme Court dismisses appeal in cassation against neo-Nazi Plevris' acquittal!" April 20, 2010 <cm.greekhelsinki.gr/uploads/2010_files/ghm1290_areios_pagos_plevris_english.doc> accessed 25/06/2015.
[880] Papantoleon (n 824) 49.
[881] De Pers and Fotakis (n 843)55-56.
[882] Ibid.

Semitic comment[883], Plevris himself and the MPs actively defending him during the trial are no marginal figures.

Having secured his acquittal, Plevris sued for defamation and dissemination of false information those who had testified against him in the trials[884]. He first sued three activists of the "Anti-Nazi Initiative", then the leadership of KIS along with an individual member of the Jewish community of Athens that had publicly condemned him as a "preacher of genocidal anti-Semitism"[885] and lastly the representative of the GHM[886]. Apart from the three activists, who were tried and acquitted on December 2010, none of the others faced trial as Plevris later withdrew his complaints against them[887].

It is tragicomic that Thanos Plevris, the defense attorney and son of K. Plevris and Adonis Georgiadis, current candidate for the leadership of New Democracy willing to testify for the prosecution in the defamation proceedings against KIS, are both MPs of the former ruling party, which in September 2014 voted for the enactment of the new "anti-racism" law[888]. As previously mentioned this law in some respects expanded the scope of the previous one by criminalizing inter alia Holocaust denial[889]. The *Plevris* case serves as an important reminder of the special difficulties that exist in the implementation of the recently enacted new "hate speech" law. Regrettably in a country where over 80% of its Jewish citizens were murdered during the Holocaust, anti-Semitic discourse from across the political spectrum remains commonplace[890].

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[883]GHM, Press Release: "Greece: "Eleftheros Kosmos" convicted for anti-Semitism – Double GHM vindication" March 5, 2008 http://cm.greekhelsinki.gr/index.php?sec=194&cid=3253 accessed 25/06/2015.
[884]Ibid, see also AI (n 857) and Abraham Foxman, "Perversion of Justice in Greece", The Jerusalem Post, February 17, 2012 http://www.jpost.com/Blogs/A-Point-of-View/Perversion-of-Justice-in-Greece-366084 accessed 24/06/2015.
[885]De Pers and Fotakis (n 843) 55-56.
[886]Ibid.
[887]Ibid.
[888] *See* World Organisation Against Torture (OMCT), "Greece: Ongoing acts of harassment against GHM", 3 September 2008 http://www.omct.org/human-rights-defenders/urgent-interventions/greece/2008/09/d19521/ accessed 30/10/2015, Nick Malkoutzis, "Whither New Democracy?", MacroPolis, 21 October 2015 < http://www.macropolis.gr/?i=portal.en.the-agora.3054> accessed 30/10/2015.
[889]Law 4285/2014 art 1(5).
[890]*See e.g.* about the incidents that occurred in the town of Kavala in June 2015: Yair Rosenberg "Greek Holocaust Memorial Vandalized Two Weeks After Unveiling", Tablet, June 22, 2015

The courtroom is inevitably affected by this established tradition of hate, an analysis of the roots of which goes beyond the purpose of this study.

### 4.2.3. Other cases before and after *Plevris*

Plevris would later be convicted twice, in November 2011, for homophobic remarks he made, in one case against one of the civil plaintiffs in the trial concerning his book and in the other case for an article he wrote in "Eleftheros Kosmos"[891].These convictions were not delivered on the basis of the "anti-racism" legislation since sexual orientation was not a protected ground at the time, they were hailed however by LGBT associations as setting important precedent[892].

At about the same time the *Plevris* judgment was delivered by the First Five-Member Appeals Court of Athens two other acquitting judgments were delivered on the basis of law 927/1979. In both cases far-right newspapers were charged with inter alia a violation of article 2 of the "anti-racism" law, the group libel provision and not of article 1, the incitement provision[893]. One of these judgments, issued just three days before the judgment on Plevris, concerned an anti-Roma article, which was published in "Eleftheros Kosmos"[894]. The article reported on the alleged stealing of equipment from rail tracks in the Attica region by Roma, using derogatory language against the Roma in general and presenting them indistinctly as troublemakers privileged by the state and the media[895]. The court dismissed the claim that the article was racist, ruling that it was merely reporting on actual facts[896].

The other judgment, delivered by the Third Three-Member Misdemeanors Court of Athens on the 7th of January 2009 concerned an anti-Semitic article entitled "Devil in the Balkans", which was published in the official LAOS newspaper "Alpha Ena". The



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http://www.tabletmag.com/scroll/191696/greek-holocaust-memorial-vandalized-two-weeks-after-unveiling accessed 25/06/2015.

[891] GHM, "Kostas Plevris and 'Eleftheros Kosmos': Second conviction for homophobia", 26 November 2011 <cm.greekhelsinki.gr/uploads/2011_files/ghm1405_dikes_plevri_omoerotofovia_greek.doc> accessed 20/07/2015.

[892] Ibid.

[893] GHM (n 820) 38-42.

[894] Ibid.

[895] Ibid.

