

ECMI
WORKING PAPER



 EUROPEAN CENTRE
FOR
MINORITY ISSUES

**Words that Hurt (2): National and
International Perspectives on Hate
Speech Regulation.**

Kyriaki Topidi

ECMI WORKING PAPER #119

September 2019



The European Centre for Minority Issues (ECMI) is a non-partisan institution founded in 1996 by the Governments of the Kingdom of Denmark, the Federal Republic of Germany, and the German State of Schleswig-Holstein. The ECMI was established in Flensburg, at the heart of the Danish-German border region, in order to draw from the encouraging example of peaceful coexistence between minorities and majorities achieved here. The ECMI's aim is to promote interdisciplinary research on issues related to minorities and majorities in a European perspective and to contribute to the improvement of interethnic relations in those parts of Western and Eastern Europe where ethno-political tension and conflict prevail.

ECMI Working Papers are written either by the staff of ECMI or by outside authors commissioned by the Centre. As the ECMI does not propagate opinions of its own, the views expressed in any of its publications are the sole responsibility of the author concerned.

ECMI Working Paper #119
European Centre for Minority Issues (ECMI)
Working Paper Series Editor: Dr. Sergiusz Bober
Language / Copy Editor: Craig Willis
© ECMI 2019

ISSN 1435-9812; ISSN-Internet 2196-4890



WORDS THAT HURT (2): NATIONAL AND INTERNATIONAL PERSPECTIVES ON HATE SPEECH REGULATION

Faced with a piecemeal approach to hate speech in Europe, leading to the reduced visibility of the phenomenon with often serious consequences, a variety of regional and international organisations have contributed legal documents and interpretative recommendations that attempt to guide states in their practice of combating hate speech.

The present paper, following up on a previous one, will engage first with the international legal and regulatory framework of hate speech, placing emphasis on the European elements of the system in place. At a second stage, the paper will briefly survey twenty European national systems exposing the variety of regulatory patterns on the issue. Finally, the study will conclude with a list of common observations pertaining to the regulation of hate speech in the European continent, as they have emerged from the comparative analysis of the case-studies.

Kyriaki Topidi

September 2019

ECMI Working Paper #119¹

1. Introduction

Hate speech constitutes an expression of a culture that emphasises conformity, tradition and the mainstream. It is largely connected to the global economic crises and the considerable increase of the number of refugees and immigrants moving across the globe. At the same time, it allows discrimination because it perpetuates socio-economic inequality (EQUINET, 2018, p. 5). The rise in popularity of far-right political parties across Europe has signalled the normalisation of such a discourse that in the past was considered politically incorrect. France's National Rally, the Austrian Freedom Party, the Hungarian Jobbik, the Italian League, the Dutch Freedom Party, the German Alternative für Deutschland or the Greek Golden Dawn, to name a few, preach fear and distrust expressed in public political statements, written in traditional media as well as circulated through online media.

Hate speech is distinguishable from the broader category of *hate crime* insofar as the latter constitutes “criminal acts committed with a bias motive” while the former represents rather a manifestation of hate (ODIHR, 2009, p. 16). The most common grounds for hate speech are



race (including ethnicity, nationality and citizenship), religion (including non-believers), sexual orientation, and more recently gender identity and gender expression as well as disability.

For any comparative analysis of hate speech at European level, however, there are a number of obstacles that complicate both the process of comparison and the empirical findings. First, the definition of hate speech varies from country to country, as it is based on different criteria. Second, hate speech is either defined as a separate criminal offence or as an offence qualified by a motive of hatred. Third, there is a consistent lack of reliable statistical data² and even when official data exist, they are greatly diverging from the findings of NGOs that are active in a particular context. Also, in a considerable number of cases, hate offences are ‘trivialised’ as ordinary crimes for lack of proper identification or for convenience in the process of prosecution.

At the outset, it should also be noted that practice shows that hate speech in many cases proceeds more serious hate crimes (Engel et al., 2018, p. 85). This fact alone justifies a thorough investigation of hate speech in order to prevent further engagement with criminal activity.

Faced with a piecemeal approach to hate speech in Europe, leading to the reduced visibility of the phenomenon, a variety of regional and international organisations have contributed legal documents and interpretative recommendations that attempt to guide states in their practice of combating hate speech.

The present paper will engage first with the international legal and regulatory framework of hate speech, placing emphasis on the European elements of the system in place. At a second stage, the paper will briefly survey twenty European national systems exposing the variety of regulatory patterns on the issue. Finally, the study will conclude with a list of common observations pertaining to the regulation of hate speech in the European continent.

2. The International Legal and Regulatory Framework of Hate Speech

Hate speech regulation was initially introduced, following the end of the Second World War, to address xenophobic and anti-Semitic propaganda that had led to the Holocaust. Its current proliferation at the national and supra-national levels is designed to criminalise speech that is insulting to its addressees on the basis of their race, ethnicity, religion or nationality, among



other grounds. Paragraph 18 of the European Commission on Racism and Intolerance General Policy Recommendation 7 explicitly cites, in the context of criminal law, the types of acts that would be covered under hate speech and should be penalised in the legal systems of States. These are public incitement to violence, hatred, or discrimination; public insults and defamation; threats against a person or a group of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin; offences relating to the trivialisation or justification of genocide or crimes against humanity; the public dissemination of materials relating to hate speech offences; membership or leadership of a racist organisation; and racial discrimination in the exercise of a public office or occupation (ECRI, 2002).

While there is a continuous struggle to come up with a universally accepted definition of *hate speech*,³ there is an inherent connection between the right to freedom of expression and non-discrimination that requires from states to adopt more holistic approaches to combat prejudice and discrimination. Various definitions of hate speech share references to a number of common characteristics such as the content of speech; the tone of speech; the nature of the speech in question; its targets (individual or collective); as well as its implications (eMore, 2018, p. 19).

Three main international legal instruments set the tone for the regulation of freedom of expression in connection to hate speech: the European Convention on Human Rights (ECHR, Article 10),⁴ the International Convention on the Elimination of All Forms of Racial Discrimination (CERD, Article 4(a))⁵ and the International Covenant on Civil and Political Rights (ICCPR, Article 20).⁶ CERD covers only racist speech while the ICCPR deals only with national, racial or religiously motivated hate speech to the exclusion of homophobic expressions.

According to the UN Rabat Plan of Action and Article 20(2) ICCPR, a six-part test has been devised to assist the legal assessment of a given expression. This test takes under consideration the following factors:

- Context: any expression under review should be considered against its political, economic and social context (e.g. existence of a conflict)
- Identity of the speaker: the speaker's position in terms of authority or influence is essential (e.g. politician, religious leader)
- Intent of the speaker: the intent and foreseeable knowledge of the impact of one's statements is crucial



- Content of expression: the form and style of an expression is a useful guiding principle
- Extent and magnitude of expression: the public or private nature of the expression, its means and intensity are important
- Likelihood of harm occurring as a result of statement: there is a requirement for reasonable probability of violence or hostility ensuing as a result.

The UN Human Rights Committee has stated that “the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression.”⁷ This compatibility, read against the background of Article 4(a) CERD and taken together with Article 19 and 20 ICCPR, suggests that states may indeed restrict the freedom of expression when preventing advocacy of hatred that constitutes incitement to racial discrimination, hostility or violence proportionally and to the extent necessary. Advocacy in that sense implies intent to promote hatred as an element of assessment of lawfulness of restriction on freedom of expression.⁸ The Human Rights Committee has noted that the State must nevertheless demonstrate “a direct and immediate connection between the expression and the threat [to others’ rights]”⁹ in order to limit one’s freedom of expression.

In terms of measures required from States to address hate speech, the Council of Europe Committee of Ministers has recommended that states adopt civil, criminal as well as administrative law provisions.¹⁰

At the European level, there are two main legislative references that regulate the matter: the EU Framework Decision 2008/913/JHA of 28 November 2008 on Racism and Xenophobia¹¹ and the Council of Europe Additional Protocol to the Cybercrime Convention.¹² The Framework Decision in Article 1.1 (a) declares that Member States shall take the measures necessary to ensure that the following *intentional* conduct is subject to punishment: “*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.” Article 1.2 adds that Member States may choose to punish conduct which may disturb public order or which is threatening, abusive or insulting. It requires Member States to “take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance or alternatively that such motivation may be taken into consideration by the courts in the determination of penalties” (Article 4 of the Decision). The Decision does not

cover hate speech on other grounds beyond racism and intolerance, such as, for example, a person's sexual identity or orientation.

The Additional Protocol punishes the distribution of online material that is intentionally and without right dissemination of racist and xenophobic material. It also covers threats and denial or justification of acts of genocide or crimes against humanity.¹³ The Decision in essence requires from Member States to introduce criminal law offences and corresponding sanctions within an effective and proportionate frame.

The adoption of the Victims' Directive in 2012,¹⁴ introducing minimum standards for victims for their rights, support and protection, added to the broader picture a requirement that when assessing the needs of victims, an assessment must be carried out to determine if the victim has particular "protection needs" in the course of criminal proceedings, justifying special measures of protection as a result of the person's vulnerability repeat victimisation or intimidation (Article 22 of the Directive). Article 22(3) adds that particular attention must be paid to victims who "have suffered a crime committed with a bias or discriminatory motive, which could notably be related to their personal characteristics."¹⁵

In 2018, the European Union (EU) adopted a new directive¹⁶ that updates and strengthens regulation on video-sharing platforms and newer forms of media. The new rules emphasise public interest while directing governments to intervene in media activities in justified and proportionate terms to serve that public interest. The main aim of the directive is to take aim at "incitement to violence or hatred" and "public provocation to commit a terrorist offence". Guided by the overarching objectives of media pluralism, freedom of speech and cultural diversity, the piece of legislation requires video-sharing platforms to ensure that viewers (especially minors) are better protected from violent or harmful content, including hate speech.

3. Hate Speech within the European Convention of Human Rights and the Council of Europe's Other Instruments

Freedom of expression according to the European Court of Human Rights (ECtHR) includes the right to shock, offend and disturb.¹⁷ In other words, the Court has stated that freedom of expression protects not only "the information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb (...)" as "such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'".¹⁸



Against this established principle, a vast variety of “hate speech” cases, covering criticism of Islam¹⁹ or of homosexual behaviour,²⁰ to name just a few examples, has challenged the content and limits of freedom of expression as spelt out in the European Convention. Given the lack of a concise definition of the term,²¹ a wide spectrum of negative discourse is potentially covered although doctrinally at least, a degree of intensity is required (McGonagle, 2012, pp. 3-4). Article 2 of the Additional Protocol to the Convention on Cybercrime, related to the criminalisation of racist and xenophobic acts committed online approaches “racist and xenophobic material” as one that “advocates, promotes, incites hatred, discrimination or violence.”

