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Challenging Right-Wing Extremism in England and Wales and Greece: Tools Available in International,  
European and National Law

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door

Natalie Alkiviadou

geboren te Lemesos, Cyprus

promotor: prof.dr. G.T. Davies

copromotor: dr. U. Belavusau

Reading Committee

Prof. Dr. E. Heinze

Prof. Dr D. Kochenov

Prof. Dr. M. Kuijer

Dr. I. Tourkochoriti

Prof. Dr. W. Werner

*Dedicated to my mother, Caroline, for her unconditional love and support that go beyond anything I could ever have wished for. Thank you.*

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## ABSTRACT

The destructive force of the far-right was tragically witnessed through the mass devastation brought about by World War II. The international community sought to prevent the repetition of such destruction through the establishment of institutions, such as the United Nations, and the adoption of documents such as the Universal Declaration of Human Rights and the European Convention on Human Rights. Jurisprudence and conventions on a supranational level directly prohibit speech and expression of the far-right with, for example, Article 4 of the International Convention on the Elimination of All Forms of Discrimination prohibiting racist associations and racist expression. Nevertheless, we are living in a world where violent far-right entities, such as *Golden Dawn* of Greece, have received unprecedented electoral support, where xenophobic parties have done spectacularly well at the latest European Parliament elections, where the United Kingdom has voted to leave the European Union and where Donald Trump has been elected as the next president of the United States of America. As such, the far-right is no longer a phenomenon of the past. It is one of the present, rising at swift and worrying rates.

In this light, the study analyses how supranational bodies, namely the United Nations, the Council of Europe and the European Union, require their members to tackle right-wing extremism either directly, or through the regulation of by-products of right-wing extremism, such as hate speech. The adherence to international obligations is examined through an assessment of two jurisdictions, namely, England and Wales and Greece. For purposes of this thesis, supranational obligations emanate from, *inter alia*, instruments such as the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the European Convention on Human Rights. It must be noted that, on an EU level, there is also a centralised mechanism in the form of Article 7 TEU which can, in theory, be used against Member States which embrace a far-right ideology or, potentially, tolerate the far-right. However, this tool has never been used. The dissertation considers the means and methods adopted by the jurisdictions under consideration to interpret and apply international and European obligations through their national legal systems along with a broader conceptualisation of their legal and judicial approaches to right-wing extremism.

The country analyses commence with an assessment of their adherence to international and European obligations, the thesis looks at the case-studies' domestic frameworks in the realm of challenging far-right movements. For both countries, there is a legal analysis of how central rights and freedoms, such as non-discrimination, expression, assembly and association, are established by law. For England and Wales, it proceeds to look at the role of criminal law in relation to the far-right, assessing the public order ambit which is the one most habitually used to challenge the rhetoric and activities of the far-right. This is followed by an evaluation of recent anti-terror legislation which has come into play in relation to the regulation of violent elements of the far-right movement. After looking at criminal law and how it deals with ensuring public order and countering terror, the assessment of England and Wales looks at how national law treats political parties before registration and during their functioning. The purpose is to determine what tools and sub-tools are available and can be used for challenging far-right parties contesting elections. From the above-described analysis, it is concluded that the legal framework of England and Wales embraces the significance of the freedom of expression but readily allows for the limitation of speech if issues of public order, terrorism or anti-social behaviour arise. Assemblies are also readily prohibited if public order or anti-social behaviour issues arise. What is clear is that this case-study is not willing to proscribe associations if such associations do not amount to terrorist organisations.

In relation to Greece, the dissertation assesses the principal legal instrument that tackles issues relevant to challenging the far-right, namely the criminal law framework and particularly the law on the punishment of racially discriminatory acts, and relevant provisions of the Greek Penal Codes such as those on racial aggravation and criminal and terrorist organisations. It also looks at the non-discrimination law which is relevant to this case-study given Golden Dawn's provision of services to Greeks only. It became evident from the analysis that relevant legislation has seldom been relied upon to challenge the far-right in Greece, a reality which has led to a state of impunity for the criminal activities of Golden Dawn and an issue that has become a key concern for national and international human rights institutions and non-governmental organisations. Although some members of Golden Dawn were convicted for their criminal activities and the Court recognised their affiliation with Golden Dawn, before the murder of an

ethnic Greek, no steps were taken against the organisation. The chapter incorporates an analysis of the legal basis of the ongoing trial against Golden Dawn. Furthermore, the chapter also looks at how national law treats political parties before registration and during their functioning. This analysis demonstrated that political parties, even ones with dangerous and undemocratic intentions, can register and function without limitations with the only point of State intervention being when such entities cross into the threshold of a criminal organisation, as was the case of Golden Dawn.



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## INTRODUCTION

### 1.1 Thesis of the Study

The destructive force of the far-right was tragically witnessed through the mass devastation brought about by World War II. The international community sought to prevent the repetition of such destruction through the establishment of institutions such as the United Nations and the adoption of documents such as the Universal Declaration of Human Rights and the European Convention on Human Rights. Jurisprudence and conventions on a supranational level directly prohibit speech and expression of the far-right with, for example, Article 4 of the International Convention on the Elimination of All Forms of Discrimination prohibiting racist associations and racist expression. Nevertheless, in 2016, we are living in a world where violent far-right entities such as *Golden Dawn* of Greece have received unprecedented electoral support, where xenophobic parties have done spectacularly well at the latest European Parliament elections, where post-Brexit Britain has seen a worrying rise in hate crime. As such, the far-right is no longer a phenomenon of the past. It is one of the present, rising at swift and worrying rates. In this light, this study analyses how supranational bodies, namely the United Nations (UN), the Council of Europe (CoE) and the European Union (EU), require their members to tackle right-wing extremism. This will be examined through an assessment of two jurisdictions, namely, England and Wales and Greece. The dissertation will consider the means and methods adopted by the jurisdictions under consideration to interpret and apply these obligations through their national legal systems along with a broader conceptualisation of their legal and judicial approaches to right-wing extremism. Where relevant and available, assessment of policy will be effectuated, however, this analysis is complimentary to the core of the dissertation which is legal analysis. It must be noted from the onset that, in some parts of the dissertation, for example when referring to international and European obligations, reference will be made to the United Kingdom (the UK) rather than to England and Wales due to the fact that in such spheres, unlike in relation to the legal system, the UK is one entity. Further discussion on this aspect occurs in chapter six.

### 1.2 Research Subject

#### 1.2.1 Extreme Right-Wing Parties, Groups and Movements: Examples and Illustrations

The rise of right-wing extremism is a pressing challenge currently faced by Europe not only within national parliaments and the European Parliament but also in the ambit of non-party groups and subculture movements. Greece's far-right spectrum is dominated by *The Popular Association - Golden Dawn (Λαϊκός Σύνδεσμος-Χρυσή Αυγή) (Golden Dawn)* which is a political party simultaneously acting as a violent movement. *Golden Dawn's* national parliamentary election results saw a dramatic rise from approximately 20,000 votes<sup>1</sup> to 440,000 votes<sup>2</sup> during the period 2009 to 2012 with a small drop in the 2015 elections, when it received around 380,000.<sup>3</sup> Nevertheless, in 2015, the party moved from the fifth to third largest party.<sup>4</sup> This development has been characterised as particularly alarming by the Fundamental Rights Agency (FRA)<sup>5</sup> and, as such, Greece was one of the two countries<sup>6</sup> considered in a 2013 thematic report on racism and intolerance.<sup>7</sup> The leadership and some members of *Golden Dawn* are currently on trial for leading or participating in a criminal organisation. In the UK, although an equivalent of the violent *Golden Dawn* does not currently exist, the far-right movement is made up of several parties and groups as well as a subculture milieu. Political parties include the *United Kingdom Independence Party (UKIP)*, the *British National Party (BNP)* and *Britain First*. Non-party groups include the *English Defence League (EDL)*<sup>8</sup> and there is also a subculture milieu made up of loosely structured groupings such as *Combat 18*. As will be demonstrated in the relevant analysis, *UKIP*, which adopts a predominantly Islamophobic and Eurosceptic rhetoric, has not

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<sup>1</sup> Golden Dawn election results 2009: <<http://ekloges-prev.singularlogic.eu/v2009/pages/index.html>> [Accessed 1 November 2015]

<sup>2</sup> Golden Dawn election results 2012:- <[http://ekloges-prev.singularlogic.eu/v2012b/public/index.html#{"cls":"party","params":{"id":41}}](http://ekloges-prev.singularlogic.eu/v2012b/public/index.html#{)> [Accessed 1 November 2015]

<sup>3</sup> Golden Dawn election results: <[http://ekloges.yes.gr/current/v/public/#{"cls":"party","params":{"id":41}}](http://ekloges.yes.gr/current/v/public/#{)> [Accessed 1 November 2015]

<sup>4</sup> Greece election results 2015: <[http://ekloges.yes.gr/current/v/public/#{"cls":"main","params":{}}](http://ekloges.yes.gr/current/v/public/#{)> [Accessed 17 April 2015]

<sup>5</sup> The European Union Agency for Fundamental Rights (FRA) is one of the EU's decentralised agencies. These agencies are set up to provide expert advice to the institutions of the EU and the Member States on a range of issues. FRA helps to ensure that the fundamental rights of people living in the EU are protected: <<http://fra.europa.eu/en/about-fra>>

<sup>6</sup> The other country was Hungary

<sup>7</sup> FRA Thematic Report: 'Racism, Discrimination and Intolerance: Learning from Experiences in Greece and Hungary' (2013)

<sup>8</sup> There are regional branches of the Defence League, namely the Welsh Defence League, the Scottish Defence League and the Northern Ireland Defence League.



been able to gain a large number of seats in the national parliament, not because of its lack of support but because of the country's 'first-past-the-post' electoral system.<sup>9</sup>

The far-right phenomenon is not restricted to the Greece and the UK as it has grown at a worrying rate in other European countries too.<sup>10</sup> Whilst the far-right is regularly associated with countries marred by financial crisis, such as Greece, and whilst 'East Central Europe continues to be the most dynamic breeding ground for right-wing extremism,'<sup>11</sup> this movement is also developing in other frameworks, such as the liberal traditions of Scandinavia. For example, *Sverigedemokraterna (The Sweden Democrats)*, a party founded in 1988, first entered the National Assembly in 2010 with 5.70% of the vote and by the 2014 elections it received 12.9% of the vote, making it the third largest party in the country.<sup>12</sup> In general, the far-right attracts more than 10% of Western European votes on a national or European level<sup>13</sup> and, in recent times, in countries such as Austria, Hungary, Sweden and the Netherlands, these parties have witnessed increasing success in elections.<sup>14</sup> In the East, apart from some exceptions such as Estonia and Slovenia, such parties receive an average support of approximately 20%.<sup>15</sup> On a European Parliament level, in 2014 the EU witnessed the victories of parties such as France's *Front National (National Front)*, *UKIP* and Denmark's *Dansk Folkeparti (The Danish People's Party)*,<sup>16</sup> with the parties gaining 24.86%<sup>17</sup> 26.77%<sup>18</sup> and 26.60%<sup>19</sup> of the vote respectively,

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<sup>9</sup> Under first-past-the-post, the UK or local authority is divided into numerous voting areas, i.e. constituencies or wards. At a general or local election, voters put a cross (X) next to their preferred candidate on a ballot paper. Ballot papers are then counted and the candidate that has received the most votes is elected to represent the constituency or ward. <<http://www.parliament.uk/about/how/elections-and-voting/voting-systems/>> [Accessed 10 August 2015] This system is further discussed in chapter six.

<sup>10</sup> ENAR Statement: 'Where Next After the Hungarian Elections?' (2014): <<http://www.enar-eu.org/Where-next-after-the-Hungarian>> [Accessed 15 April 2015]

<sup>11</sup> Friedrich-Ebert-Stiftung 'Right-Wing Extremism in Europe Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies' (2013) 9

<sup>12</sup> Sweden election results 2014: <<http://electionresources.org/se/riksdag.php?election=2014>> [Accessed 18 April 2015]

<sup>13</sup> Friedrich-Ebert-Stiftung 'Right-Wing Extremism in Europe Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies' (2013) 9

<sup>14</sup> Institute for Strategic Dialogue, 'Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe' (2012) 3 [Accessed 5 November 2014]

<sup>15</sup> Friedrich-Ebert-Stiftung 'Right-Wing Extremism in Europe Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies' 29 (2013)

<sup>16</sup> In October 2016 a scandal arose regarding the misuse of EU funds by the DPP. The scandal has affected the party's figures on the polls regarding a possible general election in the coming months.

<sup>17</sup> European Parliament Election Results: <<http://www.europarl.europa.eu/elections2014-results/en/country-results-fr-2014.html#table02>> [Accessed 18 April 2015]

finding themselves at the top of the list for their countries.<sup>20</sup> Violent far-right parties are also part of the European Parliament with *Golden Dawn* receiving 9.39% of the vote and Hungary's *Jobbik Magyarországért Mozgalom* (hereinafter *Jobbik*) receiving 14.67% of the vote in 2014 in third and second place respectively.<sup>21</sup> In relation to *Jobbik*, it must be noted that there exists a close proximity between this party and the ruling *Fidesz*.<sup>22</sup> Moreover, even in countries where such parties have not been very successful in the electoral process, they have 'nevertheless often contributed towards the mainstreaming of anti-immigrant and anti-Muslim ideas and discourse, which help to create a broader climate conducive to radical right thinking.'<sup>23</sup>

On a non-party level, examples include, as noted above, the *English Defence League (EDL)* which has been 'at the forefront of violence around major Muslim centres and mosques,'<sup>24</sup> with the UK Home Secretary banning their demonstrations on several occasions for purposes of public order.<sup>25</sup> It is estimated that there have been approximately seven hundred criminal convictions directly linked to the *EDL* and its members.<sup>26</sup> The *EDL* will be discussed further in chapter six. Other examples include Germany where, in 2011, authorities discovered a link between the violent far-right group *Nationalsozialistischer Untergrund (National Socialist Underground)* and the killing of ten persons, nine immigrants and one policewoman, over a

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<sup>18</sup> European Parliament Election Results: <<http://www.europarl.europa.eu/elections2014-results/en/country-results-uk-2014.html#table02>> [Accessed 18 April 2015]

<sup>19</sup> European Parliament Election Results: <<http://www.europarl.europa.eu/elections2014-results/en/country-results-dk-2014.html#table02>> [Accessed 18 April 2015]

<sup>20</sup> The European United Left/Nordic Green Left which includes parties such as SYRIZA (Coalition for the Radical Left) received 6.92% of the votes during the EP 2014 elections.

<sup>21</sup> European Parliament Election Results: <<http://www.europarl.europa.eu/elections2014-results/en/country-results-el-2014.html#table03>> [Accessed 18 April 2015]

<sup>22</sup> Fidesz Magyar Polgári Szövetség. This co-operation was noted by Kim Lane Scheppele in a New York Times article: 'Hungary without Two Thirds' (17 March 2015) <<http://krugman.blogs.nytimes.com/2015/03/17/hungary-without-two-thirds/>> [Accessed 13<sup>th</sup> April 2016]

<sup>23</sup> Institute for Strategic Dialogue: 'Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe' (2012) 3 [Accessed 5 November 2014]

<sup>24</sup> Institute for Strategic 'Briefing Paper- The New Radical Right: Violent and Non-Violent Movements in Europe' (2012) 7 [Accessed 5 November 2014]

<sup>25</sup> See, *inter alia*, Institute for Strategic 'Briefing Paper- The New Radical Right: Violent and Non-Violent Movements in Europe' (2012) 7, BBC: 'English Defence League March in London is blocked' (27 August 2011): <<http://www.bbc.com/news/uk-england-london-14684704>> [Accessed 10 May 2015], BBC: 'Home Secretary bans Telford EDL march' (12 August 2011) <<http://www.bbc.com/news/uk-england-shropshire-14506941>> [Accessed 10 May 2015]

<sup>26</sup> Institute for Strategic 'Briefing Paper- The New Radical Right: Violent and Non-Violent Movements in Europe' (2012) 9

period of ten years as well as a bombing in Cologne.<sup>27</sup> In 2007, members of *Jobbik* established a group entitled *Magyar Gárda Egyesület (The Hungarian Guard Association)*, which has organised several public demonstrations throughout the country and in villages inhabited by large Roma populations.<sup>28</sup> This association has been the subject of a European Court of Human Rights (ECtHR) judgement. The case involved a 2007 paramilitary rally with two-hundred participants wearing military uniform as well as armbands reminiscent of Arrow Cross symbols<sup>29</sup> who were to march through a village of predominantly Roma inhabitants. The police were present and did not allow the march to pass through a street inhabited by Roma families. As a result of the rally, the Budapest Chief Prosecutor's Office filed a court action for the dissolution of the Association. The action was based on the allegation that the Association had not conformed to the requirements of the freedom of peaceful assembly and that it carried out Romaphobic activities, generating fear amongst the Roma population of the village with speeches and the establishment of an intimidating environment through the wearing of uniforms, the marching formations used and the military style of the demonstration. After four hearings, the Budapest Regional Court disbanded the Association. Following an appeal in 2009, the Budapest Court of Appeal upheld the judgement of the Regional Court. Later that year, the Supreme Court also upheld the Regional Court's judgement<sup>30</sup> and, as will be discussed in chapter four, in 2013 the ECtHR upheld the Supreme Court's judgement. Tackling the activity of a social movement which falls within the general definitional realm of non-party groups has been deemed as more complicated than tackling a political party since a social movement is not bound by rules attached to the behaviour of entities active in the electoral process.<sup>31</sup>

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<sup>27</sup> Spiegel Online International 'The World from Berlin: 'The Neo-Nazi Killers Were Among Us' (15 November 2011) <<http://www.spiegel.de/international/germany/the-world-from-berlin-the-neo-nazi-killers-were-among-us-a-797948.html>> [Accessed 26 January 2015]

<sup>28</sup> Examples of Jobbik's paramilitary rallies beyond the rally which was the subject of the ECtHR judgement include a 2012 demonstration - following anti-Roma speeches, the marchers proceeded to Roma houses and shouted such slogans as "You are going to die here!" 75 Stones were thrown, but no one was injured.

<sup>29</sup> This symbol was used by the 1930s Hungarian Arrow Cross Party. The Arrow Cross leader, Ferenc Szalasi, was appointed by Hitler during the last months of occupation. Under his rule, as many as 80,000 Jews were deported to death camps and about 20,000 were marched to the banks of the Danube and shot. ('We are not Nazis but...The Rise of Hate Parties in Hungary and Greece and why America Should Care.' (2014): <<http://www.humanrightsfirst.org/sites/default/files/HRF-report-We-Are-Not-Nazis-But.pdf>> [Accessed 14 April 2015] 39 This symbol was considered as threatening and intimidating, firstly by the national courts and then by the ECtHR in the case of *Vona v Hungary* discussed in chapter four.

<sup>30</sup> *Vona v Hungary* App. no. 35943/10 (ECHR 9 July 2013) para. 16

<sup>31</sup> Bruce Hoffman & Anders Strindberg '*Terrorism and Beyond: A 21<sup>st</sup> Century Perspective*' (eds. Routledge 2015) 351

Further, there is the subculture milieu which is an unstructured part of the far-right movement. In the UK, the *Aryan Strike Force*, *Combat 18* and *Blood and Honour*, which are movements active on an international level, make up the entities of this milieu. In fact, two members of the *Aryan Strike Force* were arrested in 2010 and imprisoned for preparing violent racist activities, as further discussed in chapter six. The above tripartite structural approach to the types of entities which make up the far-right are not to be taken as completely reflective of the situation in each country. What will become apparent from the analysis on Greece is that the far-right framework is dominated by one entity, namely *Golden Dawn* which is a political party simultaneously acting as a subculture movement with a rigid rather than a loose structure.

### 1.2.2 'Triggering Factors' Exploited by the Far-Right

The reasons and circumstances which right-wing extremist parties, groups and movements in Europe use and abuse for purposes of advancing their mandate include immigration and the presence of settled immigrants, particularly Muslims,<sup>32</sup> and the interrelated concerns regarding so-called failed multiculturalism. Other reasons include the presence of minority groups, such as Roma and Jews and the stereotypes attached thereto, the dire financial situation which Europe finds itself in today<sup>33</sup> and the increasing lack of trust in mainstream political parties due to the perceived failure of such parties to address issues such as the economic recession and social issues such as immigration.<sup>34</sup> Within this ambit, the far-right movement finds itself in an ideal setting in which to flourish. Moreover, as noted by Michael Minkenberg, 'the mobilization of the radical right or xenophobic movements often occurs in times of accelerated social and cultural change.'<sup>35</sup>

When considering the reasons and situations which prompt the rise of the far-right in Europe, one must bear in mind that there does not exist an homogenous far-right on this continent in

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<sup>32</sup> A Chatham House Report, Matthew Goodwin, 'Right Response: Understanding and Countering Populist Extremism in Europe' (2011) Executive Summary 11

<sup>33</sup> Friedrich-Ebert-Stiftung 'Right-Wing Extremism in Europe Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies', (2013) 31

<sup>34</sup> A Chatham House Report, Matthew Goodwin, 'Right Response: Understanding and Countering Populist Extremism in Europe' (2011) Executive Summary 12

<sup>35</sup> Friedrich-Ebert-Stiftung 'Right-Wing Extremism in Europe Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies', (2013) 11

terms of origins, drivers and manifestations. In fact, ‘although the extreme right in Europe displays a set of common features, in many respects its component movements diverge markedly from one another.’<sup>36</sup> This is true in relation to the content of the movement’s activities and ideologies, as will be demonstrated below, as well as in relation to the structure of the movement with, for example, the extreme-right in the East often being less structured and organised than its Western counterpart.<sup>37</sup> The diverging nature of the triggering factors which have led to the rise in the far-right according to country and/or region is also an issue to be taken into account. These differences will be discussed further below.

### 1.2.2 (i) Immigration and Islamophobia

Since World War II, Europe has become increasingly diverse in relation to ethnicities, nationalities and religions due to immigration.<sup>38</sup> Immigration to Western Europe resulted predominately due to the influx of guest workers between 1945 and the 1970’s. Another key process which has resulted in immigration to Europe, more generally, has been that of asylum. In 1992, the EU hosted a total of 670,000 asylum seekers with the number rising to 1.26 million in 2015.<sup>39</sup> In 2014, a total of 59,085<sup>40</sup> and 126,055 persons<sup>41</sup> requesting or enjoying international protection resided in Greece and the UK respectively. In addition, due to the free movement of persons from and within the EU, both countries receive persons from other European nations. In August 2015, 269,000 EU citizens were recorded as living in the UK.<sup>42</sup> Britain’s labour migrants from former colonies in the Caribbean, India, Pakistan<sup>43</sup> and Africa increased from around half a

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<sup>36</sup> Friedrich-Ebert-Stiftung ‘Right-Wing Extremism in Europe Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies’, (2013) 6

<sup>37</sup> Friedrich-Ebert-Stiftung ‘Right-Wing Extremism in Europe Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies’, (2013) 25

<sup>38</sup> University of Deusto Bilba, Humanitarian Net: David Turton & Julia González: ‘Ethnic Diversity in Europe: Challenges to the Nation State’ (2000), 12 <<http://www.corteidh.or.cr/tablas/10698.pdf>> [Accessed 26 January 2015]

<sup>39</sup> Eurostat: Asylum Statistics: <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics)> [Accessed 7 June 2016]

<sup>40</sup> 2015 UNHCR Subregional Operations Profile - Northern, Western, Central and Southern Europe, <<http://www.unhcr.org/pages/49e48e726.html>> [Accessed 26 January 2015]

<sup>41</sup> 2015 UNHCR Subregional Operations Profile - Northern, Western, Central and Southern Europe <<http://www.unhcr.org/pages/49e45bb01.html>> [Accessed 26 January 2015]

<sup>42</sup> Office for National Statistics: Migration Statistics Quarterly Report, August 2015 <[http://www.ons.gov.uk/ons/dcp171778\\_414818.pdf](http://www.ons.gov.uk/ons/dcp171778_414818.pdf)> [Accessed 4 November 2015] There are no equivalent figures for Greece.

<sup>43</sup> In the UK, the term ‘Asian’ is used to describe some of the immigrants who have lived in the country for several generations and refers to migrants from South Asia including countries such as Bangladesh, India, Pakistan and Sri

million in the period between 1951 and 1962 to approximately one and a half million in 1970.<sup>44</sup> Even though this phenomenon decreased slightly in the 1970's, as a result of economic recession and stricter immigration control, more than half a million immigrants arrived between 1969 and 1978.<sup>45</sup> In addition to this, the infrastructure for the facilitation of permanent immigration had been established and, thus, these persons continued to reside in the country, together with their families, as a result of the process of family reunion/reunification.<sup>46</sup> Further, many descendants of the transatlantic slave trade reside in the UK.<sup>47</sup> Today, approximately eight million persons of foreign descent live in the UK.<sup>48</sup> Greece used to be only a sending country in the realm of immigration. However, after the 1990s and the fall of socialism but also due to the increase in the number of persons seeking work and international protection, Greece received approximately one million people from the Soviet Union, Southern Albania, Eastern Europe and from Asian and African countries who today make up more than 10% of the population.<sup>49</sup>

Extreme right-wing movements 'fiercely oppose immigration and rising ethnic and cultural diversity'<sup>50</sup> promulgating discrimination against such groups while exploiting unemployment and other such woes to promote their mandate of prejudice and hostility towards this diversity. Minkenberg places this approach towards immigration and cultural diversity, more generally, within the framework of the myth that marks right-wing extremism which is none other than that of 'a homogenous nation – a romantic and populist ultra-nationalism hostile to liberal, pluralistic democracy...'<sup>51</sup> As noted, there are 'immigrants and immigrants when it comes to the far

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Lanka. It also includes Asians who lived in places such as Kenya, Tanzania and Uganda who came to the United Kingdom as refugees from the African countries: John Hartwell Moore, *'Encyclopaedia of Race and Racism'* (eds. Thomson Gale 2008), Volume 3, 187

<sup>44</sup> Encyclopaedia Britannica, (William Benton 1973 Vol. 8) 416

<sup>45</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party'* (eds. Routledge 2011) 27

<sup>46</sup> David Turton & Julia González 'Ethnic Diversity in Europe: Challenges to the Nation State' (2000 Humanitarian Net), 12 <[http://www.humanitariannet.deusto.es/publica/PUBLICACIONES\\_PDF/03%20Ethnic%20Diversity.pdf](http://www.humanitariannet.deusto.es/publica/PUBLICACIONES_PDF/03%20Ethnic%20Diversity.pdf)> [Accessed 26 January 2015]

<sup>47</sup> John Hartwell Moore, *'Encyclopaedia of Race and Racism'* (eds. Thomson Gale 2008), Volume 3, 186

<sup>48</sup> Migration Observatory: UK <<http://www.migrationobservatory.ox.ac.uk/briefings/migrants-uk-overview>> [Accessed 2 November 2015]

<sup>49</sup> Minority Rights Group International: State of the World's Minorities and Indigenous Peoples 2014: <[www.minorityrights.org/12473/state-of-the-worlds-minorities/mrg-state-of-the-worlds-minorities-2014.pdf](http://www.minorityrights.org/12473/state-of-the-worlds-minorities/mrg-state-of-the-worlds-minorities-2014.pdf)> [Accessed 4 November 2015]

<sup>50</sup> Chatham House Report 'Right Response: Understanding and Countering Populist Extremism in Europe' (2011)

<sup>51</sup> Friedrich-Ebert-Stiftung 'Right-Wing Extremism in Europe Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies', (2013) 11

right.’<sup>52</sup> The immigrants who become targets of the far-right are those who are perceived as posing some sort of threat to the country and culture.<sup>53</sup> Furthermore, although post 9/11 a type of ‘acceptable xenophobia-Islamophobia’<sup>54</sup> was established, the focus has not always been on Muslims but on other groups, such as the historically persecuted Jews, as well as Southern European workers.<sup>55</sup> Islamophobia is a central issue which the majority of extreme-right parties and groups feed off and unite upon. It has been argued that Islam has become the ‘cosmic enemy of all, an open threat...that replaces the imagined powerful Jew who used to subvert European societies.’<sup>56</sup> There is no official data on how many Muslims live in Europe, but in 2013 it was estimated that they represent approximately 6% of the EU population.<sup>57</sup> In the UK today, far-right extremism is predominantly focused on immigration and is particularly driven by anti-Islamic sentiments. The European Network against Racism<sup>58</sup> (hereinafter ENAR) notes that Islamophobia and its effect on hateful discourse and hate crime are on the rise predominantly in the UK and France.<sup>59</sup> As noted by Conservative Peer Sayeeda Warsi, in the UK, ‘Islamophobia has passed the dinner table test.’ The route has been paved to facilitate the embracement and promotion of anti-Islamic rhetoric which has much more credibility than rhetoric based on ideas of biological racism.<sup>60</sup> The *BNP* tapped into the opportunities posed by terrorist events such as 9/11 to cultivate anti-Islamic sentiment. Soon after that attack, the *BNP* handed out leaflets which held that ‘Islam stood for Intolerance, Slaughter, Looting, Arson and Molestation of Women.’<sup>61</sup> In relation to hate crime, according to Metropolitan Police Statistics, in 2015 hate crimes against Muslims in London rose by 70%. There were a total of eight hundred and sixteen recorded Islamophobic crimes for the twelve months up until July 2015 in comparison to four hundred and ninety nine in the previous year.<sup>62</sup> As noted by an anonymous Home Office adviser,

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<sup>52</sup> ENAR Report: ‘Far-Right Parties and Discourse in Europe: A Challenge in Our Times’ (2012) 12

<sup>53</sup> ENAR Report: ‘Far-Right Parties and Discourse in Europe: A Challenge in Our Times’ (2012) 12

<sup>54</sup> ENAR Report: ‘Far-Right Parties and Discourse in Europe: A Challenge in Our Times’ (2012) 12

<sup>55</sup> ENAR Report: ‘Far-Right Parties and Discourse in Europe: A Challenge in Our Times’ (2012) 12

<sup>56</sup> Farid Hafez, ‘Shifting Borders: Islamophobia as Common Ground for Building Pan-European Right-Wing Unity’ (2014) 48 *Patterns of Prejudice* 5, 487

<sup>57</sup> ENAR: ‘Shadow Report - Racist Crime in Europe (2013-2014)’ 9

<sup>58</sup> ENAR is a pan-European anti-racist network that advocates for racial equality and facilitates co-operation among civil society anti-racist actors in Europe: <<http://www.enar-eu.org/>>

<sup>59</sup> ENAR: ‘Shadow Report: Racist Crime in Europe (2013-2014)’ 3

<sup>60</sup> Daniel Trilling, ‘*Bloody Nasty People – The Rise of Britain’s Far Right*’ (eds. Verso 2012) 116

<sup>61</sup> Daniel Trilling, ‘*Bloody Nasty People – The Rise of Britain’s Far Right*’ (eds. Verso 2012) 116

<sup>62</sup> Metropolitan Police Statistics: < <http://www.met.police.uk/crimefigures/#>> [Accessed 4 November 2015]

events such as atrocities committed by the Islamic State<sup>63</sup> and the Rotherham abuse scandal<sup>64</sup> have fuelled such extremism.<sup>65</sup> In relation to the Rotherham abuse scandal, Tell MAMA<sup>66</sup> found that over a quarter of anti-Muslim hate crimes (fifty-eight hate crimes) that were recorded in the immediate aftermath of the scandal were held to be provoked by the scandal<sup>67</sup> while online hate speech against Muslims, as led by the far-right group *Britain First*,<sup>68</sup> also increased as a result of it.<sup>69</sup> Further, the murder of Fusilier Lee Rigby<sup>70</sup> has had a significant effect on the rise of Islamophobic sentiments and activities in the UK. In a study conducted by Tell MAMA, this attack was referred to by Muslim participants of the study as an event which significantly increased Islamophobic hate and activity directed towards them both online and offline.<sup>71</sup> In the UK, during the period 2014-2015, anti-Muslim activity included physical attacks against Muslim men and women, racist graffiti on Muslim properties, mosques and graves as well as firebombs thrown at mosques.<sup>72</sup> In its 2015 annual report, the organisation found that the number of offline incidents of hate against Muslims rose by 200% in 2014, from 146 recorded incidents in 2014 to 437 in 2015.<sup>73</sup> Tell MAMA held that Muslim women are most vulnerable to Islamophobic

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<sup>63</sup> The Islamic State of Iraq and the Levant– a terrorist group which In June 2014 seized parts of Syria and Iraq and declared the establishment of a caliphate - a state governed in accordance with Sharia. It is led by Ibrahim Awad Ibrahim al-Badri al-Samarrai also known as Abu Bakr al-Baghdadi.

<sup>64</sup> In Rotherham, over one thousand young girls were victims of systematic sexual abuse for a period of more than ten years by British Pakistani men

<sup>65</sup> BBC News: 'Islamic State and Rotherham Abuse Fuelling Far Right' (18 September 2014) <<http://www.bbc.com/news/uk-29204170>> [Accessed 27 February 2015]

<sup>66</sup> Tell Mama UK is a public service for measuring and monitoring anti-Muslim attacks: <<http://tellmamauk.org/>>

<sup>67</sup> BBC News: 'Islamic State and Rotherham Abuse 'Fuelling Far Right' (18 September 2014) <<http://www.bbc.com/news/uk-29204170>> [Accessed 27 February 2015]

<sup>68</sup> Britain First is an extreme right-wing minor political party formed as a movement in 2011 by former members of the British National Party and registered with the electoral commission in 2014. It is against immigration and the alleged Islamification of the UK. Some of its activities have included 'Christian patrols' and 'invasions of mosques.' <<https://www.britainfirst.org/>>

<sup>69</sup> Tell Mama UK 'Facebook Report: Rotherham, Hate and the Far-Right Online' (2014) <<http://tellmamauk.org/wp-content/uploads/2014/09/Rotherham.pdf>>

<sup>70</sup> On 22 May 2013, two Muslims murdered Fusilier Lee Rigby at the Royal Artillery Barracks in Woolwich, South-East London.

<sup>71</sup> Tell Mama UK: 'We Fear for Our Lives – Offline and Online Experiences of Anti-Muslim Hate' (2014) <<http://tellmamauk.org/wp-content/uploads/resources/We%20Fear%20For%20Our%20Lives.pdf?>> [Accessed 4 November 2015] 9

<sup>72</sup> Tell Mama UK: 'We Fear for Our Lives – Offline and Online Experiences of Anti-Muslim Hate' (2014) <<http://tellmamauk.org/wp-content/uploads/resources/We%20Fear%20For%20Our%20Lives.pdf?>> [Accessed 4 November 2015] 6, 10.

<sup>73</sup> Tell Mama: 'Annual Report 2015 - The Geography of Anti-Muslim Hatred' (Faith Matters UK 2016) 10



attacks and speech.<sup>74</sup> Moreover, as noted by a government adviser in the UK: ‘I have been working with people from the far-right for about twenty-seven years now, I can see increases in some of these groups and membership in some of these groups based on things that are happening nationally here and internationally.’<sup>75</sup> As well as anti-Muslim crimes and online activity, Islamophobia marks the political discourse of parties and groups such as *UKIP*, *Britain First* and *EDL*. Goodwin argues that this movement is ‘united through a heavy preoccupation with immigration...and anxiety over the role of Islam and British Muslims in wider society.’<sup>76</sup> Moreover, Islamophobia is a more generalised problem in the UK and the construction of a very different ‘other,’ that being Muslims, has ‘wide currency in the UK and ... is certainly not confined to the far-right.’<sup>77</sup> In Greece, although Islamophobia heavily marks the discourse and activity of the far-right, this occurs within the general framework of hate promulgated against immigrants. Notwithstanding that a general hostility to Islam can be directly correlated to the country’s historical relationship with Turkey, the arrival of a large number of migrants without an adequate migration and asylum policy has meant that the issue of immigration is more easily manipulated by the far-right than concerns over Islam. The European Commission against Racism and Intolerance (ECRI)<sup>78</sup> notes that there has been a significant increase in cases of incitement to hatred within the framework of far-right discourse with such hatred usually being directed towards immigrants but also Roma, Jews and Muslims.<sup>79</sup> In Greece, there are immigrants who are Muslims and also an ethnic minority living in the North of Greece who are Muslims. Both these groups are targets of far-right rhetoric and activity. *Golden Dawn* has publicly expressed and promoted such hatred, using the national parliament as a platform on

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<sup>74</sup> Tell Mama UK: ‘We Fear for our Lives – Offline and Online Experiences of Anti-Muslim Hate’ (2014) <<http://tellmamauk.org/wp-content/uploads/resources/We%20Fear%20For%20Our%20Lives.pdf?>> [Accessed 4 November 2015] 6

<sup>75</sup> Huffington Post: ‘ISIS and Rotherham Fuelling One of the most worrying periods of right-wing extremism’ (29 August 2014) <[http://www.huffingtonpost.co.uk/2014/08/29/edl-tommy-robinson-britain-first\\_n\\_5736294.html](http://www.huffingtonpost.co.uk/2014/08/29/edl-tommy-robinson-britain-first_n_5736294.html)> [Accessed 8 May 2015]

<sup>76</sup> House of Commons, Home Affairs Committee: *Roots of Violent Radicalisation* (2012) 19<sup>th</sup> Report of Session 2010-12, Vol. 1, 11

<sup>77</sup> George Kassimeris & Leonie Jackson, ‘The Ideology and Discourse of the English Defence League: Not Racist, Not Violent, Just No Longer Silent’ (2015) 17 *British Journal of Politics and International Relations* 1, 178

<sup>78</sup> ECRI is a human rights body of the Council of Europe, composed of independent experts, which monitors problems of racism, xenophobia, antisemitism, intolerance and discrimination on grounds such as “race”, national/ethnic origin, colour, citizenship, religion and language (racial discrimination); it prepares reports and issues recommendations to member States: < [http://www.coe.int/t/dghl/monitoring/ecri/default\\_en.asp](http://www.coe.int/t/dghl/monitoring/ecri/default_en.asp)>

<sup>79</sup> ECRI Report on Greece CRI(2015)1, (24 February 2015) <<https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Greece/GRC-CbC-V-2015-001-ENG.pdf>> [Accessed 4 November 2015], 9

which to do so.<sup>80</sup> However, even beyond the framework of the far-right, Greek political discourse has been starkly marked by anti-immigrant rhetoric in recent years.<sup>81</sup> At the same time, Roma are ‘subject to negative stereotyping in political discourse’<sup>82</sup> whilst the Greek Orthodox Church has publicly expressed and promoted, amongst others, anti-Semitic beliefs.<sup>83</sup> Religious intolerance is a theme that marks Greece as illustrated by several Strasbourg cases on the treatment of Jehovah’s witnesses,<sup>84</sup> Muslims<sup>85</sup> and Humanists.<sup>86</sup> However, it is *LAOS – The Popular Orthodox Rally (ΛΑΟΣ - Λαϊκός Ορθόδοξος Συναγερμός)* (hereinafter LAOS), rather than *Golden Dawn*, which focuses more on the issue of religion. In relation to the Church, LAOS is directly affiliated with the preservation of the Orthodox religion as can be concluded by its name – The Popular Orthodox Rally. On the other hand, *Golden Dawn* was and continues to be a party obsessed with race rather than religion but, for purposes of increasing its electorate, has manipulated the subject of religion. As noted by Dimitris Psaras, although this party puts forth a Greek Orthodox profile, it essentially adopts ‘national socialist pagan beliefs.’<sup>87</sup> The party’s supporters have been called to give the genuine pagan meaning to Christian festivities<sup>88</sup> and, during Easter of 1996, issued a periodical about the ‘Greekness and the times of the celebration with the ancient ancestral celebrations.’<sup>89</sup> The leader of the party has said that ‘we believe in the Idea of Religion, we believe in a Greek Christianity, absolutely identified with the culture and the history of our people...we see the day of the Resurrection not in the Jewish Easter but in the flower festival.’<sup>90</sup> As noted by Psaras, *Golden Dawn* tried to align itself more closely with the

<sup>80</sup> ECRI Report on Greece CRI(2015)1, (24 February 2015) <<https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Greece/GRC-CbC-V-2015-001-ENG.pdf>> [Accessed 4 November 2015], para.46

<sup>81</sup> ECRI Report on Greece CRI(2015)1, (24 February 2015) [Accessed 4 November 2015], para.40

<sup>82</sup> ECRI Report on Greece CRI(2015)1, (24 February 2015) [Accessed 4 November 2015], para.43

<sup>83</sup> ECRI Report on Greece CRI(2015)1, (24 February 2015) [Accessed 4 November 2015], para.39

<sup>84</sup> See *Kokkinakis v Greece* App. no. 14307/88 (25 May 1993 ECHR), *Valsamis v Greece* App. no 74/1995/580/666 (18 December 1996) *Thlimmenos v Greece* App. no. 34369/97 (6 April 2000)

<sup>85</sup> *Serif v Greece* App. no. 38178/97 (ECHR 14 March 2000)

<sup>86</sup> *Dimitras and Others v Greece* App. nos. 42837/06, 3269/07, 35793/07 and 6099/08 (3 June 2000 ECHR)

<sup>87</sup> Dimitris Psaras – ‘*The Black Bible of Golden Dawn: The Documented History and Action of a Nazi Group*’ (eds. 2012 Polis) 224 (Δημήτρης Ψαράς, ‘*Η Μαύρη Βίβλος της Χρυσής Αυγής, Ντοκουμέντα από την Ιστορία και τη Δράση μιας Ναζιστικής Ομάδας*’): ‘εθνικοσοσιαλιστικές παγανιστικές θρησκευτικές δοξασίες.’

<sup>88</sup> Dimitris Psaras – ‘*The Black Bible of Golden Dawn: The Documented History and Action of a Nazi Group*’ (eds. 2012 Polis) 224 (Δημήτρης Ψαράς, ‘*Η Μαύρη Βίβλος της Χρυσής Αυγής, Ντοκουμέντα από την Ιστορία και τη Δράση μιας Ναζιστικής Ομάδας*’)

<sup>89</sup> Christos Papas, *Golden Dawn* issue (5.4.1996) on the ‘Greek meaning of Easter’ (‘το ελληνικό νόημα της Λαμπρής’ - ‘η ελληνικότητα και οι δεσμοί της εορτής αυτής με τις αρχαίες προγονικές γιορτές.’)

<sup>90</sup> Νικόλαος Μιχαλολιάκος ‘*Για Μια Μεγάλη Ελλάδα σε μια Ελεύθερη Ευρώπη*’ - ‘Πιστεύουμε στην Ιδέα της Θρησκείας, πιστεύουμε σε έναν Ελληνικό Χριστιανισμό, απόλυτα ταυτισμένο με τον πολιτισμό και την ιστορία του λαού μας. Βλέπουμε...στην ημέρα της Αναστάσεως όχι το εβραϊκό Πάσχα, αλλά τα ανθεστήρια.’ Nicos

Greek Orthodox religion<sup>91</sup> but through a racial lens, as illustrated in the examples given above.<sup>92</sup> As a result, the Greek Orthodox Church is essentially ‘split’ as to its opinions and positions in relation to *Golden Dawn*.<sup>93</sup> Thus, although the far-right in Greece, in the form of *Golden Dawn*, promulgates racist rhetoric and also carries out racially violent crimes, other parties and the Greek Orthodox Church have also contributed to the cultivation of racist and/or religious discriminatory sentiments.<sup>94</sup>

As well as greatly impacting the UK context and, to an extent, the Greek context, Islamophobia is also characteristic of activities and discourse occurring in other European countries. A new wave of terrorist attacks occurring over the past few years, such as the Brussels attacks which killed thirty two people and injured dozens more,<sup>95</sup> the Paris attacks which killed one hundred and thirty and injured three hundred and sixty eight,<sup>96</sup> the beheading of persons by the Islamic State which have been made public through videos, the attacks in Paris against the *Charlie Hebdo* offices and a Kosher supermarket,<sup>97</sup> the shootings in Copenhagen<sup>98</sup> and the terrorist attack

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Michaloliakos, ‘For a Big Greece in a Free Europe’ (2<sup>nd</sup> edn. Ascalon 2000) 16. Note: The flower festival is an annual festival that takes place in Greece and Cyprus in honour of the God Dionysus (In origin, Dionysus was the god of wine; afterwards he became god of vegetation and warm moisture; then he appeared as the god of pleasures and the god of civilization; and finally, according to Orphic conceptions, as a kind of supreme god: *New Larousse Encyclopaedia of Mythology*, (4<sup>th</sup> edn. Hamlyn 1973) 155

<sup>91</sup> This was especially the case following the crisis with the name ‘Macedonia’ discussed in chapter seven

<sup>92</sup> Dimitris Psaras – ‘*The Black Bible of Golden Dawn: The Documented History and Action of a Nazi Group*’ (eds. 2012 Polis) 248 (Δημήτρης Ψαράς, ‘*Η Μαύρη Βίβλος της Χρυσής Αυγής, Ντοκουμέντα από την Ιστορία και τη Δράση μιας Ναζιστικής Ομάδας*)

<sup>93</sup> As can be seen by the different positions senior priests adopt: E-Kathimerini: ‘Church of Greece Split over Role of Neofascist Golden Dawn Party’ (8 November 2012): <<http://www.ekathimerini.com/146002/article/ekathimerini/news/church-of-greece-split-over-role-of-neofascist-golden-dawn-party>> [Accessed 13 April 2016]

<sup>94</sup> ECRI Report on Greece CRI(2015)1, (24 February 2015) <<https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Greece/GRC-CbC-V-2015-001-ENG.pdf>> [Accessed 4 November 2015], para.45

<sup>95</sup> On 22 March 2016, the coordinated bombings occurred in Belgium: two at Brussels Airport in Zaventem, and one at Maalbeek metro station in Brussels. Another bomb failed to detonate.

<sup>96</sup> On 13 November 2015, there were a series of coordinated terrorist attacks in France: three suicide bombers struck near the Stade de France as well as suicide bombings and mass shootings at cafés, restaurants and a theatre where there was a concert going on.

<sup>97</sup> On 7 January 2015, two persons attacked the offices of the French satirical weekly newspaper Charlie Hebdo in Paris and killed 11 people and injured 11 others. After leaving the building they killed a police officer .On 9 January, police tracked the assailants to an industrial estate in Paris, where they took a hostage. Also, at a kosher supermarket in Paris, another perpetrator shot a police officer on 8 January and took hostages the next day. The gunman was killed and four hostages were found dead

<sup>98</sup> On 15 February 2015, there was an attack at a cultural centre in Copenhagen during an event on free expression. One man was killed and three police officers were injured. Hours later, a gunman opened fire on a synagogue.

in Tunisia,<sup>99</sup> has further fuelled the Islamophobia that taints Western society. For example, following the coordinated Paris attacks, there were several incidents of the vandalising of properties such as mosques, kebab restaurants and halal butcher shops with Islamophobic messages<sup>100</sup> and at least fifty anti-Muslim attacks against Muslims and mosques.<sup>101</sup> Other reasons for the rise in Islamophobic sentiments have been events such as the Cologne sexual attacks, where it was reported that as many as one thousand women were assaulted at the Cologne train station on New Year's Eve (2015-2016) by men of Arab or North African descent. Although asylum seekers in Germany had been targetted as the perpetrators, with hateful rhetoric against refugees subsequently arising, police found that three out of the fifty-eight suspects were, in fact, asylum seekers.<sup>102</sup> As a response to the sex attacks, the *Pegida Movement*<sup>103</sup> of Germany was, from October 2014 until February 2015, holding weekly anti-Muslim marches with approximately 25,000 participating in the Dresden march following the *Charlie Hebdo* attacks<sup>104</sup> whilst demonstrations also occurred following the Cologne attacks.<sup>105</sup> In relation to *Pegida*, the 2015 State of Hate Report noted that 2015 closed with the possibility of a branch of *Pegida* being established in the UK with certain activities, such as the movement's demonstrations outside Downing Street in London, having already taken place.<sup>106</sup> Minkenberg notes that 'the fact that large portions of the public in Western European countries display Islamophobic attitudes...provides an opening for the radical right, enabling it to appear more mainstream in

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<sup>99</sup> On 26 June 2015, a gunman attacked persons on the beach resort of Sousse in Tunisia. 38 people - plus the gunman - were killed. At least 15 of the victims were from the United Kingdom.

<sup>100</sup> The Independent: 'Paris attacks: Hating Muslims Plays Right into ISIS's Hands' (17 November 2015): <<http://www.independent.co.uk/news/world/europe/paris-attacks-hating-muslims-plays-right-into-isiss-hands-a6738131.html>> [Accessed 2 December 2015]

<sup>101</sup> ENAR Statement: 'Muslims in Europe – Questions and Answers' (20 February 2015): <<http://www.enar-eu.org/Muslims-in-Europe-Questions-and>> [Accessed 23 February 2016]

<sup>102</sup> The Independent: 'Cologne: Three out of 58 men arrested over Mass Sex attack on New Year's Eve were Refugees from Syria or Iraq' (15 February 2016) <<http://www.independent.co.uk/news/world/europe/cologne-only-three-out-of-58-men-arrested-in-connection-with-mass-sex-attack-on-new-years-eve-are-a6874201.html>> [Accessed 20 February 2016]

<sup>103</sup> Patriotische Europäer gegen die Islamisierung des Abendlandes - Patriotic Europeans Against the Islamisation of the Occident

<sup>104</sup> International Business Times: 'Charlie Hebdo Pegida March: Angela Merkel Takes Aim at German Anti-Islamist Group' (13 January 2015): <<http://www.ibtimes.com/charlie-hebdo-pegida-march-angela-merkel-takes-aim-german-anti-islamist-group-1781832>> [Accessed 15 April 2015]

<sup>105</sup> The Independent: 'Cologne attacks: What Happened after 1,000 women were Sexually Assaulted?' (11 February 2016): <<http://www.independent.co.uk/news/world/europe/cologne-attacks-what-happened-after-1000-women-were-sexually-assaulted-a6867071.html>> [Accessed 2 February 2016]

<sup>106</sup> Hope Not Hate: Nick Lowles & Graeme Atkinson 'The State of Hate in 2015' (2016 Hope not Hate) 32

comparison to blatantly extremist discourses like anti-Semitism.<sup>107</sup> This is not to say that the extreme right in Western and Southern Europe is not anti-Semitic, with parties such as *Golden Dawn* openly professing anti-Semitic ideologies, even in the national parliament.<sup>108</sup>

### 1.2.2 (ii) Ethnic Minorities and the LGBTI Community

According to context, anti-Semitism and Romaphobia may mark the rhetoric and/or activities of parts of the far-right movement. There are approximately ten to twelve million Roma<sup>109</sup> in Europe, approximately six million of whom live in the EU.<sup>110</sup> The Jewish Agency<sup>111</sup> estimates that there are 1,426,900 Jews living in Europe.<sup>112</sup> In Central and Eastern Europe, following 1989 and 1990, ‘xenophobic sentiments began to reassert themselves...they were directed especially against the Sinti and Roma, but also against national minorities, Jews and homosexuals.’<sup>113</sup> This has, in part, influenced today’s reality in these countries with targets such as Jews, Roma, LGBTI<sup>114</sup> persons and national minorities constituting the ‘primary targets of virulent hate speech attacks.’<sup>115</sup> In Central and Eastern Europe the far-right movement has ‘a vision of national renewal that is predicated upon purging<sup>116</sup> ‘all alien influences.’<sup>117</sup> For example, in Poland, victims of right-wing extremist violence are predominantly homosexuals or political opponents rather than members of ethnic minorities.<sup>118</sup> In Romania, the far-right is particularly

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<sup>107</sup> Friedrich-Ebert-Stiftung ‘Right-Wing Extremism in Europe Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies’, (2013) 23

<sup>108</sup> For example, on 23 October 2012, Ilias Kasidiaris of Golden Dawn read out a passage from ‘The Protocols of the Elders of Zion’ in the National Parliament: < <https://www.youtube.com/watch?v=JHTkXqcpF60>> [Accessed 5 May 2015]

<sup>109</sup> They include Travellers, Gypsies, Manouches, Ashkali and Sinti

<sup>110</sup> FRA Statistics on the Roma in Europe: <<http://fra.europa.eu/en/theme/roma>> [Accessed 5 November 2015]

<sup>111</sup> Jewish Agency: An agency which works on, *inter alia*, facilitating the return of Jews to Israel: < <http://www.jewishagency.org/>>

<sup>112</sup> Population of Jews in the world: <<http://www.jewishagency.org/>> [Accessed 10 November 2015]

<sup>113</sup> Friedrich-Ebert-Stiftung ‘Right-Wing Extremism in Europe Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies’, (2013) 7

<sup>114</sup> Lesbian, Gay, Bisexual, Transgender

<sup>115</sup> Uladzislau Belavusau ‘Hate Speech and Constitutional Democracies in Eastern Europe: Transitional and Militant? (Czech Republic, Hungary and Poland)’ (2014) 47 *Israel Law Review* 1, 31

<sup>116</sup> The notion of purging is very much interrelated with Nazism during which the Nazis purged Germany of groups which Hitler considered to be opposite to the make-up of an Aryan Race as well as those opposing the pursuit of Hitler’s objective. These include, amongst others, the Jews, the Roma, Poles, homosexuals and Jehovah’s witnesses.

<sup>117</sup> Friedrich-Ebert-Stiftung ‘Right-Wing Extremism in Europe Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies’ (2013) 161

<sup>118</sup> Friedrich-Ebert-Stiftung ‘Right-Wing Extremism in Europe Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies’ (2013) 157

intolerant towards Roma, ethnic Hungarians and sexual minorities<sup>119</sup> while hate speech in Hungary is anti-Semitic, anti-Roma and homophobic.<sup>120</sup> The anti-Roma nature of hate in Hungary can be reflected in the activities of the *Hungarian Guard* discussed in section 1.2.1. Such a movement can also be found in the Czech Republic and in particular the entity *Národní Garda (National Guard)*. In relation to Hungary, improvements in the sphere of LGBTI rights can be seen with this country constituting ‘one of the most gay-friendly legislations in the whole CEE.’<sup>121</sup> Whilst the far-right in Central Europe may habitually focus on ethnic and/or sexual minorities, the arrival of refugees in 2015 to countries of this area led to far-right rhetoric becoming increasingly affected by this occurrence.<sup>122</sup>

Anti-Semitism, namely hatred against Jews,<sup>123</sup> is ‘rooted in centuries of prejudice in Europe.’<sup>124</sup> In the UK, the Community Security Trust<sup>125</sup> recorded that four hundred and seventy-three anti-Semitic incidents, forty-four of which were violent assaults and two of which involved extreme violence, occurred across the UK in the first six months of 2015, a 53% increase on the first six months of 2014.<sup>126</sup> In Greece, anti-Semitic rhetoric and literature are directly interlinked with

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<sup>119</sup> Friedrich-Ebert-Stiftung ‘Right-Wing Extremism in Europe Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies’ (2013) 170

<sup>120</sup> Uladzislau Belavusau , ‘Freedom of Speech : Importing European and US Constitutional Models in Transitional Democracies’ (eds. 2013 Routledge) 145

<sup>121</sup> Uladzislau Belavusau , ‘Freedom of Speech : Importing European and US Constitutional Models in Transitional Democracies’ (eds. 2013 Routledge) 148

<sup>122</sup> For example in September 2015 members of the far-right Jobbik party and militia groups protest on Hungary's border with Serbia as thousands of refugees continue to arrive in the country. In October 2015, Dawn, a right-wing Eurosceptic party organised anti-migrant and anti-Islam demonstrations across the Czech Republic which attracted up to 5,000 people.

<sup>123</sup> Anti-Semitism: it could be said that this is probably the ‘world’s oldest hatred’: John Hartwell Moore, ‘Encyclopaedia of Race and Racism’ (eds. Thomson Gale 2008) Volume 3, 108. Anti-Semitism, as a term has been described as a ‘misnomer’: John Hartwell Moore, ‘Encyclopaedia of Race and Racism’ (eds. Thomson Gale 2008) Volume 3, 108. It replaced the word *Judenhaas* and is habitually related to the works of Wilhelm Marr. In his book ‘The Way to Victory of Germanism over Judaism’ who looked for a term which could appear scientific and thus used the word Semitic from language studies which uses it to refer to the languages spoken in the Middle or Near East such as Arabic, Aramaic and Hebrew. The term was subsequently translated into English as anti-Semitism. Hatred against the Jews and Judaism: John Hartwell Moore, ‘Encyclopaedia of Race and Racism’ (eds. Thomson Gale 2008), Volume 3, 108

<sup>124</sup> FRA Survey of Jewish people’s experiences and perceptions of discrimination and hate crime in European Union Member States (2009): <<http://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-discrimination-and-hate-crime-against>> [Accessed 4 November 2015]

<sup>125</sup> The Community Security Trust (CST) is a British organisation which seeks to ensure the security and protect the rights of Jews in the United Kingdom: < <https://cst.org.uk/about-cst/mission-statement>>

<sup>126</sup> The Community Security Trust (CST): Anti-Semitic Incidents January – June 2015: <[https://cst.org.uk/data/file/0/e/Incidents\\_Report\\_-\\_Jan-June\\_2015.1438092642.pdf](https://cst.org.uk/data/file/0/e/Incidents_Report_-_Jan-June_2015.1438092642.pdf)> [Accessed 4 November 2015]

elected members of the *Golden Dawn* party.<sup>127</sup> The latest figures in relation to anti-Semitic violence in Greece are from 2014 and show that there were four such incidents recorded.<sup>128</sup> This does not mean that there were, in fact, only four anti-Semitic incidents since, as will be reflected in the country analysis, Greece has an ineffective reporting system whilst hate crimes are often underreported and, even in the event that the victim chooses to report a hate crime it may not be recorded as such by the authorities. In 2012, the FRA carried out a survey on Jewish people's experiences and perception of discrimination, hate crime and anti-Semitism and noted that 35% of the respondents worry about being verbally insulted or harassed in a public place because they are Jewish and 33% worry about being physically attacked in the country where they live because they are Jewish. 75% of respondents considered anti-Semitism online to be a problem while 73% believed that anti-Semitism online has increased over the last five years.<sup>129</sup> Further, the Jewish Agency recorded that in 2014 approximately seven thousand French Jews left France for Israel due to the increased anti-Semitism in France but also due to the economic situation of the country.<sup>130</sup> In fact, from 2013-2014, the Jewish Agency recorded a 120% increase in the number of Jews moving from France to Israel.<sup>131</sup> When looking at anti-Semitism, one must take into consideration the differences between anti-Semitism and anti-Israeli sentiments. The former, refers to the hatred against Jews and the latter refers to hatred against Israel due to their political and/or military activities in Palestine. *The Boycott, Divestment and Sanctions Movement (BDS Movement)* is a global boycott movement that commenced in 2005 which seeks to put pressure on Israel in relation to the Palestinian issue. Some have described that this is essentially anti-Semitic.<sup>132</sup> For example, the Simon Wiesenthal Center<sup>133</sup> issued a report in 2013 arguing that the

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<sup>127</sup> ENAR Statement: 'Anti-Semitism in Europe: Time to Act' (January 2015): <[http://www.enar.eu.org/IMG/pdf/january\\_2015\\_enar\\_anti-semitism\\_islamophobia\\_briefs.pdf](http://www.enar.eu.org/IMG/pdf/january_2015_enar_anti-semitism_islamophobia_briefs.pdf)> [Accessed 4 November 2015]

<sup>128</sup> FRA Statistics 'Anti-Semitism Overview of Data available in the European Union 2004–2014' (October 2015): <[http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2015-antisemitism-update\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-antisemitism-update_en.pdf)> 39

<sup>129</sup> FRA Survey of Jewish people's experiences and perceptions of discrimination and hate crime in European Union Member States (2009) Relevant statistics:<<http://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-discrimination-and-hate-crime-against>> [Accessed 4 November 2015]

<sup>130</sup> The Jewish Agency, Annual Report 2014-2015: <[http://www.jewishagency.org/sites/default/files/JA\\_2014\\_15\\_Annual\\_Report\\_Low\\_ENG\\_v5\\_Final.pdf](http://www.jewishagency.org/sites/default/files/JA_2014_15_Annual_Report_Low_ENG_v5_Final.pdf)> 18

<sup>131</sup> The Jewish Agency, Annual Report 2014-2015: <[http://www.jewishagency.org/sites/default/files/JA\\_2014\\_15\\_Annual\\_Report\\_Low\\_ENG\\_v5\\_Final.pdf](http://www.jewishagency.org/sites/default/files/JA_2014_15_Annual_Report_Low_ENG_v5_Final.pdf)> 18

<sup>132</sup> Cary Nelson & Gabriel Noah Brahm, 'The Case against Academic Boycotts of Israel' ( eds. MLA Members for Scholar's Rights 2014)

<sup>133</sup> Simon Wiesenthal Center is described on its website as 'The Simon Wiesenthal Center is a global human rights organization researching the Holocaust and hate in a historic and contemporary context. The Center confronts anti-

*BDS Movement* presents itself as a ‘pro-peace initiative but in reality is a thinly-veiled, anti-Israel and anti-Semitic poison pill.’<sup>134</sup> Other sources, such as Al Jazeera, said that *BDS* ‘manifesto is a radical political position, but it is not anti-Semitic.’<sup>135</sup> The *BDS* is active in the UK<sup>136</sup> and in February 2016, the Conservative Party announced plans to put forth legislation for the criminalisation of anti-Israel boycotts by public bodies, town councils, libraries, universities and student unions. In a March 2016 discussion in the UK Parliament, a Conservative MP argued that ‘reports of anti-Semitic attacks being perpetrated in Europe can be directly linked with the hateful rhetoric espoused by many *BDS* campaigners.’<sup>137</sup> There is no analogous representation of *BDS* in Greece with one reported protest of *BDS* supporters having taken place with approximately twenty demonstrators demanding that Greece change the colours of its flag so they do not resemble those of the Israeli flag.<sup>138</sup> The author of this dissertation is not arguing that the *BDS* is, per se, an anti-Semitic movement. However, one must take into consideration that viewpoints on Israel and its practices, predominantly in relation to Palestine, may affect hate against Jews whilst negative sentiments towards Israel can be capitalised by haters for purposes of creating generalised hatred against Jews. The *BDS* is a platform in which there exists a real possibility of the blurring of the delineation between anti-Israeli sentiments and anti-Semitism. Moreover, haters within the far-right movement may exploit anti-Israeli sentiments arising of the current situation with Palestine for purposes of accentuating anti-Semitism.

Further, a shift from anti-Semitism to Islamophobia can be discerned in relation to certain European far-right groups. For example, France’s *National Front* was habitually interrelated

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Semitism, hate and terrorism, promotes human rights and dignity, stands with Israel, defends the safety of Jews worldwide, and teaches the lessons of the Holocaust for future generations. ‘

< <http://www.wiesenthal.com/site/pp.asp?c=IsKWLbPJLnF&b=6212365>>

<sup>134</sup> Simon Wiesenthal Centre (Dr. Harold Backman) ‘Boycott Divestment Sanctions BDS against Israel an Anti-Semitic, Anti-Peace Poison Pill’ (2013) 1

<sup>135</sup> Alastair Sloan, ‘BDS Tactics are Not Anti-Semitic’ <<http://www.aljazeera.com/indepth/opinion/2016/02/bds-tactics-antisemitic-david-cameron-israel-160216093807280.html>> [Accessed 14 April 2016]

<sup>136</sup> In the UK, BDS has a website of its own: <https://bdsmovement.net/tag/uk> outlining the movement’s action in the country.

<sup>137</sup> UK Parliament (15 March 2016):

<<http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm160315/halltext/160315h0002.htm>> [Accessed 14 April 2016]

< <http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm160315/halltext/160315h0002.htm>> [Accessed 14 April 2016]

<sup>138</sup> BDS Demands Greece Change Blue-And-White Flag; ‘Israeli Colors’:

< <http://www.preoccupiedterritory.com/bds-demands-greece-change-blue-and-white-flag-israeli-colors/>> [Accessed 14 April 2016]



with anti-Semitism, regularly demeaning the holocaust and portraying anti-Semitic views. Although Jean-Marie Le Pen attempted to rectify his party's image, this was not possible. A shift from anti-Semitism to Islamophobia was partially accomplished by his daughter<sup>139</sup> who argued that 'there is no anti-Semitism today in Europe'<sup>140</sup> with the party attempting to become embedded in the Jewish community.<sup>141</sup> The shift from anti-Semitism or, at least, an attempt thereto, which can be noted in the rhetoric and/or activities of several far-right parties of Western Europe can be discerned from other comments such as those of Andreas Mözler of Austria's *Freiheitliche Partei Österreichs (Freedom Party)*. During a meeting of the far-right in Israel,<sup>142</sup> Mözler stated that 'we do of course have a difficult relationship with Judaism, which is a hallmark of this camp [the nationalist camp]'<sup>143</sup> but noted that 'there was anti-Semitism in the nineteenth century. Today, however, we live in the twenty-first century. And we have long since overcome things like anti-clericalism and anti-Semitism.'<sup>144</sup>

In relation to Romaphobia, a 2013 ENAR Shadow Report on Hate Crime in Europe found that, even though the Roma are particularly vulnerable to hate crime in countries where there is a large Roma population, they are the most vulnerable to such crime in Italy.<sup>145</sup> Roma are often targeted with violence in Greece<sup>146</sup> whilst *Golden Dawn* exploits anti-Roma sentiments for political purposes, organising, for example, violent anti-Roma marches.<sup>147</sup> The latest statistics on Romaphobic violence in Greece are from 2009 when the FRA found that 54% of the Roma respondents in Greece had been victims of such crime.<sup>148</sup> The FRA noted that this survey which looked at the situation of the Roma in several countries, including Greece but not the UK,

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<sup>139</sup> Farid Hafez, 'Shifting borders: Islamophobia as Common Ground for Building Pan-European Right-Wing Unity' (2014) 48 *Patterns of Prejudice* 5, 484

<sup>140</sup> Marine Le Pen, quoted in Adar Primor, 'The Daughter as De-Demonizer' Haaretz (2011)

<sup>141</sup> Farid Hafez, 'Shifting borders: Islamophobia as Common Ground for Building Pan-European Right-Wing Unity' (2014) 48 *Patterns of Prejudice* 5, 487

<sup>142</sup> During the visit to Israel, far-right parties from Austria, Belgium, Germany and Sweden met with Israeli far-right groups and individuals and signed the 'Jerusalem Declaration' on issues such as the Judeo-Christian nature of Western Democracy and the need to fight what is referred to as fundamentalist Islam.

<sup>143</sup> Andreas Mözler, in Clau Pándi, *100 Stunden: Heinz-Christian Strache in Israel*

<sup>144</sup> Andreas Mözler, in Clau Pándi, *100 Stunden: Heinz-Christian Strache in Israel*

<sup>145</sup> ENAR: 'Shadow Report - Racist Crime in Europe (2013-2014)' 3

<sup>146</sup> Amnesty International, 'Europe – 'We Ask for Justice' Europe's Failure to Protect Roma from Racist Violence' (2014) <<https://www.amnesty.org/en/documents/EUR01/007/2014/en/>> [Accessed 5 November 2015] 21

<sup>147</sup> Amnesty International, 'Europe – 'We Ask for Justice' Europe's Failure to Protect Roma from Racist Violence' (2014) <<https://www.amnesty.org/en/documents/EUR01/007/2014/en/>> [Accessed 5 November 2015] 23

<sup>148</sup> FRA: 'EU-MIDIS European Union Minorities and Discrimination Survey, Data in Focus: The Roma' <<http://fra.europa.eu/en/publication/2009/eu-midis-data-focus-report-1-roma>> [Accessed 5 November 2015] 8 &

revealed that of all the groups surveyed by the FRA, 'the Roma emerged as the group most vulnerable to discrimination and crime.'<sup>149</sup> The UK is not immune to Romaphobic crime and discourse. In 2012, the UK government recognised the problem of violence against Roma communities in its action plan to combat hate crime.<sup>150</sup> The plan underlined that under-reporting continues to constitute an obstacle in fighting hate crime committed against, *inter alia*, Gypsy, Traveller and Roma Communities.<sup>151</sup> In its 2014 follow-up report, the government stated that under-reporting amongst these communities was still a problem.<sup>152</sup> Anti-Roma political discourse was particularly influential on far-right discourse in the UK during 2013 and the accession of Bulgaria and Romania to the EU,<sup>153</sup> with the emphasis repositioning itself on anti-Muslim and anti-immigrant rhetoric after that and even more so following the rise of the Islamic State and terrorist attacks committed by its members.

In a nutshell, the focus of far-right movements is very much dependent on the historical but also socio-economic context of a particular country at a particular time. The far-right targets those who pose more of a problem in the construction of an 'ideal' society, whether these people are the migrants in Greece or the Muslims in Britain, whilst they are also affected by external factors including historically established forms of racism, such as Romaphobia in Hungary as well as the position and impacts of other institutions, such as the Church (particularly the Orthodox or Catholic Church) in the realm of, for example, anti-Semitism and homophobia.<sup>154</sup> Moreover, the

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<sup>149</sup> FRA: 'EU-MIDIS European Union Minorities and Discrimination Survey, Data in Focus: The Roma': <<http://fra.europa.eu/en/publication/2009/eu-midis-data-focus-report-1-roma>> Accessed 5 November 2015, 5

<sup>150</sup> HM Government: 'Challenge it, Report it, Stop it: The Government's Plan to Tackle Hate Crime' (2012)

<sup>151</sup> HM Government; 'Challenge it, Report it, Stop it: The Government's Plan to Tackle Hate Crime' (2012) 7

<sup>152</sup> HM Government: 'Challenge It, Report It, Stop It Delivering the Government's Hate Crime Action Plan' (2014), 3

<sup>153</sup> For example, UKIP's former leader Nigel Farage held that London is already suffering a "Romanian crime wave" and accused the coalition of preparing to welcome "foreign criminal gangs" from new EU member states. See : The Guardian 'Alarm sounded on anti-Roma rhetoric as door opens to more EU workers' (1 January 2014) <<http://www.theguardian.com/uk-news/2013/dec/31/mps-anti-roma-rhetoric-romania-bulgaria>> [Accessed 5 November 2015]

<sup>154</sup> See, *inter alia*, the overt homophobia expressed by religious leaders in Bulgaria: Bilitis Resource Center Foundation: 'ILGA Annual Report – Bulgaria' (2013): <<http://www.refworld.org/pdfid/5195f11416.pdf>> Poland: Humanity in Action: Hate in the Headlines: Media Reactions to Homophobic Rhetoric in Poland:<<http://www.humanityinaction.org/knowledgebase/164-hate-in-the-headlines-media-reactions-to-homophobic-rhetoric-in-poland>> and Greece: Danish Institute for Human Rights: 'The Social Situation Concerning Homophobia and Discrimination on Grounds of Sexual Orientation in Greece' (March 2009): <[http://fra.europa.eu/sites/default/files/fra\\_uploads/376-FRA-hdgs0-part2-NR\\_EL.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/376-FRA-hdgs0-part2-NR_EL.pdf)> [All accessed 19 April 2015]

focus of the far-right is fluid and adaptable to change, as reflected in recent events such as regards the arrival of refugees in or near Central Europe.

### 1.2.2 (iii) Finances and Political Dissatisfaction

In 2014, an ECRI report noted the interrelation between the economic crisis, scapegoating of groups such as migrants and a rise in hateful parties. More particularly, it held that ‘a worrying consequence [of the recessions] has been the rise of nationalist populist parties rooted in profound hostility to ethnic, religious and cultural diversity.’<sup>155</sup> A 2002 European Social Survey concluded that support for the far-right ‘was typically stronger among people who believed that immigrants are an economic threat, by taking away jobs or depressing wages, that the nation’s culture was undermined by foreigners, or that there should be restrictive policies toward refugees.’<sup>156</sup> In countries such as Greece, although the preoccupation and concern over immigration is an issue in itself, far-right support is also strongly interlinked with the financial crisis hitting the country in 2009.<sup>157</sup> As noted by the FRA, racist violence, discrimination, intolerance and extremism, which have been evident in Greece over the past few years, can be related to the socio-political effects of the financial crisis. This sets out ‘fertile ground for the rise of political extremism’ in the form of the far-right *Golden Dawn*.<sup>158</sup> The interrelationship between financial crises and the rise of far-right extremism is not a new phenomenon. More particularly, the dire financial situation of the period between World War I and World War II are ‘widely cited as a factor in the rise of fascist parties,’<sup>159</sup> since ‘economic stagnation proved beneficial to far-right parties.’<sup>160</sup> This was particularly the case for depressed Germany which, in pre-1929, saw the *National Socialist Party* receiving only 2.63% of the vote which rose to

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<sup>155</sup> Annual Report of ECRI’s Activities 2013 (CRI(2014)32), p. 8.

<sup>156</sup> European Social Survey 2002 in Pippa Norris ‘*Radical Right Voters and Parties in the Electoral Market*’ (eds. Cambridge University Press 2005) 260

<sup>157</sup> The Telegraph: ‘What’s the Greek Debt Crisis All About?’ (23 February 2012) <<http://www.telegraph.co.uk/finance/financialcrisis/9098559/Whats-the-Greek-debt-crisis-all-about.html>> [Accessed 27 February 2015]

<sup>158</sup> Vasiliki Georgiadou & Lamprini Rori, ‘Economic Crisis, Social and Political Impact. The New Right-Wing Extremism in Greece’ (2013) *Anuari Del Conflictu Social*, 322

<sup>159</sup> Alan de Bromhead, Barry Eichengreen and Kevin H O’Rourke, ‘Right Wing Political Extremism in the Great Depression’ (2012) *Discussion Papers in Economic and Social History* 95, 3

<sup>160</sup> Antonis Klapsis, ‘Economic Crisis and Political Extremism in Europe: From the 1930s to the Present’ (2014) 13 *European View* 189

18.25% by 1930 and 37.27% in 1932 placing this party in first place.<sup>161</sup> A relevant study of the political and economic situation of the 1930s showed the existence of a relationship between political extremism and economic crises but found that a year or two of a crisis did not result in a large rise of extremist support, noting that other factors played a role. These included national occurrences, such as whether or not a country had lost the First World War, whether far-right parties already existed or whether they were a new phenomenon, the very structure of the electoral process of a country and its impact on the potential success of a far-right party as well as the length of a country's experience with democracy. Further, during that time, the economic depression did not result in the rise of the far-right in all countries with communist parties rising in countries such as Bulgaria, Greece and France.<sup>162</sup> Today, the global financial crisis 'proved to be a turning point that boosted political extremism in Europe.'<sup>163</sup> In fact, it was argued that it is no coincidence that, since 2008, far-right parties are experiencing an increased electoral success on a national and European level.<sup>164</sup> However, once again it is not all black and white. For example, whilst the far-right has drastically risen in crisis-stricken Greece, one cannot see an equivalent reaction in other countries deeply affected by the crisis such as Spain. Further, if a long-term economic crisis in itself was indispensable to the success of the far-right then one would not be witnessing its great rise in more prosperous areas such as Sweden. Thus, care must be taken when placing the far-right's success with the aforementioned crisis given that the far-right and interrelated phenomena are 'undoubtedly fuelled by the severe impact of the economic crisis but are not necessarily caused by it.'<sup>165</sup>

As well as feeding off cultural and financial fears related to a multicultural and multi-religious Europe, the far-right exploits society's disappointment with the way mainstream parties deal

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<sup>161</sup> Alan de Bromhead, Barry Eichengreen and Kevin H O'Rourke, 'Right Wing Political Extremism in the Great Depression' (2012) *Discussion Papers in Economic and Social History* 95, 3

<sup>162</sup> Alan de Bromhead, Barry Eichengreen & Kevin H O'Rourke, 'Right Wing Political Extremism in the Great Depression' (2012) *Discussion Papers in Economic and Social History* 95, 9

<sup>163</sup> Antonis Klapsis, 'Economic Crisis and Political Extremism in Europe: From the 1930s to the Present' (2014) 13 *European View* 193

<sup>164</sup> Antonis Klapsis, 'Economic Crisis and Political Extremism in Europe: from the 1930s to the Present' (2014) 13 *European View* 189, 193

<sup>165</sup> FRA: 'Racism, Discrimination, Intolerance and Extremism: Learning from Experiences in Greece and Hungary.' (2013), para.9

with social issues such as immigration.’<sup>166</sup> Based on this, far-right parties describe mainstream parties as corrupt and incompetent<sup>167</sup> whilst simultaneously portraying themselves as ‘outsiders in the party system, as underdog parties that represent the true voice of a silent minority and as the only organizations willing to address sensitive issues such as immigration.’<sup>168</sup> This reality played a significant role in, for example, Greece, where there was a gradual degradation of the public’s trust in mainstream political parties, a point which was used and abused by the far-right to usurp mainstream voters and rise.<sup>169</sup> In Greece, a decline in trust towards the government and political parties was demonstrated for the years 2003-2010. In 2003, 28% of the people had much or some trust in political parties but by 2010 this fell to 5%. In relation to the government, 55% of people had much or some trust in the government and by 2010 this had fallen to 21%.<sup>170</sup> This declining trust in the government goes hand-in-hand with the rise of the far-right in that country which, just as far-right parties in the 1930s did, ‘promise to overthrow the established political system.’<sup>171</sup> In 2005, an official survey took place in the UK, to extrapolate on why there was a low turnout at the 2001 general election. This found a ‘well-ingrained popular view across the country that our political institutions and their politicians are failing, untrustworthy and disconnected from the great mass of the British people.’<sup>172</sup>

#### 1.2.2 (iv) Concluding Comments on the Make-up of the Far-right in Europe

In sum, the far-right in Europe differs according to State, structure and nature, with key divides being discerned between the different regions, but also amongst parties within particular regions. For example, as noted by Marine Le Pen, ‘different opinions exist even in marriages’<sup>173</sup> with the Western far-right witnessing conflicting ideologies. For example, Dutch Geert Wilder’s *Partij*

<sup>166</sup> A Chatham House Report, Matthew Goodwin, ‘Right Response: Understanding and Countering Populist Extremism in Europe’ (2011) Executive Summary 12

<sup>167</sup> A Chatham House Report, Matthew Goodwin, ‘Right Response: Understanding and Countering Populist Extremism in Europe’ (2011) Executive Summary 14

<sup>168</sup> A Chatham House Report, Matthew Goodwin, ‘Right Response: Understanding and Countering Populist Extremism in Europe’ (2011) Executive Summary 14

<sup>169</sup> Friedrich-Ebert-Stiftung: ‘Right-Wing Extremism in Europe Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies’, (2013) 76

<sup>170</sup> Vasiliki Georgiadou & Lamprini Rori, ‘Economic Crisis, Social and Political Impact. The New Right-Wing Extremism in Greece’ (2013) *Anuari Del Conflict Social*, 327

<sup>171</sup> Antonis Klapsis, ‘Economic Crisis and Political Extremism in Europe: From the 1930s to the Present’ (2014) 13 *European View* 189, 193

<sup>172</sup> Daniel Trilling, *Bloody Nasty People – The Rise of Britain’s Far Right* (eds. Verso 2012) 129

<sup>173</sup> Atlantic Community: ‘Golden Dawn for a Far-Right European Coalition?: <<http://www.atlantic-community.org/-/golden-dawn-for-a-far-right-european-coalition->> [Accessed 17 April 2015]

*voor de Vrijheid (Party for Freedom)* is ‘strongly pro-gay, while NF (National Front) is against gay marriage’<sup>174</sup> Further, the mandate of the far-right is developed according to the socio-economic context of a particular area with its rise often being correlated with economic depression as well as rising worries on the impact of multiculturalism and immigration on the cultural and/or religious and/or social make-up of a society. The disharmony that marks the far-right movement in Europe, particularly *vis-à-vis* political parties, is well reflected in the trouble such parties have had in developing a coherent coalition on a European Parliament level. In 1984, the first far-right group was created on a European Parliament level but broke down by 1989 due to internal disagreements.<sup>175</sup> In 1989, the *Technical Group of the European Parliament*<sup>176</sup> was established but only lasted until 1994. It was noted that the use of the term ‘technical’ in its title reflects that ‘it was less about ideological agreement than about technical cooperation.’<sup>177</sup> In 1994, this group did not have enough members and, thus, broke apart and by 1999 even more seats were lost by the far-right and consequently the movement was weakening. In 2004, and with the rise of the far-right, the group *Identity, Tradition and Sovereignty* was formed and lasted until 2007. This was made up of members of France’s *Front National (National Front)*, the *Vlaams Belang (Flemish Interest)* party of Belgium and far-right parties from the newly acceded Romania and Bulgaria. However, there were ideological controversies within the functioning of the short life span of this group and, as a result, it ‘failed to act as a coherent political faction.’<sup>178</sup> Its dissolution came in 2007 after Italian MEP Alessandra Mussolini of *Lega Nord (Northern League)* referred to Romanians as ‘habitual lawbreakers.’<sup>179</sup> The Romanian members found this comment insulting and, in protest, left the group which resulted in its disqualification as an official parliamentary group due to lack of membership. During that period, members of parties, such as *Northern League* of Italy and *UKIP*, were part of the eurosceptic group

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<sup>174</sup> Atlantic Community: ‘Golden Dawn for a Far-Right European Coalition?’: <<http://www.atlantic-community.org/-/golden-dawn-for-a-far-right-european-coalition->> [Accessed 17 April 2015]

<sup>175</sup> Made up of members of MSI (Italian Social Movement) (Italy) National Political Union (Greece), National Front (France) and Ulster Unionists (Ireland)

<sup>176</sup> Made up of members of the National Front (France), German Republikaner (Germany) and Vlaams Blok (Belgium).

<sup>177</sup> Farid Hafez, ‘Shifting Borders: Islamophobia as Common Ground for Building Pan-European Right-Wing Unity’ 48 *Patterns of Prejudice* 5, 491

<sup>178</sup> EU Observer: ‘Far-right European Parliament Group on the Verge of Collapse’: <<https://euobserver.com/political/25115>> [Accessed 6 November 2015]

<sup>179</sup> Sonia Piedrafita & Vilde Renman, ‘Euroscepticism in the Next European Parliament: A Reason to Worry?’ (2014) *Intereconomics*: <<http://www.epin.org/new/files/Piedrafita%20Renman.pdf>> [Accessed 6 November 2015]

*Independence/Democracy*.<sup>180</sup> This group collapsed after the 2009 elections since it lost many MEPs but was succeeded by *Europe of Freedom and Democracy* for the period between 2009-2014. It is this group which provided the framework for the creation of today's *Europe of Freedom and Direct Democracy* which, up until 2015, was home to parties such as the *National Front* and *Northern League*.<sup>181</sup> When establishing this coalition, Marine Le Pen ruled out cooperation with *Golden Dawn*, *Jobbik* and *Ataka*<sup>182</sup> due to her belief that they were just too racist.<sup>183</sup> Instead, parties such as the *National Front*, the *Northern League* and *UKIP* formed a coalition, leaving representatives of the ousted parties to remain as non-attached members of the European Parliament.<sup>184</sup> In June 2015, the *Europe of Nations and Freedom* group was established which houses MEPs from the *National Front*, *Northern League*, *Flemish Interest*, *Party for Freedom* and Austria's *Freedom Party*. *UKIP* remained part of the *Europe of Freedom and Direct Democracy*.

Therefore, the historical functioning of the far-right at a European parliament level reflects that the non-uniform nature of the far-right as a political movement directly and significantly hampers its development into a strong political force on a regional level that is equivalent to mainstream groups.

### 1.2.3. The Extreme-Right: An Ideology against Human Rights

The extreme-right movement promotes ideas and beliefs which are against the spirit and values of a functional human rights culture as these have been promulgated by the Universal Declaration of Human Rights (hereinafter the UDHR) and the documents subsequent to it. In essence, far-right entities 'reject the principle of human equality and hence are hostile towards

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<sup>180</sup> European Parliament: Minutes on the sitting of 20 July 2004, P6\_PV(2004)07-20, 4  
<<http://www.europarl.europa.eu/calendar/calendar?APP=PDF&TYPE=PV1&FILE=20040720EN.pdf&LANGUE=EN>>

<sup>181</sup> Full list of parties include Front National, UKIP, Partij voor de Brijheid, Kongres Nowej Prawicy, Lega Nord, Vlaams Belang, Freiheitliche Partei Österreichs as well as one independent member.

<sup>182</sup> Ataka – Bulgarian far-right party

<sup>183</sup> The Guardian, 'Marine Le Pen to Meet Other Far-Right Leaders in Move to Create EU bloc' (27 May 2014): <<http://www.theguardian.com/world/2014/may/27/marine-le-pen-met-far-right-leaders-eu-bloc>> [Accessed 17 April 2015]

<sup>184</sup> Ousted right wing parties include Jobbik, Golden Dawn and Nationaldemokratische Partei Deutschlands

immigrants, minority groups and rising ethnic and cultural diversity.<sup>185</sup> By endorsing and carrying out Islamophobic, Romaphobic, anti-Semitic, anti-immigrant and/or homophobic and transphobic rhetoric and activities, the movement itself becomes an issue that is to be looked at and addressed through a human rights lens in a two-fold manner. On the one hand, the movement violates human rights and fundamental freedoms, such as non-discrimination, and rejects principles such as equality and human dignity. On the other hand, the movement exploits rights and freedoms emanating from this framework, such as the freedoms of expression, association and assembly, so as to pursue and achieve their discriminatory and, at times, violent goals. Particularly due to the dire effects of fascism and extremism on mid-twentieth Century Europe, through its post-WWII initiatives, the international community recognised the consequences of far-right rhetoric and activity and sought to eliminate the possibility of the movement's resurgence. This was pursued through the direct recognition of non-discrimination as a principle of law and on the limitation of the aforementioned rights in the event of discriminatory and/or violent activities and expressions. As such, there exist several international and European laws, principles and policies designed to counter this phenomenon, with leading documents including, *inter alia*, the International Convention on the Elimination of All Forms of Discrimination (ICERD) and the European Convention on Human Rights (ECHR). The framework has not remained static on any of these levels, with the UN Monitoring Bodies, such as the Committee on the Elimination of Racial Discrimination (CERD), issuing General Recommendations, such as No. 15, on Measures to Eradicate Incitement to or Acts of Discrimination and incorporating recommendations to States in relation to their handling of right-wing extremism within Concluding Observations. On a CoE level, the developments are manifested in, *inter alia*, Strasbourg case-law which prohibits hate speech and hateful association<sup>186</sup> as well as the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. In fact, one of the commitments made by the Heads of State of CoE countries in the Vienna Declaration<sup>187</sup> was 'to combat all ideologies, policies and practices constituting an incitement to racial hatred, violence

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<sup>185</sup> A Chatham House Report, Matthew Goodwin, 'Right Response: Understanding and Countering Populist Extremism in Europe' (2011) 12

<sup>186</sup> See, *inter alia*, *Norwood v UK & Vona v Hungary*

<sup>187</sup> Vienna Declaration and Programme of Action - Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>> [Accessed 14 November 2014]



and discrimination as well as any action or language likely to strengthen fears and tensions between groups from different racial, ethnic, national, religious or social backgrounds.’ The authors of the Declaration were ‘convinced that these manifestations of intolerance threaten democratic societies and their fundamental values.’ Also, in 2014, a General Rapporteur against Racism and Intolerance was appointed on a CoE level. The role of the rapporteur is to deal with issues such as racist violence and hate speech. On an EU level, the development of initiatives to challenge the far-right have been limited in scope and applicability. The most central tool to challenge the far-right in EU Member States is the combined Article 2 and Article 7 mechanism of the Treaty on the European Union which seeks to tackle breaches of the rule of law, human rights and democracy which may arise, amongst others, from the rhetoric and/or activities of movements such as the far-right. However, upon investigating this tool further, as will be done in chapter five, one can discern that, to-date; it is marred by too much reliance on political will and, thus, remains dormant for the moment. On this level, there is also the Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law which can be used to tackle rhetoric and acts of the far-right. At the foundation of relevant legal provisions of international conventions and jurisprudence and, as a result, at the foundation of the analysis of this dissertation; lies the doctrine of militant democracy further discussed in chapter two.

Regardless of the existence of tools and the existence of State obligations arising from their status as States Parties to international and European documents and/or their membership of the EU, and, even though there have been several official acknowledgements that the far-right must be challenged, this movement is rising in Europe, propagating discriminatory ideology and, at times, carrying out violent activities, with the current socio-economic climate serving as an ideal setting in which the far-right can develop.

### 1.3 Genesis of the Research Topic

In light of the above, this topic has been chosen firstly because it is timely and significant with extreme right-wing parties, non-party groups and subculture movements across Europe

becoming increasingly established.<sup>188</sup> Secondly, extreme right-wing movements reject principles pertaining to human equality and advocate discriminatory practices and stances against minority groups whilst simultaneously promoting an attitude that is ‘ambiguous, if not hostile, towards liberal representative democracy.’<sup>189</sup> As a result, and taking into account ‘the inherent dignity and the equal and inalienable rights of all members of the human family,’<sup>190</sup> such movements are to be considered a threat to democracy and the rule of law. This characteristic demonstrates the severity of the problem and the significance of looking through a human rights lens when examining the issue. Based on the above reasons which led to the genesis of the project and emanating from the premise that legal responses are a significant means of mitigating the potential damage brought about by such movements, this study shall consider the role of the law in the realm of right-wing extremism through a comparative analysis of England and Wales and Greece, carried out in the ambit of the precepts and precedents established by international and European documents and jurisprudence respectively.

#### 1.4 An Assessment of Two Countries: England and Wales and Greece

This thesis will assess the way the laws of England and Wales and Greece seek to challenge right-wing extremism. The two jurisdictions were chosen for three central reasons. Firstly, it was necessary to choose countries which are Member States/States Parties of the United Nations, the Council of Europe and the European Union so as to be able to look at principles and tools emanating from these frameworks. The supranational analysis is now ready and transferable to other countries which are members of the above institutions. Secondly, the contextual realities of the far-right in the two case-studies are particularly interesting when researching this phenomenon. On the one hand, the far-right in Greece is manifested in a particularly violent form, rendering imperative the need for research on supranational and national tools that may/should be used to challenge the far-right as well as for an evaluation of good practices from other countries. Such analysis is not currently available. Also, given that most of the legal research on Greece is available only in Greek, it was considered important to broaden this scope through research on challenging the far-right in Greece, in English. In relation to England and

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<sup>188</sup> Institute for Strategic Dialogue, ‘Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe’ (2012)

<sup>189</sup> Chatham House Report ‘Right Response: Understanding and Countering Populist Extremism in Europe’ (2011) 4

<sup>190</sup> Universal Declaration of Human Rights, Preamble

Wales, although there is no equivalent of the systematically violent far-right in the UK more generally, this country did see a rise in parties such as UKIP, an increase in far-right violence and an increase in the far-right rhetoric in the framework of the EU referendum. More particularly, the former Prime Minister, David Cameron, announced his plan for an EU referendum at the start of 2013 during which the outline for this dissertation was being prepared. The author considered the run-up to the referendum and the outcomes of it, especially in the event of a leave vote, to constitute potentially fertile grounds upon which the far-right could flourish. This did occur, with both sides of the campaign embracing hateful rhetoric and, ultimately, with the UK's vote to leave the EU pushing dormant hateful sentiments out into the open leading to an increase in far-right speech and crime. Moreover, what became apparent, both during the campaign phase and post-referendum, was that the UK is, in fact, a vulnerable society in terms of right-wing propaganda. As such, it was deemed imperative to provide an analysis of legal tools to challenge this phenomenon. Thirdly, the two case-studies move along broadly similar legislative lines to challenge the far-right, using doctrines such as public order, anti-terror activity and non-discrimination as frameworks through which to function, albeit with certain significant differences which will be discussed below. The analysis of these differences but also the approach taken by the State in upholding the relevant legislation is what renders the combination of the two case-studies particularly interesting. Given that two separate legal cultures and contextual realities will be looked at, a few words will be said regarding the difference between the two jurisdictions. The first point to note is that England and Wales has a common law system and Greece has a civil law system. This leads to several differences. Firstly, the courts in England and Wales are bound by the *stare decisis* doctrine<sup>191</sup> whereas Greek courts are not.<sup>192</sup> Secondly, in civil law jurisdictions, the central source of law is legislation in the form of codes and statutes whereas in common law jurisdictions, although legislation exists, this is of secondary importance to case-law.<sup>193</sup> In addition, the two differ in the fact that the UK does not have a written constitution. Furthermore, the make-up of the far-right in Greece and the UK is considerably different. Firstly, the focus of the Greek far-right is *Golden Dawn*, whereas an analysis of the UK incorporates more than one group including, amongst others, the *BNP*, the

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<sup>191</sup> Doctrine of legal precedent

<sup>192</sup> Caslav Pejovic, 'Civil Law and Common Law: Two Different Paths Leading to the Same Goal.' (2001) 32 *Victoria University of Wellington Law Review* 821

<sup>193</sup> Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1966-1967) 15 *American Journal of Comparative law* 425

*EDL* and *Britain First*. It must be noted that these groups are active in other parts of the United Kingdom and not just England and Wales, thus reference to the UK is made when providing an overview of the constitution of the far-right. At the same time, the UK has the *UKIP*, a washed down version of the far-right which nevertheless endorses Islamophobia, rejects multiculturalism and promotes Euroscepticism, an equivalent of which cannot yet be found in Greece. The UK also has a subculture milieu in the form of *Combat 18*, *Aryan Strike Force* and *Blood and Honour*. It must be stated from the outset that Greece is marked by a more violent far-right scene through the activities of *Golden Dawn*. This is not to say that the far-right in the UK is not violent and, in fact, in 2015 it began becoming more violent. Also, predominantly in England, hate crime has seen a rise following the country's decision to leave the EU. Further on this issue will be discussed in the country's analysis. Either way, the violence associated with *Golden Dawn* has been more severe, more systematic and has been occurring for several years on a larger scale than in the UK. As noted by the FRA, the large number of hate crimes committed by *Golden Dawn* has been repeatedly reported by national and international organisations as well as civil society.<sup>194</sup> As well as murders, *Golden Dawn* members have been accused of torture and violence committed predominantly against immigrants<sup>195</sup> Furthermore, although right-wing extremism is present in both Greece and the UK, as will be demonstrated in the relevant chapters, the reasons for the existence of these phenomena are marked by some variations with immigration, Islam and multiculturalism being central to both scenes but with Greece's experience being aggressively affected by the current financial climate and the current migration crisis. Moreover, the historical backdrops and development of the far-right scene in the two countries differ, as extrapolated in the chapters on the UK and Greece respectively.

### 1.5 Originality of Research

The phenomenon of right-wing extremism has been looked at within several academic spheres including political science and law. In relation to the former, academic discussion has considered, *inter alia*, the general trends and developments of the extreme-right generally or within particular

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<sup>194</sup> FRA: 'Racism, Discrimination, Intolerance and Extremism: Learning from Experiences in Greece and Hungary' (2013) 23

<sup>195</sup> Human Rights First: 'Greece's Prosecution of Golden Dawn: Fact Sheet' (2014): <<http://www.humanrightsfirst.org/resource/greece-s-prosecution-golden-dawn>> [Accessed 5 May 2015]

contexts,<sup>196</sup> the nature of the far-right as a political and/or non-political structure, with such books focusing on particular areas or regions,<sup>197</sup> the socio-economic and interpersonal reasons which led citizens to opt to be part of the far-right electorate<sup>198</sup> and the advantages and disadvantages of proscribing right-wing extremist groups.<sup>199</sup> Legal research, to date, has considered elements of the far-right such as hate speech and activity, more generally,<sup>200</sup> with no study, to date, focusing on far-right speech and activity as is manifested solely within the framework of political parties, non-party groups and subculture movements. Thus, the first reason for which this study is a new contribution to the general academic framework is that it focuses solely on rhetoric expressed and activities conducted in the sphere of the far-right movement. Secondly, as reflected in the literature review, hate speech has been dealt with more substantially than hateful associations, with minimal reference given to assemblies. Thus, this

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<sup>196</sup> General analyses of the development of the far-right (although case-studies are used) include: Pippa Norris *Radical Right: Voters and Parties in the Electoral Market* (eds. Cambridge University Press 2005) Contextual analyses of the development of the far-right include: Sofia Vasilopoulou & Daphne Halikiopoulou: *The Golden Dawn's 'Nationalist Solution': Explaining the Rise of the Far Right in Greece* (eds. Palgrave Pivot 2015), Kathy Marks *Faces of Right-Wing Extremism* (eds. Branded Books 2014) Anders Widfeldt *Extreme Right Parties in Scandinavia* (eds. Routledge 2014)

<sup>197</sup> General analysis: Cas Mudde, *The Ideology of the Extreme Right* (eds. Manchester University Press 2003), Contextual Regional Analysis: Andrea Mammone, Emmanuel Godin & Brian Jenkins, *Varieties of Right-Wing Extremism in Europe* (eds. Routledge 2012), Cas Mudde, *Populist Radical Right Parties in Europe* (eds. Cambridge University Press 2007), Cas Mudde, *Racist Extremism in Central & Eastern Europe* (eds. Routledge 2005), Contextual country analysis: Stephen E. Atkins, *Encyclopaedia of Right-Wing Extremism In Modern American History* (eds. ABC-CLIO 2011) Other country examples include studies on, *inter alia*, Switzerland: Marcel Alexander Niggli: *Right-Wing Extremism in Switzerland: National and International Perspectives* (eds. Nomos Publishers 2009)

<sup>198</sup> Marco Giugni & Ruud Koopmans, 'What Causes People to Vote for a Radical Right Party? A Rejoinder to van der Brug and Fennema' (2007) 19 *International Journal of Public Opinion Research* 4, Matthew J. Goodwin, *Revolt on the Right: Explaining Support for the Radical Right in Britain* (eds. Routledge 2014)

<sup>199</sup> Meindert Fennema, 'Legal Repression of Extreme Right Parties and Racial Discrimination' in Ruud Koopmans & Paul Statham 'in *Challenging International and Ethnic Relation Politics – Comparative European Perspectives*' (eds. OUP 2000), This has also been done through a US-Europe comparative approach in Erik Bleich, *The Freedom to be Racist? How the United States and Europe Struggle to Preserve Freedom and Combat Racism* (eds. OUP 2011) Stefan Sottiaux, 'Anti-Democratic Associations: Content and Consequences in Article 11 Adjudication' (2004) 22 *Netherlands Quarterly of Human Rights* 4

<sup>200</sup> Michael Herz & Peter Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (eds. Cambridge University Press 2012), Uladzislau Belavusau, *Fighting Hate Speech through EU law* (2012) 4 Amsterdam Law Forum, VU University Amsterdam, Ivan Hare & James Weinsten, *Extreme Speech and Democracy* (2nd edn. OUP 2011), Erik Bleich, *The Freedom to be Racist? How the USA and Europe Struggle to Preserve Freedom and Combat Racism* (eds. OUP 2011), Marloes van Noorloos, *Hate Speech Revisited: A Comparative and Historical Perspective on Hate Speech Law in the Netherlands and England & Wales* (eds. Intersentia 2011), Nazil Ghanea, 'Minorities and Hatred: Protections and Implications' (2010) 17 *International Journal on Minority and Group Rights*, Eva Brems, 'State Regulation of Xenophobia Versus Individual Freedoms: the European View' (2002) 1 *Journal of Human Rights* 4, David Kretzmer & Francine Kershman Hazan, *Freedom of Speech and Incitement against Democracy* (eds. Kluwer Law International 2000), Meindert Fennema, 'Legal Repression of Extreme Right Parties and Racial Discrimination' in Ruud Koopmans & Paul Statham in *Challenging International and Ethnic Relation Politics – Comparative European Perspectives* (eds. OUP 2000)

study seeks to contribute to existing academic research by addressing the imbalance described above and ensure that all the rights which may be used and abused by right-wing extremists in order to promote their mandate and conduct their activities are dealt with in a comprehensive manner. The third reason for the study's originality is that, to achieve the above, it constructs the adopted analysis partly through a militant democracy lens. This doctrine has been considered in several arenas as a concept more generally,<sup>201</sup> in the sphere of the European Convention on Human Rights<sup>202</sup> in relation to particular freedoms, such as that of association,<sup>203</sup> and as a tool for challenging the far-right movement through the spectrum of political science.<sup>204</sup> However, this doctrine has not yet been applied within a legal assessment of challenging the far-right as a single entity. Finally, this is the first study looking into the national legislation and case-law of England and Wales and Greece as single entities and/or in conjunction with each other, through the more general sphere of their obligations under international and European law in the realm of the far-right movement. In brief, by solely dealing with the organised, semi-organised or loosely organised manifestation of the far-right, approaching the study in the ambit of restricting human rights and freedoms and by offering the first insight into these two jurisdictions in the way described above, this dissertation aspires to be a new academic contribution to the task of challenging right-wing extremism.

## 1.6 Methodology and Structure

The methodology adopted throughout the thesis is a desk-bound assessment of primary and secondary sources of law as well as advisory sources. In terms of primary law, it will look at legislation and, in the example of Greece, the Criminal Code and Constitution. It will assess case-law of domestic courts, placing a focus on the highest domestic court judgement in the event that there was an appeal process. However, if the decisions of lower courts are relevant to the overall analysis, these will be discussed. Books and academic articles, as secondary sources

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<sup>201</sup> See, *inter alia*, Paul Cliteur & Bastiaan Rijpkema, 'The Foundations of Militant Democracy' in A. Ellian, G. Molier, *The State of Exception and Militant Democracy in a Time of Terror* (eds. Republic of Letters Publishing 2012)

<sup>202</sup> Paul Harvey, 'Militant Democracy and the European Convention on Human Rights' (2004) 29 *European Law Review* 3

<sup>203</sup> Stefan Sottiaux, 'Bad Tendencies in the ECtHR's Hate Speech Jurisprudence' (2011), 7 *European Constitutional Law Review* 1

<sup>204</sup> Alexander S. Kirshner: *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism* (eds. Yale University Press 2014)

of law, will also be considered for the development of critical discussion. Finally, where applicable, the thesis will look at advisory sources including reports from organisations, such as the FRA, ECRI and ENAR. These will all be assessed in the framework of hard and soft international and European law.

Chapter one will provide a definitional framework of key terms and notions that will be employed in this dissertation. Chapter two will set out the theoretical framework, considering the approaches adopted predominantly by philosophers and legal theorists on the question of if, how and when freedoms, such as expression and association, can be restricted for purposes of preventing harm and providing a review of the existing literature which lays out the ideas and thoughts relevant to the theoretical conceptualisation of restricting the far-right and/or its vehicles.. Chapter three will set out the international legal framework that is to be applied for the regulation of right-wing extremism. It will consider the relevant UN Conventions and, particularly, the International Covenant on Civil and Political Rights (ICCPR) and the ICERD as well as jurisprudence, General Comments and General Recommendations of the Human Rights Committee (HRC) and the CERD and reports of relevant UN Special Rapporteurs. It will also set out the development, efficacy and potential loopholes that exist on this level. By assessing existing academic opinions, this chapter will also pinpoint State obligations, legal benchmarks, good practices and central principles emanating from this framework so that the extent to which these have been incorporated and applied by the jurisdictions under consideration can be looked at later on. The key research questions that are to be responded to in this chapter are:

1. How does international law (directly or indirectly) challenge right-wing extremism? What are the aims, objectives, scope and possible shortcomings of international law in this sphere?
2. What State obligations arise from international law in the sphere of regulating right-wing extremism?

Chapter four will look at the Council of Europe, providing an analysis of State obligations in the realm of relevant treaties, conventions and protocols. More particularly, the chapter will look at the ECHR and how this has been interpreted and upheld by the ECtHR and, previously, the

European Commission of Human Rights (hereinafter EComHR) in jurisprudence relevant to far-right rhetoric and activity. An overview will also be made of the Additional Protocol to the Cybercrime Convention, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems. The key research questions that are to be responded to in this chapter are:

1. How is freedom of opinion and expression, freedom of association and freedom of assembly provided for by the European Convention on Human Rights?
2. How does the ECtHR approach right-wing extremism? Where available and relevant, how did the EComHR approach right-wing extremism?
3. What obligations arise from a country's status as Contracting Party to the European Convention on Human Rights in the sphere of challenging right-wing extremism?
4. What obligations arise from the Additional Protocol to the Cybercrime Convention on Racism and Xenophobia? How does this document contribute to challenging the far-right in Contracting Parties?

Chapter five will look at the EU and the frameworks through which right-wing extremism can and/or should be challenged by Member States. Particularly, it will look at primary law, such as Article 7 of the Treaty on the European Union, and secondary law, such as the Council Framework Decision on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law.<sup>205</sup> The questions that will be tackled are:

1. How does EU Law challenge (directly or indirectly) right-wing extremism?
2. What are the aims, objectives, scope and possible shortcomings of EU law in this sphere?
3. What State obligations arise from a country's status as Member State of the EU in the sphere of regulating right-wing extremism?

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<sup>205</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law.



As with the discussion on the United Nations, as well as identifying potential weaknesses which exist on an EU and CoE level, the respective chapters will also serve as a backdrop against which the obligations of the UK (and thus England and Wales) and Greece arising from these institutions shall be assessed later.

Chapters six and seven will consist of an appraisal of England and Wales and Greece respectively, examining how the extreme right-wing movement is dealt with by these jurisdictions. Firstly, a contextual setting will be established, adopting Minkenberg's three entities of political parties, non-party movements and the subculture milieu,<sup>206</sup> taking care to distinguish between violent, non-violent and quasi-violent mandates,<sup>207</sup> as this will facilitate the establishment of a broad spectrum of entities taking into account central variations. This will, accordingly, allow for a determination of the possible differentiations in laws and legal measures implemented according to a group's positioning within Minkenberg's structure and/or according to the nature of its activities. Minkenberg's structure in itself will assist in demonstrating the complexities that arose from tackling *Golden Dawn*, as a registered political party simultaneously acting within a subculture realm. In order to construct the contextual setting, academic sources will be looked at in addition to, where available, primary sources such as the groups' websites, social networking sites and Statutes. After establishing the contextual settings, there will be an overview of how the freedoms of expression, association, assembly and the right to non-discrimination are provided for by national law, as it is through the restriction of these rights that far-right phenomena are habitually tackled by international and European law. Following this analysis, the jurisdictions' legislation, policies and case-law shall be assessed in order to ascertain the efficacy and efficiency of the national laws and jurisprudence in the sphere of regulating extreme right-wing movements. More particularly, the chapters will look at the national laws that exist which can be used to challenge extreme right-wing movements and the potential loopholes or good practices that exist, therein, the intended and unintended effects of the national laws considered in the sphere of right-wing extremism and whether national laws

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<sup>206</sup> Friedrich Ebert Stiftung, Michael Minkenberg, 'The Radical Right in Europe Today: Trends and Patterns in East and West' in 'Is Europe on the Right Path? Right-Wing Extremism and Right-Wing Populism in Europe' (2011) <<http://library.fes.de/pdf-files/do/08338.pdf>>[Accessed 5 November 2014] 41

<sup>207</sup> The term 'quasi-violent mandates' is directly relevant to political parties and refers to the mandate of political parties which are formally incorporated in a country and conduct their public affairs within the democratic infrastructure of the State but, in addition to that, carry out acts of violence.

make any distinctions as to the categories of right-wing groupings. Moreover, it will assess if and, if so, how the jurisdictions have incorporated international and European law in their legislation and if and, if so, how they have followed the jurisprudence of Strasbourg, the HRC and the CERD. In order to determine the States' adherence to international obligations, potential reservations and/or interpretative declarations imposed on provisions of international conventions shall be assessed in addition to Concluding Observations made by the HRC and the CERD on the respective jurisdictions. The key research questions to be tackled in these chapters and applicable to both jurisdictions are:

1. What is the contextual framework of the far-right?
2. Are the freedoms of expression, assembly and association and the right to non-discrimination protected by the national legal orders of the two jurisdictions? If so, how?
3. Do national laws exist to challenge extreme right-wing movements? If so, what are the aims, objectives, scope and possible shortcomings of these national laws?
4. Do national laws incorporate relevant international and European laws and principles? If so, how has this been achieved?
5. Does national case-law exist that has dealt with extreme right-wing movements? If so, what approach is taken by the Courts under consideration? Is there a pattern in the treatment of far-right cases by the Courts? Do the Courts follow approaches adopted by UN Monitoring Bodies and/or Strasbourg? If so, how? If no, why?

After setting out the legal regulation of right-wing extremism in England and Wales and Greece, there will be a final conclusion of the dissertation's central findings, predominantly through a comparative analysis of the two jurisdictions.

## CHAPTER ONE: DEFINITIONAL AND CONCEPTUAL FRAMEWORK

### Introduction

This chapter will provide a definitional and conceptual framework of the key terms and notions used and referred to in this dissertation so as to facilitate the critical analysis of challenging right-wing extremism. It will look at terms habitually used to describe the phenomenon under consideration and consider Minkenberg's three entities which exist within the far-right, namely political parties, non-party movements and the subculture milieu,<sup>208</sup> ascertaining their characteristics. This structure will subsequently be adopted when appraising the legal and contextual frameworks of England and Wales and Greece in order to ensure that all the forms through which the far-right is manifested are included in the discussion and determine the differences, if any, between the legal regulations of the different entities. Furthermore, the chapter will offer definitions and explanations of racism, racial discrimination, hate speech and hate crime as consequences of the far-right. Emanating from the premise that the far-right poses a threat to liberal democracies, the chapter's analysis will elucidate the definitional boundaries between acceptable and unacceptable parties and groups and their declarations and actions.

### 1. The Extreme-Right and Related Terms

#### 1.1 The Extreme-Right – Semantics and Notions

Extreme-right movements are not easily defined, with no consensus as to their definition and with the lines between different terms that exist within this realm remaining blurred. In fact, the terms 'populist, neo-nationalist, far right, radical right and extreme right are often used interchangeably.'<sup>209</sup> According to Cass Mudde, even though 'the term right-wing extremism is today quite current in the social and political jargon, there is no unequivocal definition.'<sup>210</sup> 'Fascism' which is a 'heavily contested term'<sup>211</sup> has also been used on occasions to describe such movements. This term can be traced back to Mussolini's Italy (1922-1943) where 'prototypical

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<sup>208</sup> Friedrich-Ebert-Stiftung Forum Berlin: Nora Langenbacher & Britta Schellenberg, 'Is Europe on the Right Path? Right-Wing Extremism and Right-Wing Populism in Europe' (2011) 41

<sup>209</sup> Institute for Strategic Dialogue: Matthew Goodwin & Vidhya Ramalingam, 'Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe' (2012) 13

<sup>210</sup> Cass Mudde, 'Right-Wing Extremism Analyzed: A Comparative Analysis of the Ideologies of Three Alleged Right-wing Extremist Parties (NPD, NDP, CP'86) (1995) 27 *European Journal of Political Research* 2, 205

<sup>211</sup> Daniel Trilling, *Bloody Nasty People – The Rise of Britain's Far Right* (eds. Verso 2012) 5

Italian fascism<sup>212</sup> emanated from and could subsequently be found in countries such as France, Great Britain and the Netherlands.<sup>213</sup> European fascism is directly interrelated with the period between the end of the first World War and the end of the second,<sup>214</sup> and, notwithstanding that some pre-World War I traces of fascism existed, it was that war and its consequences which ‘truly forged fascism out of the primitive pre-war ore.’<sup>215</sup> Fascism has been defined as a term which includes phenomena such as ‘hypernationalism, antiparliamentarism, antiliberalism, populism...’<sup>216</sup> and also as one which is, ‘...a typical manifestation of 20<sup>th</sup> century totalitarianism; resistance to ‘modernization...’<sup>217</sup> As such, and as noted in the Evrigenis Report, which was formulated by an expert committee on an EU level for purposes of examining the rise of fascism and racism in Europe in the 1980s, ‘there was widespread insistence that the phenomena under consideration must be placed in a historical perspective, some experts even maintaining that the term fascism should be confined to the movements active in inter-war Europe under that name.’<sup>218</sup> Minkenber also adopts this viewpoint by noting that the term fascism ‘refers to specific historical phenomena.’<sup>219</sup> Interlinked with the term ‘fascism’ is ‘Nazism’ and variations such as Neo-Nazi. In relation to Nazism, some of the experts who composed the Evrigenis Report placed fascism and Nazism under one umbrella, arguing that ‘nazism is part of a continuous ideological development in Europe.’<sup>220</sup> whereas others noted the difference between Nazism and Fascism by making reference to, *inter alia*, ‘the anti-Semitic aspect of nazism as distinguishing the two.’<sup>221</sup> Importantly, ‘while fascist or neo-fascist movements or parties should indeed be considered right-wing extremist, not all right-wing

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<sup>212</sup> European Parliament Committee of Inquiry into the Rise of Fascism and Racism in Europe, Report on the Findings of the Inquiry, 1985, Luxembourg, para.30

<sup>213</sup> European Parliament Committee of Inquiry into the Rise of Fascism and Racism in Europe, Report on the Findings of the Inquiry, 1985, Luxembourg, para.30

<sup>214</sup> Martin Blinkhorn, ‘Fascism and the Right in Europe 1919-1945’ (eds. Routledge 2000) 9

<sup>215</sup> Martin Blinkhorn, ‘Fascism and the Right in Europe 1919-1945’ (eds. Routledge 2000) 9

<sup>216</sup> European Parliament Committee of Inquiry into the Rise of Fascism and Racism in Europe, Report on the Findings of the Inquiry, 1985, Luxembourg, para.29

<sup>217</sup> European Parliament Committee of Inquiry into the Rise of Fascism and Racism in Europe, Report on the Findings of the Inquiry, 1985, Luxembourg, para.29

<sup>218</sup> European Parliament Committee of Inquiry into the Rise of Fascism and Racism in Europe, Report on the Findings of the Inquiry, 1985, Luxembourg, para 28.