[896] Ibid, there is a lack of reporting on the hearing of the case as the court proceeded with the trial despite the request of postponement submitted by the GHM representatives and the civil claimants.

article reproduced an anti-Semitic conspiracy theory, presenting "the Zionists of the Global Dictatorship of the New Order"[897] as conspiring against peace in the Balkans in order to turn them "into a migration place of the Jews, in case something goes wrong in the Middle East…"[898]. For this article the publisher and a columnist of the newspaper were charged with dissemination of false news and a violation of article 2 of the "anti-racism" law[899]. Interestingly the reasoning of the acquitting judgment in this case bears a striking similarity with the one employed in *Plevris*. Again, as would be the case with Plevris a few months later the focus of the court was on whether the impugned article could be deemed offensive "on the basis of race or ethnic origin"[900].

More precisely, the court ruled that:

"the opinions of the person who wrote the published article aim at the Zionists, which means persons of Jewish nationality with extreme nationalistic and chauvinist tendencies or acts, which, according to the conspiracy type of theory that the author elaborates on, are abettors of wars in the Balkan area. They do not aim generally at all persons of Jewish nationality or Israeli citizenship, because of that nationality of theirs. The offenses of dissemination of false news and the violation of article 2 of Law 927/79, therefore, are not established and the defendants must be declared innocent."[901]

As in the *Plevris* case a certain interpretation of what may be considered as racially offensive speech, namely the distinction between anti-Zionist and anti-Semitic speech saved the defendants from a conviction. Although such an interpretation may indeed seem more easily discernible in this case than in *Plevris*, the similarity of the reasoning employed in these two judgments is noteworthy.

Prior to the publication of these judgments, came on September 2008 the first final conviction under law 927/1979. The case concerned an article published in

[897] Ibid.
[898] Ibid.
[899] Ibid.
[900] Ibid.
[901] Ibid, judgment 185/2009 of the Third Three-Member Misdemeanors Court of Athens , published on the 7th of January 2009.

"Eleftheros Kosmos" where among other things its author thanked God that "less than 1500 Jews have been left in Thessaloniki"[902] and referred to the Holocaust as "the supposed 'saponification' of the Jews"[903]. The publisher of the newspaper and the author of the article were convicted each to a suspended sentence of five months in prison[904] for the dissemination of offensive ideas against "the religious group of Jews"[905].

It is interesting how contrary to the aforementioned acquitting judgments for anti-Semitic expression, in this case Jews were defined as a religious and not as a racial or ethnic group. As previously mentioned the 1984 amendment of the "anti-racism" law included religion as a protected ground along with race and ethnic origin. The choice of religion by the court instead of race or ethnic origin might indicate the lack of any relevant jurisprudence as well as a reluctance to identify anti-Semitism with racism. It may as well reflect the official status of the Greek Jewry as a religious minority under Greek law. In any case the judgment remains to date the only final conviction delivered by a Greek court for anti-Semitic expression.

The second final conviction on the basis of law 927/1979 was delivered in 2011 by the Three-Member Admiralty Court of Piraeus and concerned hate slogans chanted by marines of the Greek Coastal Guard Corps at the official National Day military parade of March 25th 2010 in Athens[906]. Thirty nine men, members of the parading military contingent that shouted the slogans were charged with a violation of article 2 of the "anti-racism" law and more precisely for publicly expressing offensive ideas against a group of persons on the basis of their ethnic origin. The slogans chanted by the marines targeted Albanians and Macedonians describing in a rather graphic manner the violent subordination of these nations to the Greeks[907].



[902] Thessaloniki is the second largest city in Greece and before the Holocaust was home to a large Jewish community of more than 50.000 people.
[903] GHM (n 883).
[904] GHM (n 820) 39.
[905] GHM (n 883).
[906] Judgment 588/2011 of the Three-Member Admiralty Court of Piraeus, published on the 20th of December 2011, *see* also Vassilis Sotiropoulos, "Ostensible conviction by the Admiralty Court for racist slogans" [in Greek], 21 December 2011 <http://elawyer.blogspot.gr/2011/12/blog-post_21.html> accessed 28/08/2015 and Papantoleon (n 824) 52.
[907] Ibid, one of the slogans was "Greek you are only born and you may never become, we will spill your blood, Albanian, you pig!" («Ελληνας γεννιέσαι, δεν γίνεσαι ποτέ, το αίμα σου θα χύσουμε

Only two out of the thirty nine defendants were convicted each to a suspended sentence of three months and fifteen days in prison[908]. The court's reasoning contained the contradiction that while it was admitted that the slogans were chanted by the contingent and not by third persons close to it as the defense claimed, due to the particular angle of the video recordings that the court examined it could only be established beyond reasonable doubt for only two of the marines that they actually shouted the slogans[909] . The proceedings were marked by the withdrawal of the civil claimants from the trial in protest for the tolerance of the bench towards the continuing threats that they received by far-right extremists present in the audience[910].