In principle, the Court uses a three-prong test to determine whether there has been a violation of Article 10²²: first, the Court asks whether State interference was ‘prescribed by law’; second, it examines whether it pursued a ‘legitimate aim’; and third, it considers whether the interference with freedom of expression was ‘necessary in a democratic society’.²³ In its assessments, the Court considers the context of the hate expression (the state of the public and political debate in the country²⁴), the intention of the speaker,²⁵ the status of the speaker as well as the form and the impact of the speech. In broad terms, identifying persons by name, stirring hatred for them and creating the conditions for the risk of physical violence has been found to justify a limitation of Article 10 ECHR.²⁶

Another effect of the absence of a universally accepted definition of hate speech is the considerable variation in the ECtHR’s jurisprudence: at times, freedom of expression appears to be liberally protected,²⁷ while with regard to national security post 9/11, the limitations to the right are more easily conceded.²⁸ In principle, however, Article 10 ECHR protects both the substance of information and ideas and the form in which they are conveyed (McGonagle, 2012, p. 9).

In this context, Article 17 ECHR operates as a ‘safety mechanism’ by stating that “nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for the Convention”. In other words, Article 17 bars the use of Article 10 to protect racist, xenophobic or other forms of hate speech.²⁹



The case of *Féret v. Belgium*,³⁰ concerning the conviction of a Belgian politician for incitement to hatred and discrimination, represents in a way a test-case on the interaction between Articles 10 and 17 ECHR: the applicant's freedom of expression was not found to be violated due to the nature of his statements, made during an electoral period, and in the light of his duty as a politician to refrain from advocating discrimination.³¹ In the same framework, the Court has confirmed that it sees political parties as having an "essential role in ensuring pluralism and the proper functioning of democracy."³²

The essence and core of the challenges of the limits of protection of freedom of expression are aptly summarised in the following dissenting opinion of Judge András Sajó, joined by judges Vladimiro Zagrebelsky and Nora Tsotsoria warning in *Féret v. Belgium* that:³³

"Content regulation and content-based restrictions on speech are based on the assumption that certain expressions go 'against the spirit' of the Convention. But 'spirits' do not offer clear standards and are open to abuse. Humans, including judges, are inclined to label positions with which they disagree as palpably unacceptable and therefore beyond the realm of protected expression. However, it is precisely where we face ideas that we abhor or despise that we have to be most careful in our judgment, as our personal convictions can influence our ideas about what is actually dangerous."

Particularly with reference to religious speech, the Court has since *Kokkinakis v. Greece*³⁴ been clear about the right to freedom of expression, including in the context of evangelism. Also, with regard to blasphemy, the position within the Council of Europe's Parliamentary Assembly is that "religious groups must tolerate, as much as other groups, critical public statements and debate about their activities, teaching and beliefs, provided that such criticism does not amount to intentional and gratuitous insults or hate speech and does not constitute incitement to disturb the peace or to violence and discrimination against adherents of a particular religion."³⁵

The use of anti-Semitic and xenophobic statements in public discourse has also been singled out as a source of concern: already in 2005, ECRI issued a declaration condemning the use of such discourse.³⁶ The general climate on public opinion ever since justifies the concern that "the use of racist, anti-Semitic and xenophobic political discourse is no longer confined to extremist political parties, but is increasingly infecting mainstream political parties" by "legitimising and trivialising this type of discourse."



In sum, the broader regulatory framework of hate speech appears in practice much more nuanced: for some cases of hate speech, legal responses are suitable yet for other more subtle (and also more common) forms, non-regulatory means are likely to be more efficient (e.g. educational or informational remedies) (McGonagle, 2012, p. 5).

Alongside the ECHR and its case-law, there are additional sources on hate speech. One such source involves Articles 6 (encouragement of spirit of tolerance and intercultural dialogue) and 9 (freedom of expression and access to media) of the Framework Convention for the Protection of National Minorities. The Advisory Committee of the FCNM has adopted an approach that seeks to prevent hate speech through the development of dialogue within and between communities.

4. Brief Country Reports

4.1 Austria

Austrian law criminalises the denial, appreciation or justification of the crimes of the Nazi regime or any attempts to reinstate such regime. It also penalises defamation of religion as “degradation of religious teachings”. The Law against Discrimination also provides civil law remedies to hate speech victims in the form of pecuniary and non-pecuniary damages (ARTICLE 19 Report, 2018, p.24). Political hate speech is also common in the Austrian context (e.g. Austrian People’s Party), particularly targeting immigrants and minorities.

Regulation of audio-visual services prohibits discrimination on the grounds of race, gender, religion, disability, nationality, ethnicity or sexual orientation (ARTICLE 19 Report 2018, at 29).³⁷ The duty is very clear vis-à-vis public service broadcasters but is also extended to commercial broadcasters. The rules applicable to hate speech in this context are vaguely formulated (ARTICLE 19 Report, 2018, p. 29). In contrast, print press remains self-regulated under the supervision of the National Press Council since 2010. While prohibition of discrimination on the grounds of age, disability, gender, ethnicity, nationality, religion, sexual orientation or political view or other status is in place, there are no legal sanctions attached to violations (ARTICLE 19 Report 2018, p. 32). The broadcasting and media law is not applicable to social media platforms but does apply to the sites of traditional media (e.g. the Facebook page of a specific newspaper) (ARTICLE 19 Report 2018, p. 37).



Criminal law provides a non-exhaustive list of protected characteristics against hate speech (ARTICLE 19 Report 2018, p. 17). Between 2016 and 2017, awareness raising programmes concerning incitement to hatred and discriminatory practices online were implemented (Engel et al., p. 41).³⁸

4.2 Croatia

According to Article 39 of the Croatian Constitution “any reference to or incitement to war or violence, to national, racial or religious hatred or any form of intolerance shall be prohibited and punishable by law.” The Croatian Criminal Code in Article 325 defines public incitement to violence or hatred as follows: “Who through the press, radio, television, computer system or network, at a public gathering or otherwise publicly incites or publicly makes available flyers, images, or other materials that refer to violence or hatred directed against a group of persons or a member of the group because of their race, religion, national or ethnic origin, origin, colour, sex, sexual orientation, gender identity, disability or any other characteristic, shall be sentenced with imprisonment of up to three years”. Similarly, Article 3 of the Media Act prohibits the support and glorification of discrimination based on any of the criteria mentioned in Article 325 of the Code.

There is no explicit definition of hate speech in itself in the Criminal Code. Currently, the most targeted groups from hate speech are women, the Roma and homosexuals (Dojcinovic et al, 2014, pp. 155). Incitement to hatred should be distinguished from intimidation, which constitutes a lesser offence that flows from harassment.

4.3 Cyprus

Hate crime per se is not specifically addressed or defined in any specific legal text or code. In the context of the implementation of Council Framework Decision 2008/913/JHA of 28 November 2011, Law 134(I)/2011 on the Combating of Certain Forms and Expressions of Racism and Xenophobia by means of Criminal Law criminalises only the type of conduct specified in the Framework Decision. Particularly regarding hate speech, in 2015, the Penal Code was amended to criminalise conduct, which publicly and intentionally incites violence or hatred against any group of persons or any member on grounds of sexual orientation or gender identity (TOGETHER Cyprus, 2016, p. 4).



Racist or xenophobic motives are considered, according to the 2011 national law as an aggravating factor, relevant in the imposition of the penalty. Yet there seems to be little guidance or precedent as to how these provisions can or have been used by courts (TOGETHER Cyprus, 2016, p. 4). Regarding incitement to hatred, on the basis of the 2011 Law and the amended Penal Code, an offence is established for any person that intentionally and publicly incites to violence or hatred in any manner against a group defined by reference to race, colour, religion, descent or national or ethnic origin, sexual orientation or gender identity. The denial of the Holocaust is not specifically referred to although certain forms of speech are specifically criminalised. These are indicatively:

- Intentionally publicly denying or trivialising crimes of genocide, crimes against humanity and war crimes (as defined in Articles 6-8 of the Statute of the International Criminal Court) against a member or a group defined by reference to race, colour, religion, descent, national or ethnic origin, when the conduct is likely to incite to violence or hatred
- Intentionally publicly denying or trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal (London Agreement of 8 August 1945) directed against a group of persons by reference to race, colour, religion, descent or national/ethnic origin, when the conduct is likely to incite violence or hatred, when the mentioned crimes have been established by a final decision of an international court.

Furthermore, the Penal Code criminalises any speech or publication, which offends any religion.

Since 2005, the relevant body for the collection of official data on hate crimes is the Office for Combating Discrimination of the Criminal Investigation Department of the Police of Cyprus.³⁹ According to the available data, bias motivation of perpetrators is classified according to: language; special needs; nationality/ethnic origin; age; religion; community; political views; sexual orientation; race; gender; colour; unspecified. To determine bias, the Police take account of specific *protected characteristics* to determine bias mentioned above (TOGETHER Cyprus Report, p. 6).⁴⁰ Civil society actors, such as NGOs are also active in recording (and reporting) hate speech incidents (TOGETHER Cyprus Report 2016, p. 11).⁴¹ As elsewhere, there is a noted discrepancy between the official data where the most frequently reported cases on hate crime concern ethnicity/nationality, followed by racial background, and those coming from



civil society, where the order of vulnerable groups place first migrants, asylum seekers, refugees and then Turkish Cypriots (TOGETHER Cyprus Report, p. 11).

Similarly to other national contexts, despite efforts to educate police officers of all ranks on hate crime, it is reported that difficulties persist in the self-understanding of the role of police officers. In particular, personal prejudice of police officers often obstructs their assessment (TOGETHER Cyprus Report, 2016, p. 7). Ultimately, however, it is up to the Attorney General to decide about the prosecution of perpetrators on the basis of evidence provided. As such, the lack of a general and clear policy framework on hate crimes, in conjunction with partial reporting, makes the distinction between hate crime and discrimination challenging, unless expressly reported as an incident related to hate (TOGETHER Cyprus Report, 2016, p. 10).⁴²

Formal reports are therefore limited in number, also and in large part due to the fact that victims will not report incidents as hate crimes, but rather as racial discrimination (TOGETHER Cyprus Report 2016, p. 12).⁴³ When reporting happens, victims are willing to take action in circumstances where they trust the organisation that they are reporting to, with particular emphasis on the protection of their privacy (eMore Report 2018, p. 65).

4.4 Czech Republic

Criminal acts related to hate speech are covered by Act n.40/2009. Hate crimes are divided in those that do not require proof of motivation and those where motivation based on hatred justifies a more severe sentence (section 352 of the criminal code). In the former category, one finds the defamation of a nation (section 355), race, ethnic group, the incitement to hatred of a group or to infringement of their rights and freedom (section 356), genocide denial (section 405) or display of sympathy for a movement aiming at the suppression of the rights and freedoms of others (section 404). Article 42 (b) of the Criminal Code explicitly refers to racist, ethnic, religious or other similar hatred as aggravating circumstances that should be taken into account upon sentencing.