<sup>219</sup> Michael Minkenber, ‘The Radical Right in Europe today: Trends and Patterns in East and West’ in Friedrich-Ebert-Stiftung Forum Berlin: Nora Langenbacher & Britta Schellenberg, ‘Is Europe on the Right Path? Right-Wing Extremism and Right-Wing Populism in Europe’ (2011) 39 - 40

<sup>220</sup> European Parliament Committee of Inquiry into the Rise of Fascism and Racism in Europe, Report on the Findings of the Inquiry, 1985, Luxembourg, footnote 14

<sup>221</sup> European Parliament Committee of Inquiry into the Rise of Fascism and Racism in Europe, Report on the Findings of the Inquiry, 1985, Luxembourg, para.34

extremist movements or parties may be considered fascist or neo-fascist.<sup>222</sup> More generally, the terms Fascism, Nazism, Neo-Fascism and Neo-Nazism were the terms employed by political and academic commentators until the 1960s with the term right-wing extremism coming into play in the 1970s.<sup>223</sup> In relation to the term right-wing extremism, it must be noted that this is favoured predominantly in Europe whereas the term ‘radical right’ is more often used in the United States of America.<sup>224</sup>

Either way, it is beyond the scope of this dissertation to assess the constituents of the different definitions used to describe the far-right movement. Instead, it is sufficient to note that the definitional framework adopted for purposes of this study’s analysis of the ways in which this movement is challenged, in the jurisdictions under consideration and on a supranational level, does not adopt an exclusionary approach towards any of the aforementioned definitions when appraising academic, legal and, where relevant and available, policy text given that they are, in many cases, employed interchangeably therein. However, when referring to the movement under consideration, the terms far-right, extreme-right, radical-right and right-wing extremism will be employed due to their more neutral, broader and all-encompassing nature. Furthermore, viewing the above broad terms on an equal footing is also justified by focusing on the elements which are common to all parties and groups within this movement. For example, ‘the centrality of the immigration issue for this party family in Europe is undisputed,’<sup>225</sup> a statement that can be extended to other entities such as non-party movements. More particularly, the very opposite ‘others’ scapegoated through the movement’s rhetoric and activities are immigrants, with a particular emphasis being placed on Muslims.<sup>226</sup> This is particularly true of far-right entities which exist in countries with a high Muslim population. In fact, this characteristic is facilitated by the ‘increasingly critical rhetoric and policy surrounding migration and Islam in Europe.’<sup>227</sup> Notwithstanding the accuracy of such statements for the reality of a large number of European

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<sup>222</sup> Elizabeth Carter, *The Extreme Right in Western Europe: Success or Failure?* (eds. Manchester University Press 2005) 17

<sup>223</sup> Paul Hainsworth, *The Extreme Right in Western Europe* (eds. Routledge 2008) 8

<sup>224</sup> Paul Hainsworth, *The Extreme Right in Western Europe* (eds. Routledge 2008) 77

<sup>225</sup> Institute for Strategic Dialogue: Matthew Goodwin & Vidhya Ramalingam, ‘Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe’ (2012) 12

<sup>226</sup> Institute for Strategic Dialogue: Matthew Goodwin & Vidhya Ramalingam, ‘Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe’ (2012) 9

<sup>227</sup> Institute for Strategic Dialogue: Matthew Goodwin & Vidhya Ramalingam, ‘Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe’ (2012) 9

countries, they must be considered with care given that the contextual reality of this movement in central and eastern Europe is different resulting in the parties and groups of these areas focusing on ‘mobilizing public hostility towards the Jews [and] the Roma’<sup>228</sup> with their Northern and Western counterparts, for example, placing more emphasis on anti-Islam rhetoric. Once again, these characteristics are not clear-cut since these features are not mutually exclusive but merely mark the bulk of the parties’ activities. In simple terms, this is not to say that a right-wing extremist party in the South of Europe does not promote anti-Semitic sentiments and practices, as will be reflected by the analysis of Greece. Also, this is not to say that many of these parties limit themselves to the type of rhetoric mentioned above with new objectives arising as times and contexts change, a suitable example being the increasingly discriminatory rhetoric adopted by these parties against EU immigrants in countries such as the United Kingdom.<sup>229</sup> Thus, the argument made in the framework of right-wing political parties insofar as ‘they appear similar but in some respects they also seem the same but different’<sup>230</sup> hits the nail on the head in relation to the movement more generally. In light of the above, it is safer to argue that ‘ethnic exclusionism and/or expulsionism are now the *sine qua non* of most extreme right movements.’<sup>231</sup>

So, on one level, this movement is characterised by an anti-minority rhetoric and/or practice, a characteristic which encompasses all the relevant counterparts such as anti-immigrant, anti-Muslim, anti-Roma and anti-Semitic. In addition to this, the movement is explicitly defined as such, or implicitly linked with the notion of extremism. This positive correlation assumes that the rhetoric and activities such parties or groups promote or adopt are incongruous with the general framework in which they find themselves. In Western democracies, it is the principles which make up a liberal democracy that are the driving force of politics and, by extension, other groupings. As a result, any potential for the existence of extremism should be measured against

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<sup>228</sup> Institute for Strategic Dialogue: Matthew Goodwin & Vidhya Ramalingam, ‘Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe’ (2012) 12

<sup>229</sup> UKIP mandate and position towards EU immigrants as discussed in chapter six

<sup>230</sup> Institute for Strategic Dialogue: Matthew Goodwin & Vidhya Ramalingam, ‘Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe’ (2012) 12

<sup>231</sup> Christopher T. Husbands., ‘Combating the Extreme Right with the Instruments of the Constitutional State: Lessons from Experiences in Western Europe’ (2002) 4 *Journal of Conflict and Violence Research* 1, 53

the aforementioned principles.<sup>232</sup> In this light, and as noted by Minkenberg, right-wing radicalism, which is his preferred term, is a ‘political ideology or tendency based on ultra-nationalist<sup>233</sup> ideas which tends to be directed against liberal democracy – although not necessarily directly or explicitly so.’<sup>234</sup> It is noteworthy to refer to the possibility of an implicit breach of the principles of a liberal democracy referred to by Minkenberg, which is a reality since, for example, right-wing extremist political parties, duly registered as such, are acting within the framework of a democratically elected system of government but, through this avenue, are promoting and adopting anti-democratic approaches and practices. This poses the interesting perplexity of a liberal democratic system which permits a far-right entity to exist within its spectrum notwithstanding that the latter’s aims and objectives are in direct contravention to the former’s founding principles. The dichotomy between the freedoms of expression, association and assembly, which are central to a liberal democracy, on the one hand, and the right to non-discrimination as well as general principles such as preserving human dignity, on the other, will lie at the heart of the theoretical framework underpinning this dissertation’s analysis.

The aforementioned focus on the hostility expressed towards minority groups does not mean that groups within this framework do not adopt discriminatory approaches towards other vulnerable groups such as LGBTI, women and disabled persons.<sup>235</sup> However, the dissertation will focus solely on the hostility towards particular ethnic groups such as immigrants or ethnic minorities, since this is the common denominator in all European groupings.<sup>236</sup> It also constitutes one of the key academic, legal and policy concerns in an increasingly multicultural Europe, especially in States hit by financial crises which slowly manifest themselves into social crises of intolerance, scapegoating and racism.

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<sup>232</sup> Ian Hare & James Weinstein, ‘Extreme Speech and Liberalism’ in *‘Extreme Speech and Democracy’* (2009) <<http://www.oxfordscholarship.com>> [Accessed 20 August 2014] 2

<sup>233</sup> Ultra-nationalism can be defined as ‘a great or excessive devotion to or advocacy of national interests and rights especially as opposed to international interests.’

<sup>234</sup> Michael Minkenberg, ‘The Radical Right in Europe Today: Trends and Patterns in East and West’ in Friedrich-Ebert-Stiftung Forum Berlin: Nora Langenbacher & Britta Schellenberg, ‘Is Europe on the Right Path? Right-Wing Extremism and Right-Wing Populism in Europe’ (2011) 38

<sup>235</sup> Christopher T. Husbands, ‘Combating the Extreme Right with the Instruments of the Constitutional State: Lessons from Experiences in Western Europe’ (2002) 4 *Journal of Conflict and Violence Research* 1, 53

<sup>236</sup> Christopher T. Husbands., ‘Combating the Extreme Right with the Instruments of the Constitutional State: Lessons from Experiences in Western Europe’ (2002) 4 *Journal of Conflict and Violence Research* 1, 53

In light of the above, when looking at the jurisdictions under consideration, the dissertation will look at all groups, parties, subcultures and other forms of organised or semi-organised entities which seek to promote ethnic exclusionism or expulsionism in an extremist manner. In adopting the two-fold formula of ethnic exclusionism and expulsionism on the one hand and extremism on the other, the assessment of the two jurisdictions which will take place against the backdrop of UN, CoE and EU principles, documents and, where available, jurisprudence, will ascertain how the two jurisdictions have interpreted these terms and subsequently defined, categorised and treated the related political parties as well as other groups and entities.

## 1.2 The Extreme-Right: Structural Framework

Right-wing extremism is an ideology promoted by individuals and groups. For purposes of this dissertation, right-wing extremist rhetoric and/or activity as uttered and/or carried out by political parties, non-party groups and the subculture milieu will be assessed, looking at the far-right within the sphere of an organised or semi-organised movement, rather than at right-wing extremist individuals with no affiliation to a particular entity or movement. This is because the dissertation's objective is to conceptualise and analyse how England and Wales and Greece tackle the far-right as a movement, rather than the actions of lone wolves. As noted, Minkenberg divided the organised groupings of this movement into three different forms, those of a political party, a non-party group and a subculture environment. The first status enjoyed by such groups is that of a registered political party functioning within a democratic regime, seeking support through elections and seeking to influence policy and practice through actual or pursued representation in the executive and/or legislature. Second are the non-party groups which are not rigidly structured and are 'not geared towards elections or public offices but nonetheless aim to mobilize the public in general.'<sup>237</sup> Third are the 'small groups in the sense of a subculture environment'<sup>238</sup> which operate independently from the other entities and are more prone to

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<sup>237</sup> Michael Minkenberg, 'The Radical Right in Europe Today: Trends and Patterns in East and West' in Friedrich-Ebert-Stiftung Forum Berlin: Nora Langenbacher & Britta Schellenberg, 'Is Europe on the Right Path? Right-Wing Extremism and Right-Wing Populism in Europe' (2011) 41

<sup>238</sup> Michael Minkenberg, 'The Radical Right in Europe Today: Trends and Patterns in East and West' in Friedrich-Ebert-Stiftung Forum Berlin: Nora Langenbacher & Britta Schellenberg, 'Is Europe on the Right Path? Right-Wing Extremism and Right-Wing Populism in Europe' (2011) 41



violence than other groups.<sup>239</sup> Minkenberg's structure will be adopted when assessing the contextual frameworks as it facilitates the establishment of a spectrum of entities with, for example, varying levels of organisation and/or violent manifestations. This tripartite structure reflects the inherent weakness in a legal system which only tackles the impact of, for example, political parties and disregards the other entities making up this group. As noted, 'exclusion constrains radical right parties but cannot prevent the movement sector from developing comparatively strongly.'<sup>240</sup> As such, the advantage of adopting Minkenberg's structure in this dissertation is that it will ensure that the appraisal of the law is carried out bearing in mind the different forms which this movement takes. This subsequently allows for an evaluation of the effectiveness of the law when confronted with the right-wing extremist movement in its entirety. What becomes particularly significant in the analysis of Greece is that the far-right in this country deviates from Minkenberg's structure given that *Golden Dawn* is a political party with characteristics of a violent subculture movement with a rigid rather than a loose structure. In fact, as will be discussed in chapter seven it is precisely the status of *Golden Dawn* as a political party that constituted one of the central reasons the State repeatedly cited as the reason for not interfering with its rhetoric and actions.

### 1.3 Extreme-Right Entities: Key Characteristics

Right-wing extremist political parties are witnessing escalating success in the United Kingdom and Greece as well as in other European countries on a local and/or national and/or regional scale. On a regional scale, this was reflected by the 2014 European Parliament elections which saw the representation of the far-right flourish. Far-right parties are 'ambivalent if not hostile towards liberal representative democracy.'<sup>241</sup> There are different types of political parties that make up the far-right scene, as will be illustrated in the contextual frameworks of England and Wales and Greece, and as was reflected in the analysis of the embedded conflicts which have marked any effort to form a coalition of the far-right in the European Parliament. The simplest examples that

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<sup>239</sup> Michael Minkenberg, 'The Radical Right in Europe Today: Trends and Patterns in East and West' in Friedrich-Ebert-Stiftung Forum Berlin: Nora Langenbacher & Britta Schellenberg, 'Is Europe on the Right Path? Right-Wing Extremism and Right-Wing Populism in Europe' (2011) 41

<sup>240</sup> Michael Minkenberg, 'The Radical Right in Europe Today: Trends and Patterns in East and West' in Friedrich-Ebert-Stiftung Forum Berlin: Nora Langenbacher & Britta Schellenberg, 'Is Europe on the Right Path? Right-Wing Extremism and Right-Wing Populism in Europe' (2011) 49

<sup>241</sup> A Chatham House Report: Matthew Goodwin, 'Right Response: Understanding and Countering Populist Extremism in Europe' (2011) 10

demonstrate a differentiation of the types of political parties are those ‘that remain wedded to interwar fascism and those that eschew this tradition.’<sup>242</sup> Notwithstanding the differences between far-right political parties in terms of vision, mission and structure, they, nevertheless, share the common feature of presenting minority groups, such as immigrants and/or Muslims, in the States under consideration, as posing a socio-cultural threat to the nation. In addition to such parties’ habitual electorate, a large section of society could be wooed by this mandate as is reflected by ‘public attitudes on immigration, growing public hostility towards, for example, settled Muslim communities and public dissatisfaction with mainstream parties and their performance on immigration-related issues.’<sup>243</sup> The dire consequence of such parties is that they ‘can weaken social cohesion, undermining the social fabric of democracy.’<sup>244</sup> The impact of such parties goes beyond these frameworks given that ‘their ideas have become increasingly intertwined with mainstream politics.’<sup>245</sup> Moreover, by contributing to the mainstreaming of their rhetoric, they ‘help to create a broader climate conducive to radical right thinking.’<sup>246</sup> In light of the above, the dissertation adopts the view that the discriminatory mandates of such parties are considered to constitute a threat to the very foundation of democracy and the rule of law. As noted by Elizabeth Carter, right-wing extremist entities ‘reject the principle of fundamental human equality.’<sup>247</sup> As such, it can be concluded that such parties are considered right-wing extremists as ‘they unquestionably occupy the right-most position of the political spectrum’<sup>248</sup> and embrace ‘exclusionary representations of the nation, combined with authoritarian political perspectives.’<sup>249</sup> Some parties may directly dismiss the functioning of a representative democracy but, even if they guise themselves behind a shield of alleged legitimacy and do not, *per se*, doubt or condemn the functioning of a liberal democracy, they are nevertheless quick to

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<sup>242</sup> A Chatham House Report: Matthew Goodwin, ‘Right Response: Understanding and Countering Populist Extremism in Europe’ (2011) 12

<sup>243</sup> A Chatham House Report: Matthew Goodwin, ‘Right Response: Understanding and Countering Populist Extremism in Europe’ (2011) 11

<sup>244</sup> Institute for Strategic Dialogue: Matthew Goodwin & Vidhya Ramalingam, ‘Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe’ (2012) 12

<sup>245</sup> Institute for Strategic Dialogue: Matthew Goodwin & Vidhya Ramalingam, ‘Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe’ (2012) 9

<sup>246</sup> Institute for Strategic Dialogue: Matthew Goodwin & Vidhya Ramalingam, ‘Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe’ (2012) 3

<sup>247</sup> Elizabeth Carter, *The Extreme Right in Western Europe: Success or Failure?* (eds. Manchester University Press 2005) 17

<sup>248</sup> Piero Ignazi, *Extreme Right Parties in Western Europe* (eds. OUP 2003) 2

<sup>249</sup> Paul Hainsworth, *The Politics of the Extreme Right: From the Margins to the Mainstream* (eds. Pitner 2000) 7

espouse extremist discourses and exclusionary approaches to issues such as immigration, thereby diverging from the key constituents of a democratic system.<sup>250</sup>

The element of violence is also a key consideration when looking at the extreme right. Although today such parties are mainly of a non-violent nature with most seeking to ‘disassociate themselves from historical or perceived ties to their...violent counterparts’,<sup>251</sup> there are situations where violence continues to mark their activities as will be reflected in the analysis of Greece. Given that violence, including the incitement to violence, is a potential or a reality of this movement, whether and, if so, the extent to which far-right violence and or the prevention and/or punishment of such violence is incorporated into the jurisdictions’ legal (and where available, policy) frameworks will be considered.

Hence, right-wing extremist organisations come in different shapes and sizes, boasting a variety of means and methods adopted for purposes of achieving their objectives. Notwithstanding some variations in their mandates, the key elements which tie these entities together include their ethnically exclusionary and/or expulsionary rhetoric and activities conducted through an extremist framework, targetting a variety of groups due to their ethnicity and/or nationality and/or religion and/or sexual orientation.

#### 1.4 Nationalism

Nationalism is an important doctrine in the sphere of far-right movements and can be defined as ‘an ideological movement for the attainment and maintenance of autonomy, unity and identity on behalf of a population.’<sup>252</sup> It is closely related to concepts such as ‘national sentiment, collective sentiments for the strength and welfare of the nation and national identity.’<sup>253</sup> Ultra-nationalism can be defined as ‘a great or excessive devotion to or advocacy of national interests and rights especially as opposed to international interests.’<sup>254</sup> So, whilst nationalism can be affiliated with

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<sup>250</sup> Paul Hainsworth, *The Politics of the Extreme Right: Form the Margins to the Mainstream* (eds. Pitner 2000) 7

<sup>251</sup> Institute for Strategic Dialogue: Matthew Goodwin & Vidhya Ramalingam, ‘Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe’ (2012) 12

<sup>252</sup> John Hartwell Moore, *Encyclopaedia of Race and Racism* (eds. Thomson Gale 2008), Volume 3, 175

<sup>253</sup> John Hartwell Moore, *Encyclopaedia of Race and Racism* (eds. Thomson Gale 2008), Volume 3, 175

<sup>254</sup> Webster’s Third New International Dictionary of the English Language Unabridged Volume III (1966 G. & C. Merriam Co.) 2480

issues such as a sense of national belonging, ultra-nationalism encompasses sentiments and subsequent behaviour that incorporate a certain form of excessiveness. This is not to say that only ultra-nationalist ideas fall within the ambit of the far-right since nationalism and a thwarted and exclusionary understanding of the nation are also applicable to the far-right. For the far-right, the nation is ‘idealised and popularised as a homogenous identity.’<sup>255</sup> Minkenberg argues that ‘the nationalistic myth is characterised by the effort to construct an idea of a nation and national belonging by radicalizing ethnic, religious, cultural and political criteria of exclusion...’<sup>256</sup> One of the reasons that far-right groups are considered to be extremist is their promotion of an ‘exclusionist or exclusivist view of the nation.’<sup>257</sup> As such, for this movement, an issue such as immigration is an outside influence which constitutes a threat to the far-right conception of the nation and national identity. To summon support for anti-immigrant stances and approaches, far-right groups present immigrants as a threat to the continued existence of the national group. This is also extended to other perceived threats such as ethnic minorities.<sup>258</sup> Further, far-right entities active in Member States of the EU habitually consider their countries’ membership of the EU as a threat to their conception of a nation, national identity and state sovereignty.<sup>259</sup> This was clearly manifested in the campaigning for the leave vote in the UK’s EU referendum. Although, currently, the first issue that comes to mind when looking at the perception of the nation in the eyes of right-wing extremists is immigration, it is also interlinked with other policies and ideologies adopted by them, such as their perception of the role of women in society. For example, in *Golden Dawn’s* overview of its positions and policies, it argues for the financial support of motherhood, the further enhancement of support of families with three or more children and, interrelated to the issue of motherhood, the prohibition of abortion.<sup>260</sup> Thus, the party believes that by increasing the birth rate of Greek children, this subsequently enhances the strength of the Greek nation. This approach to motherhood and abortion was also adopted by the French *National Front* with Martin Durham arguing that its ‘anti-abortion stance was part of its pro-natalist order to ward off being overtaken by non-French birth rates.’<sup>261</sup>

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<sup>255</sup> Paul Hainsworth, *The Extreme Right in Western Europe* (eds. Routledge 2008) 77

<sup>256</sup> Paul Hainsworth, *The Extreme Right in Western Europe* (eds. Routledge 2008) 77

<sup>257</sup> Paul Hainsworth, *The Extreme Right in Western Europe* (eds. Routledge 2008) 22

<sup>258</sup> Matthew Goodwin, *New British Fascism – Rise of the British National Party* (eds. Routledge 2011) 7

<sup>259</sup> Paul Hainsworth, *The Extreme Right in Western Europe* (eds. Routledge 2008) 82

<sup>260</sup> Golden Dawn’s Positions: <<http://www.xryshaygh.com/kinima/thesis/>> [Accessed 10 November 2015]

<sup>261</sup> Martin Durham, *Women and Fascism* (eds. Routledge 1998) 86-90

## 1.5 Race and Racism

In order to consider the term racism, one must first clarify what is meant by race. For this purpose, it is sufficient to say that the notion of race is ‘based on assumptions of some sort of common ancestry and even on a degree of physiognomic homogeneity.’<sup>262</sup> Along with ‘gender, class and religion, race has been identified as an essentially contested concept.’<sup>263</sup> Although different races do not scientifically exist, ‘race discourses remain central to modern society.’<sup>264</sup> In the 17<sup>th</sup> century, scientific theories on race came about which sought to divide humans into separate races as a result of the alleged differences in physical traits. Such theories were interlinked to particular intellectual abilities promoting the position that some races were, in fact, superior to others.<sup>265</sup> This, in turn, provided ‘a veneer of legitimacy for imperialism and the slave trade. It also provided an ideological underpinning for the emergence of race laws in the 1930s and the subsequent Holocaust.’<sup>266</sup> During imperial times, it was widely considered that European States were succeeding in their efforts to conquer and rule due to the ‘qualities inherent in the white race or races.’<sup>267</sup> Such theories resulted in what is referred to as scientific or biological racism.<sup>268</sup> Rebuttal of this theory commenced in the 1920s with UNESCO accelerating the process following WWII.<sup>269</sup> In a formal statement, UNESCO held that ‘for all practical social purposes race is not so much a biological phenomenon as a social myth.’<sup>270</sup> However, UNESCO re-drafted this statement following complaints brought forth by certain scholars in the field of race and ‘focused on genetics and weakened many of the more forceful assertions of the first.’<sup>271</sup> In time, the international community began to underline the fallacy of this theory with the Preamble of the ICERD noting that ‘any doctrine of superiority based on racial differentiation is

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<sup>262</sup> Hatred against the Jews and Judaism: John Hartwell Moore, ‘*Encyclopaedia of Race and Racism*’ (eds. Thomson Gale 2008), Volume 3, 329

<sup>263</sup> Mattias Möschel, ‘Race in Mainland European Legal Analysis: Towards a European Critical Race Theory’ (2011) 34 *Ethnic and Racial Studies* 10, 1650

<sup>264</sup> Sasha Williams & Ian Law, ‘Legitimising Racism: An Exploration of the Challenges Posed by the Use of Indigeneity Discourses by The Far-Right.’ (2012) 17 *Sociological Research Online* 2, 2

<sup>265</sup> Charles Hirschman, ‘The Origins and Demise of The Concept of Race’ (2004) 30 *Population and Development Review* 385, 393

<sup>266</sup> Mark Bell, ‘*Race, Ethnicity and Racism in Europe*’(2009) Oxford Scholarship Online, <<http://www.oxfordscholarship.com>> [ Accessed 20 August 2014], 8

<sup>267</sup> Harry Goulbourne, ‘*Race Relations in Britain since 1945*’ (eds. Macmillan 1998), 58

<sup>268</sup> John Hartwell Moore, ‘*Encyclopaedia of Race and Racism*’ (eds. Thomson Gale 2008), Volume 3, 1

<sup>269</sup> David Kretzmer, ‘Freedom of Speech and Racism’ (1987) 8 *Cardozo Law Review* 445, 452

<sup>270</sup> UNESCO 1950 Statement on Race, para. 14: <<http://unesdoc.unesco.org/images/0012/001229/122962eo.pdf>>

<sup>271</sup> John Hartwell Moore, ‘*Encyclopaedia of Race and Racism*’ (eds. Thomson Gale 2008), Volume 3, 11

scientifically false, morally condemnable, socially unjust and dangerous...’ The 1978 Declaration on Race and Racial Prejudice held that ‘all human beings belong to a single species and are descended from a common stock’ and that ‘differences between the achievements of the different peoples ... can in no case serve as a pretext for any rank-ordered classification of nations or peoples.’ As a result of what was known as scientific or biological racism, the earliest definition of racism offered by UNESCO states that racism ‘consists of antisocial beliefs and acts which are based on the fallacy that discriminatory intergroup relations are justifiable on biological grounds’<sup>272</sup> The rebuttal of the theory, which served as a pretext for racism, did not mean that racism ceased to exist but merely that it found different sources and foundations on which to develop. As argued by Floya Anthias, a new form of racism has now emerged which has shifted away from ‘explicit biological notions to culturalist or nationalist ones.’<sup>273</sup> As a result, the extreme-right movements in Europe have mostly, but not entirely,<sup>274</sup> moved away from the previous race theories with their discourse becoming ‘couched in terms of opposition to immigrants and immigration,’<sup>275</sup> but also to ethnic groups such as the Roma. As a result, when seeking to determine the meaning of racism, one must take into account the contextual and conceptual variations according to acceptable rhetoric, at the material time, which may influence its causes and consequences.

Racism is a difficult term to define due to the complexities in drawing boundaries between racism, nationalism and ethnocentrism with the latter two not necessarily constituting problematic phenomena.<sup>276</sup> However, a 2005 European Parliament Resolution noted the need for ‘sound and clear definitions on racism and xenophobia, as means of effectively combatting these phenomena.’<sup>277</sup> ECRI’s General Policy Recommendation No.7 has been one of the few documents, aside from academic papers and dictionaries, offering a definition of racism. It holds

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<sup>272</sup> UNESCO, Four Statements on the Race Question, Paris, UNESCO, 1969 — Third Statement.

<sup>273</sup> Floya Anthias, ‘Cultural Racism or Racist Culture? Rethinking Racist Exclusions’ (2006) 24 *Economy and Society* 2, 279

<sup>274</sup> For example, Golden Dawn members have professed the biological superiority of the Greek race as will be discussed in chapter seven whilst the subculture milieu in the form of groups such as Aryan Strike Force and Combat 18 are founded on the idea of a biological superiority of white persons.

<sup>275</sup> Floya Anthias, ‘Cultural Racism or Racist Culture? Rethinking Racist Exclusions’ (2006) 24 *Economy and Society* 2, 279

<sup>276</sup> David Kretzmer, ‘Freedom of Speech and Racism’ (1987) 8 *Cardozo Law Review* 445, 452

<sup>277</sup> 2005 European Parliament Resolution on the Increase in Racist and Homophobic Violence in Europe P6-TA (2006) 0273, para. 14

that racism is ‘the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.’<sup>278</sup> This definition refers to contempt and superiority and not to hatred, thereby, allowing for a broad spectrum of beliefs that can be incorporated therein, as there is no need to demonstrate the intensity of hate. An academic definition put forth for racism is that it consists of ‘negative attitudes directed in blanket fashion towards people belonging to groups defined by reference to colour, race or ethnic or national origins.’<sup>279</sup> It also provides that ‘hatred of such groups is...a form of racial prejudice’<sup>280</sup> rather than incorporating the notion of hatred within the definition of racism.

Thus, the common denominator of the majority of such definitions is that they refer to racism as a belief system rather than an action or omission resulting in the abstract nature and the potential intricacies in defining and legislating on it. This could perhaps demonstrate why it is more efficient to define actual conduct in the form of racial discrimination, for example, rather than abstract notions of beliefs and ideas. In this light, it has been argued that ‘Recommendation 7 introduces a concept that is difficult for any legal system to prosecute.’<sup>281</sup> Further, as noted by Erica Howard, by legislating on one’s beliefs, this would result in the violation of the freedom of thought<sup>282</sup> which is generally granted an absolute status. These arguments are based only on the premise that racism does, in fact, merely incorporate a system of beliefs and ideas rather than any practices or activities. As noted by Mark Bell, the lack of a concrete definitional framework in legal instruments could be due to the ‘assumption that racism refers merely to a state of mind, as opposed to specific acts which could be subject to legal regulation.’<sup>283</sup> This assumption was not, however, adopted by UNESCO which, in defining racism, has gone beyond the mere system of beliefs and has underlined that racism includes ‘racist ideologies, prejudiced attitudes,

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<sup>278</sup> ECRI General Policy Recommendation No. 7 On National Legislation to Combat Racism and Racial Discrimination, CRI(2003)8 (2009), para.2

<sup>279</sup> David Kretzmer, ‘Freedom of Speech and Racism’ (1987) 8 *Cardozo Law Review* 452 - 453

<sup>280</sup> David Kretzmer, ‘Freedom of Speech and Racism’ (1987) 8 *Cardozo Law Review* 452 - 453

<sup>281</sup> Andrea Coomber, ‘The Council of Europe: Combating Racism and Xenophobia’ in R. Nickel, A. Coomber, M. Bell, T. Hutchinson and K.Zahi, ‘European Strategies to Combat Racism and Xenophobia as a Crime’ (European Network against Racism (2003) 13

<sup>282</sup> Erica Howard, ‘Race and Racism – Why does European Law Have Difficulties with Definitions?’ (2008) 24 *International Journal of Comparative Labour Law and Industrial Relations* 1, 14

<sup>283</sup> Mark Bell, ‘Race, Ethnicity and Racism in Europe’ (2009) Oxford Scholarship Online, <<http://www.oxfordscholarship.com>> [Accessed 20 August 2014] 6

discriminatory behaviour, structural arrangements and institutionalised practices resulting in racial inequality as well as the fallacious notion that discriminatory relations between groups are morally and scientifically justifiable...'<sup>284</sup> The distinction of this term in comparison to its aforementioned counterparts is that it does not remain within the sphere of ideologies and belief systems but incorporates activities which have the potential of being legislated against. Nevertheless, in most legal instruments, such as the ICERD, drafters have avoided defining racism, probably because of the assumption that it merely contains beliefs, and have circumvented this problem by focusing, defining and legislating on racial discrimination as discussed below. Despite the lacking definitional framework for the reasons mentioned, racism is *sui generis*<sup>285</sup> as it is 'universally condemned.'<sup>286</sup>

## 1.6 Racial Discrimination

### 1.6.1 Semantics and Notions

Legal documents have been more open in providing definitions for racial discrimination rather than for racism. Article 1(1) of the ICERD states that racial discrimination means 'any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' Although the word 'race' is used in the definition of Article 1(1), the international community has acknowledged that race 'is not a biological fact, but a social construction.'<sup>287</sup> In addition, the use of this term in Article 1(1) must be read in light of the ICERD's Preamble which stipulates, amongst other things, that 'any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere.' Another document which provides a definition of racial discrimination is the ECRI's General Policy Recommendation No.7 on National Legislation to Combat Racism

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<sup>284</sup> UNESCO General Conference of 27 November 1978 adopted the Declaration on Race and Racial Prejudice.

<sup>285</sup> Robert C. Post, 'Racist Speech, Democracy and The First Amendment' (1991) 32 *William and Mary Law Review* 267, 291

<sup>286</sup> Mari J. Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320, 2359

<sup>287</sup> German Institute for Human Rights, Written Contribution to the Thematic Discussion of the Committee on the Elimination of Racial Discrimination on Racist Hate Speech (August 28<sup>th</sup> 2012) 2



and Racial Discrimination, which holds that direct racial discrimination is ‘any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification’ adding language and religion to the previous list. As well as including the two additional grounds, it extrapolates on the conditions for justifying such treatment which the Policy Recommendation holds must be objective and reasonable and must seek to pursue a legitimate aim and be proportional. The Policy Recommendation adds nuance to racial discrimination in a theoretical sense. However, on a practical level, it could be argued that terms, such as objective and reasonable, are open-ended and could have a plethora of interpretations which are unavailable in the case of a policy recommendation document.

The definition of racial discrimination, as provided for by the ICERD, entails separate yet interrelated practices, namely any distinction, exclusion, restriction or preference which may result in hindering the enjoyment of human rights and fundamental freedoms within a variety of sectors of public life. As noted by General Recommendation No. 32 of the CERD, ‘the reference to public life does not limit the scope of the non-discrimination principle to acts of the public administration but should be read in light of provisions in the Convention mandating measures by States parties to address racial discrimination by any persons, group or organization.’<sup>288</sup> Thus, States have the obligation to protect persons from discrimination promoted by right-wing extremist groups and their representatives which are political or other associations operating within or outside the public domain. As such, even though racism and racial discrimination are often used interchangeably, especially in every-day speech, the fact remains that within legal documents, correctly or not, a silent distinction is recognised. This has resulted in more definitions arising as to racial discrimination. Based on the premise that racism constitutes a belief system and racial discrimination refers to the surmounting practices and omissions, it has been argued that ‘it is easier to give a definition of unlawful conduct than it is to give a definition of unlawful beliefs.’<sup>289</sup>

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<sup>288</sup> General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination (2009) CERD/C/GC/32, para.9

<sup>289</sup> Robert E. Howard, ‘Race and Racism – Why does European Law have Difficulties with Definitions?’ 24 *International Journal of Comparative Labour Law and Industrial Relations* 1, 16

### 1.6.2 Victims of Racial Discrimination

In order to comprehend fully the meaning of racial discrimination, as conceptualised in the ICERD, it is necessary to consider who may be a potential victim of the discrimination covered therein. In General Recommendation 35, the CERD refers to groups of people who may fall within the ambit of Article 1, namely ‘indigenous people, descent based groups, and immigrants or non-citizens, including migrant domestic workers, refugees and asylum seekers, as well as speech directed against women members of these and other vulnerable groups.’<sup>290</sup> Right-wing extremism marking Europe today attacks the majority of groups referred to in this explanation, with the term ‘other vulnerable groups’ holding the potential of incorporating other groups which could possibly be targeted, as long as such targeting falls within the scope of racial discrimination. The CERD has insisted that, in appraising discrimination, ‘the specific characteristics of ethnic, cultural and religious groups be taken into consideration.’<sup>291</sup> However, it must be noted that, as the CERD made clear in *Kamal Quereshi v Denmark*, discrimination must be particularly directed to the victim or groups of victims, as outlined above, given that generalised targeting does not fall within the ambit of the ICERD.<sup>292</sup>

### 1.6.3 Differential Treatment: Direct and Indirect Discrimination

It must be noted that not all differential treatment falls within the ambit of discrimination as defined by the ICERD. More particularly, Article 1 of the Convention removes liability for differential treatment between citizens and non-citizens, denotes that regulations related to citizenship, nationality or naturalisation are not to be considered discrimination as long as there is no discrimination against a particular nationality and protects measures that seek to ensure positive discrimination. It could be argued that part two is rather open-ended and potentially dangerous as it allows for preferential treatment in all areas without distinction in relation to all immigrants without citizenship, laying down no safety nets. This differentiation could pose an obstacle in combatting the far-right given that this movement often links the provision of services and the enjoyment of rights to a particular ethnic group. This potential danger was

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<sup>290</sup> CERD General Recommendation 35: Combatting Racist Hate Speech (2013) CERD/C/GC/35, para.6, Human Rights Committee General Comment 34: Article 19: Freedoms of Opinion and Expression (2011) CCPR/C/GC/34, para.6

<sup>291</sup> CERD Concluding Observations: Lao People’s Democratic Republic (2005) A/60/18, para. 169

<sup>292</sup> *Kamal Quereshi v. Denmark*, Communication No. 33/2003 (2005) CERD/C/66/D/33/2003, para. 2.13

partially rectified by CERD's General Recommendation No.14 which observed that differential treatment will constitute discrimination 'if the criteria for such differentiation, urged in the light of the objectives and purposes of the Convention, are not applied pursuant to the legitimate aim, and are not proportional to the achievement of this aim.'<sup>293</sup> General Recommendation No. 30 of the CERD observed that differential treatment will 'constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.'<sup>294</sup> Therefore, discrimination which aims to fulfill legitimate aims within the boundaries of the Convention principles and grounds, and which do so in a proportionate manner, is accepted. As an extension to this, Article 1(4) provides for positive discrimination in the form of special measures for 'securing adequate advancement of certain racial or ethnic groups or individuals...as may be necessary in order to ensure...equal enjoyment or exercise of human rights.' The aforementioned definition, as incorporated in the ECRI's General Policy Recommendation 7, also defines indirect discrimination as cases involving an 'apparently neutral factor which cannot be easily complied with by persons belonging to a particular group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin.' The same conditions in relation to the objective and reasonable justification, as incorporated in the direct discrimination definition, are found in relation to indirect discrimination as well. It must be noted that the definitions in ECRI's recommendation are very similar to those offered by the EU Council Directive Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin which deals particularly with the employment setting and the provision of goods and services. The ICERD definition may not contain the term indirect discrimination but, refers to practices which have 'the purposes or effect' of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' The reference to the word 'purpose' implies that the practices referred to in this article aim at pursuing the given result while the use of the word 'effect' means that the purpose may be seemingly legitimate whilst the result constitutes discrimination. Thus, although indirect discrimination is not explicitly provided for by this Convention, neither is it rejected,

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<sup>293</sup> CERD General Recommendation 14: The Definition of Racial Discrimination' (1994) A/48/18 at 114, para.2

<sup>294</sup> CERD General Recommendation 30: Discrimination against Non-Citizens' (2004) CERD/C/64/Misc.11/rev.3, para.4

constituting a plausible outcome on the grounds set out in the article. As a result, the definition allows for a broad range of acts to come within the scope of the ICERD so long as their consequence pertains to racial discrimination.

#### 1.6.4 Intention to Discriminate

In relation to intention, the CERD has noted that ‘the mere act of dissemination is penalised, despite lack of intention to commit an offence and irrespective of the consequences of the dissemination.’<sup>295</sup> As such, by removing the necessity of an intention, the CERD envisages discrimination in a broad manner. A 2001 Joint Statement between the Special Rapporteur on the Freedom of Opinion and Expression and the OSCE (Organisation of Security and Cooperation in Europe) and OAS (Organisation of American States) Representatives on Racism and the Media took an opposite view to the CERD and noted that ‘no one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence.’<sup>296</sup> In relation to the necessity of intention, Patrick Thornberry has argued that CERD’s stance entails a ‘total absence of culpability elements beyond the act of dissemination’ and that this approach ‘would do violence to basic principles of criminal liability in many if not most jurisdictions.’<sup>297</sup> This renders the CERD’s interpretation of intention rather problematic subsequently limiting the adoption of this stance by States Parties.

In sum, minus any forms of positive discrimination, as long as the propaganda of an organisation in question results in racial discrimination and, regardless whether this is concealed in seemingly legitimate terms, and regardless of any intention on the part of the perpetrator, actions, omissions or utterances falling within the definitional framework of Article 1 of the ICERD are forbidden. The ECRI and the EU Council Directive place explicit emphasis on the culpability of measures which are indirectly discriminative, thereby, allowing for a broad range of offences. However,

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<sup>295</sup> CERD Study: Positive Measures Designed to Eradicate all Incitement to, or Acts of, Racial Discrimination: Implementation of ICERD, Article 4, New York, UN, 1986, para.83 This study was prepared for the Second World Conference on Racism in 1983 as A/CONF.119/10

<sup>296</sup> International Mechanisms for Promoting Freedom of Expression, Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, London, 27 February 2001, 2 <<http://www.osce.org/fom/40120>> [Accessed on 7 May 2014]

<sup>297</sup> Patrick Thornberry, ‘Forms of Hate Speech and the Convention on the Elimination of all Forms of Racial Discrimination’ (2010) 5 *Religion and Human Rights* 97, 101

the issue of intention has been dealt with differently by other bodies of the UN and other institutions more generally, with intent being required as a pre-requisite for finding racial discrimination.

### 1.7 Religion as a Ground for Discrimination

Unlike the ECRI's aforementioned recommendation, the definitional framework, as provided for by Article 1 of the ICERD, does not refer to religion as a ground for discrimination. Likewise CERD's General Recommendation No. 35 does not explicitly refer to religious groups as potential victims of practices referred to in Article 1. In General Recommendation No. 35, the Committee reaffirmed what had once been stated by the Human Rights Committee, namely, that 'criticism of religious leaders or commentary on religious doctrine or tenets of faith should not be prohibited or punished.'<sup>298</sup> Nevertheless, the CERD has recognised the existence of 'manifestations of hatred against ethno-religious groups'<sup>299</sup> thereby preserving the 'principle of intersectionality.'<sup>300</sup> This principle has been defined in the framework of gender discrimination as 'multiple...discrimination...compound discrimination, interlinking forms of discrimination, multiple burdens of double or triple discrimination.'<sup>301</sup> In the CERD's General Recommendation No. 32 on Special Measures, the Committee underlined that the existing grounds of discrimination under the Convention, as referred to above, are 'extended in practice by the notion of intersectionality whereby the Committee addresses situations of double or multiple discrimination—such as discrimination on grounds of gender or religion—when discrimination on such a ground appears to exist in combination with a ground or grounds listed in Article 1 of the Convention.'<sup>302</sup> Three Special Rapporteurs have highlighted the significance of this principle in the sphere of religion, underlining the difference between racial rhetoric and religious defamation and holding that extending the affirmations of the Preamble of the ICERD to religion

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<sup>298</sup> CERD General Recommendation 35: Combatting Racist Hate Speech (2003) CERD/C/GC/35, para.6, HRC General Comment 34: Freedoms of Opinion and Expression (2011) CCPR/C/GC/34, para.48

<sup>299</sup> CERD General Recommendation 35: 'Combatting Racist Hate Speech' CERD/C/GC/35 (2013) para.6, HRC General Comment 34: Freedoms of Opinion and Expression (2011) CCPR/C/GC/34, para.6

<sup>300</sup> CERD General Recommendation 35: 'Combatting Racist Hate Speech' CERD/C/GC/35 (2013) para.6, HRC General Comment 34: Freedoms of Opinion and Expression (2011) CCPR/C/GC/34, para.6

<sup>301</sup> UN Expert Group Report: Gender and Racial Discrimination (2000):<<http://www.un.org/womenwatch/daw/csw/genrac/report.htm>> [Accessed 9 May 2014] 1

<sup>302</sup> CERD General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination (2009) CERD/C/GC/32, para.7

would be a tricky task.<sup>303</sup> More particularly, they held that ‘freedom of religion or belief also covers the rights to search for meaning by comparing different religions or belief systems, to exchange personal views on questions of religion or belief, and to exercise public criticism in such matters. For this reason, the criteria for defining religious hatred may differ from those defining racial hatred. The difficult question of what precisely constitutes religious hatred, at any rate, cannot be answered by simply applying definitions found in the area of racial hatred.’<sup>304</sup>

Intersectionality was referred to in two CERD cases, namely *P.S.N. v Denmark* and *A.W.R.A.P. v Denmark*, which were declared inadmissible given that the respective claims were, according to the CERD, based on religious discrimination only and, as noted, ‘Islam is not a religion practiced solely by a particular group.’<sup>305</sup> The CERD summed up its position in relation to this issue by holding that ‘religious questions are of relevance to the Committee when they are linked with issues of ethnicity and racial discrimination.’<sup>306</sup> Thus, in light of the principle of intersectionality, Islamophobic and/or other religiously-themed hate speech and activities, promulgated by right-wing extremist movements, can be condemned and prohibited under the ICERD only if interlinked with one of the grounds expressly stipulated in Article 1, these being race, colour, descent, or national or ethnic origin.

## 1.8 Hate Speech

Hate speech constitutes yet another by-product of right-wing extremism which does not enjoy a universally accepted formulation,<sup>307</sup> with most States and institutions adopting their own

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<sup>303</sup> OHCHR Expert Workshops on the prohibition of incitement to national, racial or religious hatred, Expert workshop on Europe (2011) Joint submission by Mr. Heiner Bielefeldt, Special Rapporteur on Freedom of Religion or Belief; Mr. Frank La Rue, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression; Mr. Githu Muigai, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, <[http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP3Joint\\_SRSubmission\\_for\\_Vienna.pdf](http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP3Joint_SRSubmission_for_Vienna.pdf) > [Accessed 6 May 2014]

<sup>304</sup> OHCHR Expert Workshops on the prohibition of incitement to national, racial or religious hatred, Expert workshop on Europe (2011) Joint submission by Mr. Heiner Bielefeldt, Special Rapporteur on Freedom of Religion or Belief; Mr. Frank La Rue, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression; Mr. Githu Muigai, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, <[http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP3Joint\\_SRSubmission\\_for\\_Vienna.pdf](http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP3Joint_SRSubmission_for_Vienna.pdf) > [Accessed 6 May 2014]

<sup>305</sup> *P.S.N v Denmark* (2007) Communication No. 36/2006, CERD/C/71/D/36/2006, para.6.3

<sup>306</sup> CERD Concluding Observations 2002 – 2006: Georgia, A/60/18, para. 246

<sup>307</sup> European Court of Human Rights, Fact Sheet on Hate Speech, 2013, 1

understanding of what hate speech entails,<sup>308</sup> notwithstanding that the term is often incorporated in legal, policy and academic documents.<sup>309</sup> Determining what constitutes hate speech in the absence of such a formulation becomes even more difficult when considering that hate speech may be ‘concealed in statements which at a first glance may seem to be rational or normal’<sup>310</sup> and does not necessarily manifest itself through the expression of hatred or of emotions.<sup>311</sup> As noted by the CERD, promoters of hate speech ‘hijack the principles and mechanisms of democracy to legitimise racist and xenophobic platforms and hate speech.’<sup>312</sup> One of the few documents, albeit non-binding, which has sought to elucidate the meaning of hate speech, is the Recommendation of the Council of Europe Committee of Ministers on hate speech.<sup>313</sup> It provides that this term is to be ‘understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerant expression by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.’ Interestingly, the Recommendation incorporates the justification of hatred as well as its spreading, incitement and promotion, allowing for a broad spectrum of intentions to fall within its definition. Hate speech has also been mentioned, but not defined, by the ECtHR. For example, it has referred to ‘all forms of expression which spread, incite, promote or justify hatred based on intolerance including religious intolerance.’<sup>314</sup> In *Vejdland v Sweden*, in the framework of homophobic speech, the Court held that it is not necessary for the speech ‘to directly recommend individuals to commit hateful acts’<sup>315</sup> since attacks on persons can be committed by ‘insulting, holding up to ridicule or slandering specific groups of the population’<sup>316</sup> and that speech used in an irresponsible manner may not be worthy of protection.<sup>317</sup> Through this case, the Court drew

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<sup>308</sup> CoE Committee of Experts for the Development of Human Rights Report (2007) Chapter IV, 123, para.4

<sup>309</sup> Tarlach McGonagle, ‘The Council of Europe against online hate speech: Conundrums and Challenges’ Expert Paper, Institute for Information Law, Faculty of Law, <[http://hub.coe.int/c/document\\_library/get\\_file?uuid=62fab806-724e-435a-b7a5-153ce2b57c18&groupId=10227](http://hub.coe.int/c/document_library/get_file?uuid=62fab806-724e-435a-b7a5-153ce2b57c18&groupId=10227)> [Accessed 15 August 2014] 3

<sup>310</sup> Anne Weber, ‘Manual on Hate Speech’ (1997) Council of Europe Publishing, 5

<sup>311</sup> Anne Weber, ‘Manual on Hate Speech’ (1997) Council of Europe Publishing, 5

<sup>312</sup> CERD 81<sup>st</sup> Session CERD/C/SR.2196

<sup>313</sup> Council of Europe’s Committee of Ministers Recommendation 97 (20) on Hate Speech

<sup>314</sup> *Gündüz v Turkey*, App. no 35071/97 (ECHR, 4 December 2003) para. 40, *Erbakan v Turkey*, App. no 59405/00, (6 July 2006), para. 56

<sup>315</sup> *Vejdland and Others v Sweden*, App. no 1813/07 (ECHR 09 February 2012) para.54

<sup>316</sup> *Vejdland and Others v Sweden*, App. no 1813/07 (ECHR 09 February 2012) para.54

<sup>317</sup> *Vejdland and Others v Sweden*, App. no 1813/07 (ECHR 09 February 2012) para.55

the correlation between hate speech and the negative effects it can have on its victims, demonstrating that it is not merely an abstract notion but one with potential to cause harm. Nevertheless, it has been argued that the fact that the Court has not yet offered a definition of hate speech is ‘unsatisfactory from the point of judicial interpretation, doctrinal development and general predictability and foreseeability.’<sup>318</sup> In addition, the FRA has offered two separate formulations of hate speech with the first being that it ‘refers to the incitement and encouragement of hatred, discrimination or hostility towards an individual that is motivated by prejudice against that person because of a particular characteristic.’<sup>319</sup> In its 2009 Report, the FRA held that the term hate speech, as used in the particular section ‘includes a broader spectrum of verbal acts including disrespectful public discourse.’<sup>320</sup> The particularly problematic part of this definition is the broad reference to disrespectful public discourse especially since institutions, such as the ECtHR, extend the freedom of expression to ideas that ‘shock, offend or disturb.’<sup>321</sup> In the framework of academic commentary, a plethora of definitions has been put forth to describe hate speech. In exploring different formulations of hate speech, Belavusau notes that hate speech is ‘deeply rooted in the ideologies of racism, sexism, religious intolerance, xenophobia, and homophobia.’ In addition, he argues that pinpointing the grounds from which hate speech may arise is also a tricky task and poses the questions of where limits are to be drawn.<sup>322</sup> According to Maria Matsuda, hate speech contains three central elements, namely that the message is ‘of racial inferiority, the message is directed against historically oppressed groups and the message is persecutory, hateful and degrading.’<sup>323</sup> Tarlach McGonagle offers a broad interpretation of hate speech that ‘virtually all racist and related declensions of noxious, identity-assailing expression could be brought within the wide embrace of the term.’<sup>324</sup> Alexander Tsesis

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<sup>318</sup> Tarlach McGonagle, ‘The Council of Europe Against Online Hate Speech: Conundrums and Challenges’ Expert Paper, Institute for Information Law, Faculty of Law, <[http://hub.coe.int/c/document\\_library/get\\_file?uuid=62fab806-724e-435a-b7a5-153ce2b57c18&groupId=10227](http://hub.coe.int/c/document_library/get_file?uuid=62fab806-724e-435a-b7a5-153ce2b57c18&groupId=10227)> [Accessed 15 August 2014] 10

<sup>319</sup> Fundamental Rights Agency, ‘Hate Speech and Hate Crimes against LGBT Persons’ (2009) 1

<sup>320</sup> Fundamental Rights Agency: ‘Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation’ (2009) 44

<sup>321</sup> *The Observer and The Guardian v The United Kingdom*, App. no 13585/88 (ECHR, 26 November 1991), para. 59

<sup>322</sup> Uladzislau Belavusau, ‘*Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies*’ (1<sup>st</sup> edn. Routledge 2013) 41

<sup>323</sup> Mark Slagle, ‘An Ethical Exploration of Free Expression and The Problem of Hate Speech’ 24 *Journal of Mass Media Ethics*, 242

<sup>324</sup> Tarlach McGonagle, ‘Wresting Racial Equality From Tolerance of Hate Speech’ (2001) 23 *Dublin University Law Journal* 21, 4



has described it as a ‘societal virus’<sup>325</sup> while Rodney Smolla refers to the lack of contribution made by hate speech to the development of society since it ‘cannot contribute to a societal dialogue and therefore can be ethically curtailed.’<sup>326</sup> Scholars, such as Kent Greenawalt, have argued about the damaging consequences of such speech, arguing that ‘epithets and slurs that reflect stereotypes about race, ethnic group, religion and gender may reinforce prejudices and feelings of inferiority in seriously harmful ways.’<sup>327</sup> In discussing bans on racist speech, Robert Post examines several arguments that have been put forth as justifications for such bans including, the ‘intrinsic harm of racist speech’<sup>328</sup> insofar as there is an ‘elemental wrongness’<sup>329</sup> to such expression, the infliction of harm to particular groups or individuals as well as to the marketplace of ideas.<sup>330</sup>

From the above approaches to hate speech and the variations, therein, although some common elements can be discerned, it could be argued that ‘hate speech seems to be whatever people choose it to mean.’<sup>331</sup> For the purpose of this thesis, and emanating from the reality that there is no one universal conceptualisation of hate speech, it will generally be assumed that hate speech ‘singles out minorities for abuse and harassment’<sup>332</sup> and, as a result, the legal regulation for any such speech will be assessed. Further, based on the premise that the actual understanding of hate speech is a significant constituent of its effective legal regulation, investigation will be made as to whether and how the case-studies under consideration have defined hate speech.

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<sup>325</sup> As cited in Mark Slagle, ‘An Ethical Exploration of Free Expression and The Problem of Hate Speech’ 24 *Journal of Mass Media Ethics*, 242

<sup>326</sup> Mark Slagle, ‘An Ethical Exploration of Free Expression and The Problem of Hate Speech’ 24 *Journal of Mass Media Ethics*, 242

<sup>327</sup> Kent Greenawalt, ‘*Speech, Crime and the Uses of Language*’ (1989 New York: OUP), Ch.2

<sup>328</sup> Robert C. Post, ‘Racist Speech, Democracy and the First Amendment’ (1990-1991) 32 *William and Mary Law Review* 267, 272

<sup>329</sup> Robert C. Post, ‘Racist Speech, Democracy and the First Amendment’ (1990-1991) 32 *William and Mary Law Review* 267, 272 quoting Wright ‘Racist Speech and the First Amendment’ 9 *Miss. C.L.Rev.* 1 (1988)

<sup>330</sup> Robert C. Post, ‘Racist Speech, Democracy and the First Amendment’ (1990-1991) 32 *William and Mary Law Review* 267, 273

<sup>331</sup> Roger Kiska, ‘Hate Speech: A Comparison Between The European Court of Human Rights and the United States Supreme Court Jurisprudence’ (2012) 25 *Regent University Law Review* 107, 110

<sup>332</sup> Mark Slagle, ‘An Ethical Exploration of Free Expression and The Problem of Hate Speech’ 24 *Journal of Mass Media Ethics*, 238

## 1.9 Hate Crime

Hate crime, for purposes of this dissertation, shall include racially aggravated crimes directed at a person or persons on grounds of the victim's participation in an ethnic, national and/or religious group. However, it must be noted that hate crime can extend to other persons such as LGBTI persons victimised due to their sexual orientation and/or identity. 'Violence against ethnic minorities is nothing new in Europe. Countries across the continent have long been sites of racist vandalism, assaults and even murders.'<sup>333</sup> As noted, hate crime is differentiated from other forms of criminality, both because of the motivations of the offender and its effects on an individual, community and societal level. Through the committal of such crimes, the victim is targeted due to his or her identity which, in turn, terrorises himself or herself but also other members of the group which he or she belongs to.<sup>334</sup> To this end, the OSCE recognises that a hate crime is also a message crime and a symbolic crime.<sup>335</sup> Previously, such crimes were habitually given 'no more concern than other serious crimes'<sup>336</sup> with this situation altering in the last twenty years as a result of 'mounting public and political attention to racist violence.'<sup>337</sup> This, in part, emanates from the realisation that this type of violence is 'particularly reprehensible'<sup>338</sup> since it 'can inflict damage above and beyond the physical injury caused by a garden-variety assault'<sup>339</sup>

When assessing the legal frameworks of the two jurisdictions under consideration in this study, hate crimes, as defined in national legislation, shall be considered and evaluated against the more general backdrop of international and European laws and principles pertaining to racism and racial discrimination always incorporating the issue of religious discrimination in its analysis but absent any supranational definition of hate crime.

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<sup>333</sup> Erik Bleich, 'Hate Crime Policy in Western Europe: Responding to Racist Violence in Britain, Germany and France.' (2007) 51 *American Behavioral Scientist* 2, 149

<sup>334</sup> Eugene McLaughlin & John Muncie, *The SAGE Dictionary of Criminology* (eds. SAGE 2006) 196

<sup>335</sup> OSCE-ODIHR 'Hate crime laws: A Practical Guide,' (2009) 7: <<http://www.osce.org/odihr/36426?download=true>> [Accessed 10 February 2015]

<sup>336</sup> Erik Bleich, 'Hate Crime Policy in Western Europe: Responding to Racist Violence in Britain, Germany and France.' (2007) 51 *American Behavioral Scientist* 2, 149

<sup>337</sup> Erik Bleich, 'Hate Crime Policy in Western Europe: Responding to Racist Violence in Britain, Germany and France.' (2007) 51 *American Behavioral Scientist* 2, 149

<sup>338</sup> James Weinstein, 'First Amendment Challenges to Hate Crime Legislation: Where's the Speech?' (1992) 11 *Criminal Justice Ethics* 2, 5

<sup>339</sup> James Weinstein, 'First Amendment Challenges to Hate Crime Legislation: Where's the Speech?' (1992) 11 *Criminal Justice Ethics* 2, 5

## Conclusion

In conclusion, the right-wing movement and particularly its consequences, such as hate speech and racism, are abstract notions which are often poorly defined or their definition purposefully omitted in supranational legal documents, meaning that there exist no definitional benchmarks against which national initiatives, laws and policies in this ambit can be assessed. Nevertheless, this chapter has underlined the key ingredients that will be considered when determining which entities will be considered and how their practices, activities and rhetoric are subsequently regulated by the legal system of the jurisdictions under consideration. Also, as a first step in the evaluations of England and Wales and Greece, the study will examine how the systems of the two jurisdictions under consideration in this dissertation have tackled the definitional frameworks of the relevant themes.

## CHAPTER TWO: THEORETICAL FRAMEWORK

### Introduction

In the framework of a militant democracy which recognises the destructive effects of abusers of rights and freedoms, challenging the far-right can be attempted by restricting the freedoms of expression and/or association and/or assembly when it comes to rhetoric and/or activities of extreme right-wing groups for the overarching purpose of adhering to the principle of non-discrimination within the wider context of human rights protection and promotion. On one level, this position can be justified by relying on the limitation grounds of certain articles, such as Articles 10<sup>340</sup> and 11<sup>341</sup> of the ECHR or by other provisions, such as Article 4 of the ICERD, which, *inter alia*, restrict racist propaganda and organisations. However, with a view to ensuring a well-rounded understanding of the issue of legitimate restrictions of certain rights, a concept which lies at the heart of this dissertation, it is imperative to conduct an appraisal of positions and arguments put forth in the realm of philosophy and legal theory. Moreover, a perusal of legal literature<sup>342</sup> which looks at themes and issues developed in the dissertation is necessary for purposes of comprehending how principles and doctrines developed in philosophical and theoretical thought have been interpreted by academics in the sphere of far-right expression and activity. Also, this chapter's analysis will provide insight into the current positions and arguments put forth in relation to the far-right, revealing possible gaps in the current academic debate and clarifying the contribution of this dissertation and its position within the broader academic context. It must be noted that, in the scholarship to date, there is more emphasis placed

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<sup>340</sup> Freedom of Expression

<sup>341</sup> Freedoms of Association and Assembly

<sup>342</sup> Several books have been written by, *inter alia*, political scientists on the far-right in the two countries under consideration in this thesis but also in Europe more generally, describing issues such as the reasons for the rise/fall of the far-right movement in the two countries/Europe and the structure of the movement and more. Examples for the UK include: Paul Hainsworth, *The Extreme Right in Western Europe* (eds. Routledge 2008), Daniel Trilling, *Bloody Nasty People – The Rise of Britain's Far Right* (eds. Verso 2012), Matthew J. Goodwin, *New British Fascism – Rise of the British National Party* (eds. Routledge 2011), Nigel Copey and John E. Richardson, *Cultures of Post-War British Fascism* (eds. Routledge 2015), Dimitris Psaras, *Η Μαύρη Βίβλος της Χρυσής Αυγής, Ντοκουμέντα από την Ιστορία και τη Δράση μιας Ναζιστικής Ομάδας (The Black Bible of Golden Dawn: The Documented History of a Nazi Group)* (eds. 2012 Polis), Vasiliki Georgiadou, 'The Electoral Rise of Golden Dawn. Revenge Vote of the Doubtful and the New political opportunities' ('Η Εκλογική Άνοδος της Χρυσής Αυγής. Ψήφος – Ρεβάνς των Επισηφών και Νέες Πολιτικές Ευκαιρίες' in Gianni Voulgaris and Ilias Nikolakopoulos *The Double Electoral Earthquake* (Διπλός Εκλογικός Σεισμός) (Themelio 2014), Antonis A. Ellinas, 'The Rise of Golden Dawn: The New Face of the Far Right in Greece' (2013) 18 *South European Politics and Society*, Sofia Vasilopoulou & Daphne Halikiopoulou, *The Golden Dawn's Nationalist Solution – Explaining the Rise of the Far-Right in Greece* (eds. Palgrave 2015)

on the issue of free expression when compared with association and assembly. However, this is not a serious shortcoming since responses to key questions in relation to association and assembly can be found when looking at the general conceptualisation of the restriction of rights whilst, at the same time, the analysis found in the framework of expression can be extended to association and assembly which are directly interrelated to expression.<sup>343</sup> Associations and assemblies constitute central vehicles for expression since an association is an organised collective through which persons seek, *inter alia*, to express their opinions whilst an assembly is another mechanism through which ideas and opinions are put forth. In light of the above, this chapter will commence by considering the general theoretical framework which demonstrates if and, if so, when the restriction of human rights and freedoms can be considered legitimate. It will continue to assess militant democracy as a doctrine justifying the restriction of rights and freedoms for the protection of democracy itself. The freedom of expression will then be appraised through an analysis of the libertarian approach to this freedom both in the realms of classical and contemporary scholars. There will be reference to hate speech throughout the analysis of the theories. It will proceed to look at Critical Race Theory (CRT) and also consider free speech restriction through the application of an effects-based approach. Following that, the chapter will examine how legal commentary has interpreted and applied the theoretical notions and principles developed in discussions on the restrictions of rights. There will then be an overview of the literature that exists on free association in the realm of the far-right. No section on the freedom of far-right assembly is incorporated in this chapter given the lack of relevant literature. As will be reflected in the analysis of relevant literature, the key theoretical dilemma faced by scholars when considering whether hate should be restricted is how to balance the freedom to practise certain rights, such as expression, and the right to be free from the effects of this expression. The theme of harm on an individual and/or group and/or societal level shall be central to this chapter.

## 1. Restricting Rights and Freedoms

### 1.1 A Legitimate Restriction of Rights - A General Framework

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<sup>343</sup> As noted, *inter alia*, by the Venice Commission: “The right to freedom of association is intertwined with the right to freedom of thought, conscience, religion, opinion and expression. It is impossible to defend individual rights if citizens are unable to organize around common needs and interests and speak up for them publicly.” See Venice Commission, “Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan” (14-15 October 2011) CDL-AD(2011)035, para. 84

In relation to ancient times, Plato's 'Republic' argued that when there are no barriers to freedom, the consequences are that it loses its meaning and results in moral superficiality and anarchy.<sup>344</sup> Plato also noted that the worst evil is too much freedom while regulated freedom is the best possession.<sup>345</sup> In Roman times, Cato<sup>346</sup> held that the State could only interfere in order to 'protect men from the injuries of one another.'<sup>347</sup> Later, John Locke, a believer in the inherent liberty and freedom of persons, argued that, for purposes of ensuring a cohesive and secure society, persons should give up a part of their freedom for purposes of its regulation and the promotion of common well-being.<sup>348</sup> He observed that 'all men may be restrained from invading others' rights and from doing hurt to one another...'<sup>349</sup> thereby recognising the potential for interference in the exercise of rights insofar as the rights of others are damaged and, as such, sowing the seeds for the harm principle which was further developed by John Stuart Mill. Mill put forth the necessity to regulate rights and freedoms in some particular circumstances. He was careful firstly to separate the role of the State in personal affairs affecting only the individual carrying out an activity, holding that the State 'must not interfere in the areas which are self-regarding, that is which concern the individual him/herself. Every human being is the sole custodian over his/her body and mind: one's freedom must not be compromised, and one should be encouraged to express his/her personal desires.'<sup>350</sup> Through this statement, Mill recognised that the State must not involve itself in any conduct which affects the conductor only (self-regarding) and implicitly setting the foundations for his subsequent arguments that, when such conduct affects others, the State has the right to interfere (in certain situations). His particular reference to expression, when talking generally of the non-interference of the State, demonstrates the significance which Mill attached to this freedom. However, he developed a framework through which rights may indeed be regulated, which is what has come to be known as the harm principle. He held that 'the only purpose for which power can be rightfully exercised over any member of a civilised

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<sup>344</sup> Plato, 'The Republic' 557 (Πλάτων, 'Πολιτεία')

<sup>345</sup> Plato, 'Epistles' 354 e4 (Πλάτων, 'Επιστολές 354 e4 'ελευθερία υπερβάλλουσα πάγκακον, έμμετρος δε πανάγαθος')

<sup>346</sup> Marcus Porcius Cato Uticensis (Cato the Younger) 95 BC, 46 BC

<sup>347</sup> John Trenchard & Thomas Gordon, 'Cato's letters' (edited by Ronald Hamowy) (Liberty Fund 1995) – original published in 1755

<sup>348</sup> John Locke, 'Two Treaties of Government' (edited by Peter Laslett) (Cambridge University Press 1988) original published in 1660, Book 2, paras. 4,6, 123-131

<sup>349</sup> John Locke, 'Two Treaties of Government' (edited by Peter Laslett) (Cambridge University Press 1988) original published in 1660, Book 2, paras. 4,6, 123-131

<sup>350</sup> John Stuart Mill, 'On Liberty' in Mary Warnock 'Utilitarianism and On Liberty (including Mill's Essay on Bentham and Selections from the Writings of Jeremy Bentham and John Austin' (2<sup>nd</sup> edition, Blackwell 2012) 95

community, against his will, is to prevent harm to others.’<sup>351</sup> He underlined that ‘as soon as any part of a person’s conduct affects prejudicially the interests of others, society has jurisdiction over it and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion.’<sup>352</sup> So, Mill extrapolated on what was previously left implied, namely the State’s power to interfere in conduct which affects others. However, this power is not automatically granted but, instead, the issue of interference simply becomes open to discussion through an appraisal of a balancing test of competing rights. The severity of interfering with the liberty of a citizen by curtailing his or her rights is, therefore, highlighted. This severity of interference is also denoted by the fact that Mill recognised that the consequences may be hurtful to another but that does not amount to a violation of rights and, as such, cannot be prohibited.<sup>353</sup> Thus, classical theorists, such as Locke and Mill, recognised that rights and conduct can be limited within the general framework of protecting the rights and interests of others, preventing harm coming upon them through the actions of another, according to the severity of the harm, with a strict threshold being attached thereto. Joel Feinberg sought to extrapolate on the meaning of harm by holding that this results in a negative effect on a person’s interests and that it violates a person’s rights.<sup>354</sup> In fact, Feinberg went a step further, noting that, following an adequate balancing test of the rights and interests involved, rights may be restricted if they result in an offence to others, but that, in such cases, the proportionality principle should be applied and means other than criminal law should be considered.<sup>355</sup> Feinberg defined offence as something which does not result in the violation of a person’s rights or interests but nevertheless has negative consequences on that person.<sup>356</sup>

## 1.2: Militant Democracy: Legitimately Restricting Rights for Purposes of Protecting Democracy

### 1.2.1 Militant Democracy - A General Overview

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<sup>351</sup> John Stuart Mill, ‘On Liberty’ in Mary Warnock ‘*Utilitarianism and On Liberty (including Mill’s Essay on Bentham and Selections from the Writings of Jeremy Bentham and John Austin)*’ (2<sup>nd</sup> edition, Blackwell 2012) 94

<sup>352</sup> John Stuart Mill, ‘On Liberty’ in Mary Warnock ‘*Utilitarianism and On Liberty (including Mill’s Essay on Bentham and Selections from the Writings of Jeremy Bentham and John Austin)*’ (2<sup>nd</sup> edition, Blackwell 2012) 147

<sup>353</sup> John Stuart Mill, ‘On Liberty’ in Mary Warnock ‘*Utilitarianism and On Liberty (including Mill’s Essay on Bentham and Selections from the Writings of Jeremy Bentham and John Austin)*’ (2<sup>nd</sup> edition, Blackwell 2012), 147

<sup>354</sup> Joel Feinberg, ‘*The Moral Limits of the Criminal Law: Harm to Others*’ (eds. Oxford University Press 1984) 47-48

<sup>355</sup> Joel Feinberg, ‘*The Moral Limits of the Criminal Law: Harm to Others*’ (eds. Oxford University Press 1984) 31

<sup>356</sup> Joel Feinberg, ‘*The Moral Limits of the Criminal Law: Harm to Others*’ (eds. Oxford University Press 1984) 47-48

This section shall consider the doctrine of militant democracy as one through which human rights and freedoms can be legitimately restricted for purposes of maintaining democracy. As Joseph Goebbels infamously observed ‘it will always remain one of the best jokes of democracy that it provides its own deadly enemies with the means with which it can be destroyed.’<sup>357</sup> Militant democracy essentially seeks to prevent such “jokes.” This concept was initially developed on an academic level by Karl Loewenstein in a 1937 two-part article which underlined the need democracy has to protect itself from anti-democratic threats. When he wrote the article, Loewenstein had just emigrated to the United States after recognising that ‘his Jewish ancestry and liberal mind set would not...be in his favour’<sup>358</sup> in the Nazi regime. Moreover, Loewenstein’s two-part article was developed during a time when the Nazi party had risen to power through the use and, ultimately, the abuse of the democratic institutions of the Weimar Republic, thereby rendering fascism a central tenet of the development of the author’s ideas. In addition to the last point, when placing Loewenstein’s writings in context, it must be taken into account that they were published before the onset of World War II, before the Holocaust and before the defeat of Nazi Germany.<sup>359</sup> Loewenstein’s arguments were, thus, not a reaction to the atrocities of the time but almost a precognitive solution to them. In his writings, he noted that ‘democracy and democratic tolerance have been used for their own destruction’<sup>360</sup> and sought to replace the opposing notion of democratic fundamentalism with a militant democracy since, ‘until very recently, democratic fundamentalism and legalistic blindness were unwilling to realise that the mechanism of democracy is the Trojan horse by which the enemy enters the city.’<sup>361</sup> Loewenstein held that ‘constitutions...have to be stiffened and hardened when confronted by movements intent upon their destruction’<sup>362</sup> and that ‘every possible effort must

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<sup>357</sup> As quoted in *Nationalsozialistische Diktatur 1933-1945 : Eine Bilanz* 16 (K.D. Bracher et al.eds., 1983)

<sup>358</sup> Paul Cliteur and Bastiaan Rijpkema, ‘The Foundations of Militant Democracy’ in Afhijn Ellian & Gelijk Molier, *The State of Exception and Militant Democracy in a Time of Terror*’ (eds., Republic of Letters Publishing 2012) 228

<sup>359</sup> Robert A. Kahn, ‘Why do Europeans Ban Hate Speech? A Debate between Karl Loewenstein and Robert Post’ (2013 ) 41 *Hofstra Law Review* 545, 560.

<sup>360</sup> Karl Loewenstein, ‘Militant Democracy and Fundamental Rights I’ (1937) 31 *The American Political Science Review* 3, 423

<sup>361</sup> Karl Loewenstein, ‘Militant Democracy and Fundamental Rights I’ (1937) 31 *The American Political Science Review* 3, 424

<sup>362</sup> Karl Loewenstein, ‘Militant Democracy and Fundamental Rights I’ (1937) 31 *The American Political Science Review* 3, 432



be made to rescue [democracy], even at risk and cost of violating fundamental principles.’<sup>363</sup> Based on Loewenstein’s initial explanatory and definitional framework, Macklem eloquently defined militant democracy as ‘a form of constitutional democracy authorised to protect civil and political freedom by pre-emptively restricting the exercise of such freedoms.’<sup>364</sup> Militant democracy (*wehrhafte Demokratie* or *streitbare Demokratie*) was embedded as a doctrine in post-war Germany to prevent the repetition of the atrocities committed by the Nazi regime and, as a result, is particularly associated with it. More particularly, the German Basic Law was the first European Constitution to recognise the need and incorporate the principle of militant democracy with most post World War II constitutions following its lead.<sup>365</sup> Within a more general framework, militant democracy today is generally seen as the fight against extreme movements, with particular emphasis on political parties pursuing anti-democratic aims.<sup>366</sup> Particularly in relation to right-wing extremism, Macklem holds that ‘neo-nazi movements...may have also provoked States to assume militant stances towards threats to democratic institutions.’<sup>367</sup> This statement shall be considered more closely when evaluating the nature of the legal and judicial stances towards such groups in the jurisdictions under consideration in this thesis. On a Council of Europe level, militant democracy can be found in the form of Article 17 of the ECHR, the prohibition of the abuse of rights clause which is discussed further down. However, notwithstanding academic, legal and judicial developments in this realm, militant democracy remains ‘an issue of extensive debate’<sup>368</sup> with a central issue being the extent to which democracies can limit personal rights and freedoms through preventive measures.<sup>369</sup>

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<sup>363</sup> Karl Loewenstein, ‘Militant Democracy and Fundamental Rights I’ (1937) 31 *The American Political Science Review* 3, 432

<sup>364</sup> Patrick Macklem, ‘Militant Democracy, Legal Pluralism, and the Paradox of Self-determination’ 4 *International Journal of Constitutional Law* 3, 488

<sup>365</sup> Paul Harvey, ‘Militant Democracy and the European Convention on Human Rights’ (2004) *European Law Review* 408

<sup>366</sup> András Sajó, ‘From Militant Democracy to the Preventive State’ (2006) 22 *Cardozo Law Review* 2255, 2262

<sup>367</sup> Patrick Macklem, ‘Militant Democracy, Legal Pluralism, and the Paradox of Self-determination’ (2006) 4 *International Journal of Constitutional Law* 3, 491

<sup>368</sup> Uladislau Belavusau, ‘Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies’ (1<sup>st</sup> edn. Routledge 2013) 13

<sup>369</sup> Uladislau Belavusau, ‘Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies’ (1<sup>st</sup> edn. Routledge 2013) 13

A large number of States have endorsed militant democracy in one form or another with countries such as Germany embracing the doctrine in a strict sense. The case-studies examined in this thesis could, on one level, be considered to have varying approaches to the principle of militant democracy due to their different experiences with authoritarian regimes. More particularly, it could have been expected that Greece is more sensitive than the UK in relation to the doctrine under consideration due to its experience with the military junta during the period 1967-1974. Further, the actual marks of militant democracy in the form of restrictions and limitations to human rights and freedoms are easier to distinguish in the case of Greece through a simple perusal of its Constitution, something that cannot be carried out with the UK due to the absence of such a Constitution. However, although not embedded as a constitutional doctrine of the UK and, even though ‘few British lawyers are acquainted with the term militant democracy,’<sup>370</sup> militant democracy can be seen in several laws and regulations and has arisen more particularly due to the country’s perceived threats arising from Irish republicanism and loyalism and Islamic extremism. A classic example was Thatcher’s 1988-1994 decision to restrict the broadcasting rights of *Sinn Féin* and other Irish Republican and Loyalist groups as her government considered these parties to pose a risk to the democratic values of the nation.<sup>371</sup> In addition, under the Terrorism Act 2000, the Home Secretary may proscribe an organisation if she believes it is involved in terrorism and that the ban constitutes a proportional measure. Some such proscribed organisations include the Greek *17 November Revolutionary Organisation (Επαναστατική Οργάνωση 17 Νοέμβρη)*, the *Kurdish Workers’ Party (the PKK)* as well as, amongst others, an array of Islamic and Irish groups.<sup>372</sup> There are several examples of militant democracy in the Greek constitution. For example, Article 14(3) on the freedom of the press holds that newspapers or other publications may be seized in the event that the material aims at *inter alia*, the violent overthrow of the regime or is directed against the territorial integrity of the State. Further, Article 25 (3) holds that the abusive exercise of rights is prohibited.

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<sup>370</sup> Markus Thiel ‘*The Militant Democracy Principle in Modern Democracies*’ (eds. Ashgate 2009) Chapter 13

<sup>371</sup> Markus Thiel ‘*The Militant Democracy Principle in Modern Democracies*’ (eds. Ashgate 2009) Chapter 13

<sup>372</sup> For a full list of proscribed organisations in the UK see: UK Home Office: Proscribed terrorist organisations: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/472956/Proscription-update-20151030.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472956/Proscription-update-20151030.pdf)>

### 1.2.2 Militant Democracy: A Balancing Act?

When seeking to comprehend militant democracy, one notes the almost oxymoronic nature of the notion of militant democracy since, as Loewenstein held, democracy ‘stands for fundamental rights, for fair play for all opinions, for free speech, assembly, press. How could it address itself to curtailing these without the vary basis of its existence?’<sup>373</sup> Some authors, such as Patrick Macklem, have noted that ‘the legality of militant democracy...is far from clear’<sup>374</sup> with others, such as Hans Kelsen, taking a stricter approach, namely, that when a democracy attempts to safeguard itself from anti-democratic entities, it is no longer a democracy.<sup>375</sup> Loewenstein justifies the militancy of a functioning democracy by noting that it has a duty to rescue itself from the ‘opportunistic platitudes of fascism...even at the risk and cost of violating fundamental principles...’<sup>376</sup> Paul Cliteur pinpointed that Loewenstein had indirectly recognised three distinct yet interrelated vulnerabilities of the democratic system, which subsequently constitute a sound backdrop against which the militancy of a democracy can be justified. These include the access democracy grants hostile entities to its institutions. More particularly, such entities are entitled to rights and freedoms ‘thereby allowing them to actually discredit and vilify her,’<sup>377</sup> making particular reference to rights such as free speech and assembly. In this realm, it is further noted that democracy allows anti-democratic parties ‘to access after the election the very institutions they have preached to destroy.’<sup>378</sup> However, notwithstanding the conjectural justifications for seeking to limit democracy in a general sense, problems do arise with the technicalities of doing so. There are intricacies related to the point at which such limitations commence and the extent to which they continue. Macklem argues that this doctrine and its legality will remain vague and open to abuse unless legal standards pertaining to definitions of entities and/or actions which

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<sup>373</sup> Karl Loewenstein, ‘Militant Democracy and Fundamental Rights I’ (1937) 31 *The American Political Science Review* 3, 430

<sup>374</sup> Patrick Macklem, ‘Militant Democracy, Legal Pluralism, and the Paradox of Self-determination’ 4 *International Journal of Constitutional Law* 3, 488

<sup>375</sup> Paul Cliteur and Bastiaan Rijpkema, ‘The Foundations of Militant Democracy’ in A. Ellian, G. Molier, *The State of Exception and Militant Democracy in a Time of Terror*’ (eds. Republic of Letters Publishing 2012), p. 243

<sup>376</sup> Karl Loewenstein, ‘Militant Democracy and Fundamental Rights I’ (1937) 31 *The American Political Science Review* 3, 432

<sup>377</sup> Paul Cliteur and Bastiaan Rijpkema, ‘The Foundations of Militant Democracy’ in A. Ellian, G. Molier, *The State of Exception and Militant Democracy in a Time of Terror*’ (eds. Republic of Letters Publishing 2012) 235

<sup>378</sup> Paul Cliteur and Bastiaan Rijpkema, ‘The Foundations of Militant Democracy’ in A. Ellian, G. Molier, *The State of Exception and Militant Democracy in a Time of Terror*’ (eds. Republic of Letters Publishing 2012) 235

should fall within the restrictive actions of a militant democracy are formulated and upheld.<sup>379</sup> In addition, as poignantly posed by Cliteur, should militant democracy protect itself ‘only against hostile but violent parties, or also against hostile but non-violent parties?’<sup>380</sup> Central to this question is the consideration of non-violent yet hostile parties, not simply due to the legal issues that may arise when balancing key rights, but also due to the fact that, as argued by Loewenstein, ‘no government can rely only on force or violence, the cohesive strength of the dictatorial and authoritarian state is rooted in emotionalism.’<sup>381</sup> Although this statement was made when referring to Loewenstein’s reality at the time, that being Nazi Germany, it can still be applicable in today’s right-wing extremist context, particularly in relation to political parties which also adopt political emotionalism as a central weapon. This reference is made with due regard to the fact that, as will be demonstrated particularly in the case of Greece, violence is present. As highlighted early on by Loewenstein, openly violent acts can easily be restricted with the intricacies lying in combatting subtler techniques related to the freedom of expression.<sup>382</sup> However, the latter part of his statement is offered without any theoretical explanation of how precisely to restrict subtler techniques and without any reference to parties which may not be openly violent but pursue discriminatory aims, to say the least. It is George Van den Bergh, who sought to extrapolate on the not so obvious justification of curtailing the right of non-violent yet undemocratic parties to associate. To this end, he refers to the ‘self-correcting nature of democracy’<sup>383</sup> which treats all ideas equally, except those which seek to destroy it.<sup>384</sup> Based on this premise, democracy may limit all groups which promote such ideas.

On a practical level, the ECtHR has, on occasion, sought to extrapolate on limiting certain rights for the preservation of democracy and, in doing so, has put forth its own justifications for a militant model of democracy. It is accepted that one of the issues at stake when deliberating on

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<sup>379</sup> Patrick Macklem, ‘Militant Democracy, Legal Pluralism, and the Paradox of Self-determination’ 4 *International Journal of Constitutional Law* 3, 495

<sup>380</sup> Paul Cliteur and Bastiaan Rijpkema, ‘The Foundations of Militant Democracy’ in A. Ellian, G. Molier, *The State of Exception and Militant Democracy in a Time of Terror*’ (eds. Republic of Letters Publishing 2012) 243

<sup>381</sup> Karl Loewenstein, ‘Militant Democracy and Fundamental Rights I’ (1937) 31 *The American Political Science Review* 3, 432

<sup>382</sup> Karl Loewenstein, ‘Militant Democracy and Fundamental Rights I’ (1937) 31 *The American Political Science Review* 4, 652

<sup>383</sup> Paul Cliteur and Bastiaan Rijpkema, ‘The Foundations of Militant Democracy’ in A. Ellian, G. Molier, *The State of Exception and Militant Democracy in a Time of Terror*’ (eds. Republic of Letters Publishing 2012) 245

<sup>384</sup> Paul Cliteur and Bastiaan Rijpkema, ‘The Foundations of Militant Democracy’ in A. Ellian, G. Molier, *The State of Exception and Militant Democracy in a Time of Terror*’ (eds. Republic of Letters Publishing 2012) 245

expression is the possible conflict between the freedom of expression in the realm of problematic speech and the values of equality and non-discrimination. As early back as *Klass v Germany*, the Court underlined that ‘some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention.’<sup>385</sup> In *United Communist Party of Turkey and Others v Turkey*, the problem which arises is how to strike an equitable balance between defending democracy whilst simultaneously protecting individual rights and freedoms. The resulting balancing test emanates from the premise that one must grant due consideration to ‘the democratic importance of freedom of speech on the one hand and the harmful consequences of hate propaganda on the other hand.’<sup>386</sup> In *Thoma v Luxembourg*, the Court held that restrictions on rights guaranteed by the Convention must be narrowly construed and enforced in the interest of public and social life in its entirety as well as in the interest of individuals making up that society.<sup>387</sup> In *Ždanoka v Latvia*, the Court held that ‘in order to guarantee the stability and effectiveness of a democratic system, the State may be required to take specific measures to protect itself.’<sup>388</sup>

### 1.2.3 Applying the Doctrine of Militant Democracy

As noted above, on a Council of Europe level, Article 17 of the ECHR echoes militant democracy. More particularly, Article 17 provides 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 in the Convention.

Interestingly, even though the Court has relied on the precepts of militant democracy legitimately to curtail radical expression and groups, as is reflected for example in the case of *Refah Partisi*, discussed below, and notwithstanding the existence of Article 17, in the large majority of instances the Court has relied on limitation grounds of relevant articles other than Article 17.

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<sup>385</sup> *Klass and others v Germany*, App.no. 502971 (ECHR 6 September 1978) para.59

<sup>386</sup> Stefan Sottiaux, ‘Bad Tendencies in the ECtHR’s Hate Speech Jurisprudence’ (2011), 7 *European Constitutional Law Review* 1, 48

<sup>387</sup> *Thoma v Luxembourg*, App. no. 38432/97, (ECHR 29 March 2001), para. 48

<sup>388</sup> *Ždanoka v Latvia*, App. no. 58278/00, (ECHR 16 March 2006), para. 100

This is probably because of the high threshold that needs to be met when applying this article. For example, as early back as *De Becker v Belgium*, the Court noted that Article 17 ‘applies only to persons who threaten the democratic system of the contracting parties and then to an extent strictly proportionate to the seriousness and duration of such threat.’<sup>389</sup> In relation to the application of the doctrine by the ECtHR, it has been noted that ‘almost since its inception, the European Court of Human Rights has been required to consider the question of the rights of anti-democratic actors within the liberal democracies.’<sup>390</sup> However, it was following its judgement in *Refah Partisi (the Welfare Party) v Turkey*, discussed in detail in chapter four, and the ‘pressing social need’ test formulated, therein, that the Court offered a ‘clear re-endorsement of militant democracy.’<sup>391</sup> In this case, the Court allowed the State to restrict the right of association of a political party which was considered to be a threat to democracy, which, due to its status as such habitually enjoys a high threshold of protection from interference. The significant characteristic of the Court’s approach in this case was the preventive nature of the restriction, that being the permissibility of the party ban before it came to power and destroyed democracy. The Court held that ‘a state cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy.’<sup>392</sup> Macklem argues that the ‘traditional democratic approach to such an agenda is to determine its constitutionality when it begins to conflict with the rights of others.’<sup>393</sup> The Court, however, militantly protected the Turkish State from such a party in a preventive manner, notwithstanding the absence of substantial violence, with the judgement, thus, embodying militant democracy rather than, for example, democratic fundamentalism as referred to by Loewenstein. When appraising the application of militant democracy, care must be taken to look at the inherent weaknesses that lie within this concept. Firstly, notwithstanding some theoretical justification for interfering with human rights and fundamental freedoms in the name of preserving democracy, and, even though the ECtHR has had the opportunity to

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<sup>389</sup> *De Becker v Belgium*, App. no. 214/5, (ECHR 2 March 1962) para.279

<sup>390</sup> Paul Harvey, ‘Militant Democracy and the European Convention on Human Rights’ (2004) *European Law Review* 407

<sup>391</sup> Paul Harvey, ‘Militant Democracy and the European Convention on Human Rights’ (2004) *European Law Review* 407, 7

<sup>392</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. Nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2002), para.102

<sup>393</sup> Patrick Macklem, ‘Militant Democracy, Legal Pluralism, and the Paradox of Self-determination’ (2006) 4 *International Journal of Constitutional Law* 3, 514

deliberate and extrapolate on the rights of the State when confronted with potential risks to democracy, some commentators contend that militant democracy continues to be a poorly defined doctrine, ‘leaving fundamental freedoms exposed to the risk of abusive state action.’<sup>394</sup> Further, it has even been held that ‘a militant democracy can easily become an illiberal democracy, more concerned with its own stability than with political developments.’<sup>395</sup> Secondly, States which choose this formula as a tool to combat extremism must not rely on this solely, since one must not ‘overestimate the ultimate efficiency of legislative provisions against fascist emotional technique’<sup>396</sup> Thus, care must be taken not to treat this doctrine in an illiberal manner.

#### 1.2.4 Militant Democracy: Concluding Observations

The analysis of the rights and freedoms in this dissertation shall be made, in part, through a militant democracy lens. This position emanates from the premise that militant democracy is central to the State regulation of extremism given the overarching objective of protecting democracy as well as individual and group rights. Moreover, by ascertaining how the different institutions looked at in this dissertation approach the issue of balancing conflicting rights and how the State protects itself from right-wing extremism on a legislative and judicial level, the thesis is essentially appraising the militancy of the institutions under consideration, without necessarily making direct reference to the term. However, this is not the only lens through which the analysis of this dissertation will be effectuated with other theories, such as CRT, being considered, as will be discussed in this chapter.

## 2. Freedom of Expression: To Restrict or not to Restrict?

### 2.1 Freedom of Expression: Thoughts from Classical Scholarship

As noted above, more emphasis has been placed by scholars on the issue of limiting expression and, so, the next section will consider some of these arguments which could be used when considering the restriction of expression and, by extension, association and assembly. Free

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<sup>394</sup> Patrick Macklem, ‘Militant Democracy, Legal Pluralism, and the Paradox of Self-determination’ (2006) 4 *International Journal of Constitutional Law* 3, 492

<sup>395</sup> Kenneth Dyson, ‘Left-wing Political Extremism and the Problem of Tolerance in West Germany’ (1975) 10 *Government and Opposition* 3, 306

<sup>396</sup> Karl Loewenstein, ‘Militant Democracy and Fundamental Rights I’ (1937) 31 *The American Political Science Review* 4, 652

expression was a concept considered by Ancient Greek thinkers. Aristotle's Rhetoric supports free expression and particularly 'robust public discourse as a means to promote citizen awareness and vigilance'<sup>397</sup> In Gorgias, Plato is contrary to public discourse as there is the potential to 'manipulate and misguide people who lack facility in critical reason.'<sup>398</sup> In Ancient Greece, there was the concept of parrhesia (*παρρησία*) which, as noted by Uladzislau Belavusau is very difficult to translate with the closest meaning being 'the frankness in speaking the truth' with Michel Foucault being one of the authors translating this into English as free speech.<sup>399</sup> In addition to the concept of parrhesia, there was also isigoria (*ισηγορία*) which 'describes the equal right of speech in a democracy.'<sup>400</sup> Thus, parrhesia refers to the freedom to express oneself in a democratic society whereas isigoria incorporates the significance of equal status amongst all citizens in the realm of expression. In Ancient Rome, Cato, a Statesman, argued that free speech was 'the great bulwark of liberty'<sup>401</sup> which protected persons against an arbitrary State and was, thus, an 'essential element of natural liberty.'<sup>402</sup> In A Letter Concerning Toleration, Locke noted that there are certain rights which are inalienable and can only be restricted if the rights of others are affected and these include, religious freedom and the freedom of thought,<sup>403</sup> demonstrating the great significance he placed on the freedom to think. Thomas Hobbes noted that, in relation to speech, there may be an issue of limitation as it is 'but an abuse of Speech to grieve him<sup>404</sup> with the tongue.'<sup>405</sup>

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<sup>397</sup> Eric Heinze, 'Hate Speech and Democratic Citizenship' (eds. OUP 2016) 116

<sup>398</sup> Eric Heinze, 'Hate Speech and Democratic Citizenship' (eds. OUP 2016) 117

<sup>399</sup> Michel Foucault, 'Fearless Speech' edited by Joseph Pearson (Semiotext(e) 2001) as referred to in Uladzislau Belavusau, 'Freedom of Speech – Importing European and US Constitutional Models in Transitional Democracies' (eds. Routledge 2013) 88

<sup>400</sup> Uladzislau Belavusau, 'Freedom of Speech – Importing European and US Constitutional Models in Transitional Democracies' (eds. Routledge 2013) 88

<sup>401</sup> John Trenchard & Thomas Gordon, 'Cato's letters' (Ronald Hamowy ED., Liberty Fund 1995) (First published in 1755)

<sup>402</sup> John Trenchard & Thomas Gordon, 'Cato's letters' (Ronald Hamowy ED., Liberty Fund 1995) (First published in 1755)

<sup>403</sup> John Locke, 'An Essay concerning Human Understanding' (1979 Clarendon) (edited by Peter H. Nidditch) (Clarendon 1979) originally published in 1700, Book 2, Chapter 27, 252

<sup>404</sup> Unless that persons 'be one whom we are obliged to govern; and then it is not to grieve, but to correct and amend': Thomas Hobbes, 'Leviathan' (Introduction by Kenneth Minogue) (J.M.Dent & Sons Ltd 1976) 13

<sup>405</sup> Thomas Hobbes, 'Leviathan' (Introduction by Kenneth Minogue) (J.M.Dent & Sons Ltd 1976) 13



## 2.2 Restricting Expression: A Libertarian Approach

Several commentators have noted that freedom of expression holds a particularly sacred place in society. This protected status has subsequently given rise to a lengthy discussion on the nature of free speech, whether it should or could be legitimately curtailed or whether it should or could be absolute. Classical libertarian models of free speech have been formulated by theorists such as Milton who, in *Areopagitica*,<sup>406</sup> considered conflicting arguments and ideas to lie within a battlefield, with the truth always revealing itself in the end. The need to restrict expression was, thus, limited given that the truth would, in one way or another, become known. However, his understanding of this freedom was very much based on his own faith in God since ‘the truth’<sup>407</sup> he speaks of is divine, and its triumph is assured by God’s own omnipotence.’<sup>408</sup> As noted by Stanley Fish, the religious foundations from which this argument emanates render it subjectively reasonable given that the truth is considered to be a divine creation. However, if one were to remove the theological character of this argument, the model would plummet.<sup>409</sup>

Mill, who developed one of the original libertarian models of free speech which has survived in time and place, held that ‘there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered.’<sup>410</sup> He put the importance of the freedom of expression down to four key points. Firstly, he held that expression may be true and so should not be curtailed, given that those who are seeking to do so have no right to interference as they are not infallible and so cannot be sure that something is in fact untrue.<sup>411</sup> Secondly, he argued that the opinion uttered may contain elements of the truth and so is necessary to ‘supply the remainder of the truth.’<sup>412</sup> Thirdly, he noted that an opinion must be

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<sup>406</sup> John Milton, ‘*Aeropagitica*’ (London 1644) in ‘*Two Complete Prose Works of John Milton*’ (eds. E. Sirluck 1959) 486

<sup>407</sup> Apart from the capacity of the truth to always reveal itself, Milton argued against licensing and censorship by the State as this would be a ‘dishonour and derogation to the author, to the book, to the privilege and dignity of learning.’ He also noted the importance of receiving both ‘good’ and ‘bad’ information posing the rhetorical question of ‘what wisdom can there be to choose, what continence to forbear without the knowledge of evil?’

<sup>408</sup> Mark Slagle, ‘An Ethical Exploration of Free Expression and the Problem of Hate Speech’ (2009) 24 *Journal of Mass Media Ethics* 238, 240

<sup>409</sup> Stanley Fish, ‘*There’s No Such Thing as Free Speech (And It’s a Good Thing Too)*’ (eds. OUP 1994) 103

<sup>410</sup> John Stuart Mill, ‘*On Liberty*’ in Mary Warnock ‘*Utilitarianism and On Liberty (including Mill’s Essay on Bentham and Selections from the Writings of Jeremy Bentham and John Austin)*’ (2<sup>nd</sup> edition, Blackwell 2012) 99

<sup>411</sup> John Stuart Mill, ‘*On Liberty*’ in Mary Warnock ‘*Utilitarianism and On Liberty (including Mill’s Essay on Bentham and Selections from the Writings of Jeremy Bentham and John Austin)*’ (2<sup>nd</sup> edition, Blackwell 2012) 128

<sup>412</sup> John Stuart Mill, ‘*On Liberty*’ in Mary Warnock ‘*Utilitarianism and On Liberty (including Mill’s Essay on Bentham and Selections from the Writings of Jeremy Bentham and John Austin)*’ (2<sup>nd</sup> edition, Blackwell 2012) 128

contested before being accepted as the truth otherwise it will 'be held in the manner of a prejudice.'<sup>413</sup> Lastly, without freedom of expression truth will become dogma thereby 'preventing the growth of any real and heartfelt conviction.'<sup>414</sup> Mill embraced a strict test when it comes to the question of the limitation of rights and, so, it can be deduced that the threshold he placed for prohibition of expression is high. For example, in relation to expression, for Mill, 'mere offensiveness does not constitute harm'<sup>415</sup> and, as such, he sought to establish some kind of threshold for unprotected speech which is attached to a certain degree of damage resulting from such speech. In relation to expression, he enhanced the stringency that is to be enforced when considering limitation by putting forth other terms and conditions that need to be met if it is to be restricted. He noted that, even if the manner in which speech is communicated is not temperate, aggravated and objectionable, the law cannot restrict it.<sup>416</sup> Thus, on the one hand, Mill did not require the tone or the manner of speech to be particularly peaceful, polite or acceptable but, on the other hand, he deemed the setting in which speech is expressed and disseminated to be significant as it has the potential to influence the effects of such speech. More particularly, he argued that 'even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act.'<sup>417</sup> This description partly rings the bell of terms used today in the realm of hate speech including dissemination of hatred or violence, which constitute mischievous acts. It is clear that Mill placed a great emphasis on the importance of free expression as a centrifugal element to the development of a society which requires persons to 'be capable of being improved through free and equal discussion.'<sup>418</sup> However, he noted that the liberty principle attached to the ever so important freedom of expression does not apply to children, madmen and barbarians as they are not in a position to be improved by free and equal discussion.<sup>419</sup> Therefore, Milton and Mill

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<sup>413</sup> John Stuart Mill, 'On Liberty' in Mary Warnock *'Utilitarianism and On Liberty (including Mill's Essay on Bentham and Selections from the Writings of Jeremy Bentham and John Austin'* (2<sup>nd</sup> edition, Blackwell 2012) 128

<sup>414</sup> John Stuart Mill, 'On Liberty' in Mary Warnock *'Utilitarianism and On Liberty (including Mill's Essay on Bentham and Selections from the Writings of Jeremy Bentham and John Austin'* (2<sup>nd</sup> edition, Blackwell 2012), 128

<sup>415</sup> David O. Brink, 'Millian Principles, Freedom of Expression and Hate Speech' (2001) 7 *Legal Theory* 119, 120

<sup>416</sup> David O. Brink, 'Millian Principles, Freedom of Expression and Hate Speech' (2001) 7 *Legal Theory* 119, 129

<sup>417</sup> John Stuart Mill, 'On Liberty' in Mary Warnock *'Utilitarianism and On Liberty (including Mill's Essay on Bentham and Selections from the Writings of Jeremy Bentham and John Austin'* (2<sup>nd</sup> edition, Blackwell 2012) 131

<sup>418</sup> John Stuart Mill, 'On Liberty' in Mary Warnock *'Utilitarianism and On Liberty (including Mill's Essay on Bentham and Selections from the Writings of Jeremy Bentham and John Austin'* (2<sup>nd</sup> edition, Blackwell 2012) 136

<sup>419</sup> John Stuart Mill, 'On Liberty' in Mary Warnock *'Utilitarianism and On Liberty (including Mill's Essay on Bentham and Selections from the Writings of Jeremy Bentham and John Austin'* (2<sup>nd</sup> edition, Blackwell 2012) 95, 147, 148 & 153

envisioned a society where unrestricted debate and discussion of a variety of conflicting ideas was central to a flourishing democracy in which truth is revealed and effective responses to issues are determined as a result of the permitted debate.<sup>420</sup> Their thoughts constitute the conceptual foundations for the ‘marketplace of ideas’ principle first formulated as such in *Abrahams v United States* which dealt with anti-war activists.<sup>421</sup> In his dissenting opinion, Justice Homes held that ‘the best test of truth is the power of thought to get itself accepted in the competition of the market.’<sup>422</sup> When considering the writings of scholars such as Milton and Mill, one must always bear in mind the systematic and long-term repression that speech underwent, with the particular temporal setting constituting the backdrop of their writings. This may have partly demonstrated the great emphasis they placed on the importance of free expression.

More recent commentaries adopting the libertarian approach include that of Zechariah Chaffee who held that, by allowing free expression, a society can discover the truth and so can proceed in the best possible way to serve its best possible interests and, also, serve the needs of the individual to express themselves on issues that are relevant to their quality of life.<sup>423</sup> Further, Alexander Meiklejohn argued that ‘absolute freedom of speech is an inevitable corollary of self-rule’<sup>424</sup> since citizens living in a democracy have the right to take decisions regarding their government which, hence, has no power to restrict the vehicle through which this is attained, namely expression. This position is partly shared by Lee Bollinger who, although underlining that hate speech does not contribute anything valuable to society nevertheless concluded that hate speech should be permitted.<sup>425</sup> He bases this premise on the fact that the ability of a society to tolerate even the most unpleasant of viewpoints allows persons to develop a sense of toleration

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<sup>420</sup> John Milton, ‘*Aeropagitica*’ (London 1644) in ‘*Two Complete Prose Works of John Milton*’ (eds. E. Sirluck 1959) 486

<sup>421</sup> *Abraham v United States*, 250 U.S. 616 (1919): The Court upheld the conviction of five anti-war protestors, who had been charged with Sedition for distributing anti-war pamphlets.

<sup>422</sup> *Abraham v United States* at 630 (Holmes, J., dissenting).

<sup>423</sup> Zechariah Chaffee, ‘*Free Speech in the United States*’ (eds. Atheneum 1969) original published in 1941, 33

<sup>424</sup> Alexander Meiklejohn, ‘*Free Speech and its Relationship to Self-Government*’ (eds. Harper 1948) 27

<sup>425</sup> Lee Bollinger, ‘*The Tolerant Society: Freedom of Speech and Extremist Speech in America*’ (eds. Oxford University Press 1986) 77-79. The principle of permitting expression, even if it ‘shocks, offends or disturbs’ was incorporated by the ECtHR in the case of *Handyside v UK* (1976) discussed in chapter four. This idea is also incorporated and extended in the jurisprudence of the US Supreme Court which has permitted, *inter alia*, the burning of a cross in the front garden of an African American family, *R.A.V. v City of Saint Paul* 505 U.S. 377 (1992), radical speech by white supremacists (*Klu Klux Klan*) and *Brandenburg v. Ohio* 395 U.S. 444 (1969)

for something that they would like to prohibit.<sup>426</sup> Thus, libertarian positions of expression comprehend expression in almost absolute terms and underline its significance on an individual and societal level. Such an approach could be said to extend not only to the expression itself but also association and assembly, given that they are some of the central vehicles through which ideas are expressed and disseminated.

It must be noted that the right to freedom of thought is one that has habitually been regarded as absolute, with little need appearing to discuss any forms of restrictions thereto. Mill refers to the ‘absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological.’<sup>427</sup> Mill noted that, although freedom of thought and freedom of expression are interlinked, they also have certain distinctions, including in that expression affects other persons. Nevertheless he recognised that it is ‘almost of as much importance as the liberty of thought itself.’<sup>428</sup> Mill’s position in relation to freedom of thought, namely that it is linked to expression, but, unlike expression, is absolute, can also be seen in international conventions. For example, Article 19 of the ICCPR holds that everyone shall have the right to hold opinions without interference. Part 2 of this article provides for expression as a separate right which may be restricted on the grounds provided for in part 3. These grounds cannot be used for purposes of restricting the freedom of opinion. However, interestingly and rather surprisingly, Article 10 of the ECHR provides for freedom of expression and incorporates the freedom of opinion as part of this right. As a result, on one level, this could appear to mean that the possibility for restriction also extends to the freedom of opinion although no Strasbourg case-law has demonstrated this point and it would be rather bizarre for the Court’s position to be that the freedom of opinion is not absolute. This takes no account of the philosophical and legal principles discussed in this chapter that essentially legitimise restriction (if at all) insofar as the exercise of a particular right affects the rights of others and/or general issues such as public order.

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<sup>426</sup> Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (eds. Oxford University Press 1986) 124

<sup>427</sup> John Stuart Mill, ‘*On Liberty*’ in Mary Warnock *Utilitarianism and On Liberty (including Mill’s Essay on Bentham and Selections from the Writings of Jeremy Bentham and John Austin)* (2<sup>nd</sup> edition, Blackwell 2012) 96

<sup>428</sup> John Stuart Mill, ‘*On Liberty*’ in Mary Warnock *Utilitarianism and On Liberty (including Mill’s Essay on Bentham and Selections from the Writings of Jeremy Bentham and John Austin)* (2<sup>nd</sup> edition, Blackwell 2012) 97

Moving more specifically to the potential realms of hate speech, there are commentators who argue for the non-prohibition of hate speech due to the inherent significance of freedom of expression. For example, Feinberg placed more emphasis on the individual level, arguing that ‘no amount of offensiveness in an expressed opinion can counterbalance the vital social value of allowing unfettered personal expression.’<sup>429</sup> However, there are also arguments in favour of non-prohibition of hate speech which are put forth for reasons other than the sanctity of free speech. Ronald Dworkin’s argument focused on a permissibility of hate speech which he considered to be ‘the price we pay for enforcing the laws that the haters and defamers oppose.’<sup>430</sup> Dworkin placed his arguments in the more general framework of ensuring democracy. However, as noted by Heinze, he does not recognise the differences between democracies in, for example, post-colonial countries compared to their Anglo-Saxon counterpart.<sup>431</sup> He holds that the State must not forbid hate speech as this may ‘spoil the only democratic justification we have for insisting that everyone obey laws.’<sup>432</sup> Thus, Dworkin adopted an interesting outlook on hate speech and the limitation of free speech which does not emanate from the importance of free speech *per se*. Instead he argued against State arbitrariness and for the maintenance of the legitimacy of a political and legal process, which he believed would be undermined if a person or persons were prohibited from uttering an opinion before a decision is taken.<sup>433</sup> Dworkin contested that, although hate speech should be permitted for purposes of legitimising other anti-discrimination legislation and processes, as discussed above, arguments in the realm of limiting speech for purposes of preventing injury to others should be permitted.<sup>434</sup> In other cases, where the aim of restriction is to satisfy the interests of policy, Dworkin noted that we should be ‘with our thumbs on the free speech side of the scales’<sup>435</sup> demonstrating the high threshold that should be met for limiting free speech insofar as only injury to others can justify it. Further, Dworkin argued that, as a result of the importance of the general legitimacy of a State, even debates on

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<sup>429</sup> Joel Feinberg, ‘*Offence to Others – The Moral Limits of the Criminal Law*’ (eds. Oxford University Press 1985) 39

<sup>430</sup> Jeremy Waldron, ‘Dignity and Defamation: The Visibility of Hate’ 2009 Oliver Wendell Holmes Lectures, 123 *Harvard Law Review*, 1596, 1640

<sup>431</sup> Eric Heinze, ‘*Hate Speech and Democratic Citizenship*’ (eds. OUP 2016) 2

<sup>432</sup> Ronald Dworkin, Forward in ‘*Extreme Speech and Democracy*’ Ivan Hare & James Weinstein (2<sup>nd</sup> ed. OUP 2009) 8

<sup>433</sup> Ronald Dworkin, Forward in ‘*Extreme Speech and Democracy*’ Ivan Hare & James Weinstein (2<sup>nd</sup> ed. OUP 2009) 7

<sup>434</sup> Ronald Dworkin, ‘*Taking Rights Seriously*’ (eds. Duckworth 1977) 274

<sup>435</sup> Frederick Schauer, ‘*Free Speech: A Philosophical Enquiry*’ (eds. Cambridge 1982) 133

controversial issues such as racial intelligence should be allowed. Waldron holds this position to be wrong, as it places too much emphasis on free speech and argues that this results in society 'bear[ing] the costs of what amounts to attacks on the dignity of minority groups.'<sup>436</sup> At this point, the central question is whether one should adopt Mill's aforementioned argument that, even an immoral opinion should be permitted in the name of free speech, or, whether such a controversial debate is to be considered to step into the grounds of harm? It is this question which lies at the heart of the debate on hate speech restriction.

Therefore, the libertarian model allows for rights to be restricted insofar as it is demonstrable that there is a serious and imminent risk of serious harm to others. Within this framework, freedom of expression has been repeatedly understood to hold a particularly significant position within the human rights framework. As such, to limit this right would entail a particularly high threshold of severity and imminence with theorists noting, for example, that mere offensiveness does not meet the threshold. It could be discerned that such a threshold could also be attached to the vehicles of expression, namely association and assembly. So, essentially, libertarians interpret free expression in a very strict manner and, as such, require a high severity of harm if expression is to be restricted. Some scholars have condemned this position with, for example, Fish arguing that the dangers associated with such speech are far more serious and extensive than classical and contemporary libertarians believe.<sup>437</sup> Furthermore, hate speech finds support as free speech for other reasons apart from the particular importance of free expression. For example, James Weinstein argues that the most suitable response to hate speech is not a ban but a lively counter-argument put forth by the State or citizens so as to enable society to realise the damage of such speech, urging the State to put time and resources in to such activities. Thus, Weinstein adopts a libertarian approach as a strategy to fight speech rather than as a result of his particular emphasis on free speech.<sup>438</sup>

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<sup>436</sup> Eric Barendt, 'Hate Speech': Lecture given at Hull (November 21 2013):  
< <http://www2.hull.ac.uk/fass/pdf/Eric%20Barendt-HATE%20SPEECH.pdf>> [Accessed 1 December 2015]

<sup>437</sup> Mark Slagle, 'An Ethical Exploration of Free Expression and the Problem of Hate Speech' (2009) 24 *Journal of Mass Media Ethics* 238, 242

<sup>438</sup> Mark Slagle, 'An Ethical Exploration of Free Expression and the Problem of Hate Speech' (2009) 24 *Journal of Mass Media Ethics* 238, 246

It must be noted that, as underlined by Heinze, opponents of hate speech bans come from different schools of thought and include communitarian writers which challenge such bans on the grounds that they manifest ‘modernity’s exaggerated focus on individual legal entitlements,’<sup>439</sup> and civic republican theorists who ‘seek to limit the capacity of rights regimes to trump, hence to foreclose, collective deliberation’<sup>440</sup> Either way, as noted by Frederick Schauer, ‘free speech is a good card to hold’<sup>441</sup> but ‘it does not mean that free speech is the ace of trumps,’<sup>442</sup> the point of contention being at what point to accept that a particular harm of a particular speech may constitute sufficient grounds for limitation.