The rather lenient sentence handed in the case of the marines came at the heart of a period of resurgence of far-right rhetoric and violence in Greece. It was a period marked by the gradual entry of neo-Nazi Golden Dawn into the political mainstream and the tolerance and/or sympathy shown by institutional actors towards its racist rhetoric and unlawful activities[911]. "Anti-racism" legislation shined through its absence during this period. While being more and more discussed in view of its planned reform[912] it was nonetheless not applied in any of the extreme instances of publicly disseminated "hate speech", which have been thoroughly recorded by domestic and foreign media as well as by regional and international human rights institutions[913].

Things started to gradually change in 2013 with the turning point being in autumn, when following the assassination of the Greek anti-fascist rapper Pavlos Fyssas by



γουρούνι Αλβανέ») which was a reference to the ongoing debate at the time on the amendment of citizenship law that would benefit the so called "Second Generation" of immigrants living in Greece, the majority of whom are of Albanian origin.

[908] Ibid.

[909] Ibid.

[910] Ibid.

[911] Christopoulos (n 818) 5-11.

[912] The first draft of the new "anti-racism" law was published in February 2011, see GHM, "Parallel Report on Greece's compliance with the UN Convention on the Rights of the Child", 3 March 2011, 15-16 <www2.ohchr.org/english/bodies/crc/docs/ngos/Greece_GHM_CRC60.doc> accessed 28/08/2015.

[913] *See* e.g. ECRI, *Report on Greece (fifth monitoring cycle)*, adopted on 10 December 2014, published on 24 February 2015, 17-22 https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Greece/GRC-CbC-V-2015-001-ENG.pdf accessed 28/08/2015 and Papantoleon (n 824) 49-54.

Golden Dawn members it was made clear to everyone and most notably to the then government that the party's activity posed a real threat to social stability and public order[914]. The criminal prosecution against Golden Dawn, initiated almost immediately after the assassination of Fyssas, to a great extent halted the activity of neo-Nazi criminal gangs affecting also indirectly the way racist speech is perceived and regulated in Greece. Although it is still very early for safe conclusions to be drawn, the conviction at first instance of A. Plomaritis, a Golden Dawn member in September 2014, under the incitement provision of law 927/1979 may be viewed as indicative of this new phase in the regulation of "hate speech" in Greece.

### 4.2.4. The *Plomaritis* case[915]

Alekos Plomaritis is a member of Golden Dawn's Central Committee and has been a party candidate in subsequent parliamentary elections. He is one of the protagonists in a documentary film with the title "The Cleaners" broadcasted on March 2013 by the British TV station Channel 4. The documentary records the activities of Golden Dawn members in the notorious Agios Panteleimonas district of central Athens[916] during the period of subsequent national election processes of May-June 2012, when Golden Dawn gained its first seats in the national Parliament.

An excerpt from the film was widely broadcasted by Greek television at about the same time the film was shown in Britain. In the film Plomaritis is shown referring to immigrants living in Greece with phrases such as the following:

"they are primitive, contaminants, sub-human…because we are ready to open the ovens [to make] Soaps because it's nice, you know not for people. Because they are chemical, we might get a rash…or something… We'll have soaps for cars, soaps for

[914] Christopoulos (n 818) 8-11.
[915] To write this sub-chapter I have relied heavily on the articles posted on the website of the initiative of lawyers "JailGoldenDawn" under the section "The Plomaritis Affair" [in Greek], whenever I do not explicitly cite another source the information has been taken from there: http://jailgoldendawn.com/%CF%85%CF%80%CE%BF%CE%B8%CE%AD%CF%83%CE%B5%CE%B9%CF%82/%CF%85%CF%80%CF%8C%CE%B8%CE%B5%CF%83%CE%B7-%CF%80%CE%BB%CF%89%CE%BC%CE%B1%CF%81%CE%AF%CF%84%CE%B7/ accessed 4/11/2015.
[916] About the activities of Golden Dawn in the Agios Panteleimonas area *see* e.g. Christopoulos (n 818) 22.

pavements…We'll make buildings, we should make floor lamps from their skin…we should get their teeth…".

The excerpt from the film appeared at a time when the need of reform of the existing "anti-racism" legislation was the subject of public debate and the new services dealing with racist violence had just been established by the Ministry of Public Order following the racist murder of Pakistani immigrant Shehzad Luqman in central Athens by two Golden Dawn members[917]. In this context the Greek police acted with rather unusual speed and the video was immediately sent to the public prosecutor, who in turn pressed charges against Plomaritis for a violation of the incitement and group libel provisions of law 927/1979.

The trial took place in September 2014, shortly after the new "anti-racism" law was enacted. The head of the Pakistani Community of Greece was allowed by the court to join the proceedings as civil claimant. Three different arguments were employed by the defense and were ultimately rejected by the court. Firstly, it was argued that the discussion contained in the film was private and thus unlawfully recorded. Plomaritis had already sued the director on the basis of this argument but at the time of trial his criminal complaint had already been archived by the competent public prosecutor. The next argument of the defense was that when using the impugned phrases the defendant was making a joke thus lacking the required intent. This argument also failed to convince the court.