The list of protected characteristics covers race, nationality, ethnicity, religious beliefs and political convictions. In terms of typology of victims, it appears that Roma constitute a large part of victims of hate crime, with Muslim Arabs and Jews being primarily (though not exclusively) victims of hate speech (Bihariová et al., 2018, pp. 44-45).



In general terms, the legal system appears to be struggling with addressing the essence of hate speech incidents: it does not address the individual (as opposed to the group) dimension of protection against hate, bias or discrimination; or the motive of hate crime is not sufficiently accounted for insofar as it should justify the reason behind hate expression (i.e. different characteristic(s) of victims) (Bihariová et al., 2018, pp. 54-55).

Commonly, thus, hateful assaults become labelled, as offences against neighbourly coexistence, although in reality they constitute verbal hate speech, often accompanied with sentences that encourage the impression that the state is protecting the majority perpetrators. The motive behind hate speech incidents is also problematic to prove, with police authorities dismissing incidents when the perpetrators' actions are not connected to any hateful movement or when they simply deny the facts (Bihariová et al., 2018, pp. 58-59).

There is also no record of a uniform mechanism for collecting disaggregated data on hate incidents.

4.5 Denmark

According to the ECRI, hate speech against specific groups, such as Muslims and refugees, is becoming more widespread in Denmark (ECRI Report on Denmark, 2017). The 2014 Council of Europe Commissioner for Human Rights Report noted in particular the wide range of hate speech and negative stereotypes in Danish politics (ECRI Report on Denmark, 2017, p. 15). In 2015, CERD noted an increase in xenophobic political statements, especially before general elections (ECRI Report on Denmark, 2017, para.25).⁴⁴ Similarly, patterns of homo- and transphobic hate speech subsist.

In stricter legal terms, Danish hate crime laws include a general penalty-enhancement provision. Article 81 No 6 of the 2008 Criminal Code declares:

“In determining the penalty it shall, as a general rule, be considered a circumstance in aggravation (...) 6) that the offence stems from others' ethnic origin, religious beliefs, sexual orientation or similar; (...)”⁴⁵

Article 266(b) of the Criminal Code criminalises “expressing and spreading racial hatred”. It is therefore an offence to threaten, insult or vilify using language intended for the general public or a wide circle of persons.⁴⁶ The Criminal Code does not include a provision criminalising the public denial, trivialisation, justification or condoning, with a racist aim, of the crimes of

genocide, crimes against humanity or war crimes. Consequently, Article 266 (b) of the Code is limited in its scope when compared to the international legal and policy standards: the public dissemination or distribution, with a racist aim, does not extend to the range covered in General Policy Recommendation 7 (in particular para. 18(1)) (ECRI Report on Denmark, 2017, para.6).

In the area of the media and the Internet, there is concern over the development of a climate of hostility towards vulnerable groups (ECRI Report on Denmark, 2017, para.27), with incidents of stigma and prejudice. There are records, in particular, of several organisations spreading hate speech through social media in particular (e.g. Facebook). Regarding the regulation of the media, the Danish Press Council is competent to hear complaints about alleged violation in the area of print media, television, radio and electronic media. It does not have the power, however, to impose sanctions and has only dealt with a limited number of cases (ECRI Report on Denmark, 2017, para.37). So, while Article 266(b) of the Criminal Code criminalises hate speech, the number of cases taken up by the police remains low. A new national strategy on the prevention of radicalisation and extremism was introduced in 2014 with a follow-up in 2016 emphasising cooperation with civil society.

Overall, hate speech offences are included in reported data, although not disaggregated from hate crime. The National Police College and the Danish National Police train police cadets and police officers on hate crime.⁴⁷ Until 2014, the Danish Security and Intelligence Services collected hate crime data but the data collected were found to be unreliable (ECRI Report on Denmark, 2017, para.18). Since 2015, the responsibility to collect such data shifted to the Danish National Police, with subsequent efforts to set up a new data collection system (ECRI Report on Denmark, 2017, para.18).

4.6 England and Wales

English criminal law has a number of legal bases related to hate speech. Section 18(1) of the Public Order Act of 1986 stipulates that “a person who uses threatening, abusive, or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of any offence if (i) he intends to thereby stir up racial hatred, or, (ii) having regard to all the circumstances racial hatred is likely to be stirred up thereby”. Additionally, under section 5 of the Public Order Act, it is a crime to use or display threatening, abusive or insulting words “within the hearing or sight of a person likely to be caused harassment, alarm, or distress



thereby”. The grounds for criminalisation of hate speech cover race, religion and sexual orientation (ARTICLE 19 Report, 2018, p. 17).

The Crown Prosecution Service applies a test in order to determine whether to proceed with criminal prosecution. This examination seeks to determine whether it is in the *public interest* to prosecute in the sense that a discriminatory motivation or hostility towards the victim should be present (ARTICLE 19 Report, 2018, p. 18). Often, however, the hate element of racially motivated crimes is filtered out either at the stage of prosecution or at trial. This is due to a variety of reasons such as the unwillingness to recognise racist motivation, the reclassification of the offence as a dispute not based on bias, the strict interpretation of the provisions on racist motivations or the extinction of the aggravating circumstance of hate through guilty pleas acceptance (ECRI Report on the UK, 2016). The overall framework in England and Wales, nevertheless, has put together a national plan on hate crime that is interpreted as an “attack [to] the fundamental values that underpin our diverse society, values of acceptance and respect for others”(Home Office, Action Plan Against Hate, 2016). In civil law, the Protection from Harassment Act and the Equality Act both cover discriminatory hate speech targeted at service users, users of premises and potential users. The protection also extends to employees in certain cases (ARTICLE 19 Report 2018, p. 25).

Of interest is the duty imposed on public authorities, by virtue of the 2010 Equality Act, to have due regard to the need to eliminate discrimination, harassment, victimization, advance equality of opportunity and foster good relations, with direct links to advance action on preventing hate speech.

In the media sector, OFCOM, which regulates broadcast media and the BBC service, has the legal duty to promote plurality, diversity and inclusion of minorities in the media (ARTICLE 19 Report 2018, p. 30). In this context, hate speech is defined as “all forms of expression which spread, incite, promote or justify hatred based on intolerance on the grounds of disability, ethnicity, gender, gender reassignment, nationality, race, religion or sexual orientation.” It is worth noting that in its guidelines for assessment, OFCOM takes account of contextual factors such as the editorial purpose of the programme, the status/position of those featured or the extent to which the material is sufficiently challenged (ARTICLE 19 Report 2018, p. 31). Regarding online hate speech, a 2017 inquiry by the Home Affairs Parliamentary Select Committee concluded that hate speech legislation was inadequate and unclear (ARTICLE 19



Report 2018, p. 22), particularly given that there is no general regulation covering online platforms.

For the print media, the Press Standards Organisation (IPSO), the Independent Monitor of Press (IMPRESS) or media organisations in themselves (e.g. the Financial Times) are responsible for self-regulation (ARTICLE 19 Report 2018, p. 36). The broader framework of self-regulation is the 2013 Royal Charter on self-regulation of the press. The efficiency of these mechanisms varies.

In 2017, statistics were published for the first time on hate offences committed online for England and Wales (Engel et al, 2018, p. 42). For the period 2016-2017, they reveal an increase in hate crimes in England and Wales by 29 per cent, with corresponding increase for hate crime directed at the disabled and LGBT people (Engel et al., 2018, p. 86). The peak of the trend occurred after the referendum for the withdrawal of the UK from the EU with 5500 crimes registered in July 2016 (Engel et al., 2018, p. 86). Equivalent data from NGOs suggest however that there was an increase in anti-Semitic and anti-Islamic hate crime too in the same period.

4.7 France

The French Criminal Code together with the Press Law 1881 criminalise public and private communication that is defamatory, insulting or incites discrimination, hatred or violence against a person or a group on the basis of origin, ethnicity, nationality, race, religion, sex, sexual orientation or disability. Similarly to other national contexts, however, there is no definition of hate speech.

The Press Freedom Act of 29 July 1881 guarantees freedom of expression while respecting public order. The Act in its Article 24 criminalises incitement to racial discrimination, hatred or violence on the basis of one's origin, membership or non-membership to an ethnic, national, racial or religious group. Article 27 of the same Act prohibits the publication, distribution or reproduction of 'fake news'. For the purposes of the scope of the Act, Article 29(2) defines an insult as "any offensive expression contemptuous term or invective not based on fact (...)".

An equivalent criminal code provision makes it an offense to act similarly in private communication. In 2003, the Criminal Code was amended (*Loi Lellouche*) to characterise racist motives as aggravating factors when sentencing crimes.⁴⁸ Examples of criteria to define a crime as having a hate motivation are "spoken or written words, images, items or acts of any kind

that are injurious to the honour or esteem of the victim, or group of persons including the victim, by virtue of their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion” (Camus, 2011). Since 1990, by virtue of the Gayssot Act, amending Article 24 of the Press Law of 1881, declarations that justify or deny crimes against humanity, such as the Holocaust, are also prohibited.

In practice, hate speech legislation shows some signs of inconsistent application, for example in connection to hate speech based on religious bias (SOS Racismo, 2016, p. 120). Case law for both public statements (oral or in writing) as well as online expression showcase unresolved questions regarding the line between freedom of expression and hate speech but also more procedural aspects such as competence to regulate, concerning the Internet.⁴⁹

With regard to audiovisual programmes, Law 86-1067 of 30 September 1986 on Freedom of Communication (*Loi Leotard*) stipulates that “the Higher Audiovisual Council monitors (...) that the programmes made available to the public by an audiovisual communication service do not contain any incitement to hatred or violence for reasons of race, sex, morals, religion or nationality”(CoE and ELSA, 2014).

In 2015, the French government launched a major campaign to tackle racism and hate speech (Chrisafis, 2015). Despite a decline in non-violent hate crime in France in 2017 by 15.8 per cent,⁵⁰ violent hate crimes increased. In fact, anti-Semitic acts in France are primarily committed by individuals with a Muslim cultural background, instead of right-wing radicals, as was the case in the past.⁵¹ In 2019, against an upsurge in anti-Semitic crimes reported in France, President Macron announced further legislative plans designed to combat hate speech on the Internet (*Le Monde*, 2019).