### 2.3 Legitimately Legislating against Hate Speech:

Some commentators have sought to tackle the question of whether hate speech should be banned by considering how to strike a balance between combatting hate, such as racial hate on the one hand, and preserving democratic freedoms such as that of expression on the other. This concept has been dealt with by several authors who have approached it, through a *mélange* of legal, normative and contextual avenues alone or in conjunction with each other. David Kretzmer’s article entitled ‘Freedom of Speech and Racism’<sup>443</sup> is an earlier piece of work but continues to be relevant to the current reality, often being cited in literature. It looks at freedom of speech and racism and considers the boundaries of freedom of expression when dealing with racist speech, placing more emphasis on normative appraisals of free speech theories such as Mill’s truth argument and individualist arguments and the way in which such theories, where applicable, have received judicial support. The central research question put forth is whether there is a case for limiting the right of racist groups, such as the *Ku Klux Klan*, from disseminating their ideologies. After establishing a definitional framework of the key terms of racist speech and freedom of speech, the paper appraises theoretical arguments for and against the restriction of racist speech and the question of legislating against hate speech, its intricacies and desirability in light of the difficulties, with the author concluding that the desirability for legislation ultimately depends on social factors. Although the paper commences with a direct reference to racist groups, no examination of the freedom of association or assembly is conducted. Elizabeth F. Defeis’

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<sup>439</sup> Eric Heinze, ‘*Hate Speech and Democratic Citizenship*’ (eds. OUP 2016) 14

<sup>440</sup> Eric Heinze, ‘*Hate Speech and Democratic Citizenship*’ (eds. OUP 2016) 14

<sup>441</sup> Frederick Schauer, ‘*Free Speech: A Philosophical Enquiry*’ (eds. Cambridge 1982) 9

<sup>442</sup> Frederick Schauer, ‘*Free Speech: A Philosophical Enquiry*’ (eds. Cambridge 1982) 9

<sup>443</sup> David Kretzmer, ‘Freedom of Speech and Racism’ (1986) 8 *Cardozo Law Review* 445

‘Freedom of Speech and International Norms: A Response to Hate Speech’<sup>444</sup> examines the USA’s approach to hate speech, underlining the difference in the approach it takes in comparison to most other countries and noting that its approach is very different to that incorporated in international law. It argues that the ‘First Amendment absolutist approach has failed to accommodate equality and non-discrimination rights’<sup>445</sup> It then looks at the international conventions relevant to this discussion and examines regional documents such as the ECHR. Thus, this article produces an overview of the international and European frameworks, making reference to other regions such as Africa but, most importantly, the author’s argument for a change in the USA’s approach to hate speech is predominantly based on the breach of equality and non-discrimination that arises from the aforementioned absolutist approach, making this a significant contribution to the interrelation and interdependence of restricting hate speech and promoting these values as a valid justification for legitimately legislating against hate. In Stephanie Farrior’s ‘Molding the Matrix,’<sup>446</sup> the author offers an extensive assessment of the international framework governing hate speech, exploring the history of the prohibition of hate speech in this sphere by looking at the *travaux préparatoires* of the documents and assesses the theories that underlie these developments. It also makes a comparison of the justifications put forth by international law for the limitation of hate speech with those of critical race theory, noting, for example, the importance both place on the potential injury of hate speech on its targets. Through its analysis of the legal and normative frameworks it concludes that hate speech can be restricted for purposes of protecting the principles of equality and non-discrimination, finding that the abuse of right theory is one of the most convincing justifications for limiting hate speech. Tarlach McGonagle’s article ‘Wrestling Racial Equality from Tolerance of Hate Looks at the Restrictions to Hate Speech from the Ambit of Prompting the Right to Equality’<sup>447</sup> studies the notion of tolerance in a normative sphere and the socio-political reality behind the increasing anti-racist mandate of the international community, thereby, setting a well-rounded and original normative and contextual setting for the subsequent analysis. It then continues with the standard

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<sup>444</sup> Elizabeth F. Defeis, ‘Freedom of Speech and International Norms: A Response to Hate Speech’ (1992) 29 *Stanford Journal of International Law* 57

<sup>445</sup> Elizabeth F. Defeis, ‘Freedom of Speech and International Norms: A Response to Hate Speech’ (1992) 29 *Stanford Journal of International Law* 57, 59

<sup>446</sup> Stephanie Farrior, ‘Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech’ (1996) 14 *Berkley Journal of International Law* 1

<sup>447</sup> Tarlach McGonagle, ‘Wrestling (Racial) Equality from Tolerance of Hate Speech’ (2001) 23 *Dublin University Law Journal* 21



UN and Council of Europe instruments and case-law, considers negationism, the effectiveness of hate speech laws and the contextual reality of Ireland. This formula is implemented in order to justify its central position that the ‘objective of promoting equality and non-discrimination must not be allowed to subordinate or even subdue the right to freedom of expression.’<sup>448</sup> The author suggests the need to balance all the rights and interests at stake. Two earlier pieces of writing also focus on the issues of equality and non-discrimination within the sphere under consideration. ‘Extreme Speech and Democracy’<sup>449</sup> includes a collection of essays on a wide variety of issues related to its title including, *inter alia*, the international and European frameworks governing hate speech and the issue of legislating against Holocaust denial. It incorporates examples from Europe and the USA to illustrate the points put forth whilst simultaneously including a section which outlines the problems of implementing comparative analyses between States’ and regions’ approach to hate speech. At the core of the discussions is the difficulty of balancing between the different rights and freedoms at stake, an issue which is further developed through a philosophical approach too. This book generally adopts an interdisciplinary approach rather than a purely legal one. In Eva Brems’ article on ‘State Regulation of Xenophobia Versus Individual Freedoms,’<sup>450</sup> the central research question is whether States can and should impose restrictive legal measures against anti-democratic rhetoric, organisations and individuals. She frames this question as a ‘democratic dilemma’<sup>451</sup> with the central question being ‘is the remedy then not as dangerous as the illness?’<sup>452</sup> The author responds to the question through a legal appreciation of the issues. She establishes the legal framework by providing an overview of the UN, EU and Council of Europe frameworks that backdrop anti-democratic rhetoric and activities, promulgated by groups and individuals, and offers a comparative analysis of the situation in the USA and Germany, offering an historical explanation as to the variation in stances. She then moves on to tackling the problem question against the aforementioned normative background, offering a two-fold justification for the legitimate restriction of anti-democratic groups and

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<sup>448</sup> Tarlach McGonagle, ‘Wrestling (Racial) Equality from Tolerance of Hate Speech’ (2001) 23 *Dublin University Law Journal* 21, 27

<sup>449</sup> Ivan Hare & James Weinstein, ‘*Extreme Speech and Democracy*’ (2n edn. OUP 2011)

<sup>450</sup> Eva Brems, ‘State Regulation of Xenophobia versus Individual Freedoms: The European View’ (2002) 1 *Journal of Human Rights* 4

<sup>451</sup> Eva Brems, ‘State Regulation of Xenophobia versus Individual Freedoms: The European View’ (2002) 1 *Journal of Human Rights* 4, 482

<sup>452</sup> Eva Brems, ‘State Regulation of Xenophobia versus Individual Freedoms: The European View’ (2002) 1 *Journal of Human Rights* 4, 482

expression in the form of ‘weighing different kinds of harm’<sup>453</sup> and ‘defending democracy.’<sup>454</sup> In relation to the first, restricting a person or group of persons’ freedom of expression or association is legitimate due to the harmful effects such speech has on individuals and groups. Although the author does not explicitly extend this position to association, it can be implicitly discerned from the composition of this section. In relation to the second justification, the author focuses particularly on Article 17 of the ECHR as the embodiment of militant democracy and notes that far-right ideology threatens the very foundation of the ECHR. Erik Bleich’s ‘The Freedom to be Racist? How the USA and Europe Struggle to Preserve Freedom and Combat Racism’<sup>455</sup> explores national laws and policies of countries such as the USA, Germany, the UK and France in the spheres of racist expression, association and racism. It recognises the differences in approach taken by European countries, on the one hand and the USA on the other, but concludes that, regardless of such variations, none of the countries has breached democratic principles. The overarching objective is to examine how the countries under consideration strike a balance between the different rights and values at stake. Interestingly, Tim Bakken’s article on ‘Liberty and Equality through Freedom of Expression: The Human Rights Questions behind Hate Crime Law’<sup>456</sup> takes an opposite stance to that of the majority of relevant literature. More particularly, it looks at how enhancing the freedom of expression maximises liberty and equality, focusing on the justification put forth for the enactment of laws against hate crime and concluding that these laws ‘actually diminish liberty and equality’<sup>457</sup> The author further argues that such laws do, in fact, promote inequality as they allow for greater punishments due to the victims’ race, religion, sex or national origin. The author seeks to justify his positions by looking at theories of free expression, some case-law, statistics and figures from the USA with a brief reference to relevant international law. It must be noted that the comparison between American and European approaches to hate speech is of particular interest and relevance to the issue of hate speech given the profoundly different approaches taken by the two on the issue, with an almost absolutist

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<sup>453</sup> Eva Brems, ‘State Regulation of Xenophobia versus Individual Freedoms: The European View’ (2002) 1 *Journal of Human Rights* 4, 495

<sup>454</sup> Eva Brems, ‘State Regulation of Xenophobia versus Individual Freedoms: The European View’ (2002) 1 *Journal of Human Rights* 4, 495

<sup>455</sup> Erich Bleich, ‘*The Freedom to be Racist? How the USA and Europe Struggle to Preserve Freedom and Combat Racism*’ (eds. OUP 2011)

<sup>456</sup> Tim Bakken, ‘Liberty and Equality through Freedom of Expression: The Human Rights Questions behind Hate Crime laws’ (2013) 4 *International Journal of Human Rights* 2

<sup>457</sup> Tim Bakken, ‘Liberty and Equality through Freedom of Expression: The Human Rights Questions behind Hate Crime laws’ (2013) 4 *International Journal of Human Rights* 2, 1

position to free speech being adopted by the former. Several articles have been written by authors such as Roger Kiska<sup>458</sup>, Claudia E. Haupt,<sup>459</sup> Winfried Brugger<sup>460</sup> and Sionaidh Douglas-Scott<sup>461</sup> on freedom of expression through a comparative assessment of US-European approaches to this freedom, with European meaning either an analysis of ECtHR case-law or an analysis of instruments available in single States, usually Germany. All the authors mentioned provide normative overviews of international and/or European law and, due to the distinctions between the approaches being compared, serve to reflect the pros and cons of each. This could arguably be the case due to the stark variation between the approaches adopted in the two areas and/or States. Thus, these articles contribute to the buildup of literature on free speech and to the variations between positions adopted in the USA, on the one hand, and in Europe and/or European countries on the other. Thus, the above literature seeks to find ways to strike a balance between the values and rights at stake in cases of promoting hate through freedoms and/or to justify or reject such a balancing exercise. Principles ranging from the preservation of the principle of non-discrimination to the Mill's truth argument against the backdrop of international and national frameworks have been assessed by authors in pursuing their objectives. One important observation that can be made from the above is that, although the authors recognise the potential of organised groups, such as political parties, to promote hate, focus is placed on the freedom of expression with no concrete mention of association or assembly in the sphere of legitimately restricting hate.

Some commentators have directly tackled the question of whether bans on hate speech should be permitted constituting a significant question particularly for American Scholars who stand before a legal culture where free expression is very important. As such, several authors have considered the basic question of whether or not hate speech bans are legitimate. For example, the issue of hate speech bans has been considered within a critical race theory framework and predominantly in the book 'Words that Wound' which rejects, amongst others, the libertarian model adopted for

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<sup>458</sup> Roger Kiska, 'Hate Speech: A Comparison between the European Court of Human Rights and the United States Supreme Court Jurisprudence' 25 *Regent University Law Review* 107

<sup>459</sup> Claudia E. Haupt, 'Regulating Hate speech – Damned If You Do and Damned If You Don't: Lessons Learned From Comparing the German and U.S. Approaches' (2006) 23 *Boston University International Law Journal* 298

<sup>460</sup> Winfried Brugger, 'Ban on or Protection of Hate Speech? Some Observations based on German and American Law' (2002) 17 *Tulane European & Civil Law Forum* 1

<sup>461</sup> Sionaidh Douglas-Scott, 'The Hatfulness of Protected Speech: A Comparison of the American and European Approaches' (1999) 7 *William & Mary Bill of Rights Journal* 2

hate speech given that critical race theorists consider this to ignore the inherent imbalances that mark American society. The authors put forth examples to demonstrate such inherent imbalances and the history of racism in America as reasons to argue against libertarian models of free speech. For example, they argue that it is the deeply embedded racism that marks American society which has led to phenomena, such as defamation, to fall outside the framework of free speech guarantees whilst racist speech is considered protected speech.<sup>462</sup> In Robert Post's Ninety's article 'Racist Speech, Democracy and the First Amendment,'<sup>463</sup> the author argues that, for purposes of ensuring a harmonious existence between the freedom of expression and the limitation of racist speech, focus must be placed on the harm caused by such speech. Closely interrelated to this justification are the ideas put forth by Jeremy Waldron. More particularly, in his 2014 book 'The Harm in Hate Speech,'<sup>464</sup> Waldron justifies limiting hate speech on grounds of preserving human dignity and protecting members of minority groups, often targeted by such speech. The arguments in this book can be considered as an extension of his article 'Dignity and Defamation: The Visibility of Hate'<sup>465</sup> in which the author argues that hate speech should be restricted for purposes of ensuring human dignity. Alexander Tsesis recognises a larger-scale consequence of hate speech as a justification for hate speech bans. More particularly, in his book 'Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements,'<sup>466</sup> he argues that hate speech sends destructive messages which are linked to the systematic marginalisation of minority groups which, in turn, become part of mainstream dialogue with destructive results, such as slavery. On the other hand, some authors find no justification for the banning of hate speech. For example, Eric Heinze in 'Viewpoint Absolutism and Hate Speech' has argued that there exist no justifications for restricting hate speech and that such measures are 'inherently discriminatory and should be abolished.'<sup>467</sup> Ronald Dworkin also adopts an anti-hate speech ban in his forward to Hare and Weinstein's book 'Extreme Speech and Democracy,' by arguing that such bans would be destructive for society since they may 'spoil the only

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<sup>462</sup> Mari Matsuda *et al.*, 'Words that Wound: Critical Race Theory, Assaultive Speech, and The First Amendment' (New Perspectives on Law, Culture & Society) (eds. Westview Press 1993)

<sup>463</sup> Robert Post, 'Racist Speech, Democracy and the First Amendment' (1990-1991) 32 *William and Mary Law Review*

<sup>464</sup> Jeremy Waldron, 'The Harm in Hate Speech' (2<sup>nd</sup> edn. Harvard University Press 2014)

<sup>465</sup> Jeremy Waldron, 'Dignity and Defamation: The Visibility of Hate' (2010) 123 *Harvard Law Review* 7

<sup>466</sup> Alexander Tsesis, 'Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements' (eds. New York University Press 2002)

<sup>467</sup> Eric Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69 *The Modern Law Review* 4, 543

democratic justification we have for insisting that everyone obey laws.’<sup>468</sup> Interestingly, in Heinze’s recent book ‘Hate Speech and Democratic Citizenship,’ the author provides a critical overview of the different positions and theories that exist in relation to hate speech regulation and concludes that public expression can only be restricted in cases where expression may create issues of national security.<sup>469</sup>

## 2.4 A Theoretical Approach to Restricting Hate speech Legitimately: Critical Race Theory

Taking into account that at the heart of this dissertation lies the concept of hate and discrimination against minority groups, Critical Race Theory (CRT) will be assessed as a lens through which free speech can be restricted insofar as such speech constitutes hate speech and, by extension hateful association and assembly. Before proceeding with an analysis of CRT, the Speech Act Theory will be briefly assessed for purposes of extrapolating on speech as an act.

### 2.4.1 Speech Act Theory

The Speech Act Theory sets out a structure for purposes of elucidating the meaning of expression and, subsequently, its hierarchy of effects. The Speech Act Theory was put forth by John L. Austin in ‘How to Do Things with Words’ which essentially ‘presented a new picture of analysing meaning.’<sup>470</sup> The theory was further developed by John R. Searle in ‘Speech Acts.’ At the core of Austin’s writings is the concept of meaning which is illustrated by reference to the concept of acts. Essentially, in speaking, the speaker ‘with an associated intention performs a linguistic act to the hearer.’<sup>471</sup> The theory sets out three speaking-acts; a locutionary act as one of purely saying something, an illocutionary act as an act performing a function such as a request and a perlocutionary act which has an effect on the actions, thoughts or feelings of the receiver.<sup>472</sup> Austin presented a locutionary act as one with a certain meaning, illocutionary as one

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<sup>468</sup> Ronald Dworkin, Forward in ‘*Extreme Speech and Democracy*’ (eds. Ivan Hare & James Weinstein (2<sup>nd</sup> edn. OUP 2009) 8

<sup>469</sup> Eric Heinze, ‘*Hate Speech and Democratic Citizenship*’ (eds. OUP 2016) 111-116

<sup>470</sup> Etsuko Oishi Esercizi Filosofici, ‘Austin’s Speech Act Theory and the Speech Situation’ (2006): <<http://www.univ.trieste.it/~eserfilo/art106/oishi106.pdf>> 1

<sup>471</sup> Etsuko Oishi Esercizi Filosofici, ‘Austin’s Speech Act Theory and the Speech Situation’ (2006): <<http://www.univ.trieste.it/~eserfilo/art106/oishi106.pdf>> 1

<sup>472</sup> Uladzislau Belavusau, ‘*Freedom of Speech – Importing European and US Constitutional Models in Transitional Democracies*’ (eds. Routledge 2013), 94

with a certain force and perlocutionary as one which is to achieve a certain effect.<sup>473</sup> Thereby, the differentiation between the three is significant for the conceptualisation of speech under consideration and its possible effects. However, as argued by Judith Butler, a speech situation is ‘not a simple sort of context, one that might be defined easily by spatial and temporal boundaries.’<sup>474</sup> As underlined by Belavusau, libertarian free speech supporters endorse the locutionary nature of a hateful form of expression,<sup>475</sup> thereby considering it as purely an act of saying something, with no ramifications whereas others who do not adhere to a libertarian approach will ‘articulate the intimidation and even subordination potential of such expression to amount to a performative act.’<sup>476</sup> The recognition, by this theory, of the capacity of speech to have an actual effect on its listener if the particular speech fell within the realm of a perlocutionary act ‘stimulated criticism of the US Supreme Court’s laissez-faire attitude towards hate speech’<sup>477</sup> by critical race theorists. Heinze notes that Critical Race Theorists describe hateful expression as ‘a weapon delivering a blow as harsh as a physical assault’<sup>478</sup> thereby reflecting the actual consequences these theorists attach to expression which is hateful. As such, CRT is discussed below.

#### 2.4.2 Critical Race Theory

CRT came about in the mid-1980s<sup>479</sup> after a realisation by scholars, activists and lawyers that ‘new theories and strategies were needed to combat the subtler forms of racism that were gaining ground.’<sup>480</sup> Racist incidents on campuses of universities in the United States prompted the writings of critical race theorists such as Mari Matsuda, Charles Lawrence, Richard Delegado

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<sup>473</sup> Etsuko Oishi *Esercizi Filosofici*, ‘Austin’s Speech Act Theory and the Speech Situation’ (2006): <<http://www.univ.trieste.it/~eserfilo/art106/oishi106.pdf>> 1

<sup>474</sup> Judith Butler, *Excitable Speech. A Politics of the Performative* (eds. Routledge 1997) 4

<sup>475</sup> In his discussion Belavusau refers to the burning of the cross in the case of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)

<sup>476</sup> Uladzislau Belavusau, *Freedom of Speech – Importing European and US Constitutional Models in Transitional Democracies* (eds. Routledge 2013) 95

<sup>477</sup> Uladzislau Belavusau, *Freedom of Speech – Importing European and US Constitutional Models in Transitional Democracies* (eds. Routledge 2013) 82

<sup>478</sup> Eric Heinze, *Hate Speech and Democratic Citizenship* (eds. OUP 2016) 138

<sup>479</sup> However, it can be traced back to the black liberationist movement of the 1960s and the Critical Legal Studies movement of the 1970s and 1980s: Jeffrey Pyle, ‘Race, Equality and the Rule of Law: Critical Race Theory’s Attack on the Promises of Liberalism’ (1999) 40 *Boston College Law Review* 3, 798

<sup>480</sup> Richard Delegado & Jean Stefanic *Critical Race Theory: An Introduction* (NYU Press 2006): <<http://www.odec.umd.edu/CD/RACE/CRT.PD>> [Accessed 2 December 2015]

and Jean Stefancic ‘who wrote the phrase hate speech into the legal lexicon.’<sup>481</sup> CRT considers a variety of issues looked at through, for example, the civil rights lens, but, instead, ‘places them in a broader perspective that includes economics, history, context, group and self-interest, and even feelings and the unconscious...[and...questions the very foundations of the liberal order, including equality theory, legal reasoning, enlightenment rationalism, and neutral principles of constitutional law.’<sup>482</sup> For these theorists, racism ‘lies at the very heart of American and Western culture.’<sup>483</sup> The overarching aim of CRT is to ‘eliminat[e] racial oppression’<sup>484</sup> and achieve ‘fundamental social transformation.’<sup>485</sup> It can be used to look at a variety of issues from law, to education, to political science and more.<sup>486</sup> In relation to hate speech, critical race theorists argued that the libertarian model adopted for free speech and, thus, for hate speech did ‘not acknowledge the imbalance of power that exists within American society.’<sup>487</sup> Thus, according to this theory, there is an inequality of arms as a result of an inherent prejudice held and manifested against the groups and, as such, these groups which live on the margins of society cannot possibly be deemed to be able to participate equally in a dialogue with haters. As noted, ‘in a rigged game...the argument that good speech ultimately drives out bad speech rests on a false premise unless those of us who fight racism are vigilant and unequivocal in that fight,’ therefore demonstrating that the groups themselves who are targets of such speech cannot participate without the assistance of others who may work in the field of anti-racism but are not marginalised themselves. According to Matsuda, hate speech is defined as such if the message incorporates the idea of racial inferiority, is directed to a traditionally marginalised group and is hateful, degrading and menacing.<sup>488</sup> In this way, Matsuda attempts to encapsulate only the

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<sup>481</sup> Eric Heinze, ‘Hate Speech and Democratic Citizenship’ (eds. OUP 2016) 15

<sup>482</sup> Richard Delegado & Jean Stefancic ‘Critical Race Theory: An Introduction’(NYU Press 2006): <<http://www.odec.umd.edu/CD/RACE/CRT.PD>> [Accessed 2 December 2015]

<sup>483</sup> Angela Harris, ‘Foreword, The Jurisprudence of Reconstruction’ 82 *California Law Review* 741, 749

<sup>484</sup> Mari Matsuda et al., ‘Words that Wound: Critical Race Theory, Assaultive Speech, and The First Amendment’ (New Perspectives on Law, Culture & Society) (eds. Westview Press 1993) 6-7

<sup>485</sup> Mari Matsuda et al., ‘Words that Wound: Critical Race Theory, Assaultive Speech, and The First Amendment’ (New Perspectives on Law, Culture & Society) (eds. Westview Press 1993) 6-7

<sup>486</sup> Richard Delegado & Jean Stefancic ‘Critical Race Theory: An Introduction’ (NUY Press 2006): <<http://www.odec.umd.edu/CD/RACE/CRT.PD>> [Accessed 2 December 2015]

<sup>487</sup> Mark Slagle, ‘An Ethical Exploration of Free Expression and the Problem of Hate Speech’ (2009) 24 *Journal of Mass Media Ethics* 238, 239

<sup>488</sup> Mari Matsuda et al., ‘Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment - New Perspectives on Law, Culture & Society’ (eds. Westview Press 1993) 36

speech which is truly hateful and menacing and to leave out generally controversial speech.<sup>489</sup> Given the emphasis placed on the unequal position certain groups find themselves in due to the prejudice and marginalisation which they have historically experienced, Matsuda argues that, in the event that hate speech is directed towards society's dominant group, then the libertarian model of free speech should be applied.<sup>490</sup> On one hand, this position could be justified by the fact that the majority group is not hampered by inequalities, prejudices and discrimination and there is no issue of inequality of arms and, as such, they can reasonably partake in an effective response with the hate speech in question not causing damage to this group's societal position which, either way, is diachronically in power. On the other, it could be hard to accept given embedded principles of law such as the general non-discriminatory application of the law. Moreover, such a position could cause concerns as to 'where such precedents might lead.'<sup>491</sup> CRT is, as might be expected, not without criticism with one of the arguments put forth against it being its 'single mindedly critical character,'<sup>492</sup> discussing, analysing and blaming without offering any solution to the issues it raises. As noted by Mark Tushnet, in relation to CRT, 'critique is all there is.'<sup>493</sup> Other critics of CRT and the way in which this school perceives the effects of hate speech include Judith Butler who has noted that the interrelationship between hate speech and the alleged resulting harm does not always exist.<sup>494</sup> Further, Heinze has argued Critical Race Theorists adopt 'wholly abstract, decontextualised and formalist readings of international norms'<sup>495</sup> resulting, amongst others in non engagement of the theory with international human rights law.<sup>496</sup> Although this theory is based on American realities and issues, Mattias Möschel notes that some of the main challenges considered within the framework of CRT are relevant and significant to Europe but, to date, this theory has 'received scant attention

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<sup>489</sup> Mari Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment - New Perspectives on Law, Culture & Society* (eds. Westview Press 1993) 36

<sup>490</sup> Mari Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment - New Perspectives on Law, Culture & Society* (eds. Westview Press 1993) 38

<sup>491</sup> Jeffrey Pyle, 'Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism' (1999) 40 *Boston College Law Review* 3, 805

<sup>492</sup> Jeffrey Pyle, 'Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism' (1999) 40 *Boston College Law Review* 3, 816

<sup>493</sup> Mark Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law* (eds. University Press of Kansas 2015) 318

<sup>494</sup> Judith Butler, *Excitable Speech. A Politics of the Performative* (eds. Routledge 1997) 16

<sup>495</sup> Eric Heinze 'Truth, Myth and Critical Theory' in Reza Banakar *Rights in Context: Law and Justice in Late Modern Society* (eds. Ashgate 2010) 98

<sup>496</sup> Eric Heinze 'Truth, Myth and Critical Theory' in Reza Banakar *Rights in Context: Law and Justice in Late Modern Society* (eds. Ashgate 2010) 98



in European legal scholarship.’<sup>497</sup> Möschel places his analysis within the framework of Continental Europe and explains the lack of CRT, therein, due to the lack of a conceptualisation of race. More particularly, he holds that the ‘fear is that by referring to race one might be implicitly and normatively recognizing the existence of different human races from the scientific viewpoint.’<sup>498</sup> This fear stands in the way of extrapolating on CRT due to the necessity to conceptualise on race. In the UK, there has been some, albeit very limited reference, to this theory.<sup>499</sup>

So, theorists in this arena are sensible to the societal reality of prejudices and inequalities and, as a result, underline that hate speech cannot contribute to the market place of ideas as an equal dialogue cannot come about from such speech. CRT essentially holds that institutional racism and prejudices that are traditionally affiliated to particular groups distort any discussion on free speech when it comes to hateful speech. However, they appear to alienate themselves from placing analyses within the framework of international human rights law which is centrifugal to the content of their discussions whilst other criticisms include the incapacity of this theory to provide solutions to the problems it identifies.

### 3. Effects-Based Approach to Hate Speech Restriction

#### 3.1 Effects-Based Approach as a General Concept

As well as looking at the legitimacy of restricting hate speech in the sphere of CRT, one can also consider this issue by conceptualising the effects of hate speech as grounds upon which such regulation is justifiable. When considering the effects of hate speech, it is important first to underline which particular groups may be affected by such speech. In this realm, Thomas Scanlon looks at the extent to which a particular expression affects the rights and interests of those affected by it. Scanlon argues that, in order for a State legitimately to regulate speech, it must determine whether and, if so, the extent to which the rights and interests of the groups of persons affected by the speech are violated. These groups include the participant, the audience,

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<sup>497</sup> Mattias Möschel, ‘Race in Mainland European Legal Analysis: Towards a European Critical Race Theory’ (2011) 34 *Ethnic and Racial Studies* 10, 1649

<sup>498</sup> Mattias Möschel, ‘Race in Mainland European Legal Analysis: Towards a European Critical Race Theory’ (2011) 34 *Ethnic and Racial Studies* 10, 1651

<sup>499</sup> See: Mike Cole, ‘Critical Race Theory comes to the UK’ (2009) 9 *Ethnicities* 246-269

the bystander and the citizens who are damaged by the speech in question.<sup>500</sup> The position put forth by Scanlon is interesting as it recognises a variety of groups that may be affected by the speech with this broad understanding being significant in the realm of hate speech which affects not only the victim but also other listeners who may be persuaded by its content and society, more generally, whose equilibrium may be impacted by the speech.

Now as to the actual effects of speech, Feinberg argues that speech which is to be prohibited must cause profound offence rather than mere nuisance and differentiates between the two in five ways. Profound offences have a particularly ominous tone, are unacceptable even to those who do not witness them, are unacceptable even if they take place in private,<sup>501</sup> are evident even if one attempts to disregard them and are morally unacceptable.<sup>502</sup> This commentator holds that racial insults result in profound outrage on the part of the victim because uttering such insults is morally wrong and because he or she is threatened by this behaviour.<sup>503</sup> It must be noted, however, that an understanding of the effects of hate speech, which encapsulates a wider range of victims and not just the targeted person or group but also others, as set out by Scanlon, is more pragmatic. David O. Brink argues that hate speech ‘evokes visceral, rather than articulate responses, it provokes violence or, more commonly silences through insult or intimidation.’<sup>504</sup> Charles Lawrence extrapolates on the reaction hate speech often causes by holding that it is an attack that ‘produces an instinctive, defensive psychological reaction. Fear, rage, shock and flight all interfere with any reasoned response.’ Many victims do not find words of response until well after the assault, when the cowardly assaulter has departed.’<sup>505</sup> These are very significant observations when taking into account arguments of classical theorists, such as Mill, who speak of the importance of dialogue and expression for a functional society. Brink and Lawrence’s points succinctly denote one of the reasons why this argument is not applicable to hate speech given that the affront it causes to the ‘other side’ cannot possibly allow its representatives to

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<sup>500</sup> Thomas Scanlon, *The Difficulty of Tolerance* (eds. Cambridge University Press 2003) 86, 99, 151, 92, 155

<sup>501</sup> Joel Feinberg, *Offence to Others – The Moral Limits of the Criminal Law* (eds. Oxford University Press 1985) 58

<sup>502</sup> Joel Feinberg, *Offence to Others – The Moral Limits of the Criminal Law* (eds. Oxford University Press 1985) 59

<sup>503</sup> Joel Feinberg, *Offence to Others – The Moral Limits of the Criminal Law* (eds. Oxford University Press 1985) 59

<sup>504</sup> David O. Brink, ‘Millian Principles, Freedom of Expression and Hate Speech’ (2001) 7 *Legal Theory* 119, 139

<sup>505</sup> Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus* (1990) *Duke Law Journal* 431, 452-453

engage in a reasoned discussion that will produce reasoned results. Further, hate speech may reinforce prejudices and feelings of inferiority in a seriously harmful way<sup>506</sup> Eric Barendt took this one step further, adopting an interesting outlook on the effects that restrictions of hate speech have on free speech by arguing that hate speech ‘silences the voice of members of the targeted group’<sup>507</sup> and, as a result, allowing for such expression essentially restricts certain groups from exercising this right.<sup>508</sup> His argument was inspired by a point made by Caroline West who held that, in the event that permitting persons to promote hate results in other speech (counter-speech) being disregarded, then this curtails rather than enhances free speech.<sup>509</sup> Such arguments conceptualise the freedom of expression within societal realities, comprehending the effects that hate speech has on the further marginalisation of its victims who essentially cannot respond in a free marketplace of ideas. In relation to the marketplace argument, scholars, such as Smolla, have argued that hate speech offers no value to the positive development of a society and its dialogue does not fall within the marketplace framework.<sup>510</sup> As such, that author argued that this type of speech ‘states no fact, offers no opinion, proposes no transaction, attempts no persuasion.’<sup>511</sup> Therefore, based on this premise and the societal in-utility of hate speech, the marketplace approach, discussed above, is eliminated as a precursor for permitting hate speech.

Further, Waldron puts forth his argumentation based on the premise of human dignity and respect. The former will be extrapolated on briefly before looking at Waldron’s position. Dignity has been described as ‘the very founding rock of fundamental rights in post-World War II constitutionalism’ Dignity is a central concept of international human rights law, with international conventions such as the United Nations Charter and the EU Charter of Fundamental

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<sup>506</sup> Eric Barendt, ‘Hate Speech: Lecture given at Hull’ (November 21 2013): <<http://www2.hull.ac.uk/fass/pdf/Eric%20Barendt-HATE%20SPEECH.pdf>> [Accessed 1 December 2015]

<sup>507</sup> Eric Barendt, ‘Hate Speech: Lecture given at Hull’ (November 21 2013): <<http://www2.hull.ac.uk/fass/pdf/Eric%20Barendt-HATE%20SPEECH.pdf>> [Accessed 1 December 2015]

<sup>508</sup> Eric Barendt, ‘Hate Speech: Lecture given at Hull’ (November 21 2013): <<http://www2.hull.ac.uk/fass/pdf/Eric%20Barendt-HATE%20SPEECH.pdf>> [Accessed 1 December 2015]

<sup>509</sup> Eric Barendt, ‘Hate Speech: Lecture given at Hull’ (November 21 2013): <<http://www2.hull.ac.uk/fass/pdf/Eric%20Barendt-HATE%20SPEECH.pdf>> [Accessed 1 December 2015] 9

<sup>510</sup> Rodney A. Smolla, ‘Free Speech in an Open Society’ (eds. Alfred A. Knopf 1993) 166-167

<sup>511</sup> Rodney A. Smolla, ‘Free Speech in an Open Society’ (eds. Alfred A. Knopf 1993) 166-167

Rights referring to dignity.<sup>512</sup> In commenting on the case of *K.A. et A.D v Belgium* which looked at sadomachism, Muriel Fabre-Magnan argues that ‘the emergence of the human dignity principle is the sign that there is something superior (transcendent) to individual wills...No one can renounce the human dignity principle, obviously not for others but no more so for oneself...’<sup>513</sup> The interrelationship between the ancient principle and *dignitas* has been considered by scholars through various lenses. *Dignitas* can be defined as including ‘worth, worthiness, dignity, rank, position, political office.’<sup>514</sup> James Q. Whitman argues that the origins of dignity are indeed to be found in the ancient norms of honour which were gradually developed into the principle of human dignity as we understand it today<sup>515</sup>. However, David Feldman and Waldron<sup>516</sup> steer away from associating the concept of human dignity as we know it today with that of the Roman principle of *dignitas* due to the contrasts between the two. More particularly, dignity as we know it today is applicable to all and is non-retractable whereas *dignitas* had to be awarded and could be taken away.

Waldron argues that hate speech targets the ‘social sense of assurance on which members of vulnerable minorities rely’<sup>517</sup> and guarantees that all citizens adhere to principles of human dignity and respect. As such, he underlined that hate speech should be prohibited in that it is so damaging, not only on an individual level but also on a group level, that such speech can almost affect social harmony.<sup>518</sup> Other commentators, such as Tsesis, consider hate speech to promote destructive messages with a menacing effect on society on a group level and not merely on an individual one, linking it to the rise of dangerous movements. Moreover, he dismissed theories of free expression in the face of the violent realities that traditionally marginalised groups have

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<sup>512</sup> Stephanie Hennette-Vauchez, ‘A Human Dignitas? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence’ (2011) 9 *International Journal of Constitutional Law* 1, 34

<sup>513</sup> Muriel Fabre-Magnan, ‘*Le Saidsm N’est Pas un Droit de L’homme*’ (2005 *Receuil Dalloz*) 2978-2980

<sup>514</sup> Collins Latin Dictionary and Grammar (1997) 66

<sup>515</sup> James Q. Whitman, ‘On Nazi Honor and New European Dignity’ in Christian Joerges & Navraj Singh Ghaleigh ‘*Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions*’, (eds. Hart 2003) 245-246

<sup>516</sup> In referring to dignitas, David Feldman held that it ‘is not human dignity of the sort which could conceivably be treated, in a sane world, as a fundamental value or as capable of generating a fundamental constitutional right.’ This statement was made in ‘Human Dignity as a Legal Value – Part I’ (1999) *Public Law* 682. On the same issue, Jeremy Waldron held that it ‘may seem an unpromising idea for human rights discourse, for such disclosure is characteristically egalitarian’ in Jeremy Waldron, ‘Dignity and Rank: In Memory of Gregory Vlastos’ (2007) 48 *Archives Européennes de Sociologie* 216

<sup>517</sup> Jeremy Waldron, ‘*The Harm in Hate Speech*’ (eds. Harvard University Press 2014) 88

<sup>518</sup> Jeremy Waldron, ‘*The Harm in Hate Speech*’ (eds. Harvard University Press 2014) 166-167

experienced as a result of the systematic development of hate speech which subsequently become part of accepted dialogue, pinpointing examples such as slavery to illustrate this point.<sup>519</sup> Cass Sunstein recognises the harm in hate speech but also incorporates a safety net by underlining that hate speech should be regulated if it can be demonstrated that the prohibitions are targeting harms rather than ideas.<sup>520</sup> The long-term effects of hate speech and the direct correlation within the continuing marginalisation of certain groups is recognised by Kent Greenwalt who holds that ‘epithets and more elaborate slurs that reflect stereotypes about race, ethnic group, religion, sexual preference and gender may cause continuing hostility and psychological damage.’<sup>521</sup>

Further, the issue of stereotypes could also be introduced within the framework of hate speech bans. Stereotypes can be described as ‘social ideas and preconceptions that exist about a particular group. Stereotypes create in and out groups: us versus them.’<sup>522</sup> Alexandra Timmer underlines the harmful effects of such stereotypes to include, amongst others, psychological distress and underachievement.<sup>523</sup> An anti-stereotyping approach for the European Court of Human Rights has been recommended and set out by Timmer, placing a particular focus on gender discrimination. Such an approach can be translated and placed within the sphere of hate speech bans. More particularly, hate speech could be deemed to contribute to the creation of stereotypes against particular groups and facilitate the creation of the ‘other’ which lies at the heart of the discrimination, hatred and violence emanating from the context under consideration. In fact, in *Vejdeland v Sweden*,<sup>524</sup> in which the ECtHR looked at homophobic speech, the concurring opinions of Judges Spielmann and Nussberger endorsed a Committee of Ministers Resolution against Croatia which looked at, amongst others, statements of the sort found in the Swedish case. The Resolution held that ‘these statements stigmatise homosexuals and are based upon negative, distorted, reprehensible and degrading stereotypes about the sexual behaviour of

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<sup>519</sup> Alexander Tsesis, *Destructive messages: How Hate Speech Paves the Way for Harmful Social Movements* (eds. New York University Press 2002) 136

<sup>520</sup> Cass Sunstein, *Democracy and the Problem of Free Speech* (eds. The Free Press 1993) 193

<sup>521</sup> Kent Greenwalt *Fighting Words Individuals, Communities and Liberties of Speech* (eds. Princeton University Press 1995) 59

<sup>522</sup> Alexandra Timmer, ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights’ 11 *Human Rights Law Review* 4, 715

<sup>523</sup> Alexandra Timmer, ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights’ 11 *Human Rights Law Review* 4, 716

<sup>524</sup> *Vejdeland v Sweden*, App. no. 1813/07, (ECHR 9 February 2012)

all homosexuals.’ There has, thereby, been an incorporation of the issue of stereotypes within the ECtHR sphere and in relation to hate speech. This particular sphere, that of an anti-stereotyping approach, has not been developed *per se* in relation to hate speech bans but could be grounds upon which analysis can be made, always taking into account the detrimental effects of stereotyping on the victims but also on society, more generally, given the divisions and classifications this approach results in.

In sum, as per Scanlon, there are a variety of groups who are affected by hate speech, not only the targeted victim. The very nature of hate speech distorts the possibility of producing and promoting a healthy and equal dialogue of the members of a society, which, in any case, is not the objective of hate speech. This, in itself, removes hate speech from the marketplace of ideas as it offers nothing of value but, instead, comes with dire effects such as harm to dignity, the production and promotion of stereotypes and the general destruction of personal and group rights. To extend this argument further, this reality results in hate speech leading to the violation of free expression as it silences particularly vulnerable and targeted groups. Moreover, the great harm which commentators, such as Tsesis and Sunstein, link to hate speech and the effects it has, not only on an individual level but also on a societal one, makes regulation imperative for them. However, the questions that remain include who is to decide what constitutes hate speech and, thus, where to draw the line between allowing free expression on the one hand and preventing the harms of hate speech on the other.

#### 4. Freedom of Expression: A Legal Assessment of Theoretical Issues

The literature below looks at the technical aspects of freedom of expression within a legal framework, laying out the principles developed in legal and philosophical theory regarding what the delimitations of free expression should be whilst also assessing the treatment of freedom of expression on national and/or supranational levels. The book ‘Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination,’<sup>525</sup> edited by Sandra Coliver, brings together a collection of essays which establish the international standards for dealing with hate speech and provides an overview of the legal regulation of hate speech in a large number of countries. This

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<sup>525</sup> Sandra Coliver, ‘*Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination*’ (Article 19, International Centre against Censorship, University of Essex, 1992)

book incorporates an introductory section regarding the balancing of rights and is simultaneously a rich source of the laws in the ambit of free speech and non-discrimination in the countries under consideration. During the countries' assessments, the authors pinpoint how the balance is found between competing rights. Dominic McGoldrick and Thérèse O'Donnell write on 'Hate Speech Laws: Consistency with National and International Human Rights Law.'<sup>526</sup> The article looks at the freedom of expression in a national, European and international framework, extensively assesses the case of *Faurisson v France* and sets out criteria for determining whether hate-speech laws are in compliance with national and international human rights law based on the variety of jurisprudence examined therein. It is a significant contribution as it refers to a series of different national laws, such as Israeli and German, as well as case-law from different States such as Canada and Australia. Therefore, this article gives an insight into the legal reality of several countries in the sphere of hate speech, is one of the most extensive analysis of the *Faurisson* case while the criteria it ultimately recommends are useful as indicators of the legitimacy of measures which restrict racist expression. For example, the authors note that restrictions on the freedom of expression for purposes of protecting the rights of others may 'extend to the protection of the community as a whole and thereby to the groups that make up that community.'<sup>527</sup> In Marloes van Noorloos' book 'Hate Speech Revisited: a Comparative and Historical Perspective on Hate Speech Law in The Netherlands and England & Wales',<sup>528</sup> the author conducts a comparative study on the historical development of hate speech and extreme speech laws in the two jurisdictions, looking at how and why the law of the two developed as it did, also considering the impact of international and European law. This contribution is particularly original since it offers an in-depth historical appreciation of the development of laws relevant to hate speech in the two jurisdictions. In Belavusau's book 'Freedom of Expression - Importing European and US Constitutional Models in Transitional Democracies',<sup>529</sup> the author looks at free speech in the Czech Republic, Hungary and Poland, assessing how these transitional democracies have incorporated free speech models of the CoE, the EU and the USA. Particularly

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<sup>526</sup> Dominic McGoldrick & Thérèse O'Donnell, 'Hate Speech Laws: Consistency with National and International Human Rights Law' (1998) 18 *Legal Studies* 453

<sup>527</sup> Dominic McGoldrick & Thérèse O'Donnell, 'Hate Speech Laws: Consistency with National and International Human Rights Law' (1998) 18 *Legal Studies* 453, 484

<sup>528</sup> Marloes van Noorloos, *Hate Speech Revisited: A Comparative and Historical Perspective on Hate Speech Law in The Netherlands and England & Wales* (eds. Intersentia 2011)

<sup>529</sup> Uladzislau Belavusau *Freedom of Expression- Importing European and US Constitutional Models in Transitional Democracies* (eds. Routledge 2013)

relevant to the current dissertation is the analysis of approaches taken to hate speech by the ECtHR and the EU. This book includes an assessment of, *inter alia*, all the relevant far-right cases dealt with on a Council of Europe level up until the time of writing and, also, provides an evaluation of the approach of the European Union to hate speech. The analysis of the EU approach is significant and, along with the same author's article 'Fighting Hate Speech through EU Law',<sup>530</sup> amounts to the first literature on regulating hate speech using European Union mechanisms, particularly in comparison with the more often looked at Council of Europe framework. Nazila Ghanea places hate speech in the realm of minority rights. More particularly, her book 'Minorities and Hatred: Protections and Implications'<sup>531</sup> looks at the protection of minorities through the restriction of hate speech. The book adopts the hypothesis that there exists a nexus between hate speech and the protection of minorities, which has not yet been adequately incorporated into international documents. To justify this position, the author examines the impact of Article 20 of the ICCPR on minorities and examines jurisprudence from several countries on the link between prohibiting hate and protecting minorities, also looking at international and European case-law. In David Kretzmer and Francine Kershman Hazan's 'Freedom of Speech and Incitement against Democracy'<sup>532</sup> the authors focus particularly on inciting violence and, more particularly, consider the extent to which speech that incites violence can be legitimately restricted by democratic States. It looks at USA and German approaches and the ECtHR case-law on incitement as well as theories of free speech and theoretical justifications of restricting speech, with the general framework emanating, in part, from the institutions' approaches to the far-right. Thus, the above literature sets out the general legal framework and treatment of the freedom of expression in relation to extreme speech with some pieces focusing on particular issues such as minority rights and the incitement to violence.

Although the majority of the above literature has referred to Strasbourg jurisprudence during the analysis of the issues, the literature mentioned below focuses solely on aspects related to this Court in the sphere of hate in particular and, more specifically, the issues of violent speech, the

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<sup>530</sup> Uladzislau Belavusau, 'Fighting Hate Speech through EU law' (2012) Amsterdam Law Forum, Vol.4 No.1 VU University Amsterdam

<sup>531</sup> Nazila Ghanea, 'Minorities and Hatred: Protections and Implications' (2010) 17 *International Journal on Minority and Group Rights*

<sup>532</sup> David Kretzmer & Francine Kershman Hazan, 'Freedom of Speech and Incitement against Democracy' (eds. Kluwer Law International 2000)



role of Article 17 of the ECHR and the ‘bad tendency test,’ with particular focus placed on *Féret v Belgium* and *Le Pen v France*. Antoine Buyse’s ‘Dangerous Expressions: The ECHR, Violence and Free Speech’<sup>533</sup> considers how the freedom of expression and the prevention of violence can be balanced, using, *inter alia*, right-wing extremist jurisprudence, such as *Vona*, *Norwood* and *Féret*, to illustrate the main arguments. Given that the analysis looks at such cases and since there exists an inextricable link between the far-right and violence, this article is of particular relevance to the topic under consideration. It indicates that the ECtHR case-law shows an ‘overlap between cases relating to hate speech and those relating to instances of violence-prone speech’<sup>534</sup> with the Court not always being clear as to the distinction between the two types of dangerous speech. It also demonstrates that the Court has not found a mechanism through which adequately to balance the prevention of violent speech and the freedom of expression. The same author has previously made a relevant contribution to a book entitled ‘Contested Contours – The Limits of Freedom of Expression from an Abuse of Rights Perspective – Articles 10 and 17 ECHR’<sup>535</sup> which focuses on the limits of freedom of expression from an abuse of rights perspective, considering Article 10 and Article 17 of the ECHR, placing the study within the framework of totalitarian regimes and particularly those of the far-right. It assesses the role of Article 17 of the ECHR, the relationship between Article 17 of the ECHR and other articles in particular Article 10 of the ECHR. The paper peruses case-law relevant to far-right expression and association where there has been a direct or indirect application or a discarding of Article 17 of the ECHR. From this analysis, it concludes that the Court applies Article 17 of the ECHR to situations of preventing totalitarian movements from abusing Convention rights as well as to those pertaining to revisionism, racism, anti-Semitism, Islamophobia and incitement to violence. This analysis interestingly shows that the Court has not been systematic when endeavouring to ‘categorise freedom of expression cases as falling either within the Convention’s protective

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<sup>533</sup> Antoine Buyse, ‘Dangerous Expressions, the ECHR, Violence and Free Speech’ (2014) 63 *International and Comparative Law Quarterly* 2

<sup>534</sup> Antoine Buyse, ‘Dangerous Expressions, the ECHR, Violence and Free Speech’ (2014) 63 *International and Comparative Law Quarterly* 2, 493

<sup>535</sup> Antoine Buyse, ‘Contested Contours – The Limits of Freedom of Expression from an Abuse of Rights Perspective – Articles 10 and 17 ECHR’ in Eva Brems & Janneke Gerards ‘*Shaping Rights in the ECHR : The Role of the European Court of Human Rights in Determining the Scope of Human Rights*’ (eds. Cambridge 2013)

scope (Article 10) or outside it (Article 17).<sup>536</sup> It also argues that experience has demonstrated that the task of deciphering whether activities do, in fact, aim at destroying human rights and democracy is, in fact, difficult. It concludes by arguing that an indirect application of Article 17 of the ECHR is the most suitable as it enables a proportionality test of the impugned measures under consideration and, thus, from a human rights perspective, is the most suitable approach. In Sottiaux's article on 'Bad Tendencies in the ECtHR's Hate Speech Jurisprudence'<sup>537</sup> the author places his analysis on the USA 'bad tendency' formula as a means to justify the suppression of ideas that put the foundations of government at risk. He argues that, although this formula has disappeared from American case-law, it marks the ECtHR's hate speech jurisprudence, thus, resulting in a lucid relation between the expression in question and the potential danger arising therefrom. He illustrates his arguments by focusing on *Féret v Belgium* and *Le Pen v France* on a European level and *R v Keegstra* on a Canadian level. The author acknowledges that the US-European comparison has occurred time and again in this sphere and, instead, looks at a Euro-Canadian comparison. The article finds that the ECtHR's current approach to hate speech 'is in need of re-evaluation,'<sup>538</sup> with the Court currently citing a variety of negative social and personal consequences which may arise from hate speech 'without indicating how they will ultimately affect its proportionality analysis.' It turns to *Keegstra* in which the Court distinguished between discriminatory speech and speech which incites hate or discrimination<sup>539</sup> as a method that should be looked at by the ECtHR for purposes of ensuring a more equitable approach to hate speech and Article 10 of the ECHR. Thus, the above three pieces of writing are directly related to the role and impact of the ECtHR in the framework of right-wing extremism, denoting key weaknesses of the Court in this sphere and seeking to advance recommendations for the improvement of its approach.

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<sup>536</sup> Antoine Buyse, 'Contested Contours – The Limits of Freedom of Expression from an Abuse of Rights Perspective – Articles 10 and 17 ECHR' in Eva Brems & Janneke Gerards *'Shaping Rights in the ECHR : The Role of the European Court of Human Rights in Determining the Scope of Human Rights'* (eds. Cambridge 2013) 185

<sup>537</sup> Stefan Sottiaux, 'Bad Tendencies in the ECtHR's Hate Speech Jurisprudence (2011) 7 *European Constitutional Law Review* 40

<sup>538</sup> Stefan Sottiaux, 'Bad Tendencies in the ECtHR's Hate Speech Jurisprudence (2011) 7 *European Constitutional Law Review* 40, 57

<sup>539</sup> Stefan Sottiaux, 'Bad Tendencies in the ECtHR's Hate Speech Jurisprudence (2011) 7 *European Constitutional Law Review* 40, 58

## 5. Freedom of Association

The literature on extreme-right association is limited in comparison to its expression counterpart. Three directly relevant articles can be found. Of particular relevance to this study is Stefan Sottiaux' article 'Anti-Democratic Associations: Content and Consequences in Article 11 Adjudication'<sup>540</sup> which seeks to evaluate the position of anti-democratic political parties under Article 11 of the ECHR doing so through an analysis of *Refah Partisi v Turkey*. Even though this case does not deal with right-wing extremism, *per se*, it is a landmark case to any analysis of Article 11 of the ECHR, with the conclusion drawn, as described below, being of particular relevance to hate speech and hateful association. The author's assessment is placed within the broader framework of Loewenstein's dilemma of whether a democracy can restrict the association of political parties without violating its very aims and objectives. The article's 'central claim is that the *Refah* Court adopted a standard which is both content and consequence-based' and, thus, resembles the US Supreme Court's First Amendment jurisprudence. The article's discussion builds up to the important question of why the ECtHR's analysis in *Refah Partisi* required a sufficiently imminent risk test whilst such a counterpart is not evident in its Article 10 case-law on hate speech, with the author referring to *Jersild v Denmark* to illustrate this example. This question subsequently provides a justification of the Court's treatment of Article 11 of the ECHR and, namely, that this reflects 'the essential role the Strasbourg organs ascribe to political associations in preserving democracy and pluralism.'<sup>541</sup> Further, in Meindert Fennema's contribution to a book entitled 'Legal Repression of Extreme-Right Parties and Racial Discrimination,'<sup>542</sup> the author looks at the origins of anti-racist and anti-fascist legislation, explores the ICERD, with a particular focus on Article 4 of the ICERD, considers the implementation of the ICERD by States Parties, with a particular focus on how far-right parties can be banned under such legislation and refers to actual cases and figures and looks at initiatives taken by the European Union for purposes of countering racism, while dedicating a separate section to the discussion on revisionism. The author makes several conclusions, two of which stand out. Firstly, that anti-fascist legislation has its foundations in militant democracy whereas

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<sup>540</sup> Stefan Sottiaux, 'Anti-Democratic Associations: Content and Consequences in Article 11 Adjudication' (2004) 22 *Netherlands Quarterly of Human Rights* 4

<sup>541</sup> Stefan Sottiaux, 'Anti-Democratic Associations: Content and Consequences in Article 11 Adjudication' (2004) 22 *Netherlands Quarterly of Human Rights* 4, 598

<sup>542</sup> Meindert Fennema, 'Legal Repression of Extreme Right Parties and Racial Discrimination' in Ruud Koopmans & Paul Statham 'Challenging International and Ethnic Relation Politics – Comparative European Perspectives' (eds., OUP 2000)

anti-racist legislation is founded on the principle of equality which is not easily compatible with the freedom of expression. Secondly, that phenomena such as globalisation and migration render the punishment of opinion to be contrary to democracy. The central issue with the first conclusion is that the author places anti-fascist legislation on a pedestal, pursuing sound and coherent objectives which don't find a place in the anti-racist counterpart and removing anti-racism from the framework of a militant democracy, with no adequate justification. The second conclusion arises without any explicit correlation between the three aforementioned realities and renders the limitation to the freedom of expression undemocratic. Either way, this article is valuable to the academic understanding of far-right parties as it is one of a kind in providing such lengthy normative overview of initiatives, legislation and case-law pertaining to, *inter alia*, banning far-right parties.

### Conclusion

Several of the thinkers discussed above provide for the possibility of rights being curtailed in the name of preventing harm to others. It is the crossroads of harm and rights and the severity and threshold of such harm which constitute the dichotomy that lies between libertarians and others. In this realm, scholarly disagreement does not lie in whether a particular right should be restricted in order to avoid harm to others but, rather, in deciphering whether something actually amounts to sufficient harm to justify such restriction. This issue becomes even more complicated in the realm of free expression as this is a right which many scholars consider to be of particular importance. The significant place held by expression has meant that libertarians and others are even more wary of finding that particular speech does, in fact, constitute harm. One could hold that this significance is extended to its vehicles, namely association and assembly, which are also subjects of consideration in this dissertation. Commentators who are against prohibiting hate speech have put forth arguments in the realm of the importance of free expression but, also, for other reasons such as Dworkin's point, for purposes of general legitimacy or that to regard a system as legitimate necessarily entails that hate speech is permitted. Those who wish to regulate it have come up with a variety of arguments, such as the great damage done by hate speech on an individual and societal level and the inability of hate speech to contribute to a marketplace of ideas. CRT has developed on the premise that racial inequalities lie at the heart of Western culture which prevent minority groups from equally and effectively participating in any

marketplace of ideas. The theory of militant democracy is another framework through which rights and freedoms can legitimately be restricted for purposes of protecting democracy itself. In light of the analysis of this chapter, the argumentation that will be put forth, hereinafter, will emanate from the premise that, permitting hate speech, and/or by extension associations and assemblies which constitute vehicles of such speech, a State paves the way for free speech to be abused. Permitting such hate results in the destruction of the rights and dignity of the victim on a micro (individual) and meso (community) level, whilst it has effects on a macro level as it damages community cohesion by embedding stereotypes against the victims and their groups. These effects further accentuate the vulnerable and/or marginalised position victims of hate find themselves in. Further, the permissibility of such speech and its vehicles facilitates a furtherance of the power gap between the powerful in comparison to the marginalised groups, with the latter experiencing (systematic) silencing by such speech, association or assemblies. As argued by Brink ‘hate speech can poison the well of mutual respect and discourage participation in the deliberative community,’<sup>543</sup> therefore directly affecting the equality required for Mill’s position to be enforceable in practice. In addition, the theoretical foundation of this dissertation also takes into account the fact that hate speech can be destructive for rights on an individual and societal level. It is the outcomes, such as racial discrimination and hate speech, which a militant democracy seeks to protect itself from by regulating association and expression that could potentially damage its very essence. In relation to what literature is available which interprets the theoretical and philosophical doctrines and principles, three conclusions can be drawn. Under the umbrella of right-wing extremism, one can find hate speech, hate crime and hateful types of associations and assemblies. These are entities within themselves but are interdependent on each other and to the broader framework of the extreme right movement. In this light, the first conclusion that can be drawn from the review is that most literature has focused on the aforementioned issues as entities within themselves. However, available literature has placed more focus on hate speech than hateful types of association, with no substantial assessment of the freedom of assembly in the framework of right-wing extremism as it arises within Article 11 of the ECHR. Lastly, the comparative approach between country laws and regulations has been adopted with a predominant reliance on the USA-European model, with the latter meaning Europe as an entity or a particular European country, more often than not, Germany.

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<sup>543</sup> David O. Brink, ‘Millian Principles, Freedom of Expression and Hate Speech’ (2001) 7 *Legal Theory* 119, 140

## CHAPTER THREE: THE UNITED NATIONS

### Introduction

This chapter aims to provide an overview of the international legal framework that regulates right-wing extremism by considering the development of international law that is relevant to this arena and by exploring its scope and objectives. By offering insight into the letter and spirit of international laws and principles, this chapter will constitute a benchmark for the subsequent appraisal of national laws in the two jurisdictions as well as looking at relevant principles formulated by UN documents particularly, the ICCPR and the ICERD. Further, with a view to ensuring an in-depth understanding of relevant provisions and themes, jurisprudence, General Comments and General Recommendations of the HRC and the CERD as well as reports of the UN Special Rapporteurs on Freedom of Expression, Freedom of Peaceful Assembly and of Association and on Racism and Xenophobia will be appraised. The aim of this approach is to determine the way in which the relevant provisions of the aforementioned instruments have been interpreted and implemented at a UN level. More particularly, right-wing extremism will be comprehended within the ambit of freedoms of expression, assembly and association and freedom from racial discrimination, through the prism of equality and non-discrimination. Thus, this chapter will start by setting out the normative framework of non-discrimination before continuing to look at the freedom from racial discrimination followed by the freedom of expression, assembly and association. It will also consider issues of sanctioning and prohibiting particular rhetoric and activity which overstep legitimate boundaries whilst also looking briefly at Article 5 of the ICCPR as another route to regulating far-right movements.

### 1. The Principle of Non-Discrimination in UN instruments

#### 1.1 Introduction: The Importance of International Non-Discrimination Law

The principle of non-discrimination, as developed by contemporary human rights law, can be traced back to the Charter of the United Nations which holds that the purposes of the UN are, amongst others, to ‘achieve international cooperation...in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.’<sup>544</sup> Article 13(1), therein, underlines that the UN General Assembly will assist ‘in the realization of human rights and fundamental freedoms for all without distinction as to race, sex,

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<sup>544</sup> Article 1.3 Charter of the United Nations 1945

language or religion.’ Article 1 of the UDHR states that ‘all human beings are born free and equal in dignity and rights.’ Article 2 of the UDHR provides that ‘everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ Article 7 of the UDHR constitutes the first effort to incorporate incitement to discrimination within the framework of discrimination, a theme which, as will be demonstrated, has been developed extensively and incorporated in instruments such as the ICERD and the ICCPR. More particularly, Article 7 of the UDHR provides that ‘... all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.’ Further, the Preambles of the ICCPR and the ICESCR confirm that the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’ The general non-discrimination clauses of the ICCPR and the ICESCR, namely Article 2(2) in both documents, follow the same approach as Article 2 of the UDHR. The ICESCR has habitually been disregarded in the framework of right-wing extremism, with more emphasis being placed on the ICCPR, the UDHR and the ICERD. However, in an interesting reference, the monitoring body of the ICESCR noted that Belgium ‘should adopt measures to ensure that xenophobia, racism and activities of racist organizations, groups or political parties are outlawed, with a view to complying with the principle of non-discrimination, set forth in article 2.2.’<sup>545</sup> The ICCPR incorporates a more specialised non-discrimination clause in the form of Article 26, therein, which states that ‘all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

Both Article 2 and Article 26 of the ICCPR provide for the principle of non-discrimination but, as noted by the HRC in its General Comment 18, ‘Article 26 of the ICCPR does not merely duplicate the guarantee already provided for in Article 2 of the same document but provides in

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<sup>545</sup> CESCR, Concluding Observations: Belgium (2000) ICESCR E/2001/22 7, para. 482

itself an autonomous right.<sup>546</sup> Article 26 of the ICCPR imposes certain obligations on States Parties when creating and implementing legislation, underlining that it must be in line with Article 26 of the ICCPR while Article 2 of the same provides for non-discrimination in relation to the enjoyment of rights as contained in the Covenant. Further, Article 26 of the ICCPR ‘is not limited to those rights which are provided for in the Covenant’<sup>547</sup> as it seeks to regulate legislation on all matters within and beyond the ICCPR’s boundaries. For example, in *Broeks v Netherlands*, the HRC held that when ‘legislation is adopted in the exercise of a state’s sovereign power, then such legislation must comply with Article 26 of the Covenant.’<sup>548</sup> The significance of the principle of non-discrimination is also reflected in Article 4 of the ICCPR which deals with derogations in times of emergency. Paragraph 1, therein, holds that States may take certain measures which derogate from their obligations under this Covenant provided that, amongst others, they ‘do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.’ However, the Covenant does not go as far as to make Article 26 non-derogable. Thus, the principle of non-discrimination has been established as a central tenet of several international documents. General Comment 18 of the HRC underlines that ‘non discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.’<sup>549</sup> In fact, the principles of equality and non-discrimination ‘are central to the human rights movement.’<sup>550</sup> In relation to these terms, it has been noted that equality and non-discrimination encompass the same theme and principle, but in a positive and negative manner respectively,<sup>551</sup> and are, thus, sometimes used interchangeably.

Notwithstanding the significance of the principle of non-discrimination, it is not defined in any of the above documents. The only effort to provide some kind of definition of non-discrimination is when it relates to a particular type, such as racial discrimination, as was discussed in chapter one. In order to fill this definitional gap, the HRC, by drawing from the definitions in the ICERD

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<sup>546</sup> Human Rights Committee General Comment 18, ‘Non-Discrimination’ (1994) HRI/GEN/1/Rev.1 at 26, para.7

<sup>547</sup> Human Rights Committee General Comment 18, ‘Non-Discrimination’ (1994) HRI/GEN/1/Rev.1 at 26, para.12

<sup>548</sup> *Broeks v Netherlands*, Communication no.172/1984 (9 April 1987) CCPR/C/OP/2, para.12.4

<sup>549</sup> Human Rights Committee General Comment 18, ‘Non-Discrimination’ (1994) HRI/GEN/1/Rev.1 para.12

<sup>550</sup> Jerome Shestack, ‘The Jurisprudence of Human Rights,’ in Theodor Meron ‘*Human Rights in International Law: Legal and Policy Issues*’ (eds. Clarendon 1984) 101.

<sup>551</sup> Ann F. Bayefsky, ‘The Principle of Equality or Non-discrimination in International Law’ (1990) 11 *Human Rights Quarterly* 1-2, 5



and CEDAW, underlined that discrimination, as incorporated in the ICCPR ‘should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.’<sup>552</sup> Further, through its case-law, the HRC has underlined that ‘not all differentiations in treatment can be deemed to be discriminatory under Article 26. A differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of Article 26.’<sup>553</sup> Even though the HRC notes that States Parties have an obligation to take the necessary measures to end discrimination both in the public and private spheres,<sup>554</sup> there is no jurisprudence that relates to the aforementioned articles from that Committee or from the Committee on Economic, Social and Cultural Rights in relation to right-wing extremism. Instead, complaints by victims of right-wing extremist movements have been dealt with by the CERD in the realm of racial discrimination. Nevertheless, non-discrimination as originally developed by the International Bill of Rights<sup>555</sup>, set the scene for the subsequent development of particular types of discrimination. Combatting right-wing extremism can be deemed to be a central objective of the above instruments given that international human rights law, as construed in the aftermath of World War II, sought to tackle the phenomenon that once brought about the destruction of the international community, that being radical extremism. For example, the drafters of the UDHR ‘made it abundantly clear that the Declaration on which they were about to vote had been born out of the experience of the war that had just ended.’<sup>556</sup> As noted by the Lebanese delegate to the drafting process ‘the document was inspired by the opposition to barbarous doctrines of Nazism and Fascism.’<sup>557</sup> These doctrines undoubtedly emanated from

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<sup>552</sup> Human Rights Committee General Comment 18, ‘Non-Discrimination’ (1994) HRI/GEN/1/Rev.1 at 26, para.12

<sup>553</sup> See, *inter alia*, Zwaan-de Vries v. The Netherlands, Communication no. 182/1984, (9 April 1987), CCPR/C/OP/2, para.13, Süsser v. Czech Republic, Communication no. 1488/2006 (28 April 2008) CCPR/C/92/D/1488/2006, para. 7.2

<sup>554</sup> Human Rights Committee General Comment 28, ‘Article 3 - Equality of Rights Between Men and Women’ (2000) CCPR/C/21/Rev.1/Add.10, para.4

<sup>555</sup> UDHR, ICCPR and ICESCR

<sup>556</sup> Johannes Morsink, ‘*The Universal Declaration of Human Rights, Origins, Drafting and Intent*’ (eds. University of Pennsylvania Press 1999), 36

<sup>557</sup> Johannes Morsink, ‘*The Universal Declaration of Human Rights, Origins, Drafting and Intent*’ (eds. University of Pennsylvania Press 1999) 36

discriminatory beliefs and practices, and so the principle of non-discrimination, as formulated by the international community, was a key to ensuring the objectives of the drafters. This mechanism was subsequently tailor-made to cater to the duties and rights arising from particular types of discrimination such as racial discrimination, which lie at the heart of right-wing extremism.

## 2. Freedom from Racial Discrimination

### 2.1 General Overview of UN Instruments

The freedom from racial discrimination is a significant constituent of international human rights law, expressed in several UN documents and initiatives as one of the many grounds from which discrimination can emanate. It is dealt with as an entity in itself by the ICERD. This Convention was adopted by the UN General Assembly in 1965 and came into force in 1969 and is the first international treaty to deal directly and exclusively with the issue of racial discrimination, offering the most comprehensive international response to the issue yet. The ICERD and its monitoring body seek to eliminate racial discrimination in the public and private spheres through several mechanisms. The Convention includes a variety of provisions that contribute to its objective such as the obligation for States to create comprehensive legislation to combat this phenomenon,<sup>558</sup> to guarantee effective protection and remedies for victims,<sup>559</sup> to provide for education and awareness raising to combat prejudices<sup>560</sup> and to punish racially discriminatory expression and association.<sup>561</sup> In the next section, the ICERD will be discussed in more detail because of its importance to the issue of extremist right-wing parties and groups which habitually promote racial hatred and discrimination. With a view to elucidating key meanings and notions, jurisprudence of the ICERD's monitoring body as well as General Recommendations and Concluding Observations prepared by this body will also be considered.

Before proceeding to the analysis of the ICERD, it is useful to mention several other international sources which are relevant in relation to the prohibition of racial discrimination. The Charter of the United Nations, the UDHR and the International Covenants, discussed

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<sup>558</sup> Article 2(d), ICERD

<sup>559</sup> Article 6, ICERD

<sup>560</sup> Article 7, ICERD

<sup>561</sup> Article 4, ICERD

previously, all stipulate that no distinction to human rights contained, therein, must be made on the basis of several factors, including race.<sup>562</sup> In 1994, the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance<sup>563</sup> was appointed to focus on these issues by transmitting appeals and communications to States, undertake fact-finding visits, publish country reports and submit annual or thematic reports to the Human Rights Council and interim reports to the UN General Assembly on the Rapporteur's work.<sup>564</sup> Several of the documents issued by this organ will be considered later on. Further, in 1997, the UN General Assembly adopted Resolution 52/11 which incorporated its decision to hold a World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.<sup>565</sup> The World Conference, which was held in 2001 in Durban, South Africa, was an effort to contribute to the struggle of eradicating all forms of racism. The Conference resulted in the Durban Declaration and Programme of Action. Notwithstanding the non-binding nature of this initiative, the Declaration outlined a vision for the 21<sup>st</sup> century where racism and racial discrimination are combatted effectively with the Programme of Action translating the Declaration's objectives into practical recommendations. In relation to right-wing extremism, the Durban Declaration condemned 'persistence and resurgence of neo-nazism, neo-fascism and violent nationalist ideologies based on racial or national prejudice'<sup>566</sup> as well as racist organisations and political platforms.<sup>567</sup> The Programme of Action requested that all States discourage racist activities and xenophobic tendencies that result in the rejection of migrants.<sup>568</sup> It also urged States to enforce measures to tackle racist crime and called upon them to promote initiatives that deter and combat radical extremist movements which promote racism. In relation to the Durban Declaration, the Commission on Human Rights created the Intergovernmental Working Group to oversee the Declaration's implementation.<sup>569</sup> In 2003, the UN Secretary General appointed the Group of

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<sup>562</sup> Article 55(c) of the United Nations Charter, Article 2 of the UDHR and Article 2 of the ICCPR and ICESCR

<sup>563</sup> Appointed by the Commission on Human Rights Resolution 1993/20

<sup>564</sup> Mandate of Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance : <<http://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/OverviewMandate.aspx>> [Accessed 13 January 2014]

<sup>565</sup> General Assembly Resolution A/RES/52/111

<sup>566</sup> World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance Durban Declaration (2001) A/CONF.189/12, para.84

<sup>567</sup> World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance Durban Declaration (2001) A/CONF.189/12, para.85

<sup>568</sup> World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance Programme of Action (2001) A/CONF.189/12, para.24

<sup>569</sup> Commission on Human Rights Resolution 2002/68

Independent Eminent Experts,<sup>570</sup> again for purposes of overseeing the implementation of the Durban Declaration. In relation to this institution, the UN General Assembly emphasised the role of these experts in ‘mobilizing the necessary political will required for the successful implementation of the Durban Declaration and Programme of Action,’<sup>571</sup> thereby reflecting that political factors as well as social and legal factors are necessary for combatting racism. Through the aforementioned initiatives, the international community has recognised the significance of dealing with this phenomenon and has taken a variety of relevant measures and established a number of institutions and groups in order to combat racism effectively. However, the most important mechanism continues to be the ICERD, which deals solely with this issue and will, therefore, be a central consideration of this chapter. Given that the analysis of this instrument is being effectuated against the backdrop of right-wing extremism, the focus will be placed on Article 4 of the ICERD which is central to racist expression and associations. In relation to the principle of non-discrimination, ‘ideas based upon racial superiority or hatred fundamentally deny the equality of human beings’<sup>572</sup> and, given that racial discrimination and incitement to racial discrimination ‘reject the very foundation of human rights,’<sup>573</sup> Article 4 of the ICERD incorporates a broad understanding of the kind of acts that fall within its ambit, also allowing for the incitement to such racial discrimination. This article provides for the prohibition of propaganda and organisations promoting racial discrimination. Moreover, it underlines the positive duties a State has to eradicate all such ideas and acts. Article 4 of the ICERD condemns propaganda and organisations endorsing racial superiority and promoting racial discrimination. Thus, it explicitly limits the freedom of expression and association to those disseminating ideas and carrying out activities relevant to this scope. It can, therefore, be said that Article 4 of the ICERD is the most specialised tool within the international framework that equips States with the duty to punish any ideas and acts of violence against persons of another colour or ethnic origin and prohibit any organisations which promote racial discrimination. The central issues of

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<sup>570</sup> General Assembly Resolution 56/266: Programme of activities for the implementation of the International Decade for People of African Descent (18 November 2014)

<sup>571</sup> General Assembly Resolution 59/177: Global efforts for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action (20 December 2004)

<sup>572</sup> German Institute for Human Rights, Written Contribution to the Thematic Discussion of the Committee on the Elimination of Racial Discrimination on Racist Hate Speech (August 28<sup>th</sup> 2012), 6

<sup>573</sup> German Institute for Human Rights, Written Contribution to the Thematic Discussion of the Committee on the Elimination of Racial Discrimination on Racist Hate Speech (August 28<sup>th</sup> 2012), 6

prohibitions of speech and/or groups as well as the issue of sanctioning will be discussed later on. In light of the above, Article 4 of the ICERD will be assessed from three separate yet interrelated angles, namely non-discrimination, expression and association. In light of the interrelationship between Article 4(a) and 4(b) to the freedom of expression and association respectively, the two articles shall be appraised in the sections that deal with these two freedoms.

## 2.2 Monitoring ICERD Obligations: The Committee on the Elimination of Racial Discrimination

In order, in part, to monitor obligations of States Parties in relation to Convention provisions, Article 8 of the ICERD established the Committee on the Elimination of Racial Discrimination (CERD) consisting of ‘eighteen experts of high moral standing and acknowledged impartiality elected by States Parties.’ The CERD receives periodic reports from States Parties and makes recommendations upon them to the UN General Assembly.<sup>574</sup> It may receive inter-State complaints<sup>575</sup> which are then referred to an *ad hoc* Conciliation Commission<sup>576</sup> with a view to reaching an amicable solution. The ICERD also contains an optional clause to permit communications from individuals or groups of individuals, within States Parties’ jurisdiction, claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention in response to which the CERD makes suggestions and recommendations to the State Party.<sup>577</sup> Unlike the HRC, which can receive and consider communications from individuals only, the CERD may consider complaints from groups of individuals as well as individuals, as stipulated in Article 14 ICERD. Further, it is clear from the CERD’s case-law that communications by non-governmental organisations can also be accepted. In *Zentralrat Deutscher Sinti und Roma et al. v Germany*, the CERD clarified that such an organisation could present a complaint, since ‘bearing in mind the nature of the organisation’s activities and the groups of individuals they represent, they do satisfy the “victim” requirement within the meaning of Article 14(1).’<sup>578</sup> This demonstrates that, in relation to admissibility criteria, the Committee was ready to interpret the spirit of Article 14 of the ICERD rather than simply its letter, by allowing an application from an organisation with a legitimate interest and correlation to the

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<sup>574</sup> Article 9, ICERD

<sup>575</sup> Article 11, ICERD

<sup>576</sup> Article 12, ICERD

<sup>577</sup> Article 14, ICERD

<sup>578</sup> *Zentralrat Deutscher Sinti und Roma et al. v Germany*, CERD/C/72/D/38/2006 (3 March 2008), CERD/C/72/D/38/2006, para.7.2

content of the complaint. The CERD plays a pivotal role, on an international level, in the regulation of right-wing extremism as it offers clarification and explanation of legal principles and country obligations arising from the ICERD, through its General Recommendations. An important example from the perspective of this study is General Recommendation 35 dealing with combatting racist speech. Also of importance are its Concluding Observations on particular States Parties as it raises points of concern or applauds measures or initiatives taken by countries in the more general ambit of combatting racial discrimination, often making direct statements *vis-à-vis* the regulation of right-wing extremism. Notwithstanding its non-binding nature, the CERD's jurisprudence, which results from the handling of individual and group complaints which involve, amongst other elements, hate speech and activities, contributes to the improvement of relevant laws and policies if the State Party opts to adopt the recommendations of the Committee. The relevant documentation prepared by the CERD will be discussed throughout the analysis of Article 4 of the ICERD.

### 2.3 Article 4 ICERD: General Overview

Article 4 of the ICERD deals with the prohibition of ideas and groups that disseminate and promote ideas of racial superiority and hatred and carry out acts of violence against minority groups. In fact, Article 4 is the provision which has 'functioned as the principal vehicle for combatting hate speech'<sup>579</sup> but is also central to limiting the actions of racist associations. This article also notes that incitement to racial discrimination and incitement to acts of violence constitute a prohibited activity. More particularly, Article 4 of the ICERD provides that:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, *inter alia*:

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<sup>579</sup> CERD General Recommendation 35: Combatting Racist Hate Speech (2013) CERD/C/GC/35, para.8

- (a) Shall declare an offence punishable by law 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, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

Article 4 of the ICERD is of a mandatory character<sup>580</sup> and the CERD has underlined that ‘the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted.’<sup>581</sup> Article 4 has been characterised as ‘the most important article in the Convention.’<sup>582</sup> The CERD noted in its General Recommendation 15 on ‘Measures to Eradicate Incitement to or Acts of Discrimination’ that, when the ICERD was adopted, Article 4 was regarded as a key tool for the fight against racial discrimination.<sup>583</sup> As underlined by the Committee, at the time of the ICERD’s adoption ‘there was a widespread fear of the revival of authoritarian ideologies... Since that time, the Committee has received evidence of organized violence based on ethnic origin and the political exploitation of ethnic difference. As a result, implementation of Article 4 is now of increased importance.’<sup>584</sup> As such, Article 4 has always been central to any discourse on right-wing extremism.

## 2.4 General Prohibition of Incitement to Racial Discrimination

Article 4 of the ICERD declares punishable by law the incitement to racial discrimination and incitement to acts of violence and declares illegal activities which incite racial discrimination.

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<sup>580</sup> CERD General Recommendation 15: ‘Measures to Eradicate Incitement to or Acts of Discrimination’ (1985) A/40/18 at 120. This principle was reiterated in a number of documents including the CERD General Recommendation 35: Combatting Racist Hate Speech (2003) CERD/C/GC/35, para.10

<sup>581</sup> CERD 2002 Statement on Racial Discrimination and Measures to Combat Terrorism, A/57/18 Chapter XI C.

<sup>582</sup> Drew Mahalic & Joan Gambee Mahalic, The Limitation Provisions of the International Convention on the Elimination of all Forms of Racial Discrimination (1987) 9 *Human Rights Quarterly* 1, 89

<sup>583</sup> General Recommendation 15: Measures to Eradicate Incitement to or Acts of Discrimination (1994) A/48/18 at 114, para.1

<sup>584</sup> General Recommendation 15: Measures to Eradicate Incitement to or Acts of Discrimination (1994) A/48/18 at 114, para.1

The CERD places great importance on prohibiting incitement, recognising the major potential it has for destruction. For example, in its Concluding Observations to Poland, it expressed concern that the State dismissed cases of incitement due to the alleged low impact on society<sup>585</sup> and noted that ‘according to the Convention, all such cases are very harmful to society.’<sup>586</sup> However, for incitement to racial discrimination to exist, it is necessary that there is a reasonable possibility that the statement could give rise to this type of discrimination.<sup>587</sup> The CERD has noted that no conditions, such as intention or the pursuit of a particular objective such as stirring up hatred, need to exist for incitement to racial discrimination to be established, given that ‘article 4(a) of the Convention declares punishable the mere act of dissemination or incitement, without any conditions.’<sup>588</sup> More particularly, the intention of the perpetrator does not need to be established since, as emphasised by the CERD ‘what is penalized ... is the mere act of incitement, without reference to any intention on the part of the offender or the result of such incitement, if any.’<sup>589</sup> The CERD has only provided details on the aspect of intention without an extrapolation of what can actually constitute incitement to racial discrimination under this article. This would be useful for States when drafting, incorporating, amending and/or implementing the necessary legislation and deciding on relevant case-law.

When considering the issue of incitement, the CERD often ‘recommends remedying gaps in legislation, preferring specific legislation on this issue.’<sup>590</sup> For example, in its concluding observations to Israel, the CERD underlined the need to ‘expand the definition of racism so as to include incitement on account of ethnic origin, country of origin, and religious affiliation.’<sup>591</sup> Even where there exists relevant legislation, the CERD does, when necessary, provide

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<sup>585</sup> CERD Concluding Observations: Poland (2003) A/58/18, para. 159

<sup>586</sup> CERD Concluding Observations: Poland (2003) A/58/18, para. 159

<sup>587</sup> Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2002) para. 6

<sup>588</sup> CERD Study: Positive Measures Designed to Eradicate all Incitement to, or Acts of, Racial Discrimination: Implementation of ICERD, Article 4, New York, UN, 1986, para.235. This study was prepared for the Second World Conference on Racism in 1983 as A/CONF.119/10.

<sup>589</sup> CERD Study: Positive Measures Designed to Eradicate all Incitement to, or Acts of, Racial Discrimination: Implementation of ICERD, Article 4, New York, UN, 1986, para.96. This study was prepared for the Second World Conference on Racism in 1983 as A/CONF.119/10

<sup>590</sup> CERD Study: Positive Measures Designed to Eradicate all Incitement to, or Acts of, Racial Discrimination: Implementation of ICERD, Article 4, New York, UN, 1986, para.235. This study was prepared for the Second World Conference on Racism in 1983 as A/CONF.119/10

<sup>591</sup> CERD Concluding Observations: Israel (2012) CERD/C/ISR/CO/14-16, para. 14



recommendations for its improvement. In its Concluding Observations to New Zealand, the Committee underlined its concern ‘at the absence of a comprehensive strategy to address incitement to racial hatred committed in cyberspace,’<sup>592</sup> directing the State Party in this direction. Also, in its concluding observations to the UK, the Committee sought to broaden the scope of the notion of incitement to include a wide range of grounds and recommended ‘the extension of the crime of incitement to racial hatred to cover offences motivated by religious hatred against immigrant communities.’<sup>593</sup>

## 2.5 State Obligations Arising from Article 4

Article 4 of the ICERD imposes a number of specific obligations on the States Parties which are specifically interesting for the purposes of the current study. For example, the UN General Assembly has noted that, under this article, States Parties are under the obligation to adopt immediate and positive measures ‘to condemn all propaganda and all organizations that are based on ideas of racial superiority... and to eradicate all incitement to, or acts of, such discrimination.’<sup>594</sup> It has also been reiterated that States Parties must criminalise the incitement to imminent violence based on religion or belief.<sup>595</sup> The CERD has emphasised the significant character of these obligations by stating that ‘the fact that Article 4 is couched in terms of States Parties’ obligations, rather than inherent rights of individuals does not imply that they are matters to be left to the internal jurisdiction of States parties, and as such immune from review.’<sup>596</sup> The CERD itself has stressed time and again that States Parties have an obligation to draft and implement legislation to combat racial discrimination and incitement to hatred and discrimination as a central part of Article 4. Furthermore, the CERD has underlined that to comply with the obligations of Article 4, States Parties must not only ensure the enactment of

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<sup>592</sup> CERD Concluding Observations: New Zealand (2013) CERD/C/NZL/CO/18-20, para.9

<sup>593</sup> CERD Concluding Observations: UK (2003) A/58/18, para. 540

<sup>594</sup> General Assembly Resolution 66/143: Inadmissibility of certain practices that contribute to fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance: (29 March 2012)

<sup>595</sup> Human Rights Council Resolution 16/18: Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief (12 April 2011), Human Rights Council Resolution 19/25: Combating intolerance, negative stereotyping and stigmatization of, and discrimination and incitement to violence and violence against persons based on religion or belief, (10 April 2012)

<sup>596</sup> The Jewish community of Oslo et al. v Norway (15 August 2005) Communication no. 30/2003, (CERD/C/67/D/30/2003)

appropriate legislation but also its effective implementation.<sup>597</sup> As far back as its first General Recommendation in 1972, the Committee noted that several countries had not incorporated Article 4 into their national legislation, ‘the implementation of which...is obligatory under the Convention for all States parties.’<sup>598</sup> Over the years, the Committee has given further instructions regarding this legislation. For example, in *Gelle v Denmark*, the Committee observed that ‘it does not suffice, for purposes of Article 4 of the Convention, merely to declare acts of racial discrimination punishable on paper. Rather, criminal laws and other legal provisions prohibiting racial discrimination must also be effectively implemented by the competent national tribunals and other State institutions. This obligation is implicit in Article 4 of the Convention.’<sup>599</sup> However, in considering remedies and redress, Article 6 of the ICERD, which more specifically relates to effective remedies, ‘does not impose upon States Parties the duty to institute a mechanism of sequential remedies, up to and including the Supreme Court level, in cases of alleged racial discrimination.’<sup>600</sup> Further, in *Yilmaz-Dogan v The Netherlands*, the Committee observed that the expediency principle, which it has defined as ‘the freedom to prosecute or not prosecute, is governed by considerations of public policy’<sup>601</sup> and noted that the Convention ‘cannot be interpreted as challenging the *raison d’être* of that principle.’<sup>602</sup> Nevertheless, the Committee noted that in light of the guarantees laid down in the Convention, the Convention should be respected in each case of alleged racial discrimination or incitement thereto.<sup>603</sup>

Further, as highlighted in *Gelle v Denmark*, Article 4 of the ICERD imposes the obligation on States Parties to carry out an effective investigation into whether or not an act of racial discrimination has taken place, omission of which results in a breach of the said article.<sup>604</sup> In *Jama v Denmark*,<sup>605</sup> the Committee stipulated that States Parties must ensure that the police and judicial authorities conduct thorough investigations into allegations of acts of racial

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<sup>597</sup> CERD General Recommendation 15: Measures to Eradicate Incitement to or Acts of Discrimination, A/48/18 at 114 (1994), para.2

<sup>598</sup> CERD General Recommendation 1: States Parties’ Obligations (1972) A/8718 at 37

<sup>599</sup> *Gelle v Denmark*, Communication no. 34/2004 (15 March 2006) CERD/C/68/D/34/2004, para. 7.3. This was reiterated in *Jama v Denmark*, *Adan v Denmark* and *TBB-Turkish Union v Germany*.

<sup>600</sup> *Gelle v Denmark*, Communication no. 34/2004 (15 March 2006) CERD/C/68/D/34/2004, para. 7.3. This was reiterated in *Jama v Denmark*, *Adan v Denmark* and *TBB-Turkish Union v Germany*.

<sup>601</sup> *Yilmaz-Dogan v The Netherlands*, Communication no. 1/1984 (10 August 1988) CERD/C/36/D/1/1984, para.9.4

<sup>602</sup> *Yilmaz-Dogan v The Netherlands*, Communication no. 1/1984 (10 August 1988) CERD/C/36/D/1/1984, para.9.4

<sup>603</sup> *Yilmaz-Dogan v The Netherlands*, Communication no. 1/1984 (10 August 1988) CERD/C/36/D/1/1984, para.9.4

<sup>604</sup> *Gelle v Denmark*, Communication no. 34/2004 (15 March 2006) CERD/C/68/D/34/2004, para. 7.6

<sup>605</sup> *Jama v Denmark*, Communication no. 41/2008 (21 August 2009) CERD/C/75/D/41/2008

discrimination, as referred to in Article 4 of the Convention. In *L.K. v the Netherlands*, the Committee underlined that ‘when threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition,’<sup>606</sup> thereby highlighting that investigation needs to be speedy in order to be adequate. Thus, the ICERD imposes on States the obligation to incorporate sufficient legislation to investigate and combat racial discrimination and incitement thereto without dictating the nature of the remedies to be imposed.

## 2.6 Conclusion: Prohibition of Discrimination and Racial Discrimination

Therefore, non-discrimination is a central constituent of international human rights law, as initially developed by the International Bill of Rights and later incorporated in a specialised manner, and namely in the form of combatting racial discrimination in the ICERD. As such, States Parties have a duty to prevent, prohibit and punish activities that are discriminatory to others. Moreover, it is upon the premise of non-discrimination that limitations to expression, assembly and association, as discussed further down and as incorporated in the UDHR, the ICCPR and the ICERD, have been developed. Particularly, the exercise of these freedoms must not result in discrimination to others.

## 3. Freedom of Expression

### 3.1 Overview of Freedom of Expression in UN Instruments

Freedom of opinion and expression are key components of liberal democracies as they are, in conjunction with each other, central vehicles that allow citizens to develop and voice their ideologies and belief systems in the formal and informal public domains. The importance of freedom of expression was underlined in Resolution 59(1) of the UN General Assembly’s first session, which holds that ‘freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.’<sup>607</sup> Freedom of expression is enshrined, in combination with the freedom of opinion, in the UDHR and the ICCPR. General Comment 34 of the HRC underlines that expression includes, amongst others,

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<sup>606</sup> *L.K. v The Netherlands*, Communication no. 4/1991 (16 March 1993) A/48/18, para. 6.6

<sup>607</sup> General Assembly Resolution 59(I): Calling of an International Conference on Freedom of Information (14 December 1946)

political discourse,<sup>608</sup> while General Comment 25<sup>609</sup> emphasises the importance of freedom of expression for the exercise of public affairs. As well as providing protection to the freedom of expression which is to be limited only if certain conditions are fulfilled, international law directly prohibits expression in the form of dissemination of ideas based on racial superiority or hatred.

The complex interrelationship between racial hatred and the freedom of expression has been recognised and tackled by a series of international initiatives. In 2011, the Office of the United Nations High Commissioner for Human Rights organised a series of expert workshops on incitement to national, racial or religious hatred, as reflected in international human rights law. In 2011, the expert workshops resulted in a large amount of information regarding racial hatred as well as recommendations for better implementation of the relevant international human rights standards. The resulting document of this initiative was the so-called Rabat Plan of Action,<sup>610</sup> which incorporates the conclusions and recommendations of the final expert workshop which took place in 2012 in Rabat, as well as an analysis of the positions held by national legislation, jurisprudence and policies in the various UN states. It makes recommendations on each point and, therefore, constitutes a significant source when evaluating the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. As will be demonstrated, the freedom of expression is provided with a high level of protection within the system of the UN while the same institution is careful when it comes to especially dangerous expression, incorporating relevant limitations and prohibitions into the legal framework, particularly in light of the link between the freedom of expression and racist speech, promulgated by extreme right-wing movements. As noted in the Rabat Plan of Action, the right to freedom of expression allows the open debate and criticism of religious matters and beliefs.<sup>611</sup> A similar position is taken by the HRC, which has emphasised that the freedom of

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<sup>608</sup> Human Rights Committee General Comment 34: Article 19: Freedoms of Opinion and Expression (2011) CCPR/C/GC/34, para.11

<sup>609</sup> Human Rights Committee General Comment 25: Article 25 -The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (1996) CCPR/C/21/Rev.1/Add.7

<sup>610</sup> Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2002) para. 6

<sup>611</sup> Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2002) para. 10

expression is of paramount importance in any society, and that any restrictions to its exercise must meet a strict test of justification.<sup>612</sup>

This section shall consider the development, composition and implementation of the said freedom in various instruments of international human rights law, taking into account the balancing exercise which is effectuated between potentially conflicting rights and principles as well as prohibitive provisions. Firstly, Article 19 of the UDHR, which established general notions pertaining to freedom of expression shall be considered, followed by a discussion of Article 19 of the ICCPR which deals with freedom of expression and legitimate limitations thereto and of Article 20(2) of the ICCPR, which is particularly relevant to extreme speech. This section will close with an analysis of Article 4(a) of the ICERD, which has been formulated to prohibit the dissemination of racist ideas through expression.

### 3.2 Article 19 of the Universal Declaration of Human Rights: General Overview

Article 19 of the UDHR provides that:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19 of the UDHR does not expressly provide for any legitimate limitation that can be imposed on the freedom of expression nor does it include an express restriction of hate speech. This article recognises that opinions are to be held ‘with no interference,’ while no such qualification is made for the freedom of expression, thereby indirectly paving the way for restrictions of the freedom of expression formulated in later documents. Indeed, the freedom of expression, as provided for by the UDHR, falls under the general limitations of Articles 29 and

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<sup>612</sup> See *inter alia* Kim v The Republic of Korea, Communication no. 574/1994 (4 January 1999) CCPR/C/64/D/574/1994, Park v The Republic of Korea, Communication no. 628/1995 (3 November 1998) CCPR/C/64/D/628/1995, Kungurov v Uzbekistan, Communication no. 1478/2006 (15 September 2011) CCPR/C/102/D/1478/2006

30 of the UDHR. Article 29 of the UDHR places duties on individuals towards the community and underlines that limitations to the exercise of rights and freedoms are to be imposed insofar as ‘they are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.’ In addition, it provides that the rights and freedoms enshrined in the Declaration ‘may in no case be exercised contrary to the purposes and principles of the United Nations.’ Further, Article 30 of the UDHR states that ‘nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.’ This principle was also enshrined in later provisions, such as Article 5 of the ICCPR and, in the case of expression of extremist groups, can be used as a yardstick for restriction given the potentially destructive impact of racist speech on the rights and freedoms of target groups. Further, the UDHR was drafted ‘because the world community wanted to protect itself from Nazism, racism and fascism.’<sup>613</sup> Taking into account the historical setting in which the UDHR was drafted as well as the importance granted to equality and non-discrimination throughout, it can safely be argued that this document does not afford racist speech protection as this type of speech is excluded as a result of the limitation clauses as well as the overall spirit of the UDHR. More particularly ‘the rights of equality and non-discrimination are central in the Universal Declaration and no rights, including speech rights, may be asserted to destroy them.’<sup>614</sup> As a result, from the non-destruction clause enshrined in Article 30 of the UDHR, the protection against incitement, as offered by Article 7 of the UDHR, and the limitation grounds, as set out by Article 29 therein, as well as from the historical setting of the UDHR, it can be deduced that hate speech and incitement to racial discrimination are not protected by this document. However, care must be taken when applying relevant limitations and restrictions given that, as noted by the High Commissioner for Human Rights, ‘defining the line that separates protected from unprotected speech is ultimately a decision that is best made after a thorough assessment of the

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<sup>613</sup> Johannes Morsink, *The Universal Declaration of Human Rights, Origins, Drafting and Intent* (eds. University of Pennsylvania Press 1999) 66

<sup>614</sup> Elizabeth Defeis E, ‘Freedom of Speech and International Laws: A Response to Hate Speech’ 29 *Stanford Journal of International Law* 57, 71

circumstances of each case.<sup>615</sup> Thus, the situation is not as simple as it may first appear given that certain definitions need to be clarified, always taking into account the content and context of the speech in question as only then may one determine if the speech is unprotected and can, therefore, be legitimately restricted. Moreover, what lies at the heart of this exercise is coherently striking the balance between the freedom of expression and the freedom from racial discrimination. An effort to extrapolate upon what kind of speech is unprotected was made by the Rabat Plan of Action which will be discussed further in the framework of Article 20(2) of the ICCPR.

Notwithstanding the general normative framework that the Declaration sought to establish, it by no means provides a precise balance test to be used in applying the freedom of expression. Rather, the UDHR sets the scene for the more complex assessment of the actual limitations that can be imposed on this freedom which was subsequently provided for by the ICCPR, as discussed further on.

### 3.3 Article 19 of the International Covenant on Civil and Political Rights: General Overview

The ICCPR was adopted and opened for signature, ratification and accession in 1966 and entered into force in 1976. Article 19 of the ICCPR provides for the freedom of opinion and expression. More particularly, it states that:

1. Everyone shall have the right to hold opinions without interference;
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice;
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;

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<sup>615</sup> Opening Remarks by Navanethem Pillay, UN High Commissioner for Human Rights, 2 October 2008, Expert Seminar on the Links between Articles 19 and 20 of the International Covenant on Civil and Political Rights; See also, UN Human Rights Committee, General Comment 34, para. 35

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

The freedom of opinion is granted an absolute status under the ICCPR with Article 19 stipulating that there exists the right to hold opinions without interference. However, no such provision is incorporated in reference to the freedom of expression which is a qualified right. General Comment 34 of the HRC underlines that the freedoms of opinion and expression mentioned in Section 1 of this provision are closely related, ‘with freedom of expression providing the vehicle for the exchange and development of opinions.’<sup>616</sup>

#### 3.4 Monitoring ICCPR Obligations: The Human Rights Committee

Article 28 of the ICCPR establishes the HRC, which is the supervisory and enforcement body of the ICCPR. States Parties undertake to submit reports on the measures they have adopted which give effect to the rights recognised therein. The HRC can consider inter-state complaints regarding violations of the rights of the ICCPR, periodic reports of the State Parties and, under the First Protocol to the ICCPR, the Committee can consider individual complaints or communications in the event of alleged violation of the rights enshrined therein. In *J.R.T and the W.G. Party V Canada*,<sup>617</sup> the Committee underlined that it is only authorised to consider communications submitted by individuals and not associations. This is relevant in the ambit of racist speech as this limitation prohibits organised human rights groups or groups which promote the rights of particular ethnic groups from bringing complaints to the HRC.

#### 3.5 Restrictions to the Freedom of Expression under the ICCPR

Notwithstanding the central role held by the freedom of expression in the international legal framework, ‘this freedom does not enjoy such a position of primacy among rights that it trumps equality rights.’<sup>618</sup> Bearing this in mind, restrictions are not to be imposed lightly given that, as noted by General Comment 34, Article 19(2) of the ICCPR embraces ‘even expression that may

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<sup>616</sup> Human Rights Committee General Comment 34, Article 19 - Freedom of Opinion and Expression (2011) CCPR/C/GC/34, para 2

<sup>617</sup> *J.R.T and the W.G. Party v Canada* (1984) Communication no. 104/1981, CCPR/C/OP/2 at 25, para. 8(a)

<sup>618</sup> Stephanie Farrior, ‘Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech.’ (1996 ) 14 *Berkley Journal of International Law* 1, 3



be regarded as deeply offensive.’<sup>619</sup> In order to clarify the meaning and applicability of limitation clauses of the ICCPR and promote their legitimate implementation, the Siracusa Principles of the United Nations Economic and Social Council were construed by a group of experts in international law in an initiative led by a number of NGOs. Notwithstanding the non-binding nature of these principles, they are nevertheless pertinent to any discussion relating to the restriction of the freedoms and rights of the ICCPR given that they constitute the only constructive expert effort to provide a uniform interpretation of limitation clauses of the aforementioned Covenant. The Principles stipulate that ‘the scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.’<sup>620</sup> The restriction must be ‘provided for by law’ which means that it must be formulated with adequate detail so as to enable citizens to conform to it.<sup>621</sup> It must be made accessible to the public<sup>622</sup> and must not equip enforcement mechanisms with unregulated discretion to restrict freedom of expression.<sup>623</sup> The Rabat Plan of Action underlines that restrictions to the freedom of expression are to be clearly defined without an overly broad scope, must respond to a pressing social need, must be the least intrusive measures available and be proportional to their goal.<sup>624</sup> The key process when determining whether speech should be prohibited is striking a proper balance between the aforementioned conflicting rights and freedoms. In relation to the ICCPR, it has been argued that it embraces a victim-centred approach when balancing free speech ‘against the listener’s right to have her inherent human dignity protected from hate speech injuries.’<sup>625</sup> Nevertheless, in imposing restrictions on this freedom, States must ‘not put in jeopardy the right itself.’<sup>626</sup> Moreover, Article 19(3) of the ICCPR must not be interpreted as ‘license to prohibit

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<sup>619</sup> Human Rights Committee General Comment 34, Article 19 - Freedom of Opinion and Expression (2011) CCPR/C/GC/34, para. 11

<sup>620</sup> United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4, Annex (1985)

<sup>621</sup> United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4, Annex (1985)

<sup>622</sup> United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4, Annex (1985)

<sup>623</sup> Human Rights Committee Concluding Observations: Lesotho (1999) CCPR/C/79/Add.106, para. 23.

<sup>624</sup> Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2002) para. 18

<sup>625</sup> Nazila Ghanea, ‘Minorities and Hatred: Protections and Implications,’ (2010) *International Journal on Minority and Group Rights* 17, 433

<sup>626</sup> Human Rights Committee General Comment 18 ‘Non-Discrimination’ (1994) HRI/GEN/1/Rev.1 at 26, para.12

unpopular speech.<sup>627</sup> Thus, restricting expression is not a simple task, with an array of factors that must be taken into account in relation to the formulation and implementation of a restriction.

### 3.6 Limitation Grounds of Article 19 of the ICCPR

As already noted, Article 19 of the ICCPR is not an absolute right and, as such, can be limited under certain grounds. Article 19(3) of the ICCPR incorporates a three-tier test to be applied when limiting the named freedom, a test which the HRC has consistently applied in its views in individual complaints cases. Article 19(3) states that the exercise of the right of freedom of expression may be subject to certain restrictions that are provided by law and are necessary for the respect of the rights or reputations of others or for the protection of national security or of public order or of public health or morals. ‘Necessary,’ thereby, means that the restriction must be based on one of the grounds justifying limitations, responds to a pressing public or social need, pursues a legitimate aim and is proportionate to that aim.<sup>628</sup> The potentially relevant grounds to be invoked when seeking to restrict freedom of expression, in the name of combatting racist speech and propaganda promulgated by right-wing extremist movements, are the respect for the rights of others, the protection of morals and the protection of public order which will be considered hereinafter. The burden is on the State Party to demonstrate whether a restriction imposed on the freedom of expression is in accordance with the Convention.<sup>629</sup> The first of the relevant legitimate grounds for restriction, listed in Article 19 (3) of the ICCPR, is that of the respect for the rights of others. When dealing with racist speech and propaganda, this ground is the most pertinent given the impact of such activities on the rights of those who are targeted. As reiterated in General Comment 34, the term ‘rights,’ as construed in Article 19 (3), includes human rights, as recognised in the Covenant, and more generally in international human rights law.<sup>630</sup> Thus, a victim’s right to be free from racial discrimination as a result of hate speech falls within the ambit of this clause. The term ‘others’ may, for example, ‘refer to individual members

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<sup>627</sup> *Faurisson v France*, Communication no. 550/1993 (8 November 1996) CCPR/C/58/D/550/1993

Individual opinion of Elizabeth Evatt and David Kretzmer (concurring opinion) para.8

<sup>628</sup> United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4, Annex (1985)

<sup>629</sup> *Syargei Belyazeka v Belarus*, Communication no.1772/2008 (23 March 2012) CCPR/C/104/D/1772/2008, *Dergachev v Belarus*, Communication no. 921/200 (19 July 2002) CCPR/C/74/D/921/2000, *Kungurov v Uzbekistan*, Communication no. 1478/2006 (15 September 2011) CCPR/C/102/D/1478/2006, *Komeenko and Milinkevich v Belarus*, Communication no. 1553/2007 (24 April 2009) CCPR/C/95/D/1553/2007

<sup>630</sup> Human Rights Committee General Comment 34, ‘Article 19 - Freedom of Opinion and Expression’ (2011) CCPR/C/GC/34, para. 28

of a community defined by its religious faith or ethnicity.<sup>631</sup> In *Ross v Canada*, the HRC noted that the term ‘others’ may relate to other persons or to a community as a whole.<sup>632</sup> In this case, the Committee reiterated its position in *Faurisson v France*,<sup>633</sup> in which it underlined that restrictions may be permitted on statements which are of a nature to enhance or heighten anti-Semitic feelings, in order to uphold the right of Jewish communities to be protected from religious hatred. Moreover, as noted in the Update of the Preliminary Report prepared for the UN Sub-Commission on Prevention of Discrimination and Protection of Minority, ‘only the concept of the rights of others, the boundaries of which are fairly clearly defined, seems apt to justify the restrictions needed in the struggle against racism.’<sup>634</sup> This could be because the rights of others can be objectively defined by turning to key international instruments and principles and because the ‘reference to the rights of others finds an echo in certain restrictive provisions laid down in the general interest by the international instruments.’<sup>635</sup> Lastly, the Committee has drawn a direct correlation between racist speech and the rights and reputation of others and, particularly, the degree to which acts of racial discrimination and racial insults damage the injured party’s perception of his/her own worth and reputation.<sup>636</sup> As such, the international framework offers important guidance in understanding and applying this particular ground, while there exists a functional nexus between hate speech and the rights and reputation of others, rendering this ground the easiest and most logical to be used when seeking to limit free speech. Secondly, Article 19(3) of the ICCPR states that the exercise of the freedom of expression may be subject to certain restrictions including the protection of public morals, which is also relevant to the consequences of far-right rhetoric and activity. In *Ross v Canada*, for example, the applicant, a former teacher, had been transferred to a non-teaching post as a result of his publication of books and leaflets which were deemed discriminatory against Jews. Here, ‘as regards the protection of public morals, the State Party submit[ted] that Canadian society is multicultural and that it is

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<sup>631</sup> Human Rights Committee General Comment 34, ‘Article 19 - Freedom of Opinion and Expression’ (2011) CCPR/C/GC/34, para. 28

<sup>632</sup> *Ross v Canada*, Communication no 736/1997 (18 October 2000) CCPR/C/70/D/736/1997 para 11.5

<sup>633</sup> *Faurisson v France*, Communication no. 550/1993 (8 November 1996), CCPR/C/58/D/550/1993 Para. 9.6

<sup>634</sup> Sandra Coliver, ‘*Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination*,’ (eds. Article 19 International Centre Against Censorship 1992) 43

<sup>635</sup> Sandra Coliver, ‘*Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination*,’ (eds. Article 19 International Centre Against Censorship 1992) 43

<sup>636</sup> CERD General Recommendation 26: The Right to Seek Just and Adequate Reparation or Satisfaction (2000) A/55/18, annex V at 153, para.1

fundamental to the moral fabric that all Canadians are entitled to equality without discrimination on the basis of race, religion or nationality.’<sup>637</sup> Nevertheless, the Committee did not confer an opinion on the applicability of this provision. Instead, as mentioned above, it found that restriction of the applicant’s expression was necessary for the protection of the rights of others. The disregard by the Committee of the State Party’s argument that the public morals ground was a legitimate reason to limit the freedom of expression in this case could have resulted from the abstract nature of the term ‘public morals.’ As argued by Toby Mendel in a discussion on hate speech, ‘public morals are not only hard to define, and change over time, but despite a number of cases on this, both nationally and internationally, it remains very difficult to identify what is being protected.’<sup>638</sup> This could also be a reason why this ground is hardly ever argued to constitute a legitimate reason for limitation of the freedom of expression in cases more generally. Furthermore, in enforcing this ground there is the risk of ‘outlawing something which is merely not accepted by everybody.’<sup>639</sup> Thus, in General Comment 22, the Committee observed that the concept of morals derives from ‘many social, philosophical and religious traditions’<sup>640</sup> and that limitation as per Article 19(3) of the ICCPR ‘must be based on principles not deriving exclusively from a single tradition.’<sup>641</sup> Such limitations must be interpreted in the realm of the universality of human rights and the principle of non-discrimination. In relation to the public order ground, the Siracusa Principles defined this as ‘the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded.’<sup>642</sup> Coliver has considered this to constitute a rather problematic ground for limitation given that its ‘boundaries ... are often ill-defined and, as a result, its unclear and abstract definitional scope means that it can be enforced in ‘irrelevant circumstances, thus committing in reality a

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<sup>637</sup> Ross v Canada, Communication no. 736/1997 (18 October 2000) CCPR/C/70/D/736/1997, para. 6.11

<sup>638</sup> Toby Mendel, Restricting Freedom of Expression: Standards and Principles – Background Paper for meetings hosted by the UN Special Rapporteur on Freedom of Opinion and Expression: <<http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>> [Accessed 10 May 2014] 15

<sup>639</sup> Sandra Coliver, ‘*Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination*,’ (eds. Article 19 International Centre Against Censorship 1992) 43

<sup>640</sup> HRC General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art.18): (1994) HRI/GEN/1/Rev.1 at 35, para.8

<sup>641</sup> HRC General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art.18): (1994) HRI/GEN/1/Rev.1 at 35, para.8

<sup>642</sup> United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4, Annex (1985).

perversion of legitimacy.’<sup>643</sup> This could be the reason why, to date, the HRC has not enforced this ground as a justification for the restriction of hate speech and it is doubtful whether it will do so given the existence of the rights of others ground which, for reasons provided below, may be easier to apply. As such, this is not to say that extremist rhetoric does not damage public morals or public order but, instead, that these grounds are more difficult to define justly, adopt and support, especially in relation to the protection of the rights of others where the understanding of rights and the nexus between speech and victim or victims can be clearly established. Further, Article 19(3) of the ICCPR provides that any restrictions to the freedom of expression must be proportional to the legitimate aim pursued. More particularly, the HRC held that any such restrictions must meet the strict tests of necessity and proportionality<sup>644</sup> and must not be too broad.<sup>645</sup> The principle of proportionality must be ‘respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.’<sup>646</sup> The Committee underlined that the principle of proportionality is to be applied to restrictions of freedom of expression on three interrelated scales. Namely, any restriction must be ‘appropriate to achieve their protective function,’<sup>647</sup> and ‘must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interests to be protected.’<sup>648</sup> Thus, the principle of proportionality is to be applied when considering the objective of the restriction, the balancing of rights at stake as well as potential limitations thereto. Applying the principle of proportionality to cases of freedom of expression is more difficult than may first appear given that it ‘entails passing a value judgement on the ideas expressed.’<sup>649</sup> As noted by the HRC, in applying the principle of proportionality the competent authorities must

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<sup>643</sup> Sandra Coliver, *‘Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination,’* (eds. Article 19 International Centre Against Censorship 1992) 43

<sup>644</sup> *Velichking v Belarus*, Communication no. 1022/2001 (20 October 2005) CCPR/C/85/D/1022/2001 (2005), reiterated in Human Rights Committee General Comment 34: Article 19 - Freedom of Opinion and Expression (2011) CCPR/C/GC/34, para. 22

<sup>645</sup> Human Rights Committee General Comment 34: Article 19 - Freedom of Opinion and Expression (2011) CCPR/C/GC/34, para. 34

<sup>646</sup> Human Rights Committee General Comment 34: Article 19 - Freedom of Opinion and Expression (2011) CCPR/C/GC/34, para. 34

<sup>647</sup> Human Rights Committee General Comment 34: Article 19 - Freedom of Opinion and Expression (2011) CCPR/C/GC/34, para. 34. See also *Marques v Angola*, Communications No. 1128/2002 (18 April 2005) CCPR/C/83/D/1128/2002 and *Coleman v. Australia*, No. 1157/2003 (10 August 2006) CCPR/C/87/D/1157/2003

<sup>648</sup> Human Rights Committee General Comment 34: Article 19 - Freedom of Opinion and Expression (2011) CCPR/C/GC/34, para. 34. See also *Marques v Angola*, Communications No. 1128/2002 (18 April 2005) CCPR/C/83/D/1128/2002 and *Coleman v. Australia*, No. 1157/2003 (10 August 2006) CCPR/C/87/D/1157/2003

<sup>649</sup> Sandra Coliver, *‘Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination,’* (eds. Article 19 International Centre Against Censorship 1992) 52

take into account the type of expression as well as what its dissemination means.<sup>650</sup> For example, in the case of public debate concerning figures in the public and political domains, the significance placed on the freedom of expression is particularly high.<sup>651</sup>

### 3.7 Conclusion: Freedom of Expression

In sum, the right to freedom of expression is theoretically the most restricted right in the Covenant as it incorporates a qualification within itself through the reference to the ‘special duties and responsibilities’ that mark the exercise of this freedom. In no other provision of the Covenant does the exercise of rights incorporate such a qualification. The inclusion of this requirement is a means to limit the negative consequences that may arise from the exercise of this freedom which can constitute a ‘dangerous instrument.’<sup>652</sup> In light of the general principles of the UDHR, the careful formulation of Article 19 of the ICCPR and its limitation grounds, the HRC jurisprudence and international initiatives, such as the Rabat Plan of Action, it can be stated that hate speech, as such, cannot be considered responsible and, thus, legitimate speech under international human rights law, primarily due to the effects it has on the rights of the victims. The tricky task is to determine what exactly constitutes hate speech, and notwithstanding guidelines emanating from HRC documentation and jurisprudence as well as documents such as the Rabat Plan of Action, hate speech must be determined on a case by case basis.

## 4. Article 20 of the ICCPR:

### 4.1 Article 20 of the ICCPR: General Obligations on States Parties

While Article 19(3) of the ICCPR provides for the general limitations to be imposed on the freedom of expression, Article 20 of the same document contains a specific prohibition on two types of expression. More particularly it holds that:

1. Any propaganda for war shall be prohibited by law.

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<sup>650</sup> Human Rights Committee General Comment 34: Article 19 - Freedom of Opinion and Expression (2011) CCPR/C/GC/34, para. 34

<sup>651</sup> Human Rights Committee General Comment 34: Article 19 - Freedom of Opinion and Expression (2011) CCPR/C/GC/34, para. 38

<sup>652</sup> Manfred Nowak, ‘*U.N. Covenant on Civil and Political Rights: CCPR commentary*’ (2<sup>nd</sup> edn. Kehl am Rhein: Engel 2005), 457 at para.40

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.<sup>653</sup>

Whilst a brief reference will be made to the background of Article 20, the following sections will focus on Article 20(2) as this is of more direct relevance to the contemporary rhetoric of right-wing extremism. Article 20 was introduced into the ICCPR upon an initiative of the Soviet Union.<sup>654</sup> The *travaux préparatoires* of the ICCPR show that there was much debate as to whether an article prohibiting advocacy of national, racial or religious hatred should be incorporated in the Covenant.<sup>655</sup> Concerns were expressed as to the effectiveness of legislation as a means of dealing with such hatred as well as to the potential abuse of this clause to the detriment of the freedom of expression.<sup>656</sup> The final text of this article was adopted by fifty-two to nineteen votes, with twelve abstentions and with several States Parties making reservations and declarations thereto.<sup>657</sup> For example, certain States held that no additional legislation needed to be formulated to secure the provisions of Article 20 as the requirements, therein, can be ensured through an interpretation of other articles in the ICCPR. For example, Belgium declared that ‘Article 20 as a whole shall be applied taking into account the rights to freedom of thought and religion, freedom of opinion and freedom of assembly and association proclaimed in Articles 18, 19 and 20 of the Universal Declaration of Human Rights and reaffirmed in Articles 18, 19, 21 and 22 of the Covenant.’<sup>658</sup> Australia interpreted ‘the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly...the right is reserved not to introduce any further legislative provision on these matters.’<sup>659</sup> Similar approaches were followed by Malta, New Zealand, the United Kingdom, Luxembourg and the United States of America.

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<sup>653</sup> This is also found in Article 13(3) of the CMW which states that the exercise of the freedom of expression ‘may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For the purpose of preventing any propaganda for war; (b) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence

<sup>654</sup> Drew Mahalic & Joan Gambee Mahalic, ‘The Limitation Provisions of the International Convention on the Elimination of all Forms of Racial Discrimination’ (1987) 9 *Human Rights Quarterly* 1, 22

<sup>655</sup> Drew Mahalic & Joan Gambee Mahalic, ‘The Limitation Provisions of the International Convention on the Elimination of all Forms of Racial Discrimination’ (1987) 9 *Human Rights Quarterly* 1, 21

<sup>656</sup> Drew Mahalic & Joan Gambee Mahalic, ‘The Limitation Provisions of the International Convention on the Elimination of all Forms of Racial Discrimination’ (1987) 9 *Human Rights Quarterly* 1, 28

<sup>657</sup> Drew Mahalic & Joan Gambee Mahalic, ‘The Limitation Provisions of the International Convention on the Elimination of all Forms of Racial Discrimination’ (1987) 9 *Human Rights Quarterly* 1, 40

<sup>658</sup> Declarations and Reservations ICCPR:

<[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec)>

<sup>659</sup> Declarations and Reservations ICCPR:

Article 20 is different from the other articles of the ICCPR in that it does not set out a particular human right but instead imposes an obligation on the States to introduce limitations on the exercise of rights that have been dealt with in other articles, particularly those of expression and association. This special characteristic makes the provision rather similar in nature to Article 4 of the ICERD, which also mainly underlines the positive duty that States Parties have to prohibit practices that fall within its scope, even if these practices, as such, can be regarded as an exercise of fundamental rights. In implementing their duties under Article 20 of the ICCPR, States Parties must bear in mind their obligations under Article 19 of the ICCPR. On this point, the HRC has underlined that ‘Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in Article 20 are all subject to restriction pursuant to Article 19, paragraph 3.’<sup>660</sup> In comparing the two articles, the Committee noted that ‘it is with regard to the specific forms of expression indicated in Article 20 that States Parties are obliged to have legal prohibitions.’<sup>661</sup> In *Ross v Canada*, the Committee underlined that ‘restrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3.’<sup>662</sup> Nowak has emphasised, moreover, that Article 20 is closely interrelated to Article 19 but also to Articles 18 and 21.<sup>663</sup> The relation between Articles 20 and 21 of the ICCPR is significant in the realm of right-wing extremism as this movement manifests itself in groups advocating hatred. However, no explanation or analysis of this interrelationship has been provided for by the HRC. General Comment 11 underlines that States Parties are obliged to adopt the necessary legislative measures prohibiting the actions referred to in Article 20 of the ICCPR.<sup>664</sup> The General Comment stipulates that, in order to ensure an efficient and effective implementation of Article 20, States Parties should create legislation that renders the advocacy described in Article 20(2) to be against public policy and to provide for appropriate sanctions in

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<[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec)>

<sup>660</sup> Human Rights Committee General Comment 34: Article 19 - Freedom of Opinion and Expression (2011) CCPR/C/GC/34, para.50

<sup>661</sup> Human Rights Committee General Comment 34: Article 19 - Freedom of Opinion and Expression (2011) CCPR/C/GC/34, para.52

<sup>662</sup> *Ross v Canada* Communication no 736/1997 (18 October 2000) CCPR/C/70/D/736/1997, para. 10.6

<sup>663</sup> Manfred Nowak, ‘*U.N. Covenant on Civil and Political Rights: CCPR commentary*’ (2<sup>nd</sup> edn. Kehl am Rhein: Engel 2005) 471, Para. 8

<sup>664</sup> General Comment 11: Article 20 - Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (1994), HRI/GEN/1/Rev.1 at 12, Para. 1



the event that this law is violated.<sup>665</sup> In relation to the reference to the appropriate sanction, ‘the article, thus, does not require criminal penalties, at least not for less serious forms of hate advocacy’<sup>666</sup> since the word ‘appropriate’ is used rather than ‘criminal.’ The question of sanctions will be discussed in more detail further down.