As it was noted by the bench the defendant's references to "soaps" and "ovens" can hardly be part of any joke. Finally, the ultimate argument of the defense was that Plomaritis was referring to left-wingers instead of immigrants and thus the "anti-racism" law could not apply in his case, political identity not being a protected ground under the previous and current "anti-racism" legislation. This argument was undermined by the defendant himself, who, when asked by the lawyers representing

[917] This was the first murder trial in Greek judicial history where racist motive was recognized by a court, on the outcome of the Luqman trial s*ee* "Court hands out life imprisonment sentences to Luqman's murderers", ToVima, 16 April 2014 http://www.tovima.gr/en/article/?aid=587353 accessed 28/08/2015.

the civil claimant about the target of his speech, stated that he was referring to "illegal immigrants"[918].

In its reasoning the court noted that:

"The phrases used by [the defendant] (…) even if they contained exaggeration, indicate his views, especially regarding the invitation publicly to various others to beat, threaten, insult, injure causing serious bodily harms to various foreigners, so that the rest [of the foreigners] are in this way convinced to leave the territory of Greece and his words and phrases were capable of inciting **discrimination**, as according to his words [the foreigners] are presented as lower beings, **hatred**, because they are presented as taking vital space from the Greeks, and **violence** especially against groups and individuals with particular racial characteristics, which are specific to various ethnic groups coming from the regions of South and Southwest Asia. Moreover it must be noted that even if it is not a required element of the criminal act described by article 1 para. 1 of law 927/1979, the discrimination, hatred and violence were particularly expressed through unlawful and extreme conducts, consisting in beatings and murders of foreigners, which are already scrutinized by the Greek Justice"[919].

This last sentence is a reference to the still ongoing criminal proceedings against Golden Dawn and it indicates the importance placed by the court on the context of the case. According to the judgment there is a clear link between the rhetoric of Plomaritis and the ideology and mode of operation of Golden Dawn. The court then stressed that:

"The provisions of the law 927/1979 must be interpreted strictly and restrictively, in view of the provisions of articles 14 para 1 and 16 para 1 of the Constitution and article 10 para 1 of the ECHR, in which freedom of expression is enshrined (…) the exercise of these constitutional rights must be considered together with the enshrined

[918] «Λαθρομετανάστες» (lathrometanastes), a derogatory term widely used in Greek public discourse over the past decade to describe immigrants and asylum seekers lacking official documentation.
[919] Judgment 65738/2014 of the Eighth One-Member Misdemeanors Court of Athens, published on the 16th of September 2014, the emphasis on the three words and the translation are mine.

in article 2 of the Constitution fundamental obligation of the State to respect and protect the value of the individual, in the concept of which is also included the individual's racial and ethnic origin"[920].

The *Plomaritis* judgment thus offers a thorough analysis of the Greek incitement legislation and the way it should be applied. The judge carefully considers the content and context of the impugned speech as well as the relevant domestic and regional human rights norms. It is, on the other hand, of limited authority being the non-final judgment of a lower court and the first and only known conviction so far for racial incitement in Greece. It is noteworthy that some months after this judgment, one of the leading Golden Dawn MPs, Ilias Kasidiaris was referred to trial for racist statements he had made during a public speech in 2011. During his speech Kasidiaris had encouraged the inhabitants of a town close to Athens to get rid of "the human trash" in their area, referring to the Roma community[921]. Although the case fits perfectly to the incitement clause of the "anti-racism" law, Kasidiaris was prosecuted on the basis of a general incitement provision[922]. This is indicative of the lack of any established pattern as to the application of the incitement provision of the previous and current "anti-racism" law.

### 4.2.5. First prosecution under the new memory law: the Heinz Richter case[923]

Interestingly the only known prosecution so far under law 4285/2014 concerns a violation of article 2, the Greek memory law. The case provides a good example of the provision's feared misuse. Before the law's enactment, explicit reassurances were given in the preamble of the law, which were repeated in the speech of the, at the time, competent Minister of Justice in Parliament, that the freedom of scientific inquiry will not be affected by the introduction of this provision. However, as it was feared by the 139 historians who signed a public pledge to the government to

[920] Ibid.
[921] "Parliament lifts immunity of Golden Dawn MP", Ekathimerini.com, 12 May 2015 <http://www.ekathimerini.com/196847/article/ekathimerini/news/parliament-lifts-immunity-of-golden-dawn-mp> accessed 29/08/2015.
[922] Article 184 of the Greek Criminal Code: "incitement to the commission of a crime".
[923] To write this sub-chapter I have heavily relied on the article of Dimitris Psarras and others (The Virus), " 'Anti-racist' national censorship" [in Greek], Efimerida ton Syntakton, 19 April 2015 <http://www.efsyn.gr/arthro/antiratsistiki-ethniki-logokrisia> accessed 29/08/2015, thus whenever I do not refer explicitly to another source the information has been taken from there.

withdraw the article from the draft law and the Scientific Advisory Committee of the Greek Parliament which recommended the introduction of a saving provision in the article for the protection of academic and artistic freedom, the first to face prosecution on the basis of article 2 is the German historian and renowned academic in Germany and Greece, Heinz Richter.