4.8 Germany

The German Criminal Code provides general protection to “national, racial, religious groups defined by their ethnic origin”. Similar to other countries, it also incriminates expressions amounting to the denial of the Holocaust and of crimes committed during Nazi rule. Defamation of a religion is also criminalised as “dissemination of written materials that defame the religion or ideology of others in a manner capable of disturbing the public peace. Hate crimes are considered politically motivated offences because they present a threat to human and constitutional rights of the victim and also undermine pluralism in society (Glet, 2009, p. 1).



Regarding broadcasting, the Interstate Broadcasting Treaty covering public and private broadcasting and applicable in all 16 Länder obliges national and regional broadcasters to respect and protect human dignity as well as the moral and religious beliefs of the population within their programmes. Hate speech is covered in the Treaty with reference to criminal law provisions which prohibit hate speech conduct such as incitement to hatred against parts of the population or a national, racial, religious or ethnic group, downplaying of acts committed under the Nazi regime (ARTICLE 19 Report, p. 29). The print media remain the competence of the federal states although there is the German Press Council which through its own Code prohibits discrimination on the basis of sex, disability, or membership of an ethnic, religious, social or national group on a nationwide basis. The 2017 loosening of the Council's guidelines on reporting the minority identity of the perpetrators of crimes if the 'public interest' requires it, raised concerns.

Statistically, hate speech incidents together with the broader hate crime category fall under the notion of "politically motivated crimes". As such, it is not clear which proportion of these politically motivated crimes corresponds to offences of interest to this study. In general, however, according to data from the Ministry of Internal Affairs, there has been a recorded decrease of 4.9 per cent of the general category of politically motivated crimes in 2017 (Engel et al., 2018, p. 97).

NGOs and public organisations express doubt about the accuracy of the statistics in question. A point at issue affecting the nature of the data is its classification with regards to the type of perpetrators: while there is an increase in Islamist perpetrators of anti-Semitic attacks, the main perpetrators remain right-wing radicals in Germany (Engel et al., 2018, p. 99). This is mainly so because select parts of right-wing political parties' leadership fuel the hate speech rhetoric on a regular basis towards electoral purposes (e.g. Alternative for Germany Party).

The 2017 Network Enforcement Act (NetzDG) (in force since January 2018) targets hate speech, by establishing intermediary liability to remove and block 'clearly violating content' and 'violating content' within a period between 24 hours and 7 days respectively. The administrative fines in cases of non-compliance can rise up to 5 million euros. The basis of the Act relates to offences recognised within the German Criminal Code, such as defamation of religion, broad concepts of hate speech, criminal defamation and insult. The majority of press laws also cover online content of traditional media outlets, subject to the additional regulation

provided for by the 2007 Tele-media Law that regulates the legal information on websites on liability for illegal online content.

4.9 Greece

In general terms, the Greek Criminal Code includes a penalty-enhancement provision for hate crimes. Hate crimes, however, are not separately reported from cases of hate speech.⁵²

Law 4285/2014 enacted in September 2014 criminalises activities likely to disturb public order and which are threatening or abusive, but not merely insulting. The Law was introduced in implementation of European Council Framework Decision 2008/913 /JHA. It makes a criminal offence the public incitement – oral, in the press or the internet – to violence or hatred or any other act of discrimination against a person or a group identified on the basis of race, colour, religion, national or ethnic origin, sexual orientation, gender identity or disability. In 2017, Greece adopted Law No.4478/2017 on the basis of Directive 2012/29/EU that establishes minimum standards for the rights, support and protection of victims of hate crime. The Law introduced measures designed for victims to participate in the criminal process. In connection to the new legal framework, and with the assistance of NGOs (in particular the Greek Helsinki Monitor), 150 cases on incitement to hatred were opened in the same year.

Overall, hate speech incidents have increased sharply. In 2017, a Golden Dawn party member (a far-right political formation) and member of the Greek Parliament was convicted for inciting violence against immigrants. Additionally, public endorsement or denial of crimes such as genocide, the Holocaust or Nazi crimes are also incriminated by the 2014 Law.

In terms of online hate speech, in the most recent European Commission monitoring report based on the Code of Conduct with social media platforms, Greece was one of the countries that in 2018 removed 100 per cent of flagged content (Beswick, 2019).

4.10 Hungary

Hate speech in Hungary can either be prosecuted as a separate criminal offence (distinguishable on the basis of motivation) or can be treated as an aggravating circumstance. According to the Criminal Code (Act C of 2012), the following offences are considered separate offences related to hate speech: violation of the freedom of conscience and religion (Section 215), incitement against a community (Section 332), denial of Nazi crimes and communist crimes (Section 333),



desecration of national symbols (Section 334) and use of symbols of totalitarianism (Section 335) (Bihariová et al., 2018, p. 27). In some cases of hateful statements made by politicians, the Equality Act has also been used as a basis for prosecution (ARTICLE 19 Report 2018, p. 23).

For offences such as defamation (Section 226), hate motivation may become an aggravating circumstance. Interestingly, the list of protected characteristics in Hungary is open. Hungarian courts assess cases on the basis of the “clear and present danger of violent actions or to individual rights” (ARTICLE 19 Report 2018, p. 18). The most frequent targets of hate crime and hate speech are Roma, followed by migrants and LGBT persons (Bihariová et al., 2018, p. 46).

At the level of prosecution, hate speech regulation is affected by law enforcement difficulties as well as certain unclear parts in the legislative framework.⁵³ The open list of protected groups tends, in practice, to create uncertainty. Similarly, lack of knowledge about hate speech coupled with eventual prejudice during investigation lead to secondary victimisation of those affected (Bihariová et al., 2018, pp. 62-63).⁵⁴ Police officers are mis-qualifying incidents leading to the erroneous track of prosecution that follows. In general terms, the current Hungarian government is particularly vocal against migrants and the EU.

For media service providers, the legislation imposes the respect of human dignity in their contents, prohibits content that incites against “any national, community, ethnic, linguistic or other minority or any majority as well as any church or religious group”, and prohibits their exclusion on the same grounds (ARTICLE 19 Report 2018, p. 30). Furthermore, there are positive obligations identified that require from media services to provide pluralistic media content. With the exception of television and radio media outlets, the rest of them are required to self-regulate through Codes of Conduct and their own disciplinary mechanisms. There is nevertheless limited clarity on the terms of use of the Codes of Conduct. It is worth noting that disciplinary proceedings that a media outlet may face do not prevent parallel liability under criminal, administrative or civil law (ARTICLE 19 Report 2018, p. 33). Overall, there are few identifiable complaints regarding media hate speech in Hungary and most content on social media is not directly subject to media regulation. Similarly to Germany, intermediary liability for comments posted by third parties is a growing area of litigation. The general trend is for strict liability of the intermediary, even if he/she is not aware of the contested content.⁵⁵

4.11 Italy

In principle, Italian law criminalises insult in the form of improper use of electronic communication to send offensive or menacing messages as well as threats with a bias motivation. Criminal sanctions also apply to expressions of apology to fascism, denial of the Holocaust or of genocide crimes and crimes against humanity. Since 2017, new legislation entered into force prohibiting cyber-bullying related to online incitement of hatred directed at individuals on various grounds (ARTICLE 19 Report 2018, p. 23).

Contrary to the requirements of Article 4 of the CERD that criminalises “any dissemination of ideas of racial superiority or hatred (...)” and “declares illegal and prohibits organizations, as well as (...) propaganda activities that encourage and incite racial discrimination and recognize participation in such organization (...)”, Italian criminal law connects liability with proof of the influence of the accused on a wide audience and the “goal of changing the audience’s behaviour” (Engel et al., 2018, p. 42). This standard of proof is difficult to reach. Additionally, the law only criminalises hate speech on the grounds of race, ethnic origin, nationality or religion. The tension between the freedom of expression and the regulation of hate speech becomes, as a result, quite clear.

In the same vein, Italian law does not provide for criminal prosecution for the manifestations of hatred towards LGBT persons, especially in the absence of an element of violence. Incitement to hatred is punishable if intention is proven as outlined above. Consequently, the wave of hatred is inevitably growing in Italy, especially through political statements (Engel et al., 2018, p. 95).

Very similarly to other countries, there is discrepancy among different sources of data recording, and there is no account for victims of hate speech and hate crime that did not report a crime to the police authorities. An important number of such unregistered complaints come from illegal immigrants that fear deportation (Engel et al., 2018, p. 96). Overall, the current political climate encourages right-wing parties and politicians to adopt hostile rhetoric towards minorities and immigrants in an attempt to gain political support.

In the area of audio-visual media regulation, legislation prohibits programmes that “instigate intolerant behaviour based on differences of race, sex, religion or nationality” (ARTICLE 19 Report, 2018, p. 30). The Press Law provides for the creation of a National, Regional or Inter-regional Press Councils overseeing the application of the Press Law. Within that framework,



the Ethical Code of Journalists as of 2016 includes the duty to respect the right of non-discrimination of race, religion, political opinion, sex, personal, physical or mental disability of every person. In case of violation of such a duty, there are administrative pecuniary sanctions established by law (ARTICLE 19 Report, 2018, p. 34).

4.12 Ireland

In general terms, there is no legislative framework for addressing hate crime and neither are there special offices, guidelines or training regarding hate speech. The only legislative recognition of ‘hate’ is through the Prohibition of Incitement to Hatred Act 1989, which is rarely used. While Ireland does not have in its criminal law a provision that allows for the racist motivation of a criminal offence to be considered as an aggravating factor in sentencing, judicial practice shows signs of considering racist motivation for example as an aggravating factor in sentencing.⁵⁶ This kind of practice however does not address an eventual hate offence based for example on religious identity. With respect to support for victims, where the system is overall ‘blind’ to the hate element in freedom of expression (i.e. crimes with a hate element are recorded under crimes “with a discriminatory motive”), it is unclear how the EU Victims’ Directive can have measurable impact. Similarly to other countries, law enforcement officials lack training in racial discrimination and xenophobia (ECRI Report on Ireland, 2013, para.152).

4.13 Lithuania

Lithuania covers hate crimes in two categories: one in which hateful motivation is included in the definition of the offence and another where this kind of motivation has a qualifying nature. For the first category, incitement to hatred is regulated in Chapter XXV of the Criminal Code, entitled ‘Crimes and Misdemeanours against a Person’s Equal Rights and Freedom of Conscience’. The Chapter includes offences executed through linguistic means, such as statements, ideas or symbols, both orally and in writing as well as contempt, marginalisation and psychological abuse (Bihariová et al., 2018, pp. 28-29). The legal basis for these prosecutions is Section 170 of the Criminal Code. The second category of crimes covers physical assaults, property crimes and other criminal acts. Since 2009, for these acts the offender’s *intent* to express racial, homophobic, religious, discriminatory or other hate qualifies the crime.⁵⁷ Regarding protected characteristics, these include according to the Criminal Code,

age, gender, sexual orientation, disability, race, nationality, language, descent, social status, faith or belief and opinions.