#### 4.2 Article 20(2) of the ICCPR: Definitions and Notions:

A 2012 Report of the Special Rapporteur, Mr. Frank La Rue, on the Promotion and Protection of the Right to Freedom of Opinion and Expression sought to expand on the issue of hate speech, given the continuing challenge faced in identifying ways to reconcile the need to protect the right to freedom of opinion and expression and to combat intolerance, discrimination and incitement to hatred. Notwithstanding that Special Rapporteurs do not have any legally binding powers to compel States to take action, they are in a position to examine and report back on a country situation or a specific human rights issue. Through the aforementioned report, the Special Rapporteur aspired to underline basic principles of international human rights law with the aim of identifying elements to be used in ascertaining what type of expression amounts to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Such a report can, thus, be used by the Special Rapporteur when dealing with reporting duties and can subsequently be used as a guide by States Parties.

In an effort to elucidate the terms contained in Article 20(2) ICCPR, the 2012 Report of the Special Rapporteur defined advocacy as ‘explicit, intentional, public and active support and promotion of hatred towards the target group.’<sup>667</sup> The Special Rapporteur underlined that Article 20(2) covers only advocacy for hatred, which means that the hatred must amount to advocacy which constitutes incitement and that such incitement must lead to one of the listed consequences, namely discrimination, hostility or violence. The report defines ‘hatred’ as ‘a state of mind characterized as intense and irrational emotions of opprobrium, enmity and detestation towards

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<sup>665</sup> General Comment 11: Article 20 - Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (1994), HRI/GEN/1/Rev.1 at 12, Para. 2

<sup>666</sup> Sandra Coliver, ‘*Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination*,’ (eds. Article 19 International Centre Against Censorship 1992) 31

<sup>667</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, Para. 44(b)

the target group.’<sup>668</sup> ‘Incitement’ is said to refer ‘to statements about national, racial or religious groups that create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.’<sup>669</sup> The notion of ‘discrimination’ is also given a long and detailed meaning in the Special Rapporteur’s report, it being understood as ‘any distinction, exclusion or restriction made on the basis of race, colour, descent, national or ethnic origin, nationality, gender, sexual orientation, language, religion, political or other opinion, age, economic position, property, marital status, disability, or any other status that has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field of public life. As well as terms such as race and national or ethnic origin, which often feature in international documents within this arena, the definition offered incorporates grounds such as age, financial position, property and more. Further, ‘hostility’ is considered to be a ‘manifestation of hatred beyond a mere state of mind,’<sup>670</sup> but the report recognises that this theme has received little attention in relevant case-law and needs to be considered further.<sup>671</sup> Lastly, ‘violence’ is defined as the use of physical force or power against another person, or against a group or community, which either results in, or has a high likelihood of resulting in, injury, death, psychological harm, maldevelopment or deprivation. This definition goes beyond the physical effects of violence, also recognising its psychosocial effects. It is adapted from the definition of violence given in the 2002 World Report on Violence and Health of the World Health Organization (WHO) which covers a broad range of outcomes including psychological harm, deprivation and maldevelopment.<sup>672</sup> As is noted in the WHO report, ‘many forms of violence against women, children and the elderly, for instance, can result in physical, psychological and social problems that do not necessarily lead to injury, disability or death.’<sup>673</sup> By incorporating the above definition, the WHO, and subsequently the Special Rapporteur on the Freedom of Opinion and Expression recognised the fact that violence does not necessarily need

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<sup>668</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, Para. 44(a)

<sup>669</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, Para. 44(c)

<sup>670</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, Para. 44(e)

<sup>671</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, Para. 44(e)

<sup>672</sup> Etienne G. Krug et al. ‘World Report on Violence and Health’ (World Health Organization, Geneva, 2002) 4

<sup>673</sup> Etienne G. Krug et al., ‘World Report on Violence and Health’ (World Health Organization, Geneva, 2002) 5

to result in injury or death but, nevertheless, may result in a burden on the different actors and individuals involved. This is of particular importance given that, defining outcomes solely in terms of injury or death ‘limits the understanding of the full impact of violence on individuals, communities and society at large.’<sup>674</sup>

Thus, the aforementioned report offers more clarity on terms which are central to Article 20 of the ICCPR. However, problems still remain as to their exact meaning, predominantly because of a lack of clarity as to thresholds. For example, what is the threshold for the given emotions to be deemed ‘intense and irrational’? What is the threshold that has to be met to ensure imminence, and what is to be considered as risk? The report offers no explanation thereto.

#### 4.3 Article 20: The Threshold Test

In order for Article 20(2) of the ICCPR to be applicable, a certain threshold must be reached. This can be discerned from the formulation of this provision given that it can only be enforced when the hatred concerned does, in fact, amount to incitement to discrimination, hostility or violence. Further, a direct correlation between the violence and the target group needs to be ascertained, with due care taken so that ‘neither random nor orchestrated acts of violence, which bear no reasonable relationship to the expression concerned, are taken on board to sway the decision. The Rabat Plan of Action states that there must be a high threshold when applying Article 20 of the ICCPR.’<sup>675</sup> Further, as noted in the 2012 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, ‘the threshold of the types of expression that would fall under the provisions of Article 20 (2) should be high and solid.’<sup>676</sup> This is also confirmed by the fact that Article 20 contains two parts, one which deals with the prohibition of war and the other which deals with the prohibition of advocacy of national, racial or religious hatred. By placing these two constituents under one roof it can be deducted that the severity of hatred which it seeks to address in the latter part is of a particularly severe nature. In determining whether particular speech reaches the necessary threshold, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and

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<sup>674</sup> Etienne G. Krug et al. ‘World Report on Violence and Health’ (World Health Organization, Geneva, 2002) 5

<sup>675</sup> Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2002) para.22

<sup>676</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, para 45

Expression followed the seven-part test proposed by the NGO Article 19, underlining that States must take into account the ‘severity, intent, content, extent, likelihood or probability of harm occurring as well as the imminence and context of the speech in question.’<sup>677</sup> The Rabat Plan of Action holds that to assess the severity of the hatred and, therefore, determine whether the high threshold is met, the possible issues to be considered are ‘the cruelty of what is said or of the harm advocated and the frequency, amount and extent of the communications.’<sup>678</sup>

The reason for this high threshold is that, as already noted, as a matter of principle, limitations of speech must remain an exception to the rule. In order to determine this threshold, the Rabat Plan of Action clarifies that Article 20 of the ICCPR needs to be read in conjunction with the freedom of expression as protected by Article 19 of the ICCPR.<sup>679</sup> The interrelationship between Article 19 and Article 20, more generally, was also considered during the drafting process of the ICCPR. In General Comment 11, the HRC has likewise addressed this issue, holding that the ‘required prohibitions of Article 20 are fully compatible with the rights of freedom of expression, as contained in Article 19, the exercise of which carries with it special duties and responsibilities. General Comment 34 holds that ‘Article 19 and 20 are compatible with and complement each other.’<sup>680</sup> The HRC further held that Article 20 is subject to restrictions set out in Article 19(3),<sup>681</sup> which means that a limitation justifiable under Article 20 must also comply with Article 19(3). Indeed, the three principles applied when restricting rights and freedoms, namely legality, proportionality and necessity, must also apply to Article 20 cases.

#### 4.4 Article 20(2): Jurisprudence of the Human Rights Committee

The HRC has dealt with three separate communications which are directly connected to Article 20(2) of the ICCPR and has adopted differing stances. In *J.R.T and the W.G. Party v Canada*, the applicant argued that his Article 19 rights had been violated given that the State Party had cut off the telephone services of tape recorded messages warning callers of international Jewry and its

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<sup>677</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, para, 79

<sup>678</sup> Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2002) para.22

<sup>679</sup> Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2002) para.11

<sup>680</sup> Human Rights Committee General Comment 34: Article 19 - Freedom of Opinion and Expression (2011) CCPR/C/GC/34, para, 50

<sup>681</sup> Human Rights Committee General Comment 34: Article 19 - Freedom of Opinion and Expression (2011) CCPR/C/GC/34, para, 50

destructive effects. Here, as well as finding no case of a breach of Article 19 of the ICCPR, given the anti-Semitic and thus racially discriminatory nature of the messages which the applicant sought to disseminate, the messages ‘clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20 (2) of the Covenant to prohibit.’<sup>682</sup> Notwithstanding the suitability of this observation given the nature of the messages in question, the Committee reached this conclusion, however, without offering any interpretative explanation of the general meaning of the terms and concepts contained in Article 20(2) and without clarifying the threshold for hatred. Twenty years on, the HRC was again hesitant in voicing its opinion regarding the interpretation and implementation of Article 20(2) of the ICCPR, this time in a case where the first and second authors directly alleged a breach of Article 20(2) of the Convention. More particularly, in *Vassilari, Maria et al. v Greece*, the Committee dealt with alleged discrimination against Roma. A letter had been sent to the University of Patras entitled ‘Objection against the Gypsies: Residents gathered signatures for their removal.’ The first and second authors filed a criminal complaint against the local associations under the Anti-Racism Law. The first and second applicants contended that the Patras Court failed to appreciate the racist nature of the impugned letter and effectively to implement the Anti-Racism Law aimed at prohibiting dissemination of racist speech. Upon examination of the case, the HRC considered that the authors insufficiently substantiated the facts of their case for the purpose of admissibility of their complaint under Article 20(2), making this part of the communication inadmissible.<sup>683</sup> As a result, the HRC could not arrive at any substantive conclusions as to the application and meaning of Article 20(2). In his dissenting individual opinion in this case, Mr. Abdelfattah Amor complained that the Committee had not yet provided an opinion on the applicability of Article 20 (2) when dealing with individual communications.<sup>684</sup> Mr. Amor continued to state that the Committee’s approach to this article was ‘neither logical nor legally sound’<sup>685</sup> which he argued had resulted in the uncertainty of Article 20’s scope. In the case of *Mohamed Rabbae, A.B.S and N.A v The Netherlands*, the authors claimed to be victims of, *inter alia*, a violation of their rights

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<sup>682</sup> J. R. T. and the W. G. Party v. Canada, Communication no. 104/1981 (18 July 1981) CCPR/C/OP/2 at 25, para.8(b)

<sup>683</sup> *Vassilari v Greece*, Communication no. 1570/2007, (29 April 2009) CCPR/C/95/D/1570/2007, para. 6.5

<sup>684</sup> *Vassilari v Greece*, Communication no. 1570/2007, (29 April 2009) CCPR/C/95/D/1570/2007, Individual Opinion of Committee Member Mr. Abdelfattah Amor (dissenting) para.1

<sup>685</sup> *Vassilari v Greece*, Communication no. 1570/2007, (29 April 2009) CCPR/C/95/D/1570/2007, Individual Opinion of Committee Member Mr. Abdelfattah Amor (dissenting) para.1

under Article 20(2) as a result of statements made by Geert Wilders, Leader of the Dutch Freedom Party and, particularly that Wilders' acquittal by the domestic court was in contravention with Article 20. This was the first time that the HRC gave a relatively extensive analysis of Article 20(2). More particularly, it held that this article secures the right of persons to be free from hatred and discrimination but holds that it is 'crafted narrowly' so as to ensure a protection of free speech. It recalled that free speech may incorporate 'deeply offensive' speech and speech which is disrespectful for a religion, except if the strict threshold of Article 20(2) is met.<sup>686</sup> The Committee recognised that the Netherlands had established a legislative framework so as to meet the obligations imposed by Article 20(2) and underlined that this allowed victims to trigger and participate in a prosecution, one which was ensured in the case in question. In this light, and given the existence, suitability and triggering of the framework of the Wilders' case, the Committee found that the State Party has taken the 'necessary and proportionate measures in order to "prohibit" statements made in violation of article 20(2)'<sup>687</sup> and thus found no violation.

As noted by the NGO Article 19, 'the wording of article 20 of the ICCPR is rarely, if ever, found enshrined in domestic legislation'<sup>688</sup> while there exists a 'lack of reference to Article 20 of the ICCPR by state authorities'<sup>689</sup> and a potential 'ignorance of these provisions.'<sup>690</sup> Before 2016, the HRC had not been particularly helpful in elucidating the obligations of States Parties as these arise from Article 20(2) which could potentially limit the effectiveness of its implementation within the national systems of States Parties. However, in the case against Wilders, it essentially found that what States Parties had to demonstrate was that they established a functional and

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<sup>686</sup> *Mohamed Rabbae, A.B.S and N.A v The Netherlands* , Communication No. 2124/2011 (14 July 2016) CCPR/C/117/D/2124/2011 Para 10(4)

<sup>687</sup> *Mohamed Rabbae, A.B.S and N.A v The Netherlands* , Communication No. 2124/2011 (14 July 2016) CCPR/C/117/D/2124/2011 Para 10(7)

<sup>688</sup> Article 19 - Towards an Interpretation of Article 20 of the ICCPR: Thresholds for the Prohibition of Incitement to Hatred Work in Progress A study Prepared for the Regional Expert Meeting on Article 20, Organised by the Office of the High Commissioner for Human Rights, Vienna, February 8-9, 2010, .3 <<http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf>> [accessed 8 May 2014]

<sup>689</sup> Article 19 - Towards an Interpretation of Article 20 of the ICCPR: Thresholds for the Prohibition of Incitement to Hatred Work in Progress A study Prepared for the Regional Expert Meeting on Article 20, Organised by the Office of the High Commissioner for Human Rights, Vienna, February 8-9, 2010, .3 <<http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf>> [accessed 8 May 2014]

<sup>690</sup> Article 19 - Towards an Interpretation of Article 20 of the ICCPR: Thresholds for the Prohibition of Incitement to Hatred Work in Progress A study Prepared for the Regional Expert Meeting on Article 20, Organised by the Office of the High Commissioner for Human Rights, Vienna, February 8-9, 2010, .3 <<http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf>> [accessed 8 May 2014]

relevant legal framework for the incorporation of Article 20(2) into national law. This obligation does not, however, come with an obligation to convict.<sup>691</sup>

#### 4.5 Conclusion: Article 20(2) ICCPR

In sum, Article 20(2) of the ICCPR is undoubtedly a significant article in the realm of right-wing extremism, imposing positive obligations on States to prohibit advocacy of national, racial or religious hatred constituting incitement to discrimination, hatred or violence. In doing so, it sets a high threshold so as to encompass activities which should fall within its ambit not affecting those which are simply unpleasant for the State or society. Yet again, definitional issues constitute a difficulty as regards the applicability of this Article, a problem which the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression sought to rectify through the clarification of key terms. Nevertheless, given the reservations imposed by some States, the lack of jurisprudence brought to the HRC on this article and the decision of the Committee to find inadmissible the one case that was brought on such grounds, this article remains under-developed, with relevant speech and activities being dealt with through the reservation clauses of the freedom of expression and the freedom of association.

### 5. Article 4(a): Regulating Hate Speech through the ICERD

#### 5.1 Article 4(a): Introductory Points

Article 4(a) of the ICERD deals with racially discriminatory expression. Since several general elements of Article 4 were considered previously, this part will focus only on the particular role political parties exercise in the framework of expression as well as in the long-standing debate on the due regard clause, as incorporated in the introductory section of Article 4 and as applicable to Articles 4(a) and (b). Issues of sanctions and punishment will be assessed later on. Article 4 acknowledges the role played, or potentially played, by the freedom of expression as a tool that could be used to promote racial hatred and racial discrimination and, therefore, obliges States to ‘declare an offence punishable by law 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, and also the

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<sup>691</sup> *Mohamed Rabbae, A.B.S and N.A v The Netherlands* , Communication No. 2124/2011 (14 July 2016) CCPR/C/117/D/2124/2011 Para 10(7)

provision of any assistance to racist activities, including the financing thereof.’ The exact content of this article will be considered below.

### 5.2 Article 4(a): Political Parties and Racist Expression

The Committee has underlined the significant obligations held by politicians and political parties in relation to their expression and their obligation to refrain from Article 4(a) activities. For example, in *Jama v Denmark*, the CERD held that States Parties must draw the attention of politicians and members of political parties to the particular duties and responsibilities incumbent upon them pursuant to Article 4 of the Convention with regard to their speech and expression.<sup>692</sup> In a Concluding Observation to Denmark, the CERD held that ‘political parties are encouraged to take steps to promote solidarity, tolerance, respect and equality by developing voluntary codes of conduct so that their members refrain from public statements and actions that encourage or incite racial discrimination.’<sup>693</sup> Moreover, the CERD broadly noted that ‘persons holding or carrying out functions in the public or political spheres should not be permitted to contribute to expressions of racism and xenophobia’<sup>694</sup> thereby drastically interfering with the freedom of expression of public figures.

### 5.3 Article 4(a): Compatibility with the Freedoms of Expression and Association

One of the central issues, both in relation to academic commentary on Article 4(a) of the ICERD and its legal formulation, is the extent to which it is compatible with the freedom of expression. When considering this issue, one must take into consideration the ‘due regard’ clause as incorporated in Article 4. However, since this is applicable both to the freedom of expression and the freedom of association, it will be considered in section 9.8, following the appraisal of Article 4 (b) and the freedom of association.

The position of the CERD in relation to the compatibility of Article 4(a) and the freedom of expression is clear. In its 2001 Concluding Observations on the USA, the CERD stated that ‘the prohibition of dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression, given that a citizen’s exercise of this right

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<sup>692</sup> *Jama v Denmark*, Communication no. 41/2008, (21 August 2009) CERD/C/75/D/41/2008, para.9

<sup>693</sup> CERD Concluding Observations: Denmark, A/57/18)27 (2002), paras. 110, 115 and 116.

<sup>694</sup> CERD Concluding Observations: Sweden , CERD, A/49/18 (1994) 30, paras. 197 and 199.



carries special duties and responsibilities, among which is the obligation not to disseminate racist ideas.’<sup>695</sup> The Committee characterised as ‘the extreme position’<sup>696</sup> the view that implementation of Article 4 might impair or jeopardise freedom of opinion and expression. In indicating that a balance must be struck between the obligations under Article 4 and the freedoms of expression and association, it noted that those freedoms are not absolute and that ‘liberty is not licence.’<sup>697</sup> Thus, in relation to the balancing exercise between freedom from racial discrimination, on the one hand, and freedom of expression on the other, the CERD has underlined that a balance between the two is the most suitable way forward but, in order to tilt the scale, it has reiterated the lower status of hate speech in relation to other types of speech which are granted more protection. Moreover as Mahalic and Mahalic note, the format of Article 4, which focuses primarily on protecting persons from racial discrimination, implies that ‘in case of conflict the balance between competing freedoms should be struck in favour of persons’ right to freedom from racial discrimination.’<sup>698</sup> This also seems to be the route adopted by the CERD. For example, in its General Recommendation 15, the CERD noted 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.’<sup>699</sup> Kean considers this General Recommendation to be a strict call for protection from racist expression and notes the disregard, therein of the due regard clause and the resulting obligations.<sup>700</sup>

When considering the balance test between the rights and duties in question and the resulting reservations that have been imposed by States Parties to the Article under consideration, an interesting point to consider is the legal status of reservations in international law. Thornberry pertinently questions whether the issue of reservations to Article 4 on the grounds of expression and/or association and assembly raises the question as to ‘whether the prohibition of hate speech

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<sup>695</sup> CERD Concluding Observations: United States of America (2001) CERD/C/59/Misc.17/Rev.3, para.12

<sup>696</sup> CERD Study: Positive Measures Designed to Eradicate all Incitement to, or Acts of, Racial Discrimination: Implementation of ICERD, Article 4, New York, UN, 1986, para.225. This study was prepared for the Second World Conference on Racism in 1983 as A/CONF.119/10

<sup>697</sup> Stephanie Farrior, ‘Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech.’ (1996 ) 14 *Berkley Journal of International Law* 1, 50

<sup>698</sup> Stephanie Farrior, ‘Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech.’ (1996 ) 14 *Berkley Journal of International Law* 1, 92

<sup>699</sup> CERD General Recommendation 15: Measures to Eradicate Incitement to or Acts of Discrimination (1994) A/48/18 at 114, para.4

<sup>700</sup> David Kean, ‘Caste – Based Discrimination in International Human Rights Law’ (eds. Ashgate, Aldershot 2007), 195

as expressed in ICERD is simply a rule of treaty law or represents customary international law on the basis of its intrinsic relationship to the norm of non-discrimination.’<sup>701</sup> Discussing this issue, Thornberry refers to the decision of the International Criminal Tribunal for Rwanda in *Nahimana et al.*, where the trial chamber found that ‘hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination.’<sup>702</sup> Finding that it falls within the framework of international customary law would undoubtedly have consequences as to the hierarchical significance of this article but also to the legitimacy of reservations imposed. However, the CERD has made no such reference. Nevertheless, when making a parallel with the ICTR case, the genocidal context and the heinous consequences of the hate speech in question must be borne in mind.

#### 6. Sanctioning Bad Expression: Limitations and Regulations

As well as positively providing for freedom of expression and stipulating the grounds on which this freedom can be restricted, Article 20(2) of the ICCPR and Article 4 of the ICERD request that certain types of expression are punishable by law. Article 20(2) of the ICCPR stipulates that ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’, while Article 4(a) of the ICERD declares ‘an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination...’ A notable difference between these two provisions is that the ICCPR states that speech and activities falling within the framework of Article 20(2) should be prohibited by law, but makes no reference to whether such activities or the perpetrators should be punished, whereas Article 4(a) of the ICERD clearly underlines that the activities described, therein, constitute an offence punishable by law. General Comment 11 of the HRC fills the ‘sanction gap’ in Article 20 by noting that, for this article to be effective, there needs to be a law stipulating that propaganda and advocacy are against public policy which provides for a sanction in the event of a violation of the provisions therein.<sup>703</sup> Thus, this section emanates from the premise that Article 20(2) also requires the sanctioning of activities falling within its framework. The type of sanction which is appropriate for extremist expression is an intricately complex

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<sup>701</sup> Patrick Thornberry, ‘Forms of Hate Speech and the Convention on the Elimination of all Forms of Racial Discrimination’ (2010) 5 *Religion and Human Rights* 97, 105

<sup>702</sup> *Nahimana et al. v the Prosecutor* (28 November 2007) Case No. ICTR-99-52-A, para. 1076

<sup>703</sup> Human Rights Committee General Recommendation 11: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (1984) HRI/GEN/1/Rev.6 at 134 para. 2

question.<sup>704</sup> This is particularly true as neither Article 20 nor Article 4 stipulate precisely how these articles should be prohibited or punished. Several initiatives and documents have tried to elucidate how hate speech should be prohibited and/or punished, with varying positions emerging when dealing with the two articles. In fact, the HRC has emphasised the need to punish acts falling within the framework of Article 20(2) but grants the States discretion in choosing the type of punishment. More particularly, in its Concluding Observations to Egypt, the Committee held that ‘the State Party must take whatever action is necessary to punish such acts by ensuring respect for article 20(2).’<sup>705</sup>

Firstly, in relation to Article 20(2), the Special Rapporteur noted that ‘there is no requirement to criminalize such expression’<sup>706</sup> and, more particularly, ‘only serious and extreme instances of incitement to hatred, which would cross the seven-part threshold, should be criminalized.’<sup>707</sup> The seven-part threshold was adopted by the Special Rapporteur in his 2012 report and has been further discussed in the above section related to the threshold discussion on Article 20. In less serious cases the Special Rapporteur is of the view that States should adopt civil laws, underlining that there are instances where neither criminal nor civil sanctions are justifiable. Thus, ‘laws to combat hate speech must be carefully construed and applied by the judiciary not to excessively curtail legitimate types of expression.’<sup>708</sup> The report underlines that when hate is expressed by politicians and public authorities, additional sanctions should be imposed, including those of a disciplinary nature.<sup>709</sup> The Rabat Plan of Action underlined that ‘criminal sanctions related to unlawful forms of expression should be seen as last resort measures’<sup>710</sup> and that other types of action, such as civil and administrative sanctions and remedies, pecuniary and

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<sup>704</sup> Stephanie Farrior, ‘Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech.’ (1996 ) *Berkley Journal of International Law* 1, 10

<sup>705</sup> HRC Concluding Observations: Egypt (2002) ICCPR A/58/40 Vol. I, para.18

<sup>706</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, para. 47

<sup>707</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, para. 47

<sup>708</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, para.76

<sup>709</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, para. 81

<sup>710</sup> Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2002) para.22

non-pecuniary damages as well as the right of correction and the right of reply must also be taken into account.

The Rabat Plan of Action recommended that, in order to clarify the situation of punishment and as a matter of general principle, without regard to a particular article, a distinction should be made between three types of expression, namely expression that constitutes a criminal offence, expression that is not criminally punishable but may justify other types of sanctions and expression that does not give rise to any such sanctions but is still problematic in terms of the respect for the rights of others.<sup>711</sup> However, no explanation is made as to which types of expression fall within each section, but this, nevertheless, serves as a guideline for States seeking to regulate the sanctioning process of hate speech.

In relation to Article 4(a) of the ICERD, the sanctioning of prohibited activities falling within its framework constituted an intricate issue from the time of its drafting. For example, the Colombian delegate at the Conference which adopted the 1965 ICERD stated, for instance, that ‘punishing ideas, whatever they may be, is to aid and abet tyranny, and leads to the abuse of power...As far as we are concerned and as far as democracy is concerned, ideas should be fought with ideas and reasons; theories must be refuted by arguments and not by the scaffold, prison, exile, confiscation or fines.’<sup>712</sup> The Colombian approach was not adopted but neither was a solely criminal approach to Article 4 offences. Article 4 underlines that any punishment must be granted ‘with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention.’ There has been a fair amount of discourse in relation to whether hate speech and incitement to racial discrimination should fall within the ambit of criminal law, or whether it would be more suitable to tackle such phenomena through the a civil law framework. This discourse has primarily come about due to the fact that the nature of the punishment is not explicitly stated in the Convention itself or by the CERD.

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<sup>711</sup> Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2002) para. 6

<sup>712</sup> A/PV. 1406 at 42-43 (1965)

In addition to the fact that there is no clear route demonstrated by the CERD on this issue, the Committee has also given mixed signals as to the nature of punishment. Mahalic and Mahalic argue that ‘most Committee members have interpreted the phrase offense punishable by law to mean the imposition of criminal liability.’<sup>713</sup> This, for example can be demonstrated by the CERD requesting States Parties to inform it of what special criminal legislation was designed for purposes of the implementation of Article 4.<sup>714</sup> It has also referred to the criminal nature of sanctions in other documents, including its Concluding Observations to Belgium in which it stated that ‘adjustments should be made to the Constitution and the laws to permit more effective criminal prosecution of racist, nugatory or discriminatory writings.’<sup>715</sup> Further, in relation to incitement, the CERD noted that ‘the severe punishment of persons found guilty of incitement to racial hatred has no doubt contributed to the improvements in the State Party.’<sup>716</sup> When talking of racism more generally and, thus, also racist expression, the CERD noted that ‘States parties should fully comply with the requirements of Article 4 of the Convention and criminalize all acts of racism.’<sup>717</sup> However, the CERD does not take an absolutist approach in relation to the nature of the prohibition. In *Yilmaz-Dogan v The Netherlands*, the Committee gave an insight on the leeway States Parties have in satisfying the objectives regarding the punishment of activities and speech that fall within the scope of Article 4. More particularly, its argumentation was based on the premise that Article 4 does not necessarily require criminal punishment by holding that ‘the freedom to prosecute criminal offences...is governed by considerations of public policy...in the light of the guarantees laid down in the Convention.’<sup>718</sup> Also, in a case against Germany, the Committee acknowledged that the fact that the author who drafted a discriminatory letter against the Roma had been suspended from his employment in the police force meant that the letter ‘carried consequences for its author, as disciplinary measures were taken against him.’<sup>719</sup> This statement reflects that the Committee considered non-criminal measures to be sufficient for the punishment of perpetrators.

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<sup>713</sup> Drew Mahalic & Joan Gambee Mahalic, *The Limitation Provisions of the International Convention on the Elimination of all Forms of Racial Discrimination* (1987) 9 *Human Rights Quarterly* 1, 92

<sup>714</sup> Decision 3(vii) adopted by the Committee on 4 May 1973

<sup>715</sup> CERD Concluding Observations: Belgium (1997), CERD A/52/18 (1997) 31 para. 226

<sup>716</sup> CERD Concluding Observations: Germany (1997) CERD A/52/18 (1997) 25, para. 157

<sup>717</sup> CERD General Recommendation 31: *The Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System* (2005) A/60/18 (2005) 98, para. 4.

<sup>718</sup> *Yilmaz-Dogan v The Netherlands* (10 August 1988) Communication no. 1/1984, CERD/C/36/D/1/1984, para.9.4

<sup>719</sup> *Zentralrat Deutscher Sinti und Roma et al. v Germany*, CERD/C/72/D/38/2006 (3 March 2008), CERD/C/72/D/38/2006, para.7.7

In relation to Article 20(2) of the ICCPR, any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law, although only incitement which is of a particularly serious nature should, according to the Special Rapporteur and the Rabat Plan of Action, merit criminal punishment. The sanctioning process in the framework of Article 4 of the ICERD places more emphasis on the criminal nature of such sanctions, while also accepting other types of punishment. Moreover, the CERD has clearly stated that ‘it is not the Committee’s task to decide in abstract whether or not national legislation is compatible with the Convention but to consider whether there has been a violation in the particular case.’<sup>720</sup> Thus, the guidelines as to the nature of prohibitions and punishments to be imposed for hate speech have been contradictory at times. This is particularly so in relation to the different approach taken *vis-à-vis* Article 20(2) and Article 4(a) which, in essence, pursue very similar objectives.

#### 7. Conclusion: Regulating, Prohibiting and Sanctioning Radical Rhetoric

In conclusion, the freedom of expression is a significant right protected by a range of documents with hate speech being prohibited explicitly by international conventions. Although a number of countries expressed reservations when ratifying these documents, ‘ultimately, international conventions both reflect and reinforce a broad consensus that it is acceptable to constrain free speech in order to limit racist expression.’<sup>721</sup> This may be ensured by limiting the freedom of expression of extremist groups through Article 19 of the ICCPR when the need arises and when limitation grounds are applicable. In addition, Article 20(2) of the ICCPR and Article 4(a) of the ICERD positively oblige States to prohibit hate speech. The key problems to the applicability and enforcement of the above articles relate to issues of definition and the type of sanction that should be applied as well as the reluctance by States to prohibit expression, as will be discussed in more detail further down. Nevertheless, what is clear is that, with a view to combatting hate speech through international norms, the aforementioned articles should be read in light of each other and in light of the broader spirit of international human rights law.

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<sup>720</sup> Er v. Denmark, Communication no. 40/2007, (8 August 2007) CERD/C/71/D/40/2007, para.7.2

<sup>721</sup> Erich Bleich, ‘The Freedom to be Racist, How the United States and Europe Struggle to Preserve Freedom and Combat Racism’ (eds. OUP 2011) 6

## 8. Freedom of Assembly and Association

### 8.1 Overview of Freedom of Association and Assembly in UN Instruments

As well as the freedom of expression, freedom of assembly and freedom of association are key vehicles in ensuring that individuals and groups may promote their political and social belief systems and ideologies. Freedom of assembly and association are interrelated and are also interconnected with the freedom of expression.<sup>722</sup> ‘All these rights allow individuals to come together and promote their ideas and interests’.<sup>723</sup> General Comment 25 of the HRC states that citizens’ participation in public affairs and debate is facilitated by ensuring freedom of expression, assembly and association.<sup>724</sup>

On a UN level, the freedoms of assembly and association are protected by the UDHR and the ICCPR. These freedoms are not absolute and, as the limitation clauses incorporated in the ICCPR provision show, and, as highlighted by UN Resolution 15/21 on the rights to freedom of peaceful assembly and of association adopted by the Human Rights Council which mandated the Special Rapporteur on the rights to freedom of peaceful assembly and of association, these freedoms ‘can be subject to certain restrictions, which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.’<sup>725</sup> Further, Article 4(b) of the ICERD recognises that the freedom of association can be abused by groups promoting racial discrimination and positively requests States to prohibit such organisations. Thus, as with the freedom of expression, the international framework protects the freedom of association and assembly from State interference. At the same time, there are some limitations which can be imposed for certain types of speech and also incorporate a State obligation to prohibit particular types of groups which associate for the purpose of promoting and inciting racial discrimination.

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<sup>722</sup> Jeremy McBride ‘Freedom of Association’ in Rhona Smith & Christien van den Anker *The Essentials of Human Rights* (eds. Routledge 2005) 18

<sup>723</sup> Jeremy McBride ‘Freedom of Association’ in Rhona Smith & Christien van den Anker *The Essentials of Human Rights* (eds. Routledge 2005) 18

<sup>724</sup> Human Rights Committee, General Comment 25 ‘General Comments under Article 40, para. 4, of the International Covenant on Civil and Political Rights’ (1996) CCPR/C/21/Rev.1/Add.7, para.1

<sup>725</sup> Human Rights Council Resolution 15/21: Mandate of the UNSR

The freedom of assembly and of association are key themes in any discussion of right-wing extremism, given that such movements associate as political parties as well as unregistered groups and non-group movements in order to promote their mission and vision. Further, the freedom of assembly, in the form of demonstrations and rallies, is also a characteristic of such movements. Thus, the next section will firstly consider Article 20 of the UDHR which deals with assembly and association together, and then it will appraise the freedom of assembly as protected by the ICCPR, following which it will provide an overview of the meaning of association under international law and consider the grounds on which association can be legitimately restricted. Also, given the direct correlation between right-wing extremism and racial discrimination, the next section shall look at the ICERD and the obligation it imposes on States to prohibit organisations from promoting racial discrimination. The overarching aims of this section are to comprehend what tools international law grants States to respond to the assembly and association of right-wing extremist groups and what types of assemblies and associations fall within the net of prohibition. Namely, for purposes of restriction, is it sufficient for these groups and/or their assemblies to promote anti-democratic values or must such promotion go hand in hand with (an actual threat of) violence?

## 8.2 Freedom of Assembly and Association under the Universal Declaration of Human Rights

Article 20 of the UDHR states that:

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.

The UDHR incorporates the freedoms of assembly and association in one article, Article 20. As in the case of the freedom of expression protected by Article 19 of the UDHR, Article 20 offers no limitation to the right to freedom of peaceful assembly and association. The freedom of assembly and association, as provided for by this document, fall under the general limitation clauses of Articles 29 and 30, as in the case of expression. Furthermore, limitations to the freedom of assembly and association, in particular, must be considered in light of the historical setting of the UDHR with the document being ‘born out of the experience of the war that had just



ended<sup>726</sup> as explained at the start of this chapter. Thus, it can be argued that the Declaration, does not afford protection to racist associations or racist assemblies of such association taking into account the atrocities that occurred in the name of National Socialism, which triggered the development of the international human rights framework under discussion. The argument in favour of such a position is reinforced by the existence of the principles of equality and non-discrimination as protected throughout the Declaration as well as the general limitation clauses. In addition, as discussed previously, Article 7 of the UDHR protects individuals against incitement to discrimination. Racist organisations are a central vehicle through which incitement to discrimination can be promoted. Thus, it is clear that the UDHR demands that a balance be struck, once again, between the right to freedom of assembly and association on the one hand and the prohibition of discrimination on the other hand.

Just as for non-discrimination and freedom of expression, the Declaration has paved the normative path for the subsequent limitations, qualifications and restrictions as provided for by the ICCPR and incorporated them in the clauses pertaining to assembly and association. Furthermore, the ICERD has taken a more specified leap towards combatting racial discrimination through tackling associations which promote it. So, to provide an all-encompassing understanding of the freedom in question in the realm of right-wing extremism, the next part will consider that it is protected by the ICCPR, followed by an analysis of the prohibition of particular groups under the ICERD.

### 8.3 Freedom of Assembly under the ICCPR

In the ICCPR, the freedoms of assembly and association are dealt with in separate, yet neighbouring articles.

Article 21 of the ICCPR holds that:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety,

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<sup>726</sup> Johannes Morsink, *The Universal Declaration of Human Rights, Origins, Drafting and Intent* (eds. University of Pennsylvania Press 1999) 36

public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

The Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association has defined assembly as ‘an intentional and temporary gathering in a private or public space for a specific purpose.’<sup>727</sup> He also stressed that assemblies play a central role in ‘mobilizing the population and formulating grievances and aspirations, facilitating the celebration of events and, importantly, influencing States public policy.’<sup>728</sup> In his 2012 report, the Special Rapporteur, therefore, underlined the positive duty States have actively to protect the right to assembly and to enable the exercising of the right to freedom of peaceful assembly. Nevertheless, he thereby emphasised that ‘international human rights law only protects assemblies that are peaceful, i.e. those that are not violent, and where participants have peaceful intentions, which should be presumed.’<sup>729</sup> This is notwithstanding the fact that sporadic acts of violence by others must not prevent individuals from exercising this right.<sup>730</sup> Thus, protection is provided to assemblies which are physically non-violent but also thematically peaceful. The Special Rapporteur noted that States must refrain from interfering with the right to peaceful assembly and that the best practice is ‘laws governing freedom of assembly [that] both avoid blanket time and location prohibitions and provide for the possibility of other less intrusive restrictions.’<sup>731</sup> Once again, prohibition is to be considered ‘a measure of last resort...when a less restrictive response would not achieve the legitimate aim(s).’<sup>732</sup> Here, the question is whether assemblies of extreme right-wing groups which promote ideologies contrary to democratic values and, thus, create an environment conducive to discrimination contravene the ‘peaceful intentions’ condition. Taking the general stance of the UN towards speech and activities promoting racial discrimination and hate in the framework of non-discrimination and expression, and broadly interpreting the

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<sup>727</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association’(21 May 2012) A/HRC/20/27, para.24

<sup>728</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association’(21 May 2012) A/HRC/20/27, para.24

<sup>729</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association’(21 May 2012) A/HRC/20/27, para.24

<sup>730</sup> Report of the Special Rapporteur on Peaceful Assembly and Association (7 August 2013) A/68/299, para.49

<sup>731</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (21 May 2012) A/HRC/20/27, para.39

<sup>732</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (21 May 2012) A/HRC/20/27, para.39

aforementioned requirement of peaceful intentions to incorporate the general notion of peace and democracy rather than just physical peace, it can be argued that any far- right assemblies are not protected by this freedom. Even though, at this point, this conclusion is based on generalised interpretations given the lack of further explanation by relevant bodies, the argument is particularly supported when considered in conjunction with Article 4 of the ICERD along this framework, which prohibits the promotion and incitement of racial discrimination, thereby, demonstrating the UN's intolerance towards such phenomena.

#### 8.4 Freedom of Association under the ICCPR: General Overview

Article 22, ICCPR stipulates that:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

The freedom of association is a far-reaching one, encompassing a variety of activities and processes of an association. In Communication No.1274/2004, the HRC observed that ‘the right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by Article 22 extends to all activities of an association [...]’<sup>733</sup> As noted in *Kungurov v Uzbekistan*, this ‘guarantees the right of such an association freely to carry out its statutory

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<sup>733</sup> Korneenko et al. v Belarus, Communication no. 1274/2004 (10 November 2006) CCPR/C/88/D/1274/2004, para.7.2

activities’<sup>734</sup> and, as such, ‘the denial of state registration of an association must satisfy the requirements of paragraph 2...’<sup>735</sup>

## 8.5 What is an Association under International Law?

The UN has defined an association as ‘any groups of individuals or any legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interests.’<sup>736</sup> This definition extends ‘*inter alia* to civil society organizations, clubs, cooperatives, NGOs, religious associations, political parties, trade unions, foundations or even online associations such as the Internet which have been instrumental, for instance, in facilitating active citizen participation in building democratic societies’.<sup>737</sup> All such entities have the right to associate and this right applies for the entire life span of the association.<sup>738</sup> The Special Rapporteur has underlined that the right to freedom of association equally protects associations that are not registered.<sup>739</sup> Further, political parties are defined as ‘a free association of persons, one of the aims of which is to participate in the management of public affairs, including through the presentation of candidates to free and democratic elections.’<sup>740</sup> Moreover, the Special Rapporteur notes that the central differences between political parties and other associations is that the former can be part of elections and subsequently form governments.<sup>741</sup> Right-wing extremist groups can take the form of registered political parties and, thereby, as a result of this status, enjoy particular protection under this framework. The position of the Special Rapporteur on the rights to freedom of peaceful assembly and of association is that, notwithstanding the important role played by political parties in a society, parties which adopt an extremist ideology

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<sup>734</sup> Kungurov v Uzbekistan, Communication no. 1478/2006 (15 September 2011) CCPR/C/102/D/1478/2006, para.8.2

<sup>735</sup> Kungurov v Uzbekistan, Communication no. 1478/2006 (15 September 2011) CCPR/C/102/D/1478/2006, para.8.2

<sup>736</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (21 May 2012) A/HRC/20/27, para.51

<sup>737</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (21 May 2012) A/HRC/20/27, para.52

<sup>738</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (21 May 2012) A/HRC/20/27, para.75

<sup>739</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (21 May 2012) A/HRC/20/27, para.31

<sup>740</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (7 August 2013) A/68/299, para.9

<sup>741</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (7 August 2013) A/68/299, para.9

often strike at democracy itself and, as a result, cannot enjoy the protection habitually afforded by the freedom of association.<sup>742</sup> Right-wing extremist groups can also take the form of unregistered subgroups which are looser in their structure. In addition to political parties, the CERD has recognised the existence of ‘non-political groups and associations which disseminate ideas based on racial superiority or hatred.’<sup>743</sup> Based on the above definitions, they too fall within the framework of an association since they seek to promote a common interest since international law does not require that they are registered or structured in a particular manner. The fact that a particular reference to such subgroups is not made in the above definition does not exclude them from the framework as it stipulates that the definition extends ‘*inter alia*’ to the types referred to.

#### 8.6 Limiting the Freedom of Association under the ICCPR

The freedom of association, as enshrined in the ICCPR, is an important but not absolute human right as it can be limited for certain reasons and in certain circumstances which remind us of those in which the freedom of assembly and the freedom of expression can be limited. Article 22(2) of the ICCPR holds that such restrictions can be imposed on this right if they are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of rights and freedoms. The HRC has tried to clarify the interpretation of the freedom of association under the ICCPR. In *Zvozskov v Belarus*, the HRC underlined that the reference to democratic society, in the context of Article 22, indicates that the functioning of association including those ‘which peacefully promote ideas not necessarily favourably viewed by the government or the majority of the population, is a cornerstone of a democratic society.’<sup>744</sup> In *Belyatsky et al. v Belarus*, the Committee noted that ‘the mere existence of reasonable and objective justification for limiting the right to freedom of association is not sufficient. The State Party must further demonstrate that the prohibition of an association is necessary to avert a real and not only hypothetical danger to national security or democratic order.’<sup>745</sup> General Comment 31 of the HRC on the nature of the general legal obligation imposed on States Parties to the

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<sup>742</sup> Human Rights Committee General Comment 18 ‘Non-Discrimination’ (1994) HRI/GEN/1/Rev.1 para.5

<sup>743</sup> CERD Concluding Observations: Poland (1997) CERD A/52/18, para. 476

<sup>744</sup> CERD Concluding Observations: Poland (1997) CERD A/52/18, para.7.2

<sup>745</sup> CERD Concluding Observations: Poland (1997) CERD A/52/18, para.7.3

Covenant holds that ‘where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the legitimate aim pursued.’<sup>746</sup> In addition, the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association notes that any restriction should be ‘strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient.’<sup>747</sup> The Special Rapporteur underlined that ‘the suspension and the involuntary dissolution of an association are the severest types of restrictions on freedom of association’<sup>748</sup> and that such practices should only be permissible where there is a ‘clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law.’<sup>749</sup> In relation to limitations, he stressed that ‘freedom is to be considered the rule and its restriction the exception.’<sup>750</sup> In *Belyatsky et al. v Belarus*, the Committee held that the State Party must prove that ‘less intrusive measures would be insufficient to achieve the same purpose.’<sup>751</sup> It is, thus, clear that the dissolution of an association should be a measure of last resort, imposed only when the limitation grounds, as incorporated into this article, are applicable, always taking into consideration the principle of proportionality and ensuring that the limitations are prescribed by law and are necessary in a democratic society.

In relation to the limitation of the freedom of association of political parties in the form of their prohibition, the Special Rapporteur noted that these entities can choose and promote ideas that are unpopular with authorities and the public more generally as this permits pluralism.<sup>752</sup> However, in the event that a political party or any of its candidates ‘uses violence or advocates for violence or national, racial or religious hatred constituting incitement to discrimination, hostility or violence ... or when it carries out activities or acts aimed at the destruction of the rights and freedoms enshrined in international human rights law...can it be lawfully

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<sup>746</sup> Human Rights Committee, General Comment 31, ‘Nature of the General Legal Obligation on States Parties to the Covenant’ (2004) CCPR/C/21/Rev.1/Add.13, para.6

<sup>747</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, (21 May 2012) A/HRC/20/27

<sup>748</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, (21 May 2012) A/HRC/20/27, para.75

<sup>749</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, (21 May 2012) A/HRC/20/27, para.75

<sup>750</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (7 August 2013) A/68/299, para.18

<sup>751</sup> *Belyatsky et al v Belarus*, Communication no. 1296/2004 (24 July 2007) CCPR/C/90/D/1296/2004, para.7.3

<sup>752</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (7 August 2013) A/68/299, para.38

prohibited.<sup>753</sup> The word ‘can’ is interestingly placed here, as this means that States may opt to prohibit them but are not under an obligation to do so. This does not bode well with the obligations arising from Article 4(b) of the ICERD, as discussed further on, which oblige States to prohibit such parties.

In conclusion, notwithstanding the imposition of negative obligations on States to refrain from interfering with the above rights, the ICCPR also grants States the tools to interfere when considered necessary in order to pursue a legitimate aim. In curtailing the freedom of association, prohibitions of groups should be considered the option of last resort unless they contravene principles of international human rights law. Once again, taking into account the establishment, spirit and objectives of the international legal framework and key principles, therein, such as non-discrimination and equality, States may prohibit right-wing extremist organisations under the ICCPR, but no explicit obligation to do so is contained therein.

#### 8.7 Limiting the Freedom of Association and Assembly under Article 4(b) of the ICERD

Article 4 of the ICERD is particularly significant in the realm of right-wing extremism given that this movement organises itself through a variety of forms of association. Moreover, Article 4 ‘reflects the growing trend towards restricting racism that spread throughout the world in the postwar era.’<sup>754</sup> However, any limitations of the freedom of association under Article 4(b) of the ICERD must be compatible with the freedom of association. The CERD has been alert to potential abuses of this clause as is reflected, for example, in its Concluding Observations to Russia in which it expressed its concern ‘that the definition of extremist activity in the federal law of July 2002 is too vague to protect...associations against arbitrariness in its application.’<sup>755</sup> In order to uphold Article 4(b) effectively and ensure a balanced approach, it is necessary to strike a legitimate balance between the freedom of association on the one hand and the freedom from discrimination on the other. It is a particularly tricky task and ‘when specific anti-racist measures are concerned, opinions may diverge as to their compatibility with the requirements of

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<sup>753</sup> Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (7 August 2013) A/68/299, para.38

<sup>754</sup> CERD Study: Positive Measures Designed to Eradicate all Incitement to, or Acts of, Racial Discrimination: Implementation of ICERD, Article 4, New York, UN, 1986, para.4. This study was prepared for the Second World Conference on Racism in 1983 as A/CONF.119/10

<sup>755</sup> HRC Concluding Observations: Russian Federation (2003) ICCPR A/59/40 vol I 20, para 6

the limitation clause.’<sup>756</sup> The international legal framework obliges States to prohibit certain types of association. More particularly, Article 4(b) of the ICERD requests that States Parties ‘declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.’ The CERD has underlined that ‘all provisions of article 4...are of a mandatory character, including declaring illegal and prohibiting all organizations promoting and inciting racial discrimination.’<sup>757</sup> In implementing this provision, States Parties must pay due regard to the principles embodied in the UDHR and the rights set out in Article 5 of the ICCPR. So, Article 4(b) imposes direct prohibitions of particular organisations and, thus, directly limits the freedom of association and, also, potentially affects the freedom of assembly as it declares illegal and prohibits ‘organized and all other propaganda activities,’ including activities which may take the form of an assembly. The majority of Committee members maintain that Article 4(b) categorically requires States Parties to outlaw racist organisations as well as their activities and that States Parties do not have a choice between these two tasks, but are obliged to undertake both.<sup>758</sup> This interpretation is in line with the stance taken during the drafting of Article 4(b) where an amendment to declare illegal and prohibit only the activities of a racist organisation and not the organisation itself was rejected.<sup>759</sup> As noted in General Recommendation 15 of the CERD, organisations promoting racial discrimination ‘have to be declared illegal and prohibited.’<sup>760</sup> And, not only that, ‘participation in these organizations is, of itself, to be punished.’<sup>761</sup> The CERD has granted leeway to States Parties to decide on the precise nature of the punishment, welcoming, for example, a variety of penalties, including financial penalties, on parties promoting racial discrimination.<sup>762</sup> However, the CERD has referred to sanctions amounting from Article 4(b) as being of a criminal nature. For example, in its Concluding Observations to Zimbabwe, it expressed its concern that the relevant law ‘does

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<sup>756</sup> Eva Brems, ‘State Regulation of Xenophobia v Individual Freedoms: the European View’ (2002) 1 *Journal of Human Rights* 4, 483

<sup>757</sup> Committee on the Elimination of Racial Discrimination Concluding Observation, Norway (2003) CERD, A/58/18, para. 475

<sup>758</sup> Committee on the Elimination of Racial Discrimination Concluding Observation, Norway (2003) CERD, A/58/18, para. 475

<sup>759</sup> Human Rights Commission 22<sup>nd</sup> Sess. (874<sup>th</sup> mtg) at 60 (E/CN.4/SR.827 (1966))

<sup>760</sup> Committee on the Elimination of Racial Discrimination General Recommendation 15: Measures to eradicate incitement to or acts of discrimination A/48/18 at 114 (1994) para.6

<sup>761</sup> Committee on the Elimination of Racial Discrimination General Recommendation 15: Measures to eradicate incitement to or acts of discrimination A/48/18 at 114 (1994) para.6

<sup>762</sup> CERD Concluding Observations: Belgium, (2002) A/57/18 (2002) 17, para. 42



not adequately address all the elements of article 4, particularly as regards the prohibition and criminalization of all organizations and propaganda activities that promote and incite racial discrimination.’<sup>763</sup> In a report to Hungary, it recommended amendments to the Hungarian Criminal Code in order to incorporate the requirements of Article 4(b) of the ICERD.<sup>764</sup>

The CERD has found that organisations which advocate racial discrimination, whether or not they commit acts of violence do, in fact, breach the peace.<sup>765</sup> Further, the CERD has underlined that groups promoting racist ideologies should fall within the framework of Article 4(b) regardless of their size or scope.<sup>766</sup> In one of its reports on the United Kingdom and Northern Ireland, the CERD found that, by not prohibiting the *BNP* and other groups and organizations of a racist nature and by allowing them to pursue their activities, the United Kingdom was failing to implement Article 4, which calls for a condemnation of all organisations attempting to justify or promote racial hatred and discrimination.<sup>767</sup> Furthermore, the CERD has noted that the obligations arising from Article 4(b) include the prohibition of organizations in their entirety and not simply the prohibition of their activities.<sup>768</sup> Indeed, many Committee members appear to share the view that Article 4(b) requires States Parties to prohibit *ad limina* (from the beginning) the establishment of racist organizations.<sup>769</sup> For example, the CERD has recognised that, ‘Article 4(b) places a greater burden upon such States to be vigilant in proceeding against such organizations at the earliest moment.’<sup>770</sup> Thus interpreted, the provision demonstrates the need to protect States from the danger of permitting racist organisations from functioning undeterred, gaining financial support, recruiting members, implementing their mandate and becoming powerful, thereby, rendering later prohibition difficult.<sup>771</sup>

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<sup>763</sup> CERD Concluding Observations: Zimbabwe (2000) A/55/18 (2000) 38, para. 197

<sup>764</sup> CERD Concluding Observations: Hungary (2002), A/57/18 (2002) 63 at paras. 372 and 376.

<sup>765</sup> CERD, 24<sup>th</sup> Sess. (538<sup>th</sup> mtg.) at 112 – 113 para.15, CERD/C/SR.538 (1981); 26<sup>th</sup> Sess. (585<sup>th</sup> mtg.) at 117-118 para.12, CERD/C/SR.585 (1984)

<sup>766</sup> CERD 20<sup>th</sup> Sess. (440<sup>th</sup> mtg) at 63, para.8, 66, para.19 CERD/C/SR.440 (1979)

<sup>767</sup> CERD Concluding Observations: UK (1993) A/48/18, para. 8

<sup>768</sup> CERD Concluding Observations: Canada, CERD A/57/18 (2002) 56, paras. 335 and 338.

<sup>769</sup> Drew Mahalic & Joan Gambee Mahalic, The Limitation Provisions of the International Convention on the Elimination of all Forms of Racial Discrimination (1987) 9 *Human Rights Quarterly* 1, 100

<sup>770</sup> CERD General Recommendation 15: Measures to Eradicate Incitement to or Acts of Discrimination (1994) A/48/18 at 114, para.46

<sup>771</sup> CERD General Recommendation 15: Measures to Eradicate Incitement to or Acts of Discrimination (1994) A/48/18 at 114, para.46

In sum, it is legitimate and, under Article 4(b), an obligation for States to ban an association, whether it is a political party or an unregistered group, if they are promoting anti-democratic values which incite racial hatred, regardless of whether or not they are violent. However, regardless of the obligations set out in Article 4(b), the Special Rapporteur has argued that a prohibition of a political party must be a last resort method, which renders the situation more complex than it already is because of conflicting demands on States. Nevertheless, it can safely be said that the suppression of racist political associations (including bans) finds both direct and indirect support in human rights treaties, conventions, and declarations drafted by the UN. Some such treaties, notably Article 4 of the ICERD, go as far as making it compulsory or strongly recommended for States to impose certain restrictions on racist organisations, with such measures being in line with duties and obligations arising from the UDHR and Article 5 of the ICERD. Thus, the central point upon which Article 19 of the ICCPR and Article 4 of the ICERD differ is that the latter obliges States to prohibit groups promoting racial hate and discrimination whereas the former simply lays out the tools for States to interfere. In order to ensure a uniform approach to the assembly and association of right-wing extremism, these two articles must be read in conjunction with each other.

#### 8.8: The Due Regard Clause of Article 4 ICERD

The central point of interest when considering Article 4(a) and Article 4(b) of the ICERD is the potential conflict that may arise as a result of the obligations emanating from the freedom of expression and the freedom of association. The question of whether the prohibition of associations under Article 4(b) is consistent with the ‘due regard’ clause has been a matter of debate within the academic, legal and political arenas with the obvious concern being that the prohibition of racist organisations can lead to abuse and places undue limitation on the right to freedom of association. As a result, many State representatives have explained that their governments have not outlawed racist organisations due to ‘the difficulty of reconciling the right to freedom of association with the requirements of Article 4(b).’<sup>772</sup> This argumentation is extended to the freedom of expression and the freedom of assembly, as reflected in the reservations below. During the drafting process of Article 4, several States Parties voiced their

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<sup>772</sup> CERD General Recommendation 15: Measures to Eradicate Incitement to or Acts of Discrimination (1994) A/48/18 at 114, para.46

concerns regarding its impact on other human rights and particularly expression and association. In fact, it is this very characteristic of the ICERD which has led Article 4 to being ‘the subject of different interpretations and a substantial number of reservations’<sup>773</sup> which have generally taken the form of explicitly limiting national obligations under this article, in light of the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association. Nevertheless, the ‘due regard clause,’ as incorporated, therein, acts as a safety net to the freedoms in questions and constitutes the thematic backdrop against which the aforementioned balance is to be found. Namely, this clause seeks to ensure that any regulation arising from Article 4 does not disregard the freedoms of expression, association and assembly.

Article 4 of the ICERD states that the provisions in parts a, b and c must be implemented ‘with due regard to the principles embodied in the UDHR and the rights expressly set forth in article 5 of this Convention’ which include, *inter alia*, the freedoms of opinion, expression, assembly and association. In particular, the due regard clause was inserted to ‘protect against overly broad limitations on the freedoms of expression and association.’<sup>774</sup> For example, during the drafting procedures, Belgium underlined the importance it attaches to Article 4 being read with due regard to the UDHR and the rights outlined in Article 5 of the ICERD and ‘therefore considers that the obligations imposed by Article 4 must be reconciled with the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association.’<sup>775</sup> France followed a similar path stating that it interprets the due regard clause of Article 4 as ‘releasing the States Parties from the obligation to enact anti-discrimination legislation which is incompatible with the freedoms of opinion and expression and of peaceful assembly and association.’<sup>776</sup> Italy held that ‘the obligations deriving from the aforementioned Article 4 are not to jeopardize the right to freedom of opinion and expression and the right to freedom of peaceful

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<sup>773</sup> McGoldrick D & O’Donnell T, ‘Hate Speech Laws: Consistency with National and International Human Rights Law’ (1998) 18 *Legal Studies* 469

<sup>774</sup> Drew Mahalic & Joan Gambiae Mahalic, ‘The Limitation Provisions of the International Convention on the Elimination of all Forms of Racial Discrimination’ (1987) 9 *Human Rights Quarterly* 1, 89

<sup>775</sup> Multilateral Treaties Deposited with the Secretary-general: Status as at 1 April 2009 by United Nations (2009), United Nations Publications, ST/LEG/SER.E/2610

<sup>776</sup> Reservation made by France to the International Convention on the Elimination of Racial Discrimination. Acceded to the Convention on 28 Jul 1971.

assembly and association.<sup>777</sup> This approach, that being the balancing of potentially conflicting rights, has also been adopted by other States Parties such as the United States of America which, upon signing the ICERD, placed a reservation on Article 4 which stipulated that ‘the Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.’<sup>778</sup> Moreover, a total of twelve States out of the eighty seven signatories and one hundred and seventy seven Parties have imposed such reservations.<sup>779</sup>

In relation to the meaning of the due regard clause, Mahalic and Mahalic refer to the equality principle laid down in Article 1 of the UDHR, the non-discrimination clause in Article 7 of the UDHR, the right to an effective remedy in Article 8 of the UDHR and the requirements of an international order whereby the rights set out in the Declaration are fully realised, as provided for by Article 28 therein. In this light, they argue that ‘to have due regard for the Universal Declaration is to have due regard for the very principles upon which Article 4(a) and Article 4(b) are premised’<sup>780</sup> Furthermore, as well as the aforementioned provisions, the UDHR provides for the freedom of expression under Article 19 and the freedom of assembly and association under Article 20 respectively. These articles do not incorporate limitation clauses but, instead, fall under the general limitations provided for by Articles 29 and 30. Thus, in order to give adequate regard to the UDHR principles in this ambit, one must decipher whether the speech in question contravenes Article 29 and particularly the respect for the rights and freedoms of others, morality, public order and the general welfare of a democratic society or whether it destroys any of the other rights set out in the Declaration. Only then can it be ascertained whether or not freedoms of expression or assembly, as provided for by Articles 19 and 20 of the UDHR, can be invoked as rationales to limiting obligations set out in Article 4 of the UDHR.

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<sup>777</sup> Declaration of Italy made upon signature of the International Convention on the Elimination of Racial Discrimination and confirmed upon ratification: Signed on 13 March 1968 and ratified on 5 January 1976.

<sup>778</sup> Reservation of the USA made upon signing of the International Convention on the Elimination of Racial Discrimination. Signed on 28 Sep 1966, Ratified on 21 Oct 1994.

<sup>779</sup> Austria, Bahamas, Belgium, France, Ireland, Italy, Japan, Monaco, Papua New Guinea, Switzerland, UK and USA.

<sup>780</sup> Drew Mahalic & Joan Gambia Mahalic, ‘The Limitation Provisions of the International Convention on the Elimination of all Forms of Racial Discrimination’ (1987) 9 *Human Rights Quarterly* 1, 90

Through its jurisprudence and other instruments, the Committee has given insight into how the ‘due regard’ clause is to be interpreted and applied in this field. In *Jewish Community of Oslo et al. v Norway*, the Committee attempted to explain what is meant by this doctrine by stating that ‘it related generally to all principles embodied in the Universal Declaration of Human Rights, not only freedom of speech’.<sup>781</sup> In this light it held that ‘to give the right to freedom of speech a more limited role in the context of Article 4 does not deprive the due regard clause of significant meaning, all the more so since all international instruments that guarantee freedom of expression provide for the possibility, under certain circumstances, of limiting the exercise of this right.’<sup>782</sup> On this premise, the Committee noted that Mr. Sjolie, who had headed the march of a group known as the ‘*Bootboys*,’ in commemoration of the Nazi leader Rudolf Hess, made statements which were ‘of an exceptionally/manifestly offensive character and are, thus, not protected by the due regard clause.’<sup>783</sup> As a result, his acquittal by the Supreme Court of Norway gave rise to a violation of Article 4 and consequently Article 6 of the ICERD. In reaching this decision, the Committee held that the ‘freedom of speech has been afforded a lower level of protection in cases of racist and hate speech dealt with by other international bodies.’<sup>784</sup> The Committee’s approach in this case, thus, demonstrates that the ‘due regard’ clause cannot be enforced unconditionally and that, in the event of racist speech, it does not constitute grounds for protecting the freedom of expression. This is reaffirmed by the CERD’s position in General Recommendation 15, where it notes that ‘the obligation not to disseminate racist ideas is of particular importance.’<sup>785</sup> Indeed, the CERD has underlined that the due regard clause cannot be called to be interpreted as ‘cancelling or justifying a departure from the mandatory obligations set forth in Articles 4(a) and 4(b).’<sup>786</sup>

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<sup>781</sup> The Jewish community of Oslo et al. v. Norway (15 August 2005) Communication no. 30/2003, (CERD/C/67/D/30/2003), para.10.5

<sup>782</sup> The Jewish community of Oslo et al. v. Norway (15 August 2005) Communication no. 30/2003, (CERD/C/67/D/30/2003), para.10.3

<sup>783</sup> The Jewish community of Oslo et al. v. Norway (15 August 2005) Communication no. 30/2003, (CERD/C/67/D/30/2003), para.10.5

<sup>784</sup> The Jewish community of Oslo et al. v. Norway (15 August 2005) Communication no. 30/2003, (CERD/C/67/D/30/2003), para.10.5

<sup>785</sup> CERD General Recommendation 15: Measures to Eradicate Incitement to or Acts of Discrimination A/48/18 at 114 (1994) para.4

<sup>786</sup> Committee on the Elimination of Racial Discrimination, 18<sup>th</sup> Sess. (339 mtg). at 152, CERD/C/SR.399 (1978), para.2

As well as considering the meaning of the due regard clause more closely in the above case, the CERD has tried to tackle the conflict between the competing rights through a variety of documents, a conflict which lies at the heart of the due regard debate. As early back as 1983, the CERD noted that concern that Article 4 would contravene the objectives enshrined in the freedoms of expression, assembly and association was ‘another factor hindering the full application of Article 4.’<sup>787</sup> Instead, the Committee suggested that a ‘balance has to be struck between article 4(a) and freedom of speech, and between article 4(b) and freedom of expression.’<sup>788</sup> In striking this balance, the Committee has noted that States Parties have an ‘obligation to respect the right to freedom of opinion and expression when implementing Article 4.’<sup>789</sup> Nevertheless, neither the ‘due regard’ clause, as established in the ICERD, nor the principles set out in the UDHR offer a clear understanding of the balance that needs to be struck between freedoms or of how that balance is to be reached. The CERD has attempted to elucidate the meaning of the due regard clause and its impact on the interpretation and application of Article 4. It has underlined the need to understand the UDHR in its entirety when considering the due regard clause.

In sum, although the due regard clause was incorporated as a safety net for the protection of key freedoms, it seems to have caused an array of problems in relation to the interpretation and application of Article 4 of the ICERD. Mahalic and Mahalic argue that the due regard clause does not greatly limit the obligations arising from Article 4 given that, under Article 29 (3), no one can enjoy the freedom of expression or association in a manner that goes against protecting others from racial discrimination whereas Article 30 does not allow the exercise of these freedoms in a manner which destructs the rights of others to be free from racial discrimination.<sup>790</sup> Also, in relation to having due regard to Article 5 of the ICERD, the Committee has stated that

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<sup>787</sup> Patrick Thornberry, ‘Forms of Hate Speech and the Convention on the Elimination of all Forms of Racial Discrimination’ (2010) 5 *Religion and Human Rights* 97, 110

<sup>788</sup> Patrick Thornberry, ‘Forms of Hate Speech and the Convention on the Elimination of all Forms of Racial Discrimination’ (2010) 5 *Religion and Human Rights* 97, 110

<sup>789</sup> Committee on the Elimination of Racial Discrimination Concluding Observations: Belarus (2004) A/59/18, paragraph 264

<sup>790</sup> Drew Mahalic & Joan Gambia Mahalic, ‘The Limitation Provisions of the International Convention on the Elimination of all Forms of Racial Discrimination’ (1987) 9 *Human Rights Quarterly* 1, 90-91

this article cannot be used as a tool for avoiding duties arising under Article 4.<sup>791</sup> In light of the above, it can safely be held that the due regard clause should not hamper the applicability of Article 4, if both are read and interpreted correctly, placing primary emphasis on the spirit of international human rights law. However, as reflected by the reservations imposed, thereto, as a result of the due regard clause, this is not the case.

#### 9. Another Route? Article 5 of the ICCPR: The Destruction of the Rights of Others

The HRC has also turned to Article 5 of the ICCPR when dealing with right-wing extremism. Article 5(1) of the ICCPR provides that ‘nothing in the present Covenant 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 recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.’ It could be argued that racist expression is destructive to the right of victims to be free from racial discrimination. This article prohibits and addresses a type of action that would have the effect of destroying the rights of freedoms protected in the ICCPR. An interesting interpretation and implementation of Article 5 can be seen in *M.A. v Italy*,<sup>792</sup> where the HRC applied Article 5 rather than Article 20(2) when considering a communication that did not primarily deal with advocacy but rather with the reorganisation of a dissolved fascist party. More specifically, the HRC found that the act for which *M.A.* was convicted, being the reorganisation of the dissolved fascist party, did not receive the protection of the ICCPR as a result of the provisions of Article 5. By applying this article, the Committee implied that the acts for which *M.A.* was convicted are not protected by the Covenant. Unfortunately it did not further state any reasons why it reached this decision and it did not provide any interpretative understanding of key themes and provisions related to the applicability of Article 5. The lack of substantive reasoning in relation to Article 5 is unfortunate, since a sound assessment of Article 5, in the realm of hate speech, would have provided for a better understanding of the balance to be struck between the freedom of association and assembly and the destruction of the rights and freedoms of others. Such a correlation, if adequately established, could also be extended to right-wing rhetoric in the realm of freedom of expression.

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<sup>791</sup> Committee on the Elimination of Racial Discrimination Sess. (449<sup>th</sup> mtg.) at 156 para.2, CERD/C/SR.449 (1979); 27<sup>th</sup> Sess. (620<sup>th</sup> mtg.) at 297 para.19, CERD/C/SR.620 (1983)

<sup>792</sup> *M.A v Italy*, Communication no. 117/1981, (21 September 1981) Supp. No. 40 (A/39/40)

#### 10. Conclusion: Regulating, Prohibiting and Punishing Far-Right Association and Assembly

In conclusion, the international legal framework foresaw that associations and assemblies are powerful tools for far-right movements and sought to limit the scope of these freedoms within such arenas through the aforementioned tools which provide the opportunity to States to interact and, in the case of Article 4(b) of the ICERD, impose a positive obligation on States to limit these freedoms. Notwithstanding that such restrictions aptly extend to non-violent anti-democratic assemblies and associations, the, at times, conflicting duties imposed on States through vital differences between the content of key tools in conjunction with the hesitation of States to adopt positive obligations, as incorporated in Article 4(b) of the ICERD in the name of protecting assembly and association, undoubtedly hamper the actual enforceability of these provisions. Article 5 of the ICCPR and the non-destruction clause have featured in one relevant case but no further jurisprudence or commentary is available in this sphere. Furthermore, no guidance is offered as to why Article 5 was enforced in *M.A v Italy* rather than another article or why this article was enforced in the particular case and not in another case also involving either far-right rhetoric or association.

#### 11. Chapter Conclusion: Militant Democracy as a Central Tenet of International Human Rights Law.

The above analysis reflects that the United Nations has recognised that, in order to ensure the protection of democracy, there occur certain circumstances in which restrictive measures must be taken in relation to expression, association and assembly. Although these rights are of utmost importance to a functioning democracy, they are to be restricted if their exercise is to harm others or society. In addition, by directly prohibiting advocacy of national, racial or religious hatred in the ICCPR and racist association and expression in the ICERD, the UN impose direct obligations on States Parties to prohibit forces which are destructive to democracy. Thus, militant democracy has become part of the narrative of international human rights law and, as will be reflected in the analysis of the two jurisdictions, has subsequently found its way through to national legal restrictions of forces, such as far-right forces, which may be destructive to a democracy.



## CHAPTER FOUR: THE COUNCIL OF EUROPE

### Introduction

This chapter will look at the tools available at a CoE level to regulate the far-right. Firstly, it will consider the ECHR with a view to assessing the meaning, scope and objectives of relevant provisions and, more particularly, Article 14 of the Convention and Article 1 of Protocol 12 of this Convention, which deal with the doctrine of non-discrimination, Article 10 on the freedom of expression, Article 11 on the freedom of assembly and association and Article 17, the non-destruction clause which provides that nothing in the Convention may be interpreted and applied in such a way as to result in the violation of rights and freedoms. After assessing the relevant articles and connected case-law, the chapter will look at the margin of appreciation enjoyed by States Parties within the framework of these rights and freedoms. Case-law of the ECtHR and the former European Commission of Human Rights (EComHR)<sup>793</sup> shall be reflected upon with a view to ascertaining their *modus operandi* when called to decide upon cases involving the aforementioned articles in the realm of right-wing activities and speech. It is important to consider the case-law of the EComHR as well as that of the ECtHR given that earlier cases related to right-wing extremism were only dealt with by the Commission because, due to their inadmissibility, they never reached the Court. However, with regard to the later cases that were examined by the Court directly, one notes a *continuum* in the overall stance of the Commission's approach, namely that right-wing speech and activities fall outside the framework of Convention protection. An assessment of Commission case-law and a comparison with the Court's case-law, in such cases, becomes particularly significant in the scope of appraising the use of Article 17 of the ECHR by the two institutions, with the Commission having applied it more regularly than the Court. Furthermore, considering how such older cases involving revisionism, negationism and anti-Semitism were dealt with and looking at how themes and rules developed, therein, can be applied today to cases involving Islamophobia, Romaphobia and anti-immigrant rhetoric, makes for an interesting and important analysis. After this, the chapter will consider how the ECtHR approaches racist crime. In addition, and given the use of the Internet by the far-right, the last section of this chapter will consider the Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through

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<sup>793</sup> This considered the admissibility of cases before the entry into force of the 11<sup>th</sup> Protocol of the European Convention of Human Rights and Fundamental Freedoms at the end of 1998.

Computer Systems and its role in challenging the far-right. Thus, the overarching aim of this chapter is to consider the application of the Convention's provisions and the development of Strasbourg's approaches to the rhetoric and actions of right-wing extremist parties, associations and their representatives, with some reference to case-law of the EComHR where relevant.

### 1. Council of Europe

The CoE was born from the ashes of World War II with its founding members committing to a future that respected human rights and fundamental freedoms. The Court and its case-law will lie at the epicentre of this chapter. However, an overview of other bodies and their role in the sphere of tackling the far-right will be made here. The European Commission against Racism and Intolerance (ECRI) is a body of the Council of Europe made up of independent experts which monitors phenomena such as racism, intolerance and discrimination. It issues country reports and makes recommendations which are referred to and discussed in this dissertation. The European Commission for Democracy through Law, also known as the Venice Commission is an advisory body of the Council of Europe providing legal advice to its member states<sup>794</sup> in the sphere of democracy, human rights and the rule of law. Importantly for this dissertation it has prepared guidelines on the Prohibition and Dissolution of Political Parties discussed herein. The ECHR was opened for signature on 4 November 1950 and entered into force on 3 September 1953. The Contracting Parties undertake to secure the rights and freedoms contained in the ECHR. All of the COE's 47 Member States are parties to this Convention. It provides a system of individual judicial redress resulting in binding judgements. For that reason, the Convention has been described as the 'greatest monument to the Council'<sup>795</sup> that is 'the most comprehensive and developed system for supranational human rights protection.'<sup>796</sup> The analysis in this chapter will commence with a consideration of the principle of non-discrimination, as provided for by the ECHR. It will then proceed with the analysis of the scope of Article 10 and Article 11 of the ECHR and the way in which they are applied in cases involving right-wing extremism. It will then consider the, at times, controversial and rather unclear role of Article 17 of the ECHR in removing some types of expression deemed to be hate speech from the scope of the Convention

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<sup>794</sup> 61 Member States: The 47 Council of Europe countries plus other countries (Algeria, Brazil, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA).

<sup>795</sup> Ivan Hare & James Weinstein, '*Extreme Speech and Democracy*' (2nd edn. OUP 2011) 4

<sup>796</sup> Ivan Hare & James Weinstein, '*Extreme Speech and Democracy*' (2<sup>nd</sup> edn. OUP 2011) 4

and close with an appreciation of the meaning and impact of the margin of appreciation doctrine on the outcome of such cases.

## 2. The Principle of Non-Discrimination in Council of Europe Instruments

### 2.1 General Overview of Non-Discrimination in the ECHR

The principle of non-discrimination is protected by the ECHR and its Protocol 12. To elucidate the duties and obligations arising, therefrom, the ECtHR has defined discrimination as ‘treating differently, without an objective and reasonable justification, persons in relevantly similar situations.’<sup>797</sup> No objective and reasonable justification means that ‘the distinction in issue does not pursue a legitimate aim or that there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized.’<sup>798</sup> Moreover, in order for an application to be successful under this article, the ‘discriminatory intent or effect’<sup>799</sup> of the object or act or measure complained of must be established.

Article 14 of the Convention provides that ‘the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’ This article can, thus, be enforced when a right or freedom as set out by the Convention is at stake, thereby, limiting its applicability and effect within that document. As noted in *Marcx v Belgium*, ‘although Article 14 (art. 14) has no independent existence, it may play an important autonomous role by complementing the other normative provisions of the Convention and the Protocols: Article 14 safeguards individuals, placed in similar situations, from any discrimination in the enjoyment of the rights and freedoms set forth in those other provisions.’<sup>800</sup> Notwithstanding the ‘accessory character’<sup>801</sup> of Article 14, its importance must not be undermined since ‘it is as though Article 14 (art. 14) formed an integral part of each of the provisions laying down rights and freedoms.’<sup>802</sup> However, the

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<sup>797</sup> *Willis v. The United Kingdom*, App. no. 36042/97 (ECHR 11 September 2002) para.48

<sup>798</sup> See, *inter alia*, *Andrejeva v. Latvia*, App. no. 55707/00 (ECHR 18 February 2009) para.81, *Sejdić and Finci v Bosnia and Herzegovina*, App. nos. 27996/06 and 34836/06 (22 December 2009) para. 42

<sup>799</sup> *Aksu v. Turkey*, App. nos. 4149/04 and 41029/04,(ECHR, 15 March 2012) para. 45

<sup>800</sup> *Marcx v. Belgium*, App. no. 6833/74 (ECHR 13 June 1979) para. 32

<sup>801</sup> Janneke Gerards, ‘The Discrimination Grounds of Article 14 of the European Convention on Human Rights’ (2013) 13 *Human Rights Law Review* 1, 100

<sup>802</sup> *Belgian Linguistics case no.2* (ECHR 23 July 1968) para. 9

‘discrimination complaints often do not add very much to the other allegations’<sup>803</sup> and, as a result, the Court decides not to deal with the Article 14 aspect of the case.<sup>804</sup>

Article 1 of Protocol 12 holds that:

The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

It further holds that ‘no one shall be discriminated against by any public authority on any grounds such as those mentioned in paragraph 1.’ By applying the non-discrimination principle to any right provided for by law extends the applicability of this principle beyond the framework of the Convention and into the realm of rights and freedoms enshrined in the national legal system of a State Party, in the event that the latter is more extensive than the former. However, the Protocol has only been adopted by eighteen out of the forty-seven States Parties and, thus, its actual impact remains limited. Nevertheless, with regard to the interrelationship between Protocol 12 and Article 14, the Court has underlined that they should be understood in a similar way given that ‘notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14.’<sup>805</sup>

## 2.2 Race as a Ground for Discrimination

Right-wing extremist groups implement activities and promote ideas and beliefs which incite racism and religious discrimination as reflected, for example, in the anti-immigrant rhetoric which is characteristic of such movements. Unlike the UN framework and particularly the ICERD, at a CoE level there exists no Convention dedicated to this theme. The only measure implemented to tackle it has been the Additional Protocol to the Convention on Cybercrime, Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through

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<sup>803</sup> Janneke Gerards, ‘The Discrimination Grounds of Article 14 of the European Convention on Human Rights’ (2013) 13 *Human Rights Law Review* 1, 100

<sup>804</sup> Janneke Gerards, ‘The Discrimination Grounds of Article 14 of the European Convention on Human Rights’ (2013) 13 *Human Rights Law Review* 1, 100

<sup>805</sup> *Sejdić and Finci v Bosnia and Herzegovina*, App.nos. 27996/06 and 34836/06 (ECHR 22 December 2009) para. 55

Computer Systems. However, as can be discerned from its title, it deals with computer systems only. Nevertheless, Article 14 of the ECHR and Article 1 of Protocol 12 both name race as a prohibited ground for discrimination, while the Court has extrapolated upon the theme of racial discrimination in the cases discussed below.

From the time of the EComHR, the particularly serious nature of racial discrimination has been underlined. In *3 East African Asians v The United Kingdom*, the Commission noted that ‘discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3.’<sup>806</sup> This viewpoint was also adopted by the Court in *Timishev v Russia*, in which it was held that racial discrimination is a ‘particularly invidious kind of discrimination’<sup>807</sup> with ‘perilous consequences.’<sup>808</sup> This position was reiterated in *Aksu v Turkey*<sup>809</sup> which dealt with Romaphobia. In *Sejdić and Finci v Bosnia and Herzegovina*, the Court held that, in the context where discrimination is based on race or ethnicity, the notion of differential treatment without an objective and reasonable justification, as referred to above, ‘must be interpreted as strictly as possible.’<sup>810</sup>

In relation to racial violence, the Court underlined that it is ‘a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a ‘vigorous reaction.’<sup>811</sup> In *Nachova v Bulgaria*, the Court also referred to the general obligation of States Parties, under Articles 2 and 14, to conduct effective investigations where there exists the possibility that the motivation for violence was of a racist nature.<sup>812</sup> This duty is also extended to cases where the motives are of a religious nature with States Parties having the duty to establish ‘whether or not hatred or prejudice may have played a role in the events.’<sup>813</sup> However, in establishing whether such racial motivation exists for purposes of the enforcement of, *inter alia*,

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<sup>806</sup> *3 East African Asians (British Protected Persons) v The United Kingdom*, App. nos. 4715/70, 4783/71, 4827/71, (EComHR 6 March 1978) para.2

<sup>807</sup> *Timishev v Russia*, App. nos. 55762/00 and 55974/00 (ECHR 13 March 2006) para. 56

<sup>808</sup> *Timishev v Russia*, App. nos. 55762/00 and 55974/00 (ECHR 13 March 2006) para. 56

<sup>809</sup> *Aksu v Turkey*, App. nos. 414904, 41029/04 (ECHR 15 March 2012) para. 43

<sup>810</sup> *Sejdić and Finci v Bosnia and Herzegovina*, App.nos. 27996/06 and 34836/06, (ECHR 22 December 2009) para. 44

<sup>811</sup> *Nachova and Others v Bulgaria*, App. nos. 43577/98 & 43579/98 (ECHR 6 July 2005) para.145

<sup>812</sup> *Nachova and Others v Bulgaria*, App. nos. 43577/98 & 43579/98 (ECHR 6 July 2005) para.161

<sup>813</sup> *Milanović v Serbia*, App. no. 44614/07 (ECHR 20 June 2011) para.96

Article 14 of the ECHR, the Court adopts a standard of proof beyond reasonable doubt.<sup>814</sup> According to established ECtHR case-law, such a standard may be attained following the ‘co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.’<sup>815</sup> The necessity for a high standard of proof was reiterated in subsequent cases, such as *Cobzaru v Romania*,<sup>816</sup> in which the Court also held that ‘the expression of concern by various organisations about the numerous allegations of violence against Roma by Romanian law enforcement officers....does not suffice to consider that it has been established that racist attitudes played a role in the applicant’s ill-treatment.’<sup>817</sup> Interestingly, in *Milanović v Serbia*, the Court made no reference to establishing proof beyond a reasonable doubt but, instead, referred to the fact that proving religiously prejudicial motivation ‘may be difficult in practice’<sup>818</sup> and, thus, the State’s obligation to investigate is ‘an obligation to use best endeavours and is not absolute.’<sup>819</sup> Therefore, aside from the route followed in *Milanović*, proving such motivation is a difficult task given that it must be proved beyond a reasonable doubt and, thus, it is possible that such acts fall outside this framework due to difficulties *vis-à-vis* attaining this standard. In fact, Interights, which was an intervener in *Nachova v Bulgaria*, criticised this standard as ‘erecting insurmountable obstacles to establishing discrimination’<sup>820</sup> and recommended a balance of probabilities standard of proof for such cases.<sup>821</sup>

The only time that Article 14 of the ECHR was directly applied in the field under consideration was in the case of *Aksu v Turkey*. Here, the Court dealt with Romaphobic rhetoric which the applicant alleged had been promoted in three publications which had received government funding. For example, these publications included references that Roma were ‘engaged in illegal activities, lived as thieves, pickpockets, swindlers, robbers, usurpers, beggars, drug dealers, prostitutes and brothel keepers and were polygamist and aggressive.’<sup>822</sup> The case was dealt with under the framework of Article 8 of the ECHR read in conjunction with Article 14. The reason

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<sup>814</sup> *Nachova and Others v Bulgaria*, App. nos. 43577/98 & 43579/98, (ECHR 6 July 2005) para.147

<sup>815</sup> *Nachova and Others v Bulgaria*, App. nos. 43577/98 & 43579/98 (ECHR 6 July 2005) para.147

<sup>816</sup> *Cobzaru v Romania*, App. no. 48254/99 (ECHR 26 July 2007) para.93

<sup>817</sup> *Cobzaru v Romania*, App. no. 48254/99 (ECHR 26 July 2007) para.95

<sup>818</sup> *Milanović v Serbia*, App. no. 44614/07 (20 June 2011) para.96

<sup>819</sup> *Milanović v Serbia*, App. no. 44614/07 (20 June 2011) para.96

<sup>820</sup> *Nachova and Others v Bulgaria*, App.nos. 43577/98 & 43579/98 (ECHR 6 July 2005) para.140

<sup>821</sup> *Nachova and Others v Bulgaria*, App.nos. 43577/98 & 43579/98 (ECHR 6 July 2005) para.140

<sup>822</sup> *Aksu v Turkey*, App. nos. 4149/04 & 41029/04 (ECHR 15 March 2012) para.14

for this shift in technique was that the applicant was not the one expressing the views, as the Court had habitually been confronted with, but, rather, a person of Roma origin who had been insulted by the expression. As noted by Belavusau, ‘procedurally, this case illustrates the paradox that hate speech cases typically reach Strasbourg exclusively as claims against States by haters, alleging violation of their rights to free speech.’<sup>823</sup> Even though it found no violation of Article 8 in conjunction with Article 14, the Court reiterated the need for the State to implement effective measures to combat negative stereotyping against the Roma.<sup>824</sup>

In sum, notwithstanding that Article 14 of the ECHR will be surpassed in the event that another article of the Convention can be relied upon, and whilst Protocol 12 has not been extrapolated on by the Court’s jurisprudence due to its limited ratification, the principle of non-discrimination is significant to any discussion on right-wing movements given that their activities and ideologies emanate from an unjustified difference in the treatment of people belonging to particular groups. The Court has recognised that discrimination can result from racial and religious causes and, as reflected in the case-law, States are under a particularly strict duty to investigate violence arising from such discrimination which, as dictated by the majority of ECtHR cases, must subsequently be proved beyond a reasonable doubt. Thus, the theoretical and jurisprudential scene has been set by the Court for future cases in the realm of right-wing extremism within the framework of non-discrimination with Article 14 and Article 1 of Protocol 12 constituting available, but, to date, rarely used tools.

### 3. Freedom of Expression

#### 3.1 General Overview of Article 10 of the ECHR

Article 10 of the ECHR protects the right to freedom of expression. More particularly, it states that:

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

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<sup>823</sup> Uladzislau Belavusau, ‘Experts in Hate Speech Cases – Towards a Higher Standard of Proof in Strasbourg?’ in Łukasz Gruszczyński & Wouter Werner, *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (eds. OUP 2014) 267

<sup>824</sup> *Aksu v Turkey*, App. nos. 4149/04 & 41029/04 (ECHR 15 March 2012) para.75

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.

First and foremost, the provision stipulates that ‘everyone’ has the right to freedom of expression, including both natural and legal persons.<sup>825</sup> Unlike Article 19 of the ICCPR, Article 10 of the ECHR does not grant the right to hold opinions an absolute status. Furthermore, as with Article 19, Article 10 recognises that the freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas, carries with it duties and responsibilities. Importantly, Article 10, unlike other articles of this Convention, incorporates a further qualification in the form of duties and responsibilities when exercising this right, demonstrating that the drafters realised and sought to conceptualise the dangers which potentially come with free expression and the due care that must be taken by the person expressing his or her opinion(s). A State may intervene in the exercise of these freedoms as long as the restriction is provided for by law and is necessary in a democratic society to pursue one of the aims provided for by Article 10(2). Paragraph 2 of this Article appears to allow more room for limitation than Article 19(3) of the ICCPR because, as well as respecting the rights or reputations of others, the protection of national security or public order and public health or morals, Article 10(2) stipulates that legitimate formalities, conditions, restrictions or penalties<sup>826</sup> can be made for purposes of territorial integrity, for the prevention of disorder or crime, for the prevention of disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Nevertheless, it is important to note that it limits the possibilities for

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<sup>825</sup> Andrew Lester, David Pannick and Javan Herberg, *‘Human Rights Law and Practice’* (3<sup>rd</sup> edn. LexisNexis 2009)

<sup>826</sup> Article 10 refers to all these methods of interference rather than simply to ‘restrictions’ as in the case of the ICCPR.



restrictions by providing that they should be necessary in a democratic society and not simply necessary in order to achieve one of the listed objectives, as is the case in Article 19(3).

The Convention does not include a particular provision on advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, as is the case with the ICCPR. Nevertheless, this has not prevented the ECtHR from ruling against cases involving speech which has such aims, nor did it prevent it or the former EComHR from rendering such cases inadmissible. As well as the limitation clauses of Article 10, Article 17 has also been of importance in this respect. This provision will be discussed separately in section 5 below.

According to long-standing case-law of the ECtHR, the rights set out in Article 10(1) are to be interpreted and applied in a broad manner, given that ‘there is no room in general for an argument that Article 10 extends only to true information: opinions, speculations and criticism are all covered.’<sup>827</sup> In *Handyside v The United Kingdom*, the Court held that the ‘freedom of expression constitutes one of the essential foundations of [a democratic society], one of the basic conditions for its progress and for the development of every man.’<sup>828</sup> The Court has repeatedly underlined the central position of the freedom of expression in a democratic and pluralist society. More particularly, in *Observer and the Guardian v The United Kingdom*, it held that the freedom of expression is applicable not only to information or ideas that are ‘favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.’<sup>829</sup> Nevertheless, as will be reflected further down, the Court has taken a militant understanding of democracy, with a democratic society in its judgements being ‘tolerant but not inert.’<sup>830</sup> The Court has accepted that a democracy should protect itself and its basic principles and must ‘fight against abuses, committed in the exercise of freedom of speech, that openly

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<sup>827</sup> Adrian Marshall Williams & Jonathan Cooper, ‘Hate Speech, Holocaust Denial and International Human Rights Law,’ (1999) 7 *European Human Rights Law Review* 593

<sup>828</sup> *Handyside v The United Kingdom*, App. no. 5493/72 (ECHR, 7 December 1976 ) para. 49

<sup>829</sup> *The Observer and The Guardian v The United Kingdom*, App. No. 13585/88 (ECHR, 26 November 1991) para. 59.

<sup>830</sup> Jean-François Flauss, ‘The European Court of Human Rights and the Freedom of Expression’ (2009) 84 *Indiana Law Journal* 809, 837

target democratic values.’<sup>831</sup> Thus, even though this freedom is undoubtedly significant, it must nevertheless coexist harmoniously with other rights and freedoms with democracy having the duty militantly to protect itself from the abuse of expressive freedom.

There is a considerable amount of case-law of the ECtHR and the EComHR in relation to Article 10 of the ECHR, including cases involving hate speech promulgated by representatives of extreme right-wing movements. To consider and evaluate this jurisprudence, the section will now consider the kinds of speech protected by the freedom of expression and then look at hate speech and how this is and has been understood and interpreted by the above institutions.

### 3.2 What Kind of Speech?

From the ECtHR’s jurisprudence, one can discern a hierarchy of different forms of speech with political, artistic and commercial speech being the main identifiable categories<sup>832</sup> as well as freedom of the press<sup>833</sup> and whistleblowing.<sup>834</sup> Within this categorisation of speech, political speech is most highly valued. As stated in *Lingens v Austria*, the freedom of political debate ‘is at the very core of the concept of a democratic society,’<sup>835</sup> with *Wingrove v The United Kingdom* noting that there is little scope under Article 10(2) to restrict political speech or issues of public interest.<sup>836</sup> In *Mouvement Raëlien Suisse v. Switzerland*, the Court acknowledged that the varying value level and subsequent extent to which a State will enjoy a certain margin of appreciation in interpreting and imposing restriction on expression depends on a range of issues including the type of speech.<sup>837</sup> In this case, it held that ‘there is little scope under Article 10(2) of the

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<sup>831</sup> Jean-François Flauss, ‘The European Court of Human Rights and the Freedom of Expression’ (2009) 84 *Indiana Law Journal* 809, 837

<sup>832</sup> Ian Leigh, ‘Damned if they Do, Damned if they Don’t: The European Court of Human Rights and the Protection of Religion from Attack’ (2011) 17 *Springer Science and Business Media B.V.* 17, 57

<sup>833</sup> *Delfi AS v Estonia*, App. no. 64569/09 (ECHR 10 October 2013) para. 79

<sup>834</sup> Lucy Vickers, ‘*Freedom of Speech and Employment*’ (eds. OUP 2002) 1, Council of Europe Parliamentary Assembly Resolution 1729 (2010) ‘Protection of Whistle-Blowers’, *Heinisch v Germany*, App. no. 28274/08 (ECHR 21 October 2011) para.43

<sup>835</sup> Case-law includes, amongst others: *Lingens v Austria*, App. no. 9815/82 (ECHR, 8 July 1986) para. 42, *Özgurluk v Dayanisma Partisi (ÖDP v Turkey)* App.no. 7819/04 (ECHR, 10 May 2012) para. 28, *Raelien Suisse v Switzerland*, App. No 16354/06 (ECHR, 13 July 2012) para. 46.

<sup>836</sup> *Wingrove v The United Kingdom*, App. no. 17419/90 (ECHR 25 November 1996) para. 58, *Surek v Turkey No.1*, App. no. 26682/95 (ECHR, 8 July 1999) para. 61, *Mouvement Raëlien Suisse v. Switzerland*, App. no 16345/06 (ECHR 13 July 2012) para. 61,

<sup>837</sup> *Mouvement Raëlien Suisse v Switzerland*, App. no.16354/06 (ECHR, 13 July 2012) para.61

Convention for restrictions on political speech.’<sup>838</sup> As well as the type of speech and the importance attached thereto, the Court has also considered the significance of the form and tone used for the expression in question as well as its content,<sup>839</sup> giving the notion of expression a wide scope within the ECtHR’s jurisprudence. Indeed, freedom within the realm of choice of language and manner of expression is evident in the official recognition of the freedom to shock as referred to above. The right to hyperbolic and provocative language and speech is a central part of political speech and, in this light, polemical,<sup>840</sup> sarcastic<sup>841</sup> and satirical<sup>842</sup> language is permitted. Moreover, a certain degree of exaggeration is broadly understood to be accepted, particularly in discussions on political issues.<sup>843</sup>

Notwithstanding the importance of political speech, the Commission, and now the Court, have both emphasised the duties politicians have in contributing to the overall peace and coexistence of a democratic society. For example, in *Sener v Turkey*, the Commission emphasised the importance of the duties and responsibilities related to the exercise of the freedom of expression within the political sphere and observed that ‘it is important for persons addressing the public on sensitive political issues to take care that they do not support unlawful political violence.’<sup>844</sup> Interlinked with this, and particularly significant to the ambit of xenophobic speech uttered by politicians and the weight that is to be attached to such political speech, are the two cases of *Féret* and *Le Pen*. In *Féret v Belgium*, the leader of a radical right political party - *National Front* brought a claim to Strasbourg for his conviction of incitement to racism. More particularly, this case dealt with anti-immigrant statements and recommendations made by Mr. Féret in leaflets distributed during an electoral campaign. Statements made, included, amongst others ‘Stop the Islamization of Belgium’ and ‘Save our people from the risk posed by Islam, the conqueror.’ Here, the Court emphasised that ‘political speech that stirred hatred based on religious, ethnic or cultural prejudices was a threat to social peace and political stability in democratic States.’<sup>845</sup> It also underlined how significant it is for politicians to take care when expressing themselves in

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<sup>838</sup> *Mouvement Raëlien Suisse v Switzerland*, App. no.16354/06 (ECHR, 13 July 2012) para.61

<sup>839</sup> *Fedchenko v Russia*, App. no. 33333/04 (ECHR, 28 06 2010) para.38

<sup>840</sup> *Lopes Gomes da Silva v Portugal*, App. no. 37698/97 (ECHR, 28 September 2000) para.35

<sup>841</sup> *Katrami v Greece*, App. no. 19331/05 (ECHR, 6 December 2007)

<sup>842</sup> *Eon v France*, App. no. 26118/10 (ECHR, 14 June 2013) para. 61

<sup>843</sup> *Dabrowski v Poland*, App. no. 18235/02 (ECHR, 19 December 2006) para.35

<sup>844</sup> *Şener v Turkey*, App. no. 26680/95 (ECHR, 18 July 2000) para. 79

<sup>845</sup> *Féret v Belgium*, App. no. 15615/07 (ECHR, 16 July 2009) para.73

public so as to avoid promoting feelings of intolerance but rather defending democracy and the values underlying it.<sup>846</sup> Therefore, although the Court recognised that political parties and their representatives ‘must enjoy broad freedom of expression to be able to attract voters, where racist or xenophobic comments were concerned, the electoral context helped to kindle hatred and intolerance and the impact of this type of speech grew worse and more harmful.’<sup>847</sup> In *Le Pen v France*, the Court dealt with a case brought by the president of the French extreme-right party, *National Front*, for the alleged breach of his Article 10 rights due to his conviction for inciting hatred against Muslims during an interview with *Le Monde* newspaper. He stated, *inter alia*, that ‘when I tell people that when we have 25 million Muslims in France we French will have to watch our step, they often reply: ‘But Le Pen, that is already the case now!’ – and they are right.’ Although no explicit reference was made by the Court to the particular duties of politicians in contributing to overall social cohesion and the overall responsibilities attached to political speech as was the case in *Féret*, this line of reasoning was implicitly reflected in the judgement. For example, the Court underlined the significance of allowing free political speech but also underlined the need to protect the rights of others and the importance of combatting racial discrimination.<sup>848</sup> In this case, as opposed to other similar cases, the application was deemed manifestly ill-founded and inadmissible.

### 3.3 Hate Speech: Semantics and Notions

The task of ensuring a smooth interrelationship between the freedom of expression and principles, such as equality and non-discrimination, is central to any discussion pertaining to hate speech uttered by right-wing extremist movements. This section will look at examples of the general position of the Commission and the Court when faced with hate speech, with the following sections examining the formulas construed and implemented by the institutions for purposes of ruling on hate speech. The Commission established the position that hate speech is not entitled to Convention protection in the cases of *Glimmerveen and Hagenbeek v The Netherlands* and *Kühnen v the Federal Republic of Germany*. *Glimmerveen and Hagenbeek* was the first case involving right-wing extremism in which Article 17 was enforced. Here, the Commission dealt with a leaflet addressed to ‘white Dutch People’ and advocated a policy which

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<sup>846</sup> *Féret v Belgium*, App. no. 15615/07 (ECHR, 16 July 2009) para.75

<sup>847</sup> *Féret v Belgium*, App. no. 15615/07 (ECHR, 16 July 2009) para.76

<sup>848</sup> *Le Pen v France*, App. no. 187788/09 (ECHR 20 April 2010) para.1

sought to remove all non-white people from the Netherlands. The Commission held that this policy contained elements of racial discrimination and held the view that ‘the expression of the political ideas of the applicants clearly constitutes an activity within the meaning of Article 17 of the Convention.’<sup>849</sup> The Commission’s exclusionary approach to racist rhetoric continued in *Kuhnen v Federal Republic of Germany*, which ‘left no doubts that racist expression cannot be rehabilitated even half a century after the Second World War for the sake of libertarian argument.’<sup>850</sup> In this case, the applicant held a seminal position in an organisation that was allegedly attempting to re-institute the Nazi party, prohibited in Germany. In this context, he prepared and disseminated pamphlets which included, amongst others, statements such as ‘We are called 'Neo-Nazis'! So what! ... We are against: bigwigs, bolshevists, Zionists, crooks, cheats and parasites.’ He was sentenced to three years and four months’ imprisonment. The Commission found that the applicant’s proposal, as expressed in the pamphlets, contravened one of the basic values underlying the Convention, ‘namely that the fundamental freedoms enshrined in the Convention are best maintained by an effective political democracy.’<sup>851</sup> In this case, the Commission found that the applicant sought to use the freedom provided in Article 10 as a tool to carry out activities which oppose the spirit of the Convention.

In the seminal case of *Jersild v. Denmark*, the Court dealt with statements expressed on television by a group called the “*Greenjackets*” (“*Grønjakkerne*”) which included, *inter alia*, that ‘a nigger is not a human being, it’s an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called.’ Here, the Court held that expression constituting hate speech, which may be insulting to particular individuals or groups, is not protected by Article 10 of the Convention.<sup>852</sup> In this case, the Court affirmed that ‘Article 10...should not be interpreted in such a way as to limit, derogate from or destroy the right to protection against racial discrimination under the UN Convention.’<sup>853</sup> In *Lehideux & Isorni v France*, the Court dealt with a publication in *Le Monde* which defended the memory of Marshal Pétain<sup>854</sup>. In this

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<sup>849</sup> *Glimmerveen and Hagenbeek v The Netherlands*, App. nos. 8348/78, 8406/78 (EComHR 11 October 1979)

<sup>850</sup> Uladzislau Belavusau, *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies* (1<sup>st</sup> edn. Routledge 2013) 49

<sup>851</sup> *Kuhnen v Federal Republic of Germany*, App. no. 12194/86 (EComHR 12 May 1988)

<sup>852</sup> *Jersild v Denmark*, App. no. 15890/89 (ECHR, 23 September 1994) para.35

<sup>853</sup> *Jersild v Denmark*, App.no. 15890/89 (ECHR, 23 September 1994) para.27

<sup>854</sup> Marshal Pétain has a contradictory role in French history – both as a hero of WWI but also as a discredited chief of State of Vichy France:< <http://www.britannica.com/EBchecked/topic/453539/>> [Accessed 14 June 2014]

case, the Court held that ‘justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10.’<sup>855</sup> In *Garaudy v France*, the Court dealt with the publication of a book, ‘The Founding Myths of Israeli politics,’ which included statements such as ‘the myth of six million exterminated Jews that has become a dogma justifying and lending sanctity (as indicated by the very word Holocaust) to every act of violence.’ In this case, the Court explained why revisionist speech is to be considered hateful and harmful speech by holding that ‘denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others.’<sup>856</sup> In *Norwood v The United Kingdom*, the applicant was a Regional Organiser for the *BNP*, an extreme-right wing political party. He displayed a large poster in the window of his flat, supplied by the BNP, with a photograph of the Twin Towers in flames, the words “Islam out of Britain – Protect the British People” and a symbol of a crescent and star in a prohibition sign. Here, the Court found that ‘a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination’<sup>857</sup> and, thereby, fell outside the scope of Article 10. In *Soulas v France*, the authors of a book discussing the alleged incompatibilities between European and Islamic cultures complained of an interference of their Article 10 rights due to their conviction by the national court for inciting hate propaganda. In reaching its judgement, the ECtHR found that phrases such as ‘it is only if an ethnic civil war breaks out that the solution can be found’ could potentially incite aggression against a particular group<sup>858</sup> and is, thus, unacceptable speech under Article 10, but was not deemed serious enough to fall within the framework of Article 17.<sup>859</sup> In *Balsytė-Lideikienė v Lithuania*, the applicant was founder and owner of a company which published the Lithuanian Calendar 2000 and received an administrative warning for statements contained in the calendar which were considered insulting

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Philippe Petain

<sup>855</sup> *Lehideux & Isorni v France*, App. no. 24662/94 (ECHR 23 September 1998) para.5

<sup>856</sup> *Garaudy v France*, App. no. 65831/01 (ECHR 25 June 2003)

<sup>857</sup> *Norwood v The United Kingdom*, App. no. 23131/03 (ECHR, 16 November 2004)

<sup>858</sup> *Soulas and Others v France*, App. no. 15948/03 (ECHR 10 July 2008) para 43

<sup>859</sup> *Soulas and Others v France*, App. no. 15948/03 (ECHR 10 July 2008) para 48

to persons of Polish, Russian and Jewish origin. Statements included, amongst others ‘The soviet occupying power, with the help of the communist collaborators, among whom, in particular, were many Jews, for half a century ferociously carried out the genocide and colonisation of the Lithuanian nation’ The Court held that the passages contained statements ‘inciting hatred against the Poles and the Jews. The Court considered that these statements were capable of giving the Lithuanian authorities cause for serious concern’<sup>860</sup> and gave the State a wide margin of appreciation to decipher and deal with the case<sup>861</sup> and, as a result, found no violation of Article 10.

Although this dissertation, for reasons explained in its introduction, places focus on racial hatred and activities expressed and carried out by right-wing extremist groups, a reference must be made to the case of *Vejdeland and Others v Sweden*. This is predominantly because this case dealt with homophobic speech expressed in leaflets disseminated by a far-right association named ‘*National Youth*’ and was, thus, part of an organised network of intolerance. The applicants of this case had been convicted by the Swedish Supreme Court of agitation against a national or ethnic group for the dissemination of leaflets which contained, amongst others, statements that homosexuality has ‘a morally destructive effect on the substance of society,’ that ‘HIV and AIDS appeared early with the homosexuals and that their promiscuous lifestyle was one of the main reasons for this modern-day plague gaining a foothold’ and that ‘homosexual lobby organisations are also trying to play down pedophilia.’ In finding no violation of the freedom of expression, the Court held that ‘although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations,’<sup>862</sup> and, by applying *Féret*, noted that incitement to hatred does not necessarily entail a call for violence.<sup>863</sup> The Court also underlined that ‘discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour.’<sup>864</sup> From the above cases, it can be discerned that hate speech can be subjected to formalities, conditions, restrictions or penalties by the State. Therefore, although the Convention does not specifically limit and/or sanction speech

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<sup>860</sup> *Balsytė-Lideikienė v Lithuania*, App. no. 72596/01 (ECHR 4 November 2009) para. 79

<sup>861</sup> *Balsytė-Lideikienė v Lithuania*, App. no. 72596/01 (ECHR 4 November 2009) para. 80

<sup>862</sup> *Vejdeland and Others v Sweden*, App. no. 1813/07 (ECHR 9 February 2012) para. 54

<sup>863</sup> *Vejdeland and Others v Sweden*, App. no. 1813/07 (ECHR 9 February 2012) para. 55

<sup>864</sup> *Vejdeland and Others v Sweden*, App. no. 1813/07 (ECHR 9 February 2012) para. 55

that promotes racial or ethnic hatred,<sup>865</sup> the Court predominantly deals with relevant cases, as they arise, under Article 10, with one notable yet unexplained shift to Article 17 in *Norwood* as well as the Articles 8-14 case of *Aksu*.

Further, probably in view of comprehending and evaluating hate speech in its entirety, the Court has sometimes made a psycho-social appraisal of its effects. In *Féret v Belgium*, the Court held that personal attacks and defamation of groups of people violate the dignity and security of the target group. More particularly, it noted that the statements were ‘inevitably of such a nature as to arouse, particularly among the less informed members of the public, feelings of distrust, rejection or hatred towards foreigners.’<sup>866</sup> However, in the dissenting opinion of Judge András Sajó, joined by Judges Vladimiro Zagrebelsky and Nona Tsotsoria, the majority saw humans as ‘nitwits...incapable of replying to arguments and counter-arguments, due to the irresistible drive of their irrational emotions.’<sup>867</sup> This, it was argued, contravened the idea of freedom of expression which incorporates the principle of informed choice. In addition, the Court considered the wider implications of hate propaganda within the sphere of social peace and political stability and further noted that ‘to recommend solutions to immigration-related problems by advocating racial discrimination was likely to cause social tension and undermine trust in democratic institutions.’<sup>868</sup> In *Le Pen v France*, the applicant’s statements were found to be of such nature as to promote rejection of and hostility against the targeted community, in this case the Muslim community.<sup>869</sup>

When confronted with the possibility of limiting Article 10 in the name of hate speech or even, as discussed later on, of ousting it from Convention protection through Article 17, a variety of questions and ambiguities arise when seeking a balance between conflicting rights and freedoms. Namely, what is hate speech? At what point and under which conditions does speech constitute incitement to discrimination, hostility or violence? When does speech surpass the threshold of simply shocking, offending and disturbing? In some cases, such as that of *Balsytė-Lideikienė v Lithuania*, the Court made reference to the Recommendation of the CoE Committee of

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<sup>865</sup> Unlike Article 20 (2) of the ICCPR or Article 4(a) of the ICERD

<sup>866</sup> *Féret v Belgium*, App. no. 15615/07 (ECHR, 16 July 2009) para.69

<sup>867</sup> *Féret v Belgium*, App. no. 15615/07 (ECHR, 16 July 2009)

<sup>868</sup> *Féret v Belgium*, App. no. 15615/07 (ECHR, 16 July 2009) para.77

<sup>869</sup> *Le Pen v France*, App. no 18788/09 (ECHR 20 April 2010)



Ministers on hate speech<sup>870</sup> as a definitional framework for this phenomenon. However, there is no regular reference to this definition nor is there a formulation of a separate definition by the Commission or the Court to be applied gradually in the framework of hate speech and, while there are sporadic references to the effects of hate speech, as considered in this chapter, the aforementioned questions remain open. Establishing the meaning of hate speech, and distinguishing it from controversial yet acceptable speech, is clearly central to any adequate legal analysis. It is a job rendered even more complicated for the ECtHR given the margin of appreciation and the resulting discretion enjoyed by Contracting Parties under certain circumstances. However, the Court has not set out a coherent test to be employed when seeking to determine whether a particular case is one of hate speech. As a result, this lacking definitional backdrop to hate speech is ‘unsatisfactory from the point of judicial interpretation, doctrinal development and general predictability and foreseeability.’<sup>871</sup> In addition to lack of coherence, this may also result in the possible misapplication of relevant principles, as was the case in *Willem v France* where the Court agreed with the conviction of the mayor of a French town who had publicly requested a boycott of Israeli products as a means of protesting the anti-Palestinian policies of Israel. Like the national judiciary, the ECtHR considered that the applicant had not been convicted for his political opinions but for inciting the commission of a discriminatory, and, therefore, punishable act.<sup>872</sup> It is, to say the least, debatable whether Article 10(2) or Article 17 aim at curtailing this genre of expression. Either way, and regardless of any technical difficulties, as noted by Belavusau and reflected in this chapter, ‘the expression of racial hatred is not covered by the protective scope of Article 10(1).’<sup>873</sup>

### 3.4 Freedom of Expression: Reasonableness Review of Restrictions and Limitations

As noted by Antoine Buyse, ‘few issues are as contested as the limits of freedom of expression.’<sup>874</sup> Against the backdrop of a lacking extrapolation on hate speech, the Court has

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<sup>870</sup> Council of Europe’s Committee of Ministers Recommendation 97 (20) on Hate Speech (30 October 1997)

<sup>871</sup> Tarlach McGonagle, ‘The Council of Europe Against Online Hate Speech: Conundrums and Challenges’ Expert Paper, Institute for Information Law, Faculty of Law, <[http://hub.coe.int/c/document\\_library/get\\_file?uuid=62fab806-724e-435a-b7a5-153ce2b57c18&groupId=10227](http://hub.coe.int/c/document_library/get_file?uuid=62fab806-724e-435a-b7a5-153ce2b57c18&groupId=10227)> [accessed 15 August 2014] 10

<sup>872</sup> *Willem v France*, App. no. 10883/05 (ECHR 10 December 2009) para. 35

<sup>873</sup> Uladzislau Belavusau, ‘*Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies*’ (1<sup>st</sup> edn. Routledge 2013), 49

<sup>874</sup> Antoine Buyse, ‘Dangerous Expressions: The ECHR, Violence and Free Speech’ (2014) *International and Comparative Law Quarterly* 2, 492

developed a tripartite justification test that emanates from Article 10(2) of the Convention, the key question being whether a particular interference is in line with the Convention. In determining whether there has been an interference with the freedom of expression, the Court implements the classical *Sunday Times* test, which, in line with the requirements of Article 10(2), includes ascertaining whether the interference is necessary in a democratic society and, more specifically, whether there was a ‘pressing social need’ for the interference, whether the interference was proportionate to the legitimate aim pursued and whether the reasons for interference are relevant and sufficient in light of the aims listed in Article 10(2). Moreover, the interference must be ‘prescribed by law’, which means it must have a basis in domestic law which is sufficiently accessible and foreseeable.

### 3.4.1 Prescribed by Law

The ECtHR has held that the term ‘law’ must be interpreted in a manner that recognises and embraces the different types of law that make up the legal reality in the country concerned. In *Sunday Times*, the Court stated that the word ‘law’ includes written law as well as the case-law interpreting it. When discussing the doctrine of contempt of court, it underlined that common law, even though unwritten, does in fact constitute law.<sup>875</sup> In the same case, the Court held that there are two requirements emanating from this provision. Firstly, the law must be readily accessible to citizens, namely ‘the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case.’<sup>876</sup> Secondly, it must be ‘formulated with sufficient precision to enable the citizen to regulate his conduct...to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.’<sup>877</sup> However, the Court recognised that, in attempting to ensure certainty and foreseeability, excessively rigid laws may result which are unable to adapt to altering circumstances and situations. As a result, the Court noted that ‘many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.’<sup>878</sup> In *Olsson v Sweden*, the Court underlined that the phrase ‘prescribed by law’ refers not only to the law itself but also embraces the quality of the law, requiring it to be

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<sup>875</sup> *Sunday Times v The United Kingdom*, App. no 6538/74 (ECHR 26 April 1979) para. 47

<sup>876</sup> *Sunday Times v The United Kingdom*, App. no 6538/74 (ECHR 26 April 1979) para. 47

<sup>877</sup> *Sunday Times v The United Kingdom*, App. no 6538/74 (ECHR 26 April 1979) para. 47

<sup>878</sup> *Sunday Times v The United Kingdom*, App. no 6538/74 (ECHR 26 April 1979) para. 47

in line with the rule of law.<sup>879</sup> Further, the Court recognised that, in attempting to ensure the organic nature of the law in an ever-changing society, vagueness can be an ensuing issue. Also, in *Sanoma Uitgevers BV v The Netherlands*, the Court held that domestic law must ‘afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention.’<sup>880</sup> In *Féret v Belgium*, the Court found that the national courts relied on a national law which criminalised certain acts inspired by racism or xenophobia and, thus, the interference was indeed prescribed by law.<sup>881</sup> This part of the Court’s test, that being the determination of whether interference has been prescribed by law, has not posed a problem for hate speech case-law and, thus, this part of the Court’s review on reasonableness will not be further considered.