The case concerns Richter's most recent book *The Battle of Crete*, the content of which stirred controversy in Greece, especially when Richter was proclaimed honorary doctorate of the University of Crete. The book has from the perspective of official Greek historiography a rather unorthodox approach to historical events that occurred during and after the Battle of Crete i.e. the airborne invasion of the southern Greek island of Crete by Nazi Germany that began on 20 May 1941 and the heavy resistance with which it was met. Among the most quoted in the Greek press are excerpts from the book where the war waged by Cretan rebels on the Nazis is described as "dirty" and "brutal", while the Nazi paratroopers are described as "youths full of enthusiasm who knew they belonged to an elite group".

In November 2014, following strong reactions by members of the local community, the ceremony organized by the University of Crete in honor of Richter was initially cancelled only to take place a day later in a closed circle. A few days later a preliminary investigation was launched by the local public prosecutor on the potential violation of law 4285/2014 by the author. Against Richter testified high profile figures from Crete such as the honorary Chief of Defense, Manoussos Parayoudakis and New Democracy MP, Lefteris Avyenakis. Ultimately, in January 2015 charges were pressed against Richter for his "denial of the crimes of Nazism and of the crimes of war", which "turns against the Cretan people and is of an insulting character". A special prosecutorial decision mandated that the prosecution against Richter be published "through the press and for ten days", "for the appeasement of the general outcry caused in the local society of Crete, for coping with the social unrest and for the avoidance of any potential extreme reaction".

As the investigative team of journalists, "The Virus" notes, the way law 4285/2014 is used in this ten-page prosecutorial decision reminds of the criminal legislation "for inciting citizens to discord", which was used against free political expression during

and after the Greek civil war. Despite the law's declared goal to protect minority groups, as well as the express requirement of article 2 that any of the behaviors described therein must be manifested in a way that is capable of inciting hatred or violence or that is threatening or insulting towards a group or person defined by one or more of the protected grounds provided by the law, the group identified by the public prosecutor is in this case "the Cretan People" indistinctly and with no further elaboration as to the protected ground defining the Cretans.

The reasoning provided for the prosecution is even more revealing as it is made clear that it is not a wholesale denial of the Nazi crimes by Richter but particular interpretations that he makes of these crimes and of related events that are, according to the public prosecutor, worthy of punishment. Richter is indeed accused of providing justification to the Nazi atrocities committed at the time against unarmed civilians, attributing them to the activities of the rebels and the British, as well as of countering an already disputed theory which links the defeat of the Nazis in the Eastern Front with the Battle of Crete. The special prosecutorial decision deems these interpretations criminal with a reasoning that resembles more a historical inquiry than a legal text.

Irrespective of the outcome of the trial, set to take place in the end of November 2015[924], the prosecution against Richter sets an important, negative precedent for the use of the new "anti-racism" law and in particular of its article 2. The fears expressed by academics and parliamentarians prior to the law's enactment that article 2 will put free historical inquiry at risk of prosecution have proven to be justified. Furthermore, the case attests to the difficulty of defining what constitutes condonation, denial and trivialization of the events associated with the Holocaust and other Nazi crimes. Apart from more or less clear-cut cases of self-proclaimed Nazis like Plevris, there is a multitude of interpretations given by historians to the same facts. This pluralism in the



[924] The case was initially set for September and then adjourned for the end of November 2015 according to local online media, *see* "Trial against Professor Richter 'for denial of Nazi crimes against Cretans' adjourned" [in Greek] CretePlus.gr, 2 September 2015 http://www.creteplus.gr/news/anaboli-stin-diki-tou-kathigiti-rixter-gia-arnisi-egklimaton-tou-nazismou-se-baros-ton-kritikon-139652.html accessed 21/10/2015.

views of historians is vital for free historical inquiry and debate and seems indeed to be endangered by memory laws.

As "The Virus" notes, Richter has in his latest books joined a specific school of German historians, who support the distinction between the acts of the "national" army and the "party" SS during WWII. According to this school, this distinction allows for another distinction to be made between, on the one hand, crimes of war that may be judged by the Law of War of the time and, on the other hand, the crimes attributable to the ideology and practice of the Nazi regime, such as the Holocaust. The same approach has been adopted by renowned Greek historians as well, who in recent years have blamed the activities of the rebels for the Nazi atrocities during the period of German Occupation. It has until now indeed been unthinkable that such interpretations may be the subject of a criminal prosecution.

Similarly to some of the cases previously examined, the prosecution against Richter seems to be linked to the current Greek political context and more precisely to a specific type of anti-German discourse that has flourished in the frame of the ongoing Euro-crisis[925]. The loose interpretation of article 2 on which the prosecution is based politicizes the case and in effect reveals the arbitrariness of the charges. Ultimately, the case hardly contributes to any existing discussions in Greek society about the experience of the War and the Occupation, instead it shuts them down, by aiming to solidify what is perceived as the one and only national truth.