Statistical data in Lithuania do not reflect the real dimension of hate speech (Bihariová et al., 2018, p. 42). This is due to the failure of law enforcement authorities to initiate criminal proceeding on hate incidents for lack of data, mis-qualification of statements (i.e. as negative comments instead of hate expressions) and a wider lack of prior guiding case law. More reflectively, however, the criterion of context to be taken into account when examining cases on hate speech is inconsistently viewed by courts so as to substantiate the impression that a real threat should ensue,⁵⁸ as a result of the contested statement(s).

4.14 Malta

Incitement to hatred, or hate speech is a specific crime. Section 82A of the Criminal code stipulates:

“1. Whomsoever uses any threatening, abusive or insulting words or behavior or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up violence or racial or religious hatred against another person or group on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion or whereby such violence or racial or religious hatred is likely, having regard to all circumstances, to be stirred up shall, on conviction be liable to imprisonment for a term from six to eighteen months.

2. For the purposes of the foregoing sub-Section, “violence or racial or religious hatred” means violence or racial or religious hatred against a person or against a group of persons in Malta defined by reference to gender, gender identity, sexual orientation, race, colour, language, national or ethnic origin, citizenship, religion or belief or political or other opinion.”

The 1991 Press Act and the 1991 Broadcasting Act also regulate hate and cyber-hate speech. The list of protected characteristics covers race/colour, gender and gender identity, sexual orientation, ethnic origin, language, citizenship/national origin, religion or belief, political or other opinion and disability.

The main challenges of the system to address hate speech concern police reluctance to collect evidence and process cases (including on the basis of lack of capacity and training), the lack of



available data as well as the socially embedded notion of victimhood for certain categories of people (e.g. on the basis of gender or race) (Bihariová et al., 2018, p. 67).

4.15 The Netherlands

Article 1 of the Dutch Constitution establishes freedom from discrimination and Article 7 protects freedom of expression. At the same time, Article 131 of the Dutch Criminal code prohibits incitement to violence; Articles 137(c) and (d) of the Dutch Criminal Code prohibit public intentional insults, as well as the oral, written or illustrated incitement to hatred on the basis of one's race, religion, sexual orientation or personal convictions.⁵⁹ These provisions do not create aggravated circumstances for hate speech but rather form independent offences. The provisions require that the offender must have the intention to insult, on the basis of the content, the manner and context of the contested statements. Insults to individuals are punishable under Article 266Sr of the Criminal Code, when violating a person's honour by referring to one of his/her characteristics such as race, religion, etc.

More specifically, Dutch law criminalises both insult of an individual as well as of a group in separate offences: elements of insult on a group basis may relate to race, religion or indirectly to racial membership, such as Holocaust denial. Article 261 sub 1 Sr of the Criminal Code further defines defamation as "the intentional assault of another person's honour or good name by the imputation of a specific fact, uttered with the apparent aim of publicity." As a general trend, the Dutch judiciary balances insult with freedom of expression using a contextual review.

In political terms, the regulation of both traditional as well as online hate speech in the Netherlands is characterised by a liberal stance on the limits of free speech, combined, however, with political strategies to claim voters holding more radical views. The case of Geert Wilders, a political party leader convicted for hate speech against Muslim immigrants is illustrative: as a result of his conviction, support for his party PVV has grown in recent years and he has also received large donations from US right-wingers while cultivating the portrait of a free-speech martyr (Souli, 2019).

Recording of offences with hate motivation does not happen separately for hate speech/discrimination and hate crimes.⁶⁰ Synergies have been forged between the prosecutor's office, the police and anti-discrimination NGOs to protect freedom of expression. This collaboration took also the form of a campaign informing the public about the manifestation of

hate speech online (Engel et al., 2018, p. 43). In 2017, there was a sharp decline noted in the total number of hate crimes by approximately 20 per cent (Engel et al., 2018, p. 97).

4.16 Poland

The law criminalises hate speech on the grounds of nationality, ethnicity, race or religion or belief (ARTICLE 19 Report 2018, p. 17). It also covers ‘crimes against the nation’. There is an overwhelming proportion of the total number of hate incidents that are connected to expressions or statements happening online and offline.⁶¹ Interestingly, only one third of all cases reached the courts. With a registered increase in violent hate crimes by 39 per cent, it is worth questioning to what extent police authorities have adopted a less vigilant approach to hate speech leading to more violent forms of hate crime (Engel et al., 2018, pp. 100-101).⁶² Quantitatively, victims of hate crimes were primarily Muslims, Ukrainians, Jews, dark-skinned people and Roma by decreasing order (Engel et al., 2018, p. 102). Similarly to Hungary, the current political leadership is openly using anti-EU and anti-immigrant discourses.

Of particular concern was a 2018 piece of legislation amending the law on historical memory, which criminalises among others the attribution of responsibility to the Polish people or the Polish nation for Nazi crimes.

Within broadcasting legislation, the law prohibits the propagation of attitudes or beliefs that are contrary to the moral values and social interests of the country, including the broadcasting of content that incites to hatred or discrimination on the grounds of race, disability, sex, religion or nationality. Additionally, the Press Law, characterised as being out of pace with contemporary society (ARTICLE 19 Report, 2018, p. 35) provides only for the remedy of the right to correction in case of hate speech, although the Civil Code provides some more efficient alternatives.

Polish law provides immunity to Internet intermediaries provided certain requirements are satisfied, in accordance with the Law on Provision of Electronic Services. The law in question does not refer directly to hate speech but case law suggests that online press of all types is covered by it (ARTICLE 19 Report, 2018, p. 39), with nevertheless limited efficiency.

4.17 Romania

Bias motivation in Romania can be considered either as an aggravating circumstance or as a substantive, self-standing offence. For the cases where it functions as an aggravating factor, the Criminal Code as amended in 2014 confirms that according to Article 78 of the Code, the penalty for the base offence will be set at the maximum level, if hate motivation is found. For substantive offences relevant to hate speech, such as incitement of hatred or discrimination (Article 369 of the Criminal Code) or the desecration of places or objects of worship (Article 382 of the Criminal Code) distinct penalties are provided for. Government Emergency Ordinance 31/2007 as amended by Law 217/2015 also bans fascist, xenophobic and legionnaire organisations, symbols and deeds as well as the promotion of the cult of persons guilty of genocide/war crimes. The 2015 amendment was instrumental in clarifying the elements of Holocaust on Romanian territory including the Legionnaire (Iron Guard) movement.

As elsewhere, hate speech in Romania can be sanctioned in the administrative, the criminal and the civil systems. For the administrative, it falls under the Anti-Discrimination Law (Government Ordinance 137/2000) or the Audio-Visual Act (Law 504/2002). Hate speech is thus considered a form of discrimination, harassment or violation of human dignity, including in the audiovisual realm (eMore Report Romania, 2017, p. 12).⁶³ Remedies under administrative law include usually fines. In criminal law, specific offences are covered by the Criminal Code, as mentioned above. As for civil law, victims can seek compensation in accordance with the Anti-discrimination Law.

As data collection happens for the 2007 Ordinance in its entirety, however, which comprises various offences, it is difficult to analyse the evolution of hate speech in the country (eMore Report Romania, 2017, pp. 11, 17). Since 2015, the Ministry of Justice has initiated an official justice database system collecting data on the hate motivation affecting basic offences, but it only concerns a limited number of crimes included in the Criminal Code (eMore Report Romania, 2017, p. 19).

Empirical evidence suggests that online hate speech by individual commenters is in direct correlation with the stories present in the Romanian media. The media in Romania are in need of higher accountability towards professional and ethical standards, where incidentally there is a very restricted record of administrative complaints related to this area (eMore Report-Romania, 2018, p. 41). The most affected groups by discrimination and broader hate crime

remain the Roma, LGBT persons, persons with disability and HIV/AIDS affected persons. Anti-Semitism is also high.⁶⁴ The 2014 visit of the Council of Europe's Commissioner for Human Rights, pointed out several problematic tracks concerning hate speech: the promotion by politicians of hate speech against the Roma enhanced by institutionalised anti-Gypsyism, the repeated public denial of Holocaust or racist incidents and chanting during football matches were some of the issues noted.⁶⁵

Police authorities and prosecutors have begun, as mentioned, to collect data on cases related to hate crime and hate speech but as they use different methodologies, it becomes difficult to extract conclusive results. As in other cases, victims or witnesses are reluctant to report incidents to the police for lack of trust or other procedural hurdles.⁶⁶

4.18 Slovakia

Act 300/2005 regulates criminal offences motivated by extremism. The concept of extremism is defined in section 140 (a), without distinguishing between offences that are based on a physical as opposed to a verbal assault.⁶⁷ A recent 2017 amendment to the Criminal code defines extremist crimes as those motivated by “hatred against a group of persons or an individual because of their actual or alleged race, nation, nationality and ethnicity, for their actual or presumed origin, complexion, sexual orientation, political belief or religion” (Bihariová et al., 2018, pp. 16-17).⁶⁸

In the Slovak case, types of hate speech are enumerated under section 140 (a) of the Criminal Code (e.g. Holocaust denial, defamation of a nation, race and belief or incitement to national, racial and ethnic hatred) but require proof of motivation although they need not be directed against a specific victim. They are simply prosecuted because they violate state interests, such as democratic values or public order (Bihariová et al., 2018, pp.18-19).

The list of protected characteristics since 2017 that leads to the characterisation of a hate crime are race, nation, nationality, ethnic group, actual or putative origins, skin colour, sexual orientation, political and religious beliefs.

According to recent data, the Office of the Slovakian Special Prosecutor intensified its efforts to combat hate speech. Prosecutors initiated prosecutions in 178 cases related to extremism, with emphasis on online commentaries that infringe the rights of social, ethnic and religious

groups (Engel et al., 2018, p.40). The most common victims of hate speech were the Roma and Jews.

Overall, according to 2017 statistics, there is a small number of identified hate speech incidents (as verbal criminal offences) despite the widespread nature of such statements (Bihariová et al., 2018, p. 52). The low number of incidents reported is due to either the trivialisation of hate incidents by police authorities or the reluctance of victims to report due to their vulnerable situation (Bihariová et al., 2018, pp.42-43). Usually, prosecuted cases of online extremism focus primarily on neo-Nazi related material leaving aside incitement of hatred against vulnerable groups. Indirectly, the impact of this trend is to increase the levels of ‘social acceptance’ of hate expression towards minority groups that have currently become part of mainstream public discourse (Bihariová et al., 2018, p. 52).

4.19 Spain

Overall, there is no specific definition of hate speech in the Spanish legal system. Traditionally, the absence of a *stricto sensu* hate speech legal basis reinforces, similarly to the Netherlands, a pre-existing doctrinal debate that prioritises freedom of expression over hate speech (SOS Racismo, 2016, p. 243).