### 3.4.2 *Necessary in a Democratic Society*

Article 10 (2) of the ECHR outlines that the interference in question must be ‘necessary in a democratic society.’ As stated beforehand, the second part of the condition is not included in Article 19 of the ICCPR, which simply outlines the factors which make a restriction necessary. In *Handyside v The United Kingdom*, as well as recognising the central role held by the freedom of expression in a democratic society, the Court outlined the characteristics that make up such a society, namely ‘pluralism, tolerance and broadmindedness without which there is no democratic society.’<sup>882</sup> In *United Communist Party of Turkey and Others v Turkey*, the Court held that ‘democracy is the only political model contemplated by the Convention and, accordingly, the only one compatible with it.’<sup>883</sup> In *Ždanoka v Latvia*, the Court more generally held that ‘democracy constitutes a fundamental element of the European public order.’<sup>884</sup> However, in order to ensure a functioning democracy, the conflict between the freedom of expression in the realm of problematic speech and the values of equality and non-discrimination must be resolved. The resulting balancing test emanates from the premise that one must grant due consideration to ‘the democratic importance of freedom of speech on the one hand and the harmful consequences

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<sup>879</sup> *Olsson v Sweden*, App. no 10465/83, (ECHR, 24 March 1998) para. 61(b)

<sup>880</sup> *Sanoma Uitgevers B.V. v The Netherlands*, App.no 38224/03 (ECHR 14 September 2010) para. 82

<sup>881</sup> *Féret v Belgium*, App. no 15615/07 (ECHR, 16 July 2009) para. 58

<sup>882</sup> *Handyside v The United Kingdom*, App. no. 5493/72 (ECHR 7 December 1976) para 49

<sup>883</sup> *United Communist Party of Turkey and Others v Turkey*, App. no 133/1996/752/951 (ECHR 30 January 1998) para. 45

<sup>884</sup> *Ždanoka v Latvia*, App. no 58278/00 (ECHR 16 March 2006) para 98

of hate propaganda on the other hand.’<sup>885</sup> In *Klass v Germany*, the Court affirmed that ‘some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention.’<sup>886</sup> In *Thoma v Luxembourg*, the Court held that restrictions on rights guaranteed by the Convention must be narrowly construed and enforced in the interest of public and social life, in its entirety, as well as in the interest of individuals making up that society.<sup>887</sup> In *Ždanoka v Latvia*, the Court held that ‘in order to guarantee the stability and effectiveness of a democratic system, the State may be required to take specific measures to protect itself.’<sup>888</sup> However, as noted in *United Communist Party of Turkey and Others v Turkey*, the problem which arises is how to strike an equitable balance in defending democracy whilst simultaneously protecting individual rights and freedoms. For the purpose of mitigating the potential risks involved, this balancing must be conducted meticulously, with due care and consideration given to all the actors and institutions involved. Regardless of a certain variation made by the Court when deciphering the margin of appreciation, a State should, in fact, be the guiding light in the balancing exercise between the different rights at stake so as to ensure that individuals and groups do not use and abuse the genuine aims and objectives of Article 10(1) for purposes contrary to the Convention. This is the precise outcome which the Court attempts to avoid in cases involving right-wing extremism, either through the enforcement of Article 10(2) or of Article 17.

Further, in *Sunday Times v The United Kingdom*, the Court found that whilst the adjective ‘necessary’ within the meaning of Article 10(2) ‘is not synonymous with indispensable, neither has it the flexibility of such expressions as admissible, ordinary, useful, reasonable or desirable and that it implies the existence of a pressing social need.’<sup>889</sup> When assessing the pressing social need and the proportionality of the interference, the State must consider whether the expression contributes ‘to any form of public debate capable of furthering progress in human affairs’<sup>890</sup> or whether the expression is simply aimed at destructing democratic principles and values. In

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<sup>885</sup> Stefan Sottiaux, ‘Bad Tendencies in the ECtHR’s Hate Speech Jurisprudence’ (2011) 7 *European Constitutional Law Review* 1, 48

<sup>886</sup> *Klass and Others v Germany*, App. no. 5029/71 (ECHR 6 September 1978) para. 59

<sup>887</sup> *Thoma v Luxembourg*, App. no. 38432/97 (ECHR 29 March 2001) para. 48

<sup>888</sup> *Ždanoka v Latvia*, App. no. 58278/00 (ECHR 16 March 2006) para. 100

<sup>889</sup> *Sunday Times v The United Kingdom*, App. no. 6538/74 (ECHR 26 April 1979) para.59

<sup>890</sup> *Otto-Preminger-Institut v Austria*, App. no. 13470/87 (ECHR, 20 September 1994) para. 49

relation to far-right rhetoric, the Commission directly interlinked the prohibition of National Socialist activities with the preservation of a democratic society. More particularly, in *X v. Austria*, the applicant was convicted on charges of neo-Nazi activities and sentenced to nine months' imprisonment for violating a constitutional act dealing with Nationalist Socialist Activities. The Commission examined whether the restriction was necessary in a democratic society and stated that Austria recognised the dangers to social order brought about by National Socialism, and held that 'it is scarcely to be supposed that the EComHR, whose duty it is, after all, to preserve this democratic order in the European States will disagree with her.'<sup>891</sup>

### 3.4.3 *Legitimate Aim*

In order to be accepted, interference to the freedom of expression must pursue a legitimate aim. In this realm, the legitimate aim of protecting the rights of others should be central to any discussion pertaining to hate speech, taking into account the need to protect the rights of those groups who may be subject to such hatred. In assessing limitations on the freedom of expression, the Court in *Otto-Preminger-Institut v Austria* considered whether the expressions are 'gratuitously offensive to others and, thus, an infringement of their rights and which, therefore, do not contribute to any form of public debate capable of furthering progress in human affairs.'<sup>892</sup> In *Seurot v France*, the Court dealt with the dismissal of a teacher who wrote an article for a school newsletter describing French people of North African origin as "Muslim hordes that it was impossible to assimilate." Here, the Court found that the interference to the expression in question pursued at least one of the legitimate aims of the Convention, namely the protection of the reputation or rights of others.<sup>893</sup> In finding no violation of Article 10 in *Féret v Belgium*, the Court accepted a national restriction of racist and xenophobic expression as being necessary for the protection of the rights of others and for preventing disorder. The Court summarised the effects of hate speech on the rights of others, namely that 'insults, ridicule or defamation aimed at specific population groups or incitation to discrimination, as in this case, sufficed for the authorities to give priority to fighting hate speech when confronted by the

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<sup>891</sup> *X v Austria*, App. no. 1747/62 (EComHR 13 December 1963)

<sup>892</sup> *Otto-Preminger-Institut v Austria*, App. no. 13470/87 (ECHR, 20 September 1994) para. 49

<sup>893</sup> *Seurot v France*, App. no. 57383/00 (ECHR, 18 May 2004)

irresponsible use of freedom of expression which undermined people's dignity, or even their safety.'<sup>894</sup>

Given the devastating effect of the atrocities committed by Nazis during World War II, revisionist speech has been central to the development of hate speech law on a CoE level, with the Commission and the Court having adopted a stable approach to any kinds of speech which seek to negate the occurrence of the Holocaust. They have dealt with such cases in the sphere of, *inter alia*, protecting the rights of others. For example, in *X v the Federal Republic of Germany*, the individual displayed pamphlets describing the Holocaust as a 'zionist swindle or lie' on his garden fence. His conviction included a civil prosecution for group defamation and a criminal conviction for incitement to hatred. The Commission affirmed that such interference is necessary in a democratic society and pursued a legitimate aim, namely the protection of the rights of others. Here, the Commission underlined that a democratic society 'rests on the principles of tolerance and broadmindedness which the pamphlets in question clearly failed to observe.'<sup>895</sup> In *Remer v Germany*, the Commission held that a conviction for incitement to racial hatred by publishing information which denied that Jews had been gassed in Nazi Germany fell within the legitimate aims of preventing disorder and crime as well as protecting the rights of others.<sup>896</sup> However, just a month after *Remer*, in *Honsik v Austria*, the Commission did not make reference to the legitimate aims pursued in allowing restrictions on this type of expression as contained in Article 10 of the ECHR, but instead simply stated that the restriction in question was necessary in a democratic society as incorporated in Article 10 given that, if permitted, this expression would contribute to the destruction of the rights and freedoms of the Convention. The approach in *Honsik* appears to be a *mélange* of Article 10 and Article 17 with the Court enforcing the former but essentially upholding the purpose of the latter, an issue which will be discussed more extensively further on.

Interrelated to revisionist speech and within the framework of promoting National Socialism as an ideology, through rhetoric of hate more generally, the Court and, previously, the Commission, have repeatedly stressed their incongruence with the Convention's central objectives. For

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<sup>894</sup> *Féret v Belgium*, App. no. 15615/07, (ECHR, 16 July 2009) para. 73

<sup>895</sup> *X v Federal Republic of Germany*, App. no. 9235/81, (EComHR, 1982) para. 7.12

<sup>896</sup> *Remer v Germany*, App. no. 25096/95 (EComHR, 6 September 1995)

example, in *B.H., M.W., H.P. and G.K v Austria*, the Commission held that the prohibition of activities involving expression of national socialist ideas was necessary in a democratic society in the interests of national security and territorial integrity as well as for the prevention of crime and, hence, found the interference to be within the realm of Article 10(2) of the ECHR. Moreover, it noted that ‘National Socialism is a totalitarian doctrine incompatible with democracy and human rights and that its adherents undoubtedly pursue aims of the kind referred to in Article 17 of the ECHR.’<sup>897</sup> This case, thus, found a violation of Article 10 and concluded with a reference to Article 17.

Thus, hate speech has been legitimately restricted for the purpose of protecting the rights of others and, in certain contexts, for the purposes of protecting national security, territorial integrity and the prevention of crime and disorder with *Honsik* being the only aforementioned case not clearly applying one of the legitimate aims as incorporated in the article under consideration.

#### 3.4.4 Proportionality

The doctrine of proportionality is significant in considering restrictions to Article 10 as it is a key issue to be taken into account when looking at the reasonableness of an interference, as reflected in Article 10 cases below. More particularly, as established in *Handyside*, ‘every formality, condition, restriction or penalty imposed in this sphere must be proportionate to the legitimate aim pursued.’<sup>898</sup> In the case of *Lehideux and Isorni v France*, the proportionality principle was the game breaker. Here, the Court noted that the choice of criminal proceedings rather than other means of intervention through the civil pathway was ‘disproportionate and, as such, unnecessary in a democratic society.’<sup>899</sup> As a result, the Court found a breach of Article 10. As the Court noted in *Incal v Turkey*,<sup>900</sup> and reiterated in other cases, such as *Balsytė-Lideikienė v Lithuania*, the government must avoid resorting to criminal proceedings, particularly where it is possible to use other means. In the case against Lithuania, it nevertheless held that governments could adopt measures, even of a criminal nature which have the potential to respond ‘appropriately and

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<sup>897</sup> *B.H., M.W., H.P. and G.K v Austria*, App. non 12774/87 (EComHR 12 October 1989)

<sup>898</sup> *Handyside v UK*, App. non 5493/72 (ECHR, 7 December 1976) para. 49

<sup>899</sup> *Lehideux and Isorni v France*, App. no. 24662/94 (ECHR 23 September 1998) para. 57

<sup>900</sup> *Incal v Turkey*, App. no. 22678/93 (ECHR 9 June 1998) para. 54

without excess to such remarks.<sup>901</sup> Furthermore, the nature and severity of the penalties are key factors to be taken into consideration when appraising the proportionality of an interference of Article 10.<sup>902</sup> Within the same mindset, in *Féret*, the Court considered the proportionality of the restriction which was of a non-criminal nature, thereby, reflecting the Contracting party's restraint when resorting to criminal proceedings, particularly where other means are available.

### 3.5 Violence as a Key Element to Prohibiting Expression

Closely related to hate speech is the concept of violence. The majority of cases in which the ECtHR considered this theme, and particularly its glorification and/or incitement, were in relation to cases against Turkey dealing particularly with the Kurdish issue. Although this form of expression does not fall within the concept of right-wing extremism *per se*, the rationales and discussions, therein, are pertinent to the discussion of right-wing extremist rhetoric and will, therefore, be referred to. Moreover, in relation to inciting violence through expression, the Court and Commission have been clear, stating that a conviction for the offence of incitement to violence through expression is a justified interference with freedom of expression as it seeks to ensure public safety and prevent disorder or crime.<sup>903</sup> Violence was also a central issue in *Erdođdu and Ince v Turkey*, in which the Court stated that an interviewee 'expressed his view of the Kurdish question and related matters in moderate terms and he did not associate himself in any manner with the use of violence.'<sup>904</sup> As a result, the Court found that there had been a violation of Article 10 as the restriction imposed was to deter public discussion on important political issues rather than limiting hate speech. In *Sener v Turkey*, the Court found that the statements in question could be deemed to be shocking and disturbing for the public but the author did not associate himself with the use of violence in any context and, on the contrary, promoted the need to employ peaceful methods in resolving the Kurdish issue. In considering inciting or fuelling violence, the Court underlined that it is necessary to take into consideration the contextual backdrop in which the expression occurs. Namely, in *Karatas v Turkey*, the Court underlined that, in light of the sensitivity of the security situation in south-eastern Turkey and the subsequent need for the authorities to be alert to acts capable of fuelling additional violence, the

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<sup>901</sup> *Balsytė-Lideikienė v Lithuania*, App. no. 72596/01 (ECHR, 4 February 2009) para.81

<sup>902</sup> *Balsytė-Lideikienė v Lithuania*, App. no. 72596/01 (ECHR, 4 February 2009) para.83

<sup>903</sup> *Osmani v Former Yugoslav Republic of Macedonia*, App. no. 50841/99 (ECHR 6 April 2000) and *Glimmerveen and Hagenbeek v The Netherlands*, App. nos. 8348/78, 8406/78 (EComHR 11 October 1979)

<sup>904</sup> *Erdođdu and Ince v Turkey*, App nos.25067/94 and 25068/94 (ECHR 8 July 1999) para.46



measures taken against the applicant can be said to meet the legitimate aims of protecting national security and territorial integrity and preventing disorder and crime.<sup>905</sup> The issue of violence was extrapolated on in concurring opinions in *Gerger*. More specifically, the joint concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve in *Gerger v Turkey* underlined that it is necessary to focus less on words employed and more on the context in which expression occurred. In particular, the questions that need to be answered include whether the language was intended to inflame or incite to violence and whether there was a real and genuine risk that it might actually do so. In Judge Bonello's concurring opinion in *Gerger*, it was underlined that violence needs to be real and actual with punishment of those promoting violence being justifiable in a democratic society 'only if the incitement were such as to create a clear and present danger.'<sup>906</sup> In *Gündüz v Turkey*, the Court recognised that some protection can be granted to expression which is contrary to the objectives of the Convention as long as it does not constitute incitement to violence or hatred. Here, the Court considered that simply defending Sharia was not to be regarded as hate speech if there is no reference to violence.<sup>907</sup> In *Dicle v Turkey*, the Court underlined the significant role that violence plays when determining whether hate speech exists and, thus, if expression should be restricted. More particularly, it held that the expression under consideration did 'not encourage violence, armed resistance or insurrection and does not constitute hate speech.'<sup>908</sup> Intertwined with inciting violence is the incitement to hatred, as referred to in *Féret v Belgium*. Here the Court underlined that 'incitation to hatred did not necessarily call for specific acts of violence or other offences. Insults, ridicule or defamation aimed at specific population groups or incitation to discrimination, as in this case, sufficed for the authorities to give priority to fighting hate speech when confronted by the irresponsible use of freedom of expression which undermined people's dignity, or even their safety.'<sup>909</sup>

In relation to the glorification of violence, in *Leroy v France*, the Court dealt with a restriction to the expression of a cartoonist who published a drawing of the attack on the twin towers of the World Trade Centre in a newspaper with a caption which parodied the advertising slogan of a famous brand: "We have all dreamt of it... Hamas did it." Here, the Court found no violation of

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<sup>905</sup> *Karatas v Turkey*, App. no. 23168/94 (ECHR, 9 July 1999) para.44

<sup>906</sup> *Gerger v Turkey*, App. no. 24919/94 (EComHR, 8 July 1999)

<sup>907</sup> *Gündüz v Turkey*, App. no. 35071/97 (ECHR, 4 December 2003) para. 51

<sup>908</sup> *Dicle v Turkey*, App. no. 34685/97 (ECHR 10 February 2005) para 17

<sup>909</sup> *Féret v Belgium*, App. no. 15615/07 (ECHR, 16 July 2009) para 73

Article 10 by stating that the drawing supported and glorified the violent destruction of the twin towers. The Court based its finding on the caption which accompanied it and noted that the applicant had expressed his moral support for those whom he presumed to be the perpetrators of the attacks.<sup>910</sup>

### 3.6 Freedom of Expression – Concluding Comments

In sum, the freedom of expression is clearly a significant constituent of any analysis pertaining to the utterances of extremist right-wing groups, associations, political parties and their representatives. Relevant cases, which initially dealt with anti-Semitism and neo-Nazi rhetoric can be seen from the early days of the Commission. Notwithstanding that the context of the cases may have altered as time has gone by to include issues such as Islamophobia, anti-immigration rhetoric and Romaphobia, the position of the Commission and the Court remains steadfast. More particularly, even though there exists an inadequate definitional framework in relation to the term ‘hate speech,’ in the framework of the judicial deliberations, it is clear that both the Court and Commission deem this type of speech to be undeserving of the protection of the Convention, with the institutions referring either to the limitation grounds found in Article 10(2) or expelling the speech from Convention protection through Article 17, which will be discussed further down. With regard to speech inciting violence, this must definitely be prohibited when it seeks to incite, fuel or glorify violence, with the interrelated term of ‘hatred’ taking on a broad meaning as extrapolated in *Féret*.

## 4. Freedom of Assembly and Association

### 4.1 General Overview of Article 11 ECHR

Article 11 of the ECHR on the freedom of assembly and association provides that:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national

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<sup>910</sup> Leroy v France, App. no.36109/03 (ECHR 2 October 2008) para.43

security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

In *Socialist Party v Turkey*, the ECtHR underlined that the protection of opinions and the freedom to express them, within the meaning of Article 10 of the Convention is one of the core objectives of the freedoms of assembly and association. It further held that this relationship ‘applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy.’<sup>911</sup> Article 11 encompasses both the freedom of association and the freedom of assembly, unlike its international counterpart in the ICCPR, which deals with these two rights in separate articles. It is clear that Articles 10 and 11 are interrelated and interconnected and, as a result, many of the central issues and standards discussed in the sphere of Article 10 are equally relevant in respect of Article 11.

In the following sections, the freedom of association will be looked at, starting with an analysis of what constitutes an association, followed by an evaluation of the circumstances in which this freedom can be restricted. After that, the freedom of assembly and how it has been assessed by the ECtHR in the realm of right-wing extremism will be considered.

#### 4.2 What Constitutes an Association?

As noted initially by the EComHR in *Young, James and Webster v The United Kingdom*, for an association to exist it must be voluntary and must pursue a common goal.<sup>912</sup> However, an association cannot be a casual gathering of persons seeking to enjoy each other’s company but must, instead, be characterised by a certain degree of organisation and stability.<sup>913</sup> The EComHR and the ECtHR, the Report of the Venice Commission<sup>914</sup> and the EU’s Charter of Fundamental

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<sup>911</sup> *Socialist Party and Others v Turkey*, App. no. 21237/83 (ECHR 25 May 1998) para.41

<sup>912</sup> *Young, James and Webster v The United Kingdom*, App. nos. 7601/76 and 7896/77, Commission’s report of 14 December 1979, Series B, no. 39, p. 36, § 167. December 1979, Series B, no.39 p.36, para.167

<sup>913</sup> *McFeeley v The United Kingdom*, App. no. 8317/78, Commission’s decision of 15 May 1980, Decisions and Reports (DR) 20, p. 44.

<sup>914</sup> Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures Adopted by the Venice Commission at its 41st plenary session (Venice, 10 - 11 December, 1999)

Rights<sup>915</sup> all deem political parties to constitute an association within the realm of Article 11 of the Convention. For example, the ECtHR holds that ‘political parties are a form of association, and that, in view of the importance of democracy in the Convention system, there can be no doubt that political parties come within the scope of Article 11.’<sup>916</sup> In a number of cases, the Court has reiterated the significant position held by political parties in a democracy. In *United Communist Party of Turkey and Others v Turkey*, the Court stated that ‘in view of the role played by political parties, any measure taken against them affected both freedom of association and, consequently, democracy in the State concerned.’<sup>917</sup> Further, it underlined the particularly important role played by political parties in comparison to other associations or groups in a democracy given that ‘by the proposal for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organizations which intervene in the political arena.’<sup>918</sup> In *Dicle (on behalf of the Democratic Party (DEP) v Turkey*, the Court stated that, to ensure a functional democracy, political bodies should be able to make public proposals, even if they conflicted with mainstream governmental policy or prevailing public opinion.<sup>919</sup> Thus, notwithstanding the important role an association plays or should play in a democracy, this does not mean that it is endowed with an indefinite and unmonitored capacity to participate and promote values and themes that are contrary to principles underlying democracy, nor does it mean that the methods used by it to achieve its aims and objectives can go against these principles. In *KPD v Germany*, the Commission recognised that there always exists the possibility that, in enforcing the rights as provided for by Article 11 (as well as Article 10) of the ECHR, a political party may, in fact, be seeking to pursue the destruction of democracy.<sup>920</sup> Also, the Court noted that a political party may work towards a change in the law of a State only under the condition that ‘the means used to that end must be legal and democratic ... [and]... the change proposed must itself be compatible

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<sup>915</sup> Article 12 (2) Charter of Fundamental Rights of the European Union

<sup>916</sup> *Socialist Party and Others v Turkey*, App. no. 21237/83 (ECHR 25 May 1998).

<sup>917</sup> *United Communist Party of Turkey and Others*, App. no. 19392/92 (ECHR 30 January 1998) para 31

<sup>918</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para 87

<sup>919</sup> *Dicle (on behalf of the Democratic Party DEP) v Turkey*, App. no. 25141/94 (10 January 2012) para. 53

<sup>920</sup> *Communist Party (KPD) v. Germany*, App. no. 250/57, Commission decision of 20 July 1957, Yearbook 1, p. 222)

with fundamental democratic principles.’<sup>921</sup> As a result, a political party inciting violence or policies and practices which contravene democratic principles cannot seek protection under Article 11 against any resulting penalties. As is the case with Article 10, democracy entails concessions and compromises between individuals and groups making up a society in order to satisfy the needs of all the different associations whilst simultaneously preserving values, such as human rights and fundamental freedoms, which are inherently interrelated to democracy.

In *Vona v Hungary*, the Court dealt with the role of Article 11 in the realm of social organisations rather than political parties. It distinguished between political parties and social organisations and movements, stating that they may have the ability to influence the development of politics and public discourse but, unlike political parties, they enjoy less legal privileges to do so.<sup>922</sup> Nevertheless, given the actual political impact which social organisations and movements have when any danger to democracy and its principles is being evaluated, due regard must be given to this impact<sup>923</sup>. As a result, this article is central to any coherent analysis of right-wing extremism which often takes the form of a political party as well as other types of associations.

#### 4.3 Legitimate Interferences to the Freedom of Association

The freedom of association is a central tenet of a functioning democracy. In relation to this freedom, the ECtHR noted that ‘the way in which national legislation enshrines this freedom and its practical application by the authorities reveals the state of democracy in the country concerned.’<sup>924</sup> Nevertheless, this freedom is not granted an absolute status by the ECHR as it can be legitimately restricted for the purposes provided in part two of the article. The grounds which legitimately exist to restrict the freedom of association are nearly identical in both the ICCPR and the ECHR, with the European Convention including the prevention of disorder or crime whilst the ICCPR refers to the interests of public order. In deciphering whether dissolution is permitted, the Court clearly considers the limitation clause as provided for by Article 11 (2). More particularly, the Court looks at whether the interference is prescribed by law, is necessary

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<sup>921</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para. 98

<sup>922</sup> *Vona v Hungary* App. nos. 35943/10 (ECHR 9 July 2013) para. 69, para.56

<sup>923</sup> *Vona v Hungary* App. nos. 35943/10 (ECHR 9 July 2013) para. 69, para.56

<sup>924</sup> *Sidiropoulos and Others v Greece*, App. no 57/1997/841/1047 (ECHR 10 July 1998) para. 40

in a democratic society, pursues a legitimate aim and is proportional to the aim pursued. At a first glance, the approach taken by the Court in limiting Articles 10 and 11 is similar. However, when one looks at the relevant case-law, it becomes clear that this is not, in fact, the case. In view of the central role political parties and, to an extent, social movements play in a democracy, the necessity standard applied when restricting association is strictly interpreted.

The method adopted by the ECtHR, in relation to restrictions imposed on allegedly anti-democratic parties, has been predominantly established by several cases involving Turkey as well as the recent case of *Vona v Hungary*, which dealt with a social association/movement rather than with a political party directly, notwithstanding an affiliation between the association, movement and political party, as will be explained further on. Even though the Turkish cases do not involve extreme right-wing movements, as understood in this analysis, the methodology created and implemented by the Court as a means to assess legitimacy of dissolution is relevant to this discussion. *Refah Partisi v Turkey* dealt with the dissolution of an Islamic political party and the suspension of the political rights of the other applicants who were leaders of the party at that time. *Vona v Hungary* included several types of association. More particularly, the *Hungarian Guard Association (Magyar Gárda Egyesület)* had been founded by ten members of the political party Movement for a *Better Hungary (Jobbik Magyarországért Mozgalom)*, an extreme right-wing party. The applicant was chairman of the association. Uniformed members of the Movement held rallies and demonstrations throughout Hungary, including in villages with large Roma populations, and called for the defence of “ethnic Hungarians” against so-called “Gipsy criminality”. These demonstrations and rallies were not prohibited by the authorities. One of these demonstrations, involving about two-hundred activists, was organised in Tatárszentgyörgy, a village of some 1,800 inhabitants. The police were present and did not allow the march to pass through a street inhabited by Roma families. In 2007, in reaction to this event, the Budapest Chief Prosecutor’s Office lodged a court action seeking the dissolution of the Association. The Prosecutor’s Office was of the view that the Movement constituted a division of the Association, and indeed its activity represented a significant part of the association. In 2008, the Budapest Regional Court ruled in favour of the Prosecutor’s Office and disbanded the Association. The Regional Court acknowledged the symbiotic relationship between the Association and Movement but noted that the legal effect of the judgement was, nevertheless,

limited to the dissolution of the Association, since in the Court's view the Movement did not have any legal personality. In 2009, the Budapest Court of Appeal upheld the judgement of the Regional Court but established a closer connection between the two entities, also extending the scope of the judgement to the Movement. Given the central role *Vona* has in the sphere of the Court's treatment of right-wing extremist association and assembly, and given the important legal principles developed in *Refah Partisi* and subsequently upheld in *Vona*, the analysis of the legitimate restriction of association will focus predominantly on these two cases.

It must be noted that the Court has set a high threshold for the limitation of association. In *Refah Partisi*, the Court underlined that where the prohibition of political parties is concerned 'only convincing and compelling reasons can justify restrictions on such parties' freedom of association.'<sup>925</sup> In *Vona*, the Court underlined that the threshold should be even higher for associations given that 'the incidental advocacy of anti-democratic ideas is not sufficient in itself to justify banning a political party on grounds of compelling necessity even less so in the case of an association which cannot make use of the special status granted to political parties.'<sup>926</sup>

An assessment of the methodology imposed by the Court to assess the legitimacy of interference to this freedom will follow.

#### 4.3.1 Is the Interference Prescribed by Law?

In order to satisfy the expression 'prescribed by law,' the Court follows the same route of determination as it does with the freedom of expression. More particularly, the interference must be based on domestic law which is foreseeable and accessible. As mentioned in the framework of freedom of expression, it is impossible to ensure such precision given the organic nature of situations which the law seeks to regulate. A law which provides a certain extent of flexibility and discretion is not, *per se*, inconsistent with the requirement of precision provided that the 'the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having

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<sup>925</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para.100

<sup>926</sup> *Vona v Hungary*, App. no. 35943/10, (ECHR, 9 July 2013) para.69

regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference.’<sup>927</sup>

#### 4.3.2 Does the Interference Pursue a Legitimate Aim?

In *Refah Partisi*, the Court found that, in light of the importance of secularism in Turkey, the interference pursued the legitimate aim of protecting national security and public safety, prevention of disorder of crime and protection of the rights and freedoms of others.<sup>928</sup> Thus, the analysis of the legitimate aim occurred against the backdrop of secularism with the Court taking into account an appraisal of the situation in the State under consideration and specifically the ‘general interest in preserving the principle of secularism in that context in the country’<sup>929</sup> as well as its own previous statements of secularism being a fundamental principle in line with the rule of law, human rights and democracy.<sup>930</sup> Further, in this case, the Court held that the dissolution of a political party with an anti-democratic mandate is ‘also consistent with Contracting Parties’ positive obligations under Article 1 of the Convention to secure the rights and freedoms of persons within their jurisdiction.’<sup>931</sup> In *Vona v Hungary*, the Court mentioned that the interference pursued a legitimate aim of ensuring public safety, preventing disorder and protecting the rights of others, regardless of the applicant’s argument that no specific instance of disorder or violation of the rights of others had been demonstrated.<sup>932</sup> The Court then went on to reiterate that a State is entitled to take preventive action to ensure the protection of the rights of others, in this case Roma persons, in the event that their rights and democratic values are at serious risk, one such value being the ‘co-existence of members of society free from racial segregation.’<sup>933</sup> In this realm, the Court noted that the removal of the threat to the rights of

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<sup>927</sup> *Margareta and Roger Andersson v Sweden*, App. no. 12963/87 (ECHR 20 January 1992)

<sup>928</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para 67

<sup>929</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para 105

<sup>930</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para 93

<sup>931</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para. 103

<sup>932</sup> *Vona v Hungary*, App. no. 35943/10, (ECHR, 9 July 2013) para.52

<sup>933</sup> *Vona v Hungary*, App. no. 35943/10, (ECHR, 9 July 2013) para.57



others could only be ensured by ‘removing the organisational back-up of the Movement provided by the Association.’<sup>934</sup>

#### 4.3.3 Is the Interference Necessary in a Democratic Society?

In *Refah Partisi*, the Court held that the dissolution of an association should constitute the last resort, with less intrusive measures being implemented when possible. In applying the necessity test, ‘the right of association is accorded particular protection in the maintenance of pluralist opinion and democracy.’<sup>935</sup> As is the case with the freedom of expression and Article 10(2), the restrictions to Article 11 are necessary in a democratic society only when there exists a pressing social need to invoke the restrictions. In order to make this determination, the Court must consider three factors, namely whether a risk to democracy was sufficiently imminent, whether the acts and speeches of the leaders and members of the political party were imputable to the party as a whole and whether the acts and speeches imputable to the political party promoted a societal model incompatible with the concept of a democratic society.<sup>936</sup> Further, in determining the necessity of the impugned measure, the Court must appreciate the contextual and, sometimes, historical setting in which a particular dissolution occurs. For example, in *Refah Partisi*, the Court considered the general interest in preserving secularism in Turkey.<sup>937</sup> The issue of context was deemed significant in other Article 11 cases, such as *Herri Batasuna and Batasuna v Spain*, where the Court underlined that, in view of the Spanish experience in the field of terrorist attacks, a link with ETA and the applicant parties could objectively result in a threat to democracy.<sup>938</sup>

#### 4.3.4 Is the Interference Proportionate to the Legitimate Aim Pursued?

In *Refah Partisi*, the Court noted ‘that the nature and severity of the interference are...factors to be taken into account when assessing its proportionality.’<sup>939</sup> In *Herri Batasuna and Batasuna v*

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<sup>934</sup> *Vona v Hungary*, App. no. 35943/10, (ECHR, 9 July 2013) para.71

<sup>935</sup> Mustafa Koçak & Esin Örucü, ‘Dissolution of political parties in the Name of Democracy: Cases from Turkey and the European Court of Human Rights’ (2003) 9 *European Public Law* 3, 419

<sup>936</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98, (ECHR, 13 February 2003) para. 104 (This test was also implemented in *Vona v Hungary*)

<sup>937</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos 41340/98, 41342/98, 41344/98, (ECHR, 13 February 2003) para. 105

<sup>938</sup> *Herri Batasuna and Batasuna v Spain*, App. nos. 25803/04 and 25817/04, (ECHR 6 November 2009) para. 89

<sup>939</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para. 133

*Spain*, the Court held that, in order to determine whether an interference was proportionate to the legitimate aim pursued, it must consider it in light of the case as a whole.<sup>940</sup> In *Refah Partisi*, the Court noted that, after the party's dissolution, only five of its MPs temporarily forfeited their parliamentary office and their role as leaders of a political party. The one hundred and fifty two remaining MPs continued to sit in Parliament. In *Vona*, the Court noted that no additional sanction was imposed on the Association or the Movement or their members who were in no way prevented from continuing political activities in other forms.

#### 4.4 Violence as a Key Element in Limiting Association

As is the case with the freedom of expression, the issue of violence is central in ascertaining whether there has been a breach of Article 11. In *Refah Partisi*, the Court considered that the members of the party in question mentioned the possibility of resorting to force to overcome the obstacles that *Refah Partisi* was facing in the political arena.<sup>941</sup> The Court recognised that, while its leaders did not, in government documents, call for the use of force and violence as political weapon, 'they did not take prompt practical steps to distance themselves from those members of [Refah] who had publicly referred with approval to the possibility of using force against politicians who opposed them.'<sup>942</sup> In *Vona v Hungary*, the Court underlined that, unless the impugned association can reasonably be regarded as a hotbed for violence or incarnating a negation of democratic principles, restrictions to the freedom of association are incompatible with the Convention.<sup>943</sup>

#### 4.5 Limiting Association - Destruction of Democracy

Limitations and restrictions may be imposed on practices, mandates and activities which are promoted and implemented by political parties and social organisations and movements through the enforcement of Article 11(2) and/or Article 17. In particular relation to political parties, the Court emphasised the need to protect them vigorously 'in view of their essential role in ensuring

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<sup>940</sup> *Herri Batasuna and Batasuna v Spain*, App. nos. 25803/04 and 25817/04, (ECHR 6 November 2009) para. 75

<sup>941</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para.130

<sup>942</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para 131

<sup>943</sup> *Vona v Hungary* App.nos. 35943/10 (ECHR 9 July 2013) para. 64

pluralism and the proper functioning of democracy.’<sup>944</sup> In fact, it has repeatedly underlined that the dissolution of a political party and restricting party members from carrying out their activities for a particular time period are measures to be resorted to only in the most serious of cases.<sup>945</sup> Notwithstanding the high threshold that is to be attained in relation to the potential or actual destructiveness of an association, in the two central cases of *Refah Partisi v Turkey* and *Vona v Hungary*, the Court upheld the dissolution of the *Turkish Welfare Party* and the Hungarian right-wing extremist social movement and association respectively. With regard to the latter, the Court underlined that the dissolution of associations and movements is ‘a sanction of comparable gravity’<sup>946</sup> to that of political parties and, therefore, such a measure must be as relevant and sufficient as in the case of dissolution of a political party. It also recognised that, in the case of an association and in light of its more limited national influence, ‘justification for preventative restrictive measures may be less compelling than in the case of a political party.’<sup>947</sup> Moreover, it distinguished, yet again, between a political party and other types of association by noting that ‘the incidental advocacy of anti-democratic ideas is not enough, *per se*, for banning a political party in the sense of compelling necessity and even less so in the case of an association.’<sup>948</sup> Despite these statements, the actual judgements reflect that the same route and analysis are taken for registered and unregistered movements and groups, with the guiding factor always being whether the interference in question is permitted under Article 11(2) or whether the activities of such an entity fall outside the scope of the Convention, as per Article 17.

In seeking to determine the potentially destructive impact of an association, the Court has warned of associations which may hide their true intentions in trying to avoid prohibitions or sanctions. In *Refah Partisi*, the Court considered that the ‘constitution and programme of a political party cannot be taken into account as the sole criterion for determining its objectives and intentions.’<sup>949</sup> The political experience of the Contracting States has shown that, in the past,

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<sup>944</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para. 88

<sup>945</sup> See *United Communist Party of Turkey and Others, Socialist Party and Others*, cited above and *Freedom and Democracy Party (ÖZDEP) v Turkey*

<sup>946</sup> *Vona v Hungary*, App. nos. 35943/10 (ECHR 9 July 2013) para. 58

<sup>947</sup> *Vona v Hungary*, App. nos. 35943/10 (ECHR 9 July 2013) para. 58

<sup>948</sup> *Vona v Hungary*, App. nos. 35943/10 (ECHR 9 July 2013) para. 69

<sup>949</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para. 101

political parties with aims contrary to the fundamental principles of democracy have not revealed such aims in their official publications until after taking power. As a result, the Court notes that ‘the content of the programme must be compared with the actions of the party’s leaders and the positions they defend. Taken together, these acts and stances may be relevant in proceedings for the dissolution of a political party, provided that as a whole they disclose its aims and intentions.’<sup>950</sup> In relation to *Vona*, it was the totalitarian and racist nature of the association that led to its destructiveness. The Court made clear that it does not tolerate racist expression or activity and acknowledged that the Movement relied on a race-based opposition to the Roma minority.<sup>951</sup> Moreover, the Court noted that ‘it is not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime.’<sup>952</sup> In the concurring opinion of Judge Pinto De Albuquerque, it was underlined that the ECtHR had reiterated the significance of combatting racial discrimination including hate speech and racial violence. Furthermore, it underlined that ‘the vulnerability of the group against whom discrimination and violence takes place has been a factor in the Court’s analysis.’<sup>953</sup> This opinion also emphasised the positive duty States Parties have to ‘criminalize speech or other forms of dissemination of racism, xenophobia or ethnic intolerance, prohibit every assembly and dissolve every group, organization, association or party that promotes them.’<sup>954</sup>

Thus, as noted by the Court in *Refah Partisi* and then in *Vona*, political parties which aim for the destruction of democracy cannot enjoy Convention protection against penalties imposed on those grounds. However, due care must be taken not to surpass the legitimate objective, which, in this case, is the protection of democracy. Therefore, the Court has stipulated that limitations and restrictions are not to be taken lightly and that ‘only convincing and compelling reasons can justify restrictions on such parties’ freedom of association.’<sup>955</sup>

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<sup>950</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para. 101

<sup>951</sup> *Vona v Hungary* App. nos 35943/10 (ECHR 9 July 2013) para. 66

<sup>952</sup> *Vona v Hungary* App. nos 35943/10 (ECHR 9 July 2013) para. 99

<sup>953</sup> *Vona v Hungary*, App. nos. 35943/10 (ECHR 9 July 2013)

<sup>954</sup> *Vona v Hungary*, App. nos. 35943/10 (ECHR 9 July 2013)

<sup>955</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para. 100

#### 4.6 Dissolution of an Association – Establishing a Sufficiently Imminent Risk

The intricately complex question of timing in the realm of dissolution of associations must be considered with due care to avoid unsubstantiated actions which constitute a breach of Article 11, on the one hand, whilst avoiding harmful consequences of destructive associations on the other. In *Refah Partisi v Turkey*, the Court held that a State may reasonably prevent the execution of a policy which is against the letter and spirit of the Convention. Also, the Court underlined that a ‘State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent.’<sup>956</sup> In that case, the Court established a threshold for the dissolution of associations through the ‘sufficiently imminent risk to democracy’ test. In *Vona v Hungary*, the Court found that the State may also take such preventive measures to protect democracy against such non – party entities ‘if sufficiently imminent prejudice to the rights of others undermines the fundamental values upon which a democratic society rests and functions.’<sup>957</sup> Here, the Court reiterated the provision related to the timing of intervention, stating that ‘the State cannot be required to wait, before intervening, until a political movement takes action to undermine democracy or has recourse to violence.’<sup>958</sup>

#### 4.7 The Freedom of Racist Association and its Effects in the Workplace

In two cases brought against the United Kingdom, namely, the *Associated Society of Locomotive Engineers & Firemen (ASLEF) v The United Kingdom* and *Redfearn v The United Kingdom*, the Court had to decipher the freedom of association rights in the sphere of a far-right party, namely the *BNP*, *vis-a-vis* membership of a trade union and employment respectively. In *ASLEF v The United Kingdom*, the applicant, a trade union, alleged that it had been prevented by the national courts from expelling one of its members due to his membership of the *BNP*. In considering this case, the ECtHR held that the central question was whether the State had struck an equitable balance between the rights of the member and those of the trade Union.<sup>959</sup> It held that Article 11

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<sup>956</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para. 102

<sup>957</sup> *Vona v Hungary* App. nos. 35943/10, (ECHR 9 July 2013) para. 57

<sup>958</sup> *Vona v Hungary* App. nos. 35943/10 (ECHR 9 July 2013) para. 57

<sup>959</sup> *Associated Society of Locomotive Engineers & Firemen (ASLEF) v The United Kingdom*, App. no. 11002/05 (ECHR 27 February 2007) para. 49

of the ECHR entailed the right of trade unions to choose its members<sup>960</sup> and so, this, in addition to the fact that no particular hardship was suffered by the member as a result of his expulsion from the trade union<sup>961</sup> led to a violation of the trade union's Article 11 rights.<sup>962</sup> In *Redfearn v The United Kingdom*, the applicant had been dismissed by his employer following his identification as a candidate for the *BNP* in upcoming local elections. In considering whether the applicant's right to freedom of association, as enshrined in Article 11, had been violated, the ECtHR noted that the appropriate remedy for dismissing a person on his political beliefs would be a claim for unfair dismissal under national law,<sup>963</sup> a remedy which the applicant was not entitled to because he had not been employed for the one year qualifying period.<sup>964</sup> Thus, in light of the absence of this remedy and taking into consideration that the *BNP* was not illegal under national law,<sup>965</sup> the Court found that a 'legal system which allows dismissal from employment solely on account of the employee's membership of a political party carries with it the potential for abuse.'<sup>966</sup> In finding a violation of Article 11, the Court made no reference to the nature of *BNP's* mandate, ideology, structure or objectives, which are directly interlinked with far-right extremism.

#### 4.8 Freedom of Association: Conclusion

Thus, the freedom of association is clearly a significant doctrine to consider when looking at the conduct of extreme right-wing political parties, associations and movements. In this ambit, the Court dealt with a wave of Turkish claims eventually culminating in the landmark case of *Refah Partisi*. Notwithstanding the significant points of law developed that are directly applicable to the sphere of right-wing extremism, it only once had to deal with a right-wing extremist

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<sup>960</sup> Associated Society of Locomotive Engineers & Firemen (ASLEF) v The United Kingdom, App. no. 11002/05 (ECHR27 February 2007) para. 39

<sup>961</sup> Associated Society of Locomotive Engineers & Firemen (ASLEF) v The United Kingdom, App. no. 11002/05 (ECHR27 February 2007) para.50

<sup>962</sup> Associated Society of Locomotive Engineers & Firemen (ASLEF) v The United Kingdom, App. no. 11002/05 (ECHR27 February 2007) para. 53

<sup>963</sup> Associated Society of Locomotive Engineers & Firemen (ASLEF) v The United Kingdom, App. no. 11002/05 (ECHR27 February 2007) para. 50

<sup>964</sup> Associated Society of Locomotive Engineers & Firemen (ASLEF) v The United Kingdom, App. no. 11002/05 (ECHR27 February 2007) para. 51

<sup>965</sup> Associated Society of Locomotive Engineers & Firemen (ASLEF) v The United Kingdom, App. no. 11002/05 (ECHR27 February 2007) para. 47

<sup>966</sup> Associated Society of Locomotive Engineers & Firemen (ASLEF) v The United Kingdom, App. no. 11002/05 (ECHR27 February 2007) para. 55

association *per se*, namely in *Vona v Hungary*. By assessing the above cases, it is concluded that the discourse pertaining to the interpretation of Article 11 has resulted in a content-based, pragmatic approach to the limitations that can be legitimately imposed thereon. This applies particularly in relation to *Vona v Hungary* which not only incorporated principles and points, as developed in the previous Turkish cases, but also constitutes in itself a well-rounded precedent for future cases as a result of a balancing of rights and duties as these emanate from Article 11. As such, *Vona* has set the judicial scene for permitting the banning of extremist right-wing groups. Further, in the sphere of employment, the Court endows trade unions with the right to choose membership on grounds of ideologies and belief systems but imposes upon States to protect its citizens from being dismissed from their employment on such grounds.

#### 4.9 Freedom of Assembly

##### 4.9.1 Freedom of Assembly – General Overview

As well as the freedom of association, the freedom of assembly is a significant constituent of Article 11. The freedom of assembly constitutes a significant tool for right-wing extremist groups to promote their belief-systems through demonstrations, rallies and marches. The importance of assembly was noted in *Fáber v Hungary* where the Court held that interferences to the freedom of assembly and expression ‘other than in cases of incitement to violence or rejection of democratic principles....do a disservice to democracy and often even endanger it.’<sup>967</sup> This section will consider two cases which are directly linked to the far-right use of assembly to promote ideas and values, namely *Fáber v Hungary* and *Vona v Hungary* while briefly mentioning the case of *Vajnai v Hungary*. The aim is to consider in what circumstances the Court permits this freedom to be restricted and on what grounds.

##### 4.9.2 Legitimately Limiting Assembly

*Fáber v Hungary* involved the silent holding of an Árpád-striped flag by the applicant near a demonstration held by the *Hungarian Socialist Party* against racism and hatred. The police supervising the scene called on the applicant either to remove the banner or leave. The applicant refused to do so and was subsequently taken into custody and placed under interrogation, following which he was fined two hundred Euros for disobeying police instructions. In

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<sup>967</sup> *Fáber v Hungary*, App. no. 40721/08 (ECHR 24 July 2012) para. 37

considering whether the above facts led to a breach of Article 11 of the ECHR, the ECtHR held that this case requires ‘the right to freedom of assembly to be balanced against the right to freedom of expression and, allegedly, against the right of others to freedom of assembly.’<sup>968</sup> Further, it underlined that the freedom of assembly protects a demonstration that may annoy or offend persons and that the rights enshrined in this article must apply to all assemblies ‘except those where the organisers and participants have violent intentions or otherwise deny the foundations of a democratic society.’<sup>969</sup> It further noted that the display of this particular flag, which was used by a totalitarian regime in Hungary, may create feelings of uneasiness but these sentiments ‘cannot alone set the limits of freedom of expression. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler’s veto.’<sup>970</sup> In considering whether Article 17 could come into play, the Court recognised that, even though expression is not always allowed in certain times, places and contexts given the obligation to protect the honour of those murdered and their relatives, it was satisfied that the use of this flag did not include any abusive element, such as the contempt for the victims of a totalitarian regime.<sup>971</sup> The Court did not offer any coherent explanation as to how it reached this conclusion, which can be arguably controversial given that the applicant was standing at the steps leading to the Danube embankment, the location where in 1944/45, during the Arrow Cross regime, Jews were exterminated in large numbers, holding a flag which albeit not illegal could be deemed offensive and, to use the Court’s own words, to reject democratic principles.

In ensuring that the impugned measure is proportional to the legitimate aim pursued in the sphere of the freedom of assembly, the Court held that a balance must be struck between Article 11(2) and Article 10(2).<sup>972</sup> In this case, the Court underlined that in determining the proportionality of a particular form of interference, the location and timing of the display of a symbol with multiple meanings plays a significant role. This is precisely why this decision may be considered somewhat peculiar. More particularly, as noted by the dissenting opinion of Judge Keller, the flag that was being held was associated in public opinion with the Nazi regime in Hungary and was raised at a place where grave human rights violations were committed during World War II.

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<sup>968</sup> Fáber v Hungary, App. no. 40721/08 (ECHR 24 July 2012) para. 28

<sup>969</sup> Fáber v Hungary, App. no. 40721/08 (ECHR 24 July 2012) para. 37

<sup>970</sup> Fáber v Hungary, App. no. 40721/08, (ECHR 24 July 2012) para. 57

<sup>971</sup> Fáber v Hungary, App. no. 40721/08, (ECHR 24 July 2012) para. 58

<sup>972</sup> Fáber v Hungary, App. no. 40721/08 (ECHR 24 July 2012) para. 39



If one takes into account that, in previous cases involving holocaust denial and related issues,<sup>973</sup> the Court and the Commission repeatedly found that such speech should not be afforded Convention protection, why then should this flag, which constitutes a form of expression during an assembly, be allowed? Notwithstanding that the Court recognised that where an applicant expresses contempt for victims of totalitarian regimes this may call for an application of Article 17, it declared that ‘it is satisfied that in the instant case no such abusive element can be identified.’<sup>974</sup> Unfortunately though, it reached this conclusion loosely with no explanation on how it did so. In finding a violation of Article 10, the Court took into account the non-violent nature of the applicant’s conduct, the distance held from the other demonstration and the absence of the potential risk of disturbance.<sup>975</sup> So, in determining the risk of disturbance and thus reaching its verdict, the previously discussed ‘sufficiently imminent risk’ test finds a counterpart in the realm of the freedom of assembly and, particularly the right to demonstrate, with emphasis on the scale of potential consequences rather than their timing. More particularly, in this case, the Court held that the mere existence of a risk is not sufficient to ban a demonstration. Instead, authorities must concretely assess the possible scale of potential disturbance in order to be able to choose the appropriate measures to neutralise the threat of violence.<sup>976</sup> Moreover, the peculiar element of this case is how the Court could have departed so much from previous cases involving, in particular, reviving the traumas of World War II.

Before proceeding to *Vona*, reference must be made to the case of *Vajnai v Hungary*, which, although dealing with the left rather than the right-wing, contained similar facts to *Fáber* and the presentation of symbols. In *Vajnai*, the applicant only alleged a violation of Article 10. This case dealt with a form of visual expression during a demonstration, namely the wearing of a symbol associated with the past dictatorship and particularly a five-pointed red star. The applicant was subsequently prosecuted for wearing a totalitarian symbol in public. When finding that the impugned measure breached Article 10, the Court held that this expression could not be denied Convention protection simply because it makes certain individuals or groups feel uneasy or

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<sup>973</sup> See, *inter alia*, *Kühnen v Germany*, B.H., M.W., H.P. and G.K. v Austria, *Walendy v Germany*, *Honsik v. Austria* and *Witsch v Germany*.

<sup>974</sup> *Fáber v Hungary*, App.no. 40721/08 (ECHR 24 July 2012) para. 58

<sup>975</sup> *Fáber v Hungary*, App.no. 40721/08 (ECHR 24 July 2012) para. 47

<sup>976</sup> *Fáber v Hungary*, App.no. 40721/08, (ECHR 24 July 2012) para. 40

because they are considered by some to be disrespectful.<sup>977</sup> The reasons for the differences between these cases shall be extrapolated on further on.

In *Vona v Hungary*, discussed previously, the Court also dealt with the issue of demonstrations given that the group in question carried out rallies using a paramilitary formation which was ‘reminiscent of the Hungarian Nazi (Arrow Cross) movement which was the backbone of the regime that was responsible for...the mass extermination of Roma in Hungary.’<sup>978</sup> Although the Court recognised that it was not requested to consider the extent to which the demonstrations constituted a legitimate exercise of the freedom of assembly, the demonstrations, nevertheless, had to be taken into account with a view to revealing the association’s actual objectives and mandate.<sup>979</sup> As a result, it made relevant comments and considerations in relation to the freedom of assembly. It held that, if the freedom of assembly is repeatedly enforced in the form of intimidating marches and rallies involving large groups, the State can take the necessary restrictive measures to ‘avert the danger which such large-scale intimidation represents for the functioning of democracy,’<sup>980</sup> In deciding on the demonstrations, the ECtHR, as well as the national courts, placed particular emphasis on the fact that the rallies involved, *inter alia*, the display of the Arrow Cross symbols which brought about a ‘public menace by generating social tension and bringing about an atmosphere of impending violence.’<sup>981</sup> As a result, and even though the Court underlined that no violence occurred during the association’s rallies, their military style formation and marching through villages, wearing ominous armbands reminiscent of the Arrow Cross and calling for racial division must have an ‘intimidating effect on members of a racial minority, especially when they are in their homes as a captive audience.’<sup>982</sup> As summed up in the Concurring Opinion of Judge Pinto De Albuquerque, when considering the dissolution of a political party, one must also consider its ‘overall style... meaning its symbols, uniforms, formations, salutes, chants and other modes of expression.’<sup>983</sup>

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<sup>977</sup> *Vajnai v Hungary*, App. no. 33629/05 (ECHR, 8 July 2008) para. 57

<sup>978</sup> *Vona v Hungary* App. no. 35943/10 (ECHR 9 July 2013) para. 65

<sup>979</sup> *Vona v Hungary* App. no. 35943/10 (ECHR 9 July 2013) para. 69

<sup>980</sup> *Vona v Hungary* App. no. 35943/10 (ECHR 9 July 2013) para. 69

<sup>981</sup> *Vona v Hungary* App. no. 35943/10 (ECHR 9 July 2013) para. 61

<sup>982</sup> *Vona v Hungary*, App. no. 35943/10 (ECHR 9 July 2013) para. 66

<sup>983</sup> *Vona v Hungary* App. no. 35943/10 (ECHR 9 July 2013) Concurring Opinion of Judge Pinto De Albuquerque

In this light, the Court found that the activity of the association ‘exceeds the outer limit of the scope of protection secured by the Convention for expression or assemblies and amounts to intimidation.’<sup>984</sup> Moreover, it pinpointed the interrelation between the freedom of expression and the freedom of assembly by underlining the fact that, in cases where expression is coupled with conduct and that conduct is ‘associated with the expression of ideas is intimidating or threatening or interferes with the free exercise or enjoyment by another of any Convention right or privilege on account of that person’s race, these considerations cannot be disregarded even in the context of Articles 10 and 11.’<sup>985</sup> Here, it is apt to note that in relation to symbols used during assemblies, in the cases of *Fáber v Hungary*<sup>986</sup> and *Vajnai v Hungary*<sup>987</sup> which dealt with prosecuting the holding of an Árpád-striped flag<sup>988</sup> and the wearing of a five-pointed red star<sup>989</sup> respectively, the Court found the impugned measures to have breached Article 10 and/or Article 11. The reason for these differentiations is that *Fáber* and *Vajnai* lacked the intimidating and threatening environment created by the assembly in its entirety within the framework of *Vona*.

#### 4.9.3 Freedom of Assembly – Concluding Comments

In sum, three conclusions can be made from the above analysis. Firstly, there exists a close interrelationship between Article 10 and Article 11. Secondly, that, in theory, assemblies which reject democratic principles should not be permitted.<sup>990</sup> However, the bizarre point is that the symbols used in *Fáber*, were, in fact, representative of regimes and ideologies which reject democratic principles, allowing us to conclude that the Court fleetingly used the phrase ‘rejection of democratic principles’ without giving too much thought to the content and context of the cases. Thirdly, that the issue of violence plays a major role in deciphering whether an assembly should be permitted. As it noted, if the freedom of assembly guaranteed by Article 11 of the Convention is not to lose out on its meaning and objective, national authorities must be tolerant

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<sup>984</sup> *Vona v Hungary*, App. no. 35943/10 (ECHR 9 July 2013) para. 66

<sup>985</sup> *Vona v Hungary*, App. no. 35943/10 (ECHR 9 July 2013) para. 66

<sup>986</sup> *Fáber v Hungary*, App.no. 40721/08, (ECHR 24 July 2012)

<sup>987</sup> *Vajnai v Hungary*, App. no. 33629/05 (ECHR, 8 July 2008)

<sup>988</sup> The roots of the flag go back more than eight-hundred years to a medieval dynasty. However, the flag was expropriated by the notorious Hungarian Arrow Cross Party, whose Nazi-installed puppet regime in late 1944 began murdering thousands of Jews. < <http://www.jpost.com/Jewish-World/Jewish-News/Nazi-linked-flag-surfaces-in-Hungary>> [Accessed 17 April 2015]. This is not an illegal symbol in Hungary.

<sup>989</sup> The communist red star has been a banned symbol in Hungary since 1994. <<http://www.politics.hu/20080709/European-court-overturns-hungarian-prohibition-on-communist-star/>> [Accessed 17 April 2015]

<sup>990</sup> *Fáber v Hungary*, App.no. 40721/08 (ECHR 24 July 2012) para. 37

towards peaceful gatherings, in situations where demonstrators do not engage in acts of violence.<sup>991</sup> However, violence took a broad meaning in *Vona*, just as it did in its expression counterpart *Féret*. More particularly, in denouncing the rallies in *Vona*, it underlined that violence as a condition for permitting impugned measures did not necessarily entail actual violence but also incorporated the intimidation felt by victims targeted by the rallies, thereby, extending the scope of this condition.<sup>992</sup> In fact, it was the intimidating and racially discriminating nature of the rallies in *Vona* which directly affected the ‘others’ which subsequently allowed for a restriction on such exercises of the right to assembly.<sup>993</sup>

#### 4.10 Freedoms of Association and Assembly – Concluding Comments

In a nutshell, associations which seek to destroy democracy<sup>994</sup> and assemblies which go beyond simply annoying or causing offence to persons who do not share the same belief system<sup>995</sup> do not enjoy the rights and freedoms enshrined in the Convention. This is the general thematic framework regardless of cases, such as *Fáber*, which can be considered to be a hiccup when placed in the broader framework of dealing with expression and association relating to World War II hate. In the realm of right-wing extremism, the case of *Vona*, which was very much founded on principles developed in *Refah Partisi*, constitutes a significant precedent for other groups and movements promoting such ethnically exclusionist and/or expulsionist rhetoric and activities.

### 5. Article 17 of the ECHR: Non-Destruction Clause

#### 5.1 Article 17 – Theoretical and Jurisprudential Overview

Article 17 of the ECHR provides 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

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<sup>991</sup> *Fáber v Hungary*, App.no. 40721/08 (ECHR 24 July 2012) para. 47

<sup>992</sup> *Vona v Hungary*, App. no. 35943/10 (ECHR 9 July 2013) para. 61

<sup>993</sup> *Vona v Hungary*, App. no. 35943/10 (ECHR 9 July 2013) para. 66

<sup>994</sup> The threshold as underlined in *Refah Partisi (the Welfare Party) and Others v Turkey*, App. no. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para.98

<sup>995</sup> The threshold as underlined in *Stankov and the United Macedonian Organization Ilinden v Bulgaria*, App. nos 29221/95 and 29225/95 (ECHR 2 October 2001) para.86

the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

‘Article 17 was originally included in the Convention in order to prevent the misappropriation of ECHR rights by those with totalitarian aims.’<sup>996</sup> Further discussion on Article 17 and militant democracy is included in chapter two. The Court has enforced this article both in relation to freedom of expression and freedoms of association and assembly, but it has been mainly adopted in the realm of expression. In his concurring opinion in *Lehideux v France*, Judge Jambrek expounded the meaning of actions which may trigger the implementation of Article 17 by noting that the aim of the actions in question must ‘be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation’s democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others.’<sup>997</sup> In *Witzsch v Germany*, the Court similarly observed that ‘the general purpose of Article 17 is to make it impossible for individuals to take advantage of a right with the aim of promoting ideas contrary to the text and the spirit of the Convention.’<sup>998</sup> As noted by the Court in *Ždanoka v Latvia*, the possibility exists that persons or groups may use the rights and freedoms emanating from the Convention in order to conduct themselves in such a manner as to destroy the rights or freedoms protected therein.<sup>999</sup> As a result, the Court considered that ‘no one should be authorised to rely on the Convention’s provisions in order to weaken or destroy the ideals and values of a democratic society.’<sup>1000</sup> It is, thus, clear that Article 17 lies at the crossroads between regular situations and states of emergency, given that it may be excused from regular tests imposed by the Convention but is not as broad as Article 15.<sup>1001</sup> In relation to the duties imposed on States by the spirit of this article, Buyse has argued that ‘Article 17

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<sup>996</sup> Law Commission: Hate Crime: The Case for Extending the Existing Offences Appendix A: Hate Crime and Freedom of Expression under the European Convention on Human Rights (2013) Consultation Paper No 213, 8

<sup>997</sup> *Lehideux and Isorni v France*, App. no. 55/1997/839/1045 (ECHR 23 September 1998) Concurring opinion of Judge Jambrek, para.2

<sup>998</sup> *Witzsch v Germany*, App. no. 7485/03 (ECHR 13 December 2005)

<sup>999</sup> *Ždanoka v Latvia*, App. no. 58278/00 (ECHR 16 March 2006) para. 99

<sup>1000</sup> *Ždanoka v Latvia*, App. no. 58278/00 (ECHR 16 March 2006) para. 99

<sup>1001</sup> Buyse A, ‘Contested Contours – The Limits of Freedom of Expression from an Abuse of Rights Perspective – Articles 10 and 17 ECHR’ in Brems E & Gerards J ‘*Shaping Rights in the ECHR : The Role of the European Court of Human Rights in Determining the Scope of Human Rights*’ (eds., Cambridge 2013), 191

enables States to act to protect freedoms and democracy but does not force them to do so.’<sup>1002</sup> However, when discussing Article 17 in *Glimmerveen and J.Hagenbeek v the Netherlands*, the Commission held that, in allowing the applicants to promote their belief-system with no restriction, the Dutch authorities would, in fact, be encouraging discrimination, which is prohibited by the ECHR and the ICCPR, thereby at the very least implying a positive obligation emanating from the article in question.

## 5.2 Article 17 and Hate Speech

In the realm of hate speech, Article 17 has been applied more regularly, in whole or in part, by the Commission. Apart from *Norwood* and two revisionist cases, all relevant cases before the Court have been dealt with under the limitation clauses of Article 10. The following section will look at the application of Article 17 by the two institutions. In *Glimmerveen and Hagenbeek v. the Netherlands*, the facts of which are described above, the Commission ousted the speech in question from Convention protection through Article 17. More particularly, the Commission noted that the policy promoted by the applicants contained elements of racial discrimination and, thus, held the view that ‘the expression of the political ideas of the applicants clearly constitutes an activity within the meaning of Article 17 of the Convention.’<sup>1003</sup> *Kühnen v Federal Republic of Germany*, the facts of which are described above, marks the beginning of the Commission’s approach which can be characterised as a *mélange* of Article 10 and Article 17. More particularly, it found that the applicant sought to use the freedom provided for by Article 10 as a tool to carry out activities, namely ones related to National Socialism, which oppose the spirit of the Convention and which would contribute to the destruction of the rights and freedoms set forth in the Convention. As such, the Commission held that the interference was necessary in a democratic society within the ambit of Article 10 (2) of the ECHR and so the application was manifestly ill-founded and, thus, inadmissible.<sup>1004</sup> This approach continued in other cases such as *Ochensberger v Austria* in which the applicant was accused of having edited, published and distributed articles which, having regard to the contents of these articles, constituted National Socialist activities. Here, the Commission agreed with the national court that the applicant’s

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<sup>1002</sup> Buyse A, ‘Contested Contours – The Limits of Freedom of Expression from an Abuse of Rights Perspective – Articles 10 and 17 ECHR’ in Brems E & Gerards J ‘*Shaping Rights in the ECHR : The Role of the European Court of Human Rights in Determining the Scope of Human Rights*’ (eds., Cambridge 2013), 190

<sup>1003</sup> *Glimmerveen and Hagenbeek v The Netherlands*, App. nos 8348/78, 8406/78 (EComHR 11 October 1979)

<sup>1004</sup> *Kühnen v Germany*, App. no. 12194/86 (EComHR 12 May 1988)

publications incited the reader to racial hatred, anti-Semitism and xenophobia. As a result, it found that the applicant was essentially seeking to use the freedom of information enshrined in Article 10 as a basis for activities which were contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms set forth in the Convention.<sup>1005</sup> In *Nationaldemokratische Partei Deutschland, Bezirksverband München-Oberbayern v Germany*,<sup>1006</sup> the applicant organisation was ordered by the Municipality to take the appropriate steps to ensure that, on the occasion of one of their meetings, the persecution of Jews under the Nazi regime was not denied or called into question. In its decision, the Municipality noted that the applicant organisation, in a local as well as in a supraregional party publication, had issued invitations to the above-mentioned meeting, indicating that a well-known revisionist historian, David Irving, would attend it and comment on the question of whether the Germans and their European neighbours could further afford to accept contemporary history as means of extortion. As to the preventive nature of the interference at issue, the Commission noted the high probability of punishable statements given the subject of the discussion and the participation of Mr. Irving. In this case, the Commission found the interference of Article 10 to be justified given that the protection of public interest by preventing crime and disorder as well as the protection of the reputation and rights of Jews surpassed the freedom of the applicant organisation to hold a meeting and that, therefore, the interference was necessary in a democratic society. The Commission fleetingly took into account Article 17 when looking at the provisions of the Penal Code and the Assembly Act which aimed to secure the peaceful co-existence of the population in Germany. It made no appraisal of this Article or its relevance to the present case and its facts and, in reaching its final conclusion, simply referred to Article 10.

The aforementioned cases were all dealt with by the Commission with *Garaudy v France* being the first case involving revisionism and related issues being dealt with by the Court and, here, the Court enforced Article 17 directly. It held that the promotion of a pro-Nazi policy could not be allowed to enjoy protection granted by Article 10 by stressing that there exists a ‘category of clearly established historical facts – such as the Holocaust – whose negation or revision would be

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<sup>1005</sup> *Ochensberger v Austria*, App.no. 21318/93 (EComHR 2 September 1995)

<sup>1006</sup> *Nationaldemokratische Partei Deutschland, Bezirksverband München-Oberbayern v Germany*, App. no. 25992/94 (EComHR 29 November 1995)

removed from the protection of Article 10 by Article 17.<sup>1007</sup> More particularly, the Court held that the revisionist nature of the book in question is contrary to the objectives of the Convention, namely justice and peace, and is a serious threat to public order. It, therefore, held that the applicant's complaint as to an alleged violation of Article 10 was incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35(3) and must be rejected pursuant to Article 35(4). This approach was adopted soon after in *Witzsch v Germany*, which also dealt with revisionist speech.<sup>1008</sup>

The approach of implementing Article 17 when dealing with hate speech continued in the realm of the more contemporary extremist rhetoric in one case involving Islamophobia, namely *Norwood v The United Kingdom*, the facts of which are mentioned above. The poster in question was held by the Court to be 'incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.'<sup>1009</sup> In this light, the Court underlined that the expression in question fell within the ambit of Article 17 and, thus, no assessment under Article 10 would take place. However, it offered no explanation as to how and when the line should be drawn between speech which is prohibited as a result of the provisions of Article 17 and speech which can be restricted as a result of the limitation clauses of Article 10. The decision to apply Article 17 in *Norwood* can be characterised as rather random and a manifestation of the unpredictable nature of this article. For example, why was Article 17 enforced in *Norwood* but not enforced, let us say, in *Féret*? The Court offers no explanation, thereto, and subsequently no explanation as to the applicability of these articles in such cases. Nevertheless, especially in a world of changing trends, patterns and phenomena, the task of determining whether a particular type of activity seeks to destroy the rights of others is very difficult indeed. In *De Becker v Belgium*, the Commission underlined that Article 17 applies only to persons who threaten the democratic system of the contracting parties and then to an extent strictly proportionate to the seriousness and duration of such a threat.<sup>1010</sup> In *Lehideux and Isorni v France*, the concurring opinion of Judge Jambrek attempted to set out the conditions for the application of Article 17. More particularly, he held that, in order for this article to be enforced,

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<sup>1007</sup> *Garaudy v France*, App. no. 64831/01 (ECHR 24 June 2003)

<sup>1008</sup> *Witzsch v Germany*, App.no. 7485/03 (ECHR 13 December 2005)

<sup>1009</sup> *Norwood v UK*, App. no. 23131/03, (ECHR 16 November 2004)

<sup>1010</sup> *De Becker v Belgium*, App. no. 214/56 (EComHR, 8 January 1960) para. 279



the aim of the offending actions must be ‘to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation’s democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others.’<sup>1011</sup> Either way, no satisfactory extrapolation on the use of Article 17 is offered by the Court with discrepancies in the treatment of *Norwood* and *Féret* complicating the situation further.

### 5.3 Article 17 and Free Association and Assembly

In relation to Article 17 being applied in the framework of association, the Court has deliberated on some relevant cases. In *Refah Partisi*, the Court clearly separated justifications for interferences as emanating from Article 11(2) and Article 17 and held that any discussion as to the applicability of Article 17 would have to commence only after an appraisal of Article 11(2) in the realm of the given interference.<sup>1012</sup> This position was also implemented in *Vona v Hungary*. In relation to the applicability of Article 17 in *Refah Partisi*, the Court noted that, since the complaints brought forth under Article 17 concerned the same facts as those examined under Article 11, no separate examination was necessary.<sup>1013</sup> This is an almost distressing conclusion on Article 17 as it denotes that the treatment of Article 17, and the legal formula to be applied when seeking to determine its potential application, match that of Article 11 which, given the gravity of the cases that should fall within the framework of Article 17 and given the general abstraction in relation to the latter, renders an understanding of this article even more complicated. However, in *Vona v Hungary*, the Court actually took the time to consider the applicability of Article 17 to this case. More particularly, it eliminated the possibility of recourse to Article 17 predominantly due to the lack of totalitarian elements of the association and movement in question and also due to the lack of violence during the demonstrations in question and the seriousness of the restriction imposed, that being the elimination of the legal existence of the association.<sup>1014</sup> In these circumstances, the Court could not conclude that the Association’s

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<sup>1011</sup> *Lehideux and Isorni v France*, App. no. 24662/94 (ECHR 23 September 1998)

<sup>1012</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para.96

<sup>1013</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para.137

<sup>1014</sup> *Vona v Hungary*, App. no 35943/10 (ECHR, 9 July 2013) para.36

activities were intended to justify or propagate totalitarian oppression serving totalitarian groups.<sup>1015</sup>

In *Hizb ut-Tahrir and Others v Germany (Liberation Party)*, the applicant, describes itself as a ‘global Islamic political party and/or religious society.’ It was established in Jerusalem in 1953 and advocated the overthrow of governments throughout the Muslim world and their replacement by an Islamic State in the form of a recreated Caliphate. Even though this case does not come within the sphere of right-wing extremism, as understood and applied in this thesis, the religious extremism interlinked to the case and the subsequent treatment by the Court provide important points of assessment. In this case, the ECtHR underlined that the first applicant attempted to abuse Article 11 of the ECHR for purposes which are ‘clearly contrary to the values of the Convention, notably the commitment to the peaceful settlement of international conflicts and to the sanctity of human life.’<sup>1016</sup> Further, it underlined that, during the meetings of the local section of the association chaired by the second applicant, statements calling for violence against Jews were made and that the leaflets handed out included the promotion of recourse to violence to establish the domination of Islam. Also, the Court underlined that Sharia is ‘incompatible with the fundamental principles of democracy, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.’<sup>1017</sup> For these reasons, the Court found that the dissemination of the ideology promoted by *Hizb ut-Tahrir* constituted an activity falling within the scope of Article 17 of the Convention.

In *Kasymakhunov and Saybatalov v Russia*, the Court dealt with a complaint against Russia for the prohibition of *Hizb ut-Tahrir*. In considering the applicability of Article 17 to the said case, it reiterated its findings in *Hizb ut-Tahrir v Germany* and that the aims and objectives of this association were clearly contrary to the values of the Convention. Here, the Court dealt with an unregistered association operating on an international scale with approximately two hundred followers in Germany but with no known sub-organisation in Germany. Even though the entity was unregistered with a limited amount of followers, the fact that its aim and objectives sought

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<sup>1015</sup> *Vona v Hungary*, App. no. 35943/10 (ECHR, 9 July 2013) para.37

<sup>1016</sup> *Hizb ut-Tahrir and Others v Germany*, App. no. 31098/08, (ECHR 12 June 2012) para.74

<sup>1017</sup> *Kasymakhunov and Saybatalov v Russia*, App. no. 26261/05 and 26377/06 (ECHR 14 March 2013) para.111

to destroy Convention values and principles led to the Court ousting it from the protection of the Convention through the application of Article 17.<sup>1018</sup>

Thus, in the framework of association, Article 17 has been applied in two connected cases which involved elements of radical Islam, violence and anti-Semitism. Most interesting to this discussion is firstly the decision in *Refah Partisi* that an analysis of Article 11 would have to precede any consideration of the applicability of Article 17, thereby contributing to the creation of a comprehensive appraisal of the issues at stake and, secondly, the non-applicability of Article 17 in *Vona*, despite the intimidating and potentially destructive facts of this case. On this point, Buyse argued that the Court's stance 'was triggered by a desire to consider the merits of the case in-depth rather than dismissing it right away under Article 17.'<sup>1019</sup>

#### 5.4 Article 17 – Concluding Comments

Three key issues can be deduced from an analysis of Article 17. Firstly, in the realm of expression, this article has been applied more often by the Commission than the Court. Secondly, the Court has rarely applied Article 17 to expression cases with the sore thumb definitely being *Norwood* as no legitimate justification can be attached to its use in relation to that case when comparing it to other similar cases in which Article 10(2) rather than Article 17 was relied on. Such a deviation from common practice has contributed to the unpredictability of Article 17's applicability. Thirdly, the Court's analysis in *Refah Partisi*, as reproduced in *Vona*, as to the necessity of assessing limitation grounds before enforcing Article 17, is a contributing factor to ensuring a safer use of this article. In a nutshell, the application of this article has constituted a source of criticism given that 'it is not clear in which instances the provision applies.'<sup>1020</sup> Buyse has argued that 'this inconsistency is most probably due to the inherent tension between human rights protection and an abuse of rights clause'<sup>1021</sup> but also due to the difficulties in proving such

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<sup>1018</sup> *Hizb ut-Tahrir and Others v German*, App. no. 31098/08 (12/06/2012) para.73

<sup>1019</sup> Antoine Buyse, 'Dangerous Expressions: The ECHR, Violence and Free Speech'(2014) 2 *International and Comparative Law Quarterly* 63, 495

<sup>1020</sup> Antoine Buyse, 'Dangerous Expressions: The ECHR, Violence and Free Speech'(2014) *International and Comparative Law Quarterly* 63, 495

<sup>1021</sup> Antoine Buyse, 'Contested Contours – The Limits of Freedom of Expression from an Abuse of Rights Perspective – Articles 10 and 17 ECHR' in Brems E & Gerards J 'Shaping Rights in the ECHR : The Role of the European Court of Human Rights in Determining the Scope of Human Rights' (eds., Cambridge 2013) 184

an abuse of rights.<sup>1022</sup> In addition, David Harris, Michael O’Boyle and Colin Warbrick have suggested that all speech should be considered under Article 10 and its limitation grounds in order to prevent ‘States from having abusive recourse to Article 17.’<sup>1023</sup> This argument could potentially be extended to radical associations and assemblies. Leigh argues that this would result in ‘greater consistency and predictability in decision-making in hate speech cases.’<sup>1024</sup> But then again, would this not offer the chance to those acting upon totalitarian aims and objectives to taste at least a little bit of the democracy that they wish to use and abuse?

#### 6. The Margin of Appreciation: Its Role in the Interpretation and Application of Article 10 and Article 11 of the ECHR

In dealing with cases involving, *inter alia*, alleged breaches of Articles 10 and 11, the Court has ‘devised and applied its well-known margin of appreciation doctrine as an instrument to negotiate between conflicting interests in a multi-layered legal order.’<sup>1025</sup> This doctrine has been developed by case-law of the ECtHR and now constitutes a central doctrine taken into consideration in ensuing jurisprudence. Article 1 of Protocol 15 which was developed in 2013 amends the Convention and incorporates the doctrine therein by holding that:

At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows:

“Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,”

Protocol 15 will enter into force as soon as all the States Parties to the Convention have signed and ratified it. This is still pending.

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<sup>1022</sup> Antoine Buyse, ‘Contested Contours – The Limits of Freedom of Expression from an Abuse of Rights Perspective – Articles 10 and 17 ECHR’ in Eva Brems E & Janneke Gerards ‘*Shaping Rights in the ECHR : The Role of the European Court of Human Rights in Determining the Scope of Human Rights*’ (eds. Cambridge 2013) 188

<sup>1023</sup> David Harris, Michael O’Boyle and Colin Warbrick, ‘*Law of the European Convention on Human Rights*,’ (2<sup>nd</sup> edn. OUP 2009),450

<sup>1024</sup> Ian Leigh, ‘Damned if they do, Damned if they don’t: the European Court of Human Rights and the Protection of Religion from Attack.’ (2011) 17 *Res Publica* 55, 72

<sup>1025</sup> Janneke Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (2011) *European Law Journal* 17 (1) 81

In *Handyside v The United Kingdom*, the Court stated that ‘it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of necessity in this context.’<sup>1026</sup> This is because it is impossible to find a uniform conception of morals in all Contracting Parties and, anyhow, this conception varies according to the time and the place.<sup>1027</sup> Also, as stated in *Müller and Others v Switzerland*, State authorities are in a better position than international judges to rule on the necessity of a restriction given the contextual and moral framework of their country.<sup>1028</sup> Furthermore, as well as allowing States Parties a margin of appreciation in determining whether there exists a pressing social need that would justify a restriction, the Court also provides them with leeway when deciphering other issues. For example in *Rekvényi v Hungary*, the Court held that the national authorities enjoy a certain margin of appreciation in determining whether the impugned interference is proportionate to the legitimate aim in question.<sup>1029</sup>

The margin of appreciation is granted to the legislature, the judiciary and other relevant bodies.<sup>1030</sup> It can be argued that when a State is permitted, through the margin of appreciation, to decide on whether or not a particular type of speech or form of association or assembly is offensive and, therefore, a source of violation of other rights and freedoms, it is inevitably empowered with much subjectivity given that the personal approaches, attitudes and convictions of members of governing bodies may influence any such decisions. Nevertheless, the Contracting States do not enjoy an unmonitored and endless margin of appreciation given that the ECtHR has the last say in deciding whether an interference with the freedom of expression is in fact in line with Article 10.<sup>1031</sup> Thus, the ‘domestic margin of appreciation goes hand in hand with a European supervision.’<sup>1032</sup> In *Sunday Times v The United Kingdom*, the Court underlined that, in exercising its supervisory powers, its role is to determine whether an interference ‘was proportionate to the legitimate aim pursued and whether the reasons given by the national

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<sup>1026</sup> *Handyside v UK*, App. no. 5493/72 (ECHR 7/12/76) para. 48

<sup>1027</sup> *Handyside v UK*, App. no. 5493/72 (ECHR 7/12/76) para. 48

<sup>1028</sup> *Müller and Others v Switzerland*, App. no. 10737/84 (ECHR 24/5/88) para.35

<sup>1029</sup> *Rekvényi v Hungary*, App. no. 25390/94 (ECHR 20/05/99) para. 42

<sup>1030</sup> *Handyside v UK*, App. no. 5493/72 (ECHR 7/12/76) para.48

<sup>1031</sup> *Handyside v UK*, App. no. 5493/72 (ECHR 7/12/76) para.49

<sup>1032</sup> *Handyside v UK*, App. no. 5493/72 (ECHR 7/12/76) para.49

authorities to justify it are relevant and sufficient.<sup>1033</sup> In *Özgür Gündem v Turkey*, the Court underlined that ‘in exercising its supervisory judgement, the Court must look at interference in light of the case as a whole, including the content of the impugned statements and the context in which they were made.’<sup>1034</sup>

The width of this margin very much depends on the type and subsequent significance of the right being considered. In the framework of expression, the Court ‘has generally been particularly restrictive in its approach to the margin of appreciation but has been prepared to accept a wider margin in relation to issues likely to offend personal convictions in the religious or moral domain.’<sup>1035</sup> This was manifested in *Soulas v France*, where the Court held that States should be granted a wider margin of appreciation in cases where they limit hate speech or discriminatory speech because of the risks they pose to social relationships and the treatment of immigrants.<sup>1036</sup> In relation to this case, Andrew Lester, David Pannick and Javan Herberg criticised the Court’s decision to uphold a restriction on anti-immigrant and Islamophobic speech. More particularly, they held that, by applying the margin of appreciation, the Court did not recognise the significance of protecting and promoting plurality of opinions.<sup>1037</sup> The wide margin of appreciation is also granted to States if expressions ‘incite to violence against an individual, a public official or a sector of the population.’<sup>1038</sup> However, as noted by Buyse, the Court does not ‘conclusively explain when this is the case.’<sup>1039</sup>

In relation to the freedom of association, the Court has underlined that the States enjoy only a narrow margin of appreciation.<sup>1040</sup> In relation to assembly, in *Fáber v Hungary*, the Court held that adopting preventive measures to ensure public order during a demonstration and counter-

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<sup>1033</sup> *Sunday Times v The United Kingdom*, App. no. 6538/74, (ECHR 26 April 1979) para. 62

<sup>1034</sup> *Gündem v Turkey*, App. no. 23144/93 (ECHR, 16 March 2000) para. 57

<sup>1035</sup> *Lehideux and Inorn v France*, App. no. 24602/94 (ECHR 23 September 1998) Joint Dissenting opinion of Judge Foighel, Loizou and Sir John Freeland.

<sup>1036</sup> *Soulas and Others v France*, App. no. 15948/03 (ECHR 10 July 2008) para. 38

<sup>1037</sup> Andrew Lester, David Pannick and Javan Herberg, ‘*Human Rights Law and Practice*’ (3<sup>rd</sup> edn. LexisNexis 2009)

<sup>1038</sup> *Ceylan v Trukey*, App. no. 23556/94 (ECHR 8 July 1999) para. 34,

<sup>1039</sup> Antoine Buyse, ‘Dangerous Expressions: The ECHR, Violence and Free Speech’(2014) 63 *International and Comparative Law Quarterly* 2, 494

<sup>1040</sup> *Refah Partisi (the Welfare Party) and Others v Turkey*, App. nos. 41340/98, 41342/98, 41344/98 (ECHR, 13 February 2003) para.10, *Vona v Hungary*, App. no. 35943/10 (ECHR, 9 July 2013) para.69

demonstration enjoys a wide margin of appreciation.<sup>1041</sup> This is due to the equal importance of the competing rights and because the national authorities are most suited to evaluate the security risks and the measures which should be implemented to overcome the risks.<sup>1042</sup> Despite this qualitative statement regarding the wide nature of the State's discretion, the Court went on to find that there was, in fact, a violation of Article 11 of the ECHR. This is because the significance attached to this right is so great that it cannot be curtailed in any way 'so long as the person concerned does not himself commit any reprehensible act on such occasion.'<sup>1043</sup> Interestingly enough, in this case, the Court underlined factors which should be considered by the State in the exercise of its margin of appreciation, particularly past violence at similar events and the impact of a counter-demonstration on the targetted demonstration. Considering these factors would allow the State to appraise the danger of violent confrontation between the two groups who are demonstrating.<sup>1044</sup>

Thus, the margin's width depends on the right at stake, with a strict overall approach being taken to expression, association and assembly with some exceptions being determined *vis-à-vis* expression. Lord Lester of Herne Hill stated that 'the concept of the margin of appreciation has become as slippery and elusive as an eel. Again and again the Court appears to use the margin of appreciation as a substitute for coherent legal analysis of the issues at stake.'<sup>1045</sup> It could well be argued that the margin of appreciation affects the regulated approach that has been developed by the Court in determining the scope of freedom of expression as well as the freedom of association. More particularly, the application of this approach 'is made less predictable by the influence of the controversial margin of appreciation doctrine.'<sup>1046</sup> Nevertheless, this doctrine is undoubtedly necessary for a Court working with a plethora of traditions and practices which has the potential of ensuring predictability and certainty whilst simultaneously appreciating cultural, moral and legal relativism.

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<sup>1041</sup> Fáber v Hungary, App.no. 40721/08 (ECHR 24 July 2012) para. 6

<sup>1042</sup> Fáber v Hungary, App.no. 40721/08 (ECHR 24 July 2012) para. 42

<sup>1043</sup> Fáber v Hungary, App.no. 40721/08 (ECHR 24 July 2012) para. 46

<sup>1044</sup> Fáber v Hungary, App.No 40721/08 (ECHR 24 July 2012) para. 44

<sup>1045</sup> Lord Lester of Herne Hill, Q.C., 'Universality Versus Subsidiarity: A Reply' (1998) *European Human Rights Law Review* 73, 75-76

<sup>1046</sup> Ian Leigh, 'Damned if they do, Damned if they Don't: The European Court of Human Rights and the Protection of Religion from Attack' (2011) 17 *Springer Science and Business Media B.V.* 17, 56

## 7. The EctHR and Racist Crimes

The EctHR has dealt with three cases which involved racist crime, as this is conceptualised in the current dissertation. *Nachova and Others v Bulgaria*, involved the killing of two Bulgarian nationals of Roma origin by the police. This case constituted the first platform through which the Court set out its approach to racist crimes. More particularly, the Chamber noted that:

‘it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.’<sup>1047</sup>

This position was subsequently endorsed by the Grand Chamber and essentially attaches particular severity to racist crimes. It underlines the significance of effective investigation given the messages of condemnation that arise, therefrom, but also the instilling of confidence in potential target groups. Furthermore, the Chamber noted that, in the event of racist crimes, in particular those resulting in death by State agent:

‘State authorities have the additional duty to take all reasonable steps to unmask any racist motive...Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights...’

This position was also endorsed by the Grand Chamber and is significant as it recognises the importance of establishing a racist motive insofar that the racist crime is perpetrated by the State. However, and probably due to the facts of the particular case, this additional duty only extends to racist crime perpetrated by the State and not by private individuals. The imposition of this additional duty comes with a recognition by the Court that proving racial motivation ‘will often be extremely difficult in practice’<sup>1048</sup> and, as such, notes that the duty to investigate such

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<sup>1047</sup> *Nachova and Others v Bulgaria*, App. nos. 43577/98 and 43579/98 (ECHR 6 July 2005) para 157

<sup>1048</sup> *Nachova and Others v Bulgaria*, App. nos. 43577/98 and 43579/98 (ECHR 6 July 2005) para 159



motivation is an ‘obligation to use best endeavours and not absolute.’<sup>1049</sup> The above-described approach of the Court in relation to racist crime was applied in *Šečić v Croatia* which involved the beating of a Roma by a skinhead group. Importantly, in this case, the Court extended the additional duty to unmask any racist motive, as referred to in *Nachova*, to racist crimes committed by private individuals.<sup>1050</sup> In 2016, the Court dealt with a case against Greece, which involved the serious beating of an Afghan undocumented migrant living in the infamous area of Agios Panteleimon, which has been particularly affected by racist crime carried out by the hit squads of *Golden Dawn*. Following the incident, the applicant was hospitalised and upon his release was detained on grounds of illegal stay. A deportation order was issued and the applicant was under criminal investigation on the grounds of illegal entry into Greece. The applicant was released ten days later and served with his deportation order. It must be noted that the Court dealt with the condition of the victim’s detention and the investigation of the violence perpetrated against him. Relevant to this discussion is the latter element, namely the investigation of the violence perpetrated against him. In the judgement, the Court referred to four reports on racist violence in Greece issued by the Ombudsperson, Amnesty International, Human Rights Watch and the Racist Violence Recording Network which, amongst others, underline the rise of racist violence in Greece and the inactivity of the Police to bring perpetrators to justice.<sup>1051</sup> Thereby, by considering such reports, the Court placed the violence perpetrated against the applicant in the more general context of racist violence in Greece and the approach adopted by the Police to such violence. In fact, the Court underlined the significance of placing this particular case within the general context of the rise of racist crime in Greece at the material time.<sup>1052</sup> It noted that the Police took no steps to identify perpetrators with a history of racial violence and affiliation to extremist groups<sup>1053</sup> and ignored the racist violence context which had been the subject of the aforementioned reports.<sup>1054</sup> Moreover, the Court recognised the importance effectively to investigate racist crimes, as set out in *Nachova*.<sup>1055</sup> As a result, the Court found Greece to be in violation of Article 3 in relation to the ineffective investigation of the crime, thereby, recognising

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<sup>1049</sup> *Nachova and Others v Bulgaria*, App. nos. 43577/98 and 43579/98 (ECHR 6 July 2005) para. 159

<sup>1050</sup> *Šečić v Croatia*, App. no. 40116/02 (ECHR 31 May 2007) para. 67

<sup>1051</sup> These are all discussed in chapter seven

<sup>1052</sup> *Sakir v Greece*, App. no. 48475/09 (ECHR 24 March 2016) 71

<sup>1053</sup> *Sakir v Greece*, App. no. 48475/09 (ECHR 24 March 2016) 65

<sup>1054</sup> *Sakir v Greece*, App. no. 48475/09 (ECHR 24 March 2016) 71

<sup>1055</sup> *Sakir v Greece*, App. no. 48475/09 (ECHR 24 March 2016) 64

the positive obligation to investigate cases of ill-treatment, as is, in any case, the accepted position of the Court.<sup>1056</sup>

#### 8. The Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems

The Internet is one of the most powerful contemporary tools used by individuals and groups to express ideas and opinions and receive and impart information.<sup>1057</sup> It ‘magnifies the voice and multiplies the information within reach of everyone who has access to it.’<sup>1058</sup> Notwithstanding the positive aspects of this development in the realm of free speech and exchange of ideas, the Internet also provides a platform for the promotion and dissemination of hate.<sup>1059</sup> In fact, the Internet has seen a sharp rise in the number of extreme-right websites and activity.<sup>1060</sup> As well as facilitating the promotion of hate, the Internet has also strengthened the far-right movement more generally by bringing hate groups together and converging the lines of previous fragmentation, thus contributing to the creation of a ‘collective identity that is so important to movement cohesiveness.’<sup>1061</sup> This has occurred on an international level, thereby, ‘facilitating a potential global racist subculture.’<sup>1062</sup> Although hate existed long before the creation of the Internet, this technological advancement has provided an effective and accessible means of communication and expression for hate groups and individuals whilst simultaneously adding a new dimension to the problem of regulating hate<sup>1063</sup> particularly due to the nature of the Internet as a global and, to an extent, anonymous medium. It is the anonymity of the Internet which deeply hampers the implementation of traditional legal procedures and enforcement of traditional laws<sup>1064</sup> as the

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<sup>1056</sup> It also found Greece in violation of Article 3 in relation to the applicant’s detention conditions.

<sup>1057</sup> The number of Internet users for 2014 was 2,925,249,355: <<http://www.internetlivestats.com/internet-users/#trend>> [Accessed 25<sup>th</sup> October 2015]

<sup>1058</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye (22 May 2015) A/HRC/29/32, para. 11

<sup>1059</sup> Fernne Brennan, ‘Legislating against Internet Race Hate’ (2009) 18 *Information and Communications Technology Law* 2, 123

<sup>1060</sup> James Bank, ‘Regulating hate speech online’ (2010) *International Review of Law, 24 Computers & Technology* 3, 233

<sup>1061</sup> Barbara Perry & Patrick Olsson ‘Cyberhate: The Globalization of Hate’ 18 *Information and Communications Technology Law* 2, 185

<sup>1062</sup> Barbara Perry & Patrick Olsson ‘Cyberhate: The Globalization of Hate’ 18 *Information and Communications Technology Law* 2, 185

<sup>1063</sup> Dragos Cucereanu ‘*Aspects of Regulating Freedom of Expression on the Internet*’ (eds. Intersentia 2008) 7

<sup>1064</sup> James Banks, ‘Regulating Hate Speech Online’ (2010) 24 *International Review of Law Computers & Technology* 3, 233

perpetrator cannot readily be determined, whilst the global nature of the Internet means that, even if a perpetrator can be identified, bringing him or her to justice may not be possible due to jurisdictional limitations.<sup>1065</sup> The CoE recognised the dangers attached to the above-described developments and, thus, put forth the Additional Protocol to the Cybercrime Convention, discussed in this section.

The Council of Europe's Convention on Cybercrime is the first multilateral treaty that aims at combatting crimes committed through computer systems and has, to date, been ratified by forty seven countries.<sup>1066</sup> This Convention was signed and ratified not only by CoE States but also by the USA which, although it is not a member of this entity, has observer status. Interestingly, however, the USA acceded to the Convention only after the issue of online hate was removed from the table of discussion.<sup>1067</sup> This reality demonstrates that 'fundamental disagreements remain as to the most appropriate and effective strategy for preventing dissemination of racist messages on the Internet'<sup>1068</sup> which subsequently contribute to the weakening or even nullification of regulatory measures which may be adopted by particular States, given that Internet regulation requires co-operation for both technical and legal reasons, as discussed above. To fill the resulting gaps, the CoE subsequently developed an Additional Protocol to criminalise online racist and xenophobic acts committed through computer systems. This has been ratified by twenty four countries.<sup>1069</sup> The CoE recognised the limitations in implementing a unilateral approach to the issue of online hate in the form of racist or xenophobic hate and, thereby, sought to ensure a common set of standards for participating States and promote co-operation amongst them in the criminalisation of relevant acts.<sup>1070</sup> This document is seen as a 'supplement'<sup>1071</sup> to the Convention to ensure that the latter's procedural and substantive provisions encompass

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<sup>1065</sup> Christopher D. Van Blaricum, 'Internet Hate Speech: The European Framework and the Merging American Haven' (2005) 62 *Washington and Lee Law Review* 2, 783

<sup>1066</sup> List of signatures and ratifications: <<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/189/signatures>>

<sup>1067</sup> James Banks, 'Regulating Hate Speech Online' (2010) 24 *International Review of Law, Computers & Technology* 3, 236

<sup>1068</sup> Dragos Cucereanu 'Aspects of Regulating Freedom of Expression on the Internet' (eds. Intersentia 2008) 17

<sup>1069</sup> List of signatures and ratifications: <<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/189/signatures>>

<sup>1070</sup> James Banks, 'Regulating Hate Speech Online' (2010) 24 *International Review of Law, Computers & Technology* 3, 236

<sup>1071</sup> Article 1, Additional Protocol to the Convention on Cybercrime, Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems

racism and xenophobia online. Thus, a series of the Convention's articles apply *mutatis mutandis* to the Protocol under consideration including, amongst others, Article 13 on sanctions and measures and Article 22 on jurisdiction. However, even on first sight, this document comes with several significant limitations which will be discussed hereinafter. Firstly, as demonstrated in its title, this Protocol tackles only racist and xenophobic hate, completely disregarding other forms of hate on grounds including, but not limited to, sexual orientation, gender identity and disability, whilst religion is considered a protected characteristic within the definitional framework set out by Article 2 of the Additional Protocol. Thus, there seems to be an unjustified prioritisation of online hate with the CoE almost arbitrarily seeking to regulate the effects of racism and xenophobia online, leaving victims of other types of hate without a respective legal framework.

The Additional Protocol defines what is meant by racist and xenophobic material and underlines the measures to be taken at a national level in relation to the dissemination of such material,<sup>1072</sup> racist and xenophobic threats and insults professed through computer systems<sup>1073</sup> as well as in relation to the denial, gross minimisation, approval or justification of genocide or crimes against humanity.<sup>1074</sup> The Protocol also renders the intentional aiding and abetting of any of the above a criminal offence. It must be noted that, unlike Article 9 of the Cybercrime Convention which deals with child pornography, the Protocol does not criminalise the possession and procurement of racist and xenophobic material.<sup>1075</sup> As noted in the Explanatory Note of the Protocol, in order to amount to offences, racist and xenophobic material, insults and revisionist rhetoric must occur on a public level, a point which has been incorporated for purposes adhering to Article 8 of the European Convention on Human Rights.<sup>1076</sup> In relation to the acts that are to be deemed offences, it becomes clear that the freedom of expression is 'the sacred cow against which the legislation seeks to justify its apparent encroachment for the sake of providing a measure to prohibit

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<sup>1072</sup> Article 3, Additional Protocol to the Convention on Cybercrime, Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems

<sup>1073</sup> Article 4 and 5, Additional Protocol to the Convention on Cybercrime, Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems

<sup>1074</sup> Article 5, Additional Protocol to the Convention on Cybercrime, Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems

<sup>1075</sup> Dragos Cucereanu 'Aspects of Regulating Freedom of Expression on the Internet' (eds. Intersentia 2008) 50

<sup>1076</sup> Explanatory Note to the Additional Protocol to the Convention on Cybercrime, Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems, para.29

cybercrimes motivated by race hate.’<sup>1077</sup> To illustrate this, one can turn to Article 3 of the Additional Protocol on the dissemination of racist and xenophobic material through computer systems, with part 1, therein, providing that:

‘each party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally and without right, the following conduct: distributing or otherwise making available, racist and xenophobic material to the public through a computer system.’

However, Part 3 holds that a party may reserve the right not to apply the above paragraph to those cases of discrimination for reasons of upholding free expression. Thus, the Protocol, as an initiative to combat online hate, has been ‘thwarted through the compromise they have made to concerns about freedom of expression’<sup>1078</sup> with much less regard evidently being had for other freedoms such as that of non-discrimination. It could, thus, be argued that the Protocol and its efficacy is undermined by the approach adopted by the CoE which grants an unequal and unjustifiable emphasis on expression rather than non-discrimination and equality.<sup>1079</sup>

In relation to general limitations that may be imposed on the applicability of Article 3, Part 2, therein, holds that a State may choose not to attach criminal liability to conduct referred to in Part 1 if this does not promote violence or hatred insofar as other effective remedies are available. This is notwithstanding the fact that the Protocol itself is entitled as a document which seeks to criminalise racist and xenophobic acts committed through computer systems. Whilst criminalising racist and xenophobic threats has no opt-outs, Article 5 of the Additional Protocol on racist and xenophobic insults provides that a State has the right not to apply part 1 of this article, in whole or in part, which sets out the legislative and other measures that may be adopted to criminalise racist and xenophobic insults. Although no direct reference to free expression is made here as the justifier of such limitation, it could implicitly be assumed that concerns

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<sup>1077</sup> Fernne Brennan, ‘Legislating against Internet Race Hate’ (2009) 18 *Information and Communications Technology Law* 2, 124

<sup>1078</sup> Fernne Brennan, ‘Legislating against Internet Race Hate’ (2009) 18 *Information and Communications Technology Law* 2, 123

<sup>1079</sup> Fernne Brennan, ‘Legislating against Internet Race Hate’ (2009) 18 *Information and Communications Technology Law* 2, 126

regarding the freedom of expression led to the formulation of the aforementioned reservation available to those who want it. Many of the States which ratified the Protocol took the opportunity to incorporate reservations. It generally appears that Article 4 on racist and xenophobic threats is the one granted the most protection as it extends to private as well as public communications, unlike the other acts found in the Protocol while Article 4 no opt-out possibility as do the others.

The issue of intent is also significant when seeking to appraise the Protocol. This document renders illegal the dissemination of material, threats, insults and revisionist rhetoric offences as well as aiding and abetting the committal of such offences in the event that such acts and/or expressions are effectuated and/or uttered intentionally. This is particularly significant in the realm of the liability of the Internet Service Provider (hereinafter ISP) which simply constitutes the platform through which problematic speech may arise. The Explanatory Report to the Additional Protocol holds that the precise meaning of ‘intentionally’ should be interpreted at a national level.<sup>1080</sup> However, it did clearly stipulate that it is not sufficient for an ISP, which simply constitutes the host of the material, to be found guilty of any of the Protocol’s offences if the required intent under domestic law does not exist.<sup>1081</sup> Thus, on the one hand it does limit the liability of unknowing ISPs but leaves the general conceptualisation of intent unsure and contingent on national positions. However, the Protocol does not regulate or prohibit the finding of permissive intent in the event that an ISP is made aware of racist or xenophobic material or expression and does not take the necessary measures to remove it, thereby, leaving some doors open for finding potential liability in the inaction of ISPs. Such permissive intent is found, for example, in Germany’s Information and Communications Service Act of 1997 which underlines the liability of ISPs in the event that they knew of hateful content, had the ability to block it but chose not to.<sup>1082</sup> Further, in the realm of ISPs, the Protocol remained silent on the very significant question of jurisdiction in the event of a conflict of law between the hosting country

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<sup>1080</sup> Explanatory Note to the Additional Protocol to the Convention on Cybercrime, Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems, para.25

<sup>1081</sup> Explanatory Note to the Additional Protocol to the Convention on Cybercrime, Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems, para.25

<sup>1082</sup> Christopher D. Van Blaricum, ‘Internet Hate Speech: The European Framework and the Merging American Haven’ (2005) 62 *Washington and Lee Law Review* 2, 796

and the other.<sup>1083</sup> Although for EU countries, the Directive on Electronic Commerce<sup>1084</sup> would govern with Article 3, therein, providing that ISPs are governed by the laws of the Member State in which they are established,<sup>1085</sup> the situation is not clear in the event that a non-EU country is involved in a particular dispute.<sup>1086</sup>

Although the Protocol may contribute to promoting harmonisation on agreed upon principles and procedural, technical and legal cooperation amongst States, it remains problematic. This is the case not only due to its inherent limitations, as described above, but also due to the fact that the USA is not part of it. This, in addition to the absence of any form of extradition treaties between the USA and other countries in the sphere of online hate speech, deeply restricts the efficacy of the Protocol's aims and objectives. Moreover, it may well appear that the Protocol has sought to achieve the lowest possible common denominator, maybe for purposes of maximising ratification. Either way, the aforementioned delimitations may serve as stumbling blocks when seeking to meet the objectives of the Protocol. Furthermore, as well as limitations as a result of an over-emphasis on the freedom of expression, it could be argued that the Protocol constitutes an ineffective base through which online hate can be restricted since it adopts traditional conceptions of State boundaries, State sovereignty, on issues such as the freedom of expression mentioned above, and more generally, treats the issue of online hate as any other issue using traditional means of communication, throwing in the concept of international cooperation without effectively and pragmatically considering the challenges of the Internet. However, 'the Internet is a very different animal from that we are used to, which requires handling in a different way,'<sup>1087</sup> although this has not yet been taken on board.

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<sup>1083</sup> Christopher D. Van Blarcum, 'Internet Hate Speech: The European Framework and the Merging American Haven' (2005) 62 *Washington and Lee Law Review* 2, 801

<sup>1084</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, In Particular Electronic Commerce, in the Internal Market ('Directive on electronic commerce')

<sup>1085</sup> It must be noted that the Directive provides for an exception to that choice of law when the receipt country's choice of law is necessary for the prevention, investigation, detection and prosecution of criminal offence including the 'fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons.' (footnote)

<sup>1086</sup> Christopher D. Van Blarcum, 'Internet Hate Speech: The European Framework and the Merging American Haven' (2005) 62 *Washington and Lee Law Review* 2, 801

<sup>1087</sup> Fernne Brennan, 'Legislating Against Internet Race Hate' (2009) 18 *Information and Communications Technology Law* 2, 141

## Conclusion

In sum, the ECtHR grants States the limitation clauses in Articles 10 and 11 of the ECHR as tools to restrict expression, associations and assemblies that go beyond the protective framework of the Convention, with Article 17 enforced, theoretically, in the framework of conduct or speech which seeks to destroy democracy. Militant Democracy can, thus, be seen both in the realm of the limitation grounds of Articles 10 and 11 and is fully embodied in Article 17. Five points can be discerned from the above analysis. Firstly, that speech and association interlinked to right-wing extremist groups are not permitted by the Convention, whereas right-wing assemblies which are not intimidating or violent are permissible. Secondly, that the Court reaches this decision through an appraisal of the limitation clauses of the relevant articles or, in some circumstances, through the application of Article 17. Thirdly, that in relation to expression, the Court's assessment occurs against a weak theoretical backdrop of key notions and definitions, more particularly as to what hate speech is and at what point such speech does, in fact, become illegal. Fourthly, that the Court offers no clear guidelines as to when Article 17 of the ECHR rather than the limitation clauses should be applied, a point best illustrated by the random application of Article 17 in *Norwood*. Lastly, that the margin of appreciation doctrine is necessary, on the one hand as a regulator of a varying range of beliefs and ideologies which mark the Contracting Parties although, on the other, rendering even more difficult the pursuit of any kind of cohesion and predictability in the judicial approach to the speech and conduct under consideration, with approach meaning the technical tackling of these cases and not the Court's general stance. However, the ECtHR has recognised that racist crimes are particularly destructive of fundamental rights and, as such, States must take the necessary steps to determine racist motives and to carry out investigations with particular vigour so as to demonstrate the condemnation of such crimes. As such, the ECtHR recognises the particularly severe characteristic of racist crimes and places them high on the hierarchy of severity. In addition to the ECtHR's role in interpreting and applying the ECHR in the sphere of hateful expression, assembly and association as well as racist crime, the CoE is also particularly significant in a discussion on the far-right given the Additional Protocol to the Cybercrime Convention. This is a significant step given that the Internet is a central platform which is used and abused by the far-right to disseminate hateful messages, target their victims and incite discrimination, violence and hatred against them although the Protocol is lacking as per its scope as it is arbitrarily limited to



racism and xenophobia. In addition, given the Internet's nature as a global, boundary-free entity, for the Protocol to be of practical use in combatting its hateful usage of the Internet, it would have to be signed by all countries. Notwithstanding the limitations of this Protocol, it fills a conspicuous gap in terms of regulating racism and xenophobia online. Unfortunately, it has not been ratified by the countries under consideration in this dissertation.

## CHAPTER FIVE: THE EUROPEAN UNION

### Introduction

This chapter will look at measures formulated by the EU which contribute to challenging right-wing extremism. This analysis is necessary, not only because both countries under consideration are EU Member States, but also because of the 2014 European Parliament election results which saw their far-right parties performing well.<sup>1088</sup> It must be reiterated that in June 2016 the UK voted to leave the European Union although this is not a straight-forward and automatic task, as further discussed in chapter six so, at the time of writing and for a while afterwards, the UK remains and will continue to remain a member of the Union, bound by its laws. It has been argued that measures ‘restricting racist speech and racist organizations as such are not within the field of competence of the European Union.’<sup>1089</sup> Nevertheless, as will be reflected in this section, the EU has taken certain steps in this direction with the EU having first dealt with right-wing extremism in the 1980s within the wider framework of combatting racism following the 1984 European Parliament elections which saw a high percentage of extreme-right voting, especially in France.<sup>1090</sup> In relation to extremist ideologies, the European Parliament noted in a 2007 Resolution that these are ‘incompatible with the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.’<sup>1091</sup> This chapter will look at Article 7 of the Treaty on the European Union (hereinafter TEU) which deals with a possible risk of a serious breach or the existence of a serious and persistent breach to values such as the rule of law. To allow for a comprehensive understanding of this mechanism, its analysis will be preceded by an assessment of the rule of law looking at its key characteristics and then at its incorporation into the EU framework. There will be an assessment of a real and actual risk to the rule of law within the EU, through a consideration of Hungary and the constitutional and democratic shock

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<sup>1088</sup> Greece: Golden Dawn - 9.39%, third in line: <<http://www.europarl.europa.eu/elections2014-results/en/country-results-el-2014.html>> as opposed to 0.46% in the 2009 elections: <<http://www.antenna.gr/news/Politics/article/349082/pososta-sok-gia-ti-xrysi-avgi>> [accessed 7 November 2014] UK: UKIP - 26.77%, first in line as opposed to 16.09% and second in line in 2009. BNP demonstrated a fall from 6.04% in the 2009 elections to 1.11% in the 2014 elections <<http://www.europarl.europa.eu/elections2014-results/en/country-results-uk-2014.html>> <<http://www.europarl.europa.eu/elections2014-results/en/country-results-uk-2009.html>> [Both accessed 7 November 2014]

<sup>1089</sup> Eva Brems, ‘State Regulation of Xenophobia versus Individual Freedoms: The European view’ (2002) 1 *Journal of Human Rights* 4, 489

<sup>1090</sup> ‘European Union Anti-Discrimination Policy: From Equal Opportunities between Women and Men to Combating Racism’, Directorate – General for Research: Working document, Public Liberties Series, LIBE 102 en, <[http://www.europarl.europa.eu/workingpapers/libe/102/text1\\_en.htm](http://www.europarl.europa.eu/workingpapers/libe/102/text1_en.htm)> [accessed 15 August 2014]

<sup>1091</sup> Resolution of the European Parliament on Combatting the Rise of Extremism in Europe, 13 December 2007, P6\_TA(2007)062

caused by the *Fidesz* party. More particularly, the relevant section will consider the mechanisms employed and/or recommended by the EU to tackle the violation of Article 2 TEU principles by the Member State. There will then be an evaluation of the New EU Framework to Strengthen the Rule of Law and the Council's Annual Dialogue on the Rule of Law which constitute some of the more recent additions to the EU's resource kit for the preservation of the rule of law. The discussion of the above instruments emanates from the premise that right-wing extremist groups pose a direct threat to a liberal democracy and, thus, to the rule of law. After dealing with the rule of law framework and how the EU attempts to protect itself from potential or actual threats to the rule of law and interrelated doctrines, the chapter will consider the Charter of Fundamental Rights of the EU and especially its provisions which relate to the freedom of expression, freedom of association and assembly and freedom of non-discrimination, the 1996 Joint Action adopted by the Council concerning action to combat racism and xenophobia, its follow up 2008 Council Framework on combatting certain forms and expressions of racism and xenophobia by means of criminal law and the relevant European Parliament Resolutions. In addition to the aforementioned measures taken to combat racism and xenophobia, which directly mention or incorporate the regulation of activities and utterances of right-wing extremist groups, the EU adopted the Council Directive for combatting discrimination on the grounds of racial or ethnic origin within areas such as employment, trade unions, social protection and access to goods and services. In effect, 'since the adoption of the Race Directive in 2000, the EU has had a legislative prohibition of racial discrimination.'<sup>1092</sup> The bedrock of this Directive is Article 19 of the Treaty on the Functioning of the European Union (hereinafter TFEU), which holds that the Council 'may take appropriate measures to combat discrimination sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.' However, the Directive does not extend, *per se*, to practices and rhetoric promulgated by right-wing movements given that, notwithstanding the significance of this development in the fight against racism and xenophobia which are consequences of right-wing rhetoric, more generally, it does not deal with the regulation of right-wing extremist groups. This viewpoint is adhered to even though there exists a correlation between the increasing number of extremist organizations and the exacerbation of fears in society that may subsequently result in the manifestation of racism in a variety of arenas such as

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<sup>1092</sup> Erica Howard 'Race and Racism – Why does European Law have Difficulties with Definitions?' (2008) 24 *The International Journal of Comparative Labour Law and Industrial Relations* 1, 6

employment, housing, education and health.<sup>1093</sup> Finally, this chapter will look at two reports, the Evrigenis Report and the Ford report, which were formulated during the early stages of the EU's involvement in the regulation of right-wing extremism. It must be noted that the EU has not yet adopted any binding legislation in relation to regulating right-wing extremism *per se*, other than the mechanisms provided for in Article 7 which are applicable to other issues as well as the far-right.

## 1. Rule of Law

### 1.1 Rule of Law: General Overview

The rule of law is conceptually significant with 'appeals to the rule of law remain[ing] rhetorically powerful.'<sup>1094</sup> However, the rule of law 'is an exceedingly elusive notion'<sup>1095</sup> resulting in a 'considerable diversity of opinions as to its meaning,<sup>1096</sup> with the doctrine falling prey to abuse.<sup>1097</sup> Several scholars have sought to put forth an all-embracing, contemporary definition of the rule of law. For example, Guillermo O' Donnell has described it as the state of affairs in which there exists an equitable implementation of a written and publicly announced law by competent authorities, adhering always to the principle of non-retrospective application, giving no consideration to personal characteristics such as status or class.<sup>1098</sup> However, the definition of the rule of law remains a tricky issue, with temporal and geographical variations affecting its universal understanding and applicability as one single doctrine. Either way, it is undoubtedly a central tenet of a democratic society, interconnected with human rights and fundamental freedoms and thus, a founding principle of the EU. To set the scene of the assessment of the protection and promotion of the rule of law within an EU framework, this section will provide a brief overview of the historical origins of the doctrine as well as its aims and objectives. It must be noted that it is beyond the scope of this dissertation to assess extensively the variation of definitions brought forth and to provide an historical account of the

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<sup>1093</sup> Resolution of the European Parliament on Combating the Rise of Extremism in Europe, 13 December 2007, P6\_TA(2007)0623, 4

<sup>1094</sup> Richard H. Fallon, Jr. 'The Rule of Law as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1, 1

<sup>1095</sup> Brian Z. Tamanaha, 'On the Rule of Law: History, Politics, Theory' (eds. Cambridge University Press 2004) 3

<sup>1096</sup> Paul Craig, 'The Rule of Law,' Appendix 5 in House of Lords Select Committee on the Constitution, Relations between the executive, the judiciary and Parliament, HL Paper 151 (2006-2007) 97

<sup>1097</sup> Brian Z. Tamanaha, 'On the Rule of Law: History, Politics, Theory' (eds. Cambridge University Press 2004) 4

<sup>1098</sup> Guillermo A. O'Donnell, 'Why the Rule of Law Matters' (2004) 15 *Journal of Democracy* 4, 33

development of the doctrine. Instead, a general overview of key points and developments will be provided.