### 4.3. Conclusion

The new "anti-racism" law has been enacted at a period of long-lasting political instability in Greece. During the past five years the country has been faced on more than one occasions with the prospect of economic collapse while the political and social landscape have been undergoing profound changes. The use of the "anti-racism" law is consequently affected by these changes as it can, most notably, be seen in *Plomaritis* and the more recent *Richter* case. On the other hand, it is hard to discern

[925] *See* e.g. Roberto Orsi, "Weaponisation of War Memories and Anti-German Sentiment", LSE Euro Crisis in the Press blog, 14 August 2015 http://blogs.lse.ac.uk/eurocrisispress/2015/08/14/weaponisation-of-war-memories-and-anti-german-sentiment/ accessed 21/10/2015.

from the existing case-law specific patterns in the use of the legislation, its overall application being scarce and fairly recent. Throughout the past twelve years, the law has been applied in a fragmented manner, with the three only known convictions so far offering little guidance as to its future use.

A challenge facing lawyers and enforcers of the law in the years to come is the politically charged use of the law. This challenge is certainly not specific to the Greek "hate speech" legislation. The preservation of public order being an express target of this legislation, its application is more or less always dependent on a political evaluation of which expression may qualify as incitement, a threat or an insult worthy of punishment. Although in Greece, contrary to the UK, there is no governmental involvement in the prosecution of the relevant offences, an examination of the way the law has been applied in the past attests to the prevalence in some cases of political considerations over legal certainty.

This issue is all the more pertinent if one considers the documented erosion of the Greek State Apparatus by the far-right[926], the judiciary being no exception in this respect[927]. Naturally one should not expect the judiciary to be insulated from racist social attitudes and state policies, after all judges are members of society, serving an inherently conservative, core state function[928]. As Clio Papantoleon, however, notes judicial practices cannot be reduced to mere reflections of existing social and state norms but also have a more active aspect[929]. By reviewing judicial practices with regard to speech offences, Papantoleon, contrasts the trend of impunity for racist

[926] Papantoleon notes in the introduction of her study on the Greek judiciary: "Thematically, [the cases examined] concern issues of national or other identity, the formation of a collective "we" against some "Other". Moreover, they deal with the specific ultra-right ideological components of racism, religious fanaticism, sexism and nationalism. In these cases judges were asked to pronounce upon issues charged with special ideological connotations because of socially widespread, extremely conservative or even ultra-right valuations. These ideas are not exclusive to the ultra-right. The ultra-right is their privileged outlet, but their greater social dissemination leaves room for a judge who implements these ideas in his or her practice to still feel as though he or she is anything other than an ultra-right sympathizer. Indeed, this dissemination allows a judge to neglect the fundamental obligation to subordinate his or her ideology to the rule of law and the principle of legitimacy. This is where we get a clear idea of the problem in its entirety, which exceeds by far the outcome of particular cases: judges making use of their public authority to send clear, ultra-right and racist messages to society and other authorities", *see* Papantoleon (n 824) 45.
[927] Ibid 43-63.
[928] Christopoulos (n 818) 6-7.
[929] Papantoleon (n 824) 43.

speech to the commonality of prosecutions for blasphemy[930]. As she notes the decision of the Supreme Court on *Plevris* must be read within the context of its other case-law regarding freedom of expression and most notably the weight that the court has accorded to "blasphemous" as opposed to racist speech.

In this respect, the influence of the Greek Orthodox Church on Greek social and political life cannot be overlooked. Despite the fact that criminal complaints have been filed under the "anti-racism" law against high ranking church officials, who more often than not publicly express homophobic, nationalist and anti-Semitic hate rhetoric, no prosecution has ever been initiated against them[931]. On the other hand, prosecutions for blasphemy, which in most cases originate in complaints filed by clergymen, often lead to convictions[932]. This type of informal immunity enjoyed by the Church has for many years, albeit to a different degree, extended to the Greek racist far-right[933].

The long period of utter impunity of the widely publicized criminal acts of Golden Dawn, which preceded the party's prosecution, cannot be easily forgotten. In this period the inaction of the judiciary and the police towards neo-Nazi rhetoric and violence was coupled with the overzealous application by these institutions of the principle of "zero tolerance against anomie" [934], declared by the Minister of Public order and Citizen Protection of the time[935]. This principle signaled in effect an expansive interpretation of law and order in direct contrast to the principles of the rule of law and legality and was in effect translated in a crackdown on civil liberties, characterized by sweeping police operations against immigrants and refugees[936], the Roma[937], drug addicts and sex workers[938]. For a long period Golden Dawn's rhetoric

[930] Ibid 49-52, 55-59.
[931] Ibid.
[932] Ibid, *see e.g.* Christos Syllas, "Greece: When satire cannot be tolerated", Index on Censorship, 23 January 2014 https://www.indexoncensorship.org/2014/01/elder-pastitsios-satire-tolerated/ accessed 30/10/2015.
[933] Ibid 52-54.
[934] Ibid.
[935] Ibid.
[936] ibid
[937] Ibid, *see* Eva Cossé, "Europe: Time to Drop the Roma Myths", Human Rights Watch, 4 November 2013 http://www.hrw.org/news/2013/11/04/europe-time-drop-roma-myths accessed 30/10/15.
[938] Ibid, *see* the documentary movie "Ruins, Chronicle of an HIV witch-hunt" http://ruins-documentary.com/en/ accessed 30/10/2015.

and illegal practices were not only tolerated but were more or less openly endorsed by segments of the police and the judiciary[939].