More specifically, however, Article 510 of the Spanish Criminal Code⁶⁹ criminalises:

“(1) a) Those who publicly encourage, promote or incite hatred, directly or indirectly, hostility, discrimination or violence against a group, part of it or against a particular person because of their membership in that, for reasons of racism, anti-Semitism or other concerning ideology, religion or beliefs, family situation, membership of an ethnic group, race or nation, national origin, gender, sexual orientation or gender identity, gender, illness or disability.

b) Those who produce, develop, possess in order to distribute, provide access to third parties, distribute, disseminate or sell writings or any other material or media whose content shall be able to encourage, promote, or incite directly or indirectly hatred, hostility, discrimination or violence against a group, a part thereof, or against a particular person because of their membership in that, for racist, anti-Semitic or other related to ideology, religion or beliefs, motives, family circumstances, membership of members of an ethnic group, race or nation, national origin, gender, sexual orientation or identity, gender, illness or disability.



c) Publicly deny, trivialize or exalt seriously the crimes of genocide, crimes against humanity or against people and protected in armed conflict, or exalt the perpetrators virtues, when they had committed against a group or a part thereof, or against a person determined by reason of their belonging to it, for reasons of racism, anti-Semitic or other related to ideology, religion or beliefs, family situation or membership of an ethnic group, race or nation, their national origin, sex, sexual orientation or gender identity, gender, illness or disability, which in this way promote or encourage a climate of violence, hostility, hatred or discrimination against them.”

Article 510, 2 of the Criminal Code covers in similar terms the dissemination of offensive information and Article 510, 3 addresses online hate speech by stipulating that perpetrating the same offence through any new media tool is considered an aggravating factor, due to the larger impact that the statement might have and the number of people that can be reached through the use of these communication tools.

Article 18 of the Media Law 7/2010 of 31 March 2010 on Audiovisual Communication prohibits discriminatory advertisements promoting hatred or containing discriminatory content. The competent supervisory body in this case is the National Council of Audiovisual Media.

Hate speech cases are therefore decided on the basis of anti-discrimination law, accepting implicitly that ‘speech’ is a form of discriminatory action. There are also concerns in Spain about hate and xenophobic discourse emanating from politicians and political leaders (SOS Racismo Report, 2016, p. 243).

Regarding online forms of hate speech, there are additional provisions in place, which authorise judges to close down Spanish sites and block access to webpages based abroad that do not comply with national laws (SOS Racismo Report, 2016, p. 243).⁷⁰ Geographic location technology (IP address identification) operates in this context as a facilitator to this frame. In May 2014, the issue of suppressing Twitter hate speech was posed and was met with resistance by Spanish prosecutors because of the great number of incidents. As such, the incident highlights the absence of specific regulation for online hate speech. More broadly, however, despite the wide net of anti-discrimination provision, there is limited evidence of targeted use of provisions towards the combat of hate speech. In this light, there are efforts underway to train enforcement officials at central, regional and local levels to identify racist and xenophobic



incidents, including online (Engel et al., 2018, p. 41), with emphasis on the establishment of a specialised body of prosecutors (SOS Racismo Report, 2016, p. 245).⁷¹

As for victims, there appears to be little confidence in justice administration, limited rights-awareness and considerable procedural difficulties in establishing hate motivation (SOS Racismo Report, 2016, p. 246). Since 2014, a yearly report has been issued related to hate crime in Spain by the Ministry of Interior (SOS Racismo Report, 2016, p. 252).

In general terms, what remains unclear with respect to hate speech is the extent to which the phenomenon can be tackled more efficiently through the state judicial system as opposed to extra-judicial avenues (SOS Racismo Report, 2016, p. 253). Also, with the recent economic crisis affecting Spain, racism and xenophobia have emerged as considerable elements of a growing crisis of values accentuating hate speech (SOS Racismo Report, 2016, p. 259).

4.20 Sweden

Combating hate crimes has been a policy priority in Sweden since the mid-1990s, with hate crime broadly understood being equated to a human rights violation (Government of Sweden National Plan, 2017). Chapter 29, Article 2(7) of the Penal Code stipulates that racist motivation must be considered an aggravating circumstance. More specifically, section 2 of Chapter 29 of the Criminal Code outlines the types of aggravating circumstances that will be given “special consideration” and they include “whether a motive for the crime was to aggrieve a person, ethnic group or some other similar group of people by reason of race, colour, national or ethnic origin, religious belief, sexual orientation or other similar circumstance.” The question as to whether membership of an extremist organisation constitutes evidence of hate motivation remains open (Granström and Aström, 2017). Ultimately the sentencing court retains discretion as to whether the sentence will be increased (Granström and Aström, 2017). In similar vein and in practice, the term ‘national origin’ covers language and nationality as criteria in the same way. Underreporting in the country remains also an issue.

5. Summary of Common Observations on Hate Speech Regulation

In general and from a comparative perspective, three main sets of factors influence the degree of recognition of the hate element within offences by individual actors in a criminal justice system: the type of legislative approach to hate speech and hate crime more broadly; the

existence of policy on the issue; and how any existing policies are implemented in practice and on the ground (Schweppe et al., 2018, pp. 102-103). Localised solutions seem to be in high demand in order to tackle the challenges of hate speech in specific contexts. These solutions largely depend on the socio-political context within each case and require synergies among state and non-state actors so as to protect the increasingly broad range of minoritized identities, with emphasis on victims.

The following common points encountered in several national legal systems illustrate the main shortcomings of the national legal frameworks addressing hate speech in Europe:

- There is a general absence of a European-wide shared understanding of concepts, even within individual jurisdictions.
- A number of Criminal codes recognise the notion of intention (hateful motive) when qualifying hate incidents as hate speech (or hate crime). This implies that in many cases there is not a separate place for hate speech in the criminal legal structure.
- Legislation on hate speech is generally available but it is the empirical application and use that becomes an issue in combatting hate crime.
- There is often confusion in the comprehension and framing of hate speech, with occasional conflation between hate crime and hate speech.
- In some legal systems the concept of extremism is directly incorporated in hate crime. The use of political categories such as “right-wing extremism”, however, lead to the masking of hate speech incidents.
- Most legal systems have adopted a wide list of protected characteristics.
- Authorities responsible for investigation and prosecution of hate speech offences have insufficient knowledge of relevant legislation, including for online statements. Special prosecutors’ offices for hate speech remain rare but are really needed to unveil the extent and characteristics of hate speech.⁷²
- Connected to the previous point is a broad reluctance of groups to report hate speech incidents for a variety of reasons.
- The typology of victims of hate speech includes the Roma, closely followed by immigrants and Jews. Anti-Muslim and anti-Semitic hate crimes are on the rise and FRA research suggests that anti-LGBT abuse is also rising (Schweppe et al., 2018, p. 143).



- Official statistics kept by law enforcement authorities are not reliable. This is due to mistrust between the police and vulnerable communities, limited resources, hostile disposition of the police towards specific categories of groups, and victims' reluctance to report hate crimes. It is also connected to the different methods used by different actors involved to collect data. Typically, in many cases it is difficult to disaggregate data on hate speech as opposed to hate crime, when criminal law provisions are conflated.
- There is diversity in the approaches on the threshold of 'hate' above which freedom of expression is no longer protected (Schweppe et al, 2018, p. 139).
- There is inherent difficulty to deal with and accept online hate speech. Regulation of hate speech by the broadcast media varies greatly across states following differing degrees of normative force.
- There is a need for more victim-centred approaches to combat hate speech as well as empirical research on the features of the implementation on the ground of hate speech laws and policies (ARTICLE 19 Report 2018, p. 42).



Notes

¹ The present working paper is work in progress. All errors remain the author's. For comments and suggestions please contact the author at topidi@ecmi.de

² To name only a few, Hungary, Ukraine, Italy or to some extent Greece do not have available data on the question. (Cf. Valery Engel et al., *Xenophobia, Radicalism and Hate Crime in Europe*, Annual Report 2018, <https://www.osce.org/odhr/395336?download=true> at 84).

³ See for example Anne Weber, *Manual on Hate Speech*, Council of Europe Publishing, 2009, at 3.

⁴ Article 10 ECHR grants freedom of expression to all under the limitation that the exercise of the right will be subject to restrictions necessary “for the protection of the reputation and rights of others”.

⁵ Article 4(a) CERD requires signatories to make “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin” a punishable offence.

⁶ Article 20 ICCPR requires outlawing “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Restrictions to freedom of expression, according to Article 19(3) ICCPR echo those of Article 10 (2) ECHR and require that they must be aimed at the protection of national security, public order, public health or morals or respect for the rights and reputations of others; that they be provided by law; and that they be necessary (proportionate and the least restrictive possible) to achieve the intended aim.

⁷ General Recommendation No.15, at para.4.

⁸ See the joint submission of UN Special Rapporteurs on freedom of religion or belief, on the promotion and protection of the right to freedom of opinion and expression and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance that have noted in 2011 that “[t]he public intent of inciting discrimination, hostility or violence must be present for hate speech to be penalized” [Cf. Joint Submission of Heiner Bielefeldt, Frank La Rue and Githu Muigai on the prohibition of incitement to national, racial or religious hatred, 9-10 February 2011, Vienna, at p.11]. For a more nuanced view suggesting that ICERD encapsulates a lower threshold with no necessity that the expression constitute or call for hatred or violence while the ICCPR requires advocacy see Natalie Alkiviadou, *The Hierarchy of Hate: Mixed Signals in the Combat Against Hate Speech*, *VerfBlog*, 2018/2/06, <https://verfassungsblog.de/the-hierarchy-of-hate-mixed-signals-in-the-combat-against-hate-speech/>, DOI: <https://dx.doi.org/10.17176/20180206-124217> .

⁹ UN Human Rights Committee, General Comment 34- Article 19: Freedoms of opinion and expression, Doc. No. CCPR/C/GC/34, 12 September 2011, at para.35.

¹⁰ Recommendation R(97)20 of the Committee of Ministers in the Council of Europe on Hate Speech, 30 October 1997, Principle 2.

¹¹ EU Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law.

¹² Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, 28 January 2003, European Treaty Series No. 189. (Available at <https://www.coe.int/web/conventions/full-list/-/conventions/rms/090000168008160f>).



¹³ See Articles 3-6 of the Additional Protocol.

¹⁴ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

¹⁵ “The European Agency for Fundamental Rights has advised that in implementing the Directive, Member States should interpret the concept of *discrimination* as relating to all characteristics under Article 21 of the Charter”. Cf. FRA, Opinion of the European Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime (FRA 2013), at 8.