## 1.2 Rule of Law Origins

The rule of law can be traced back to Ancient Greece and particularly to the works of Plato and his student Aristotle.<sup>1099</sup> Aristotle wrote that ‘rightly constituted laws should be the final sovereign and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign...’<sup>1100</sup> The rule of law also developed during Roman times, with Cicero condemning a King who did not abide by the law, arguing that he was ‘the foulest and most repellent creature imaginable,’<sup>1101</sup> thus demonstrating the supremacy of law. The doctrine continued into the Middle Ages with particular influences emanating from ‘the contest between kings and popes for supremacy, Germanic customary law, and the Magna Carta.’<sup>1102</sup> Furthermore, in recent years, scholars have noted that Prussia was a region in which the rule of law was promoted and upheld predominantly as a result of the establishment of the Supreme Administrative Law Court having ‘formalized a meaningful rule of law in Prussia that provided greater protection for individual rights.’<sup>1103</sup> In modern times, the rule of law was further defined and embedded mainly through the German, French and Anglo-Saxon frameworks<sup>1104</sup> which developed the doctrines of *rechtsstaat*, *état de droit* and the rule of law respectively, and which all essentially sought to ensure a just society through regulating State Power and preventing its arbitrary exercise. However, the doctrines go about it in different ways and through a different set of objectives, as they stem from ‘differences among political and legal histories and traditions.’<sup>1105</sup> The term *rechtsstaat* was developed at the end of the eighteenth century ‘to

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<sup>1099</sup> Brian Z. Tamanaha, ‘*On the Rule of Law: History, Politics, Theory*’ (eds. Cambridge University Press 2004) 7

<sup>1100</sup> Ernest Barker, ‘*The Politics of Aristotle - Translated with an Introduction, Notes and Appendixes By Ernest Barker*’ Book III, Chapter 11, para 19 at 127 (OUP 1946).

<sup>1101</sup> Niall Rudd, ‘*Marcus Tullius Cicero - The Republic and The Laws - A New Translation by Niall Rudd*’ (eds. OUP 1998) Book II, para.48, 50 (1998 OUP)

<sup>1102</sup> Brian Z. Tamanaha, ‘*On the Rule of Law: History, Politics, Theory*’ (2004 Cambridge University Press) 15

<sup>1103</sup> Kenneth F. Ledford, ‘Formalizing the Rule of Law in Prussia: The Supreme Administrative Court 1876-1914’ (2004) 37 *Central European History* 2, 204

<sup>1104</sup> Michel Rosenfeld, ‘The Rule of Law, and the Legitimacy of Constitutional Democracy’ (2001) Cardozo Law School, Working Paper Series No.36, 43 <[www-bcf.usc.edu/~uscirev/pdf/074503.pdf](http://www-bcf.usc.edu/~uscirev/pdf/074503.pdf)> 5

<sup>1105</sup> Martin Krygier, ‘Rule of Law and Rechtsstaat’ (2013) University of New South Wales Research Paper No. 2013-52, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2311874](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311874)> [Accessed 15 April 2015], 1

capture a new phenomenon, the modern state with its monopoly of force.’<sup>1106</sup> In Germany, this doctrine ‘precludes the possibility of the primacy of law over the State...Conversely, the English doctrine of the government of law is most clearly distinguished by grounding the rule of law on the superiority of law...’<sup>1107</sup> Further, the French *état de droit* was originally advanced by Duguit and Carré de Malberg,<sup>1108</sup> became part of the French legal system after World War II and was fully realised in 1971 after the adoption of constitutional review of parliamentary laws.<sup>1109</sup> Although essentially founded on the template created by its German counterpart, the French doctrine developed extensively and today ‘does not mean State rule through law but rather constitutional state as legal guarantor of fundamental rights.’<sup>1110</sup>

It is now necessary to pinpoint what the above doctrines actually entail by looking at the central fathers of their development including A.V Dicey, Immanuel Kant and some other classical and more modern scholars. In his 1885 ‘Introduction to the Study of the Law of the Constitution’ Albert Venn Dicey ‘associated the rule of law with rights-based liberalism and judicial review of governmental action.’<sup>1111</sup> Dicey’s explanation of the rule of law was composed of three central tenets namely ‘the absolute supremacy of regular law as opposed to prerogative or arbitrary power...second, equality before the law...third, that constitutions are not the source but the consequence of individual rights defined and enforced by courts...’<sup>1112</sup> Thus, Dicey’s conception of the doctrine incorporated an understanding that it was the Courts rather than a constitution which could check the legality of an act.<sup>1113</sup> While Dicey’s above explanation continues to be looked at as ‘an indispensable point of departure, contemporary discussions are

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<sup>1106</sup> Martin Krygier, ‘Rule of Law and Rechtsstaat’ (2013) University of New South Wales Research Paper No. 2013-52, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2311874](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311874)> [Accessed 15 April 2015], 4

<sup>1107</sup> Gustavo Gozzi, ‘*Rechtsstaat and Individual Rights in German Constitutional History*’ in Pietro Costa and Danilo Zolo ‘*The Rule of Law: History, Theory and Criticism*’ (eds. Springer Verlag) 238

<sup>1108</sup> Laurent Pech, ‘*Rule of Law in France*’ in R. Peerenboom ‘*Asian Discourses of Rule of Law*’ (eds. Routledge 2004) 79

<sup>1109</sup> Michel Rosenfeld, ‘The Rule of Law, and the Legitimacy of Constitutional Democracy’ (2001) Cardozo Law School, Working Paper Series No.36, 43 <[www-bcf.usc.edu/~usclev/pdf/074503.pdf](http://www-bcf.usc.edu/~usclev/pdf/074503.pdf)> 28

<sup>1110</sup> Michel Rosenfeld, ‘The Rule of Law, and the Legitimacy of Constitutional Democracy’ (2001) Cardozo Law School, Working Paper Series No.36, 43 <[www-bcf.usc.edu/~usclev/pdf/074503.pdf](http://www-bcf.usc.edu/~usclev/pdf/074503.pdf)> 37

<sup>1111</sup> Richard H. Fallon, Jr. ‘The Rule of Law as a Concept in Constitutional Discourse.’ (1997) 97 *Columbia Law Review* 1, 1

<sup>1112</sup> Kenneth F. Ledford, ‘Formalizing the Rule of Law in Prussia: The Supreme Administrative Court 1876-1914’ (2004) 37 *Central European History* 2, 206

<sup>1113</sup> Brian Z. Tamanaha, ‘*On the Rule of Law: History, Politics, Theory*’ (2004 Cambridge University Press) 7

marked by multiple and at times competing understandings and categorizations.’<sup>1114</sup> Further, the rule of law is looked at from two approaches, from a formal and a substantive one.<sup>1115</sup> The former entails that this doctrine is necessary for the functioning of a legal order, regardless of the make-up of the law.<sup>1116</sup> The latter entails that the legal system ‘embraces a particular public morality.’<sup>1117</sup>

The *rechtsstaat*, as a doctrine has evolved over a period of approximately two hundred years and was first looked at by theorists such as Karl Rotteck, Karl Theodor Welcker and Robert von Mohl.<sup>1118</sup> German writers habitually place the analysis of the doctrine within the realm of Immanuel Kant’s work since the *rechtsstaat* emanates from ideas formulated by him in works such as the *Groundwork of the Metaphysics of Morals*.<sup>1119</sup> Notwithstanding this, the term was first created by Wilhelm Petersen in 1798 as an antithesis of the *polizeistaat* (Police State).<sup>1120</sup> Kant’s aim in embellishing this doctrine was to establish ‘a universal and permanent peaceful life’<sup>1121</sup> and to achieve this, he argued that a State must ensure that its people must have ‘legislative guarantees of their property rights secured by a common constitution. The supremacy of this constitution...must be derived a priori from the considerations for achievements of the absolute ideal in the most just and fair organization of people’s life under the aegis of public law.’<sup>1122</sup> In sum, this conceptualisation of the *rechtsstaat*, which underlined the importance of a constitution and the enforcement of a supreme constitution for the safeguard of citizens’ rights, was prominent amongst theorists in the nineteenth century.

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<sup>1114</sup> Laurent Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’ (2009) Jean Monnet Working Paper 04/09, 24

<sup>1115</sup> See, *inter alia*, Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) Public Law 467

<sup>1116</sup> Dimitry Kochenov, ‘The EU Rule of Law: Cutting Paths Through Confusion’ (2009) 2 *Erasmus Law Review* 1, 6

<sup>1117</sup> Dimitry Kochenov, ‘The EU Rule of Law: Cutting Paths Through Confusion’ (2009) 2 *Erasmus Law Review* 1, 12

<sup>1118</sup> Martin Krygier, ‘Rule of Law (And Rechtsstaat)’ in ‘*International Encyclopedia of the Behavioral Sciences*’ (2<sup>nd</sup> edn, Elsevier 2015), 8

<sup>1119</sup> Martin Krygier, ‘Rule of Law (And Rechtsstaat)’ in ‘*International Encyclopedia of the Behavioral Sciences*’ (2<sup>nd</sup> edn, Elsevier 2015), 8

<sup>1120</sup> Laurent Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’ (2009) Jean Monnet Working Paper 04/09, 32

<sup>1121</sup> Leo Strauss & Joseph Cropsey, ‘*Immanuel Kant, in History of Political Philosophy*’ (eds. University of Chicago Press 1987)

<sup>1122</sup> Leo Strauss & Joseph Cropsey, ‘*Immanuel Kant, in History of Political Philosophy*’ (eds. University of Chicago Press 1987)

The liberal understanding of the *rechtsstaat* was split into natural law and positive law approaches with the former being based on its Kantian assessment. Carl von Rotteck, whose work was particularly influenced by Kant, argued that an individual could enjoy rights ‘not as a citizen but as a legal entity’<sup>1123</sup> and that these could be enjoyed ‘even without the state.’<sup>1124</sup> Unlike the natural law approach adopted by von Rotteck, Mohl looked at the doctrine from a positive law point of view. For example, in Mohl’s assessment of the Württemberg constitution, ‘he treated the reality of the State as a condition, which imposed itself on human behaviour.’<sup>1125</sup> Conservative perspectives of *rechtsstaat*, including that of Friedrich Julius Stahl ‘who grounded his doctrine of *rechtsstaat* on the monarchic principle,’<sup>1126</sup> considered that the *rechtsstaat* ‘must determine with precision and with certainty the boundaries and the limits of its activity, as well as the free sphere of its citizens, according to the modalities of the law.’<sup>1127</sup> Given the broad understanding that can be attached to the *rechtsstaat*, this doctrine was adopted by most of the Central and Eastern European countries following the cold war and before that by Portugal and Spain.<sup>1128</sup> Thus, ‘depending on time, place and author, [the rule of law’s] requirements range from strong public institutions and legal certainty to substantive justice.’<sup>1129</sup> Today, when considering the major European legal traditions of Britain, Germany and France, one may pinpoint differences and variations between the interpretation and understanding of the doctrine under consideration. However, authors such as Laurent Pech argue that these ‘divergences should not be overstated’<sup>1130</sup> with Dimitry Kochenov arguing that ‘the meaning of the concepts that correspond to the Rule of Law in the legal systems of EU Member States....differs to a considerable extent.’<sup>1131</sup> It must be noted that, for purposes of this study, the term ‘rule of law’ will be referred to without necessarily adopting the meaning of this doctrine in the English sense.

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<sup>1123</sup> Pietro Costa & Danilo Zolo, ‘The Rule of Law: History, Theory and Criticism’ (eds. Springer 2007) 241

<sup>1124</sup> Pietro Costa & Danilo Zolo, ‘The Rule of Law: History, Theory and Criticism’ (eds. Springer 2007) 241

<sup>1125</sup> Pietro Costa & Danilo Zolo, ‘The Rule of Law: History, Theory and Criticism’ (eds. Springer 2007) 242

<sup>1126</sup> Pietro Costa & Danilo Zolo, ‘The Rule of Law: History, Theory and Criticism’ (eds. Springer 2007) 242

<sup>1127</sup> Pietro Costa & Danilo Zolo, ‘The Rule of Law: History, Theory and Criticism’ (eds. Springer 2007) 242

<sup>1128</sup> Laurent Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’ (2009) Jean Monnet Working Paper 04/09, 35

<sup>1129</sup> Armin von Bogdandy & Michael Ioannidis, ‘Systemic Deficiency in the Rule of Law, What it is, What has Been Done, What Can be Done’ (2014) 51 *Common Market Law Review* 59, 62

<sup>1130</sup> Laurent Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’ (2009) Jean Monnet Working Paper 04/09, 22

<sup>1131</sup> Dimitry Kochenov, ‘The EU Rule of Law: Cutting Paths through Confusion’ (2009) 2 *Erasmus Law Review* 1, 14



### 1.3 Rule of Law: Final Comments on the Rule of Law as a Doctrine

Thus, the rule of law ‘is among the essential pillars upon which any high quality democracy rests.’<sup>1132</sup> While the above mentioned flaws may realistically exist in any democratic system, it has been argued that, even if the rule of law is in fact respected this ‘does not guarantee that violations of human dignity do not occur.’<sup>1133</sup> This is predominantly because the rule of law is a virtue or law but not a moral value.<sup>1134</sup> In a nutshell, issues of non-arbitrary and equal application of a just law mark the above definitions, although as noted by one scholar, the actual application of the rule of law is marked by increasing limitations including, *inter alia*, flaws in the law, its application, access to justice and relations between the person and the State,<sup>1135</sup> thereby undermining the objectives of the doctrine. However, for purposes of this chapter, the key elements of the rule of law shall be borne in mind as necessary prerequisites for a functional and equitable system of democratic powers.<sup>1136</sup> As noted by Friedrich Hayek, the rule of law ‘is not only a safeguard, but a legal embodiment of freedom.’<sup>1137</sup> In the end, it is against such a backdrop, rhetorical or not, that violations of principles such as fundamental freedoms and human rights can be assessed.

### 1.4 Rule of Law: General Overview of the Rule of Law in EU Law

The European Commission has characterised the rule of law as ‘the backbone of any modern constitutional democracy’<sup>1138</sup> and ‘one of the main values upon which the Union is based.’<sup>1139</sup> It has been argued that ‘quite paradoxically for the organization created in the wake of WWII, the EU’s concern for democracy and the rule of law is of relatively recent origin.’<sup>1140</sup> Before the

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<sup>1132</sup> Guillermo A. O’Donnell, ‘Why The Rule of Law Matters’ (2004) 15 *Journal of Democracy* 4, 33

<sup>1133</sup> András Sajó, ‘Abuse: The Dark Side of Fundamental Rights’ (eds. Eleven 2006) 17

<sup>1134</sup> András Sajó, ‘Abuse: The Dark Side of Fundamental Rights’ (eds. Eleven 2006) 17

<sup>1135</sup> Guillermo A. O’Donnell, ‘Why the Rule of Law Matters’ (2004) 15 *Journal of Democracy* 4, 39

<sup>1136</sup> See, *inter alia*, Dimitry Kochenov ‘EU Enlargement and The Failure of Conditionality’ (eds. Kluwer International 2008) 110

<sup>1137</sup> Friedrich von Hayek, ‘The Road to Serfdom’ (eds. 1944 The University of Chicago Press) 90

<sup>1138</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final/2, 2

<sup>1139</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final/2, 2

<sup>1140</sup> Bojan Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’ (2014) LEQS Paper No. 79/2014, 2

incorporation of the doctrine into Treaties ‘its normative basis in EU law was not quite clear.’<sup>1141</sup> During that time, to elucidate its position in European law, the European Court of Justice (hereinafter the ECJ) recognised that the European Community was a ‘Community based on the rule of law’<sup>1142</sup> and the EC Treaty was a ‘polity based on the rule of law.’<sup>1143</sup> In time, the rule of law and interconnected doctrines including, *inter alia*, human rights, have increasingly influenced the formulation of primary and secondary sources of EU law. Article 2 of the TEU provides that ‘the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.’ As noted in that article, these values are necessary for a society where ‘pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’ As underlined by the Commission ‘the respect of the rule of law is intrinsically linked to respect for democracy and fundamental rights.’<sup>1144</sup> The principles incorporated in Article 2 have been described as ‘vague...[but] not meaningless,’<sup>1145</sup> with no treaty underlining which interpretation should be incorporated in the European context and no definition or elucidation of the doctrine having been offered.<sup>1146</sup> The importance of the rule of law and the other values have also been emphasised in Article 49 of the TEU which notes that only European States, which respect these values, may apply for membership of the EU. The adherence to the rule of law is also part of the Preambles of the TEU and the Charter of Fundamental Rights. The New EU Framework to Strengthen the Rule of Law, which will be discussed further on, notes that ‘the principle of the rule of law has progressively become a dominant organizational model of modern constitutional law’<sup>1147</sup> The European Commission holds that the principles upon which the rule of law is based include, amongst others, legality, legal certainty, respect for fundamental rights and equality before the law, notwithstanding that the nature of the rule of law may vary according to a country’s

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<sup>1141</sup> Dimitry Kochenov, ‘The EU Rule of Law: Cutting Paths through Confusion’ (2009) 2 *Erasmus Law Review* 1, 17

<sup>1142</sup> *Les Verts v Parliament* [1986] Case 294/83, para.23

<sup>1143</sup> See, *inter alia*, *Kadi & Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] Joined Cases, C-402/05 P and C-415/05, para.281

<sup>1144</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to strengthen the Rule of Law, COM (2014) 158 final/2, 4

<sup>1145</sup> Bojan Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’ (2014) LEQS Paper No. 79/2014, 15

<sup>1146</sup> Anthony Arnull, ‘The Rule of Law in The European Union’ in Anthony Arnull and Daniel Wincott *‘Accountability and Legitimacy in the European Union’* (eds. Oxford University Press 2002), 240

<sup>1147</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final/2, 3

constitutional reality.<sup>1148</sup> It is for purposes of promoting, amongst others, the dignified and equitable rule of law as a means of ensuring a functional democracy that Article 7 of the TEU, as discussed below, has been developed. This tool is of particular importance to this thesis given that it is not only one which can theoretically be used to combat right-wing extremism in Europe, but is one that partly emanated from the handling or mishandling, as will be looked at below, of a perceived threat posed by a right-wing extremist political party, namely the *Freedom Party (Freiheitspartei Österreichs - FPÖ)* of Austria. Before proceeding to the following analysis, it must be noted that EU documents and judicial decisions refer to the term ‘rule of law’ and, in, for example, the French and German translations refer to the ‘*état de droit*’ and ‘*rechtsstaat*’ respectively as if the doctrine is the same in all legal traditions. This, as a starting point, may cause conceptual and definitional problems in relation to the interpretation and implementation of, for example, the treaty articles. It has been argued that, in order to rectify the current confusing situation, ‘an autonomous Union concept of the Rule of Law needs to be identified.’<sup>1149</sup> Europe is currently experiencing breaches (or risks thereto) of the core values enshrined in Article 2 TEU due to the socio-political, constitutional and/or financial developments in Member States, including but not limited to Hungary and Greece. For example, in the former, one notes the constitutional shock experienced in the *Fidesz* led Hungary and, in the latter, the success of violent *Golden Dawn* which holds third place in the parliament.<sup>1150</sup> Notwithstanding such developments, the political and academic communities in Europe seem to believe that the EU does not possess tools which are effective both in theory and practice, for purposes of tackling the far-right.<sup>1151</sup>

#### 1.4.1 Article 7 of the TEU: Safeguarding the Rule of Law in EU Member States?

##### 1.4.1 (i) Article 7: General Overview

Article 7 of the TEU holds that in the event of a ‘clear risk of a serious breach by a Member State’ of the values referred to in Article 2 TEU which include, *inter alia*, the rule of law, human

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<sup>1148</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final/2, 4

<sup>1149</sup> Dimitry Kochenov, ‘The EU Rule of Law: Cutting Paths through Confusion’ (2009) 2 *Erasmus Law Review* 1, 18

<sup>1150</sup> Far-right Jobbik also holds third place in the Hungarian Parliament:  
< <http://electionresources.org/hu/assembly.php?election=2014>> [Accessed 2 May 2015]

<sup>1151</sup> Carlos Closa, Dimitry Kochenov & Joseph H.H. Weiler, ‘Reinforcing Rule of Law Oversight in the European Union.’ (EUI Working Papers) RSCAS 2014/25, 2

rights and non-discrimination, the Council will hear the position of the State in question and may address recommendations to it as a means of overcoming the risk. If however, there continues to be a ‘serious and persistent breach’ by a Member State of the said values, the State in question may have certain rights suspended including voting rights in the Council, to be alleviated if the breach of values ceases to exist. Thus, this article is composed of a two-part mechanism which includes preventive measures in the form of exchanges with the State and recommendations made to it within a spirit of removing the risk which can be imposed, in the event that the risk materialises into a serious and persistent breach of Article 2 values. Here, it must be noted that a central problem faced by the EU in relation to Article 2 is ‘who is to decide what is democracy, the rule of law etc?’<sup>1152</sup> and thus, who is to decide what constitutes a breach to these values? This is further complicated by the fact that the Member States’ understanding of the principles enshrined in Article 2 differs and ‘whether we ultimately really share values seems a much more subjective matter to verify.’<sup>1153</sup> As such, it has been argued that for this article to be effectively understood and for the Article 7 mechanism to be effectively enforced, it will be necessary to ‘create an *acquis* on values, which does not exist.’<sup>1154</sup> The sanctioning mechanism preceded the preventive mechanism, having been incorporated by the Treaty of Amsterdam in 1997. The preventive mechanism came into effect in 2001 with the Treaty of Nice. Moreover, it must be noted that Article 7, unlike other instruments such as the Charter of Fundamental Rights, is unique, innovative, if not bold, in that it applies not only to areas covered by EU Law,<sup>1155</sup> rendering Article 7 a provision of ‘strategic value.’<sup>1156</sup>

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<sup>1152</sup> Dimitry Kochenov, ‘On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed’ (2014) 33 *Polish Yearbook of International Law*, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2438271&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2438271&download=yes)> 165 [Accessed 10 October 2015]

<sup>1153</sup> Jan-Werner Müller, ‘Safeguarding democracy inside the EU, Brussels and the Future of Liberal Order’ (2013) Transatlantic Academy 2012-2013 Paper Series No.3, 18

<sup>1154</sup> Dimitry Kochenov, ‘On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed’ (2014) 33 *Polish Yearbook of International Law*, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2438271&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2438271&download=yes)> 165 [Accessed 10 October 2015]

<sup>1155</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union – Respect for and Promotion of the Values on which the European Union is Based, COM (2003) 606 Final, para.1.4

<sup>1156</sup> Wojciech Sadurisk, ‘Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider.’ (2010) *Sydney Law Journal*, Legal Studies Research Paper No.10/01, 29

Therefore, Article 7 of the TEU seemingly ‘fills a gap in the Union’s approach to human rights protection’<sup>1157</sup> through its preventive and sanctioning mechanisms. However the reality *vis-à-vis* its actual application is quite different, as will be assessed further on. When dealing with the risk or breach of principles as grounds for activating the Article, the Commission has noted that a breach may include a piece of legislation or an administrative instrument.<sup>1158</sup> The Parliament has criticised the Commission’s account of what could fall within this framework, providing its own appraisal which includes a ‘Member State’s failure to act on violations of human rights’<sup>1159</sup> in the areas of, *inter alia* anti-Semitism, racism and xenophobia.<sup>1160</sup> In the field of right-wing extremism, it is precisely the incorporation of this failure to act which enhances the efficacy of Article 7, extending its scope to the majority of situations where right-wing movements, either as political parties or as non-party entities, constitute a threat to the rule of law, human rights and democracy with their rhetoric and activities being tolerated by the State.

There is a high threshold for the implementation of Article 7 with the nature of these mechanisms being described as ‘a last resort.’<sup>1161</sup> For a violation to fall within the threshold of seriousness, as incorporated in Article 7, it is probable that the breach in question will ‘radically shake the very foundations of the EU.’<sup>1162</sup> As such, the threshold is ‘much higher than in individual cases of breaches of fundamental rights such as established...by the Court of Justice.’<sup>1163</sup> These statements, which were made by the Commission, give a general indication of the genres and seriousness of the violations which can involve only the most serious breaches of

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<sup>1157</sup> Wojciech Sadurisk, ‘Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider.’ (2010) *Sydney Law Journal*, Legal Studies Research Paper No.10/01, 1

<sup>1158</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union – Respect for and promotion of the values on which the European Union is based, COM (2003) 606 Final, para.1.4.4

<sup>1159</sup> European Parliament, Committee on Constitutional Affairs, Rapporteur: Johannes Voggenhuber, Report on the Commission Communication on Article 7 of the Treaty on European Union, Respect for and promotion of the values on which the Union is based, (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI), point.11

<sup>1160</sup> European Parliament, Committee on Constitutional Affairs, Rapporteur: Johannes Voggenhuber, Report on the Commission Communication on Article 7 of the Treaty on European Union, Respect for and promotion of the values on which the Union is based, (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI), 11

<sup>1161</sup> Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final/2, 6

<sup>1162</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union – Respect for and promotion of the values on which the European Union is based, COM (2003) 606 Final, 3

<sup>1163</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union – Respect for and promotion of the values on which the European Union is based, COM (2003) 606 Final, para.1.4

Article 2. The high threshold attached to this provision is also reflected by the Commission's elucidation of the key terms used in this article, namely the 'clear risk of a serious breach' and a 'serious and persistent breach.' More particularly, the risk or breach must not merely be an individual breach of fundamental rights but must 'concern a more systematic problem,'<sup>1164</sup> a requirement which the Commission describes as the 'added value'<sup>1165</sup> of the provision, saving its application for the most serious of breaches. In relation to the first part of the article and the risk of a serious breach, this must be 'clear excluding purely contingent risks from the scope of the prevention mechanism.'<sup>1166</sup> As to the seriousness of the risk or actual breach, both the purpose and the result must be taken into account.<sup>1167</sup> In brief, Article 7 is 'hard to satisfy'<sup>1168</sup> especially if one takes into account the numbers and votes needed for making a reasoned proposal for the existence of a risk to Article 2 and, further, for the determination of such a breach.<sup>1169</sup> This high threshold arises from the fact that, as noted by Kuijer, this article is one with 'far-reaching consequences' and a 'punitive nature'<sup>1170</sup>. The actors involved in the process are the Member States, the Parliament, the Commission and the Council. Interestingly, as noted by Pech, the fact that the ECJ was not incorporated in any way in this procedure 'is a not so subtle indication that the Member States understand these mechanisms as political ones and whose value is essentially if not exclusively symbolic.'<sup>1171</sup> In relation to this, it must be noted that extensive debate on the possibility of incorporating the ECJ in deciding Article 7 sanctions

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<sup>1164</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union – Respect for and promotion of the values on which the European Union is based, COM (2003) 606 Final, para.1.4.1

<sup>1165</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union – Respect for and promotion of the values on which the European Union is based, COM (2003) 606 Final, para.1.4.1

<sup>1166</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union – Respect for and promotion of the values on which the European Union is based, COM (2003) 606 Final, para.1.4.2

<sup>1167</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union – Respect for and promotion of the values on which the European Union is based, COM (2003) 606 Final, para.1.4.3

<sup>1168</sup> Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) Jean Monnet Working Paper 04/09, 64

<sup>1169</sup> The determination of a clear rise of a serious breach of Article 2 requires, according to Article 7 a reasoned proposal of such a breach must be made by one third of the Member States, by the European Parliament or by the European Commission. The determination of such a breach must be made by the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament.

<sup>1170</sup> Martin Kuijer 'Fundamental rights protection in the legal order of the European Union' in Adam Lazowski and Steven Blockmans *Research Handbook on EU Institutional Law* 231 (eds. 2016 Elgar)

<sup>1171</sup> Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) Jean Monnet Working Paper 04/09, 65

occurred in the 1990s and early 2000s, which led to an outright rejection of the Court's role in that realm.<sup>1172</sup> Also, the European Parliament noted that this article 'may not be invoked in support of any right to, or policy of, permanent monitoring of the Member States of the Union.'<sup>1173</sup> The reasoning behind this position could be that anything else would undermine the spirit of Article 7 and would inevitably be deemed unacceptable on an operational level, extending the powers of the Union too far. However, in a contradictory 2013 Resolution, the European Parliament requested that 'Member States be regularly assessed on their continued compliance with the fundamental values of the Union and the requirement of democracy and the rule of law.'<sup>1174</sup>

#### 1.4.1 (ii) Article 7 – Foundations for the Combatting of Right-Wing Extremism

Given that this dissertation deals with right-wing extremism, an interesting point to consider is an event which partially resulted in the inclusion of the preventive mechanism of Article 7(1) TEU and, namely the participation of the right-wing *Freedom Party (Freiheitspartei Österreichs -FPÖ)* in the Austrian government.<sup>1175</sup> After gaining second place in the 1999 elections, the Freedom Party formed a coalition with the *People's Party (Österreichische Volkspartei - ÖVP)*,<sup>1176</sup> with the *FPÖ* taking control of six of the ten ministries.<sup>1177</sup> The *FPÖ* has been described as a populist, right-wing party, trivialising Nazi atrocities and promoting racially prejudicial rhetoric.<sup>1178</sup> The correlation between the participation of the *FPÖ* in the Austrian

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<sup>1172</sup> Jan-Werner Müller, 'Safeguarding Democracy Inside the EU, Brussels and the Future of Liberal Order' (2013) Transatlantic Academy 2012-2013 Paper Series No.3, 18

<sup>1173</sup> European Parliament, Committee on Constitutional Affairs, Rapporteur: Johannes Voggenhuber, Report on the Commission Communication on Article 7 of the Treaty on European Union, Respect for and Promotion of the Values on which the Union is Based, (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI), point.11(a)

<sup>1174</sup> See the EP Resolutions setting out various recommendations to the EU institutions on how to strengthen the protection of Article 2 TEU (the Rui Tavares Report of 2013, the Louis Michel and the Kinga Göncz Reports of 2014)

<sup>1175</sup> Wojciech Sadurisk, 'Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider.' (2010) *Sydney Law Journal*, Legal Studies Research Paper No.10/01, 3, Bojan Bugarič, 'Protecting Democracy and The Rule of Law in the European Union: The Hungarian Challenge' (2014) LEQS Paper No. 79/2014, 14

<sup>1176</sup> Anton Pelinka, 'The Haider Phenomenon in Austria – Examining the FPO in European Context' (2001) 9 *Journal of the International Institute* 1: <<http://quod.lib.umich.edu/j/jii/4750978.0009.102/--haider-phenomenon-in-austria-examining-the-fpo-in-european?rgn=main;view=fulltext>> [accessed 1 November 2014]

<sup>1177</sup> Wojciech Sadurisk, 'Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider.' (2010) *Sydney Law Journal*, Legal Studies Research Paper No.10/01, 3, Bojan Bugarič, 'Protecting Democracy and The Rule of Law in the European Union: The Hungarian Challenge' (2014) LEQS Paper No. 79/2014, 1

<sup>1178</sup> Anton Pelinka, 'The Haider Phenomenon in Austria – Examining the FPO in European Context' (2001) 9 *Journal of the International Institute* 1: <<http://quod.lib.umich.edu/j/jii/4750978.0009.102/--haider-phenomenon-in-austria-examining-the-fpo-in-european?rgn=main;view=fulltext>> [accessed 1 November 2014]

government and the inclusion of the preventive mechanism in Article 7 is not only an academic assumption but has, in fact, been underlined by a European Parliament report. As noted therein, ‘respect for fundamental rights within the EU has become a major political issue, not only owing to the Charter of Fundamental Rights, but also because of the concern which the inclusion of an extreme right-wing party in the government of one of the Member States has given rise to. The political responses to that event included proposals from many quarters to strengthen the measures provided for in Article 7 of the Treaty on European Union.’<sup>1179</sup> This short paragraph makes three separate yet interrelated observations, which are significant as they demonstrate the EU’s stance to far-right parties within a human rights framework. Firstly, it establishes an explicit link between the need to protect fundamental rights and, thus, the implicit fear of a violation of fundamental rights in an environment affected by far-right ideology. Secondly, it denotes that the right-wing movement is not something to be taken lightly, with the EU having demonstrated ‘concern’ regarding such ideology within a system of government. Thirdly, it adopts a militant model whereby the EU acting as a single entity needs to protect itself from the consequences of the participation of such a party in the government of a Member State. Even though the event under consideration ‘provoked intense political turmoil in the European Union,’<sup>1180</sup> the sanctioning mechanism of Article 7 was not put in place and, instead, fourteen Member States, acting in their capacity as a group of States rather than the EU, imposed certain sanctions,<sup>1181</sup> such as ceasing bilateral communications with the Austrian government.<sup>1182</sup> As a result, the Austrian case demonstrated that ‘Brussels has little if any leverage over a member country once it gains admission to the European club.’<sup>1183</sup> The question which immediately comes to mind is why the sanctions were not imposed by the EU. The president of the Commission had noted that it was ‘the duty of a strong supranational institution not to isolate one

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<sup>1179</sup> Committee on Constitutional Affairs, Rapporteur: Olivier Duhamel, Report on the Constitutionalisation of the Treaties, (2000/2160 (INI), FINAL 15-0289/2000, 12 October 2000, at 10

<sup>1180</sup> Anton Pelinka, ‘The Haider Phenomenon in Austria – Examining the FPO in European Context’ (2001) 9 *Journal of the International Institute* 1: <<http://quod.lib.umich.edu/j/jii/4750978.0009.102/--haider-phenomenon-in-austria-examining-the-fpo-in-european?rgn=main;view=fulltext>> [accessed 1 November 2014]

<sup>1181</sup> The sanctions were put in place in February 2000 and were officially removed in September 2000

<sup>1182</sup> Wojciech Sadurisk, ‘Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement and Jörg Haider.’ (2010) *Sydney Law Journal*, Legal Studies Research Paper No.10/01, 3, Bojan Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’ (2014) LEQS Paper No. 79/2014, 13-14

<sup>1183</sup> Erik K. Jenne & Cas Mudde, ‘Hungary’s Illiberal turn - Can Outsiders Help?’ (2012) 23 *Journal of Democracy* 3, 147



of its members, but instead to keep it firmly in the fold.’<sup>1184</sup> An academic position which has been put forth as an explanation of the EU’s decision not to impose sanctions is that, at the material time, the Austrian government had not actually violated EU Law.<sup>1185</sup> However, this statement seems to ignore the sanctioning mechanism of Article 7 of the TEU which existed during the Austrian saga, imposing a duty on the EU and its institutions to sanction breaches of the rule of law. Instead of sanctions, on an EU level, a Committee was established to consider whether Austria complied with common European values, particularly in relation to the rights of minorities, immigrants and refugees and to comment on the nature of the *FPÖ*. The resulting report noted that ‘the European history of the twentieth century reinforces the positive obligation on the part of European governments to combat any form of direct or indirect propaganda for xenophobic and racial discrimination and to react against any kind of ambiguous language which introduces a certain trivialization or negative normalization of the National Socialist past.’<sup>1186</sup> Three significant conclusions can be drawn from this paragraph. Firstly, that the atrocities committed during the mid 20<sup>th</sup> century should act as a catalyst for due care to be taken by governments in the field of right-wing rhetoric and activity. Secondly, that the mandate of a far-right party is difficult to reconcile with common European values and, thirdly, that the government has a general duty to combat right-wing rhetoric which may include, *inter alia*, the trivialisation of Nazism. The duty of the government to ensure a just society was reiterated with the report noting that there is a ‘clear, positive obligation on the part of the Austrian Government actively to defend the values enshrined in Art.6 of the Union Treaty, in particular human rights, democracy and the rule of law.’<sup>1187</sup> Also, the report recommended that the measures taken by the 14 Member States should be lifted because ‘if continued would become counterproductive’<sup>1188</sup> the measures already having ‘stirred up nationalist feelings in the country.’<sup>1189</sup> Thus, the report helps our understanding of today’s Article 7 in two ways.

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<sup>1184</sup> President of the European Commission, Mr. Romano Prodi, Agence Europe, 3.2.2000

<sup>1185</sup> Michael Merlingen, Cas Mudde, Ulrich Sedelmeier, ‘The Right and the Righteous? European Norms, Domestic Politics and the Sanctions against Austria’ (2001) 39 *Journal of Common Market Studies* 1, 66

<sup>1186</sup> Report by Martti Ahtisaari, Jochen Frowein & Marcelino Oreja, adopted in Paris on 8 September 2000  
<<http://www.eu-ophlysningen.dk/upload/application/pdf/78abace8/report.pdf%3Fdownload%3D1>> [accessed 4 November 2014] , para.70

<sup>1187</sup> Report by Martti Ahtisaari, Jochen Frowein & Marcelino Oreja, adopted in Paris on 8 September 2000  
< <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HOSI-1.pdf>> [accessed 4 November 2014] , para.107

<sup>1188</sup> Report by Martti Ahtisaari, Jochen Frowein, Marcelino Oreja, adopted in Paris on 8 September 2000  
<<http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HOSI-1.pdf>> [accessed 4 November 2014] , para.116

<sup>1189</sup> Report by Martti Ahtisaari, Jochen Frowein, Marcelino Oreja, adopted in Paris on 8 September 2000

According to the report, a government has a horizontal responsibility *vis-à-vis* breaches of the values of Article 2 and that sanctioning measures may not always be the way forward, shedding, in this way, doubt on the sanctioning mechanism incorporated in Article 7(2). As argued, ‘it is almost unanimous that imposing sanctions on Austria was highly questionable.’<sup>1190</sup> Nevertheless, rather than arguing for the imposition of no sanctions for such an event, taking into account the horizontal duty of a State to protect the rule of law and interrelated notions and, considering the fact that the leader of the party was promoting right-wing rhetoric which goes against the foundations of the EU, a more equitable argument could simply have been the imposition of ‘less drastic measures’<sup>1191</sup> rather than no measures at all. Finally, as well as significant observations made by the report, it was also one of the documents which promoted the need for ‘preventative and monitoring procedures into Article 7 of the EU Treaty, so that a situation similar to the current situation in Austria could be dealt with within the EU from the very start.’<sup>1192</sup>

#### 1 .4.1 (iii) Article 7 – Concluding Comments

As underlined at the beginning of this assessment, this article seemingly contributes to the EU’s protection of human rights through sanctions and preventive mechanisms. At a first glance, it could even be described as unique, innovative and even bold as it circumvents any limitations of the EU’s powers on the supervision and sanctioning of violations to the rule of law and interrelated doctrines in its Member States. However, it has been argued that the likelihood of its actual application any time soon is limited<sup>1193</sup> with the possibility that the central obstacle to its implementation could lie in the fact that, as noted by the Commission, the Article 7 procedure

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<<http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HOSI-1.pdf> > [accessed 4 November 2014] , para.116

<sup>1190</sup> Bojan Bugarič, ‘Protecting Democracy and The Rule of Law in the European Union: The Hungarian Challenge’ (2014) LEQS Paper No. 79/2014, 17, Wojciech Sadurisk, ‘Adding a Bite to a Bark? A Story of Article 7, The EU Enlargement and Jörg Haider.’ (2010) *Sydney Law Journal*, Legal Studies Research Paper No.10/01, 3, Bojan Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’ (2014) LEQS Paper No. 79/2014, 6

<sup>1191</sup> Wojciech Sadurisk, ‘Adding a Bite to a Bark? A Story of Article 7, The EU Enlargement and Jörg Haider.’ (2010) *Sydney Law Journal*, Legal Studies Research Paper No.10/01, 3, Bojan Bugarič, ‘Protecting Democracy and The Rule of Law in the European Union: The Hungarian Challenge’ (2014) LEQS Paper No. 79/2014, 17

<sup>1192</sup> Report by Martti Ahtisaari, Jochen Frowein, Marcelino Oreja, adopted in Paris on 8 September 2000

<<http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HOSI-1.pdf> > [accessed 4 November 2014] , para.177

<sup>1193</sup> Wojciech Sadurisk, ‘Adding a Bite to a Bark? A Story of Article 7, The EU Enlargement and Jörg Haider.’ (2010) *Sydney Law Journal*, Legal Studies Research Paper No.10/01, 3, Bojan Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’ (2014) LEQS Paper No. 79/2014, 33-34

seeks to tackle issues through a ‘comprehensive political approach.’<sup>1194</sup> In practical terms, it is the political nature of this article with ‘a lot of behind-the-scene leverage and not implying any active participation of the ECJ’<sup>1195</sup> which limits its application given the overt reliance on the Council for the determination of an Article 2 breach and, further, making particular reference to Hungary, the Commission noted ‘strong political unwillingness to use the mechanism provided for by Article 7 TEU.’<sup>1196</sup> As noted by Müller, it would be delusional not to acknowledge that politics play a role in the decision of the EU to intervene in a particular case,<sup>1197</sup> especially one occurring within the national sphere. As a result, many scholars have been negative towards its potential application referring to it as ‘unusable,’<sup>1198</sup> as an ‘empty gesture’<sup>1199</sup> and a ‘dead letter.’<sup>1200</sup> In blunt terms, State representatives are just too worried to enforce Article 7 in the fear that one day it will happen to them.<sup>1201</sup> Either way, it cannot be disputed that, at least on a purely theoretical level, this article contributes to the enhancement of the Union as a protector of principles of democracy and the rule of law with it also constituting a source of deterrence against abuse. Could this be why Article 7 has not been enforced to deal with the situation in *Fidesz*’ Hungary which has been in power since 2010 and has been implementing a series of ‘questionable policies inspired by the right-wing extremist Jobbik party’?<sup>1202</sup> It has been stated that the Hungarian case is exactly what Article 7 was created to tackle yet no constructive steps

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<sup>1194</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union – Respect for and Promotion of the Values on which the European Union is Based, COM (2003) 606 Final, para.1.4.1

<sup>1195</sup> Carlos Closa, Dimitry Kochenov & Joseph H.H. Weiler, ‘Reinforcing Rule of Law Oversight in the European Union’ RSCAS 2014/25, 7

<sup>1196</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on the European Union – Respect for and Promotion of the Values on which the European Union is Based, COM (2003) 606 Final, para.1.4.1

<sup>1197</sup> Jan-Werner Müller, ‘Safeguarding Democracy Inside the EU – Brussels and The Future of Liberal Order’ (2013) Transatlantic Academy, Paper Series 3, 13

<sup>1198</sup> Jan-Werner Müller, ‘Safeguarding Democracy Inside the EU – Brussels and The Future of Liberal Order’ (2013) Transatlantic Academy, Paper Series 3, 17

<sup>1199</sup> Andrew Williams, ‘The Indifferent Gesture: Article 7 TEU, The Fundamental Rights Agency, and the UK’s invasion of Iraq,’ (2006) 31 *European Law Review* 3,

<sup>1200</sup> Steven Greer, Andrew Williams, Human Rights in the Council of Europe and the EU: Towards ‘Individual’, ‘Constitutional’ or ‘Institutional’ Justice? (2009)15 *European Law Journal* 4, 474

<sup>1201</sup> Jan-Werner Müller, ‘Safeguarding Democracy Inside the EU – Brussels and The Future of Liberal Order’ (2013) Transatlantic Academy, Paper Series 3, 17

<sup>1202</sup> Bojan Bugarič, ‘Protecting Democracy and the Rule of Law in The European Union: The Hungarian Challenge’ (2014) LEQS Paper No. 79/2014, 17, Wojciech Sadurisk, ‘Adding a Bite to a Bark? A Story of Article 7, The EU Enlargement and Jörg Haider.’ (2010) *Sydney Law Journal*, Legal Studies Research Paper No.10/01, 3, Bojan Bugarič, ‘Protecting Democracy and The Rule of Law in the European Union: The Hungarian Challenge’ (2014) LEQS Paper No. 79/2014, 20

in this direction have yet been made. It is the reliance on political will for the upholding of values enshrined in Article 2, whatever these may actually mean, which has led to recommendations to make this article ‘enforceable law’<sup>1203</sup> rather than merely depending on politics and politicians. Although, as recognised, this mechanism ‘provides an insufficient legal basis for a successful intervention,’<sup>1204</sup> it could be argued that it still serves for something. More particularly, as a result of this mechanism, Member States ‘must always be ready to defend the legitimacy of their actions in light of principles they cannot individually set aside,’<sup>1205</sup> even though they do not, in reality, risk being sanctioned. In 2012, due to the obstacles and limitations noted above, President Barroso noted that what is needed is ‘a better developed set of instruments, not just the alternative between the soft power of political persuasion and the nuclear option of Article 7 TEU.’<sup>1206</sup> The following sections shall look at what mechanisms have been established to fill the limitations noted by Barroso and, particularly, the Commission’s New EU Framework to Strengthen the Rule of Law and the Council’s Annual Dialogue on the Rule of Law.

## 1.5 Threats to the Rule of Law Case-Study: Hungary

### 1.5.1 The Deterioration of the Rule of Law: The case of Hungary

The practical treatment of anti-democratic activities can be further considered through a rule of law lens on an EU level by considering the case of Hungary and particularly the constitutional and democratic turmoil brought about by the *Fidesz* party, led by Victor Orbán. To do so, this section will provide a brief overview of some of the key constitutional changes that were made in Hungary and the reaction of the EU to these changes. In 2010, Fidesz won the majority of seats in the national parliament and soon after that, with its two-thirds majority, autonomously adopted a new Constitution<sup>1207</sup> which came into force on 1 January 2012.<sup>1208</sup> Amongst other things, the

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<sup>1203</sup> Dimitry Kochenov, ‘How to Turn Article 2 TEU into a Down-to-Earth Provision?’ (2013) <<http://www.verfassungsblog.de/how-to-turn-article-2-teu-into-a-down-to-earth-provision/#.VTnrfNKqqko>> [Accessed 24 April 2015]

<sup>1204</sup> Carlos Closa, Dimitry Kochenov and Joseph.H.H Weiler, ‘Reinforcing Rule of Law Oversight in The European Union’ RSCAS 2014/25, 7

<sup>1205</sup> Laurent Pech, ‘The Rule of Law as a Constitutional Principle of The European Union’ (2009) Jean Monnet Working Paper 04/09, 67

<sup>1206</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen The Rule of Law, COM (2014) 158 final/2, 2

<sup>1207</sup> Bojan Bugarič, ‘Protecting Democracy and The Rule of Law in The European Union: The Hungarian Challenge’ (2014) LEQS Paper No. 79/2014, 1

new Constitution ‘sets a controversial change in fiscal policy, appeals to a religious and mono-ethnic ethos of Hungarian society [and] defines marriage as a union between a man and a woman...’<sup>1209</sup> Moreover, it sought to ‘eliminate any kind of checks and balances, and even the parliamentary rotation of governing parties.’<sup>1210</sup> It has been described as being ‘in a direct conflict with the fundamental values of the EU political constitution, such as democracy, the rule of law and respect for human rights.’<sup>1211</sup> In fact, the Fundamental Rights Agency of the EU characterised the constitutional developments in Hungary as a ‘constitutional crisis.’<sup>1212</sup> Importantly, in 2015 and following statements of Hungary’s right-wing Prime Minister Orbán on the reintroduction of the death penalty, the European Commission made clear this would lead to the application of Article 7 TEU<sup>1213</sup> and that the European Commission ‘is ready to use immediately all the means at its disposal’<sup>1214</sup> to ensure that Hungary complies with its obligations under EU law and respects Article 2 TEU. The European Parliament issued a resolution on the situation in Hungary in respect of the death penalty statements but also the government’s stance on immigration and its alleged interrelation with security threats and urged the Commission to activate the first stage of the New EU framework to Strengthen the Rule of Law, therefore initiating a monitoring process of the situation of democracy, the rule of law and fundamental rights, assessing a potential systematic and serious breach of Article 2 values and evaluating the emergence of a systemic threat to the rule of law in that Member State that could develop into a clear risk of a serious breach within the meaning of Article 7 TEU. The Parliament requested the Commission to report back on this matter to Parliament and the Council

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<sup>1208</sup> Uladzislau Belavusau, ‘On Age Discrimination and Beating Dead Dogs: Commission v Hungary.’ (2013) 50 *Common Market Law Review* 1145, 1150

<sup>1209</sup> Uladzislau Belavusau, ‘On Age Discrimination and Beating Dead Dogs: Commission v Hungary.’ (2013) 50 *Common Market Law Review* 1145, 1150

<sup>1210</sup> Gábor Halmai, ‘An Illiberal Constitutional System in the Middle of Europe’ (2014) 5 *European Yearbook on Human Rights* 497

<sup>1211</sup> Bojan Bugarič, ‘Protecting Democracy and The Rule of Law in the European Union: The Hungarian Challenge’ (2014) LEQS Paper No. 79/2014, 1

<sup>1212</sup> (Fundamental Rights Agency of the European Union, *Fundamental Rights: Challenges and Achievements in 2012*, Vienna: FRA 2012, 22 – 25.

<sup>1213</sup> European Parliament Plenary – Commission Statement on the Situation in Hungary First Vice-President Timmermans Strasbourg, 19 May 2015: <[http://euparl.net/9353000/1/j9vvhskmycle0vf/vju1obotyvqxq?ctx=vg09llk9rgrp&tab=1&start\\_tab0=5](http://euparl.net/9353000/1/j9vvhskmycle0vf/vju1obotyvqxq?ctx=vg09llk9rgrp&tab=1&start_tab0=5)> [Accessed 6 November 2015]

<sup>1214</sup> European Parliament Plenary – Commission Statement on the Situation in Hungary First Vice-President Timmermans Strasbourg, 19 May 2015: <[http://euparl.net/9353000/1/j9vvhskmycle0vf/vju1obotyvqxq?ctx=vg09llk9rgrp&tab=1&start\\_tab0=5](http://euparl.net/9353000/1/j9vvhskmycle0vf/vju1obotyvqxq?ctx=vg09llk9rgrp&tab=1&start_tab0=5)> [Accessed 6 November 2015]

before September 2015.<sup>1215</sup> There was no response and the European Parliament issued another Resolution in December 2015 reminding the Commission of the issue.<sup>1216</sup> Following the Austrian case discussed above, the situation in Hungary constitutes the first real instance where a Member State is so openly and directly violating principles including, *inter alia*, the rule of law.<sup>1217</sup> As such, Hungary can be referred to for purposes of responding to the question of what the EU institutions are able and/or willing to do when posed with a violation of the rule of law within its own territory.

### 1.5.2 Response of the European Union to the Hungarian Constitutional Crisis

When considering the reaction of the EU to the Hungarian constitutional crisis, the first point that must be noted is that resort to Article 7 TEU was not completely disregarded in this case, with the European Parliament putting forth this idea as a possible course of action. However, the leading European People's Party did not adhere to this view and this avenue was dismissed.<sup>1218</sup> This points to a bleak future for Article 7 TEU ever being implemented, with doubts arising in any reasonable mind as to what kind of situations could actually meet the threshold of this article and instigate its implementation. Either way, the European Parliament settled for a Report, namely the Tavares Report, adopted in mid-2013 which has been characterised as 'by far the strongest and most consequential official condemnation of the *Fidesz* consolidation of power.'<sup>1219</sup> With the adoption of this report,<sup>1220</sup> the European Parliament has established a new framework of several avenues through which Article 2 TEU principles are to be protected and promoted.<sup>1221</sup> Although this report emanated from and sought to tackle the situation in Hungary, the general recommendations made, therein, *vis-à-vis* the protection of Article 2 principles are applicable to the EU more generally and, thus, constitute additions to the EU basket of rule of

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<sup>1215</sup> European Parliament Resolution of 10 June 2015 on the Situation in Hungary (2015/2700(RSP)) 10 June 2015

<sup>1216</sup> European Parliament Resolution of 16 December 2015 on the Situation in Hungary (2015/2935(RSP)) (16 December 2015)

<sup>1217</sup> Bojan Bugarič, 'Protecting Democracy and The Rule of Law in The European Union: The Hungarian Challenge' (2014) LEQS Paper No. 79/2014, 5

<sup>1218</sup> Editorial Comments: Hungary's New Constitutional Order and "European Unity" (2012) 49 *Common Market Law Review* 3, 878.

<sup>1219</sup> Kim Lane Scheppele, 'In Praise of the Tavares Report' Hungarian Spectrum: Reflections on Politics, Economy and Culture: <<https://hungarianspectrum.wordpress.com/2013/07/03/kim-lane-scheppele-in-praise-of-the-tavares-report/>> [Accessed on 27 January 2015]

<sup>1220</sup> The report passed with 370 in favour, 248 against and 82 abstentions.

<sup>1221</sup> Gábor Halmai, 'An Illiberal Constitutional System in the Middle of Europe' (2014) 5 *European Yearbook on Human Rights*, 505

law protection mechanisms. Even though some of the follow-up procedures described, such as the Article 2 Trialogue composed of EU institutions to receive and assess information provided by the Hungarian government, are designed and tailored particularly for this case, such a mechanism could constitute a precedent for future cases. As noted by one scholar, they are ‘important tools in the toolkit that European institutions can now use to ensure that a member state of the European Union maintains its European constitutional commitments.’<sup>1222</sup> It must be noted further that resort to Article 7 was reiterated, therein, as explained below.

The most concrete mechanisms proposed by the report include the establishment of an ‘Article 2 TEU Alarm Agenda’<sup>1223</sup> to be kick-started the moment a threat to Article 2 violation is discerned. This Alarm Agenda ‘effectively blocks all other dealings between the Commission and Hungary until Hungary addressed the issues raised in the report.’<sup>1224</sup> Further, the report recognises the need to ‘tackle the so-called Copenhagen dilemma’<sup>1225</sup> where the strictness attached to pre-accession state of affairs *vis-à-vis* Article 2 standards does not continue post-accession. To this end, it calls for the ‘establishment of a new mechanism to ensure compliance by all Member States with the common values enshrined in Article 2 TEU, and the continuity of the Copenhagen criteria; this mechanism could assume the form of a Copenhagen Commission...’<sup>1226</sup> which will entail, amongst others, a noticeably enhanced role for the FRA.<sup>1227</sup> The proposal for the creation of a Copenhagen Commission has been ‘the most recent

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<sup>1222</sup> Kim Lane Scheppele, ‘In Praise of the Tavares Report’ Hungarian Spectrum: Reflections on Politics, Economy and Culture: <<https://hungarianspectrum.wordpress.com/2013/07/03/kim-lane-scheppele-in-praise-of-the-tavares-report/>> [Accessed on 27 January 2015]

<sup>1223</sup> Report on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012) Committee on Civil Liberties, Justice and Home Affairs, A7-0229/2013, para 69

<sup>1224</sup> Gábor Halmai, ‘An Illiberal Constitutional System in the Middle of Europe’ (2014) 5 *European Yearbook on Human Rights*, 506

<sup>1225</sup> Committee on Civil Liberties, Justice and Home Affairs: ‘Report on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012’ A7-0229/2013 (2013) para 72

<sup>1226</sup> Committee on Civil Liberties, Justice and Home Affairs: ‘Report on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012’ A7-0229/2013 (2013) para 79

<sup>1227</sup> Committee on Civil Liberties, Justice and Home Affairs: ‘Report on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012’ A7-0229/2013 (2013) para.79

in a queue of incoherent responses'<sup>1228</sup> to the breach of Article 2 by Member States. In addition to these mechanisms, the report reiterates, *inter alia*, the need for close cooperation between competent institutions<sup>1229</sup> and the launching of debates on the relevant themes.<sup>1230</sup> Moreover, it is noteworthy that Article 7 TEU was not dismissed by this document as it noted that the Conference of Presidents should consider the possibility of resorting to this mechanism in the event that Hungary does not adhere to Article 2.<sup>1231</sup>

### 1.5.3 European Court of Justice: Its Role in the Hungarian Situation

During the aforementioned constitutional crisis which has not yet been redressed, the European Commission considered and, in two of the three cases, sought recourse to the ECJ under Article 258 of the Treaty on the Functioning of the European Union (TFEU) in relation to the independence of the Central Bank of Hungary and the independence of the judiciary by looking particularly at the lowering of the retirement age of judges<sup>1232</sup> and the abolishment of the Parliamentary Commissioner for Data Protection and replacement of this institution with a governmental agency.<sup>1233</sup> All these changes were brought about following the election of *Fidesz* as ruling party and directly fall within the framework of the rule of law. In relation to the first case, following effective discussion and cooperation with the Hungarian government, the Commission was satisfied that the government had taken the necessary steps to rectify the situation and, as such, did not proceed to bringing the case before the ECJ.<sup>1234</sup> The first case that the Commission brought against Hungary involved the lowering of the retirement age of judges from seventy to sixty two, putting forth arguments revolving around age discrimination. In a fast

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<sup>1228</sup> Dimitry Kochenov, 'The Issues of Values' University of Groningen Faculty of Law Research Paper Series No.19/2013, 9

<sup>1229</sup> Report on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) Committee on Civil Liberties, Justice and Home Affairs, A7-0229/2013, para 75

<sup>1230</sup> Report on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) Committee on Civil Liberties, Justice and Home Affairs, A7-0229/2013, para 76

<sup>1231</sup> Report on the Situation of Fundamental Rights: Standards and Practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) Committee on Civil Liberties, Justice and Home Affairs, A7-0229/2013, para 86

<sup>1232</sup> Case C-286/12, *Commission v Hungary*, Judgement of the Court of Justice (First Chamber) 6 November 2012

<sup>1233</sup> Case C-288/12, *Commission v Hungary*, Judgement of the Court of Justice (Grand Chamber) 8 April 2014

<sup>1234</sup> European Commission Press Release: Hungary - Infringements: European Commission satisfied with changes to Central Bank Statute, but refers Hungary to the Court of Justice on the Independence of the Data Protection Authority and Measures Affecting the Judiciary (2012): <[http://europa.eu/rapid/press-release\\_IP-12-395\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-12-395_en.htm?locale=en)> [Accessed 27 January 2015]



track process the ECJ ‘ruled quickly and forcefully against Hungary’<sup>1235</sup> and, although Hungary delayed the enforcement of the judgement until all judges were essentially fired, they then compensated the judges who took early retirement. As a result, ‘the decision did nothing to change the facts on the ground. The new government was able to remake the judiciary with its preferred new judges despite having lost the case.’<sup>1236</sup> With regard to the case that dealt with the data protection officer, the European Commission argued that Hungary violated the independence of this officer, a view which the ECJ agreed with. As Scheppele argues, ‘the case broke little new legal ground’<sup>1237</sup> but, it was nevertheless, significant because not only does it demonstrate Hungary’s breach of fundamental values but, also ‘exposes the limitations of ordinary infringement proceedings for bringing a Member State into line.’<sup>1238</sup>

The most interesting point for purposes of the present discussion is that the rule of law narrative was completely disregarded by the ECJ as if it never existed, even though the themes looked upon directly emanated from a dangerous disregard of Article 2 TEU principles, including the rule of law. As noted by Bugarič, ‘they ultimately fail to address broader institutional issues that threaten the very foundations of the rule of law...’<sup>1239</sup> In seeking to find a solution to the structural problems faced by recourse to Article 258 TFEU in the wider framework of promoting the rule of law, human rights and democracy in Member States, Scheppele proposed an adjustment to Article 258 TFEU through the enforcement of a systemic infringement action through which, when bringing a case before the ECJ, the Commission can provide the Court with

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<sup>1235</sup> Kim Lane Scheppele, ‘Making Infringement Procedures More Effective: A Comment on Commission v. Hungary, Case C-288/12 (8 April 2014) (Grand Chamber)’ (2014) <<http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/>> [Accessed 24 April 2015]

<sup>1236</sup> Kim Lane Scheppele, ‘Making Infringement Procedures More Effective: A Comment on Commission v. Hungary, Case C-288/12 (8 April 2014) (Grand Chamber)’ (2014) <<http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/>> [Accessed 24 April 2015]

<sup>1237</sup> Kim Lane Scheppele, ‘Making Infringement Procedures More Effective: A Comment on Commission v. Hungary, Case C-288/12 (8 April 2014) (Grand Chamber)’ (2014) <<http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/>> [Accessed 24 April 2015]

<sup>1238</sup> Kim Lane Scheppele, ‘Making Infringement Procedures More Effective: A Comment on Commission v. Hungary, Case C-288/12 (8 April 2014) (Grand Chamber)’ (2014) <<http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/>> [Accessed 24 April 2015]

<sup>1239</sup> Bojan Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’ (2014) LEQS Paper No. 79/2014, 15

‘a holistic argument about how the pattern infringes not only specific points of European law but also its most fundamental values.’<sup>1240</sup> Such a system would have allowed the Court to consider incidents such as the lowering of the retirement age of judges in Hungary in the realm of the constitutional overhaul of the country rather than looking at it in isolation. What must be noted is that the actions of the ECJ considered the aforementioned issues as single problems without placing them within the broader framework of Hungary’s unconstitutional approach. This, in turn allowed the government to ‘argue that it has responded satisfactorily to the outstanding complaints without having to change anything essentially about its illiberal reforms.’<sup>1241</sup>

#### 1.5.4 Hungary: Concluding Points

Hungary is a testing ground for the efficacy and efficiency of the mechanisms available for the protection and promotion of the rule of law within the EU regarding the framework of State activity which is founded, in whole or in part, on far-right ideas. A July 2014 observation held that, due to external pressure, some ‘cosmetic changes’<sup>1242</sup> were made by Hungary, taking minimal action on the concerns expressed by entities such as the European Parliament.<sup>1243</sup> This indicator demonstrates that, ‘not by any standards do the results of the test qualify a success.’<sup>1244</sup> It appears that the Tavares Report, although rich in innovation, ideas and good will, did not result in the amelioration of the rule of law situation in Hungary. In addition, the ECJ, when looking at by-products of this new constitutional reality, did not place its analysis within a rule of law setting. What is left is the resort, or at least more serious consideration of resort to Article 7 TEU, as anyhow proposed by the Report.

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<sup>1240</sup> Kim Lane Scheppele, ‘What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions’ (November 2013): <[http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf)> [Accessed 24 April 2015]

<sup>1241</sup> Erik K. Jenne & Cas Mudde, ‘Hungary’s Illiberal Turn - Can Outsiders Help?’ (2012) 23 *Journal of Democracy* 3, 150

<sup>1242</sup> Gábor Halmai, ‘An Illiberal Constitutional System in the Middle of Europe’ (2014) 5 *European Yearbook on Human Rights* 510

<sup>1243</sup> Gábor Halmai, ‘An Illiberal Constitutional System in the Middle of Europe’ (2014) 5 *European Yearbook on Human Rights* 510

<sup>1244</sup> Gábor Halmai, ‘An Illiberal Constitutional System in the Middle of Europe’ (2014) 5 *European Yearbook on Human Rights* 498

## 1.6 A New EU Framework to Strengthen the Rule of Law

The New EU Framework to Strengthen the Rule of Law, created by the European Commission, seeks to ensure that the rule of law is adequately upheld in all Member States and to offer solutions for purposes of tackling situations of a ‘systemic threat’<sup>1245</sup> to the rule of law. More particularly, this framework is to be activated before the mechanisms of Article 7 are applicable,<sup>1246</sup> therefore, contributing to the overall structure through which the rule of law and interrelated themes are respected and promoted by Member States and through which risks or violations of these principles are adequately dealt with by the EU. Further, it is applicable in cases where Member States are ‘taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.’<sup>1247</sup> This paragraph is important since it denotes that the State has a responsibility not only for directly causing a violation of the rule of law but also for tolerating a situation which violates the rule of law, which, as noted above, is relevant to situations where right-wing parties not in power or non-party groups are threatening the democratic state of a country. Thus, in this Framework, the Commission has rectified the position it put forth in its 2003 Communication to the Parliament on Article 7, as discussed above, to include that the State may be guilty of any omission and not just its direct actions. This Framework decision implements a tripartite formula to achieve its objectives, namely assessments, recommendation and follow up.<sup>1248</sup> In the event that the State does not adequately follow up the Commission’s recommendation, the latter will consider activating the preventive or sanctioning mechanism of Article 7.<sup>1249</sup> In relation to the assessment procedure, the Commission will consider all the relevant information and make an assessment as to the existence of ‘clear indications of a systemic threat to the rule of law...’<sup>1250</sup> In doing so, it can refer to sources of institutions such as the CoE and the EU’s Agency for

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<sup>1245</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final/2, 3

<sup>1246</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final/2, 3

<sup>1247</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final/2, 6

<sup>1248</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final/2, 6

<sup>1249</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final/2, 7

<sup>1250</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final/2, 7

Fundamental Rights.<sup>1251</sup> If such a threat is determined, the Commission will enter into a confidential dialogue with the Member State concerned, relying always on the State's 'duty of sincere cooperation.'<sup>1252</sup> If the Commission then finds that the Member State is not taking the adequate steps necessary for redressing the threat, it will proceed to making a public recommendation to the State that the threat is resolved, within a set time-frame, and that such solutions are then communicated to the Commission. This recommendation may also incorporate means and methods that can be implemented by the State for the resolution required.<sup>1253</sup> The Commission will oversee the follow up of the State in question to the recommendation put forth and, if no satisfactory steps have been taken within the established temporal framework, then only then will the Commission take into account the 'possibility of activating one of the mechanisms set out in Article 7 TEU.'<sup>1254</sup> Thus, through this mechanism, the State is given enough chances through dialogue, recommendation and follow up to rectify the problem and, even if it does not take the necessary steps, the Framework does not necessarily result in the implementation of Article 7 but only the possibility of such an occurrence. In October 2015, Poland saw the first majority government come to power since 1989 in the form of the *Law and Justice party (Prawo i Sprawiedliwość)*. Since its rise to power, this party has undertaken several changes similar to those taken by Hungary. In Poland, these have included changes which affect the impartiality of the Constitutional Tribunal and media pluralism. In light of these changes, the EU has commenced a structured dialogue under the Rule of Law Framework.<sup>1255</sup> The efficacy of this procedure in relation to Poland remains to be seen, with little hope arising given the experiences from Hungary and the inherent weakness of this Framework.

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<sup>1251</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final/2, 7

<sup>1252</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final/2, 8

<sup>1253</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final/2, 8

<sup>1254</sup> Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law, COM (2014) 158 final/2, 8

<sup>1255</sup> European Commission Press Release on Poland: 'College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers' (2016) <[http://europa.eu/rapid/press-release\\_MEMO-16-62\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-62_en.htm)> [Accessed 13th April 2015]

In sum, the Framework can be characterised as an ‘early-warning tool to enable the Commission to enter into a structured dialogue with the Member State concerned.’<sup>1256</sup> However, given the fact that there are no automatic legal sanctions in the event that a Member State opts to disregard the Commission’s Recommendation, with recourse to Article 7 TEU only constituting a possibility, as noted above, this mechanism has been characterised as ‘anything but revolutionary.’<sup>1257</sup> Moreover, the non-binding nature of the Commission’s recommendation and the mere possibility of kick-starting Article 7 renders the potential of effective implementation of this mechanism limited since, in a Member State where ‘the ruling elite has made a conscious choice not to comply with EU values, engaging in a rule of law dialogue is unlikely to be fruitful.’<sup>1258</sup> Notwithstanding the intrinsic shortcomings of this Framework, one may, at least conceptually, argue that it is too early to assess this Framework due to the fact that it is still recent. If anything, it constitutes an addition to the basket of mechanisms that can be instigated when faced with rule of law threats within the EU. Either way, it remains to be seen whether it will, in fact, be implemented, with higher hopes being attached to this Framework than the implementation of Article 7, as it will be Commissioners rather than the Heads of State which will be instigating and setting into force the mechanisms of this Framework, their actions bearing less political cost.

### 1.7 Council of the European Union – Annual Rule of Law Dialogue

The Council of the European Union criticised the European Commission’s framework, discussed above, on the grounds that ‘it would breach the principle of conferral’<sup>1259</sup> and, thus, put forth its own mechanism for tackling rule of law issues, this being an annual dialogue among all Member States within the Council for the promotion of the rule of law. The Council noted that such a dialogue will occur ‘on the principles of objectivity, non-discrimination and equal treatment of

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<sup>1256</sup> Dimitry Kochenov, Laurent Pech ‘From Bad to Worse? On the Commission and the Council’s Rule of Law Initiatives’ (2015) <<http://www.verfassungsblog.de/bad-worse-commission-councils-rule-law-initiatives/#.VTo7rdKqqko>> [Accessed 15 January 2015]

<sup>1257</sup> Dimitry Kochenov, Laurent Pech ‘From Bad to Worse? On the Commission and the Council’s Rule of Law Initiatives’ (2015) <<http://www.verfassungsblog.de/bad-worse-commission-councils-rule-law-initiatives/#.VTo7rdKqqko>> [Accessed 15 January 2015]

<sup>1258</sup> Dimitry Kochenov, Laurent Pech ‘From Bad to Worse? On the Commission and the Council’s Rule of Law Initiatives’ (2015) <<http://www.verfassungsblog.de/bad-worse-commission-councils-rule-law-initiatives/#.VTo7rdKqqko>> [Accessed 15 January 2015]

<sup>1259</sup> Dimitry Kochenov, Laurent Pech ‘From Bad to Worse? On the Commission and the Council’s Rule of Law Initiatives’ (2015) <<http://www.verfassungsblog.de/bad-worse-commission-councils-rule-law-initiatives/#.VTo7rdKqqko>> [Accessed 15 January 2015]

all Member States'<sup>1260</sup> and that it would be conducted on a 'non-partisan and evidence-based approach'<sup>1261</sup> noting that the principle of conferral and the identity of Member States will be respected. Essentially, this procedure is a chat about the rule of law and ideas of promoting it within the EU, with no legal or political consequences or sanctions and no mention of Article 7 TEU in the event that problems or threats are identified. Moreover, it applies equally to all Member States, providing no margin for focusing on a problematic State or States. As noted by the First Vice President of the Commission, in charge of issues including the rule of law, the Council's dialogue as well as the Commission's Framework are both 'grossly inadequate to tackle the problem of rule of law backsliding post EU accession.'<sup>1262</sup> In fact, the term 'dialogue' in itself projects the spirit of this procedure which limits itself to discussion and talk with no consequences or actions arising, therefrom, and, as such, cannot sincerely be relied on as a protector of the rule of law in the Union. In addition, using the aforementioned statement made by Barosso as a benchmark, namely that there is a need for instruments that are not as harsh as Article 7 and not as soft as mere political persuasion, one can reach two conclusions. Firstly, that the Council's dialogue has not fulfilled the identified need as it is mere dialogue and, secondly, that the Commission's Framework, although limited in that it is non-binding and recourse to Article 7 is not automatic in the event that all else fails, is a step up from the Council's mechanism. Either way, the current set of instruments does not fulfill the needs, as set out by Barosso, and, in addition to the fact that Article 7 is essentially a no-go area for Member States, leaves the Union exposed to rule of law violations.

### 1.8 Rule of Law: Concluding Comments

In sum, the rule of law constitutes a theoretically effective and efficient framework through which right-wing extremism, an accepted threat to this doctrine, may be combatted on an EU level. Once again, the preventive and sanctioning measures incorporated in the above-discussed mechanisms emanate from the EU's need to protect itself and, possibly, the country in question, from destructive forces. However, despite the growing number of available mechanisms, the fact

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<sup>1260</sup> Conclusions of the Council of the European Union and the member states meeting within the Council on ensuring respect for the rule of law, General Affairs Council meeting Brussels, 16 December 2014.

<sup>1261</sup> Conclusions of the Council of the European Union and the member states meeting within the Council on ensuring respect for the rule of law, General Affairs Council meeting Brussels, 16 December 2014.

<sup>1262</sup> Dimitry Kochenov, Laurent Pech 'From Bad to Worse? On the Commission and the Council's Rule of Law Initiatives' (2015) <<http://www.verfassungsblog.de/bad-worse-commission-councils-rule-law-initiatives/#.VTo7rdKqqko>> [Accessed 15 January 2015]

remains that ‘outside the accession framework, the EU does not enjoy a solid set of resources and procedural standards’<sup>1263</sup> when it comes to the rule of law and, thus, practical reliance on this doctrine remains rather illusory.

## 2. Charter of Fundamental Rights of the European Union

The interrelationship between the EU and human rights is not a simple one to assess. It has been argued that ‘under the orthodox account of the EU Law, the Union lacks any general competence in the field of human rights.’<sup>1264</sup> Nevertheless, this interrelationship is ever-developing with the Union being marked by a ‘more strongly embedded paradigm of fundamental rights in the Union law.’<sup>1265</sup> For example, Article 7 TEU now grants the EU a supervisory role in relation to the protection of Article 2 principles, such as human rights, and, since the Treaty of Nice, allows the EU to prevent breaches to the rule of law and related notions. Other initiatives have included the incorporation of Article 6 of the TEU which, *inter alia*, renders the Charter of Fundamental Rights of the EU a source of European Law and stipulates that the Union is to ratify the European Convention on Human Rights (ECHR). It has been argued that this push towards endowing the EU with a role in the field of human rights has partly emanated from concerns over whether the newer Eastern Member States would continue to uphold their obligations in the ambit of democracy and human rights once their membership has been approved.<sup>1266</sup> The Charter of Fundamental Rights of the EU was ratified in 2000 on the premise that ‘the peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.’<sup>1267</sup> Notwithstanding the significant step forward taken by this charter, its actual impact is restricted due to its non-binding nature and its applicability only in the event that the institutions and States implement EU Law.<sup>1268</sup> The articles relevant to a discourse on right-wing extremism are those pertaining to the freedom of expression, the freedom of

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<sup>1263</sup> Uladzislau Belavusau, ‘On Age Discrimination and Beating Dead Dogs: Commission v Hungary.’ (2013) 50 *Common Market Law Review* 1145, 1150

<sup>1264</sup> Wojciech Sadurski, ‘Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider’ (2010) *Sydney Law Journal*, Legal Studies Research Paper No.10/01, 29

<sup>1265</sup> Uladzislau Belavusau, ‘Historical Revisionism in Comparative Perspective: Law, Politics, and Surrogate Mourning’ European University Institute Working Papers, Law (2013) 2013/12, 15

<sup>1266</sup> Michael Merlingen, Cas Mudde, Ulrich Sedelmeier, ‘The Right and the Righteous? European Norms, Domestic Politics and the Sanctions against Austria’ (2001) 39 *Journal of Common Market Studies* 1, 63 – 64

<sup>1267</sup> Preamble, Charter of Fundamental Rights of the European Union 2000

<sup>1268</sup> Stijn Smismans, ‘The European Union’s Fundamental Rights Myth’ (2010) 48 *Journal of Common Market Studies* 1, 50

association and assembly, the prohibition of discrimination, the general limitation clause, the non-destruction clause and the prohibition of abuse of rights. Article 11 of the Charter states that ‘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.’ Article 12 of the Charter states that ‘everyone has the right to freedom of peaceful assembly and to freedom of association at all levels...’ Notwithstanding that any limitations to these rights are absent from these articles, the Charter incorporates a general limitation clause in the form of Article 52 which notes that limitation shall be ‘provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest, recognised by the Union or the need to protect the rights and freedoms of others.’ This article also states that ‘in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’ Therefore, as in the case of the ECHR, militant democracy is also found in the Charter which permits limitations to expression, association and assembly insofar as such limitations are prescribed by law and are necessary in a democratic society, concepts which are provided for by the ECHR and which have been duly interpreted and defined by the (ECtHR). However, Article 52 refers only to the meaning of these rights as covered by the Convention and not as interpreted by the Court. The distance kept by the EU from the CoE was further enhanced at the end of 2014 by the ECJ. In considering the EU’s accession to the ECHR, the Court noted that, if this were to occur, the EU would, *inter alia*, be bound by ECtHR judgements of the European Court of Human Rights.<sup>1269</sup> After setting out a series of legal obstacles to acceding to the Convention, the ECJ found that to do so would be incompatible with EU law.<sup>1270</sup> Moreover, due to the lack of relevant case-law in relation to the application of the Charter’s provisions, it is not possible to ascertain, merely from this document, what kind of limitation of expression is in

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<sup>1269</sup> Court of Justice of the European Union Press Release No 180/14 Luxembourg, 18 December 2014, Opinion 2/13 <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf>> [Accessed 2 December 2015]

<sup>1270</sup> Court of Justice of the European Union Press Release No 180/14 Luxembourg, 18 December 2014, Opinion 2/13 <<http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf>> [Accessed 2 December 2015]



fact proportional. Even though, on an EU level, *Feryn*<sup>1271</sup> ‘marks the long-awaited birth of what can be symbolically entitled a European law of freedom of expression,’<sup>1272</sup> this case dealt with hate speech within the employment setting and not hate speech promulgated by right-wing extremism and, therefore, the contextual difference does not permit us to extend principles and points developed, therein, to the framework of far-right rhetoric.

In addition, the Charter incorporates Article 53, which notes that the provisions, therein, shall not be interpreted as ‘restricting or adversely affecting human rights and fundamental freedoms’ as recognised by the EU, international law, international agreements, such as the ECHR, and by the Constitutions of Member States. In referring to international law, the Charter, thereby, incorporates provisions, such as those contained in the ICERD, which positively stipulate the banning of racist parties and groups. In addition, Article 54 holds that ‘nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.’ Article 21 provides that ‘any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.’ Thus, expression or association of right-wing groups which result in such discrimination could be prohibited as a result of Article 21 but also in light of Article 54 which prohibits the destruction of the rights and freedoms of this Charter, including the freedom from non-discrimination. Article 21 is of particular relevance to hate speech and hate crime expressed and conducted by right-wing groups, given that, notwithstanding a general reference to the adoption of international law, there is no particular article dealing with racial discrimination and its prohibition within this Charter. However, given the lack of ECJ jurisprudence on central themes, such as far-right rhetoric and activity, and given that it was decided that the EU would not accede to the ECHR and is, thus, not bound to follow the interpretations set out by the ECtHR, the way in which the issue of, for example, expression is interpreted and understood in the realm of far-right rhetoric is not lucid.

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<sup>1271</sup> *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* Case C-54/07, [2008] ECR I

<sup>1272</sup> Uladzislau Belavusau, ‘Fighting Hate Speech Through EU Law’ (2012) 4 Amsterdam Law Forum 1, 22

In sum, the Charter provides a brief overview of rights that could be quoted by right-wing groups as a justification for extremist speech or activity and provides the possibility to limit such extremism in a general manner through Articles 52, 53 and 54 with Article 21 being the only positive obligation directly imposed on Member States to prohibit racial discrimination, albeit through a broad discrimination clause. The rather generalised articles and the absence of relevant ECJ case-law mean that there does not yet exist a well-rounded insight into key meanings and notions. Instead, what is demonstrated through the aforementioned articles is the objective of the Charter simply to lay down key rights and obligations without entering into too much detail on central terms and themes, nevertheless reflecting the general spirit of the EU against actions that are contrary to human rights, whatever such spirit may entail.

### 3. 1996 Joint Action adopted by the Council Concerning Means to Combat Racism and Xenophobia

The 1996 Joint Action<sup>1273</sup> was the first comprehensive initiative taken by the EU to combat racism and xenophobia within EU Member States by promoting a harmonised criminal law amongst Member States as a means to this end. Prior to this initiative, no steps had been taken to tackle racism through EU mechanisms apart from two reports prepared by Commissions of Inquiry, as discussed below. However, during the 1990's, the EU was faced with increasing pressure from the European Parliament and civil society to incorporate measures against such discrimination.<sup>1274</sup> Joint Actions were the legal means available between 1993 and 1999 and were later replaced by the Framework Decisions following reforms brought about by the Treaty of Amsterdam. As noted by Bell, while Joint Actions were, in theory, legally binding, 'the absence of any jurisdiction for the ECJ over Joint Actions meant that the main lever for compliance was political will'<sup>1275</sup> and, therefore, their actual application and legal enforceability were limited. The 1996 Joint Action had the objective of adopting rules to combat racism and xenophobia and ensure harmonisation of criminal law on this issue amongst States in order to prevent

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<sup>1273</sup> Joint action/96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, Concerning Action to Combat Racism and Xenophobia.

<sup>1274</sup> Erik Bleick and Mary Clare Feldmann, 'The Rise of Race? Europeanization and Antiracist Policymaking in the EU' Paper presented at the conference 'The Impact of Europeanization on Politics and Policy in Europe: Trends and Trajectories' University of Toronto, 7-9 May 2004.

<sup>1275</sup> Mark Bell, 'Racism and Equality in the European Union' (Oxford Scholarship Online 2009), 157

perpetrators ‘from exploiting the fact that racist and xenophobic activities are classified differently in different States by moving from one country to another in order to escape criminal proceedings or avoid serving sentences...’ For the purposes of this Joint Action, a plethora of activities constitute a criminal offence, with the most relevant to right-wing extremism being the participation in the activities of groups, organisations or associations which involve discrimination, violence, or racial, ethnic or religious hatred with other activities including the public incitement to discrimination, violence or hatred in respect of a group of persons or a member of such a group defined by reference to colour, race, religion or national or ethnic origin, the public condoning, for racist or xenophobic purposes, of crimes against humanity and human rights violations, the public dissemination of material containing expressions of racism and xenophobia as well as public denial of certain international crimes. Such actions fall within the sphere of activities conducted and ideas professed by right-wing groups. Interestingly, the Joint Action criminalises what is habitually referred to as revisionism only when it ‘includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to colour, race, religion or national or ethnic origin’ whilst publicly condoning crimes against humanity and human rights violations is only criminalised when it is carried out for ‘a racist or xenophobic purpose,’ thereby, demonstrating the weight placed by the Joint Action on intent in that group of offences. Moreover, when reading the list of punishable activities, a similarity can be discerned between the offences listed, therein, and Article 4 of the ICERD. The Joint Action sought to ensure cooperation between Member States for the aforementioned offences through a variety of means, such as the seizure and confiscation of material intended for public dissemination, acknowledgement that the offences are not of a political nature in order to prevent refusal for mutual cooperation, provision of information to another Member State to initiate legal proceedings and the establishment of contact points in the Member States responsible for the collection and exchange of information for purposes of investigation and proceedings. Interestingly, the Joint Action assumed a legal and cultural cohesion between Member States in relation to criminal law but also in relation to the restriction of the freedom of expression and freedom of association, which are directly related to the offences listed therein. This weakness could be considered an obstacle to the proper interpretation and implementation of its provisions, a weakness which was partially rectified in the subsequent Framework Decision, as discussed below.

It has been noted that ‘there is very little evidence on how the Joint Action has been applied in practice.’<sup>1276</sup> However, two years after its entry into force, the Council noted that only Austria and Luxembourg made amendments to their legal systems in order to conform with the provisions therein.<sup>1277</sup> Thus, the overall contribution that the Joint Action has made to the fight against racism and xenophobia remains questionable. However, it did constitute the foundation upon which the next tool, namely a Framework Decision, was developed.

#### 4. Council Framework Decision 2009/913/JHA of 28 November 2008 on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law

The incorporation of the fight against racism in today’s Article 67.3 of the Treaty on the Functioning of the European Union (TFEU) demonstrated the increasing dedication of the EU to contributing thereto. This article foresees collaboration between Member States in criminal matters pertaining to racism and xenophobia by holding that ‘the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for co-ordination and co-operation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.’

In light of the provisions, therein, and building on the 1996 Joint Action, the Commission put forth a Framework Decision on combatting racism and xenophobia through criminal law which was adopted in 2008, after seven years of negotiations.<sup>1278</sup> The negotiations were lengthy and complex, predominantly due to the ‘disparity of the Member States legal systems and traditions as regards the protection of the right to freedom of expression.’<sup>1279</sup> In fact, the conflicting appraisals adopted by States in the realm of restricting freedom of expression and also freedom of association are a recurring theme in the drafting of such documents, as can be reflected, for

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<sup>1276</sup> Mark Bell, ‘*Racism and Equality in the European Union*’ (Oxford Scholarship Online 2009), 158

<sup>1277</sup> Council of the European Union, ‘Note de Comité K.4 AU Coreper’ Ref 7808/1/98/ REV 1, 29 April 1998

<sup>1278</sup> Report from the Commission to the European Parliament and the Council on the Implementation of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law COM (2014) 27, 1

<sup>1279</sup> Report from the Commission to the European Parliament and the Council on the Implementation of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law COM (2014) 27, 1

example, in the reservations imposed on Article 4 of the ICERD, discussed in the international framework. As such, the Framework Decision underlines that it respects the freedom of expression and the freedom of association and assembly, as provided for by the ECHR and the Charter of Fundamental Rights of the EU and, thus, adheres to the limitation clauses attached thereto and through which any conditions, limitations, restrictions to or penalties for the offences listed can be introduced. In this ambit, Article 7 of the Framework Decision holds that it shall ‘not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression.’ Further, in relation to criminal law, the Framework Decision recognised that full harmonization of criminal law is not possible given that the Member States’ cultural and legal traditions differ. Notwithstanding the purpose of this provision stemming from a potential to provide a realistic outlook on the objectives of this document, ‘such wording leaves a certain, albeit very unclear, margin for the States to assess a pure racist...scope of the concrete hate speech utterances.’<sup>1280</sup>

Article 1 of the Framework Decision outlines that Member States must punish incidences of publicly inciting to violence or hatred against a particular group through public dissemination or distribution of material, publicly condoning, denying or grossly trivializing international crimes as defined in the Statute of the International Criminal Court or the Charter of the International Military Tribunal directed against a group when the conduct is carried out in such a manner likely to incite to violence or hatred against such a group. However, as noted, without an ECJ assessment of what falls within the framework of conduct that is likely to incite violence or hatred against a group or a member of such a group, ‘it remains difficult to assess the potential of the severity of criminalizing speech.’<sup>1281</sup> Against a backdrop of a lacking judicial extrapolation of key notions and themes, three interesting observations can be made in relation to the list of offences incorporated in the Framework Decision. Firstly, the ‘participation in the activities of groups, organizations or associations, which involve discrimination, violence, or racial, ethnic or religious hatred,’ as incorporated in the 1996 Joint Action, is not named as an offence. This provision ‘was opposed from the outset by nearly all States except Germany and so it was

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<sup>1280</sup> Uladzislau Belavusau, ‘Historical Revisionism in Comparative Perspective: Law, Politics, and Surrogate Mourning’ (2013) European University Institute Working Papers, Law 2013/12, 14

<sup>1281</sup> Uladzislau Belavusau, ‘Historical Revisionism in Comparative Perspective: Law, Politics, and Surrogate Mourning’ (2013) European University Institute Working Papers, Law 2013/12, 15

deleted from the draft text.<sup>1282</sup> Secondly, the public incitement of discrimination, which was incorporated in the Joint Action, has been removed, allowing only for incitement to violence or hatred. Thirdly, the offence of grossly trivialising international crimes, such as genocide, has been added to the list of publicly condoning and denying such crimes. As is the case in the Joint Action, publicly condoning, denying and, now, grossly trivialising an international crime, such as the Holocaust, is only a criminal offence insofar as it is effectuated in a manner likely to incite violence or hatred against such a group, thereby permitting such expression as long as it does not potentially lead to an undesirable consequence. Article 1(4) provides Member States with further leniency when faced with the public denial or trivialisation of international crimes, such as genocide, as these can, if a Member State wishes, be restricted to crimes which have been established by a final decision of a national and/or international court. It must be noted that no reference is made to gross trivialisation in this ambit and one can only assume that this is an oversight by the drafters rather than a purposeful exclusion for which there exists no reasonable explanation. In addition, Article 1(2) grants Member States the liberty to punish all the aforementioned actions and/or expressions only when they are carried out in a way ‘likely to disturb public order or which is threatening, abusive or insulting.’ The objective of this provision is problematic given that it can safely be said that the offences listed in this article cannot occur without disturbing public order or without being threatening, abusive or insulting. Thus, not only is it difficult to understand in what types of situation this provision could be enforceable, but, simultaneously, it indirectly foresees that the type of activities or words described, therein, can be carried out or expressed without resulting in harm. Further, Article 1(3) interlinks religion with race, colour, descent or national or ethnic origin, adopting the principle of intersectionality as is the case, for example, in the ICERD.

In addition, Article 2 of the Framework Decision provides that instigating, aiding and abetting the aforementioned offences are all punishable activities, marking a positive development in relation to the Joint Action where such activities are not punishable. Article 3 notes that criminal penalties for the offences should be ‘effective, proportionate and dissuasive’ with the conduct included in Article 1 being punishable by penalties of between one and three years’ imprisonment. In addition to the offences incorporated in the document, Article 4 notes that

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<sup>1282</sup> Mark Bell, ‘*Racism and Equality in the European Union*’ (Oxford Scholarship Online 2009), 160

Member States must take the necessary steps to ‘ensure that racist and xenophobic motivation is considered an aggravating circumstance’ or that it is at least taken into account by courts in the determination of punishment, demonstrating another positive development from the time of the Joint Action. Article 5 is a significant article given that it deals with the liability of legal persons. It holds that Member States must take all the necessary steps to ‘ensure that a legal person can be held liable for conduct referred to in Articles 1 and 2, committed for its benefit by any person, acting either individually or as part of an organ of the legal persons\, who has a leading position within the legal person...’ Importantly, the liability of legal persons ‘shall not exclude criminal proceedings against natural persons who are perpetrators or accessories in the conduct...’ However, the Framework Decision states that legal persons cannot include ‘the State or other public bodies in the exercise of State authority and public international organisations’ thereby excluding the State and its institutions from criminal liability in the event that it or they promote racial hatred and/or violence. Thus, this article leaves an ‘important discretion for a State to grapple with certain political movements’<sup>1283</sup> thereby, equipping it with the tools to combat right-wing extremist groups promoting rhetoric and conduct as described in this document. However, and, although no definition of ‘State’ is provided, one could presumably conclude that a political party that is part of the government would fall within the definition of a State and, thus, outside the scope of this liability. In relation to penalties for legal entities active within the right-wing extremist movement, the most relevant include the exclusion from entitlement to public benefits or aid<sup>1284</sup> and the placement under judicial supervision.<sup>1285</sup>

In relation to the enforceability of the Framework Decision, the 2014 Report prepared by the Commission to the European Parliament and the Council on its implementation noted that ‘in accordance with Article 10(1) of Protocol No. 36 to the Treaties, prior to the end of the transitional period expiring on 1 December 2014, the Commission does not have the power to launch infringement proceedings under Article 25 TFEU with regard to Framework Decisions

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<sup>1283</sup> Uladzislau Belavusau, ‘Historical Revisionism in Comparative Perspective: Law, Politics, and Surrogate Mourning’ (2013) European University Institute Working Papers, Law 2013/12, 15

<sup>1284</sup> Council Framework Decision 2009/913/JHA of 28 November 2008 on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, Article 6 (1)(a)

<sup>1285</sup> Council Framework Decision 2009/913/JHA of 28 November 2008 on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, Article 6 (1)(d)

adopted prior to the entry into force of the Treaty of Lisbon.’<sup>1286</sup> As a result, the EU and its institutions are left with limited powers to push States in the direction of adequate enforcement. As noted in the recent report, a number of Member States have not fully and/or suitably transposed the Framework Decision’s provisions ‘namely in relation to the offences of denying, condoning and grossly trivialising certain crimes.’<sup>1287</sup>

Thus, the Framework Decision does contribute, at least on a theoretical level, to combatting right-wing extremism, notwithstanding its great leap backwards from the Joint Action *vis-à-vis* the criminalisation of participation in racist groups. Nevertheless, it deals with an array of activities carried out by such groups, embellishes and adds certain notions, such as the consideration of a racist motivation as an aggravating circumstance, and deals separately with the penalties which are to be imposed on legal persons, thereby, encompassing some of the vehicles used to promulgate right-wing rhetoric, albeit leaving out the significant vehicle of political parties. The limitations brought by this Decision, as discussed above, demonstrate that ‘combatting racism can encounter strong political resistance...[with] the text resembling ‘a lowest common denominator.’<sup>1288</sup> This, in addition to the limitations of the EU in launching infringement proceedings, as noted above, render the efficacy and actual application of the Framework Decision in a unified and adequate manner in all Member States doubtful, with little progress having been made to date. More particularly, as noted in the 2014 Report on the Framework Decision, ‘at present it appears that a number of Member States have not transposed fully and/or correctly all the provisions of the Framework Decision’<sup>1289</sup> In fact, the report urges the ‘full and correct legal transposition of the existing Framework Decision.’<sup>1290</sup> Indeed, it has

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<sup>1286</sup> Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law COM (2014) 27, 1

<sup>1287</sup> Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law COM (2014) 27, 9

<sup>1288</sup> Mark Bell, ‘*Racism and Equality in the European Union*’ (Oxford Scholarship Online 2009), 161

<sup>1289</sup> Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law COM (2014) 27, 9

<sup>1290</sup> Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law COM (2014) 27, 9



been argued that ‘the full implementation of the Framework Decision will radically alter the legal landscape in Europe.’<sup>1291</sup> This remains to be seen.

## 5. European Parliament Resolutions

The European Parliament has taken certain initiatives which incorporate regulating right-wing extremism, the most relevant of which are discussed in this section. In 1993, the European Parliament adopted a Resolution on the Resurgence of Racism and Xenophobia in Europe and the danger of right-wing extremist violence.<sup>1292</sup> It draws attention to the ‘proliferation in the Member States of extreme right-wing groups, parties and movements’<sup>1293</sup> and holds that ‘these practices pose a grave threat to those democratic values which form the basis of the common heritage of the Member States.’<sup>1294</sup> It reaffirms the duty of EU institutions to ‘combat any group or movement liable to pose a threat to democracy and basic human rights.’<sup>1295</sup> However, it does not extrapolate on the term ‘combat’ and does not provide any further recommendations in relation to how such movements can be combated. In 1994, it passed a resolution on racism, xenophobia and anti-Semitism<sup>1296</sup> which arose following its concern about the electoral success of racist parties in Europe and particularly in countries such as Austria, France, the UK and Belgium, whilst simultaneously expressing its contentment at the decrease in votes given to the respective party in Germany. The Resolution deplores the fact that ‘certain political forces are using the existing crisis in employment and the economy to stir up xenophobic and racist sentiments and exploit them for electoral ends.’<sup>1297</sup> It notes ‘with concern the increasing sympathy with which the positions of extreme right-wing movements and political parties are

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<sup>1291</sup> Laurent Pech, ‘The Law of Holocaust Denial in Europe: Towards a (Qualified) EU-wide Criminal Prohibition’ (2009) Jean Monnet Working Paper 10/09, 3

<sup>1292</sup> European Parliament Resolution on the Resurgence of Racism and Xenophobia in Europe and the Danger of Right-Wing Extremist Violence, 21 April 1993 ((OJ C 150, p. 127, 31.5.1993)

<sup>1293</sup> European Parliament Resolution on the Resurgence of Racism and Xenophobia in Europe and the Danger of Right-Wing Extremist Violence, 21 April 1993 ((OJ C 150, p. 127, 31.5.1993)

<sup>1294</sup> European Parliament Resolution on the Resurgence of Racism and Xenophobia in Europe and the Danger of Right-Wing Extremist Violence, 21 April 1993 ((OJ C 150, p. 127, 31.5.1993)

<sup>1295</sup> European Parliament Resolution on the Resurgence of Racism and Xenophobia in Europe and the Danger of Right-Wing Extremist Violence, 21 April 1993 ((OJ C 150, p. 127, 31.5.1993)

<sup>1296</sup> European Parliament Resolution on Racism, Xenophobia, and Anti-Semitism, 27 October 1994 (OJ C 323/154, 20.11.1994)

<sup>1297</sup> European Parliament Resolution on Racism, Xenophobia, and Anti-Semitism, 27 October 1994 (OJ C 323/154, 20.11.1994)

being received in several Member States of the Union and a candidate country.’<sup>1298</sup> Notwithstanding the concern and condemnation of the right-wing in this Resolution, the Parliament proceeded to make recommendations for combatting racism through initiatives such as education and NGO projects, making no reference to the banning and/or regulation of right-wing extremist groups, activities and rhetoric. In 1995, it adopted the Resolution of the European Parliament on racism, xenophobia and anti-Semitism<sup>1299</sup> which noted that whenever there is ‘a risk that organizations or people with racist, xenophobic or anti-Semitic behaviour make contacts across the borders of a Member State, the criminal aspects should be studied by Europol.’<sup>1300</sup> Furthermore, the European Parliament adopted a Resolution in 1997<sup>1301</sup> to express ‘its regret at racist and xenophobic statements by politicians and parties at national and European Level’<sup>1302</sup> and called upon ‘democratic parties to use all democratic means to ostracise racist movements and groups.’<sup>1303</sup> However, this Resolution makes no reference to the meaning of what can constitute democratic means nor does it make further direct recommendations in relation to the regulation of right-wing groups, but instead suggests measures, such as education and national and local projects and youth exchanges, to promote tolerance and understanding. In 2005, the European Parliament called upon States to withdraw public funding from political parties that do not abide by human rights and fundamental freedoms.<sup>1304</sup> In 2007, the European Parliament passed a Resolution on combatting the rise of extremism in Europe where it underlined that ‘extremist political movements is a European challenge that requires a joint and coordinated approach.’<sup>1305</sup> It further went on to stipulate, for the first time so directly, that the combat of extremism must not negatively affect the protection of the freedom of expression and

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<sup>1298</sup> European Parliament Resolution on Racism, Xenophobia, and Anti-Semitism, 27 October 1994 (OJ C 323/154, 20.11.1994)

<sup>1299</sup> European Parliament Resolution on Racism, Xenophobia, and Anti-Semitism, 27 October 1994 (OJ C 323/154, 20.11.1994)

<sup>1300</sup> European Parliament Resolution on Racism, Xenophobia, and Anti-Semitism, 27 October 1994 (OJ C 323/154, 20.11.1994)

<sup>1301</sup> European Parliament Resolution on Racism, Xenophobia and Anti-Semitism and the European Year against Racism (1977) (OJ C 55/17, 24.2.97)

<sup>1302</sup> European Parliament Resolution on Racism, Xenophobia and Anti-Semitism and the European Year against Racism (1977) (OJ C 55/17, 24.2.97)

<sup>1303</sup> European Parliament Resolution on Racism, Xenophobia and Anti-Semitism and the European Year against Racism (1977) (OJ C 55/17, 24.2.97)

<sup>1304</sup> European Parliament Resolution on the Increase in Racist and Homophobic Violence in Europe, P6 – TA (2006) 0273

<sup>1305</sup> Resolution of the European Parliament on Combatting the Rise of Extremism in Europe, 13 December 2007, P6\_TA(2007)062

association.<sup>1306</sup> It called upon other political forces to avoid supporting and forming alliances with extremist political parties either directly or indirectly.<sup>1307</sup>

Thus, the issue of right-wing extremism has been an issue of concern to the Parliament since 1993. Notwithstanding certain measures to combat this phenomenon, such as non-alliance with such parties and the ostracising of such groups through the implementation of all democratic means, whatever that may mean, no Resolution has been as explicit as the ICERD in mentioning the banning and prohibition of such parties or groups. This could be due to the experience of the limitations imposed on the relevant Article to that Convention due to concerns over the freedom of expression and freedom of association and, also, due to the Parliament's concern over this given that it did, in fact, note that any measures must not violate those rights.

## 6. Other Measures

Following the 1984 European Parliamentary elections and the rise in the success of right-wing parties, the Parliament established a Committee of Inquiry into the rise of racism and fascism in Europe which resulted in the Report of the Committee of Inquiry, known as the Evrigenis Report,<sup>1308</sup> which provides comprehensive, definitional and conceptual frameworks of key terms and phenomena, gives an overview of the situation in Member States and makes recommendations for combatting this phenomenon. Notwithstanding that the Report focuses on the rise of racism and fascism in Europe and extensively discusses the development of the right-wing movement in Member States, the recommendations made relating to the direct regulation of the phenomenon are limited with more emphasis being placed on tackling the causal factors leading to their formation and why they flourish. More particularly, recommendations include the immediate ratification of relevant international conventions,<sup>1309</sup> the 'creation of a European legal area in order to prevent the activities of...extremist organizations...and the distribution of

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<sup>1306</sup> Resolution of the European Parliament on Combatting the Rise of Extremism in Europe, 13 December 2007, P6\_TA(2007)062

<sup>1307</sup> Resolution of the European Parliament on Combatting the Rise of Extremism in Europe, 13 December 2007, P6\_TA(2007)062

<sup>1308</sup> European Parliament Committee of Inquiry into the Rise of Fascism and Racism in Europe, Report on the Findings of the Inquiry, 1985, Luxembourg

<sup>1309</sup> European Parliament Committee of Inquiry into the Rise of Fascism and Racism in Europe, Report on the Findings of the Inquiry, 1985, Luxembourg, Para 310 (a)

illegal propaganda material,<sup>1310</sup> and that national legislations on combatting political extremism are constantly revised and their application ensured.<sup>1311</sup>

In 1990, the European Parliament re-examined the issue through a second Committee of Inquiry which resulted in the Report of the Committee of Inquiry on Racism and Xenophobia, or the Ford Report, which, once again, underlined the need for action, looked at the situation in Member States and produced recommendations to combat racism and xenophobia with some dealing directly with right-wing extremist groups. Such recommendations included the establishment of a system for monitoring developments in the field of racism, anti-Semitism and xenophobia, including extreme-right and fascist groups<sup>1312</sup> and that a periodic report be prepared every eighteen to twenty four months by the Commission of the European Communities on the current situation in relation to racism, anti-Semitism and xenophobia, including extreme right and fascist groups.<sup>1313</sup> These reports were valuable initiatives that contributed to the development of knowledge in relation to right-wing extremism.

In sum, these reports are significant in that they reflect the early steps taken by the European Parliament to look into the issue of right-wing extremism and provide concrete recommendations for Member States to combat it. They also allow for an appraisal of developments taken on this level within the framework considered. For example, in 1985, the Evrigenis Report recommended the creation of a European Legal Order to prevent the activities of right-wing extremist groups but this has not yet been realised. However, and notwithstanding that both reports recommend that Member States which have not yet ratified the ICERD do so immediately,<sup>1314</sup> and, by extension, requests the implementation of Article 4, therein, nowhere in

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<sup>1310</sup> European Parliament Committee of Inquiry into the Rise of Fascism and Racism in Europe, Report on the Findings of the Inquiry, 1985, Luxembourg, Para.318 (i)

<sup>1311</sup> European Parliament Committee of Inquiry into the Rise of Fascism and Racism in Europe, Report on the Findings of the Inquiry, 1985, Luxembourg, Para.313 (d)

<sup>1312</sup> European Parliament, Report of the Committee of Inquiry on Racism and Xenophobia, 1991, Luxembourg, Recommendation 3

<sup>1313</sup> European Parliament, Report of the Committee of Inquiry on Racism and Xenophobia, 1991, Luxembourg, Recommendation 16

<sup>1314</sup> European Parliament, Report of the Committee of Inquiry on Racism and Xenophobia, 1991, Luxembourg, Recommendation 51, European Parliament Committee of Inquiry into the Rise of Fascism and Racism in Europe, Report on the Findings of the Inquiry, 1985, Luxembourg, para. 310 (a)

the above reports are there suggestions pertaining to the prohibition or banning of right-wing extremist parties or other less restrictive measures such as non-alliance with such parties.

### 7. European Union Framework – Concluding Comments

In conclusion, the strongest and most real tool with real potential and consequences, which the EU has at its discretion to tackle right-wing extremist movements, is Article 7 of the TEU. This is not only due to its primacy *vis-à-vis* its positioning on the ladder of EU sources but also due to its innovative, second chance nature incorporated in the dual preventive – sanctioning mechanism offered therein. Nevertheless this article has not yet been applied, with a lacking political will to kick-start real preventive and sanctionary measures, as demonstrated in the case of Hungary. According to the letter and spirit of the article, one could come up with a multitude of examples in which this article could and should be implemented, many of those relating to the European far right. Moreover, the New EU Framework to Strengthen the Rule of Law which broadens the scope of the second-chance nature approach adopted by the EU to risky situations, the mechanisms proposed by the Tavares report, such as the ‘Copenhagen Commission’ and, to a much lesser extent the Council’s Annual Rule of Law Dialogue, all constitute tools which can be used to protect the rule of law from, *inter alia*, right-wing extremism. However, the efficacy of the tools, apart from Article 7 TEU, is doubtful since they are primarily non-binding, non-consequential recommendations. In addition to the above, the EU has come up with other instruments that could be implemented in this sphere. The 1996 Joint Action was the only initiative which sought to criminalise participation in such groups, a measure which was removed by the subsequent Framework Directive. Notwithstanding that the Charter provides for the principle of non-discrimination and limits freedom of expression and association in certain circumstances, regardless of the fact that the Framework Decision criminalises activities and speeches conducted by such movements, and, even though the European Parliament expresses concern in relation to right-wing groups, the EU has yet to adopt comprehensive and binding legal measures which are particular to the regulation of such movements. These measures, which should incorporate a coherent definitional framework of right-wing extremism and clearly outline the steps that should be adopted by Member States towards the regulation of the phenomenon, are particularly timely given the rise of the movement on a national and regional level within the EU. It could be discerned, from the Parliament’s Resolutions and the Framework

Decision, that the EU wishes to avoid outright bans and prohibitions of such groups and resort to other less restrictive measures which have been referred to in more recent years, such as cutting public funding, either due to sincere concern for the freedoms of expression and association or in fear of a repeat of the limitations imposed on the ICERD's prohibitive provision. Either way, what can safely be said and is reflected from the above is that the far-right is incongruous with European common values but has not yet been challenged by the European family.

## CHAPTER SIX: ENGLAND AND WALES

### Introduction

This chapter will map out the domestic legal framework that exists to challenge right-wing extremist movements in England and Wales. Discussion of relevant policies, where available, shall be made. This analysis will be effectuated against the backdrop of a contextual framework which will set out the legal culture of England and Wales and, in particular, its common law system, discussing the unity of England and Wales as one legal system. Based on this, it will explain why the dissertation is studying England and Wales and not the UK as a whole. Given the developments, following the referendum of the 23<sup>rd</sup> June 2016 in which 52% of the British people opted to exit the European Union, there will also be a discussion of the impact of the referendum on the legal and political culture of the United Kingdom as well as the link between the results and the rise in hate crime and hate speech in the country. A backdrop will then be given of right-wing extremist entities active in England and Wales, adopting Minkenberg's structure, composed of political parties, non-party movements and the subculture milieu, taking care to distinguish between any violent, non-violent and quasi-violent mandates. After the contextual setting has been established, the chapter will provide an overview of the definitional framework of key terms including, but not limited to, right-wing extremism, right-wing terrorism, racist speech, racial hatred and religious hatred emanating from the legal and policy frameworks of England and Wales. The relevant definitions are repeated in this chapter due to the particularities which stem from the legal and policy frameworks of England and Wales as, for example, in relation to the national construction and conceptualisation of race, racism and racial discrimination. Against the aforementioned contextual setting, the chapter will proceed to consider the interpretation and incorporation of the UK's, and thus, England and Wales' obligations as these emanate from international and European frameworks. In relation to international obligations, the section will consider the status of Article 20(2) ICCPR and Article 4 ICERD in national law. In order to determine the State's adherence to international obligations, reservations and/or interpretative declarations imposed on provisions of international conventions shall be assessed as well as documents of the HRC and the CERD. On a CoE level, the Human Rights Act 1998<sup>1315</sup> (HRA 1998) will be looked at which has incorporated the ECHR

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<sup>1315</sup> This is currently being contested by the current government who wishes to replace it with the British Bill of Rights; however a draft Bill has yet to be put forth.

into national law. On this level, it must be noted that the Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems has not been transposed into national law. Although no further discussion will arise from this document, the fact of non-transposition is a finding in itself in the realm of the tools available for a State to challenge hate. On an EU level, the chapter will consider the position of the UK *vis-à-vis* the Framework Decision on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law.<sup>1316</sup> After assessing its adherence to international and European obligations, the chapter will look at its domestic framework in the realm of challenging far-right movements. To this end, it will firstly pinpoint how the key freedoms of non-discrimination, expression, assembly and association are established therein. This is the starting point since these rights and freedoms are the central mechanisms used by the far-right to disseminate hate. In addition to this, the normative foundation of this dissertation emanates from deciphering where to draw the line between the exercise of human rights and freedoms on the one hand and preventing, for example, the destruction of democracy and/or the rights of others and/or the destruction of dignity on the other. After this framework is set out, the chapter will appraise the role of criminal law in relation to the far-right, looking firstly at the public order ambit which is the one most habitually used to challenge the rhetoric and activities of the far-right. Then, it will consider the more recent anti-terror legislation which, as will be demonstrated below, has come into play in relation to the regulation of violent elements of the far-right movement. After looking at criminal law, and how it deals with ensuring public order and anti-terror, the chapter will proceed to appraise how national law treats political parties before registration and during their functioning. The purpose is to determine what tools and sub-tools are available and can be used for challenging far-right parties contesting elections. The principle of non-discrimination in the realm of parties' mandates, but also *vis-à-vis* activities of their members, will also be considered in this section. By perusing all the above frameworks, this chapter incorporates all means and methods adopted by England and Wales which, directly or indirectly challenge the far-right. The chapter will then proceed to conclude on key themes identified throughout the chapter, making reference to the

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<sup>1316</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law



compatibility between national law and international and European law and, more generally, appraising whether the current system is well-enough equipped to challenge the far-right.

## 1. Contextual and Definitional Framework

### 1.1 Jurisdiction

It is necessary to explain why the dissertation looks at England and Wales and not the UK as a whole and, also, why it is looking at England and Wales and not only England. The UK was the result of a merger of independent countries. In relation to Wales, the Wales Acts 1535-1542 were a series of parliamentary acts through which Wales was annexed to England rendering the English legal system applicable to Wales.<sup>1317</sup> This State is habitually referred to as England and Wales and it is this particular part of the UK which will constitute the focus of this analysis. In 1707, the Union with England Act<sup>1318</sup> provided that England (and Wales) and Scotland became one single State named the United Kingdom of Great Britain<sup>1319</sup> with one Parliament.<sup>1320</sup> Further, the 1800 Union with Ireland Act joined Great Britain and Ireland as one State, represented by one Parliament.<sup>1321</sup> Following the division of Ireland, with the Southern part wanting independence from the UK and the Northern part seeking to remain therein, the Irish Free State Agreement Act<sup>1322</sup> was passed in 1922 and Ireland became an independent country. The result of these developments was the formation of the United Kingdom of Great Britain and Northern Ireland.

The UK has three legal systems. These are English Law, which is the generic term applied for the law governing England and Wales, Northern Ireland Law, which applies in Northern Ireland, and Scots Law, applied in Scotland. The first two emanate from principles of common law and the latter is a mélange of civil and common law. Differences also exist in relation to the executive, the legislature and the judiciary. More particularly, the Scottish government is led by

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<sup>1317</sup> Keith Feiling, *'A History of England'* (8<sup>th</sup> edn. Book Club Associates 1972) 362. 'The effective union of the principality of Wales with England dates from 1301 when Edward I's son was created Prince of Wales, although Wales was not enfranchised until the reign of Henry VIII.' Encyclopedia Britannica (William Benton 1973, Vol.10) 734

<sup>1318</sup> Union with England Act 1707 c.7

<sup>1319</sup> Union with England Act 1707, c.7, Section III

<sup>1320</sup> Union with England Act 1707, c.7, Section III

<sup>1321</sup> Union with Ireland Act 1800, c.67

<sup>1322</sup> The Irish Free State (Agreement) Act 1922 c.4

a First Minister and a cabinet of Ministers, responsible for policy.<sup>1323</sup> Scotland's executive was established by the Scotland Act 1998.<sup>1324</sup> However, the powers of the executive are limited to issues that are devolved to Scotland through the Scotland Act 1998.<sup>1325</sup> These are all matters falling outside the framework of those reserved for the UK Parliament which are issues of national importance and, thus, remain within the powers of the UK government. Some of the issues which the UK Parliament reserves as ones to be dealt with solely by the UK Parliament, include, amongst others, the registration and funding of political parties, defence issues and foreign affairs.<sup>1326</sup> Within the ambit of Northern Ireland, an equivalent, the Northern Ireland Act,<sup>1327</sup> was also passed in 1998, creating the Northern Irish executive and legislature and devolving powers in the areas which are not reserved to<sup>1328</sup> or excepted from<sup>1329</sup> the UK Parliament. These cover a broader range of issues than their Scottish counterpart including, *inter alia*, elections, immigration, firearms and safety. In addition, Wales received more executive and legislative powers with the Government of Wales Act 1998 creating the National Assembly for Wales which was subsequently reformed by the Government of Wales Act 2006. The National Assembly enjoys legislative powers over a total of twenty issues which are directly provided for by Schedule 5 of the 2006 Act and include, amongst others, tourism and social welfare.<sup>1330</sup> Up until 2011, the National Assembly could not legislate on the issues prior to consultation with the UK Parliament or the Secretary of State for Wales, a reality which was overturned following the "yes" vote in the 2011 referendum on the issue.<sup>1331</sup> In addition, the 2006 Act created the Welsh Assembly Government, a devolved government which also functions within the framework of

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<sup>1323</sup> Scotland Act 1998 c.46 Part II, Section 44-51

<sup>1324</sup> Scotland Act 1998 c.46 Part II

<sup>1325</sup> Scotland Act 1998 c.46 Part II, Section 54

<sup>1326</sup> Scotland Act 1998 c.46 Schedule 5: the full list of reserved matters include the Constitution, political parties, foreign affairs, defence and treason.

<sup>1327</sup> Northern Ireland Act 1998 c.47

<sup>1328</sup> Schedule 3 of the Act provides for the reserved matters and these include firearms, financial services, broadcasting, import and export, navigation and civil aviation, international trade and financial markets, telecommunications and post, the foreshore and seabed, disqualification from Assembly membership, consumer safety, intellectual property

<sup>1329</sup> Schedule 2 of the Act provides for the excepted matters and these include: the Constitution, Royal succession, international relations, defence and armed forces, nationality, immigration and asylum, elections, national security, nuclear energy, UK-wide taxation, currency, conferring of honours, international treaties.