This is not to say that all judges are ideologically predisposed or act contrary to their duty. On the contrary in several cases judges have gone against the tide, vigorously defending democratic principles in a politically hostile environment[940]. It is important, however, to see the existing inherent limitations to the application of "hate speech" legislation in a non-secular state, the history of which has been marked by numerous constitutional aberrations, while its present is equally marked by political turbulence and uncertainty[941]. Despite deep-rooted, structural limitations to the use of the "anti-racism" law, its incitement provision can and must be used in the direction of safeguarding the right to equality and the dignity of members of minority groups.



[939] As has been repeatedly reported in the Greek press in all past election processes carried out from May 2012 to this day, more than 40% of Greek police officers voted for Golden Dawn. This heavy overrepresentation of the party among law enforcement agents cannot go unnoticed considering that the party has not gained more than 7% of the national vote in any of these election processes, *see* Matthaios Tsimitakis, "Greece's Fascists Are Gaining", The New York Times, 4 October 2015 http://www.nytimes.com/2015/10/05/opinion/greeces-fascists-are-gaining.html?_r=0 accessed 30/10/2015.
[940] Ibid 63.
[941] Christopoulos (n 818) 10.

# Conclusion

Discussion of the various legal norms and practices governing the regulation of "hate speech" reveals important divergences but also convergences among the different jurisdictions examined. The standards set at the regional level are broad and evasive, able to accommodate legal traditions as different between them as are the British and the Greek. The interaction between these two national jurisdictions, the CoE and the EU is not symmetrical. The UK has its own distinct approach to the problem which has had an important influence on the regional framework, as is apparent most notably in the EU Framework Decision on racism and xenophobia. The Greek legislation on the other hand being inert for decades is now gradually being interpreted and applied in accordance with developments at the regional level.

The breadth of the notions of "hate speech" and "incitement" varies among the jurisdictions examined. The regulation of "hate speech" in the UK appears at first glance to be closer to the international standard, which has been evolving in the direction of minimal interference with the right to free speech. Indeed contrary to the regional and Greek approaches, the UK criminal ban on "hate speech" covers only different forms of incitement without directly allowing for content-based speech restrictions such as the prohibition of Holocaust denial. On the other hand the removal of the requirement of intent with regard to racial incitement offences in the UK has significantly lowered the threshold for prosecution contrary to contemporary international and regional trends, to which the recently enacted Greek legislation has had to adapt.

Another important feature distinguishing the UK from the other jurisdictions examined here is that the speech proscribed by the incitement legislation has to be directed at groups and not individual members of these groups. In the latter case other criminal provisions apply. This approach is at odds both with the EU Framework Decision on racism and xenophobia and the Greek law as was authoritatively interpreted by the Greek Supreme Court in its *Plevris* judgment allowing individual members of targeted groups to have standing as civil claimants in criminal proceedings under the "anti-racism" law. The recent ECtHR Grand Chamber *Aksu* and *Perinçek* judgments equally admit the possibility of individual claims for

protection against "hate speech". In fact, however, through the separate regulation of discriminatory speech which is directed at individuals the UK seems to offer more adequate protection to individual victims of "hate speech" than does Greece[942].

In terms of the grounds covered by "hate speech" regulations, race continues to be the privileged ground at both regional and national level. The need to counter anti-Semitism, which in the post-WWII context triggered "hate speech" regulation internationally and regionally, continues to be prioritized over other forms of racism by the CoE, the EU and the UK. The Greek approach appears to be a notable exception in this regard as the *Plevris* case manifests. Apart from anti-Semitism, other forms of racism have been addressed albeit in a less coherent and decisive manner. Anti-immigrant "hate speech" in particular raises complex issues with regard to the status of race and ethnicity in Europe at a time when restrictive immigration laws and policies have become the norm costing the lives of thousands of people yearly[943]. Similarly the increasing, albeit reluctant, recognition of religion and sexual orientation creates new tensions not only in the jurisdictions examined but also internationally and is still far from producing clear legal standards.

The above considerations lead to the conclusion that there is no common and clear standard with regard to the regulation of "hate speech" in Europe and the interpretation of the threshold notion of "incitement". Apart from an abstract recognition of the need of countering harmful discriminatory expression there is little common ground as to the types of expression which qualify as incitement and are thus worthy of criminal sanctions. This uncertainty as to the scope of the relevant laws is problematic from a free speech as well as from an equality point of view.

From a free speech perspective the lack of foreseeability in criminal bans on "hate speech" is capable of producing a pervasive chilling effect on legitimate expression[944].Passionate argumentation or criticism of prevailing narratives may

[942] *See* the sub-chapter on the Greek "anti-racism" legislation above.
[943] *See* the "Missing Migrants Project" documenting the continuously rising death toll in the Mediterranean Sea http://missingmigrants.iom.int/ accessed 4/11/2015, *see* also Hepple (n 588).
[944] *See* Barendt (n 9) 32.

unwarrantably be restricted by "hate speech" bans[945]. On the other hand, even when powerful moral reasons counsel for the restriction of certain expressions for the sake of equality and non-discrimination, regulation is likely to have perverse effects[946]. The inevitable focus of speech regulation on apparent extremes allows a wide range of normalized harmful speech to go unchecked[947]. This selectiveness confers legitimacy to mainstream "hate speech", capable of censoring minority views, while it reduces structural social problems such as racism, religious intolerance or homophobia to marginal, isolated instances[948].