¹⁶ Directive EU 2018/1808 amending Directive 2010/13/EU concerning the provision of audiovisual media in view of changing market realities, O.J. L3030, 28 November 2018.

¹⁷ *Handyside v. United Kingdom*, 24 Eur.Ct.H.R. (ser.A) at 23 (1976).

¹⁸ *Handyside v. United Kingdom*, 24 Eur.Ct.H.R. (ser.A) at 23 (1976).

¹⁹ See for example *Norwood v. United Kingdom*, 2004 –XI Eur. Ct.H.R. 343, at 347-50, concerning individuals linked to neo-Nazism that unlawfully entered a school and placed approximately 100 pamphlets condemning homosexual behaviour in students’ lockers.

²⁰ *Vejdeland v. Sweden*, Appl. No. 1813/07 (2012), where the Court held that the speech in question “did not directly recommend individuals to commit hateful acts” but “the comments were serious and prejudicial allegations.” [at para.54]

²¹ In *Gunduz v. Turkey*, Appl. N. 35071/97, decision of 4 December 2003 at para.41, the Court refers to hate speech as “all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)”. Overall, the Court’s understanding of hate speech seems to function independently from national jurisdictions.

²² Article 10 ECHR stipulates:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

²³ *Müller v. Switzerland*, 133 Eur.Ct.H.R. (ser. A) at 19 (1988).

²⁴ See for example *Balsyte –Lideikiene v. Lithuania*, Appl. N. 26682/95, decision of 4 November 2008. In *Soulas and Others v. France*, Appl N. 15948/03, decision of 10 July 2008, the Court added that the effect of the speech depends also on the historic, demographic and cultural context of the country in question.

²⁵ See for example *Gunduz v. Turkey*, Appl. N. 35071/97, decision of 4 December 2003.

²⁶ *Surek v. Turkey* (No.1), Appl. N. 26682/95, decision of 8 July 1999, at para.62.



²⁷ See for example *Arslan v. Turkey*, Appl.No. 23462/94, where the Court extended Article 10 ECHR protection to a book on the history of the Kurdish people in Turkey from a pro-Kurdish perspective encouraging people to resist the government of Turkey.

²⁸ See for example *Zana v. Turkey*, 1997-VII Eur.Ct.H.R. 2533, 2540, 2547, where a former mayor of Diyarbakir made statements in favour of the Kurdish Workers' Party, presenting killings of civilians as accidents. Turkish authorities argued that his conviction to a jail sentence was in the interest of national security, as the author of the statements was a known political figure whose statements were likely to lead to further violence. The Court accepted that line of argument.

²⁹ For an illustration on the use of Article 17 by the ECtHR see *Lehideux and Isorni v. France*, concerning an advertisement in a national newspaper, *Le Monde*, part of a campaign for the rehabilitation of the memory of Général Pétain. The Court confirmed that protection of speech would be withheld from remarks that were attacking the core Convention values [23 September 1998, Reports of Judgments and Decisions, 1998 –VII at paras. 52, 53, 55.] Article 17 ECHR was also used in the *Norwood v. UK* case (Inadmissibility decision of 16 November 2004, Appl. No. 32131/03), where the Court argued: “[...] the words and images on the poster amounted to a public expression of 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.”

³⁰ Judgment of the European Court of Human Rights (Second Section) of 16 July 2009.

³¹ In the earlier *Lingens v Austria* case [Judgment of the European Court of Human Rights of 8 July 1986, Series A, no. 103], the Court had found that the limits of acceptable criticism are wider for politicians than for private individuals because they expose themselves to closer scrutiny and they have to display a greater degree of tolerance (Ibid, at para.42).

³² *United Communist Party of Turkey and Others v. Turkey*, Judgment of the European Court of Human Rights, 30 January 1998, at para.43.

³³ Appl.No. 15615/07, Eur.Ct.H.R. 16 July 2009 (Sajo, J. dissenting).

³⁴ 260 Eur.Ct.H.R 3. The Court found that: “[w]hile religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to ‘manifest [one’s] religion’. Bearing witness in words and deeds is bound up with the existence of religious convictions” (at 17).

³⁵ Council of Europe, Parliamentary Assembly Recommendation 1805 (2007) on Blasphemy, religious insults and hate speech against persons on grounds of their religion (at para.5), available at https://www.coe.int/en/web/education-and-religious-diversity/resources/-/asset_publisher/fQaSCQ5K0u4n/content/recommendation-1805-2007-blasphemy-religious-insults-and-hate-speech-against-persons-on-grounds-of-their-religion?inheritRedirect=false , last accessed on 30 May 2019.

³⁶ European Commission Against Racism and Intolerance, Declaration on the Use of Racist, Anti-Semitic and Xenophobic Elements in Political Discourse (2005), available at <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/statements> , last accessed on 30 May 2019.

³⁷ The responsible body is the Communications Regulatory Authority (KommAustria) who can order suspension of transmission of programmes in cases of violation, including incitement to hatred based on race, sex, religion, nationality.

³⁸ The Report mentions the pilot project *Police Communication* launched in Vienna in 2016.



³⁹ According to the TOGETHER Cyprus Report (2016), at 5, Police Order 3/38 issued by the Chief of Police, any offence reported or perceived as racially motivated by the victim, a person or NGO acting on behalf of the victim, a witness, a member of the police or the Ombudsman, shall be perceived as such .

⁴⁰ Multiple bias is also recorded accordingly.

⁴¹ See for example the work of KISA- Action for Equality, Support & Antiracism as well as RADIALert that monitors and collects data on racist and hate speech crime.

⁴² The TOGETHER Cyprus Report gives the example of the frequent acts against Turkish Cypriots in the workplace according to the Pancyprian Federation of Labour (PEO) with no reported hate crime for any of them.

⁴³ There is record of a case on incitement to hatred against persons belonging to far-right groups attacking the KISA Rainbow festival. The contested slogan was “axe and fire against KISA dogs” but the Court found no offence as the slogans were not related to any protected characteristic.

⁴⁴ UN Committee on the Elimination of Racial Discrimination (15 May 2017): 3-4. The Jewish Community has also been affected.

⁴⁵ Section 81 No. 6 was adopted on 31 March 2004 by Act No.218.

⁴⁶ See for example the lifting of the parliamentary immunity of MP Jesper Langballe in 2010 in order to face charges under Article 266(b) for an article published on the Islamisation of Europe and the status of Muslim women.

⁴⁷ OSCE/ODIHR Hate Crime Reporting – Denmark, available at <http://hatecrime.osce.org/denmark> .

⁴⁸ Articles 132-76 and 132-77 respectively.

⁴⁹ See for example the 2002 case against Michel Houellebecq’s interview on *Lire* against Islam; the 2005 case against Jean-Marie Le Pen’s comments in *Le Monde* against Islam or the *LICRA v. Yahoo!* string of cases on the online sale of Nazi memorabilia as well as the 2012 and 2015 cases against Twitter on anti-Semitic online content.

⁵⁰ Engel et al., (2018) at 88-9. Racist threats decreased by 17.36 per cent, anti-Semitic threats by 17.1 per cent and anti-Muslim threats by 58.5 per cent.

⁵¹ See the work of Jérôme Fouquet, *L’an prochain à Jerusalem?*, with Sylvain Manternach, Éditions de l’Aube/Fondation Jean Jaurès, 2016. The main argument is that anti-Semitic accounts are related to the Second Intifada in 2000.

⁵² OSCE/ODIHR, Hate Crime Reporting – Greece, available at www.hatecrime.osce.org/greece, last accessed on 30 May 2019.

⁵³ For example, incitement to discrimination against a member of a community is not covered by law in Hungary. Only direct victims can act as plaintiffs. Furthermore, action against ‘incitement against a community’ requires necessity of a clear and imminent danger of violence.

⁵⁴ It also observed that hate speech is not considered a policy priority, based on the misrepresented low numbers of incidents within official statistics.

⁵⁵ See the ECtHR *MTE and Index.Hu v. Hungary* case Appl. N. 22947/13, judgment of 2 February 2016, where the ECtHR found a violation of the right to freedom of expression.



⁵⁶ See for example the case *Director of Public Prosecutions v Elders* [2014] IECA 6.

⁵⁷ Law on the amendment of articles 60, 129, 135 and 138 of the Criminal Code of the Republic of Lithuania, 16 June 2009, No. XIX-303.

⁵⁸ See the controversial decision of the Supreme Court of Lithuania of 1 March 2016 in the criminal case No. 2K-86-648/2016 concerning LGBT rights.

⁵⁹ One of the most illustrative uses of these provisions were seen in the case of Geert Wilders who was indicted by the public prosecutor in 2009 for his public comments about Muslims and Islam.

⁶⁰ OSCE/ODIHR Hate Crime Reporting – Netherlands (2016), available at <http://hatecrime.osce.org/report-data/netherlands/2016> , last accessed on 30 May 2019.

⁶¹ Only 13.7% of all hate crime was violent in 2017. (Cf. Engel et al., 2018, at 41).

⁶² For 207, 1449 offenses were registered in Poland of which 29.8 per cent concerned hate speech and propaganda of fascism on the basis of Article 256, para.1 of the Criminal Code and 19.3 per cent concerned cases of insult to religious beliefs, incitement of crimes or spread of hatred and a majority committed on the internet.

⁶³ See for example articles 29 and 40 of the Audio-Visual Law.

⁶⁴ Most relevant data are sourced from international human rights reports and ECtHR case law. (Cf. eMore Report, An Overview on hate crime and hate speech –Romania, 2017, at 20.)

⁶⁵ Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, <https://wcd-coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet?InstranetImage=2613895&SecMode=1&DocID=21911194&Usage=2> .

⁶⁶ Data from the second EU MIDIS II (2016) survey conducted by the EU Agency for Fundamental Rights – European Union Minorities and Discrimination Survey, Data in Focus Report 1: The Roma – Selected findings signal little to no improvement in reporting discrimination or filing complaints. (http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-eu-minorities-survey-roma-selected-findings_en.pdf)

⁶⁷ Section 140 (a) of the Criminal Code stipulates that extremist crimes are those: „1. Crimes perpetrated with specific motivation (...)

2. The crimes explicitly enumerated in Section 140 (a).

⁶⁸ Article 140 (e) of the Criminal Code as amended by Act No.316/2016.

⁶⁹ Adopted by Organization Act No. 10/95 of 23 November 1995, as amended, especially by Organic Law 1/2015, adopted on 30 March 2015 modifying Article 510.

⁷⁰ The law in question is called the ‘Sinde Law’.

⁷¹ The designated Division of the Prosecutor for Computer Crimes is responsible for coordinating prosecutors targeting cyber-crime and has wider tasks, including the training of other officials on the matter.