<sup>1330</sup> The matters are: Agriculture, fisheries, forestry and rural development, ancient monuments, culture, economic development, education and training, environment, fire safety, food, health, transport, housing, local government, National Assembly for Wales, public administration, social welfare, sport and recreation, tourism and town and country planning, water and Welsh language.

<sup>1331</sup> Richard Wyn Jones & Roger Scully, *Wales Says Yes: Devolution and the 2011 Welsh Referendum* Preface (eds. University of Wales Press 2012)

Wales' devolved powers. There is no respective devolution process for England. All issues that are not devolved to the aforementioned institutions are legislated by the United Kingdom Parliament and executed by the UK Government.

In relation to the judiciary, the Supreme Court of the UK is the ultimate Court for England, Wales and Northern Ireland on all civil and criminal matters and for Scotland on civil matters only.<sup>1332</sup> The court system is unified for England and Wales and falls under Her Majesty's Courts and Tribunals Service (HMCTS)<sup>1333</sup> with Northern Ireland and Scotland having their own court system while the tribunal system covers England, Wales and, at times, Northern Ireland and Scotland.<sup>1334</sup> Even if statutes considered within this dissertation are applicable to Scotland and Northern Ireland, the interpretation of their provisions is effectuated by Courts which are under a separate court system and, in the case of Scotland, follow a different legal culture than England and Wales and, therefore, the interpretation of relevant provisions may differ. In relation to Scotland, a decision of the UK Supreme Court on English Law is a persuasive authority in Scots Law where the same legal principles apply but are not binding *per se*.<sup>1335</sup> In theory the same is the case for Northern Ireland whose judiciary is not bound by decisions of English Courts but, in practice, academics and practitioners often cite English decisions as if they were part of domestic law. Therefore, the differences between England and Wales and Northern Ireland *vis-a-vis* judicial interpretations are not as rigid as with Scotland, but they do exist.<sup>1336</sup> Furthermore, in relation to criminal law, it is the Crown Prosecution Service<sup>1337</sup> (hereinafter CPS), which is responsible for the prosecution of criminal cases investigated by the police in England and Wales. Thus, the competent authority which decides on, amongst others, if particular conduct is racially hateful, has jurisdiction over England and Wales only.

In sum, Northern Ireland and Scotland have a separate court system and, in the case of Scotland, do not fall fully and completely within the framework of the UK Supreme Court. Judicial decisions on English law do not bind the Courts of Scotland and Northern Ireland and, thus,

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<sup>1332</sup> Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (eds. Oxford Scholarship Online 2013) Introduction

<sup>1333</sup> Garry Slapper & David Kelly, *The English Legal System* (10<sup>th</sup> edn. Routledge 2009-2010) 142

<sup>1334</sup> Garry Slapper & David Kelly, *The English Legal System* (10<sup>th</sup> edn. Routledge 2009-2010) 142-143

<sup>1335</sup> Julio César Riviera, *The Scope and Structure of Civil Codes* (eds. 2014 Springer) 354

<sup>1336</sup> Elizabeth Cooke *Modern Studies in Property Law* (eds. Hart 2002 Volume II) 205

<sup>1337</sup> The Crown Prosecution Service: <<http://www.cps.gov.uk/index.html>>

interpretations of statutes may differ. On the other hand, England and Wales have one unified court system. Also, in the case of Scotland, the legal system is different, with characteristics of both common and civil law. Northern Ireland and Scotland are part of the UK but have devolved parliaments and governments which are allowed to function alone in certain areas which are broader than those of Wales.

In light of the above, when considering particular legislation and policy, it may well be that some of the documents that are to be considered do not fall within the framework of the devolved powers granted to Scotland and Northern Ireland. Apart from national instruments, this is extended to the issue of international and European obligations which bind the UK as a whole. However, since variations exist between the type of legal and court systems in England and Wales and Scotland, and whilst Northern Ireland also adopts the common law but has its own court system and case-law and, given that there is a separate prosecution body for England and Wales, it would not be possible to make a comparison of the UK as one single legislative, executive and judicial unit. As a result, England and Wales, albeit with some separations occurring under the 2006 Government Act which do not, anyhow, directly affect this dissertation, are unified as a legal system and unified as a court system. For this purpose, only England and Wales, as one entity and one jurisdiction, will be assessed. Notwithstanding the above, it must be noted that when making the assessment of the nature of the far-right movement and how this is manifested in the forms of political parties, non-party groups and the subculture milieu, reference will usually be made to the UK and not to England and Wales. This is because the majority of entities do not restrict their activities to England and Wales but function within the context of the UK as a State. This reference will be used broadly notwithstanding that, in some cases, parties, such as the BNP and the UKIP function with those names in all of the regions of the UK whereas groups, such as the EDL, have respective formations and names in Wales, Scotland and Northern Ireland but fall under the general umbrella of the *Defence League* ideology.

## 1.2 The EU Referendum: Legal, political and social ramifications

A referendum was held on the 23<sup>rd</sup> June 2016 on whether the UK should remain a Member State

of the EU.<sup>1338</sup> 52% of the population voted to leave the EU and 48% to remain therein.<sup>1339</sup> Leave won the majority of votes in England and Wales whilst remain won the majority in Scotland and Northern Ireland.<sup>1340</sup>

The formal process for a Member State to leave the EU is governed by Article 50 of the Treaty of Lisbon which provides that:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.  
A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

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<sup>1338</sup> The precise question of the referendum will be: 'Should the United Kingdom remain a member of the European Union or leave the European Union?' The options will be: 'Remain a member of the European Union' and 'Leave the European Union'

<sup>1339</sup> House of Commons: The UK's EU Referendum 2016 Explained: 51.9% (leave) and 48.1% (remain): <<http://www.parliament.uk/eu-referendum>> [Accessed 28 June 2016]

<sup>1340</sup> House of Commons: European Union Referendum 2006: <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7639>> [Accessed 28 June 2016]

In light of the above article, it is clear that departure from the EU is not an automatic or a simple process but is rather one that commences with a notification of mere intention to depart, expressed by the Member State to the EU. This is then followed by a negotiation procedure for the departure itself and the future relationship between the two. Article 218(3) of the Treaty on the Functioning of the European Union which is a provision of an article that governs agreements between third countries or international organisations is the one governing the negotiation procedure for departure. This provides that:

The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

Following negotiation procedure which involves the Member State, the European Commission or the High Representative of the Union for Foreign Affairs and Security Policy, the departure negotiation is concluded by the Council of the European Union which acts by a qualified majority only after it receives the consent of the European Parliament. After the process is kick-started by the country, the next steps up to the point of actual departure involve the central European institutions, with requirements such as parliamentary approvals and qualified majorities. In relation to the timeframe, it is first necessary for the Member State to give notice of its intention to depart, a step which triggers the aforementioned negotiation process. During this process, EU treaties continue to apply to the Member State whilst they cease to apply either from the date of enforcement of the withdrawal agreement which is concluded after the above-described process is followed or within two years after the notification of intention to leave or longer than that, if an extension has been agreed upon. Significantly, the Member State, in this case the UK, will not be part of the discussions of the European Council concerning this procedure. In relation to the kick-starting of the process, this has yet to happen. The previous Conservative Prime-Minister announced his resignation immediately after the referendum results and was soon replaced by Theresa May. His intention was for the aforementioned negotiation

procedure to be commenced (and thus Article 50 to be triggered) by his successor.<sup>1341</sup> On a national level, the 1972 European Communities Act,<sup>1342</sup> which is the statute which incorporated the UK into the European family<sup>1343</sup> and granted supremacy to EU law, will be repealed. In addition, other laws related to the EU will need to be subject to repeal or amendment or may even be kept as part of national law. It must be noted that in November 2016, the High Court ruled that, as a matter of UK constitutional law, the government cannot trigger Article 50 of the Lisbon treaty and commence formal exit negotiations with the EU without the input of the national parliament. The government is appealing this decision.<sup>1344</sup> The EU referendum results are of historic importance for the UK and for the EU and its future. The impacts of this referendum and the departure of the UK from the EU will undoubtedly have an effect on the legal, political, social and financial landscape of the UK in a large number of areas. For purposes of this thesis and its content, two issues must be underlined. Firstly, the analysis of EU law and its role on challenging the far-right in Member States applies to this country and will continue to do so up until the point that a withdrawal agreement is enforced. Secondly, hate has been directly interlinked with this referendum. As noted by ENAR, hate speech was directly intertwined with the exit campaign which ‘escalated into real life’ following the referendum.<sup>1345</sup> According to the National Police Chief’s Council, there was a 57% rise in the reporting of hate crime on the Police’s online reporting tool.<sup>1346</sup> Although the Police underlined that this demonstrates a rise in the use of the online reporting tool rather than a rise in hate crime<sup>1347</sup>, the positive temporal correlation between the referendum results and the rise should be of concern.

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<sup>1341</sup> Gov.UK ‘EU referendum outcome: PM statement, 24 June 2016’(24 June 2016): <<https://www.gov.uk/government/speeches/eu-referendum-outcome-pm-statement-24-june-2016>> [Accessed 27 June 2016]

<sup>1342</sup> The European Communities Act 1972 c. 68

<sup>1343</sup> Article 1 (2) of the European Communities Act provides that ‘communities’ means the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community

<sup>1344</sup> Gina Miller & Deir Tozetti Dos Santos v The Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin)

<sup>1345</sup> ENAR: ‘Alarming Post-Brexit Racist Incidents Require Action’ (27 June 2016): < <http://www.enar-eu.org/Alarming-post-Brexit-racist-incidents-require-action>> [Accessed 28 June 2016]

<sup>1346</sup> National Police Chief’s Council: ‘Hate Crime is Unacceptable in Any Circumstance Say Police’ (27 June 2016): < <http://news.npcc.police.uk/releases/hate-crime-is-unacceptable-in-any-circumstances-say-police>> [Accessed 28 June 2016]

<sup>1347</sup> National Police Chief’s Council: ‘Hate Crime is Unacceptable in Any Circumstance Say Police’ (27 June 2016): <<http://news.npcc.police.uk/releases/hate-crime-is-unacceptable-in-any-circumstances-say-police>> [Accessed 28 June 2016]

### 1.3 The Face of the Far-Right in the United Kingdom: A General Overview

This section will provide an overview of the phenomenon of right-wing extremism in the UK, referring to the key characteristics of this movement and groups present, therein, through an analysis of political parties, non-party groups and the subculture milieu. It must firstly be noted that, far-right parties in the UK, such as UKIP and, to a lesser extent, the BNP ‘are not static in their policies, beliefs and practices, they may and do evolve over time.’<sup>1348</sup> The development of the far-right movement in the UK can be traced back to the period after the First World War where it sought to place limits on immigration, focusing predominantly on Jewish immigration.<sup>1349</sup> The focus on Jews in the far-right rhetoric during that particular temporal framework can be explained as a result of certain realities. Firstly, such a focus was habitual in the rhetoric of European far-right parties of the time.<sup>1350</sup> Secondly, Jews have historically undergone discrimination in this country (and not only) with the process of their equality and emancipation, therein, being a particularly slow process in comparison to other European countries.<sup>1351</sup> Moreover, the path to equality for Jews had been laid down in 1830 and, thus, even after the period following World War I, community relations had not reached a positive turning point. This is reflected in, for example, the passing of the Aliens Act 1905 which incorporated immigration controls for the first time and which, it has been argued, sought to control Jewish immigration arriving from Eastern Europe.<sup>1352</sup> In the wake of the 20<sup>th</sup> century, Jews experienced anti-Semitism which went hand-in-hand with Germanophobia given the fact that, during that time, Jews were considered in the same ambit as Germans. As a result, Jews with German sounding names often anglicised them to avoid discrimination.<sup>1353</sup> On a more general level, the far-right worked against the backdrop of racism more widely. In Britain, racism has historically

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<sup>1348</sup> Paul Hainsworth, *The Extreme Right in Western Europe* (eds. Routledge 2008), 10

<sup>1349</sup> John E. Richardson & Ruth Wodak ‘Recontextualising Fascist Ideologies of the Past: Right-Wing Discourses on Employment and Nativism in Austria and the United Kingdom’ (2009) 6 *Critical Discourse Studies* 4, 256

<sup>1350</sup> Farid Hafez, ‘Shifting borders: Islamophobia as Common Ground for Building Pan-European Right-Wing Unity’ (2014) 48 *Patterns of Prejudice* 5: Throughout this article, reference is made to the previous tendency of far-right Parties in Europe to Historically Deal with Anti-Semitism (which was recently replaced with Islamophobia) Or, see for example: Anti-Semitism: it could be said that this is probably the ‘world’s oldest hatred’: John Hartwell Moore, *Encyclopaedia of Race and Racism* (eds. Thomson Gale 2008) Volume 3, 108. This reality undoubtedly influenced the rhetoric of far-right parties during the relevant time.

<sup>1351</sup> Encyclopaedia Britannica (William Benton 1973, Vol.10) 1070

<sup>1352</sup> John E. Richardson & Ruth Wodak ‘Recontextualising Fascist Ideologies of the Past: Right-Wing Discourses on Employment and Nativism in Austria and the United Kingdom’ (2009) 6 *Critical Discourse Studies* 4, 256

<sup>1353</sup> James D. Ciment & Thaddeus Russell, *The Home Front Encyclopedia: United States, Britain, and Canada in World Wars I and II* (eds. ABC-CLIO; 2006)



been common,<sup>1354</sup> endorsed not only by the far-right but also by members of the judiciary<sup>1355</sup> and legislators.<sup>1356</sup> The development of racism and racist attitudes in the UK is clearly interlinked with colonialism and post-colonialism and has undergone transformation according to the temporal realities of immigration. During the late nineteenth and early twentieth centuries, the correlation between racism and colonialism manifested itself ‘in the form of the articulation between nationalism and patriotism in the construction of the very definition of Englishness and Britishness.’<sup>1357</sup> Following the colonial period and with the entrance of commonwealth immigrants to Britain which led to a ‘dramatic contact and integration of Africans and Asians,’<sup>1358</sup> racism became further embedded into the daily reality of British life. It has been noted that previous arrivals of immigrants, such as the Irish, had a different societal impact in relation to that which arose from the arrival of new Commonwealth citizens. More particularly, the effects that the arrival of the latter had on the development of racism were significant and this could be partly attributed to the ‘catalytic role black and brown people played in the process of Britain redefining her identity and place as a post-imperial nation...’<sup>1359</sup> Racism did not limit itself to the aforementioned period of colonialism or change and ‘xenophobia, nationalism and authoritarianism are still very much present in Britain.’<sup>1360</sup> Sasha Williams and Ian Law refer to a 2009 You Gov poll which found 43% of its respondents agreeing with the vision of the BNP although they would not support the particular party.<sup>1361</sup> This points to the fact that outright racism is not accepted in Britain today but the framework for racist ideas, and, potentially practices and rhetoric, does exist. On the other hand, Ronald Niezen argues that, in the British

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<sup>1354</sup> Garry Slapper, ‘Legality of Assaulting Ideas’ (2007) 71 *Journal of Criminal Law*, 4, 279

<sup>1355</sup> Garry Slapper, ‘Legality of Assaulting Ideas’ (2007) 71 *Journal of Criminal Law* 4, 279. Slapper illustrates this point by reference to Judge Neil McKinnon QC, who in dealing with a case of speech including the words niggers, wogs and coons, found the defendant not guilty of incitement to racial hatred and said to him ‘by all means propagate the view you have...I wish you well.’

<sup>1356</sup> For example, Enoch Powell’s (MP at the time) 1968 ‘rivers of blood speech’ during which he stated, *inter alia*, that: ‘For these dangerous and divisive elements the legislation proposed in the Race Relations Bill is the very pabulum they need to flourish. Here is the means of showing that the immigrant communities can organise to consolidate their members, to agitate and campaign against their fellow citizens, and to overawe and dominate the rest with the legal weapons which the ignorant and the ill-informed have provided. As I look ahead, I am filled with foreboding; like the Roman, I seem to see ‘the River Tiber foaming with much blood.’

<sup>1357</sup> Les Back & John Solomos *Theories of Race and Racism: A Reader* (6<sup>th</sup> edn. Routledge 2005) 14

<sup>1358</sup> Harry Goulbourne, ‘Race Relations in Britain since 1945’ (eds. Macmillan 1998), 26-28

<sup>1359</sup> Harry Goulbourne, ‘Race Relations in Britain since 1945’ (eds. Macmillan 1998), 26-28

<sup>1360</sup> Sasha Williams and Ian Law, ‘Legitimising Racism: An Exploration of the Challenges Posed by the Use of Indigeneity Discourses by the Far-Right.’ (2012) 17 *Sociological Research Online* 2, 2-3

<sup>1361</sup> Sasha Williams and Ian Law, ‘Legitimising Racism: An Exploration of the Challenges Posed by the Use of Indigeneity Discourses by the Far-Right.’ (2012) 17 *Sociological Research Online* 2, 3

context, indigeneity, which presupposes the inherent link of the first descendants of a place with the right to self-determination,<sup>1362</sup> is a ‘badge worn with pride.’<sup>1363</sup> However, this concept has been twisted by parties such as the BNP, with the aim of legitimising its appearance and attracting more voters. A further differentiation of past and present racism in the UK has been discussed by Floya Anthias, who describes the current situation as a reality of ‘neo-racism’ which assumes a transformation from a biological conceptualisation of race and, thus, racism to a type of cultural racism. However, she poignantly argues that although the backdrop is now purportedly that of culture, racism in the UK emanates from the crux of ‘black victims and white perpetrators.’<sup>1364</sup> To illustrate this point, Anthias argues that other groups in the country such as Jews, Irish, Cypriots and Gypsies are rarely considered in works that consider neo-racism whilst focus is placed on Asians, Afro-Caribbeans and Muslims which she incorporates into the racism debate and defines as ‘another signifier for what is also called Asian.’<sup>1365</sup> Much discussion on racism and interconnected phenomena, such as institutional racism and hate crime, came about following the racist murder of youngster Stephen Lawrence in 1993<sup>1366</sup> and the resulting 1999 Stephen Lawrence Inquiry which was formulated for purposes of inquiry into the investigation and prosecution of his death. The report held that a ‘racist incident is any incident which is perceived to be racist by the victim or any other person.’<sup>1367</sup> The concept of perception in relation to a racist incident came with an array of negative reactions due to its broad nature, with a trial judge dealing with a case of racist violence holding that ‘whatever the general approach to definitions of racist, in the context of the substantive criminal law at least, certainty is of paramount importance.’<sup>1368</sup>

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<sup>1362</sup> United Nations Declaration on the Rights of Indigenous Persons

<sup>1363</sup> Ronald Niezen, *The Origins of Indigenism: Human rights and the Politics of Identity* (eds. University of California 2003) 3

<sup>1364</sup> Floya Anthias, ‘Cultural Racism or Racist Culture? Rethinking Racist Exclusions’ (2006) 24 *Economy and Society* 2, 289

<sup>1365</sup> Floya Anthias, ‘Cultural Racism or Racist Culture? Rethinking Racist Exclusions’ (2006) 24 *Economy and Society* 2, 289

<sup>1366</sup> Stephen Lawrence was an eighteen year old Black British man who was stabbed to death by a group of up to six young white people in an unprovoked attack at a bus stop in London. It took more than eighteen years to bring two of his killers to justice. A subsequent inquiry demonstrated that the Metropolitan police had failed in investigating this crime and found the police force guilty of institutional racism.

<sup>1367</sup> Stephen Lawrence Inquiry:

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/277111/4262.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf)> [Accessed 15 May 2015] 45.17

<sup>1368</sup> D. C Ormerod & Clare Barsby, ‘Case Comment: Racial Aggravation of Offence: Whether ‘African’ is Within Meaning of ‘Racial Group’ (2001) *Criminal Law Review* 576, 576

Notwithstanding the examples of racism, mentioned above, this country has ‘never had an electorally significant extreme right party’<sup>1369</sup> with several factors presented to explain this, including the obstacles posed by the first-past-the post system and the pride Britons take in their role against Nazism.<sup>1370</sup> Another obstacle which has been cited is the extreme nature of the older entities constituting the far-right who were associated with violent street activities.<sup>1371</sup> Removing the obstacles of outright extremism and violence as a result of an allegedly reformed BNP, as described below, and a prim and proper UKIP, could be one of the factors which have led to the rise of the far-right since the start of the twenty-first century. During this time, the country witnessed the far-right undergoing increasing electoral success predominantly in the form of the BNP and the UKIP. There exist several, partly conflicting, opinions regarding the threat currently faced by the UK in relation to far-right extremism. In 2014, referring to developments such as the activities of the Islamic State<sup>1372</sup> and the Rotherham scandal,<sup>1373</sup> a senior Home Office adviser warned that ‘this is one of the most worrying periods in right-wing extremism, given the growth in right-wing groups and the recent news events which are making them more angry.’<sup>1374</sup> However, the 2015 State of Hate report,<sup>1375</sup> issued by Hope not Hate,<sup>1376</sup> notes that the British far-right is smaller but more violent in comparison to 2014.<sup>1377</sup> This is a worrying development compared to the findings of the 2014 report which noted that the far-right in the UK

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<sup>1369</sup> Robert Ford & Matthew Goodwin, *Revolt on the Right – Explaining Support for the Radical Right in Britain* (eds. Routledge 2014) 7

<sup>1370</sup> Nigel Copsey and John E. Richardson, *Cultures of Post-War British Fascism* (eds. Routledge 2015), 52

<sup>1371</sup> Paul Hainsworth, *The Extreme Right in Western Europe* (eds. Routledge 2008), 59

<sup>1372</sup> The Islamic State came onto the international scene in 2014 when it seized large swathes of territory in Syria and Iraq. It has become notorious for its brutality, including mass killings, abductions and beheadings. In June 2014, the group formally declared the establishment of a "caliphate" - a state governed in accordance with Islamic law, or Sharia, by God's deputy on Earth, or caliph: Aymenn Jawad al-Tamimi < The Dawn of the Islamic State of Iraq and ash-Sham> *Current Trends in Islamist Ideology* (2014) Vol. 16, 8 & 15.

<sup>1373</sup> Between 1997 and 2013, over one thousand girls were victims of sexual abuse. In 2010, five men of Pakistani origin were found guilty of sexual offences against girls aged as young as twelve years old. The Home Affairs Select Committee condemned the South Yorkshire Police and the Rotherham Metropolitan Borough Council for the poor handling of the abuses: Warwick Middleton, ‘Tipping Points and the Accommodation of the Abuser: Ongoing Incestuous Abuse during Adulthood’ 4 *International Journal for Crime, Justice and Democracy* 2,7

<sup>1374</sup> Huffington Post, ‘ISIS and Rotherham Fuelling One of the most worrying periods of right-wing extremism’ (29 August 2014): <[http://www.huffingtonpost.co.uk/2014/08/29/edl-tommy-robinson-britain-first\\_n\\_5736294.html](http://www.huffingtonpost.co.uk/2014/08/29/edl-tommy-robinson-britain-first_n_5736294.html)> [Accessed 25 April 2015]

<sup>1375</sup> Hope not Hate Report: Nick Lowles & Graeme Atkinson ‘The State of Hate in 2015’ (2016 Hope not Hate)

<sup>1376</sup> Hope not Hate: This is a non-governmental organisation in the UK working on issues of hate predominately through awareness raising and research on the far-right movement:< <http://www.hopenothate.org.uk/who-we-are/our-goal/>>

<sup>1377</sup> Hope not Hate: Nick Lowles & Graeme Atkinson ‘The State of Hate in 2015’ (2016 Hope not Hate), 4

‘ends 2014 in its worst state for almost 20 years.’<sup>1378</sup> In relation to the political participation of far-right parties, it must be noted that far-right groups have found it difficult to mobilise due to the functioning of the electoral system but also because of its increasing fragmentation.<sup>1379</sup> Nevertheless, there does exist an ‘appetite for a successful far-right party to emerge’<sup>1380</sup> as manifested in the rise of UKIP, with internal issues of entities such as the BNP and the EDL having led to the demise of the latter. Either way, it cannot be ignored that the far-right does, in fact, impact the general political climate of this country, with mainstream political parties seeking to attract the electorate which is concerned about immigration and Islam. For example, in 2015, David Cameron described migrants seeking to arrive in the UK from Calais as ‘a swarm of people.’<sup>1381</sup> Another example of bigotry rhetoric moving into mainstream politics is Cameron’s speech on the failure of multiculturalism in 2011.<sup>1382</sup> Further, an older but direct example of this impact was the Labour Party’s statement in 2002 that it was people’s ‘fear of migration, and asylum seekers in particular, which was responsible for an increase in support for the BNP and that, therefore, the government had to be seen to be addressing these concerns.’<sup>1383</sup> Although the influence of the far-right on the mainstream is evident in other countries as well, the particularities attached to the first-past-the-post system,<sup>1384</sup> which constitute serious obstacles for smaller parties to enter the national parliament, have the simultaneous effect of further pushing mainstream parties into the realm of the far-right so as to attract populist votes which voters may be afraid to give to smaller parties, in case these are lost due to the electoral system.

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<sup>1378</sup> Hope not Hate: Matthew Collins & Carl Morphett, ‘The State of Hate in 2014’ (2015 Hope not Hate)

<sup>1379</sup> Hope not Hate: Matthew Goodwin & Jocelyn Evans ‘From Voting to Violence? Far Right Extremism in Britain’ (Hope not Hate 2012), 12

<sup>1380</sup> Juris Pupcenoks & Ryan McCabe, ‘The Rise of the Fringe: Right-Wing Populists, Islamists and Politics in the UK’ (2014) 33 *Journal of Muslim Minority Affairs* 2, 174

<sup>1381</sup> Independent: ‘David Cameron Description of Migrant ‘Swarm’ Condemned as ‘Irresponsible’ and ‘Extremely Inflammatory’ by Human Rights Group’ (30 July 2015): <<http://www.independent.co.uk/news/world/europe/calais-crisis-live-david-cameron-says-swarm-of-illegal-migrants-will-not-be-offered-safe-haven-10426083.html>> [Accessed 30 November 2015]

<sup>1382</sup> For excerpts of the speech see: BBC News: ‘State Multiculturalism has Failed, says David Cameron’ (5 February 2011) : <<http://www.bbc.com/news/uk-politics-12371994>> [Accessed 1 June 2015]

<sup>1383</sup> John E. Richardson & Ruth Wodak ‘Recontextualising Fascist Ideologies of the Past: Right-Wing Discourses on Employment and Nativism in Austria and the United Kingdom’ (2009) 6 *Critical Discourse Studies* 4, 251

<sup>1384</sup> The first-past-the-post is used to elect the UK Parliament and for local elections in England and Wales. Under this system, the UK (for parliamentary elections) or the local authority (for local elections) is divided into constituencies or wards. Voters can vote for one candidate. The candidate who wins the most votes in each constituency or ward is the winner. The rest of the votes do not count.

Immigration, Islam and multiculturalism lie at the heart of the far-right movement in the UK with ‘Islamophobia [having] increasingly become part of extreme right-wing terrorist ideology.’<sup>1385</sup> However, as noted by Hope not Hate, one of the difficulties the far-right movement is currently facing is its own identity since its key actors, although manipulating the fertile ground upon which Islamophobia can feed off and develop, ‘find it hard to disengage from their old racist and thuggish tendencies and beliefs.’<sup>1386</sup> Since Islamophobia is such a central issue to the far-right in this country, it is necessary to put forth relevant figures on some the victims of far-right speech and activity in England and Wales. The latest report on the issue is from 2011 which found 2.7 million Muslims living in England and Wales in comparison to 1.55 million in 2001.<sup>1387</sup> Further, the Muslim population is growing at faster rates than the overall population with more children and fewer elderly persons.<sup>1388</sup> In addition, although an emphasis on Muslims as targets of the far-right is indisputable, ethnic minorities also fall victim to this movement. As such, the relevant statistics of ethnic minorities living in England and Wales are necessary, with a 2011 survey demonstrating that 83.35% of the population is White British with the remainder belonging to an ethnic minority group.<sup>1389</sup> What will be discerned from this section’s analysis is that, even though an equivalent of the systematically violent extremism as manifested by the likes of Golden Dawn in Greece cannot be found in the UK today, the far-right does manifest itself in the form of several political parties, non-party groups and the subculture milieu, which will be assessed hereinafter. Although in the past, the far-right in the UK was more violent than today, this is not to say that it is now free from violent elements. For example, in relation to terrorism offences, the Government’s anti-terror Contest Strategy<sup>1390</sup> noted that in 2011 there were fourteen people, associated with extreme right-wing groups, serving prison

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<sup>1385</sup> HM Government, Prevent Strategy (2011), para. 5.46

<sup>1386</sup> Hope not Hate, Matthew Goodwin & Jocelyn Evans ‘From Voting to Violence? Far Right Extremism in Britain’(2012) 12

<sup>1387</sup> Office for National Statistics: 2011 Census – Religion in England and Wales: <<http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcn%3A77-286262>> [Accessed 2 May 2015]

<sup>1388</sup> One in three Muslims is under 15, compared with fewer than one in five overall. There are also fewer elderly Muslims, with 4% aged over 65, compared with 16% of the overall population: Office for National Statistics: UK Census of the Muslim population in the UK for 2011

<sup>1389</sup> Mixed race: 1.80%, Asian: 5.87, Black: 2.81 and Chinese 0.82%: Office for National Statistics: UK Census for Ethnicity and National Identity in England and Wales for 2011

<sup>1390</sup> The Contest Strategy is the general anti-terrorist strategy adopted by the UK and part of this strategy is the Prevent Strategy which aims to stop people becoming terrorists or supporting terrorism. The Channel programme is a central tenet of the Prevent Strategy and is a government anti-terror programme which provides support and guidance for persons at risk of becoming involved with violent extremism.

sentences for terrorism offences, even though none of these groups is defined as a terrorist group.<sup>1391</sup> Further, approximately 8% of the persons referred to the Channel programme were linked to the far-right.<sup>1392</sup> In addition, violence has marked the activities of far-right groups with members of the Aryan Strike Force being convicted for, *inter alia*, terrorism-related offences in 2010 and a BNP member and former election candidate being convicted in 2007 for keeping chemical explosives for purposes of preparing for the ‘evils of uncontrolled immigration’<sup>1393</sup> and the ‘forthcoming race war.’<sup>1394</sup>

### 1.3.1 Political Parties

To map out the development of the political activity of the far-right movement, information regarding the performance of far-right political parties in the last two general elections shall be put forth. There is currently only one such political party in the Parliament, that being UKIP, which holds one seat following the 2015 general elections. It must be noted that UKIP’s winning of just one seat in the 2015 elections does not reflect the number of votes received but results from the ‘first past the post’<sup>1395</sup> electoral system adopted by the country. Either way, UKIP did see a large increase in votes, going from 919,546 in 2010 to nearly four million in 2015<sup>1396</sup> and also, as already noted, won the greatest number of votes in the 2014 European Parliament elections. The BNP, which in 2015 saw a 99.7% fall in votes in relation to the 2010 general elections,<sup>1397</sup> has become almost extinct. Also, in the general elections of 2010, the *National Front* received 10,784 votes falling to 1,114 in 2015. An overview of the political parties, groups and the subculture milieu will be provided below. Before World War II, the British extreme-right was occupied by several small and insignificant parties including the *Britons Society*, *The Fascist League*, *The Yorkshire Fascists* and *The British Fascisti*. The ‘only serious attempt at fascist

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<sup>1391</sup> HM Government Contest Strategy (2011), para. 2.39

<sup>1392</sup> HM Government, Prevent Strategy (2011), para.9.23

<sup>1393</sup> Institute for Strategic ‘Briefing Paper- The New Radical Right: Violent and Non-Violent Movements in Europe’ (2012) 5

<sup>1394</sup> Institute for Strategic ‘Briefing Paper- The New Radical Right: Violent and Non-Violent Movements in Europe’ (2012) 5

<sup>1395</sup> In this system the candidate with the most votes in each constituency wins and becomes the MP for that seat. All other votes are disregarded. It is examined in section 6.2.1

<sup>1396</sup> UKIP received 3,881,129 votes during the 2015 General Elections

<sup>1397</sup> The British National Party received just 1,667 in the 2015 UK general election, a large drop from 2010 when it garnered 563,743.

mobilisation was undertaken by the British Union of Fascists<sup>1398</sup> which occurred in 1932, during times of economic hardship. Although it was an electoral failure, the party did have a large but unstable membership with 40,000 – 50,000 members in 1934.<sup>1399</sup> The party was proscribed in 1940 and is the only political party of the UK ever to have been proscribed.<sup>1400</sup> This occurred under the Defence Regulation 18b (AA) of the Defence (General) Regulations 1939.<sup>1401</sup>

### 1.3.1 (i) The National Front

The *National Front* was created in 1967 as a ‘result of an uneasy merger between rival groups’<sup>1402</sup> such as the *League of Empire Loyalists*, the *Racial Preservation Society* and the *Greater Britain Movement*.<sup>1403</sup> This developed into Britain’s fourth largest political party in the Seventies.<sup>1404</sup> It had a reputation of violence<sup>1405</sup> and racist rhetoric which included anti-immigration and anti-Semitism and a belief in the superiority of Anglo-Saxons.<sup>1406</sup> The *National Front* was prohibited from accessing public halls under the control of the Council, particularly when these were controlled by the *Labour Party*. More particularly, the *Labour Party* prohibited this party from using local buildings in more than one hundred areas it controlled.<sup>1407</sup> As such, the need to go onto the streets was further accentuated and ‘high profile street processions became one of the Front’s principal means of attempting to communicate with a wider audience.’<sup>1408</sup> It must also be noted that, during the 1970s, *The National Front* became increasingly involved in racist violence.<sup>1409</sup> The party slowly fizzled out following Margaret

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<sup>1398</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party*’ (eds. Routledge 2011) 20

<sup>1399</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party*’ (eds. Routledge 2011) 21

<sup>1400</sup> Alfred Simpson, *In the Highest Degree Odious. Detention Without Trial in Wartime Britain* (eds. Oxford University Press 1992) 172-191.

<sup>1401</sup> These were regulations drafted during the second world war for purposes of limiting Nazi-affiliated actions in the United Kingdom.

<sup>1402</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party*’ (eds. Routledge 2011) 25

<sup>1403</sup> Nigel Copsey and John E. Richardson, ‘*Cultures of Post-War British Fascism*’ (eds. Routledge 2015), 53

<sup>1404</sup> It won over 100,000 voters at the general election in October 1974, almost 200,000 at the general election in 1979.

<sup>1405</sup> Robert Ford & Matthew Goodwin, ‘*Revolt on the Right – Explaining Support for the Radical Right in Britain*’ (eds. Routledge 2014) 23

<sup>1406</sup> Nigel Copsey and John E. Richardson, ‘*Cultures of Post-War British Fascism*’ (eds. Routledge 2015), 59

<sup>1407</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party*’ (eds. Routledge 2011) 34

<sup>1408</sup> Nigel Copsey and John E. Richardson, ‘*Cultures of Post-War British Fascism*’ (eds. Routledge 2015) 52

<sup>1408</sup> Paul Hainsworth, ‘*The Extreme Right in Western Europe*’ (eds. Routledge 2008) 49

<sup>1409</sup> Daniel Trilling, ‘*Bloody Nasty People – The Rise of Britain’s Far Right*’ (eds. Verso 2012) 40

Thatcher's rise to power<sup>1410</sup> in 1979 and is, today, nearly obsolete, with its membership ranging between two and three hundred persons.<sup>1411</sup> This number is the membership of both National Fronts since the party split into North/South sections. Either way, it continues to attract members that have a 'fanaticism for racism, ultra-nationalism and outright Nazism.'<sup>1412</sup> The party was de-registered by the Electoral Commission in 2014 due to administrative issues and re-registered in 2015<sup>1413</sup> and today has links with violent far-right groups and activities.<sup>1414</sup> The *New Dawn Party* was born from the ashes of the losing faction of the *National Front*.<sup>1415</sup>

### 1.3.1 (ii) The British National Party

The BNP was founded in 1982, predominantly by members of the National Front, and, was initially led by John Tyndall<sup>1416</sup> who remained leader until 1999.<sup>1417</sup> This party describes itself as a party of civic and ethnic British nationalism which embraces national sovereignty and the integrity of the indigenous British.<sup>1418</sup> The BNP adopts a stern anti-immigration rhetoric, pledging to 'stemming and reversing the immigration and migration of peoples'<sup>1419</sup> and to restoring the indigenous British as the majority group of the country.<sup>1420</sup> Since 2001, anti-Islam rhetoric and activity have heavily influenced the party's mandate.<sup>1421</sup> During Tyndall's time, the party was strongly committed to the 'core pillars of biological racism, radical xenophobia and anti-democratic appeals'<sup>1422</sup> as well as to anti-Semitism.<sup>1423</sup> It argued for forced deportation of non-white immigrants, suggested that the British Empire should be restored and suggested

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<sup>1410</sup> Report of Hope not Hate on the National Front:<<http://www.hopenothate.org.uk/hate-groups/nf/>> [Accessed 9 May 2015]

<sup>1411</sup> Hope not Hate: Matthew Collins & Carl Morphet, 'The State of Hate in 2015' (2016) 17

<sup>1412</sup> Hope Not Hate: National Front: <<http://www.hopenothate.org.uk/hate-groups/nf/>> [Accessed 9 May 2015]

<sup>1413</sup> Electoral Commission: National Front: <<http://search.electoralcommission.org.uk/Registrations/PP2707>> [Accessed 9 February 2016]

<sup>1414</sup> Hope not Hate, Matthew Collins & Carl Morphet, 'The State of Hate in 2015' (2016) 18

<sup>1415</sup> Hope not Hate, Matthew Collins & Carl Morphet, 'The State of Hate in 2015' (2016) 19

<sup>1416</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party* (eds. Routledge 2011) 36

<sup>1417</sup> Nigel Copsey and John E. Richardson, 'Cultures of Post-War British Fascism' (eds. Routledge 2015) 27

<sup>1418</sup> BNP Constitution version 14.4, para.3.2.1:

<[https://m.bnp.org.uk/sites/default/files/constitutionbnpnov272015\\_2.pdf](https://m.bnp.org.uk/sites/default/files/constitutionbnpnov272015_2.pdf)> [Accessed 9 May 2015]

<sup>1419</sup> BNP Constitution version 14.4, para.3.2.3:

<[https://m.bnp.org.uk/sites/default/files/constitutionbnpnov272015\\_2.pdf](https://m.bnp.org.uk/sites/default/files/constitutionbnpnov272015_2.pdf)> [Accessed 9 May 2015]

<sup>1420</sup> BNP Constitution version 14.4, para.3.2.3:

<[https://m.bnp.org.uk/sites/default/files/constitutionbnpnov272015\\_2.pdf](https://m.bnp.org.uk/sites/default/files/constitutionbnpnov272015_2.pdf)> [Accessed 9 May 2015]

<sup>1421</sup> Nigel Copsey and John E. Richardson, 'Cultures of Post-War British Fascism' (eds. Routledge 2015) 77

<sup>1422</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party* (eds. Routledge 2011) 36

<sup>1423</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party* (eds. Routledge 2011) 38



several authoritarian measures that stemmed from Nazi times.<sup>1424</sup> It went down a similar path as that of The *National Front* with marches and rallies marred by violence and attacks on the opposition which ‘sought to create ethnic divisions by encouraging – or even perpetrating racial assaults.’<sup>1425</sup> As people’s finances and education improved, this radical approach was increasingly failing to attract support.<sup>1426</sup> Following the party’s take over by Nick Griffin, several changes were made so as to soften its image and make it more attractive to mainstream voters. As Griffin noted, he wanted to make such amendments and transformations so as to avoid ‘the inevitable media smear of Nazi.’<sup>1427</sup> Steps included replacing the party’s British Nationalist newspaper with the ‘*Voice of Freedom*’ newspaper, a magazine entitled ‘*Identity*’ and establishing a record company to produce English folk music to replace its previous association with white supremacist music.<sup>1428</sup> Further, in 2005, the party published new guidelines for its activists named ‘Language and Concepts and Discipline Manual.’ Therein, it noted that the party was not to be referred to, by members, as fascist but, rather, as a ‘right-wing populist party’ which embraces ‘like many political parties all over the world, the right-of-centre views traditional to ordinary working people who are not leftist.’<sup>1429</sup> Through this description, the party sought to present itself as a regular party for regular people, with no extreme views but, simply, the opposite side of a leftist believer. Further, under Griffin, the party went from adopting a hard-line approach to the forced deportation of non-white persons to that of the promotion of assisted repatriation.<sup>1430</sup> However, it must not be ignored that ‘although the emphasis has shifted, racism was still at the core of the BNP’s mandate.’<sup>1431</sup> BNP’s affiliation to violence was more emphatic during the 1990’s with a 1997 Human Rights Watch Report noting that, while the BNP is ‘not directly responsible for a large degree of racist violence, it does recruit from skinhead and

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<sup>1424</sup> Daniel Trilling, ‘*Bloody Nasty People – The Rise of Britain’s Far Right*’ (eds. Verso 2012) 19

<sup>1425</sup> Daniel Trilling, ‘*Bloody Nasty People – The Rise of Britain’s Far Right*’ (eds. Verso 2012) 20

<sup>1426</sup> Matthew J. Goodwin, ‘*New British Fascism – Rise of the British National Party*’ (eds. Routledge 2011) 42

<sup>1427</sup> Nick Griffin, ‘*Moving On, Moving Up: Campaign for British National Party*’ NG Election Campaign (1999)

<sup>1428</sup> Nigel Copsey and John E. Richardson, ‘*Cultures of Post-War British Fascism*’ (eds. Routledge 2015) 154

<sup>1429</sup> Daniel Trilling, ‘*Bloody Nasty People – The Rise of Britain’s Far Right*’ (eds. Verso 2012) 132

<sup>1430</sup> Paul Hainsworth, ‘*The Extreme Right in Western Europe*’ (eds. Routledge 2008) 71

<sup>1431</sup> Daniel Trilling, ‘*Bloody Nasty People – The Rise of Britain’s Far Right*’ (eds. Verso 2012) 131

football hooligan groups that are involved in racist violence.<sup>1432</sup> Further, some of the party's members have been convicted for incitement to racial hatred<sup>1433</sup> and racist attacks.<sup>1434</sup>

The BNP initially made no particular impact on the British political scene despite receiving a local government seat in 1993.<sup>1435</sup> However, as the twenty-first century approached, the increasing public concern over immigrants and settled Muslims, the perceived inefficacy of the mainstream parties to function effectively<sup>1436</sup> as well as worries over the country's economy,<sup>1437</sup> all provided a sphere through which the BNP could, and, did, develop effectively. A perfect point to illustrate this advancement was that between 1992-2010, the number of votes the party received in general elections 'increased more than seventy-fold, rising from seven thousand to more than half a million.'<sup>1438</sup> The BNP was the central player of the far-right between 2001-2010,<sup>1439</sup> with electoral success including over fifty councillors, one position on the Greater London Assembly<sup>1440</sup> and two seats in the European Parliament in 2009.<sup>1441</sup> Given its increasing success between 2001-2010, the party set high hopes for the 2010 general elections, placing great emphasis, in its manifesto, on the betrayal of the British people by mainstream political parties.<sup>1442</sup> However, following 2010 and until today its situation has gone 'from bad to worse.'<sup>1443</sup> With approximately three hundred to five hundred members, the party's demise is predominantly due to debt, internal strife, organisational problems and bad political tactics.<sup>1444</sup> As a result, this party has splintered, with some of its members having returned to the National Front and others moving to new groupings such as the *British Democratic Party* and the *English*

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<sup>1432</sup> Human Rights Watch Report: 'Racist Violence in the United Kingdom' (1995), 19

<sup>1433</sup> R v Griffin [1998] Crim. L.R. 418: In 1998, Nick Griffin, the leader of the BNP was convicted of violating section 19 of the Public Order Act 1986, relating to incitement to racial hatred. He received a nine-month prison sentence, suspended for two years, and was fined £2,300.

<sup>1434</sup> The BNP's National Organiser Richard Edmonds was sentenced to three months in prison in 1994 for his part in a racist attack

<sup>1435</sup> Daniel Trilling, *Bloody Nasty People – The Rise of Britain's Far Right* (eds. Verso 2012) 52

<sup>1436</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party* (eds. Routledge 2011) 9-10

<sup>1437</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party* (eds. Routledge 2011) 13

<sup>1438</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party* (eds. Routledge 2011) 10

<sup>1439</sup> Institute for Strategic 'Briefing Paper- The New Radical Right: Violent and Non-Violent Movements in Europe' (2012) 5

<sup>1440</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party* (eds. Routledge 2011) 1

<sup>1441</sup> The BNP received 943,598 votes and gained two seats at the European Parliament

<sup>1442</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party* (eds. Routledge 2011) 1

<sup>1443</sup> Hope not Hate, Matthew Collins & Carl Morphett, 'The State of Hate in 2015' (2016) 17

<sup>1444</sup> Hope not Hate: BNP : <<http://www.hopenothate.org.uk/hate-groups/bnp/>> [Accessed 9 May 2015]

*Democrats*.<sup>1445</sup> In 2014, its leader Griffin was expelled for allegedly causing internal strife. Supporters of Griffin formed *British Voice* in 2014, a small, irrelevant party, which received no support from Griffin himself. He, instead, formed *British Unity*, a non-member organisation with about two thousand Facebook followers, active only online.<sup>1446</sup> By the 2015 general elections, the party only fielded eight candidates, in comparison to three hundred and thirty eight in 2010 and won just 0.44% of the vote.<sup>1447</sup> In January 2016, the Electoral Commission de-registered the BNP for failure to conform to the annual confirmation of registration details with the Commission and pay the annual fee of £25.<sup>1448</sup> It carried out all necessary procedures and was re-registered within a month. The BNP, although radically weakened, has undoubtedly left its mark on the far-right scene. For example, *Britain First*, discussed below, has also emerged from the ashes of the BNP and at the end of 2014, Jack Sen, a BNP spokesperson, left the party to form another far-right group, *The British Renaissance*. Moreover, the BNP has contributed to infecting the rhetoric put forth by the mainstream parties as manifested, for example, in Cameron's argument that multiculturalism has failed or the Labour Party's position that the government needed to be considered active in tackling concerns which had led to the rise of the BNP, such as migration.

### 1.3.1 (iii) The United Kingdom Independence Party

UKIP was founded in 1993 with the central aim of removing the UK from the EU.<sup>1449</sup> During the first ten years of its existence, the party contested twenty-five parliamentary by-elections, averaging about 1.7%.<sup>1450</sup> However, twenty years on, in 2013, the party demonstrated that it had made a deep and serious impact on British politics, taking significant steps in local elections and European elections whilst gathering over 30,000 members and often polling ahead of the Liberal

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<sup>1445</sup> Robert Ford & Matthew Goodwin, *Revolt on the Right – Explaining Support for the Radical Right in Britain* (eds. Routledge 2014) 7

<sup>1446</sup> Hope not Hate, Matthew Collins & Carl Morphett, 'The State of Hate in 2014' (2015)

<sup>1447</sup> Hope not Hate, Matthew Collins & Carl Morphett, 'The State of Hate in 2015' (2016)

<sup>1448</sup> Electoral Commission statement on removal of British National Party from register of political parties (8 January 2015): <http://www.electoralcommission.org.uk/i-am-a/journalist/electoral-commission-media-centre/news-releases-donations/electoral-commission-statement-on-removal-of-british-national-party-from-register-of-political-parties> > [Accessed 9 January 2015]

<sup>1449</sup> UKIP Constitution, para.2.3: < [http://www.ukip.org/the\\_constitution](http://www.ukip.org/the_constitution) > [Accessed 10 May 2015]

<sup>1450</sup> Robert Ford & Matthew Goodwin, *Revolt on the Right – Explaining Support for the Radical Right in Britain* (eds. Routledge 2014) 2

Democrats as the third most popular party in the UK.<sup>1451</sup> As a result, this party has been described as ‘the most significant new British political party in a generation.’<sup>1452</sup> In relation to UKIP’s development, it is important to reiterate that one of the factors preventing smaller parties, such as UKIP, from proceeding politically is the first-past-the-post electoral system of the UK,<sup>1453</sup> as was demonstrated in the 2015 elections. While UKIP received nearly four million votes,<sup>1454</sup> and would have constituted the third largest party of the Parliament had there been a system of proportional representation, it received just one seat due to the country’s electoral system. The party has not remained within its original sphere of Euroscepticism, but has increasingly become active in the field of, *inter alia*, anti-immigrant and anti-Muslim rhetoric and has ‘developed a suite of radical right-wing policies.’<sup>1455</sup> Even though Nigel Farage<sup>1456</sup> insisted that ‘he is not a racist and that his party is colour blind,’<sup>1457</sup> by 2010 the party was setting out a ‘combination of nationalist, xenophobic, Eurosceptic and populist policies.’<sup>1458</sup> In brief, UKIP’s three main pillars include ‘hard Euroscepticism anti-immigration and a populist backlash against the established political class.’<sup>1459</sup> Further, there exists a plethora of examples that pinpoint the party’s far-right ideology such as a UKIP member and candidate for local elections arguing that ‘Islam is a cancer that needs eradicating, multiculturalism does not work in this country clear them all off to the desert with their camels that’s their way of life.’<sup>1460</sup> Other statements include a former UKIP’s candidate for council elections holding that ‘I reckon dogs

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<sup>1451</sup> Robert Ford & Matthew Goodwin, *Revolt on the Right – Explaining Support for the Radical Right in Britain* (eds. Routledge 2014) 2-3

<sup>1452</sup> Robert Ford & Matthew Goodwin, *Revolt on the Right – Explaining Support for the Radical Right in Britain* (eds. Routledge 2014) 2

<sup>1453</sup> Institute for Strategic ‘Briefing Paper- The New Radical Right: Violent and Non-Violent Movements in Europe’ (2012) 5

<sup>1454</sup> 3,881,129 votes: <<http://www.bbc.com/news/election/2015/results>> [Accessed 11 May 2015]

<sup>1455</sup> Open Society Foundations, Julian Baggini, ‘A Very British Populism’ (2013 Counterpoint) 30

<sup>1456</sup> Nigel Farage announced his resignation leader of UKIP following the EU referendum results, citing personal reasons.

<sup>1457</sup> The Guardian: ‘Farage’s ‘Fifth Column’ Remarks must not Go Unchallenged’ <<http://www.theguardian.com/commentisfree/2015/mar/12/nigel-farage-muslim-fifth-column-ukip>> (12 March 2015) [Accessed 15 July 2015]

<sup>1458</sup> Hope not Hate, Matthew Goodwin & Jocelyn Evans ‘From Voting to Violence? Far Right Extremism in Britain’ (2012) 12

<sup>1459</sup> Robert Ford & Matthew Goodwin, *Revolt on the Right – Explaining Support for the Radical Right in Britain* (eds. Routledge 2014) 277-278

<sup>1460</sup> Statement made by UKIP member Ken Chapman in 2013 who stood for election to Amber Valley Borough Council in Derbyshire.

are more intelligent, better company and certainly better behaved than most Muslims.’<sup>1461</sup> These statements are not isolated examples and simply add to the general approach UKIP adopts to immigration and the need to limit it. UKIP’s bigotry and prejudice are not restricted to particular ethnic or religious groups as there exists an ‘inherent homophobia within UKIP’<sup>1462</sup> with several of its representatives having made homophobic remarks. For example, UKIP’s by-election candidate, Roger Helmer, argued that the National Health Service should fund gay cure therapy<sup>1463</sup> and stated that homosexuality is ‘abnormal and undesirable.’<sup>1464</sup> In relation to the EU referendum, UKIP found fertile ground on which to disseminate its anti-immigrant and anti-EU rhetoric. More particularly, following the sexual attacks on women in Cologne at the end of 2015, Farage held that ‘after Cologne, the EU referendum is about nothing less than the ‘the safety and security of British women.’<sup>1465</sup> UKIP’s stance, described above, has resulted in several academics suggesting that UKIP and the BNP ‘may be drawing on the same well of support and may be part of the same phenomenon.’<sup>1466</sup> It has even been argued that ‘UKIP feels like the BNP – only with blazers.’<sup>1467</sup> It has also been noted that what the two parties have in common is ‘the psychological suggestion that ordinary people are being betrayed by the political class. They are paying too much fuel tax, too much council tax, they are being pushed around by foreigners....[they] have become victims in their own countries.’<sup>1468</sup> Furthermore, an empirical study of UKIP’s electorate demonstrated that, although the central reason for its support is Euroscepticism, it has also rallied people who are ‘deeply hostile towards immigrants....and

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<sup>1461</sup> Statement made by Joseph Quirk, former UKIP candidate for Boldon Colliery Ward on South Tyneside Council: <<http://leftfootforward.org/2015/02/is-ukip-a-racist-party-these-15-comments-would-suggest-so/>> [Accessed 11 May 2015]

<sup>1462</sup> Huffington Post: ‘UKIP continues to Normalise Homophobia’ (13 June 2014): <[http://www.huffingtonpost.co.uk/anna-tippet/ukip-homophobia\\_b\\_5484455.html](http://www.huffingtonpost.co.uk/anna-tippet/ukip-homophobia_b_5484455.html)> [Accessed 10 May 2015]

<sup>1463</sup> Huffington Post: ‘UKIP MEP Roger Helmer Says NHS Should Fund ‘Gay Cure Therapy’ (1 June 2014): <[http://www.huffingtonpost.co.uk/2014/06/01/ukip-mep-roger-helmer-nhs-gay-cure\\_n\\_5427003.html](http://www.huffingtonpost.co.uk/2014/06/01/ukip-mep-roger-helmer-nhs-gay-cure_n_5427003.html)> [Accessed 10 May 2015]

<sup>1464</sup> UKIP MEP who said homosexuality was ‘abnormal’ is party’s candidate in Newark by-election (6 May 2014): <<http://www.telegraph.co.uk/news/politics/ukip/10811738/Ukip-MEP-who-said-homosexuality-was-abnormal-is-party-candidate-in-Newark-by-election.html>> [Accessed 20 May 2015]

<sup>1465</sup> UKIP MEP’s statements: ‘Brexit vote about the safety and security of British women - Nigel Farage’ (19 01 2016): <[http://www.ukipmeps.org/news\\_1114\\_Brexit-vote-about-the-safety-and-security-of-British-women---Nigel-Farage.html](http://www.ukipmeps.org/news_1114_Brexit-vote-about-the-safety-and-security-of-British-women---Nigel-Farage.html)> [Accessed 10 February 2016]

<sup>1466</sup> Peter John and Helen Margetts, ‘The Latent Support for the Extreme Right in British Politics.’ (2009) 32 *West European Politics* 3, 501

<sup>1467</sup> Robert Ford & Matthew Goodwin, *Revolt on the Right – Explaining Support for the Radical Right in Britain* (eds. Routledge 2014) 146

<sup>1468</sup> Robert Ford & Matthew Goodwin, *Revolt on the Right – Explaining Support for the Radical Right in Britain* (eds. Routledge 2014) 8

strikingly similar to supporters of the BNP.<sup>1469</sup> In fact, senior activists of the UKIP admit that, following the demise of the BNP, UKIP ‘actively targeted voters who had previously held their nose while supporting extremists.’<sup>1470</sup> This has led to UKIP being looked at as a ‘polite alternative to the right-wing extremist BNP.’<sup>1471</sup> This politeness may also be traced back to the fact that the UKIP was founded on the doctrine of euroscepticism, free of any affiliation to themes such as biological racism and racial violence, a point which it sees as a ‘reputational shield’ which has further been developed by the party in other instances. For example, in 2013 Farage criticised the government’s plan to facilitate irregular migrants to leave the UK as ‘nasty’ and ‘not the British way.’<sup>1472</sup> Very interestingly, it seems that this shield has also been effective in avoiding scrutiny by civil society. More particularly, the 2014 State of Hate report, issued by Hope not Hate, does not incorporate UKIP in its analysis of the far-right, even though it noted that ‘while UKIP is not the BNP and Farage is not Griffin, it is clear that most former BNP voters feel quite at home in the UKIP stable.’<sup>1473</sup> This dissertation will incorporate UKIP in its analysis given that, notwithstanding the party’s reputational shield and its efforts to remain legitimate in the eyes of the electorate, the crux of the matter is that it nevertheless advocates ideas and values that are against principles of human rights and equality and puts forth statements and uses language prejudicial to particular groups, with some examples referred to above. As such, it would be unwise and unfair to disregard this party in the present analysis only because of a bit of politeness which, in any case, has served as a vehicle of success for ‘Britain’s politically underrepresented populist impulses.’<sup>1474</sup>

### 1.3.1 (iv) Britain First

*Britain First* was formed in 2011 and registered with the Electorate Commission in 2014 by ex-

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<sup>1469</sup> Hope not Hate, Matthew Goodwin & Jocelyn Evans ‘From Voting to Violence? Far-Right Extremism in Britain’ (2012), 12

<sup>1470</sup> Robert Ford & Matthew Goodwin, ‘*Revolt on the Right – Explaining Support for the Radical Right in Britain*’ (eds. Routledge 2014) 273

<sup>1471</sup> Hope not Hate, Matthew Goodwin & Jocelyn Evans ‘From Voting to Violence? Far Right Extremism in Britain’ (2012), 12

<sup>1472</sup> Robert Ford & Matthew Goodwin, ‘*Revolt on the Right – Explaining Support for the Radical Right in Britain*’ (eds. Routledge 2014) 274

<sup>1473</sup> Hope not Hate, Matthew Collins & Carl Morphett, ‘The State of Hate in 2014’ (2015 Hope not Hate)

<sup>1474</sup> Open Society Institutes: Julian Baggini, ‘A Very British Populism’ (2013 Counterpoint) 30

BNP members<sup>1475</sup> and has approximately eight hundred to one thousand members.<sup>1476</sup> By 2014, it was the ‘most active group to emerge from the collapse of the BNP and EDL,<sup>1477</sup> seeking to ‘fill a vacuum left by the declining BNP and splintering EDL.’<sup>1478</sup> It put forward candidates for the European Parliament elections in Wales, receiving 0.9% of the votes.<sup>1479</sup> However, up until 2014 it was best known for its strong online presence with more than half a million followers on Facebook<sup>1480</sup> and its mosque attacks and Christian Patrols,<sup>1481</sup> although, during 2015, it stopped mosque raids and provocative street actions, attempting to appear mainstream, with its leader standing in the London Mayoral election in 2016.<sup>1482</sup> The founder of the group stepped down due to the increasingly racist and provocative nature *Britain First’s* rhetoric and activities were taking.<sup>1483</sup> Matthew Collins, Director of Research for Hope not Hate, noted that *Britain First* ‘is the most dangerous group to have emerged on the British far right scene for several years.’<sup>1484</sup> However, 2015 was a year of ‘stagnation’ for *Britain First* which did not manage to mobilise support offline as it had done online.<sup>1485</sup> *Britain First* will be further looked at in the section on case-law due to prosecutions being brought in relation to its assemblies and also a harassment incident carried out by its leader.

Other small to miniscule far-right parties include *Liberty GB* registered in 2013 with two hundred and ninety members. It’s position is that mainstream parties are ignoring the dangers posed by immigration, Islam and the dilution of British culture<sup>1486</sup> and envisages the implementation of ‘politics bordering on the revolutionary’<sup>1487</sup> to save Britain. In the 2014 EU

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<sup>1475</sup> Palmer, Ewan ‘Who are Britain First? The Far-Right Party ‘Invading’ Mosques’ (20 May 2014) International Business Times.

<sup>1476</sup> Matthew Collins & Carl Morphett, ‘The State of Hate in 2015’ (2016 Hope not Hate) 16

<sup>1477</sup> Hope not Hate Report: Britain First: <<http://www.hopenothate.org.uk/hate-groups/bf/>> [Accessed 12 May 2015]

<sup>1478</sup> Hope not Hate Report: Britain First: <<http://www.hopenothate.org.uk/hate-groups/bf/>> [Accessed 12 May 2015]

<sup>1479</sup> The party came 8th of 11 in Wales, with 6,633 votes (0.9%), "Vote 2014 - Wales". BBC News. Retrieved 25 May 2014.

<sup>1480</sup> Hope not Hate, Matthew Collins & Carl Morphett, ‘The State of Hate in 2014’ (2015)

<sup>1481</sup> Hope not Hate: Britain First: <<http://www.hopenothate.org.uk/hate-groups/bf/>> [Accessed 12 May 2015]

<sup>1482</sup> Hope not Hate, Nick Lowles & Graeme Atkinson ‘The State of Hate in 2015’ (2016) 16

<sup>1483</sup> Hope not Hate Report: Britain First: <<http://www.hopenothate.org.uk/hate-groups/bf/>> [Accessed 12 May 2015]

<sup>1484</sup> Hope not Hate Report: Britain First: <<http://www.hopenothate.org.uk/hate-groups/bf/>> [Accessed 12 May 2015]

<sup>1485</sup> Hope not Hate, Nick Lowles & Graeme Atkinson ‘The State of Hate in 2015’ (2016) 12

<sup>1486</sup> Liberty GB website – mission statement: < <http://libertygb.org.uk/about-us/mission-statement>> [Accessed 12 May 2015]

<sup>1487</sup> Liberty GB website – mission statement: < <http://libertygb.org.uk/about-us/mission-statement>> [Accessed 12 May 2015]

Parliamentary elections it received a very small number of votes.<sup>1488</sup> In the same year, its party leader, a former UKIP member, was arrested on suspicion of racial or religious harassment whilst quoting passages from Winston Churchill's Book 'The River War'<sup>1489</sup> which a member of public was offended by.<sup>1490</sup> However, no further action was further taken against him. In addition, there is the *British Democratic Party*, formed in 2013 by an individual who was a former chair of the National Front and an MEP for the BNP.<sup>1491</sup>

### 1.3.1 (v) Non-Party Groups: The English Defence League (and others)

The EDL was created in 2009 following a Luton protest by an extremist group *Islam4UK* against British soldiers, occurring at the same time as a homecoming parade for soldiers returning from Afghanistan.<sup>1492</sup> The EDL identifies itself as a 'defender of English values and by extension and intention, Western values...against the threat of Islam.'<sup>1493</sup> Its sister organisation, the *Welsh Defence League*, was also created in 2009.<sup>1494</sup> The EDL is founded on Islamophobic beliefs, predominantly carrying out Islamophobic activities.<sup>1495</sup> However, there is evidence that it has increasingly targetted left-wing groups, such as the incident in 2011 where a group shouting EDL broke a window of a building where a *Unite against Fascism*<sup>1496</sup> meeting was being held.<sup>1497</sup> The EDL is a street-based organisation promoted through social network pages, with its activities being marches and demonstrations which have often resulted in violence in several cities<sup>1498</sup> with alcohol and football hooliganism often marking such events.<sup>1499</sup> It takes to the streets rather than to politics to advance its Islamophobic beliefs with a 'more fluid coalition of

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<sup>1488</sup> 0.02%: of the votes

<sup>1489</sup> Hope not Hate, Matthew Collins & Carl Morphett, 'The State of Hate in 2014' (2015)

<sup>1490</sup> This book contains Churchill's description of his experiences regarding Islam whilst a servicemen during war in the Sudan. For example, the Weston (Liberty GB's Leader) quoted passages such as 'improvident habits, slovenly systems of agriculture, sluggish methods of commerce, and insecurity of property exist wherever the followers of the Prophet rule or live.'

<sup>1491</sup> British Democratic Party websites: <<http://britishdemocraticparty.org/>> [Accessed 12 May 2015]

<sup>1492</sup> Juris Pupcenoks & Ryan McCabe, 'The Rise of the Fringe: Right- Wing Populists, Islamists and Politics in the UK' (2014) 33 *Journal of Muslim Minority Affairs* 2, 175

<sup>1493</sup> Juris Pupcenoks & Ryan McCabe, 'The Rise of the Fringe: Right Wing populists, Islamists and Politics in the UK' (2014) 33 *Journal of Muslim Minority Affairs* 2, 172

<sup>1494</sup> There is also the Scottish Defence League and the Northern Ireland Defence League.

<sup>1495</sup> Matthew J. Goodwin, 'New British Fascism: Rise of the British National Party' (eds. Routledge 2011) 6

<sup>1496</sup> Daniel Trilling, 'Bloody Nasty People – The Rise of Britain's Far Right' (eds. Verso 2012) 189

<sup>1497</sup> Daniel Trilling, 'Bloody Nasty People – The Rise of Britain's Far Right' (eds. Verso 2012) 189

<sup>1498</sup> Institute for Strategic 'Briefing Paper- The New Radical Right: Violent and Non-Violent Movements in Europe' (2012) 3

<sup>1499</sup> Hope not Hate: EDL: < <http://www.hopenothate.org.uk/hate-groups/edl/>> [Accessed 9 May 2015]



supporters'<sup>1500</sup> rather than a system of formal membership. Interestingly, and due to the absence of ethnic or other conditions for participation, the EDL has attracted groups such as Jewish anti-discrimination groups and gay rights activists for the promotion of anti-Islam positions thereby 'increasing interaction among previously disconnected networks.'<sup>1501</sup> The EDL has been 'at the forefront of violence around major Muslim centres and mosques'<sup>1502</sup> with the Home Secretary banning their demonstrations on several occasions for purposes of ensuring public order.<sup>1503</sup> Policing its marches and demonstrations cost the UK over seven million pounds in 2012<sup>1504</sup> while it is estimated that there are seven-hundred criminal convictions directly linked to the EDL and its activists.<sup>1505</sup> The EDL's most successful years were between 2009-2011, a period during which it was 'without doubt the largest social movement in the country.'<sup>1506</sup> However, from 2011 onwards, the EDL has 'dwindled, split and split again'<sup>1507</sup> as a result of media exposure to, *inter alia*, the agreement professed by some of its members with the actions of murderer Anders Breivik<sup>1508</sup> and the allegations of one of its founding members being a pedophile<sup>1509</sup> as well as other internal problems.<sup>1510</sup> Today, EDL continues its 'steady decline into oblivion.'<sup>1511</sup> The problems faced by the EDL resulted in many members breaking away and forming their own

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<sup>1500</sup> Hope not Hate, Matthew Goodwin & Jocelyn Evans 'From Voting to Violence? Far Right Extremism in Britain' (2012) 10

<sup>1501</sup> Juris Pupcenoks & Ryan McCabe, 'The Rise of the Fringe: Right -Wing Populists, Islamists and Politics in the UK' (2014) 33 *Journal of Muslim Minority Affairs* 2, 177

<sup>1502</sup> Institute for Strategic 'Briefing Paper- The New Radical Right: Violent and Non-Violent Movements in Europe' (2012) 7

<sup>1503</sup> See, *inter alia*, Institute for Strategic 'Briefing Paper- The New Radical Right: Violent and Non-Violent Movements in Europe' (2012) 7, BBC: 'English Defence League March in London is blocked' (27 August 2011): <<http://www.bbc.com/news/uk-england-london-14684704>> [Accessed 10 May 2015], BBC: 'Home Secretary bans Telford EDL march' (12 August 2011) <<http://www.bbc.com/news/uk-england-shropshire-14506941>> [Accessed 10 May 2015]

<sup>1504</sup> Institute for Strategic Dialogue 'Briefing Paper- The New Radical Right: Violent and Non-Violent Movements in Europe' (2012) 9

<sup>1505</sup> Institute for Strategic 'Briefing Paper- The New Radical Right: Violent and Non-Violent Movements in Europe' (2012) 9

<sup>1506</sup> Institute for Strategic 'Briefing Paper- The New Radical Right: Violent and Non-Violent Movements in Europe' (2012) 9

<sup>1507</sup> Hope not Hate, Matthew Collins & Carl Morphett, 'The State of Hate in 2014' (2015)

<sup>1508</sup> Anders Breivik, Norwegian far-right terrorist. In 2011 he killed eight people by setting off a van bomb amid government buildings in Oslo, then shot dead 69 participants of a Workers' Youth League (AUF) summer camp. In 2012 he was convicted of mass murder, causing a fatal explosion, and terrorism.

<sup>1509</sup> EDL news: <<http://edlnews.co.uk/2011/06/20/the-edl-and-paedophiles/>> [Accessed 10 May 2015]

<sup>1510</sup> Huffington Post, 'Woolwich Attack: Should We Expect a Violent Response?' (24 May 2013) <[http://www.huffingtonpost.co.uk/vidhya-ramalingam/woolwich-attack-edl-violence\\_b\\_3326463.html](http://www.huffingtonpost.co.uk/vidhya-ramalingam/woolwich-attack-edl-violence_b_3326463.html)> [Accessed 10 May 2015]

<sup>1511</sup> Hope not Hate, Nick Lowles & Graeme Atkinson 'The State of Hate in 2015' (2016) 9

groups, such as the *English National Resistance*, the *English Democratic Party*<sup>1512</sup> and the *EDL Infidels* which are ‘showing a taste for more traditional fascist politics.’<sup>1513</sup> In fact, the Infidels developed into a ‘network of regional fascist gangs pursuing a far more confrontational and violent agenda.’<sup>1514</sup> Other non-party groups include *National Action* which has been described as ‘dangerous.’<sup>1515</sup> One of its members, Zack Davies, was convicted of attempted murder for a racist attack on an Asian man in a local supermarket in Mold, North Wales in January 2015. The Court found that he had developed ‘extreme racist views’<sup>1516</sup> and that his attack against his victim was ‘planned and racially motivated.’<sup>1517</sup>

The *Aryan Strike Force* defines itself as a ‘white nationalist organisation’<sup>1518</sup> that seeks to remove all persons from ethnic minority backgrounds from the UK. Members of this group have been convicted for terrorism-related offences. *Blood and Honour* is an extremist music network promoting national socialism and anti-communism with divisions in the UK and abroad. It was set up in 1987 and used the Nazi swastika on the cover of one of its magazine issues.<sup>1519</sup> In addition to music festivals, it has a radio show and issues a magazine to promote its ideology.<sup>1520</sup> Interestingly, *Blood and Honour’s* online manual advises its followers that ‘the underground cell should also carefully plan its operations and avoid any contact with those engaged in the legal part of the struggle – for its own security’s sake but also so as not to jeopardize the ordinary political work by linking these organisations to subversive violence and what might be labeled as terrorism.’<sup>1521</sup> The *Racial Volunteer Force* is a violent white supremacist group established in 2003 which published a magazine ‘The Stormer’ for promoting the group’s racist ideas. In 2005,

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<sup>1512</sup> Huffington Post, ‘Woolwich Attack: Should We Expect a Violent Response?’ (24 May 2013) <[http://www.huffingtonpost.co.uk/vidhya-ramalingam/woolwich-attack-edl-violence\\_b\\_3326463.html](http://www.huffingtonpost.co.uk/vidhya-ramalingam/woolwich-attack-edl-violence_b_3326463.html)> [Accessed 10 May 2015]

<sup>1513</sup> Daniel Trilling, ‘*Bloody Nasty People – The Rise of Britain’s Far Right*’ (eds. Verso 2012) 189

<sup>1514</sup> Hope not Hate, Nick Lowles & Graeme Atkinson ‘The State of Hate in 2015’ (2016) 5

<sup>1515</sup> Hope not Hate, Nick Lowles & Graeme Atkinson ‘The State of Hate in 2015’ (2016) 22

<sup>1516</sup> This case is not reported so a secondary source is used: BBC News: Lee Rigby Revenge Attacker Zack Davies Given Life Sentence <<http://www.bbc.com/news/uk-wales-north-east-wales-34218184>> [Accessed 10 March 2016]

<sup>1517</sup> This case is not reported so a secondary source is used: BBC News: Lee Rigby Revenge Attacker Zack Davies Given Life Sentence: <<http://www.bbc.com/news/uk-wales-north-east-wales-34218184>> [Accessed 10 March 2016]

<sup>1518</sup> Aryan Strike Force website (about us): <<http://www.aryanstrikeforce318.org/about-us.html>> [Accessed 1<sup>st</sup> June 2015]

<sup>1519</sup> Blood and Honour Magazine, no.11

<sup>1520</sup> Blood and Honour website (index): <http://www.bloodandhonour.org/index2.html> [Accessed 1st June 2015]

<sup>1521</sup> Blood and Honour Manual:

<[https://archive.org/stream/BloodAndHonourFieldManual\\_912/BhFieldManual\\_djvu.txt](https://archive.org/stream/BloodAndHonourFieldManual_912/BhFieldManual_djvu.txt)> [Accessed 1<sup>st</sup> June 2015]

five *Radical Volunteer Force* supporters were imprisoned after being found guilty of conspiring to incite racial hatred through the articles which they disseminated. One such article was entitled ‘Roast a Rabbi’ which included how to make an incendiary device and offered ‘one hundred team points’ to the first one to set fire to a synagogue.<sup>1522</sup>

### 1.3.1 (vi) The Subculture Milieu - Combat 18

With regard to the subculture milieu, *Combat 18* is the only movement which ‘has no public profile whatsoever but a network of supporters.’<sup>1523</sup> This is a neo-Nazi movement formed in 1992 by the security wing of the BNP and bases its ideology on ‘hard-line racism and opposition to immigration.’<sup>1524</sup> *Combat 18* resulted from the creation of a security group for the BNP, however, this relationship did not work well since the BNP wanted to tone down its racist stance whilst the former did not want to go ahead with this but, instead, pursued a ‘violent uprising against the State, a race war.’<sup>1525</sup> The BNP ‘was trying to go legitimate... they [C18] didn’t want to go legitimate...’<sup>1526</sup> *Combat 18* even turned on BNP members who wanted to go ahead with electoral, rather than street politics.<sup>1527</sup> As can be seen on the website of *Aryan Strike Force*, the two are closely interrelated. In fact, that website denotes the importance of *Combat 18* being ‘leaderless,’<sup>1528</sup> ‘memberless’ and ‘faceless’<sup>1529</sup> as this means that ‘there isn’t even need to claim whatever action you do, the activism is and should always remain faceless... This is proven to be the most successful way to strike fear into our opponents, and this is the only way we will win this war!’<sup>1530</sup> *Combat 18*’s members have been associated with murder and violence.<sup>1531</sup> The more violent groups such as *Aryan Strike Force* and the subculture milieu may have a minor following in comparison to some parties or non-party groups but continue to exist as they cater to right-wing extremists with a taste for violence.

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<sup>1522</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party*’ (eds. Routledge 2011) 6

<sup>1523</sup> Hope not Hate, Matthew Collins & Carl Morphet, ‘The State of Hate in 2014’ (2015) This was reiterated in the 2016 Hope not Hate Report, 20

<sup>1524</sup> Nigel Copsey & John E. Richardson, ‘*Cultures of Post-War British Fascism*’ (eds. Routledge 2015), 149

<sup>1525</sup> Daniel Trilling, ‘*Bloody Nasty People – The Rise of Britain’s Far Right*’ (eds. Verso 2012) 68

<sup>1526</sup> Nigel Copsey and John E. Richardson, ‘*Cultures of Post-War British Fascism*’ (eds. Routledge 2015), 150

<sup>1527</sup> Daniel Trilling, ‘*Bloody Nasty People – The Rise of Britain’s Far Right*’ (eds. Verso 2012) 68

<sup>1528</sup> *Aryan Strike Force* website: <<http://www.aryanstrikeforce318.org/combat-18.html>> [Accessed 10 May 2015]

<sup>1529</sup> *Aryan Strike Force* website: <<http://www.aryanstrikeforce318.org/combat-18.html>> [Accessed 10 May 2015]

<sup>1530</sup> *Aryan Strike Force* website: <<http://www.aryanstrikeforce318.org/combat-18.html>> [Accessed 10 May 2015]

<sup>1531</sup> Nigel Copsey and John E. Richardson, ‘*Cultures of Post-War British Fascism*’ (eds. Routledge 2015), 153

### 1.3.1 (vii) Other Far-Right Groups and Movements

There exist several other small non-party groups<sup>1532</sup> which are all recent and all promote racist and Islamophobic ideas. There are also other small but radical parties and groups which sprung up following the Second World War but lasted only a short while including the *National Socialist Movement*<sup>1533</sup> and the *Greater Britain Movement*<sup>1534</sup>. The *National Democrats* and the *New Nationalist Party* are also in existence but have a very small number of members and, although aim to function within a legitimate ambit, often see their members carrying out violent activities.<sup>1535</sup>

### 1.3.2 The Far-Right in the United Kingdom: Concluding Comments

In sum, UKIP directly dominates the far-right representation on a political level, albeit with a marginal representation on a national and local level, whilst the movement, makes an impact on the rhetoric and promises made by other parties with a view to attracting voters concerned with issues such as Islam and immigration. Even though a strong far-right presence is not evident in Parliament, due to the electoral system which deprived UKIP of eighty-two seats and, even though some argue that the far-right is declining in the UK, the fact remains that it is still present both in the political sphere, the non-group sphere and the subculture milieu. An array of groups and parties has emerged from the splintering of the BNP and the EDL leading to increased fragmentation and disorganisation of the movement and that, in addition to an electoral system which does not favour small parties, has contributed to the current state of the far-right in the UK rather than a lack of actual or potential supporters of this ideology.

## 1.4 Definitional Framework

This section shall look at how this country defines key words under consideration in this dissertation with the aim being to set out the terminological setting upon which the subsequent legal and policy analyses will be based.

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<sup>1532</sup> As well as the groups noted in the text, other non-party groups include the South East Alliance, the British Movement, South East Alliance, National Action, British Renaissance New Right (a far-right think tank), Traditional Britain Group and Iona London Forum (far-right think tank), New British Union, Right Wing Resistance, Legion, A.K. Chesterton Trust, Friends of Oswald Mosley, League of St. George, National Patriotic Front, The Sons of St. George, Traditional Britain Group.

<sup>1533</sup> Daniel Trilling, *'Bloody Nasty People – The Rise of Britain's Far Right'* (eds. Verso 2012) 55

<sup>1534</sup> Daniel Trilling, *'Bloody Nasty People – The Rise of Britain's Far Right'* (eds. Verso 2012) 57

<sup>1535</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party'* (eds. Routledge 2011) 5

#### 1.4.1 Racial and Religious groups

In order to consider the formulation of racial groups in the legislation and case-law of England and Wales, it is important firstly to set out how the notion of race developed on a theoretical level in the country's recent history. In the Victorian era, it was against the backdrop of Britain as a colonial power that Britons developed their understanding of race in relation to Africans and Indians, although this was based on secondary sources such as literature, as the people themselves had no contact with those whom the State colonised.<sup>1536</sup> It must be noted that imperialism came with the 'widespread assumption of white superiority',<sup>1537</sup> and, thus, deeply affected the construction of the concept of race. In the period immediately after the Second World War, race as a notion was used much less on a number of levels, including social and scientific ones,<sup>1538</sup> given the manner in which it had been used and abused by the Nazi regime.<sup>1539</sup> In relation to the science industry, it was noted that 'the violence and hysteria of the Nazis...threatened to discredit race science.'<sup>1540</sup> However, on a societal level, matters changed following the arrival of new Commonwealth immigrants to the UK with race becoming, once again, increasingly used in the press but also in political and daily speech to refer to the different groups inhabiting the country.<sup>1541</sup> This continues to be the situation today, where race is used in a variety of legal, political and societal frameworks for purposes of differentiating between different groups, catering to the particular needs each group may have and forming policies and legislation and taking other initiatives based on such needs. Importantly, however, race is no longer used in the mainstream to differentiate biologically between inferior and superior groups inhabiting Britain. In the realm of far-right rhetoric and with the exception of some white supremacist groups, a biological conceptualisation of race has been substituted by a cultural one, although the difference between these two types of racism has been contested by Anthias, as discussed in section 1.2. It was in 1965 that the concept of race had to be tackled and transposed

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<sup>1536</sup> Les Back & John Solomos *Theories of Race and Racism: A Reader* (6<sup>th</sup> edn. Routledge 2005) 14

<sup>1537</sup> Tony Kushner, 'H. J Fleure: A Paradigm for Inter-War Race Thinking in Britain' 42 *Patterns of Prejudice* 2, 151

<sup>1538</sup> Les Back & John Solomos *Theories of Race and Racism: A Reader* (6<sup>th</sup> edn. Routledge 2005) 58

<sup>1539</sup> Tony Kushner, 'H. J Fleure: A Paradigm for Inter-War Race Thinking in Britain' 42 *Patterns of Prejudice* 2, 151

<sup>1540</sup> Tony Kushner, 'H. J Fleure: A Paradigm for Inter-War Race Thinking in Britain' 42 *Patterns of Prejudice* 2, 152

<sup>1541</sup> Les Back & John Solomos *Theories of Race and Racism: A Reader* (6<sup>th</sup> edn. Routledge 2005) 59

into legislation, namely with the Race Relations Act 1965, which was the first piece of legislation that sought to address the issue of racial discrimination. Although race is referred to, therein, and in successive Acts, including the latest one, the 2010 Equality Act, as a characteristic upon which a racial group could be formed, there is no definition of race, therein, or in any subsequent piece of legislation. The Equality Act 2010<sup>1542</sup> does not define racial groups, *per se*, but provides an overview of what it understands by this term. More particularly, it holds that ‘a racial group is a group of persons defined by reference to race’<sup>1543</sup> with race including colour, nationality or ethnic or national origins.<sup>1544</sup> The same Act offers no definition or extrapolation of religious groups but limits itself to defining religion or belief and the protected characteristic of religion or belief.<sup>1545</sup> This Act repealed the Race Relations Act 1976<sup>1546</sup> which had initially held a racial group to mean ‘a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person’s racial group refer to any racial group into which he falls.’<sup>1547</sup> However, determining what constitutes a racial group has been considered a notoriously difficult task in this country. Lord Simon has argued that the task of deciding whether a particular group constitutes a racial group is ‘rubbery and elusive,’<sup>1548</sup> a point which will be reflected from the below discussion. In finding that Sikhs<sup>1549</sup> constitute a racial group defined by their ethnic origin,<sup>1550</sup> in the case of *Mandla and another v Dowell Lee and another*,<sup>1551</sup> the House of Lords held that the term ‘ethnic’ in Section 3 of the 1976 Act was ‘to be construed relatively widely in a broad cultural and historic sense.’<sup>1552</sup> The Court noted that, in determining whether a particular group was an ethnic group, it ‘had to regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics’<sup>1553</sup> including two

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<sup>1542</sup> Equality Act 2010 c. 15

<sup>1543</sup> Equality Act 2010 c.15, Section 9(3)

<sup>1544</sup> Equality Act 2010 c.15, Section 9(1)

<sup>1545</sup> Equality Act 2010 c.15, Section 10

<sup>1546</sup> Race Relations Act 1976 1976 c. 74

<sup>1547</sup> Race Relations Act 1976 1976 c. 74, section 3.1

<sup>1548</sup> *Ealing LBD v Race Relations Board*

<sup>1549</sup> Other cases relating to Sikhs in this framework include: *Panesar v nestle Co. Ltd* [1980] IRLR 64, *Sing v British Rail Engineering Ltd* [1986] ICR 22 and *Dhanjal v British Steel plc* [1994] unreported.

<sup>1550</sup> Race Relations Act 1976 c.74, section 3.1 refers to a racial group as ‘a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person’s racial group refer to any racial group into which he falls.’

<sup>1551</sup> *Mandla and Another v Dowell Lee and another* [1982] UKHL 7

<sup>1552</sup> *Mandla and Another v Dowell Lee and another* [1982] UKHL 7

<sup>1553</sup> *Mandla and Another v Dowell Lee and another* [1982] UKHL 7

essential ones, namely a long shared history and a cultural tradition.<sup>1554</sup> Further, in *Commission for Racial Equality v Dutton*,<sup>1555</sup> the Court of Appeal held that there was ‘sufficient evidence to establish that gypsies were an identifiable minority group...they did accordingly constitute a racial group within the meaning of Section 3(1) of the [Race Relations Act 1976]’<sup>1556</sup> In *O’Leary v Allied Domecq & Others*,<sup>1557</sup> the Court held that Irish travellers constitute an ethnic group under the Race Relations Act 1976, with the judge characteristically noting that ‘modern Irish travellers are guided by the culture and traditions which have been handed down by generations. They do not go around reading history, they practise it.’<sup>1558</sup> Furthermore, in looking at racial discrimination in *Seide v Gillette Industries Ltd*,<sup>1559</sup> which dealt with anti-Semitic comments made in an employment setting and *R v JFS*<sup>1560</sup> that dealt with the admissions policy of a Jewish school, the Courts held that Jews<sup>1561</sup> are part of a racial and religious group.

Furthermore, ascertaining what is meant by a racial group is not only significant in the ambit of anti-discrimination legislation, but, also in the framework of criminal law which seeks to tackle, *inter alia*, racist violence. The Crime and Disorder Act 1998<sup>1562</sup>, amongst others, creates certain racially and religiously aggravated offences and offers definitions for both racial groups and religious groups. Section 28(4), therein, provides that a racial group is ‘a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.’ In *R v Rogers*, the House of Lords found that the Act adopts a ‘broad non-technical approach’<sup>1563</sup> to the definition of a racial group and that this makes sense ‘not only as a matter of language, but also in policy terms.’<sup>1564</sup> Such an approach ensures that ‘racist language will not be excluded by reasons of exclusive or inclusive criteria.’<sup>1565</sup> As noted by the House of Lords, it is a

<sup>1554</sup> *Mandla and Another v Dowell Lee and another* [1982] UKHL 7

<sup>1555</sup> *Commission for Racial Equality v Dutton* [1989] WB 783

<sup>1556</sup> *Commission for Racial Equality v Dutton* [1989] WB 783

<sup>1557</sup> Abdul Gofur, ‘The Meaning of Racial Group R v Rogers’ (2007) 18 *Entertainment Law Review* 5, 186 (2007)

<sup>1558</sup> *P.O’Leary & Others v Allied Domecq and Others* (County Court 2000): <[https://www.cps.gov.uk/news/assets/uploads/files/oleary\\_v\\_allied\\_domecq.pdf](https://www.cps.gov.uk/news/assets/uploads/files/oleary_v_allied_domecq.pdf)>

<sup>1559</sup> *Seide v Gillette Industries Ltd* [1980] IRLR 427

<sup>1560</sup> *R v JFS* [2009] UKSC 15, para. 121

<sup>1561</sup> Another case relating to Jews in this framework includes *Morgan v CSC & British Library* [1990] DCLD 6 19177/89

<sup>1562</sup> The Crime and Disorder Act 1998, c.37

<sup>1563</sup> *R. v Rogers (Philip)* [2007] UKHL 8; [2007] 2 A.C. 62 (HL), para.11

<sup>1564</sup> *R. v Rogers (Philip)* [2007] UKHL 8; [2007] 2 A.C. 62 (HL), para. 12

<sup>1565</sup> Abdul Gofur, ‘The Meaning of Racial Group R v Rogers’ (2007) 18 *Entertainment Law Review* 5, 186

contextual analysis of the particular case which will reveal whether a racial group is targeted in a racist way<sup>1566</sup> and, it is, thus, a question for the fact-finder to address. In *R v White (Anthony Delroy)*,<sup>1567</sup> the Court held that the term ‘African’ could refer to ‘race’ or ‘ethnic origin’ and thus fell within Section 31 of the Crime and Disorder Act 1998 regarding the committal of a racially aggravated offence. The defendant appealed his conviction holding that the term ‘African’ could not constitute a race or ethnic group, and although the Court of Appeal held that the term ‘African’ could not refer to an ethnic group, it rejected this appeal holding that this term could fall within the ambit of race. Once again, the Court reiterated the non-technical meaning that should be attributed to the language of the legislation and referred to the importance and relevance of ordinary speech. The Court held that in ordinary speech the term African ‘denoted a limited group of people regarded as of common stock...and the word was used to mean black Africans.’<sup>1568</sup> In *Attorney General’s Reference (No.4 of 2004)*,<sup>1569</sup> the Court of Appeal considered whether the use of the word ‘immigrant’ for a victim of an offence could fall within the framework of a racial group under Section 28(4) of the Crime and Disorder Act 1998. The Court found that the judge in the lower Court had made an error of law in ruling that the use of the phrase ‘immigrant doctor’ could not fall within the meaning of the ‘racial group.’ It underlined that whether or not the use of this term demonstrated hostility to the victim within the framework of the relevant section was a question for the jury to decide. The CPS has noted that the definition of racial groups is far-reaching and that ‘gypsies and some travellers, refugees or asylum seekers or others from less visible minorities would be included within this definition.’<sup>1570</sup> Notwithstanding the above cases and the incorporation of broad words, such as ‘immigrant,’ in the framework of legislative protection from discrimination and hate and, even though the CPS held the definition of racial groups to be far-reaching, there was one group who was evidently left out of the protective framework, that being the Muslims. For example, in *Nyazi v Ryman Ltd*,<sup>1571</sup> the Employment Appeal Tribunal held that ‘Muslims include people of many nations and colours, who speak many languages and whose only common denominator is

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<sup>1566</sup> *R. v Rogers (Philip)* [2007] UKHL 8; [2007] 2 A.C. 62 (HL), para. 14

<sup>1567</sup> *R v White (Anthony Delroy)* [2001] EWCA Crim 216

<sup>1568</sup> *R v White (Anthony Delroy)* [2001] EWCA Crim 216

<sup>1569</sup> *Attorney General’s Reference (No. 4 of 2004)* 2005 WL 936842, Court of Appeal (Criminal Division) 22 April 2005. Also known as *R v D* Court of Appeal (Criminal Division) [2005] EWCA Crim 889

<sup>1570</sup> CPS: ‘CPS Guidance - Racist and Religious Crime’:

< [http://www.cps.gov.uk/legal/p\\_to\\_r/racist\\_and\\_religious\\_crime/](http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/) > [Accessed 10<sup>th</sup> June 2015], 3

<sup>1571</sup> *Nyazi v Ryman Ltd*, Employment Appeal Tribunal, 10 May 1988 [unreported]



religion and religious culture'<sup>1572</sup> and, therefore, found that that the appellant was not entitled to protection against discrimination under the Race Relations Act 1976. The position was finally rectified in 2006 where discrimination on grounds of religion or belief was incorporated within the non-discrimination framework through the Equality Act.<sup>1573</sup> The 2010 Equality Act repealed this section and provided that religion or belief is a protected characteristic. This Act described 'any religion' including 'a lack of religion' while belief means 'any religious or philosophical belief' including a lack of such belief.<sup>1574</sup>

In the realm of criminal law, before the incorporation of the Religious and Racial Hatred Act 2006 which provided for religious hatred offences, the only protection religious groups could receive in the realm of hateful offences was that granted by the Crime and Disorder Act 1998 which, following amendments made by the Anti-Terrorism, Crime and Security Act 2001, incorporated religious aggravation. The lacking framework had direct effects on the impunity of far-right organisations, such as the BNP, in relation to religiously discriminatory rhetoric. For example, when a member of the BNP disseminated material which was considered offensive and threatening to Muslims, Merton Borough informed the CPS which held that Muslims were not covered by the Public Order Act 1986 and, thus, no proceedings against the party or its member could commence.<sup>1575</sup> The arbitrariness of the legislation in this realm, more generally, was further accentuated in this case considering that the same member was found guilty of disseminating hateful material against Jews.<sup>1576</sup> Another example includes a 2004 decision of the Police not to prosecute the BNP for distributing material entitled 'Islam: Intolerance, Slaughter, Looting, Arson, Molestation of Women.'<sup>1577</sup> As a result, the disregard of protection from discrimination and hate of religious groups who were not also considered to be members of racial groups was problematic. In fact, NGOs had, for some time, argued that an inequality existed between Sikhs and Jews on the one hand and Muslims on the other since the former, as noted above, were recognised as racial groups whereas no such recognition has been granted for

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<sup>1572</sup> *Nyazi v Rymans Ltd*, Employment Appeal Tribunal, 10 May 1988 [unreported]

<sup>1573</sup> Equality Act 2006 c.3, Part 2

<sup>1574</sup> Equality Act 2010, c.15, Article 10(1) and (2)

<sup>1575</sup> Nasar Meer, 'The Politics of Voluntary and Involuntary Identities: Are Muslims in Britain an Ethnic, Racial or Religious Minority?' (2008) 42 *Patterns of Prejudice* 1, 72

<sup>1576</sup> *R v DPP ex parte London Borough of Merton* CO/1319/1998

<sup>1577</sup> Nasar Meer, 'The Politics of Voluntary and Involuntary Identities: Are Muslims in Britain an Ethnic, Racial or Religious Minority?' (2008) 42 *Patterns of Prejudice* 1, 72

Muslims.<sup>1578</sup> Moreover, there was never any sufficient extrapolation on what could be considered as an arbitrary exclusion of religious groups as an entity from this framework. This was rectified by the enactment of the Racial and Religious Hatred Act 2006 which entered into force in 2007 and which incorporated religious hatred as an offence in the public order framework. Article 29A of the Racial and Religious Hatred Act stipulates that religious hatred is ‘hatred against a group of persons defined by reference to religious belief or lack of religious belief.’ It must be noted that the Explanatory Notes to the 2006 Act stated that a religious group is a ‘a group of persons defined by reference to religious belief or lack of religious belief. This includes at least the religions widely recognised in the UK, such as Christianity, Islam, Hinduism, Judaism, Buddhism, Sikhism, Rastafarianism, Baha’ism, Zoroastrianism and Jainism as well as branches or sects within those religions and non-religious groups such as Atheists and Humanists.’<sup>1579</sup> These religions were incorporated in the explanatory notes for exactly the reasons pointed out, that they are religions active and apparent in the British context due to several factors. So, for example, Christianity is the State religion, arriving in Britain under the Romans.<sup>1580</sup> Jews came to England at the start of the Norman conquest in the eleventh century and were expelled by Edward I in 1290.

Following that, there were no Jews in England up until the rule of Cromwell. There was no formal readmission policy of Jews to England but a small group of persons in London were known and were permitted to remain.<sup>1581</sup> In 1753, a Bill was introduced that aimed to naturalise and emancipate Jews but, in the same year, this was repealed as a result of public outcry. It was only in 1830 that the path to equality for Jews was laid down.<sup>1582</sup> The history of Jews in Wales is similar to that in England with Jewish settlement being traced back to the eighteenth century and, to a greater extent, to the nineteenth century.<sup>1583</sup> Other religions have come about predominantly due to more recent immigration and, particularly, the arrival of Commonwealth immigrants. For

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<sup>1578</sup> Joint submission by UK NGOs Against Racism to the UN Committee on the Elimination of Racial Discrimination (CERD) with regard to the UK Government’s 18th and 19th Periodic Report (2011), 24: <<http://www.runnymedetrust.org/uploads/pdfs/UK%20NGOs%20Against%20Racism%20CERD%20Report.pdf>> [Accessed 1<sup>st</sup> June 2015]

<sup>1579</sup> Racial and Religious Hatred Act 2006 – Explanatory Notes (2006) para. 12.

<sup>1580</sup> Encyclopaedia Britannica (1973 William Benton Vol. 12) 433

<sup>1581</sup> Encyclopaedia Britannica (1973 William Benton Vol. 12) 1069

<sup>1582</sup> Encyclopaedia Britannica (1973 William Benton Vol. 12) 1071

<sup>1583</sup> Todd M. Endelman, *The Jews of Britain 1646 to 2000* (eds. University of California Press 2002) 130

example, Zoroastrianism is the ‘religion of Britain’s oldest South Asian minority,’<sup>1584</sup> other religions such as Islam, Hinduism, Sikhism and Rastafarianism arrived in the UK with the arrival of immigrants from, amongst others, Pakistan, India and Jamaica.<sup>1585</sup> Buddhism arrived in the UK as a result of ‘pull factors of interested westerners and from the ‘push factors of socio-political circumstances in the East.’<sup>1586</sup> In relation to Baha’ism, this came to England in 1898 and grew ‘leading to a pioneer movement beginning after the Second World War.’<sup>1587</sup> It must be noted that the Explanatory Notes note that the recognised religions include at least the above religions, leaving the door open for other religions in the framework of the Act. In addition to the above, in order to comprehend what is understood by a religion, one can also turn to a recent judgement of the Supreme Court which found that ‘there has never been a universal legal definition of religion in English law’<sup>1588</sup> and held that religion is to mean ‘a spiritual or non-secular belief system...which claims to explain mankind’s place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives...’<sup>1589</sup> This is a broad definition, that encapsulates an array of beliefs, thereby incorporating several religious groups into its understanding.

#### 1.4.2 Stirring up Racial and Religious Hatred – A Substitute for Hate Speech?

The Public Order Act 1986 provides that acts intended or likely to stir up racial hatred include the use of words or behaviour or display of written material, the publishing or distribution of written material, the public performance of play, the distribution, showing or playing of a recording and/or the broadcasting of a programme in a cable programme service.<sup>1590</sup> The offence of stirring up religious hatred has been defined and incorporated into the 1986 Public Order Act by the Racial and Religious Hatred Act 2006, with Sections 29B-F of the latter addressing the issue of stirring up religious hatred in the same way as it does its racial hatred counterpart.. Thus, the closest one can get to a definition of hate speech in England and Wales are the

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<sup>1584</sup> John R. Hinnells, ‘Zoroastrians in Britain: The Ratanbai Katrak Lectures’ (Oxford Scholarship Online 2011)

<sup>1585</sup> The majority of the African- Caribbean population in the UK is of Jamaican origin.

<sup>1586</sup> David N. Kay, ‘Tibetan and Zen Buddhism in Britain – Transplantation, Development and Adaptation’ (eds. Routledge 2004) 19

<sup>1587</sup> Peter Smith, ‘An Introduction to the Baha’i Faith’ (eds. Cambridge 2008) 90

<sup>1588</sup> R (on the application of Hodkin and another) (Appellants) v Registrar General of Births, Deaths and Marriages (Respondent) [2013] UKSC 77, para.34

<sup>1589</sup> R (on the application of Hodkin and another) (Appellants) v Registrar General of Births, Deaths and Marriages (Respondent) [2013] UKSC 77, para.57

<sup>1590</sup> Public Order Act 1986 c.64, Sections 18 - 22

aforementioned provisions, namely the use of words intended or likely to stir up racial or religious hatred. Important, however, is the observation of the CPS when discussing potential material that may incite hatred, namely that ‘hatred is a strong term and the offence does not necessarily encompass material that stirs up ridicule, prejudice, or which causes offence.’<sup>1591</sup>

In relation to the position of freedom of expression within the realm of stirring up racial or religious hatred, it must be noted that, *vis-à-vis* the latter, Section 29J of the Racial and Religious Hatred Act stipulates that ‘nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.’ Thus, in relation to speech that could stir up racial hatred, no freedom of expression allowance is stipulated by legislation, whereas, restrictions to speech targetted towards a religion that falls within the ambit of Section 29J shall not be permitted. Incorporating Section 29J has been characterised as providing a ‘most valuable right for those who wish to speak freely against the religious ideas held by some people. To criticise an idea is not to insult the person who holds the idea.’<sup>1592</sup> Garry Slapper characterises this as logical given that ‘people do not choose their race. But people can choose their ideas.’<sup>1593</sup> Notwithstanding the poignancy of this observation, it could be argued that the backdrop of the differentiation of free expression, *vis-à-vis* race on the one hand and religion on the other, is also because of the outright societal condemnation of criticising a person’s race which finds no justification on the grounds of debate and discussion. Further, it could be argued that, simply because religion is a choice and race is not should not directly correlate with the supposition that the latter should receive more protection than the former. The significance of preventing a dogmatic and restrictive State in which free speech is curtailed cannot be undermined, nevertheless, the incorporation of Section 29J could be a contributive factor to the fact that there are ‘no reported cases interpreting it, and prosecutions

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<sup>1591</sup> CPS, ‘The Crown Prosecution Service Response to the All-Party Parliamentary Inquiry into Anti-Semitism’ (2008) Para.87

<sup>1592</sup> Garry Slapper, ‘The Legality of Assaulting Ideas’ (2007) 71 *Journal of Criminal Law* 4, 280

<sup>1593</sup> Garry Slapper, ‘The Legality of Assaulting Ideas’ (2007) 71 *Journal of Criminal Law* 4, 281

under the religious hatred provisions are rare.’<sup>1594</sup> Since this statement was made, one relevant case against a BNP member has been brought forth, which will be assessed in section 5.3.1. At this point, it suffices to say that the case did not result in a conviction.

Although the national legislation incorporates a provision on stirring up racial and religious hatred through different forms of expression and whilst the encouragement of terrorism is illegal, what is missing is legislation which clearly and directly defines and bans hate speech. Interrelated to this is the UK’s decision to make a reservation to Article 4 of the ICERD and Article 20 of the ICCPR. The first reservation was based on free speech grounds and the second on the grounds that the country had already legislated on relevant matters ‘in the interests of public order.’ From the above, two issues can be discerned that will be extrapolated on further, firstly that freedom of expression is put forth as a justification for not banning speech that falls within the realm of hate speech and, secondly, that this country seems to have historically considered issues of potentially harmful speech within the arena of preserving public order.

#### 1.4.3 Racial and Religious Aggravation

Section 28 of the Crime and Disorder Act 1998 defines a racially or religiously aggravated offence as one in which the ‘offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a racial or religious group.’ The temporal framework of this hostility is defined as occurring before, during or after committing the offence, while membership of a group also includes any association with members of a particular group. Interestingly, to prove the existence of racially or religiously aggravated offences, hostility and not hatred of the victim’s membership of a particular group must be demonstrated. With regard to the variations between the two terms of hostility and hatred, it must be noted that neither of them is defined in the statutes. However, the CPS holds that hostility ‘can be taken to bear its ordinary meaning. It is generally accepted that hatred is a stronger term than hostility.’<sup>1595</sup> As such, the Law Commission<sup>1596</sup> underlines that an offence is easier to prove

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<sup>1594</sup> Law Commission: ‘Hate Crime: Should the Current Offences be Extended?’ (LAW COM No. 348) Cm 8865 (May 2014) 30

<sup>1595</sup> Law Commission: ‘Hate Crime: Should the Current Offences be Extended?’ (LAW COM No. 348) Cm 8865 (May 2014) 28

<sup>1596</sup> The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law under review and to recommend reform where it is needed: < <http://www.lawcom.gov.uk/>>

if only hostility must be demonstrated since hatred reflects ‘intense, dislike enmity or animosity.’<sup>1597</sup> As noted, ‘hatred is a very strong emotion,’<sup>1598</sup> so, the act of stirring up hatred is ‘a much stronger thing than simply bringing into ridicule or contempt, or causing ill-will or bringing into distaste.’<sup>1599</sup> In fact, ‘stirring up racial tension, opposition, even hostility may not necessarily be enough to amount to an offence.’<sup>1600</sup> This means that a low threshold *vis-à-vis* the offender’s intent in the realm of aggravation is required in comparison to stirring up offences which incorporate the requirement of hatred. Moreover, the Law Commission notes that ‘ultimately it will be a matter for the tribunal of fact to decide whether a defendant has demonstrated or been motivated by, hostility.’<sup>1601</sup> The same meaning of racial or religious aggravation has been incorporated into the Criminal Justice Act 2003 which, *inter alia*, makes provisions for the criminal justice system. Section 145, therein, provides for increased sentences for racial or religious aggravation in relation to offences that are not incorporated into the relevant provisions of the Crime and Disorder Act. The Criminal Justice Act adopts the same definition of racially or religiously aggravated crime as the Crime and Disorder Act, thereby integrating hostility rather than hatred.

#### 1.4.4 Hate Crime

Hate Crime, per se, is not defined in national legislation but, instead, has been defined on a policy level. In 2007 institutions such as the Police, the CPS and the National Offender Management Services,<sup>1602</sup> as well as other institutions which are part of the criminal justice system, came up with a definition of hate crime. This is ‘any criminal offence which is perceived, by the victim or any other person, to be motivated by hostility or prejudice towards someone

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<sup>1597</sup> Law Commission: ‘Hate Crime: Should the Current Offences be Extended?’ (LAW COM No. 348) Cm 8865 (May 2014) 28

<sup>1598</sup> Law Commission: ‘Hate Crime: Should the Current Offences be Extended?’ (LAW COM No. 348) Cm 8865 (May 2014) 28

<sup>1599</sup> Law Commission: ‘Hate Crime: Should the Current Offences be Extended?’ (LAW COM No. 348) Cm 8865 (May 2014) 28

<sup>1600</sup> Law Commission: ‘Hate Crime: Should the Current Offences be Extended?’ (LAW COM No. 348) Cm 8865 (May 2014) 28

<sup>1601</sup> Law Commission: ‘Hate Crime: Should the Current Offences be Extended?’ (LAW COM No. 348) Cm 8865 (May 2014) 19

<sup>1602</sup> The role of this service is to ensure that people serve the sentences and orders handed out by courts, both in prisons and in the community.

based on a personal characteristic.’<sup>1603</sup> The institutions defining hate crime recognised five key grounds upon which hate crime occurs, namely race or ethnicity, religion or belief, sexual orientation, disability and transgender identity. As noted by a group of NGOs, hate crime is a ‘relatively new concept, and due to the broadening of reports of hate crime, as opposed to racist crimes specifically, race specific data on hate crime have become less comprehensive over the past few years.’<sup>1604</sup> Hate crime became of increasing importance particularly after the murder of Stephen Lawrence in 1993 and the subsequent investigation.<sup>1605</sup> Conceptually, reducing hate crime is considered by the government as central if this country is to ‘embrace[the] rich mix of different races, cultures, beliefs, attitudes and lifestyles’<sup>1606</sup> that exist in the UK.

#### 1.4.5 Racial and Religious Discrimination or Harassment

There is no definition of racial or religious discrimination in national law, with such phenomena falling within the general framework of discrimination, as defined by the Equality Act 2010. The central purpose of this Act is to ensure equality in the socio-economic life of citizens, extending its scope to a multitude of arenas such as employment (including occupational pension schemes),<sup>1607</sup> education,<sup>1608</sup> access to goods and services,<sup>1609</sup> the functioning of associations<sup>1610</sup> and other areas particular to certain protected characteristics such as transport for disabled persons.<sup>1611</sup> Section 13(1), therein, holds that, direct discrimination arises when one person treats another less favourably because of a protected characteristic, including race and religion. Further, this section holds that, if the protected characteristic is race, then less favourable treatment includes segregation, although segregation is not considered less favourable treatment in the ambit of religion. The Act also holds that indirect discrimination exists if one person applies a

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<sup>1603</sup> Home Office: ‘Hate Crimes, England and Wales, 2013/14’: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/364198/hosb0214.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/364198/hosb0214.pdf)> 4

<sup>1604</sup> Joint submission by UK NGOs Against Racism to the UN Committee on the Elimination of Racial Discrimination (CERD) with regard to the UK Government’s 18th and 19th Periodic Report (2011), 25: <<http://www.runnymedetrust.org/uploads/pdfs/UK%20NGOs%20Against%20Racism%20CERD%20Report.pdf>> [Accessed 2<sup>nd</sup> June 2015]

<sup>1605</sup> Chara Bakalis, ‘Legislating against Hatred: The Law Commission’s Report on Hate Crime’ (2015) 3 *Criminal Law Review* 177, 177

<sup>1606</sup> HM Government: ‘Challenge it, Report it, Stop it: The Government’s Plan to Tackle Hate Crime’ (2012): <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97849/action-plan.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97849/action-plan.pdf)> 3

<sup>1607</sup> Equality Act 2010 c.15, Part 2

<sup>1608</sup> Equality Act 2010 c.15, Part 6

<sup>1609</sup> Equality Act 2010 c.15, Part 3

<sup>1610</sup> Equality Act 2010 c.15, Part 7

<sup>1611</sup> Equality Act 2010 c.15, Part 12

relevant provision, criterion or practice to another based on a protected characteristic. Section 26(1) of the Equality Act 2010 holds that harassment occurs when a person engages in unwanted conduct related to a protected characteristic and the conduct has the purpose or effect of violating the victim's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. In ascertaining whether conduct constitutes harassment as per this Act, Section 26(4) underlines that the Court must consider the perception of the complainant, the circumstances of the case and whether it is reasonable for the conduct to have the effect it does on the complainant. In deciphering whether harassment has occurred, intention does not need to be demonstrated since Section 26(1) refers to the purpose or effect of the conduct. The settled approach to ascertaining the existence of harassment was formulated in *Driskel v Peninsula Business Services*.<sup>1612</sup> In this case, the claimant had to demonstrate that the conduct she perceived to amount to harassment was unwanted and that this perception was reasonable. What distinguishes harassment from discrimination under the framework of this Act is that the former results in the creation of a particular type of adverse environment for the victim, for example, intimidation, whereas the latter is not interlinked with the creation of such an environment but the actual treatment (direct or indirect) by the perpetrator. In relation to direct discrimination, Section 13(1) holds that 'a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.' Section 19(1) holds that 'a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.' Harassment, as incorporated in the framework of the Equality Act 2010, can be applicable to the rhetoric and mandate of far-right groups insofar as their members act in a racially harassing way in the arenas set out by this legislation. However, to date, only Part 7 of this Act regarding associations has been applied to the far-right with the cases brought against the BNP regarding its racially discriminatory constitution which excluded non-whites from party membership.

Harassment, as an offence more generally and not solely within the spheres set out by the Equality Act, is incorporated in the 1997 Protection from Harassment Act. In seeking to conceptualise harassment, this Act does so in a broad sense, underlining that harassment includes

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<sup>1612</sup> *Driskel v Peninsula Business Services* [2000] I.R.L.R. 151



alarming the person or causing the person distress<sup>1613</sup> whilst noting that prohibited conduct also includes speech.<sup>1614</sup> The 1997 Act does not incorporate the purpose or effect model but, rather, holds that the perpetrator knows or ought reasonably to know that his or her conduct will result in harassment.<sup>1615</sup> Section 32 of the Crime and Disorder Act 1998 incorporates a provision on racially or religiously aggravated forms of harassment as incorporated in the 1997 Act. Harassment is also incorporated in the public order framework which refers to intentional harassment,<sup>1616</sup> thereby, limiting the scope of its applicability in comparison to the previously mentioned Acts. The 1997 Act, with the racially or religiously aggravated element, can come into play where members of the far-right harass an individual or individuals because of their race or religion. When such harassment leads to a disarray of public order then the 1986 Act can be invoked. Importantly, during deliberations on this Act, the House of Lords held that its aim is to protect victims of harassment, including those of racial harassment and also underlined that racial violence is directly intertwined with the offence of putting people in fear of violence.<sup>1617</sup> Particular modes of harassment such as harassment of a person in his home, is incorporated into the Criminal Justice and Police Act 2001. It was this piece of legislation, and particularly Section 42A, therein, which was used to convict Paul Golding, leader of *Britain First*, after he harassed the sister-in-law of a man linked to the 7/7 bombings. He was also convicted of wearing a political uniform signifying association with a political organisation, as proscribed by the Public Order Act 1936.<sup>1618</sup>

#### 1.4.6 Terrorism

Section 1 of the Terrorism Act 2000<sup>1619</sup> defines terrorism as including the use or threat of action for ‘the purposes of advancing political, religious, racial or ideological cause.’ The inclusion of a racial cause was incorporated later by Section 75 of the Counter-Terrorism Act 2008.<sup>1620</sup> Actions include, amongst other, serious violence against a person, serious damage to property and serious

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<sup>1613</sup> Protection from Harassment Act 1997 c.40, Section 7.2

<sup>1614</sup> Protection from Harassment Act 1997 c.40, Section 7.4

<sup>1615</sup> Protection from Harassment Act 1997 c.40, Section 1 (1a)

<sup>1616</sup> Public Order Act 1986 1986 c. 64, Part 1, 4a

<sup>1617</sup> Protection from Harassment Bill HL Deb 24 January 1997 vol 577 cc917-43

<sup>1618</sup> R v Golding [2014] EWCA Crim 889

<sup>1619</sup> Terrorism Act 2000, c.11

<sup>1620</sup> Counter-Terrorism Act 2008 2008 c. 28, Section 75 (1): In the provisions listed below (which define “terrorism”, or make similar provisions, and require that the use of threat of action is made for the purpose of advancing a political, religious or ideological cause), after “religious” insert “racial.”

risk to public health or safety.<sup>1621</sup> Part 5 of this section holds that ‘a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.’ It must be noted that this definition has been described by commentators as too wide, with one author noting that the ‘breadth of the S.1 definition arguably compounds the perceived latitude of several new offences in the 2006 Act.’<sup>1622</sup> Organisations,<sup>1623</sup> such as Liberty,<sup>1624</sup> have argued that the far-reaching nature of the definition has allowed for the creation of far-reaching criminal offences and police powers.<sup>1625</sup> Following a request from the government, Lord Carlile acted as an independent reviewer of terrorism laws and made several recommendations to the government with a view to limiting the broadness of the definition, including an amendment of the 2000 definition of terrorism to, *inter alia*, remove offences against property from the definition of terrorism.<sup>1626</sup> However, in its response, the government noted that the definition of terrorism is ‘both comprehensive and effective and there is no evidence that the broadness of the definition has caused problems in the way that it has operated.’<sup>1627</sup> As a result, the 2000 definition of terrorism has remained in place without any amendment. The Government’s anti-terror Prevent Strategy recognises that right-wing extremist activity could fall within the framework of terrorist activity.<sup>1628</sup>

#### 1.4.7 Extremism

Since the revised 2011 Prevent Strategy, the government defines extremism as ‘vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs.’ In a 2013 Report from the Prime Minister’s Task Force on Tackling Radicalisation and Extremism, it was noted that extremists

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<sup>1621</sup> Terrorism Act 2000, c.11 Section 1(2)

<sup>1622</sup> Clive Walker, ‘The Legal Definition of Terrorism in United Kingdom Law and Beyond’ (2007) University of Leeds - Centre for Criminal Justice Studies (CCJS) *Public Law*, 331

<sup>1623</sup> Other organisations and bodies to argue that the definition of terrorism is too broad include Amnesty International and the Parliamentary Committee on Human Rights: Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters, 28 November 2005: <[www.parliament.uk](http://www.parliament.uk)>

<sup>1624</sup> Liberty website: <<https://www.liberty-human-rights.org.uk/>>

<sup>1625</sup> Liberty: ‘Liberty’s Response to Lord Carlile’s review of the definition of terrorism’ (2006),

<sup>1626</sup> ‘The Definition of Terrorism: A Report by Lord Carlile of Berriew Q.C. Independent Reviewer of Terrorism Legislation Presented to Parliament by the Secretary of State for the Home Department, by Command of Her Majesty’ (March 2007) Cm 7052, para.48

<sup>1627</sup> The Government Reply to the Report by Lord Carlile of Berriew Q.C. Independent Reviewer of Terrorism Legislation: The Definition of Terrorism, Cm 7058, point 4

<sup>1628</sup> HM Government ‘Prevent Strategy’ (June 2011) Cm8092, 15

include, *inter alia*, far-right extremists.<sup>1629</sup> The CPS holds that violent extremism includes, amongst others, ‘the demonstration of unacceptable behaviour by using any means or medium to express views which...foster hatred which might lead to inter-community violence in the UK. Such conduct can give rise to a number of offences which include, for example, incitement to racial hatred.’<sup>1630</sup>

## 2. International Framework

This section shall consider whether and, if so, how, the UK has interpreted and applied its obligations in the realm of challenging right-wing extremism as these emanate from international and European conventions. To do so, and, taking into account that the UK has not incorporated the ICCPR or the ICERD into national law, the analysis of its obligations on a UN level shall be effectuated by considering the reservations adopted by the country on relevant articles of the aforementioned conventions and reports submitted by the UK to the relevant Committees and the Concluding Observations adopted by them as well as, where appropriate, the list of issues raised by the Committees and the State Party’s responses to them, always looking at the latest available documents. No case-law in relation to the UK exists as this country has not accepted the individual complaints procedure for the ICCPR or the ICERD. On a CoE level, and with a view to determining the position held by the ECHR on Human Rights, and particularly the articles which are directly related to the discussion of right-wing extremism, this section shall set out the relevant articles of the HRA 1998 and provide an overview of the provision for Courts to issue a declaration of incompatibility as this could potentially affect the application of this Act. On this level, it must be noted that the decision not to sign or ratify the Additional Protocol to the Convention on Cybercrime concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems hampers the country’s position in fighting racist speech and material disseminated through the internet, and places it outside the ever important framework of international co-operation which is centrifugal to countering this phenomenon. In relation to the EU, reference will be made to the Council Framework Decision on combatting certain forms and expressions of racism and xenophobia by means of criminal law. It must be

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<sup>1629</sup> HM Government ‘Tackling Extremism in the UK - Report from the Prime Minister’s Task Force on Tackling Radicalisation and Extremism’ (December 2013) 3

<sup>1630</sup> HM Crown Prosecution Service Inspectorate, ‘Report of the Inspection of the Counter Terrorism Division of CPS Headquarters’ (2009) para. 6.14

noted that this section will deal solely with a theoretical analysis of documents submitted to and from UN, CoE and EU committees and bodies as well as the HRA itself with the aim of setting out the theoretical framework of the interpretation and incorporation of the country's UN, CoE and EU obligations into domestic law and practice. Further analysis of these issues will be effectuated in the section on domestic jurisprudence.