Moreover, focusing on certain speakers or types of expression often results in conferring visibility and moral salience on them[949]. This is particularly apparent in cases where marginal racists find in their prosecution a chance for publicity and claim martyrdom[950]. It is also the case that members of targeted groups, similarly to rape victims have to go through lengthy criminal proceedings where the hateful expressions are publicized, repeated and elaborated upon[951]. Lastly, not only do these laws very often fail to effectively protect vulnerable members of minority groups, but the latter can also end up targeted by such legislation as the British example indicates.

As Richard Abel notes, some of the above mentioned problems concern the legal system more broadly[952]. Existing power relations are irrelevant to a legal formalism willfully blind towards context. This is particularly so with regard to racism, to which law has been inextricably tied in the West for a long time[953]. Moreover, formal procedures tend to reconstruct and to a certain extent distort experience while their various costs make them applicable to what are considered as the most extreme cases. These generic problems are exacerbated however when it comes to speech regulation. Speech being inherently evasive and ambiguous any attempt of establishing exceptions to legitimate expression runs the risk of arbitrariness. In face of this



[945] Ibid.
[946] Abel (n 625) 102-104.
[947] Ibid.
[948] Ibid, *see* also Sottiaux (n 8) 55-56.
[949] Ibid.
[950] Ibid.
[951] Ibid.
[952] Abel (n 625) 85, 93, 97-98, 105-107, *see* also Farrior (n 30) 98.
[953] *See* Matsuda (n 33) 2325.

problem a civil libertarian position advocates for the absence of "hate speech" regulation[954].

This position, endorsed nowadays by the U.S. Supreme Court holds that freedom of expression is essentially synonymous to the absence of state regulation on private speech[955]. In this view speech can justifiably be regulated only when "a clear and present danger" stems from it[956]. The various problems of this position are persuasively analyzed by authors like Richard Abel and Stanley Fish[957]. Siding with these authors I endorse the view that the state constructs the value of speech either through its action or through its inaction[958]. Neutrality in this domain is thus impossible[959]. The regulation of "hate speech" as other forms of speech regulation necessarily presupposes a certain departure from the idea of state neutrality so as to make sure that the equal dignity of all is respected and atrocities of the past are not repeated[960]. Despite the many inherent shortcomings in the regulation of speech more broadly, the basic idea underlying international norms on "hate speech" regulation is still valid[961].

Having accepted that "hate speech" regulation is needed the question is which form that regulation should take. In this respect important guidance is provided by the evolving international standard on "incitement" as reflected in the RPA. As previously mentioned a central conclusion of this document is that criminal bans are in most cases not a suitable response. They should not however be entirely excluded and should be used as long as they are accompanied by specific safeguards setting a high threshold for prosecution. Instead of employing criminal law in all cases, the state can and must use other means for responding to the problem. Apart from civil and administrative sanctions which may be used in that direction, an institutionally supported civil society able to provide victims with a wide range of informal

[954] Abel (n 625) 33-34.
[955] Ibid 33-34, *see* also Stanley Fish, *There's No Such Thing As Free Speech, And It's A Good Thing, Too* (New York, Oxford: OUP 1994) 102-119 and Barendt (n 9) 7-13.
[956] *See* n 306.
[957] *See* Abel (n 625) 33-80 and Fish (n 955) 102-119, *see* also Farrior (n 30) 93-96 and Matsuda (n 33) 2356-2362.
[958] Ibid.
[959] Ibid.
[960] Ibid.
[961] *See* Abel (n 625) 123, Farrior (n 30) 96-98 and Matsuda (n 33) 2344.

responses is suitable for countering normalized "hate speech"[962]. Moreover self-regulation should be encouraged in different areas of social life, from education to the workplace and the media[963]. Rather than dictating a specific approach the state's role in this process should be to ensure that a pluralism of approaches exists[964].

"Hate speech" regulation makes part of a valuable anti-fascist and anti-racist legacy[965]. It originates in a moral commitment to the values of equality and full participation made by the international community several decades ago but which is still very much relevant today[966]. Excesses fostered by any speech regulation do not counsel against the very need of regulating "hate speech" but should instead be a reminder of the requisite moral and political responsibility when legislating and enforcing these rules[967]. Taking up such responsibility with regard to the realization of both freedom of expression and freedom from discrimination is all the more urgent when democratic institutions and human rights are under siege not only by labeled extremist groups but also by legitimately elected governments and political parties.



[962] Apart from the RPA s*ee* Abel (n 625) 136-152.
[963] Ibid.
[964] Ibid.
[965] *See* Matsuda (n 33) 2360-2361.
[966] Ibid.
[967] *See* Abel (n 625) 123-130.

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