⁷² In 2016, the EU High Level Group on combating racism, xenophobia and other forms of intolerance requested from the Fundamental Rights Agency to reflect on methodologies for the collection of hate crime data. In 2017,



a set of guiding principles on *Improving the Recording of Hate Crime by Law Enforcement Authorities* was endorsed by the High Level Group.

References

Alkiviadou, Natalie (2018, February 6) The Hierarchy of Hate: Mixed Signals in the Combat Against Hate Speech, *VerfBlog*, retrieved from <https://verfassungsblog.de/the-hierarchy-of-hate-mixed-signals-in-the-combat-against-hate-speech/>, DOI: <https://dx.doi.org/10.17176/20180206-124217> .

ARTICLE 19 (2018) Responding to ‚hate speech’: Comparative overview of six EU countries, 2018, available at <http://europeanjournalists.org/mediaagainsthate/wp-content/uploads/2018/02/Final-compilation-off-regional-research-digital.pdf>

Beswick, Emma (2019, February 4) ‘EU applauds social media platforms for removing more illegal ‘hate speech’, *Euronews*, retrieved from <https://www.euronews.com/2019/02/04/eu-applauds-social-media-platforms-for-removing-more-illegal-hate-speech>

Bihariová, Irena et al. (2018) Tackling Hate Crime and Hate Speech in Europe, available at https://hrmi.lt/wp-content/uploads/2018/11/Tackling-Hate-Crime-and-Hate-Speech-in-Europe_EN.pdf

Camus, Jean-Yves (2011) Racist Violence in France, ENAR, available at <http://cms.horus.be/files/99935/MediaArchive/Racist%20Violence%20Report%20France%20-%20online.pdf>

Chrisafis, A. (2015, April 17) „France launches major anti-racism and hate speech campaign“ *The Guardian*, available at <https://www.theguardian.com/world/2015/apr/17/france-launches-major-anti-racism-and-hate-speech-campaign>

Council of Europe and ELSA (2014) „International Legal Research Group on hate speech online- Final Report“, available at http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

Council of Europe, (2003, January 28) Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, European Treaty Series No. 189, available at <https://www.coe.int/web/conventions/full-list/-/conventions/rms/090000168008160f>

Council of Europe (2007)Parliamentary Assembly Recommendation 1805 (2007) on Blasphemy, religious insults and hate speech against persons on grounds of their religion, available at https://www.coe.int/en/web/education-and-religious-diversity/resources/-/asset_publisher/fQaSCQ5K0u4n/content/recommendation-1805-2007-blasphemy-religious-insults-and-hate-speech-against-persons-on-grounds-of-their-religion?inheritRedirect=false



Council of Europe (1997, October 30) Recommendation R(97)20 of the Committee of Ministers in the Council of Europe on Hate Speech

Dojcinovic, Ida et al. (2014) An Introductory Report on legal matters regarding online hate speech in Croatia and Europe, International Legal Research Group on Online Hate Speech, *Pravnik*, 47, 1 (95), pp.145-157.

ECRI Report on Denmark, (2017, May 16) Fifth Monitoring Cycle CRI (2017) 20, available at <https://rm.coe.int/fifth-report-on-denmark/16808b56a4>

ECRI Report on Ireland (2013) 4th Monitoring Cycle, Council of Europe, available at <https://www.refworld.org/docid/513d98592.html>

EMORE, (2018) eMore Webapp for Monitoring and Reporting Online Hate Speech: A cross-cutting analysis of data collected using the eMore Webapp in 9 EU countries, available at https://www.emoreproject.eu/wp-content/uploads/2018/10/Emore_ComparativeReport.pdf

Engel, Valery et al.,(2018) *Xenophobia, Radicalism and Hate Crime in Europe, Annual Report*, <https://www.osce.org/odihr/395336?download=true>

EQUINET (2018)Extending the Agenda – Equality Bodies Addressing Hate Speech, available at http://www.equineteurope.org/IMG/pdf/hate_speech_perspective_-_web.pdf

EU Agency for Fundamental Rights (2016) – European Union Minorities and Discrimination Survey, Data in Focus Report 1: The Roma – Selected findings signal little to no improvement in reporting discrimination or filing complaints. (http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-eu-minorities-survey-roma-selected-findings_en.pdf)

EU Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law

European Agency for Fundamental Rights (2013) Opinion of the European Agency for Fundamental Rights on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime, available at <https://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims>

European Commission Against Racism and Intolerance (2005), Declaration on the Use of Racist, Anti-Semitic and Xenophobic Elements in Political Discourse, available at <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/statements>

European Commission on Racism and Intolerance (2002) ECRI General Policy Recommendation n. 7: National Legislation to combat racism and racial discrimination,



available at <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.7>

European Commission on Racism and Intolerance (2016) ECRI Report on the UK, 5th Monitoring Cycle, Council of Europe, available at <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/united-kingdom>

European Union Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, *O.J. L 315/57*, 25 October 2012

European Union Directive EU 2018/1808 amending Directive 2010/13/EU concerning the provision of audiovisual media in view of changing market realities, *O.J. L3030*, 28 November 2018

Glet, Alke (2009) The German hate crime concept: An account of the classification and registration of bias-motivated offences and the implementation of the hate crime model into Germany's law enforcement system', *Internet Journal of Criminology*

Government Offices of Sweden (2017) A comprehensive approach to combat racism and hate crime: National Plan to combat racism, similar forms of hostility and hate crime, Government Offices of Sweden, available at <http://www.government.se/information-material/2017/02/a-comprehensive-approach-to-combat-racism-and-hate-crime> .

Granström, Görel and Aström, Karin (2017) Lifecycle of a Hate Crime: Country Report for Sweden, ICCL available at <https://www.iccl.ie/wp-content/uploads/2018/04/Life-Cycle-of-a-Hate-Crime-Country-Report-for-Sweden-English.pdf>

Le Monde (2019, February 20) ,Lutte contre l'antisémitisme: ce qu'il faut retenir des annonces de Macron au dîner du CRIF', available at https://www.lemonde.fr/societe/article/2019/02/20/macron-attendu-au-diner-du-crif-pour-des-decisions-fortes-contre-l-antisemitisme_5425991_3224.html

McGonagle, Tarlach (2012) The Council of Europe against online hate speech: Conundrums and challenges, available at <https://rm.coe.int/16800c170f>

OSCE/ODIHR (2017) Hate Crime Reporting – Denmark, available at <http://hatecrime.osce.org/denmark>

OSCE/ODIHR (2016) Hate Crime Reporting – Netherlands, available at <http://hatecrime.osce.org/report-data/netherlands/2016>

OSCE/ODIHR (2017) Hate Crime Reporting – Greece, available at , <http://hatecrime.osce.org/greece>



OSCE/Office for Democratic Institutions and Human Rights (ODIHR), (2009) Hate Crime Laws: A Practical Guide, (OSCE/ODIHR), available at <https://www.osce.org/odihr/36426?download=true>

Schweppe, Jennifer Haynes, Amanda and Walters, Mark A. (2018) Lifecycle of a Hate Crime: Comparative Report, ICCL, available <https://www.iccl.ie/wp-content/uploads/2018/04/Life-Cycle-of-a-Hate-Crime-Comparative-Report-FINAL.pdf>

SOS Racismo (2016) Hate Crime and Hate Speech in Europe: Comprehensive Analysis of International Law Principles, EU wide Study and National Assessments, 2016, at 120, available at <https://sosracismo.eu/wp-content/uploads/2016/07/Hate-Crime-and-Hate-Speech-in-Europe.-Comprehensive-Analysis-of-International-Law-Principles-EU-wide-Study-and-National-Assessments.pdf>

Souli, Sarah (2019, March 13) The Netherlands' Burgeoning Free Speech Problem *The New Republic*, available at <https://newrepublic.com/article/153305/netherlands-burgeoning-free-speech-problem>

TOGETHER (2016) Empowering civil society and Law Enforcement Agencies to make hate crimes visible, Country Report: Cyprus, available at https://kisa.org.cy/wp-content/uploads/2016/01/Hate_Crime_Together_report_Cy.pdf

UK Home Office, (2016) Action Against Hate: The UK Government's plan for tackling hate crimes, available at <https://www.gov.uk/government/publications/hate-crime-action-plan-2016>

UN Human Rights Committee (2011, September 12) General Comment 34- Article 19: Freedoms of opinion and expression, Doc. No. CCPR/C/GC/34

UN Joint Submission of Heiner Bielefeldt, Frank La Rue and Githu Muigai on the prohibition of incitement to national, racial or religious hatred, 9-10 February 2011, Vienna, available at <https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Statements.aspx>

Weber, Anne (2009) Manual on Hate Speech, Council of Europe Publishing



European Court of Human Rights Case-law

Arslan v. Turkey, Appl. No. 23462/94, decision of 8 July 1999

Handyside v. United Kingdom, 24 Eur.Ct.H.R. (ser.A) at 23 (1976).

Féret v. Belgium, Appl.No. 15615/07, Eur.Ct.H.R. 16 July 2009

Norwood v. United Kingdom, decision of 16 November 2004, Appl. No. 32131/03, 2004 –XI Eur. Ct.H.R. 343

Vejdeland v. Sweden, Appl. No. 1813/07 (2012).

Gunduz v. Turkey, Appl. N. 35071/97, decision of 4 December 2003.

Lehideux and Isorni v. France, 23 September 1998, Reports of Judgments and Decisions, 1998 –VII

Lingens v Austria, Judgment of the European Court of Human Rights of 8 July 1986, Series A, no. 103.

MTE and Index.Hu v. Hungary, Appl. N. 22947/13, judgment of 2 February 2016.

Müller v. Switzerland, 133 Eur.Ct.H.R. (ser. A) (1988).

Balsyte –Lideikiene v. Lithuania, Appl. N. 26682/95, decision of 4 November 2008.

Soulas and Others v. France, Appl N. 15948/03, decision of 10 July 2008.

Surek v. Turkey (No.1), Appl. N. 26682/95, decision of 8 July 1999.

United Communist Party of Turkey and Others v. Turkey, Judgment of the European Court of Human Rights, 30 January 1998.

Zana v. Turkey, 1997-VII Eur.Ct.H.R. 2533, 2540, 2547.



ABOUT THE AUTHOR

Kyriaki Topidi

ECMI Senior Research Associate, Head of Culture & Diversity Cluster.

*Contact: topidi@ecmi.de

FOR FURTHER INFORMATION SEE

EUROPEAN CENTRE FOR MINORITY ISSUES (ECMI)

Schiffbruecke 12 (Kompagnietor) D-24939 Flensburg

☎ +49-(0)461-14 14 9-0 * fax +49-(0)461-14 14 9-19

* E-Mail: info@ecmi.de * Internet: <http://www.ecmi.de>