## 2.1 International Framework – The United Nations

### 2.1.1 The International Covenant on Civil and Political Rights and the United Kingdom

The UK signed the ICCPR in 1968 and ratified it in 1976. However, it has not yet incorporated the ICCPR into national law nor has it signed or ratified the First Optional Protocol to the ICCPR. The State Party's latest report was considered in the Human Rights Committee's session between June and July 2015. In the report submitted by the UK, the government held that it 'remains to be convinced of the added practical value to people in the UK of rights of individual petition to the United Nations.'<sup>1631</sup> In reaching this conclusion, it noted that 'the United Nations committees that consider petitions are not courts, and they cannot award damages or produce a legal ruling on the meaning of law whereas the United Kingdom has strong and effective laws under which individuals may seek remedies...'<sup>1632</sup> It further held that the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and the Disability Convention were ratified as testing grounds, with the country's experience to date not having yet provided sufficient evidence to decipher the added value of committees and the individual petition process.<sup>1633</sup> Article 20 (2), which is the part most relevant to the current analysis, provides that 'any advocacy for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' The UK incorporated a reservation on this article holding that it 'interprets Article 20 consistently with the rights conferred by Articles 19 and 21 of the Covenant and having legislated in matters of practical concern in the interests of public order...reserve the right not to introduce any further legislation...' In the latest report submitted by the country to the Human Rights Committee, it

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<sup>1631</sup> HRC Consideration of Reports submitted by States Parties under Article 40 of the Convention: United Kingdom, the British Overseas Territories, the Crown Dependencies, CCPR/C/GBR/7 (2013) para. 192

<sup>1632</sup> HRC Consideration of Reports submitted by States Parties under Article 40 of the Convention: United Kingdom, the British Overseas Territories, the Crown Dependencies, CCPR/C/GBR/7 (2013) para.192

<sup>1633</sup> HRC Consideration of Reports submitted by States Parties under Article 40 of the Convention: United Kingdom, the British Overseas Territories, the Crown Dependencies, CCPR/C/GBR/7 (2013) para. 192

was underlined that there exists no intention to withdraw this reservation or introduce any new legislation for the reasons underlined in the reservation clause itself.<sup>1634</sup> In its reply to the list of issues put forward by the HRC, the UK extrapolated on the reasons for which it imposed this reservation, which are nearly identical to those it gave in relation to the reservations in its report to the CERD as justifications for the imposition of a reservation on Article 4, referring namely to permissible speech as long as it does not incite violence or hatred.<sup>1635</sup>

### 2.1.2 International Convention on the Elimination of Racial Discrimination and the United Kingdom

The UK signed the ICERD in 1966 and ratified it in 1969 but has not yet incorporated it into national law. In September 2011, the CERD published its Concluding Observations on the country's eighteenth and nineteenth periodic reports. The UK delayed submitting the above which were due in 2006 but were sent in 2010. The country's next report was due in 2014 but was submitted in 2015. In the latest Concluding Observations prepared by the CERD on the country's report, it was noted that, although the State Party maintains its position that it has no obligation to make the Convention part of national law, 'the Committee reiterates its continuing concern that the State Party's courts may not give full legal effect to the provisions of the Convention unless it is expressly incorporated into its domestic law or the State Party adopts necessary provisions in its legislation. The Committee requests the State party to reconsider its position so that the Convention can more readily be invoked in the domestic courts of the State party.'<sup>1636</sup> NGO's, such as the Runnymede Trust,<sup>1637</sup> have held that the government should incorporate the ICERD into national law,<sup>1638</sup> introducing legislation requiring the judiciary to

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<sup>1634</sup> HRC Consideration of Reports submitted by States Parties under Article 40 of the Convention: United Kingdom, the British Overseas Territories, the Crown Dependencies, CCPR/C/GBR/7 (2013) para. 37

<sup>1635</sup> Replies to the list of issues to be taken up in connection with the consideration of the sixth periodic report of the government of the United Kingdom of Great Britain and Northern Ireland. (CCPR/C/GBR/6/6/Add.1), para.2

<sup>1636</sup> Concluding Observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland, CERD/C/GBR/CO/18-20, para.10

<sup>1637</sup> The Runnymede is an independent race equality think tank. They generate intelligence for a multi-ethnic Britain through research, network building, leading debate, and policy engagement: <<http://www.runnymedetrust.org/about.html>>

<sup>1638</sup> Joint submission by UK NGOs Against Racism to the UN Committee on the Elimination of Racial Discrimination (CERD) with regard to the UK Government's 18th and 19th Periodic Report (2011), 7: <<http://www.runnymedetrust.org/uploads/pdfs/UK%20NGOs%20Against%20Racism%20CERD%20Report.pdf>> [Accessed 2<sup>nd</sup> June 2015]

take the Convention's provisions into account where relevant.<sup>1639</sup> In its 2015 report to the CERD, the UK maintained its position regarding the non-incorporation of the ICERD into national law given that there already exists a comprehensive anti-racial discrimination framework within national law.<sup>1640</sup>

As well as not incorporating the ICERD into national law and imposing the limitation on Article 4 in the name of striking balances with other freedoms, the UK has not yet made a declaration under Article 14.<sup>1641</sup> By making an Article 14 declaration, the UK would recognise 'the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.' As is the case with the ICCPR, this further limits the effectiveness and practical effect of the ICERD since victims of violations of the rights enshrined, therein, cannot seek to address their complaint at the CERD set up for, *inter alia*, receiving such complaints. As a result, in its Concluding Observations of 2011, the CERD requested the State Party to reconsider its position *vis-à-vis* Article 14.<sup>1642</sup> In its 2015 report, the UK reiterated that it did not consider this mechanism to be of added value for this country and its people.<sup>1643</sup>

The most relevant article of the ICERD to the current analysis is Article 4, discussed in chapter three, which deals with condemning racist propaganda and organisations. Article 4 of the ICERD provides, *inter alia*, that States Parties condemn all racist propaganda and organisations,

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<sup>1639</sup> Joint submission by UK NGOs Against Racism to the UN Committee on the Elimination of Racial Discrimination (CERD) with regard to the UK Government's 18th and 19th Periodic Report (2011), 8: <<http://www.runnymedetrust.org/uploads/pdfs/UK%20NGOs%20Against%20Racism%20CERD%20Report.pdf>> [Accessed 2<sup>nd</sup> June 2015]

<sup>1640</sup> CERD Consideration of Reports submitted by States Parties under Article 9 of the Convention Twenty-first to twenty-third periodic reports of States Parties: United Kingdom of Great Britain and Northern Ireland, CERD/C/GBR/21-23 (2015) para.2

<sup>1641</sup> It must be noted that the other country under consideration in this dissertation – Greece, has not yet made a declaration under Article 14.

<sup>1642</sup> Concluding Observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland, CERD/C/GBR/CO/18-20, para.31

<sup>1643</sup> CERD Consideration of Reports submitted by States parties under Article 9 of the Convention Twenty-first to twenty-third periodic reports of States Parties: United Kingdom of Great Britain and Northern Ireland, CERD/C/GBR/21-23 (2015), para.272

declaring the dissemination of racist ideas and racist organisations illegal. The UK issued a reservation on Article 4, noting that:

‘It interprets Article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article only insofar as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and practice in those fields is necessary for the attainment of the end specified in the earlier part of article 4.’<sup>1644</sup>

On this point, the United Kingdom noted in its 2010 report submitted to the CERD that it maintains its position *vis-à-vis* the reservation imposed on Article 4 since it has:

‘a long tradition of freedom of speech which allows individuals to hold and express views which may well be contrary to those of the majority of the population, and which many may find distasteful or even offensive. This may include material produced by avowedly racist groups and successive Governments have held the view that individuals have the right to express such views so long as they are not expressed violently or do not incite violence or hatred against others. The Government believes that it strikes the right balance between maintaining the right to freedom of speech and protecting individuals from violence and hatred.’<sup>1645</sup>

It reiterated the above point in its 2015 report to the CERD.<sup>1646</sup> Thus, the UK holds that racist speech and material produced by racist groups should be permitted for the purpose of protecting free speech above as these do not incite or promote violence and hatred. However, in appraising

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<sup>1644</sup> Report submitted by States parties under Article 9 of the Convention to the CERD: United Kingdom, CERD/C/GBR/18-20, para. 106

<sup>1645</sup> Report submitted by States Parties under Article 9 of the Convention to the CERD: United Kingdom, CERD/C/GBR/18-20, para. 107

<sup>1646</sup> CERD Consideration of Reports submitted by States Parties under Article 9 of the Convention Twenty-first to twenty-third periodic reports of States parties: United Kingdom of Great Britain and Northern Ireland, CERD/C/GBR/21-23 (2015), para.54

the reservation, the UK only makes reference to the freedom of expression and its boundaries, providing no overview of its interpretation of the freedom of association and the freedom of assembly which are essentially the vehicles used by racist groups or, for that matter, any other groups, to produce material and express racist opinions. Further, in this framework, the UK interprets the freedom of expression in a broader manner than the ECtHR in cases such as *Féret v Belgium* and *Norwood v The United Kingdom*, and, ironically, more broadly than its national Courts in cases such as *DPP v Norwood* discussed later on. In a nutshell, the above Courts, in the cases referred to, did not deem hate speech to be protected speech, even if such speech did not directly constitute a call for violence. Moreover, the aforementioned position is also contrary to the legislative reality of the country and, more particularly, is contrary to the Public Order Act since Article 18, therein, prohibits insulting as well as abusive and threatening words, behaviour and/or material. This reservation, thus complicates the understanding of the UK's approach to racist speech. In its most recent Concluding Observations, the Committee noted that the State Party must lift its reservation to Article 4, taking into account the non-absolute nature of the freedom of expression and the racist statements in the media which may result in a rise in racial discrimination.<sup>1647</sup> However this reservation has not yet been lifted.

### 3. European Framework

#### 3.1 The Council of Europe: The Human Rights Act 1998: Incorporating the European Convention on Human Rights into Domestic Law

The HRA 1998 received Royal Assent<sup>1648</sup> in 1998 and came into force in October 2000. It aims to give 'further effect'<sup>1649</sup> to the rights and freedoms enshrined in Articles 2 to 12 and 14 of the ECHR, Articles 1 to 3 of the First Protocol and Article 1 of the Thirteenth Protocol as read with Articles 16 to 18 of the Convention.<sup>1650</sup> For purposes of this discussion, it suffices to say that, since 2000, the freedoms of expression, association, assembly and the right to non-discrimination, as provided for by the ECHR, have become a codified part of national law. Along

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<sup>1647</sup> Concluding Observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland, CERD/C/GBR/CO/18-20, para.11

<sup>1648</sup> This is when the Queen formally agrees to make the bill into an Act of Parliament

<sup>1649</sup> Long title of the Act: An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.

<sup>1650</sup> Section 1, Human Rights Act 1998



with the codification of freedoms such as that of expression came the limitation grounds to such freedoms, as enshrined in the ECHR. This was the first time that human rights and freedoms became codified in the legal system of this country given the lack of a written constitution and no previous statute in this area. However, this is not to say that these were not part of the country's legal framework, as reflected by the long title of the Act which makes reference to the purpose of giving 'further effect' to already established rights. This Act makes public authorities, including Courts and Tribunals, bound to a statute which requires them to act in conformity with the ECHR articles transposed into the HRA.<sup>1651</sup> In fact, it is only public authorities that are bound by the provisions therein. Further, Courts must 'so far as it is possible'<sup>1652</sup> interpret primary and secondary legislation in a way compatible to Convention rights. The point of contention, however, is a situation in which a Court cannot, in fact, interpret legislation in accordance with a convention right. In such a case, Section 4 holds that 'if the Court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.' Such a declaration can only be issued by certain Courts<sup>1653</sup> and, as noted in *R v A*, must only be enforced as 'measure of last resort.'<sup>1654</sup> However, the effects of the declaration are curtailed by the fact that they do not affect the validity, continuing operation or enforcement of the provision in respect of which it is given and is not binding on the parties of the proceedings.<sup>1655</sup> The central objective of this provision is to ensure that the HRA does not influence the doctrine of Parliamentary Sovereignty.<sup>1656</sup> Regardless of the limitations imposed on the declaration of incompatibility, and, even though it is Parliament's role to make or change a law, the efficacy of this tool, as provided for in Section 4 of the HRA, must not be undermined given that there 'will often be significant political pressure to amend incompatible primary legislation.'<sup>1657</sup> It is noteworthy that, although the ECHR's articles are included in Schedule 1 of

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<sup>1651</sup> Section 6 Human Rights Act 1998

<sup>1652</sup> Section 3 Human Rights Act 1998

<sup>1653</sup> Section 4(5): For England and Wales: the Supreme Court, the Judicial Committee of the Privy Council, the Court Martial Appeal Court, the High Court or the Court of Appeal, the Court of Protection, in any matter being dealt with by the President of the Family Division, the Vice-Chancellor or a puisne judge of the High Court.

<sup>1654</sup> *R v A* [2002] 1 AC 45, at 67-68

<sup>1655</sup> Section 4 (6) Human Rights Act 1998

<sup>1656</sup> Parliamentary sovereignty makes Parliament the supreme legal authority in the UK, which can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change. Parliamentary sovereignty is a very significant element of the British legal order: Garry Slapper & David Kelly, *The English Legal System* (10<sup>th</sup> edn. Routledge 2009-2010) 30-31

<sup>1657</sup> Mark Elliot, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) 22 *Legal Studies* 340, 348

the Act, two freedoms, namely, that of expression and that of religion are incorporated into the Act itself. In relation to the former, which is directly relevant to this discussion, Section 12 lays down certain conditions for cases in which a Court is considering granting any relief which might affect the exercising of Article 10. These conditions pertain to notifying the respondent of the relief or taking reasonable measures to do so in the event that he or she is not present, restraining publications and having particular regard to the freedom of expression in the ambit of journalistic, literary or artistic material.<sup>1658</sup> Incorporating the freedom of expression into a section of its own in the HRA demonstrates the significance which the drafters of the statute granted it.

The HRA, and particularly ECtHR judgements and their role in the national legal framework of the UK, have resulted in a plethora of negative reactions by governmental and non-governmental actors of the country. This has particularly been the case in relation ECtHR judgements regarding deportation of foreign criminals and suspected terrorists and the tabloid attention subsequently received by them.<sup>1659</sup> As such, in its 2010 general election manifesto, the Conservative Party highlighted its desire to ‘replace the Human Rights Act with a UK Bill of Rights.’<sup>1660</sup> However, instead of repealing the Act and as a ‘compromise with the liberal democrats’<sup>1661</sup> the government appointed a commission which drew up a proposal which suggested that the Act be repealed.<sup>1662</sup> This document proposed, *inter alia*, to reduce the ECtHR’s status to that of an advisory body,<sup>1663</sup> to release British Courts from the obligation to consider ECtHR case-law,<sup>1664</sup> to clarify meanings of the right not to receive degrading treatment

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<sup>1658</sup> Section 12(a) Human Rights Act 1998

<sup>1659</sup> Steven Greer & Rosie Slow, ‘The Conservatives’ Proposal for a British Bill of Rights: Mired in Muddle, Misconception and Misrepresentation?’ (2015) 4 *European Human Rights Law Review* 370, 371

<sup>1660</sup> Invitation to Join the Government of Britain: The Conservative Manifesto 2010 (Conservative Party, 2010), 79: <<https://www.conservatives.com/~media/files/activist%20centre/press%20and%20policy/manifestos/manifesto2010>> [Accessed 20 November 2015]

<sup>1661</sup> Steven Greer & Rosie Slow, ‘The Conservatives’ Proposal for a British Bill of Rights: Mired in Muddle, Misconception and Misrepresentation?’ (2015) 4 *European Human Rights Law Review* 370, 371

<sup>1662</sup> Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws (October 2014): <[https://www.conservatives.com/~media/files/downloadable%20Files/human\\_rights.pdf](https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf)> [Accessed 20 November 2015] At that time, and following a ‘hung parliament’ Conservatives and Liberal Democrats formed a coalition.

<sup>1663</sup> Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws (October 2014): <[https://www.conservatives.com/~media/files/downloadable%20Files/human\\_rights.pdf](https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf)> [Accessed 20 November 2015] 5

<sup>1664</sup> Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws (October 2014): <[https://www.conservatives.com/~media/files/downloadable%20Files/human\\_rights.pdf](https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf)> [Accessed 20 November 2015] 5

or punishment<sup>1665</sup> and to withdraw from the ECHR if the proposals cannot be put in place.<sup>1666</sup> However, no constructive steps were taken by the government to materialise the recommendations contained in the proposal. During his 2015 election campaign, the current Prime Minister of the UK announced that he planned to scrap the Act and replace it with a British Bill of Rights.<sup>1667</sup> Following the 2015 elections, which resulted in a majority government for the Conservative Party, the efforts to repeal the Act appear more intense with a draft bill potentially being put forth in the spring of 2016.<sup>1668</sup> These plans have come with staunch criticism from the political and academic world. For example, the Joint Committee on Human Rights has argued against this, noting that it goes against international human rights.<sup>1669</sup> Some academics have argued that to do so ‘would create at least as many problems as would be solved’<sup>1670</sup> and that it would place UK’s ‘relationship with international and European human rights law in jeopardy’<sup>1671</sup>

### 3.2 The European Union: The Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law

Since the time of its drafting, the UK has been rather wary of this Framework Decision and had previously rejected drafts of this document in the name of free speech.<sup>1672</sup> The mark of the UK on the development of this document is reflected in the latter’s staunch embracement of the preservation of public order, as the central tenet through which hate is to be regulated is reflected in Article 1 (2). More particularly, this Article holds that Member States may choose only to punish conduct which is either (i) carried out in a manner likely to disturb public order or (ii)

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<sup>1665</sup> Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws (October 2014): <[https://www.conservatives.com/~media/files/downloadable%20Files/human\\_rights.pdf](https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf)> [Accessed 20 November 2015] 6

<sup>1666</sup> Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws (October 2014): <[https://www.conservatives.com/~media/files/downloadable%20Files/human\\_rights.pdf](https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf)> [Accessed 20 November 2015] 8

<sup>1667</sup> The Conservative Party Manifesto (2015) 62

<sup>1668</sup> Steve Foster, ‘Repealing the Human Rights Act – No Not Delay, Just Don’t Do It’ (2015) 20 *Coventry Law Journal* 1, 12

<sup>1669</sup> ‘A Bill of Rights for the UK? Report of the Joint Committee of Human Rights (10 August 2008) HL, Paper 156-1, HC 150-1.

<sup>1670</sup> Steven Greer & Rosie Slow, ‘The Conservatives’ Proposal for a British Bill of Rights: Mired in Muddle, Misconception and Misrepresentation?’ (2015) 4 *European Human Rights Law Review* 370, 373

<sup>1671</sup> Steve Foster, ‘Repealing the Human Rights Act – No Not Delay, Just Don’t Do It’ (2015) 20 *Coventry Law Journal* 1, 14

<sup>1672</sup> Marloes van Noorloos, ‘Hate Speech Revisited: A Comparative and Historical Perspective on Hate Speech Law in the Netherlands and England & Wales’ (eds. Intersentia 2006) 129

which is threatening, abusive or insulting, mirroring Section 18 of the 1986 Public Order Act. The UK did not pass or amend legislation for purposes of adopting the Framework Decision given that it already contains provisions which meet the document's objectives. In fact, in comparison to other countries, this country has been effective in achieving the purpose of this Framework Decision. For example, it has the highest criminal penalty for stirring up hate (its form of hate speech) in the EU,<sup>1673</sup> and has provided the EU with case-law and detailed statistics which demonstrate that racist and xenophobic motivation is taken into consideration.<sup>1674</sup> Nevertheless, certain deviations from the Framework Decision do exist in this country. For example, the list of grounds upon which people are victims of racism and xenophobia, as included in the Framework Decision, are not fully transposed in UK law which leaves out descent but incorporates all the rest.<sup>1675</sup> Further, elements which are clearly missing from national legislation are the requirements of Article 1(c) and (d) of the Framework Decision. Article 1(c) of the Framework Decision provides for the criminalisation of publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, 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 when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group. Article 1(d) adopts the same wording, structure and approach as contained in Part (c) but deals with the crimes defined in Article 6 of the Charter of the International Military Tribunal. The country under consideration has no legislation to criminalise such offences,<sup>1676</sup> thereby falling short of the requirements of Article 1 (c) and (d) of the Framework Decision.

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<sup>1673</sup> The maximum penalty in relation to hate speech ranges from 1 year (BE) to 7 years (UK, in the case of a conviction on indictment): Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, COM/2014/027 final, para. 3.1.3

<sup>1674</sup> The only other country to do this was Denmark

<sup>1675</sup> List of grounds in the Framework Decision include: race, colour, religion, descent or national or ethnic origin.

<sup>1676</sup> Interestingly however, in the 1998 case against Griffin, the national court found that Issue 12 of the magazine he edited violated section 19 of the Public Order Act 1986 as it contained anti-Semitic cartoons, allegations denying the Holocaust and propaganda related to Jewish power.

#### 4. National Legal Framework

This section shall provide an analysis of the domestic legal framework of England and Wales that can be relied upon when challenging far-right extremism. The section will look at the relevant legislation in the sphere of speech, material and activities of far-right entities and consider how, in practice, the judiciary has interpreted and applied such legislation when confronted with the far-right movement. Before proceeding with an insight into the particular legislation and jurisprudence and, given that the problem questions within this dissertation are assessed through a human rights lens, the section will firstly look at the human rights framework of the country as this will facilitate any subsequent discussion. To this end, it will set out how the freedoms of expression, association and assembly are conceptualised and incorporated into domestic law. It will subsequently appraise how England and Wales balance these rights with other interests, namely public order and anti-terrorism. Following this, the section will consider how the law regulating the registration and functioning of political parties as well as the electoral process in itself may separately or in conjunction with each other affect the development of the far-right, regardless of whether such laws, regulations and systems have the purpose of countering such movements. This approach is necessary since it will enable an understanding of the handling of all the entities which make up the far-right and the manner in which they are tackled by England and Wales. An overview of the statutes' objectives as well as the sections relevant to this discussion shall be effectuated and followed by an analysis of interrelated case-law so as to enable an understanding of the way in which Courts and Tribunals have interpreted and applied the legislative tools available to them as a means of challenging the far-right. In relation to legislation created in the ambit of criminal law, a historical account of its development shall be made before the analysis of this area of law, given the multiple changes undergone and brought about by different statutes.

## 4.1 Human Rights: Conceptual Backdrop

### 4.1.1 Freedom of Expression

It has been suggested that, even before the incorporation of the HRA 1998, the freedom of expression was anyhow constructed and protected in the common law framework.<sup>1677</sup> However, the fact remains that there was no statutory protection of the right to the freedom of expression up until the passing of the HRA in 2000. That was the first time that the meaning of the freedom of expression and a reference to the limitations that can be legitimately imposed thereto, as so provided by Article 10 of the ECHR, were incorporated into national legislation. In fact, referring to two cases, namely *R v Secretary of State for the Home Department*<sup>1678</sup> and *Reynolds v Times Newspapers Ltd*,<sup>1679</sup> one commentator noted that an embracement of the freedom of expression by the Courts can be discerned during the time when the HRA was being passed.<sup>1680</sup> For example, in the former case, which dealt with prisoners' freedom of expression, the House of Lords deemed this freedom to be 'as strongly protected in the common law as it is under the Convention.'<sup>1681</sup> In the latter case on defamation and libel, Lord Steyn, in citing the 1972 case of *Broome v Cassell & Co. Ltd*,<sup>1682</sup> noted that there is a 'constitutional right to freedom of expression in England.'<sup>1683</sup>

So, what position does this freedom hold when it comes to far-right rhetoric? The answer is not a simple one. A House of Commons Home Affairs Select Committee report has underlined that free speech is not absolute, with one of the examples offered in relation to legitimate restriction of this right being hate speech. Namely, the Committee held that 'those who incite racial hatred claim the right to free speech, but they misuse that right to preach a doctrine of hate and violence. Surely those who persecute others, should themselves be prosecuted by the forces of law and

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<sup>1677</sup> For example, Lord Reid in *Brutus v Cozens*, where the Court did not punish the use of offensive language during an anti-apartheid demonstration at Wimbledon to, amongst others, protect the freedom of expression and the freedom of assembly. *Brutus v Cozens* UKHL 6, [1973] A.C. 853

<sup>1678</sup> *R v Secretary of State for the Home Department*, [1989] 1 QB 26

<sup>1679</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127

<sup>1680</sup> Eric Barendt, 'Freedom of Expression in the United Kingdom under the Human Rights Act 1998' 84 *Indiana Law Journal* 3, 853

<sup>1681</sup> *R v Secretary of State for the Home Department* [1989] 1QB 26

<sup>1682</sup> *Broome v Cassell & Co. Ltd* [1972] AC 1027, 1133 A-B per Lord Kilbrandon

<sup>1683</sup> *Reynolds v Times Newspapers Ltd*, [2000] HRLR 134

order.<sup>1684</sup> Thus, the Committee refers to preachers of hate and violence, thereby appearing to pose violence as a requirement for prohibition. On a judicial level, when considering the scope of free expression, Courts usually embrace the position of Sedley LJ in *Redmond Bate v DPP*,<sup>1685</sup> which echoed the judgement of the ECHR in *Handyside v The United Kingdom*.<sup>1686</sup> Namely, he held that ‘free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.’<sup>1687</sup> This approach therefore accepts all types of speech insofar as they do not constitute calls for violence. Further, in its 2010 submission to the CERD, the UK, in explaining why the reservation to Article 4 had not been lifted, referred to a ‘a long tradition of freedom of speech which allows individuals to hold and express views which may well be contrary to those of the majority of the population...’<sup>1688</sup> This position was reiterated in the country’s 2015 report to the CERD. This freedom has also habitually been referred to when racial hatred provisions were to be incorporated into national legislation and any discussion about new relevant legislation usually comes with strong resistance in the name of free expression.<sup>1689</sup> In fact, this could be the reason for which this country has not proceeded to the incorporation of offences such as group insult as have other countries<sup>1690</sup> and, by extension, has not incorporated any provision clearly banning hate speech. However, any strictness in relation to the significance of free speech seems to crumble in the sphere of preserving public order given that harmful expression is prohibited in this country if it negatively affects public order. In fact, the significance of public order in the realm of hate speech (and also acts) within the sphere of the extreme-right, can be illustrated by looking at the factors leading up to the incorporation of relevant legislation, namely the Public Order Act 1936. This was predominantly a response to the Battle of Cable Street which commenced from a march of the *British Union of Fascists* and resulted in public disarray on the streets of London. It is also

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<sup>1684</sup> Philip N.S. Rumney, ‘The British Experience of Racist Hate Speech Regulation: A Lesson for First Amendment Absolutists?’ (2003) 32 *Common Law World Review* 2, 136

<sup>1685</sup> *Redmond Bate v DPP*, [1999] EWHC Admin 733

<sup>1686</sup> *Handyside v UK*, Application no. 5493/72, (ECHR 7 December 1976), para.49

<sup>1687</sup> *Redmond Bate v DPP*, [1999] EWHC Admin 733, para.20

<sup>1688</sup> Report submitted by States Parties under Article 9 of the Convention: United Kingdom, CERD/C/GBR/18-20, para. 106

<sup>1689</sup> Marloes van Noorloos, ‘*Hate Speech Revisited – A Comparative and Historical Perspective on Hate Speech Law in the Netherlands and England and Wales*’ (eds. Intersentia 2011) 231

<sup>1690</sup> Marloes van Noorloos, ‘*Hate Speech Revisited – A Comparative and Historical Perspective on Hate Speech Law in the Netherlands and England and Wales*’ (eds. Intersentia 2011) 231

noteworthy that the Race Relations Act 1965 was a response to race riots taking place in London and Bristol, namely the 1958 Notting Hill Riots and the 1963 Bristol Bus Boycott riots.<sup>1691</sup> In fact, when it comes to preserving public order, the country is ready and willing to limit free expression<sup>1692</sup> demonstrating that public order comes higher up the hierarchy than free speech.

In more recent times, anti-terror measures have been developed with expression that, amongst others, supports or glorifies terrorism, constituting prohibited speech. So, when dealing with the serious offence of terrorism, relevant expression can also be prohibited although, once again, because of the damage it can result in on a societal level. However, by placing the relevant offences within the public order framework (and also anti-terrorism), what is missing is legislation against harmful expression simply because of the harm it can do to the victim, regardless of the effects on, for example, public order. The Public Order Act 1986, discussed below, prohibits racially hateful expression which is threatening, abusive or insulting and religiously hateful expression which is threatening or abusive. However, nowhere do we find provisions analogous to the purposes of the aforementioned CoE Additional Protocol (which the UK has not yet ratified) which aims at prohibiting, *inter alia*, forms of online expression which promote or incite discrimination against an individual or group of individuals. Thus, it appears to be the case that discrimination is not sufficient to amount to a public order offence and personal harm is not sufficient to excuse the curtailment of free expression and, as such, there is currently no space for a hate speech ban in this country. Moreover, the importance attached to the freedom of expression and the significance of preserving public order, which essentially overrides the former, could possibly be the reasons for which the UK has not taken supranational steps in the form of ratifying the Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems. More particularly, given that the State adopts the position that expression can only legitimately be curtailed insofar as it poses a danger to the public, the aforementioned Additional Protocol, which is not placed within the realm of maintaining public order does not fit within the national approach. The extent to which this approach can be justified is open to discussion according to how harm is conceptualised. More particularly, if a restrictive approach to harm is

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<sup>1691</sup> David Williams, 'Keeping the Peace. The Police and Public Order' (eds. Hutchinson 1967) 11 -12

<sup>1692</sup> Susannah Vance, 'The Permissibility of Incitement to Religious Hatred Offenses under European Convention Principles.' (2004) 14 *Transnational Law & Contemporary Problems* 1, 235



adopted, then curtailing expression is legitimate insofar as destructive effects result from such expression. If one views harm in a broader manner, then abstract effects, such as the moral damage of expression, can also constitute legitimate grounds for curtailing expression which, in such a case, does not need to cause public disorder but may lead to harm such as personal and group denigration.

For purposes of the subsequent analysis, it is also necessary to note one more important characteristic of England and Wales in the realm of free expression. Notwithstanding that the judiciary has made several attempts to make an analysis of the freedom of expression and has put forth certain reasons in relation to the limitations of speech and, even though there exist comments such as those made by the Select Committee discussed above, it must be acknowledged that the freedom of expression in England and Wales ‘remain[s] heavily under-theorised’<sup>1693</sup> with Lord Steyn being the central figure who attempted, on numerous occasions, to provide an overview of the normative framework underlying this freedom.<sup>1694</sup> Thus, the analysis of hate speech uttered by far-right groups, parties and movements will be effectuated against a lacking normative backdrop accompanied by a statutory setting which has only recently seen the codification of the freedom of expression.

#### 4.1.2 Freedoms of Assembly and Association

As with expression, the freedoms of assembly and association became part of the statute following the enforcement of the HRA which, *inter alia*, incorporated Article 11 of the ECHR into national law.

##### *4.1.2(i) Freedom of Association: General Overview*

Although not part of statute until 2000, freedom of association was put forth by the UK as a reason to reject the endorsement of Article 4 of the ICERD. During the drafting process and discussions on Article 4, the UK representative held that her country ‘defended the right of all organisations, even fascist and communist ones, to exist and to make their views known, even

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<sup>1693</sup> Ivan Hare, ‘Crosses, Crescents and Sacred Cows: Criminalizing Incitement to Religious Hatred’ (2006) *Public Law* 521, 526

<sup>1694</sup> See, *inter alia*, *R v Secretary of State for the Home Department, Ex p. Simms* [2000] 2 A.C. 115, 126, *R v Shayler* [2002] UKHL 11

though those organisations held views which the majority of the people utterly repudiated. No matter how odious the ideas of any group or organisation were, her country could not agree to the banning of it.’<sup>1695</sup> This paragraph reflects two significant issues, firstly that, although the HRA had not been part of national law at that point, the UK did recognise the freedom of association and, secondly, that the representative’s argument is no longer valid since, following the 2000 Terrorism Act, several associations are, in fact, proscribed. More particularly, the freedom of association is limited through Section 3 of the Terrorism Act 2000, which provides that the Secretary of State can proscribe an association which is involved in terrorism. Although groups affiliated predominantly with Irish republicanism, communism and Islamic extremists have been proscribed under this Act, no far-right associations, as understood and conceptualised in this dissertation, have yet been proscribed.<sup>1696</sup> More particularly, in relation to political parties contesting elections in the UK, the only one ever to have been proscribed was a far-right one, namely the *British Union of Fascists*.<sup>1697</sup> This however, occurred under the Defence Regulation 18b (AA) of the Defence (General) Regulations 1939, drawn up for purposes of restricting Nazi activities, and are no longer in use. Following that, and notwithstanding some restrictions placed on the access to the media by parties such as *Sinn Féin*<sup>1698</sup> up until 1994 when the *Irish Republican Army*<sup>1699</sup> declared a ceasefire, no other restrictions have been placed on the right of political parties functioning in the UK to associate.<sup>1700</sup> It has been held that ‘the extreme rarity of placing limitations upon or banning political parties illustrates how freedom of association for

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<sup>1695</sup> Marloes van Noorloos, ‘Hate Speech Revisited – A Comparative and Historical Perspective on Hate Speech Law in the Netherlands and England and Wales’ (eds. Intersentia 2011) 281

<sup>1696</sup> For example, the Irish Republican Army, 17 November Revolutionary Organisation, Basque Homeland and Liberty and Revolutionary Peoples’ Liberation Party—Front, Armed Islamic Group (Groupe Islamique Armée) (GIA)

<sup>1697</sup> Equality and Human Rights Commission: Human Rights Review 2012: Article 11 Freedom of Assembly and Association: <[http://webcache.googleusercontent.com/search?q=cache:Siq\\_PkKNQn4J:www.equalityhumanrights.com/sites/default/files/documents/humanrights/hrr\\_article\\_11.pdf+&cd=1&hl=en&ct=clnk&gl=cy](http://webcache.googleusercontent.com/search?q=cache:Siq_PkKNQn4J:www.equalityhumanrights.com/sites/default/files/documents/humanrights/hrr_article_11.pdf+&cd=1&hl=en&ct=clnk&gl=cy)> [Accessed 20<sup>th</sup> July 2015], 412

<sup>1698</sup> Sinn Féin an Irish republican political party active in both the Republic of Ireland and Northern Ireland: <<http://www.sinnfein.ie/>>

<sup>1699</sup> The IRA is a republican paramilitary organisation which pursued the establishment of a unified Ireland, without British rule in Northern Ireland: <republican paramilitary organisation seeking the establishment of a republic, the end of British rule in Northern Ireland, and the reunification of Ireland. In April 1998, the Good Friday Agreement was signed which sought the normalization of inter-communal relations. Although the IRA destroyed some of its weapons, it resisted decommissioning its entire armoury, hampering implementation of key parts of the peace agreement. On July 28, 2005, however, the IRA announced that it had ended its armed campaign and instead would pursue only peaceful means to achieve its objectives: <<http://www.britannica.com/topic/Irish-Republican-Army>> [Accessed 23<sup>rd</sup> July 2015]

<sup>1700</sup> Equality and Human Rights Commission: Human Rights Review 2012: Article 11 Freedom of Assembly and Association, 412

political parties is well-protected in Britain, provided they do not advocate violence.<sup>1701</sup> This, in itself, is not in contravention of the ECtHR which, in *Vona v Hungary*, held that ‘unless the impugned association can reasonably be regarded as a hotbed for violence or incarnating a negation of democratic principles, restrictions to the freedom of association are incompatible with the Convention.’<sup>1702</sup> Interestingly the ECtHR’s position (and also the national position) deviates from Article 4 of the CERD. In fact, the CERD held that, by not prohibiting the BNP and other groups and organisations of a racist nature and by allowing them to pursue their activities, the UK was failing to implement Article 4, which calls for a condemnation of all organisations attempting to justify or promote racial hatred and discrimination.<sup>1703</sup> Activities of associations have been tackled through the public order framework. More particularly, the Public Order Act 1936<sup>1704</sup> was the first statutory tool created to tackle activities of groups and associations that could bring disarray to public order. This document was created to address public order issues arising from racist assemblies of the *British Union of Fascists*<sup>1705</sup> and their opposition.<sup>1706</sup> Although no direct proscription of racist assemblies and marches was contained therein, nor did it contain any hate speech regulation, this Act sought to ensure public order by granting the police powers to preserve the public order on the occasion of assemblies, processions and meetings<sup>1707</sup> and to prohibit uniforms in connection with political objects<sup>1708</sup> and quasi-military organisations.<sup>1709</sup> This was the basis of today’s Public Order Act 1986.

#### 4.1.2(ii) Freedom of Association and Employment: Issues of Non-Discrimination

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<sup>1701</sup> Equality and Human Rights Commission: Human Rights Review 2012: Article 11 Freedom of Assembly and Association, 412

<sup>1702</sup> *Vona v Hungary*, App. No. 35943/10 (ECHR 9 July 2013) para 64

<sup>1703</sup> CERD Concluding Observations - United Kingdom of Great Britain and Northern Ireland, A/48/18 (1993), para 8

<sup>1704</sup> Public Order Act 1936 c.6

<sup>1705</sup> British Union of Fascists: The British Union of Fascists was a fascist, anti-communist political party in the United Kingdom formed in 1932 by Oswald Mosley. In 1936, it changed its name to the British Union of Fascists and National Socialists and in 1937 to British Union which existed until 1940 when it was proscribed. It was a fascist, anti-communist party.

<sup>1706</sup> Marloes van Noorloos, ‘Hate Speech – A Comparative and Historical Perspective on Hate Speech Law in the Netherlands and England and Wales’ (eds. Intersentia 2011) 286

<sup>1707</sup> Public Order Act 1936 c.6 : Introductory Text

<sup>1708</sup> Section 1, 1936 Public Order Act c.6

<sup>1709</sup> Section 2, 1936 Public Order Act c.6

Although, the country has only once proscribed a political party, the judiciary has come before cases in which the issue of restricting the association rights of members of far-right parties and particularly the BNP has arisen.

(a) H M Prison Service v Mr. C Potter

In the case of *HM Prison Service v Mr. C Potter*,<sup>1710</sup> the Prison Service had introduced a policy which precluded from employment any individuals who are members of racist organisations.<sup>1711</sup> The Prison Service held that this policy was adopted so as to ensure compliance with Section 71 of the Race Relations Act 1976, as amended by Section 2 of the Race Relations Amendment Act 2000. Section 71 required that every authority or person specified in Schedule 1A (including the Prison Service) must, in carrying out its functions, have due regard to the need to eliminate unlawful racial discrimination. The prison's policy held that certain organisations, including the BNP, were considered to be racist.<sup>1712</sup> The claimant, an active BNP member, twice applied and was rejected for employment in the Prison Service.<sup>1713</sup> As a result of these rejections, he brought the case to the Employment Tribunal arguing that 'as a white Anglo-Saxon I have been racially discriminated against by HM Prison Service.'<sup>1714</sup> He based this argument on the fact that the Prison Service's policy was, in fact, applied only against white organisations.<sup>1715</sup> In this case, a pre-hearing review was conducted as per the Employment Tribunal's (Constitution and Rules etc.) Regulations 2004, with the Tribunal having to consider, as per paragraph 18(7) (b) thereof, whether the case should be struck out or not. More particularly, under Section 18 of the regulations, pre-hearing reviews are conducted by the chairman unless certain conditions, not applicable in this case, are met. Subject to Section 18(7) (b), a chairman can strike out or amend a claim on the grounds that it has, *inter alia*, no reasonable prospect of success. In considering the case, the Employment Tribunal found the freedom of expression under Article 10 ECHR and

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<sup>1710</sup> *HM Prison Service v Mr. C Potter* [2006] UKEAT 0457\_06\_1411 14 November 2006 Employment Appeal Tribunal

<sup>1711</sup> *HM Prison Service v Mr. C Potter* [2006] UKEAT 0457\_06\_1411 14 November 2006 Employment Appeal Tribunal, para.2

<sup>1712</sup> *HM Prison Service v Mr. C Potter* [2006] UKEAT 0457\_06\_1411 14 November 2006 Employment Appeal Tribunal, para.3

<sup>1713</sup> *HM Prison Service v Mr. C Potter* [2006] UKEAT 0457\_06\_1411 14 November 2006 Employment Appeal Tribunal, para.4

<sup>1714</sup> *HM Prison Service v Mr. C Potter* [2006] UKEAT 0457\_06\_1411 14 November 2006 Employment Appeal Tribunal, para.5

<sup>1715</sup> *HM Prison Service v Mr. C Potter* [2006] UKEAT 0457\_06\_1411 14 November 2006 Employment Appeal Tribunal, para.16

the freedom of association under Article 11 ECHR to be directly relevant to the case. More particularly, it noted that ‘it may be, and I put it no higher than this, that a blanket rule that precludes someone from being a member of a racist organisation, even where for example they keep their membership a secret or do not bring their views into the working environment at all, might not necessarily be justified at least simply on the basis that they belong to a racist group.’<sup>1716</sup> The Employment Tribunal held that the prospects of the claimant winning the trial would be limited, but, bearing in mind the relatively serious nature of the allegation and the need for some evidence to be examined, including evidence in relation to the equal or unequal application of the policy, the case should be heard by a tribunal.<sup>1717</sup> The Prison Service appealed this decision, with the Employment Appeal Tribunal rejecting it but noting the ‘considerable irony in the Claimant alleging a breach in the Race Discrimination Act, which is an anathema to racists in any event, on the basis that some racists are treated in a racially discriminatory way and less favourably treated than other racists.’<sup>1718</sup> The Employment Appeal Tribunal found that the prospect of success was very limited but based its decision, in part, on a dictum of Lord Steyn in a previous case in which he held that ‘discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society.’<sup>1719</sup> In addition, the Employment Appeal Tribunal underlined the relatively serious nature of the allegations. The only difference with the Employment Tribunal was that the Employment Appeal Tribunal found that this was a possible case of direct discrimination rather than indirect as held by the previous Court.<sup>1720</sup> The important points to be retained from this case were that both tribunals underlined the limited prospects of success of this case but either way granted Potter a chance to proceed if he wished, with the Employment Appeal Tribunal noting the grounds of seriousness and variability of discrimination cases. No records of a subsequent trial exist, thereby, preventing an in-depth

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<sup>1716</sup> HM Prison Service v Mr. C Potter [2006] UKEAT 0457\_06\_1411 14 November 2006 Employment Appeal Tribunal, para.15

<sup>1717</sup> H M Prison Service v Mr. C Potter [2006] UKEAT 0457\_06\_1411 14 November 2006 Employment Appeal Tribunal, para.1

<sup>1718</sup> H M Prison Service v Mr. C Potter [2006] UKEAT 0457\_06\_1411 14 November 2006 Employment Appeal Tribunal, para.22

<sup>1719</sup> H M Prison Service v Mr. C Potter [2006] UKEAT 0457\_06\_1411 14 November 2006 Employment Appeal Tribunal, para.9, citing Lord Steyn in Anyanwu v South Bank Student Union [2001] IRLR 305; [2001] ICR 391, para.24

<sup>1720</sup> H M Prison Service v Mr. C Potter [2006] UKEAT 0457\_06\_1411 14 November 2006 Employment Appeal Tribunal, para.22

analysis of what a tribunal would finally have decided based on the actual content of the case and the relevant points of law.

In the case of *Serco Limited v Arthur Redfearn*,<sup>1721</sup> the Court of Appeal was confronted with a decision of the Employment Appeal Tribunal regarding a claim for race discrimination contrary to the Race Relations Act 1986. More particularly, Redfearn, a (white) member of the BNP and, at the material time of his dismissal, a candidate for the BNP in forthcoming local elections, was employed by Serco which supplies transport services to public authorities, including the Bradford City Council. Its buses are used to transport adults and children with physical or mental disabilities who are mostly of Asian origin. Serco received notifications from unions and employees about Redfearn's employment at Serco being 'a significant cause for concern, bearing in mind the BNP's overt and racist/fascist agenda.'<sup>1722</sup> As a result of these concerns, Serco summarily dismissed Redfearn who subsequently sued on the basis of racial discrimination. Redfearn argued that Serco had treated him less favourably under Section 1(1)(a) of the 1976 Act by dismissing him on the grounds of the Asian race and ethnic origin of the people the Applicant transported.<sup>1723</sup> The Employment Tribunal rejected the claim for direct discrimination, holding that Serco's dismissal of Redfearn did not occur on racial grounds.<sup>1724</sup> It must be underlined that Redfearn could not bring a claim against Serco under the HRA 1998 for infringements of his rights under Articles 9, 10 and 11 since Serco is not a public authority.<sup>1725</sup> The Court of Appeal noted that the key question to be tackled was whether it had been established that Serco had directly or indirectly discriminated against him on racial grounds.<sup>1726</sup> It found that the Employment Appeals Tribunal was correct in deciding that Redfearn was not dismissed on racial grounds since 'they did not become racial grounds because Serco dismissed him in circumstances in which it wished to avoid the perceived detrimental effects of Redfearn's

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<sup>1721</sup> *Serco Limited v Arthur Redfearn* Court of Appeal (Civil Division) [2006] EWCA Civ 659 (25 May 2006)

<sup>1722</sup> *Serco Limited v Arthur Redfearn* Court of Appeal (Civil Division) [2006] EWCA Civ 659 (25 May 2006), para.7

<sup>1723</sup> *Serco Limited v Arthur Redfearn* Court of Appeal (Civil Division) [2006] EWCA Civ 659 (25 May 2006), para.15

<sup>1724</sup> *Serco Limited v Arthur Redfearn* Court of Appeal (Civil Division) [2006] EWCA Civ 659 (25 May 2006), para.27

<sup>1725</sup> *Serco Limited v Arthur Redfearn* Court of Appeal (Civil Division) [2006] EWCA Civ 659 (25 May 2006), para.14

<sup>1726</sup> *Serco Limited v Arthur Redfearn* Court of Appeal (Civil Division) [2006] EWCA Civ 659 (25 May 2006), para.13

membership of and election to office representing the BNP, which propagated racially discriminatory policies concerning non-white races who formed part of Serco's workforce and customer base.<sup>1727</sup> Thus, Redfearn was not treated less favourably because he was white but because of his membership of the BNP.<sup>1728</sup> In a nutshell, 'Serco was not adopting a policy which discriminated on the basis of a dividing line of colour or race. Serco would apply the same approach to a member of a similar political party, which confined its membership to black people.'<sup>1729</sup> In fact, the Court reminded the parties that it was the BNP who was adopting a racially exclusionary membership policy against persons who were not white.<sup>1730</sup> As such, the Court noted that Redfearn's complaint was one of discrimination on political grounds, with political belief not constituting a protected characteristic under anti-discrimination law.<sup>1731</sup> Although the Court of Appeal found in favour of Serco and, notwithstanding that Redfearn was refused leave to appeal to the House of Lords, thereby prohibiting Redfearn's right to associate with the BNP while an employee of Serco, the ECtHR found that his freedom of association had, in fact, been violated by Serco's decision to dismiss him based on his affiliation to the BNP. This case, at the Strasbourg level, will be discussed further in chapter four. As such, in this case, the national judiciary interpreted the freedom of association in a more restrictive manner than Strasbourg, when faced with a far-right member.

In the case of *Associated Society of Locomotive Engineers & Firemen v Lee*,<sup>1732</sup> the Associated Society of Locomotive Engineers & Firemen (ASLEF) excluded Lee who was an activist for the BNP and had stood as a candidate in the general elections.<sup>1733</sup> Furthermore, there were allegations that he had harassed *Anti-Nazi League* leafleteers by taking pictures of them, taking

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<sup>1727</sup> Serco Limited v Arthur Redfearn Court of Appeal (Civil Division) [2006] EWCA Civ 659 (25 May 2006), para.49

<sup>1728</sup> Serco Limited v Arthur Redfearn Court of Appeal (Civil Division) [2006] EWCA Civ 659 (25 May 2006), para. 49

<sup>1729</sup> Serco Limited v Arthur Redfearn Court of Appeal (Civil Division) [2006] EWCA Civ 659 (25 May 2006), para.49

<sup>1730</sup> Serco Limited v Arthur Redfearn Court of Appeal (Civil Division) [2006] EWCA Civ 659 (25 May 2006), para.49

<sup>1731</sup> Serco Limited v Arthur Redfearn Court of Appeal (Civil Division) [2006] EWCA Civ 659 (25 May 2006), para.49

<sup>1732</sup> *Associated Society of Locomotive Engineers & Firemen v Lee* Employment Appeal Tribunal 24 February 2004 2004 WL 343848 Employment Appeal Tribunal UKEAT/0625/03/RN [24 February 2004]

<sup>1733</sup> *Associated Society of Locomotive Engineers & Firemen v Lee* Employment Appeal Tribunal 24 February 2004 2004 WL 343848 Employment Appeal Tribunal UKEAT/0625/03/RN, para.4

their car numbers, making cut throat gestures at them and following a woman in his car to her home, noting down her house number.<sup>1734</sup> The Employment Tribunal found that, by dismissing Lee, ASLEF had acted in a way contrary to Section 174 of the Trade Union and Labour Relations (consolidation Act) which entails the right not to be excluded or expelled from a union. More particularly Section 174(1) provides that an individual shall not be excluded or expelled from a trade union unless the exclusion or expulsion is permitted by this section. Section 174 (2) (d) provides that ‘the exclusion or expulsion is entirely attributable to conduct of his (other than excluded conduct) and the conduct to which it is wholly or mainly attributable is not protected conduct.’ Part 4 notes that protected conduct is conduct ‘which consists in the individual’s being or ceasing to be, or having been or ceased to be, a member of a political party.’ ASLEF appealed to the Employment Appeal Tribunal, which interpreted Section 174 of the Trade Union and Labour Relations Act to mean that a Union can rely on a member’s conduct to expel him or her and cannot rely on such conduct if this constitutes membership of a political party, while the Union must demonstrate that the expulsion is entirely justified by impermissible conduct.<sup>1735</sup> The Employment Appeal Tribunal found that the Employment Tribunal erred in law and ruled that the case be remitted to a different Tribunal to respond to the questions of firstly, who and/or what body on the Union’s behalf expelled the applicant? Secondly, was the expulsion entirely attributable to his conduct, regardless of his being a member of the BNP?<sup>1736</sup> The second tribunal upheld Lee’s complaint, rejecting the defence that his expulsion was based on his conduct, holding that the expulsion occurred ‘primarily because of his membership of the BNP’ and was, thus, a violation of the aforementioned Section 174.<sup>1737</sup> Therefore, in this case, which involved trade union rather than employment rights, the national Court found in favour of a far-right member in the realm of association. ASLEF subsequently took the UK to the ECtHR and won, on the basis that a violation of its Article 11 had occurred since a trade union is, within the ambit of this freedom, allowed to select its members. This case is discussed in more detail in chapter

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<sup>1734</sup> Associated Society of Locomotive Engineers & Firemen v Lee Employment Appeal Tribunal 24 February 2004 2004 WL 343848 Employment Appeal Tribunal UKEAT/0625/03/RN 24 February 2004, para.5

<sup>1735</sup> Associated Society of Locomotive Engineers & Firemen v Lee, Employment Appeal Tribunal, UKEAT/0625/03/RN, para.29

<sup>1736</sup> Associated Society of Locomotive Engineers & Firemen v Lee, Employment Appeal Tribunal, UKEAT/0625/03/RN, para.34

<sup>1737</sup> Associated Society of Locomotive Engineers & Firemen v Lee, Application no. 11002/05 (ECHR27 February 2007), para.16 - para.25 of judgement of second tribunal (unreported)



four. Thus, in Potter's case, the tribunals recognised that the prospects of his winning the case were limited but allowed him a voice, given, amongst others, the severity granted to the freedom of expression and association. However, from their judgements and predictions one can conclude that, had a hearing occurred, Potter would not have won in the name of freedom of association (and/or expression). In Redfearn's case, the Court of Appeal directly restricted his freedom of racist association in the employment setting. Finally, in Lee's case, the Employment Appeal Tribunal granted him the freedom of association, that being the freedom to participate in the trade union concerned, regardless of his BNP membership. It seems that with a trade union, the threshold of limiting association is higher for national Courts. Thus from Redfearn's case, the national Courts sent out a clear message to members of the far-right, namely that this sort of association may readily and legitimately affect other rights such as that of employment. This contributes to the overall process of challenging the far-right, directly or indirectly, as the judiciary has an extra tool to challenge its members, even in the sphere of employment, insofar as their association may affect those receiving his services.

#### 4.1.2 (iii) Freedom of Assembly

The birth of the freedom of assembly had been interlinked during the time leading up to the enactment of the HRA.<sup>1738</sup> For example, in a 1997 case, Lord Denning underlined 'the right to demonstrate and the right to protest on matters of public concern.'<sup>1739</sup> The central issue that has been clear from the onset is that only peaceful assembly is accepted, as is the position on a European and international level, with 'provocative disorderly behaviour which is likely to have the natural consequences of causing violence...is likely to cause a breach of the peace'<sup>1740</sup> deemed illegal under domestic law. Part 2 of the 1986 Public Order Act regulates processions and assemblies and incorporates a range of conditions and duties that must be met if such activities are to occur. For example, Article 11 holds that written notice shall be given to the Police for a public procession that aims to, *inter alia*, support or oppose the view or activities of a person or body of persons. Article 12 holds that such processions may be prohibited if the Police consider there to exist a possibility of public disorder. Article 14 allows the Police to

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<sup>1738</sup> Equality and Human Rights Commission: Human Rights Review 2012: Article 11 Freedom of Assembly and Association, 412

<sup>1739</sup> *Hubbard v Pitt* [1975] 3 All ER 1

<sup>1740</sup> *Morpeth Ward Justices, ex parte Ward* [1992] 95 Cr App R 215

restrict assemblies insofar as issues of public disorder may arise. The Serious Organised Crime and Police Act 2005<sup>1741</sup> requires those organising a demonstration, within one kilometer of Parliament Square or in any other area designated by the Secretary of State for purposes of this Act, previously to request a permit to do so.<sup>1742</sup> In granting such a permit, the Commissioner may impose conditions to, amongst other things, prevent disorder and protect property.<sup>1743</sup> This has happened on several occasions in relation to EDL marches. In fact, in some cases, the Secretary of State for the Home Department ordered a blanket ban on all marches due to fear that EDL marches would result in violence and public disorder.<sup>1744</sup> Further, EDL marches which have been allowed to take place have often been marked with arrests on the grounds of persons breaching the peace or to prevent an imminent breach of the peace.<sup>1745</sup> In the case of *Chief Constable of the Bedfordshire Police v Paul Golding and Jayda Fransen*,<sup>1746</sup> the High Court addressed the Police's request for interim injunctions under the Anti-Social Behaviour, Crime and Policing Act 2014<sup>1747</sup> against the leader and deputy leader of *Britain First*. Under Section 1 of the aforementioned Act, a Court may grant an injunction insofar that, on the balance of probabilities, the respondent has engaged or threatens to engage in anti-social behaviour and, that the Court considers it just and convenient to grant the injunction for the purposes of preventing the respondent from engaging in anti-social behaviour. The injunctions were sought for a one-year period, but the immediate reason for the injunctions was *Britain First's* march which was to take place on the 27 June 2015.<sup>1748</sup> The injunctions were requested given the anti-Islam and anti-immigrant rhetoric and activity of the two defendants, with the subsequent concern being that the 27 June march would possibly result in public disorder.<sup>1749</sup> The High Court refused the first injunction which would forbid the respondents from entering Luton and the surrounding area.

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<sup>1741</sup> Serious Organised Crime and Police Act 2005 c.15

<sup>1742</sup> Serious Organized Crime and Police Act 2005 c.15, section 132

<sup>1743</sup> Serious Organized Crime and Police Act 2005 c.15, section 134

<sup>1744</sup> The Guardian: 'English Defence League March in Leicester Banned' (4 October 2010)

<<http://www.theguardian.com/uk/2010/oct/04/english-defence-league-march-banned>> [Accessed 15 November 2015]

<sup>1745</sup> See for example: The Guardian: 'Police Arrest EDL Supporters to Prevent Breach of the Peace': <<http://www.theguardian.com/uk/2011/nov/11/police-arrest-edl-supporters-peace>> (11 November 2011)[Accessed 15 November 2015]

<sup>1746</sup> *Chief Constable of the Bedfordshire Police v Paul Golding and Jayda Fransen*, [2015] EWHC 1875 (QB)

<sup>1747</sup> Anti-Social Behaviour, Crime and Policing Act 2014 c.12

<sup>1748</sup> *Chief Constable of the Bedfordshire Police v Paul Golding and Jayda Fransen*, [2015] EWHC 1875 (QB), para.4

<sup>1749</sup> Neil Parpworth, 'Public Order and the Anti-Social Behaviour, Crime and Policing Act 2014' (8 August 2015) 179 *Criminal Law and Justice Weekly* 30

<sup>1750</sup>The reasons put forth by the Court for rejecting this injunction included one that directly correlated to the significance of political expression, assembly and association. More particularly, the Court held that ‘to ban the leaders of a registered political party altogether from a town is a very considerable thing. The evidence and the submissions on behalf of the Chief Constable did not address the consequences for legitimate political activity by that party in a town. Nor did they address the potential for an injunction in one town to lead to calls for injunctions in other towns and cities with a Muslim population of appreciable size, and, in turn, how legitimate political activity might be conducted if those calls were heeded.’<sup>1751</sup>

However, it granted the rest of the injunctions, preventing the respondents from:

- (a) Entering any Mosque or Islamic Cultural Centre or its private grounds within England and Wales without prior written invitation.
- (b) Publishing, distributing or displaying, or causing to be published, distributed or displayed, any words or images, whether electronically or otherwise, which having regard to all the circumstances are likely to stir up religious and/or racial hatred.
- (c) Using threatening, abusive or insulting words or behaviour thereby causing harassment, alarm or distress to any person.
- (d) Carrying or displaying in Luton on Saturday 27 June 2015 at or in connection with the march by "Britain First" any banner or sign with the words "No More Mosques" or similar words or words to like effect.<sup>1752</sup>

Thus, the Court embraced the position that it is particularly important that the freedom of assembly is exercised within the framework of a political party, even a far-right one with particular emphasis being added by the Court to the defendants’ roles as leaders of a political party. It instead sought to limit their behaviour in order to maintain the peace. Once again, challenging the far-right occurred within the spectrum of ensuring public order.

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<sup>1750</sup> Chief Constable of the Bedfordshire Police v Paul Golding and Jayda Fransen, [2015] EWHC 1875 (QB), para.4

<sup>1751</sup> Chief Constable of the Bedfordshire Police v Paul Golding and Jayda Fransen, [2015] EWHC 1875 (QB), para.33

<sup>1752</sup> Chief Constable of the Bedfordshire Police v Paul Golding and Jayda Fransen [2015] EWHC 1875 (QB), para.13

As such, England and Wales have historically prohibited far-right assemblies, the prohibition of which constitutes a practical and usable tool to limit the activities and rhetoric of far-right groups such as the EDL, preventing them from taking to the streets. The restrictions to relevant rights, such as that of assembly, are curtailed in the framework of public order and anti-social behaviour. On the other hand, the ECtHR permits the prohibition of assemblies insofar as they are violent but also, if they ‘otherwise deny the foundations of a democratic society.’<sup>1753</sup> The latter element is not upheld by England and Wales which will ban an assembly because of its nature, namely that this may lead to violence and/or public disarray but has not, to date, banned one because of its undemocratic content. The handling of such occurrences reflects, once again, the great significance placed by the country on public order rather than, for example, on the detrimental effects the content of an assembly may have on its target group.

## 5. The Far-Right Movement and Criminal Law

This section will provide an overview of the relevant legislative provisions in the ambit of criminal law, and particularly the public order and anti-terrorism frameworks, which can be used for purposes of challenging the rhetoric and/or activity of the far-right. Following a commentary on the provisions, there will be a jurisprudential analysis demonstrating how these are interpreted and applied by the judiciary when faced with the challenge of the far-right. It should be noted that the English legal system does not have statutes which directly and explicitly deal with extreme right-wing movements and/or their expression, activities or symbolism. However, this State has other legislative tools that can be used to challenge the far-right movement,<sup>1754</sup> with public order constituting the predominant realm through which relevant cases have traditionally been pursued. More recently, in relation to criminal law, the far-right has also been challenged through anti-terror laws.

### 5.1 Maintaining Public Order as a Sphere through which to Challenge the Far-Right

Sections 18-23 of Part 3 of the Public Order Act 1986, as amended, deal with racial hatred and, specifically, acts intended or likely to stir up racial hatred and make it an offence to possess racially inflammatory material. Acts intended or likely to stir up racial hatred include the use of

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<sup>1753</sup> *Fáber v Hungary*, App.no 40721/08, (ECHR 24 July 2012) para. 37

<sup>1754</sup> Christopher J. Newman & Peter Rackow, ‘Undesirable Posters and Dubious Symbols: Anglo-German Legal Solutions to the Display of Right-Wing Symbolism and Propaganda; (2011) 75 *Journal of Criminal Law* 2, 143

words or behaviour or display of written material, the public performance of a play, the distribution, showing or playing of a recording and the broadcasting or inclusion of a programme in cable programme service. Section 17 defines what is meant by racial hatred, while Section 23 prohibits the possession of racially inflammatory material. Section 27(1) restricts the enforcement of the above provisions by holding that the consent of the Attorney-General must be acquired before the commencement of proceedings for any of the said offences. This provision was originally incorporated into the Race Relations Act 1965 and then the Public Order Act 1986 in order to safeguard ‘against proceedings being taken in circumstances which would penalize or inhibit legitimate controversy, and will ensure that their use is confined to the ringleaders and organizers of incitement to racial hatred.’<sup>1755</sup> Section 27(2) holds that, for purposes of respecting the rules against charging more than one offence in the same count or information, Sections 18 to 23 create one offence. Section 27(3) holds that the penalty imposed for a conviction on indictment<sup>1756</sup> for any of the offences under consideration results in imprisonment of no more than seven years and/or a fine, whilst a summary conviction<sup>1757</sup> results in imprisonment for a term of up to six months and/or a fine.

5.1.2 Acts Intending to Stir up Racial/Religious Hatred and Possession of Inflammatory Material  
Incitement to racial hatred has routes in seditious libel, public mischief and breach of the peace. Seditious libel was defined in the case of *R v Burns*<sup>1758</sup> as ‘an intention...to raise discontent or disaffection amongst Her Majesty’s subjects or to promote feelings of ill-will and hostility between different classes of such subjects.’<sup>1759</sup> By the late 1960s, it was noted that sedition could only be invoked where there was incitement to violence or public disorder. The courts defined public mischief even more widely to include ‘all offences of a public nature, that is all such acts or attempts as tend to the prejudice of the community.’<sup>1760</sup> Although some prosecutions were

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<sup>1755</sup> Kenneth Lasson, ‘Racism in Great Britain: Drawing the Line on Free Speech’ (1987) 7 *Boston College Third World Law Journal* 2, 167

<sup>1756</sup> Conviction on indictment usually occurs in the Crown Court: Gary Slapper & David Kelly, *The English Legal System* (10<sup>th</sup> edn. Routledge 2009-2010) 174

<sup>1757</sup> Summary offences are normally dealt with in the magistrates court where they are governed by Part 37 Criminal Procedure Rules 2010. The Crown Court may deal with summary offences in some circumstances

<sup>1758</sup> *Cave J in R v Burns* (1886) Cox CC 359

<sup>1759</sup> Ivan Hare, ‘Crosses, Crescents and Sacred Cows: Criminalizing Incitement to Religious Hatred’ (2006) *Public Law* 521, 521

<sup>1760</sup> *R v Higgins* (1801) East at 21

brought forth under these offences for cases dealing with incitement to racial hate<sup>1761</sup>, ‘such offences were hardly an effective deterrent since their inherent vagueness discouraged prosecutions.’<sup>1762</sup> The Race Relations Act 1965 was the first statutory document to incorporate the offence of incitement to racial hatred. In fact, it was the State’s fear for, *inter alia*, the increase of support for neo-Nazi and other racist groups and associations during the 1960s that led to the incorporation of the offence of stirring up racial hatred in the Race Relations Act 1965. Section 6, therein, prohibited incitement to racial hatred by making it an offence for a person intentionally to stir up racial hatred through the publication or distribution of written matter which was threatening, abusive or insulting or through the use of such words in a public place. Consent of the Attorney-General was required for a prosecution under section 6 to occur. Section 6 of the 1965 Act was received with much criticism with, for example, Judge Leslie Scarman noting that it was ‘hedged about with restrictions (proof of intent, requirement of the Attorney General’s consent), it is useless to a policeman on the street....’<sup>1763</sup> Section 70 of the Race Relations Act 1976<sup>1764</sup> moved the offence of stirring up racial hatred to Section 5 of the Public Order Act 1936 and amended it in such a way as to remove the requirement that the offender intended to stir up racial hatred and added behaviour which could lead to racial hatred to the existing package of speech and material.<sup>1765</sup> This rendered prosecution of practices falling within the provision’s ambit more realistic and allowed a greater number of occurrences to fall within its scope. Moreover, the government had noted that it considered a criminal public order statute rather than a civil anti-discrimination statute to constitute a more appropriate framework through which such incitement could be dealt with.<sup>1766</sup> Since the insertion of this provision into the Public Order Act 1936, stirring up racial hatred as expressed through speech or actions has been habitually dealt with within the framework of public order regulation. Section 5 of the Public Order Act 1936 created the offence of conduct which was conducive to a breach of the peace,

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<sup>1761</sup> R v Caunt (1943) 64 LQR 0203: defendant charged with though later acquitted, R v Leese, The Times 22 September 1936, R v Osbrone (1732) 229, 231

<sup>1762</sup> Ivan Hare, ‘Crosses, Crescents and Sacred Cows: Criminalizing Incitement to Religious Hatred’ (2006) *Public Law* 521, 521

<sup>1763</sup> Scarman LJ, 1975 cited in Stephen Bailey & Nick Taylor ‘Bailey, Harris and Jones: Civil Liberties: Cases and Material’ (eds. Butterworth 1985).464

<sup>1764</sup> Race Relations Act 1976 c. 74

<sup>1765</sup> Section 5 of the Public Order Act 1936 read: a person who in any public place or at any public meeting: - (a) uses threatening, abusive or insulting words or behaviour or (b) distributes or displays any writing, sign or visible representation which is threatening, abusive or insulting with intent to provoke breach of the peace of where the breach of the peace is likely to be occasioned, shall be guilty of an offence.

<sup>1766</sup> Luke McNamara ‘Human Rights Controversies: The Impact of Legal Form’ (eds. Routledge-Cavendish 2007)

holding that ‘a person who in any public place or at any public meeting: - (a) uses threatening, abusive or insulting words or behaviour or (b) distributes or displays any writing, sign or visible representation which is threatening, abusive or insulting with intent to provoke breach of the peace of where the breach of the peace is likely to be occasioned, shall be guilty of an offence.’ As will be reflected in the jurisprudential analysis, this section has been the one most often used to curtail far-right expression and activities which may lead to public disorder.

The provisions on incitement to racial hatred, as incorporated in the 1936 Act were, as noted by Lord Stoneham, ‘designed to operate selectively against the leaders and organizers of race hatred, and not be capable of becoming a weapon used against the ordinary man in the street engaged in ordinary conversation or discussion of the issues or events of the day.’<sup>1767</sup> While there have been some convictions for the use of racist words or racist conduct under Section 5 of the Public Order Act 1936, it has been suggested that ‘the punishments were often derisory, and police interpretation of the law was often incontinent.’<sup>1768</sup> However, some successful examples of convictions, thereunder, do exist. In *Jordan v Burgoyne*,<sup>1769</sup> the defendant and several other speakers, all members of the *National Socialist Movement*, addressed an assembly of approximately five thousand people at Trafalgar Square in London, some of whom were counter-demonstrators. During his speech, the defendant stated that ‘more and more people every day...are opening their eyes and coming to say that Hitler was right. They are coming to say that our real enemies...were not Hitler and the *National Socialists* of Germany but world Jewry and its associates in this country.’<sup>1770</sup> Although ‘there was disorder throughout the whole of the meeting,’<sup>1771</sup> this statement led to complete disorder as the counter-demonstrators moved towards the stage which resulted in approximately twenty arrests for breaching the peace.<sup>1772</sup> Jordan was convicted under Section 5 and, during his appeal, which was unsuccessful, Lord Chief Justice Parker<sup>1773</sup> noted that the words the defendant used were threatening, abusive or

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<sup>1767</sup> Hansard HL series 5 vol.268 col. 1011 (1932)

<sup>1768</sup> Richard Thurlow, *Fascism in Britain: From Oswald Mosley's Blackshirts to the National Front* (2<sup>nd</sup> edn. I.B. Tauris 1998) 85

<sup>1769</sup> *Jordan v Burgoyne* [1963] 2 QB 744, [1963] 2 All ER 225

<sup>1770</sup> *Jordan v Burgoyne* [1963] 2 QB 744, [1963] 2 All ER 225

<sup>1771</sup> *Jordan v Burgoyne* [1963] 2 QB 744, [1963] 2 All ER 225

<sup>1772</sup> *Jordan v Burgoyne* [1963] 2 QB 744, [1963] 2 All ER 225

<sup>1773</sup> Lord Chief Justice is the head of the English and Welsh judiciary:

<<http://www.britannica.com/topic/lord-chief-justice-English-and-Welsh-judge>>

insulting, thereby resulting in a breach of the peace.<sup>1774</sup> Furthermore, it has been argued that the 1936 provision on incitement to racial hatred was one of the elements which led to the decline of the National Front while, at the same time, improving behaviour during assemblies of far-right groups.<sup>1775</sup> During parliamentary debates, the Home Secretary noted that the new law sought ‘to deal with more dangerous, persistent and insidious forms of propaganda campaigns – the campaign which, over a period of time, engenders hate which begets violence.’<sup>1776</sup> As a result, legitimate parties had to ‘publicly disassociate themselves from the violent activity even if they continued to hold covert links.’<sup>1777</sup>

As noted, the Public Order Act 1986 incorporates provisions that tackle an array of words or acts that are threatening or abusive, likely or intended to stir up racial hatred and renders the possession of racially inflammatory material an offence. As underlined by the CPS, demonstrating incitement to racial hatred (and logically by extension religious hatred) is problematic given that there are ‘high legal hurdles to clear in order to bring a successful prosecution.’<sup>1778</sup> Also significant to this is the meaning of hatred as discussed, which does not ‘necessarily encompass material that stirs up ridicule, prejudice, or which causes offence.’<sup>1779</sup> Finally, the CPS holds that another issue relevant to the legal obstacles is the complex balancing test that is to be enforced in the realm of freedom of expression on the one hand and the damaging effects of incitement on the other.<sup>1780</sup> Moving to more recent statutes, the Racial and Religious Hatred Act 2006, which was created at ‘a time when polarization of communities in the UK was feared,’<sup>1781</sup> incorporated the offence of stirring up religious hatred into the Public

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<sup>1774</sup> *Jordan v Burgoyne* [1963] 2 QB 744, [1963] 2 All ER 225

<sup>1775</sup> Philip N.S. Rumney, ‘*The British Experience of Racist Hate Speech Regulation: A Lesson For First Amendment Absolutists?*’ (2003) 32 *Common Law World Review* 2, 144

<sup>1776</sup> Hansard, HC (series 5) vol.711, col.941 (1965)

<sup>1777</sup> Daniel Trilling, ‘*Bloody Nasty People – The Rise of Britain’s Far Right*’ (eds. Verso 2012) 56

<sup>1778</sup> CPS, ‘The Crown Prosecution Service Response to the All-Party Parliamentary Inquiry into Anti-Semitism’ (2008) para.87

<sup>1779</sup> CPS, ‘The Crown Prosecution Service Response to the All-Party Parliamentary Inquiry into Anti-Semitism’ (2008) para.87

<sup>1780</sup> CPS, ‘The Crown Prosecution Service Response to the All-Party Parliamentary Inquiry into Anti-Semitism’ (2008) para.115

<sup>1781</sup> Marloes van Noorloose, ‘*Hate Speech Revisited - A Comparative and Historical Perspective on Hate Speech Law in the Netherlands and England and Wales*’ (2011) (eds. Intesentia), 304



Order Act 1986<sup>1782</sup> and rendered the possession of religiously inflammatory material an offence. However, vital differences exist between the statutory approach and handling of racial hate, on the one hand and religious hate on the other, with the latter encompassing only threatening acts or words, leaving out abusive and insulting acts or words, whilst, at the same time, being accompanied by a 'broad ranging freedom of expression defence incorporated at the House of Lords.'<sup>1783</sup> As a result, the efficacy of the religious hatred provisions was, from the onset of their incorporation, drastically limited.

Section 18 of the Public Order Act 1986 deals with the use of words or behaviour or display of written material and provides that:

- (1) 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 an offence if:
  - (a) he intends thereby to stir up racial hatred, or
  - (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.
- (2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

Thus, this section curtails the free use of certain speech, execution of certain acts and display of written material which stir up racial hatred, replacing incitement, which had been referred to as stirring up in the Race Relations Act 1965. This reflects the removal of the necessity of intent on the part of the offender, which had, at any rate been ensured by the 1936 Act. So, ever since 1936, intention has no longer been a prerequisite for prosecution, with it sufficing that an offence is committed if the offender intends to stir up racial hatred or having regard to all the circumstances, racial hatred is likely to be stirred up. However, Article 18 provides that a person

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<sup>1782</sup> In 2010 the offence of stirring up hatred on the grounds of sexual orientation came into force following the insertion of this provision by the Criminal Justice and Immigration Act 2008 into Part 3A of the Public Order Act 1986.

<sup>1783</sup> Marloes van Noorloose, 'Hate Speech Revisited - A Comparative and Historical Perspective on Hate Speech Law in the Netherlands and England and Wales' (2011) (eds. Intesentia), 304

who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting. As such, the only defence to this offence is for the person who has allegedly committed the offence of stirring up racial hatred to demonstrate that he neither intended nor was aware that the words, acts or written material may be threatening, abusive or insulting. It can reasonably be assumed that a certain abstraction is accompanied with proving such intention and/or absence of knowledge, as contained within the aforementioned section.

In relation to free opinion, Section 18 incorporates certain safeguards as to opinion. Namely, as with Article 19(1) of the ICCPR, Section 18 places no restrictions on opinions or beliefs, in this case, racist ones. Instead, Section 18 only deals with the actual voicing of opinion in the form of expression or acts. Further, the type of words used in Section 18 must be considered. More particularly, an offence exists if the words, acts or material are threatening or abusive. So, any racist acts, material or expression disseminated or voiced by, *inter alia*, far-right groups which do not meet this threshold but, rather, are simply prejudicial or contemptuous, cannot be deemed an offence. In *Brutus v Cozens*, the House of Lords noted that determining whether or not conduct is abusive or insulting rather than simply annoying is a question of fact to be determined by the trial court.<sup>1784</sup>

Further, Section 19 deals with publishing or distributing written material, Section 20 with the public performance of a play, Section 21 with the distribution, showing or playing of a recording and Section 22 with the broadcasting or inclusion of a programme in a cable programme service. The key issue of relevance for this discussion is that the offences take the same pattern as Section 18, namely that the aforementioned activities amount to offences if the person intended to stir up racial hatred or, having regard to all the circumstances, racial hatred is likely to be stirred up. The same defences apply for all sections, namely, that the person did not intend to stir up racial hatred or was not aware of the content of the material/play/recording or programme and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

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<sup>1784</sup> *Brutus v Cozens* [1973] AC 854]

Lastly, Section 23 prohibits the possession of material or a recording of visual images which are threatening, abusive or insulting in the event that the person possessing such material intends to use it for purposes of stirring up racial hatred or, having regard to all the circumstances, racial hatred is likely to be stirred up. The classic defence, as seen with the other articles, exists, namely, that the person had no intention of stirring up racial hatred or that he/she was not aware of the content of the material or had no reason to suspect it to be threatening, abusive or insulting.

### 5.1.3 Prohibiting Religious Hatred within the Public Order Framework: The Racial and Religious Hatred Act 2006

The Racial and Religious Hatred Act 2006, which entered into force in October 2007, was created to tackle offences involving stirring up hatred against persons on religious grounds. More particularly, it amends the Public Order Act 1986 for England and Wales, incorporating Part 3A therein, which makes an offence out of threatening speech, acts and material which seek to stir up religious hatred.<sup>1785</sup> Prior to that, religion was not included in any relevant laws since it was considered ‘as something inherently different from race - connected to certain convictions and teachings and thus more open to criticism ...’<sup>1786</sup> One of the reasons for which the decision was taken to incorporate religious hatred into the Public Order Act 1986 was the increased vulnerability of the Muslim community post September 11<sup>th</sup>.<sup>1787</sup> To investigate whether incitement to religious hatred should be criminalised, the government set up the Select Committee on Religious Offences in England and Wales.<sup>1788</sup> In 2003, the Committee presented its report on the issue,<sup>1789</sup> finding that it could not reach a final decision as to whether incitement to religious hatred should, in fact, be made an offence.<sup>1790</sup> Either way, the government presented the reasons for which it believed that such an offence should, in fact, exist by holding that

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<sup>1785</sup> Note that the Public Order Act was further amended by Schedule 16 of the Criminal Justice and Immigration Act 2008 to incorporate the offence of hatred on grounds of sexual orientation.

<sup>1786</sup> Marloes van Noorloose, ‘*Hate Speech Revisited - A Comparative and Historical Perspective on Hate Speech Law in the Netherlands and England and Wales*’ (2011) (eds. Intesentia), 309

<sup>1787</sup> David Nash & Chara Bakalis, ‘Incitement to Religious Hatred and the Symbolic: How will the Racial and Religious Hatred Act 2006 Work?’ (2007) 28 *Liverpool Law Review* 3, 356. This was further exacerbated post London bombings on 7/7/2005

<sup>1788</sup> Select Committees work in both Houses. They check and report on areas designated to them and the results of these inquiries are public and many require a response from the government: <<http://www.parliament.uk/about/how/committees/select/>>

<sup>1789</sup> House of Lords First Report, ‘Religious Offences in England and Wales’ (3002-2003 HL 95-I, April 10 2003)

<sup>1790</sup> House of Lords First Report, ‘Religious Offences in England and Wales’ (2002-2003 HL 95-I, April 10 2003), paras.131-138

‘although the Government does not believe that incitement to religious hatred is commonplace, it does exist and where it exists it has a disproportionate and corrosive effect on communities, creating barriers between different groups and encouraging mistrust and suspicion. At an individual level this can lead to fear and intimidation and a sense of isolation. It can also indirectly lead to discrimination, abuse, harassment and ultimately crimes of violence against members of our communities. It is legitimate for the criminal law to protect citizens from such behaviours.’<sup>1791</sup> Interestingly, in this extrapolation, the government recognised the effects such offences may have on a personal and/or community level rather than focusing solely on the issue of public order.

This Act has ‘a frantic history’<sup>1792</sup> with six attempts having been made in Parliament to incorporate an offence of stirring up religious hatred over a period of twelve years.<sup>1793</sup> The central concern voiced time and again was that the new provisions pertaining to the stirring up of religious hatred may lead to a violation of the freedom of expression.<sup>1794</sup> The first version of the Racial and Religious Hatred Bill was a mirror image of Part 3 of the Public Order Act 1986 on racial hatred. The House of Lords considered this to be too broad, with commentators, such as Lord Lester, noting that the provisions were ‘using a steamroller to crack a nut.’<sup>1795</sup> So, a long negotiation process started between the House of Lords and the House of Commons with the former finally convincing the latter to accept certain significant amendments to the government’s initial proposals. These amendments sought to protect the freedom of expression but, as will be demonstrated below, would directly affect the scope and enforcement of the Act as it stands today. The first was that acts intending to stir up religious hatred would be dealt with by separate legislative provisions rather than being incorporated into the existing framework on racial hatred.<sup>1796</sup> This was simply because the template of Part 3 of the Public Order Act 1986 was not

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<sup>1791</sup> House of Commons: Religious Hatred: Attempts to Legislate 2001- 2005 (10 June 2008) Standard Note: SN/PC/03189, 15

<sup>1792</sup> Kay Goodall, ‘Incitement to Religious Hatred: All Talk and Non substance?’ (2007) 70 *Modern Law Review* 1, 89, 89

<sup>1793</sup> Kay Goodall, ‘Incitement to Religious Hatred: All Talk and Non Substance?’ (2007) 70 *Modern Law Review* 1, 89, 89

<sup>1794</sup> David Nash & Chara Bakalis, ‘Incitement to Religious Hatred and the Symbolic: How Will the Racial and Religious Hatred Act 2006 Work?’ (2007) 28 *Liverpool Law Review* 3, 354

<sup>1795</sup> Antony Lester in Lisa Appignanensi, ‘*Free Expression is no Offence*’ (eds. Penguin 2005) 234

<sup>1796</sup> Kay Goodall, ‘Incitement to Religious Hatred: All Talk and No Substance?’ (2007) 70 *Modern Law Review* 1, 89, 89

considered suitable for curtailing religious hatred, due to its alleged broadness if it were to be used in the ambit of religious hatred. Secondly, words or acts would have to be threatening, not simply abusive or insulting as in the case of the racial hatred provisions discussed above. The House of Lords sought this amendment so as to protect those simply making a joke about a religion or partaking in a theological debate.<sup>1797</sup> Thirdly, it would not be enough that religious hatred would be likely to be stirred up as a result of the words or acts, but, instead, the persons would have to have intended the speech or acts to result in religious hatred. Lastly, the Lords requested the incorporation of a provision that explicitly protects the freedom of expression so as to ensure, once again, the protection of theological debates, jokes and proselytism.<sup>1798</sup>

As a result of the accepted amendments, the provision on hatred against persons on religious grounds, as inserted into Part 3A of the Public Order Act 1986 by Section 29B of the Racial and Religious Hatred Act, provides that a person who uses threatening words or behaviour or displays any written material which is threatening is guilty of an offence if he intends to stir up religious hatred. The rest of the provisions in the framework of acts intended to stir up religious hatred follow the pattern of their racial hatred counterpart in relation to the private/public distinction and the non-application of the provision for purposes of the material, words or behaviour being included in a programme service. Further, the only defence available is that the person proves that he/she was in a dwelling and had no reason to believe that the words, acts or material would be heard or seen by someone outside that dwelling. This provision existed in the framework of racial hatred and particularly in Section 18(3) of the Act under consideration but was repealed by the Serious Organised Crime and Police Act 2005.<sup>1799</sup> Section 29C makes an offence out of the publication or distribution of threatening written material in the event that the person publishing or distributing this material intends to stir up religious hatred. Section 29D deals with the public performance of a play which involves the use of threatening words or behaviour and whose presenter or director intends, thereby, to stir up religious hatred. Section 29E holds that the distribution, showing or playing of a threatening recording in the event that the person intends to stir up religious hatred is an offence while Section 29F deals with the

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<sup>1797</sup> David Nash & Chara Bakalis, 'Incitement to Religious Hatred and the Symbolic: How will the Racial and Religious Hatred Act 2006 Work?' (2007) 28 *Liverpool Law Review* 3, 353

<sup>1798</sup> David Nash & Chara Bakalis, 'Incitement to Religious Hatred and the Symbolic: How will the Racial and Religious Hatred Act 2006 Work?' (2007) 28 *Liverpool Law Review* 3, 353

<sup>1799</sup> Serious Organised Crime and Police Act 2005. c.15

broadcasting or inclusion in a programme service. Section 29G underlines that it is an offence to possess inflammatory material, which is threatening if the person possessing it seeks to use it in a way to stir up religious hatred. Significantly, the legislation incorporates a broad protective net for religious jokes, discussions and debates, thereby, seeking to limit the possibility of the provisions curtailing the freedom to express ones humorous, theological or academic ideas. More particularly, Section 29J holds that ‘nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.’ No such provision was incorporated in the ambit of racial hatred, with the conclusion being that it was considered necessary by the House of Lords that more leeway for expression, behaviour and material pertaining to religion should be granted, even if these are essentially insulting or abusive. Lastly, as is the case with its racial hatred counterpart, Section 29L requires the consent of the Attorney-General for any procedures to be instigated. In relation to this, one commentator has argued that the broadness of this power and the unlikelihood of its being adequately reviewed could mean that certain ‘haters,’ such as extreme religious clerics, are brought forth for prosecution more often than other, less usual suspects<sup>1800</sup> Also, notwithstanding the indisputable inequalities *vis-à-vis* the scope between the provisions dealing with racial hatred and those dealing with religious hatred, the punishments for offenders are the same.

Thus, it can be discerned that ensuring a conviction under Part 3A is more difficult than doing so under Part 3 since only threatening words, behaviour, acts, material, plays, recordings and programmes are considered an offence insofar as the person responsible has intended to stir up religious hatred, with the likelihood of an offence occurring regardless of intention not sufficing. In fact, it has been argued that the decision to prohibit only threatening speech/acts/material has ‘probably narrowed the new offence to the point of non-existence.’<sup>1801</sup> The scope is further narrowed by the incorporation of Section 29J which seeks to protect acts and expression ranging

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<sup>1800</sup> Maleiha Malik, ‘Racist Crime: Racially Aggravated Offences in the Crime and Disorder Act 1998 Part II’ (1999) 62 *Modern Law Review* 3, 414

<sup>1801</sup> Ivan Hare, ‘Crosses, Crescents and Sacred Cows: Criminalizing Incitement to Religious Hatred’ (2006) *Public Law* 521, 528

from proselytism to humour. Also, opposed to the sections on racial hatred, demonstrating lack of intention is unavailable for potential offenders. Either way, it cannot be doubted that rendering the stirring up of religious hatred an offence, and ensuring prosecution within this ambit, occurs in a much more restricted sphere than in relation to racial hatred. The point to which this has depleted any possibility of practical success can be demonstrated by a lack of prosecutions and convictions in this realm. The limited prosecutions and convictions under Part 3 and 3A is reflected in CPS statistics. In its 2013-2014 report on hate crime, no reference was made to any cases brought forth on religious hatred grounds and only one on the grounds of racial hatred.<sup>1802</sup> As a point of comparison, for the years 2013-2014, five-hundred and fifty religiously aggravated cases and 11,818 racially aggravated cases were prosecuted with a 77.3% and 75.9% conviction rate respectively.<sup>1803</sup> In the same report, the CPS underlined that the freedom of expression considerations that have to be taken into account in relation to prosecutions under Part 3 and Part 3A mean that the number of cases brought forth is much lower than for the general hate crime offences<sup>1804</sup> in the form of Section 5 offences made racially or religiously aggravated by the Crime and Disorder Act. This reflects the fact that, even if the freedom of expression is not integrated into Part 3 as it is in Part 3A, the CPS takes it into consideration in the realm of the relevant sections on racial hatred. In fact, in its All-Parliamentary Inquiry into Anti-Semitism, the CPS found that ‘there are high legal hurdles to clear in order to bring a successful prosecution for an offence to incitement to racial hatred. Hatred is a strong term and the offence does not necessarily encompass material that stirs up ridicule, prejudice or which causes offence.’<sup>1805</sup> This, by extension, and to an even greater extent can be applied to the situation *vis-à-vis* religious hatred offences under the Public Order Act 1986. Maybe, the aim of Part 3A was not to have a tool that would be readily and practically enforceable, but rather a symbolic mechanism to ensure respect for the diverse religions present in the country. In fact, the symbolic effect of this Act was underlined time and again by the House of Lords Select Committee on the issue. The panel ‘accepted that it was unlikely the law

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<sup>1802</sup> CPS Report: Hate Crime and Crimes against Older People (2013-2014)

<[http://www.cps.gov.uk/publications/equality/hate\\_crime/index.html](http://www.cps.gov.uk/publications/equality/hate_crime/index.html)> [Accessed 25 July 2015] 35

<sup>1803</sup> CPS Report: Hate Crime and Crimes against Older People (2013-2014) <

[http://www.cps.gov.uk/publications/equality/hate\\_crime/index.html](http://www.cps.gov.uk/publications/equality/hate_crime/index.html)> [Accessed 25 July 2015] 35

<sup>1804</sup> CPS Report: Hate Crime and Crimes against Older People (2013-2014) <

[http://www.cps.gov.uk/publications/equality/hate\\_crime/index.html](http://www.cps.gov.uk/publications/equality/hate_crime/index.html)> [Accessed 25 July 2015] 35

<sup>1805</sup> The Crown Prosecution Service Response to the All-Party Parliamentary Inquiry into Anti-Semitism  
CPS 2008, Par. 87

would attract a great number of prosecutions’<sup>1806</sup> but nevertheless underlined that ‘there are many devout people living in our country who take their religion very seriously and have a legitimate interest in seeking to preserve [it].’<sup>1807</sup>

As a result, and although the aforementioned sections in Parts 3 and 3A deal directly with racial and religious hatred, Section 5 of the Public Order Act 1986 which deals generally with harassment, alarm and distress has, as will be reflected further down, been used to challenge the speech and activities of far-right groups. This section provides that a person is guilty of an offence if he uses threatening or abusive words or behaviour or disorderly behaviour, or displays any writing, sign or other visible representation which is threatening or abusive within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby. As opposed to Parts 3 and 3A, no consent from the Attorney-General is needed for a prosecution to be made in this section and, thus, it is easier to use for relevant cases. Section 5 as Section 6(4), dealing with the mental element of an offence, underwent an amendment under Section 57 of the Crime and Courts Act 2013<sup>1808</sup> which removed the word ‘insulting’ from the words or behaviour considered to amount to an offence under Section 5(1) and removed the word ‘insulting’ from the intentions of the person uttering the words or behaving in a particular manner so as to broaden the spectrum of free speech. The amendments came into force on 1 February 2014. No such amendments were made to sections contained in Parts 3 and 3A of the Act which deal exclusively with racial and religious hatred. Further, it is noteworthy that, before the enforcement of the Serious Organised Crime and Police Act 2005,<sup>1809</sup> police officers had extensive powers both in the framework of Section 5 and Section 18. More particularly, a police officer could arrest a person without warning if he or she engaged in offensive conduct which a constable warned him to stop and he engaged in offensive conduct immediately or shortly after the warning with offensive conduct meaning conduct which the police officer reasonably suspects to constitute an offence under the particular section.<sup>1810</sup> Thus, previously, the police could arrest a

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<sup>1806</sup> David Nash & Chara Bakalis, ‘Incitement to Religious Hatred and the Symbolic: How will the Racial and Religious Hatred Act 2006 Work?’ (2007) 28 *Liverpool Law Review* 3, 349, 364

<sup>1807</sup> David Nash & Chara Bakalis, ‘Incitement to Religious Hatred and the Symbolic: How will the Racial and Religious Hatred Act 2006 Work?’ (2007) 28 *Liverpool Law Review* 3, 349, 364

<sup>1808</sup> Crime and Courts Act 2013 c.22

<sup>1809</sup> Serious Organised Crime and Police Act c.15 2005

<sup>1810</sup> Section 5 (4) and 5(5) and section 18(3) Public Order Act



person if it was suspected that he or she was committing a Section 5 or Section 18 offence so long as there was reasonable suspicion, with the legislation not elucidating the circumstances in which such arrest could occur, thereby, granting complete discretion to the Police and entrusting them with the ability and will to think and act reasonably. As a result of the aforementioned amendments, Police powers and discretion to act within the ambit of the above sections have been restricted.

## 5.2 Aggravation and Sentencing

In relation to arrest and sentencing, both the Crime and Disorder Act 1998, as amended by the Anti-terrorism, Crime and Security Act 2001,<sup>1811</sup> and the Criminal Justice Act 2003<sup>1812</sup> contain provisions that can be used by the judiciary to allow for sentence enhancements for racially and religiously aggravated offences. These will be looked at in detail below. Nevertheless, it must be noted that, even before the incorporation of racially aggravated crimes, judicial discretion *vis-à-vis* considering racial motivation as an element during sentencing ‘has been an effective weapon in dealing with racially motivated crime.’<sup>1813</sup> As was underlined by Lord Chief Justice Taylor ‘it is perfectly possible for the Court to deal with any offence of violence which has a proven racial element in it, in a way which makes clear that that aspect invests the offence with added gravity and therefore must be regarded as an aggravating feature.’<sup>1814</sup>

The Crime and Disorder Act 1998, and particularly Part 2 therein, creates certain racially and religiously aggravated offences. The introduction of racially aggravated offences came before the incorporation of its religious counterpart. The former has been deemed to represent ‘a major shift in the State response to violence and harassment of minorities in the UK’<sup>1815</sup> with cases such as the brutal murder of Stephen Lawrence and the Stephen Lawrence enquiry denoting the urgency

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<sup>1811</sup> Anti-terrorism, Crime and Security Act 2001, 2001 c. 24

<sup>1812</sup> Criminal Justice Act, 2003 c.444

<sup>1813</sup> Maleiha Malik, ‘Racist Crime: Racially Aggravated Offences in the Crime and Disorder Act 1998 Part II’ (1999) 62 *Modern Law Review* 3, 409. The case of *R v Ribbans*, *R v Duggan*, *R v Ridley* [1994] affirmed this principle.

<sup>1814</sup> *R v Ribbans*, *R v Duggan*, *R v Ridley* [1994] Cr App R (S) 702

<sup>1815</sup> Maleiha Malik, ‘Racist Crime: Racially Aggravated Offences in the Crime and Disorder Act 1998 Part II’ (1999) 62 *Modern Law Review* 3, 409

of dealing with racial violence in a more effective manner.<sup>1816</sup> It was only in 2001 with the Anti-terrorism, Crime and Security Act, and specifically Section 39, therein, that religious aggravation was incorporated into the Crime and Disorder Act, on an equal footing with racial aggravation. Once again, the gradually developing concern for religious hostility is demonstrated by the integration of religious aggravation into the Act under consideration. This Act provides the judiciary with a tool to enhance the sentencing of, *inter alia*, persons committing offences within the framework of the far-right.

Section 28 of Part 2 of the Crime and Disorder Act provides that an offence is racially or religiously aggravated if:

- (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group or
- (b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

Part 2 of this section underlines that membership in relation to a racial or religious group includes association with members of that group while Part 3 notes that it is immaterial for the purposes of the above paragraphs, whether or not the offender's hostility is also based on any other factor.

Section 29 holds that a person is guilty of a racially or religiously aggravated assault if he commits:

- (a) an offence under Section 20 of the Offences Against the Person Act 1861 (malicious wounding or grievous bodily harm);
- (b) an offence under Section 47 of that Act (actual bodily harm); or
- (c) common assault

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<sup>1816</sup> The Stephen Lawrence Inquiry Cm 4262-I (1999): <  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/277111/4262.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf)> [Accessed 15<sup>th</sup>  
June 2015]

In the event that a person is found guilty of an offence under part (a) or (b) above, he or she will be liable to punishments which mirror those incorporated in Part 3 and 3A of the Public Order Act, these being:

(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding seven years or to a fine, or to both.

In the event that the person is found guilty of common assault which is racially or religiously aggravated for purposes of this Act, he or she will be liable:

(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.

Furthermore, Section 30 deals with racially or religiously aggravated criminal damage, Section 31 with racially or religiously aggravated public order offences and Section 32 with racially or religiously aggravated harassment with the penalties varying according to the crime committed.

The Crime and Disorder Act 1998 is particularly important since the limitations of enforceability of Part 3 and, even more so, Part 3A of the Public Order Act 1986 on stirring up and possession of inflammatory material in the ambit of racial hate and religious hate, respectively, may hamper the efforts of England and Wales to challenge the far-right. Thus, the tools that are granted by the Crime and Disorder Act 1998 must not be undermined as they essentially allow the invocation of other provisions, such as Section 5 of the Public Order Act 1986, which do not require the strict tests or high thresholds incorporated in relation to racial or religious hatred, thereby, facilitating successful prosecutions and allowing for the enhancement of sentencing. However, this is only within the framework of offences directly stipulated by the Crime and Disorder Act, namely

assault, criminal damage, public order offences, namely, violence, alarm, distress and harassment.<sup>1817</sup> Section 145 of the Criminal Justice Act 2003, which came into force in 2005, increases the sentences for racial or religious aggravation and for offences other than those provided for by the Crime and Disorder Act 1998, thereby, broadly extending the scope of offences for which a Court may enhance a sentence for racial or religious aggravation.

Thus, racial or religious aggravation as a reason for enhanced sentencing is a tool for challenging far-right groups which are criminally active, harassing and assaulting their victims by ensuring convictions under the more general offence of Section 5 and subsequently enhancing sentencing. Interestingly, in *R v Rogers*, the House of Lords underlined that ‘the mischiefs attacked by the aggravated version of these offences are racism and xenophobia. Their essence is the denial of equal respect and dignity to people who are seen as ‘other.’ This is more deeply hurtful, damaging and disrespectful to the victims than the simple versions of these offences. It is also more damaging to the community as a whole, by denying acceptance to members of certain groups not for their own sake but for the sake of something they can do nothing about...’<sup>1818</sup> This statement is interesting as it moves away from the designated lens through which hate crimes have been habitually perceived in this country, namely that of public order, and demonstrates that the judiciary conceptualise the harm done by prejudice on an individual and community level. As with the comments on the government’s position on religious hatred and its effects on the community, this statement does not reflect the stance adopted by the country in the realm of challenging hate.

### 5.3 Jurisprudential Analysis

#### 5.3.1 Utilising the Public Order Act and/or the Crime and Disorder Act to Deal with the Activities of the Far-Right

In 1986, the judiciary dealt with the expression of two persons acting within the framework of a far-right party as disseminated, *inter alia*, by publications of that party, namely the BNP. More particularly, the Crown Court found John Morse and John Tyndall guilty of conspiring to contravene Section 5A of the Public Order Act 1936 due to their role in the publication of a

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<sup>1817</sup> Crime and Disorder Act 1998 C.37, Part II

<sup>1818</sup> Baroness Hale of Richmond in *R. v Rogers (Philip)* [2007] UKHL 8; [2007] 2 A.C. 62 (HL), para.11

newspaper ‘*British Nationalist*’ which was the newspaper of the BNP and which the Court considered to have stirred up racial hatred against black people, Asians and Jews in the UK.<sup>1819</sup> Morse, the editor of the newspaper and Tyndall, the leader of the BNP at the time, worked together for the production of the newspaper. In addition, Tyndall was found guilty of a violation of Section 5A of the Act which dealt with, amongst others, threatening, abusive or insulting expression and material and for his role in the publication of three leaflets and three issues of a magazine entitled ‘*Spearhead*,’ all which resulted in the same consequences *vis-à-vis* racial hatred as did the newspaper.<sup>1820</sup> In 1998, Griffin, the leader of the BNP and editor of the magazine ‘*The Rune*’ was found guilty of violating Section 19 of the Public Order Act 1986, namely for the publishing or distribution of threatening, abusive or insulting material which intends to or is likely to stir up racial hatred. Issue 12 in the aforementioned magazine contained claims that the Holocaust had not occurred, depicted some cartoons which were alleged by the Crown Court to be anti-Semitic and referred to certain statistics and facts which were supposed to demonstrate the great power Jews have in institutions such as the media.<sup>1821</sup> Ballard, the magazine’s distributor and a BNP member, was also prosecuted but pleaded guilty and was, therefore, not tried by the Court. The judge instructed the jury that the material was not threatening but that they would have to decide whether the magazine was insulting or abusive or both.<sup>1822</sup> It must be noted that the reference to this case has only been based on secondary sources since no transcript of the hearing was made and only the CPS holds records of the case. In fact, in 2010, the CPS blocked attempts to disclose further details about this case, claiming that this would breach data protection rights.<sup>1823</sup>

The following two cases are also relevant to the rhetoric and activities of the BNP but deal particularly with posters depicting messages for which their displayers were tried by the Courts and found guilty. These are the cases of *Mark Anthony Norwood v Director of Public Prosecutions*<sup>1824</sup> and *Kendall v Director of Public Prosecutions*.<sup>1825</sup>

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<sup>1819</sup> Daniel Trilling, ‘*Bloody Nasty People – The Rise of Britain’s Far Right*’ (eds. Verso 2012) 61

<sup>1820</sup> R. v John Morse and John Tyndall Court of Appeal 20 October 1986 (1986) 8 Cr. App. R. (S.) 369 – Unreported

<sup>1821</sup> Tina G. Patel & David Tryer, ‘*Race, Crime and Resistance*’ (eds. Sage 2011) 40

<sup>1822</sup> Tina G. Patel & David Tryer, ‘*Race, Crime and Resistance*’ (eds. Sage 2011) 40

<sup>1823</sup> Hope not Hate: CPS refuses to reveal details of Nick Griffin's race hate trial (2010): <<http://www.hopenothate.org.uk/news/home/article/1499/cps-refuses-to-reveal-details-of-nick-griffins-race-hate-trial>> [Accessed 25 July 2015]

<sup>1824</sup> Mark Anthony Norwood v Director of Public Prosecutions [2003] EWCH 1564 (QB)

### 5.3.1 (i) *Norwood v Director of Public Prosecutions*

*Norwood* involved the display of a poster on the accused's window containing words in very large print 'Islam out of Britain - Protect the British people.' The poster had a photograph of one of the twin towers of the World Trade Centre in flames on 11<sup>th</sup> September 2001 and a Crescent and Star surrounded by a prohibition sign. The poster had been supplied by and bore the initials of the BNP, of which Norwood was the regional organiser for his area.<sup>1826</sup> Norwood was convicted by the Magistrates Court of an offence under Section 5(1)(b) of the Public Order Act 1986, aggravated in the manner provided for by Sections 28 and 31 of the Crime and Disorder Act 1998. He appealed his conviction by way of case stated<sup>1827</sup> at the Supreme Court of Judicature, Queen's Bench Division.

#### Section 5 Analysis

Section 5(1) (b), which was relied on by the Court in this case provided that a person is guilty of an offence if he displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

In relation to Section 5, the Court held that its structure required the display of a visible representation, a value-judgement that the representation in question was in fact threatening, abusive or insulting and a demonstration of intention or awareness on the part of the defendant that the representation may be threatening, abusive or insulting as well as a demonstration that the display was within the sight of a person likely to be caused harassment, alarm or distress as a result of the poster.<sup>1828</sup> Interestingly, the Court found that the wording of Section 5.1 means that 'the prosecution do not have to prove that the display of the poster in fact caused anyone harassment, alarm or distress.'<sup>1829</sup> In his judgement, Lord Justice Auld rejected the appeal against

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<sup>1825</sup> Andrew Timothy Kendall v DPP [2008] EWHC 1848 (admin) (QB)

<sup>1826</sup> Mark Anthony Norwood v Director of Public Prosecutions, [2003] EWCH 1564 (QB), para.7

<sup>1827</sup> An appeal by case stated is an appeal to a superior court on the basis of a set of facts specified by the inferior court for the superior court to make a decision on the application of the law to those facts [ Accessed 25 July 2015] para.1.1

<sup>1828</sup> Mark Anthony Norwood v Director of Public Prosecutions, [2003] EWCH 1564 (QB) para.16

<sup>1829</sup> Mark Anthony Norwood v Director of Public Prosecutions, [2003] EWCH 1564 (QB) para.34

conviction and held that ‘ the appellant's conduct was unreasonable, having regard to the clear legitimate aim, of which the section was itself a necessary vehicle, to protect the rights of others and/or to prevent crime and disorder. There are also... considerations under Articles 9 and 17, weighing against permitting the appellant to rely on his right under Article 10.1 in the circumstances of this case.’<sup>1830</sup> Thus, in reaching his conclusion, the judge took into account the limitation grounds of the freedom of expression and conducted a balancing act between the appellant’s right to access this freedom and the right of others to enjoy, without interference, their freedom of religion or belief. Moreover, by referring to the prohibition of abuse of rights clause, as enshrined in Article 17 of the ECHR, the judge demonstrated the severity which he attached to the potential consequences of Norwood’s expression. Interestingly, the ECtHR, followed the Article 17 approach in this case.

#### Consideration of the Freedom of Expression

The Court noted that a prosecution under Section 5 does not necessarily entail a restriction on Article 10.<sup>1831</sup> However, it held that if Article 10 is engaged in any such case then the key issue to be examined is ‘whether the accused’s conduct went beyond legitimate protest and whether the behaviour had not formed part of an open expression of opinion on a matter of public interest, but had become disproportionate and unreasonable.’<sup>1832</sup> In this way, the Court set the boundaries for free expression, using them as a framework for the subsequent analysis. In establishing the outer boundaries of speech, the Court referred to *Handyside v The United Kingdom*<sup>1833</sup> noting that restrictions to Article 10 of the ECHR are to be ‘narrowly construed.’<sup>1834</sup> Furthermore, the Court underlined the obligations arising from the HRA and recognised that the Court must take into account Strasbourg jurisprudence when making judgements on issues such as the freedom of expression. More particularly, it cited Lord Nicholls of Birkenhead in *Reynolds v Times Newspapers Ltd*:<sup>1835</sup>

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<sup>1830</sup> Mark Anthony Norwood v Director of Public Prosecutions, [2003] EWCH 1564 (QB) para.40

<sup>1831</sup> Mark Anthony Norwood v Director of Public Prosecutions, [2003] EWCH 1564 (QB) para.37

<sup>1832</sup> Mark Anthony Norwood v Director of Public Prosecutions, [2003] EWCH 1564 (QB) para.37

<sup>1833</sup> *Handyside v UK*, Application no. 5493/72, (ECHR 7 December 1976) para.49

<sup>1834</sup> Mark Anthony Norwood v Director of Public Prosecutions, [2003] EWCH 1564 (QB) para.22

<sup>1835</sup> Mark Anthony Norwood v Director of Public Prosecutions, [2003] EWCH 1564 (QB) para.22

‘Under Section 12 of the HRA 1998....the Court is required, in relevant cases, to have particular regard to the importance of the right to freedom of expression. The common law is to be developed and applied in a manner consistent with article 10...and the Court must take into account the relevant decision of the ECtHR...To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved.’<sup>1836</sup>

Norwood: Final Comments

After looking at the structure of Section 5 and the obligations arising from Article 10 of the ECHR, the Court held that the appellant had displayed a poster which he intended or knew would be insulting given that it was ‘a public expression of attack on all Muslims in this country...’<sup>1837</sup> and, thus, could ‘not be dismissed as merely an intemperate criticism or protest against the tenets of the Muslim religion...’<sup>1838</sup> This is similar to the statement made by the ECtHR on the poster, namely that it was a ‘general vehement attack against a religious group.’<sup>1839</sup> Furthermore, in relation to the prosecution having to prove that the poster was within the hearing or sight of a person likely to be caused harassment, alarm or distress, the Court found that this poster, its imagery and words were capable of distressing, alarming or harassing ‘any right-thinking member of society concerned with the preservation of peace and tolerance... as well as to any follower of the Islamic religion...’<sup>1840</sup>

### 5.3.1 (ii) *Kendall v Director of Public Prosecutions*

*Kendall* involved several posters that had been put up by the accused on an advertising pillar along a road. One wrote ‘Illegal Immigrant Murder Scum,’ the other consisted of photographs of three black men and the third gave the contact telephone number for BNP. Three men seen in the photographs were undocumented migrants who had been convicted for the manslaughter of a woman holding her baby.<sup>1841</sup> In 2007, Kendall was convicted of the offence created by Section 5 of the Public Order Act 1986, racially aggravated as provided for by Section 31 of the Crime and

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<sup>1836</sup> Reynolds v Times Newspapers Ltd [2001] 2 AC 127

<sup>1837</sup> Mark Anthony Norwood v Director of Public Prosecutions, [2003] EWCH 1564 (QB) para.33

<sup>1838</sup> Mark Anthony Norwood v Director of Public Prosecutions, [2003] EWCH 1564 (QB) para.33

<sup>1839</sup> Norwood v The United Kingdom, App. no 23131/03, (ECHR, 16 November 2004)

<sup>1840</sup> Mark Anthony Norwood v Director of Public Prosecutions, [2003] EWCH 1564 (QB) para.34

<sup>1841</sup> Andrew Timothy Kendall v DPP [2008] EWHC 1848 (admin) High Court of Justice, QBD, para.5



Disorder Act 1988. He had pleaded not guilty and appealed to the High Court of Justice by way of case stated.

The magistrates put forth three questions for the opinion of the High Court, namely:

- (1) Whether on the facts of the case, the visual display can be regarded as 'threatening and abusive'.
- (2) Whether on the facts of the case it can be said that the [appellant] intended or was aware that the poster was 'threatening, abusive or insulting'.
- (3) Whether on the facts of the case it can be said that an act of putting the poster up was motivated by hostility towards a particular racial or religious group.<sup>1842</sup>

In relation to all the above, the Court replied in the positive. To the first question, the Court held that the response was 'very much a value judgement'<sup>1843</sup> as was previously noted in *Norwood v DPP*. The Court proceeded to underline that 'the value judgement which the magistrates would unquestionably have been entitled to make was that the posters were conveying the message that black people are scum because they are the sort of people who come to this country illegally, and who either commit, or are capable of committing, crimes like murder.'<sup>1844</sup> In relation to the second question, the Court held that 'all that had to be proved was that the appellant had been aware that they might be threatening, abusive or insulting.'<sup>1845</sup> Regarding the last question, the racial group which was allegedly targetted by these posters was the immigrant community and, to this end, the Court held that it was open to the magistrates to treat as significant the fact that the appellant chose to illustrate the prevalence of crimes committed by irregular immigrants by a case involving black men, and by putting up photographs of them so that everyone could see that they were black.<sup>1846</sup> Moreover, the Court found that 'the appellant's conduct amounted to a manifestation of his hostility to immigrants because their non-Britishness was perceived by him to derive from their race or colour.'<sup>1847</sup> Further, the Court noted that, even though he may have

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<sup>1842</sup> Andrew Timothy Kendall v DPP [2008] EWHC 1848 (admin) (QB) para.7

<sup>1843</sup> Andrew Timothy Kendall v DPP [2008] EWHC 1848 (admin) (QB) para.8

<sup>1844</sup> Andrew Timothy Kendall v DPP [2008] EWHC 1848 (admin) (QB) para.10

<sup>1845</sup> Andrew Timothy Kendall v DPP [2008] EWHC 1848 (admin) (QB) para.7

<sup>1846</sup> Andrew Timothy Kendall v DPP [2008] EWHC 1848 (admin) (QB) para.14

<sup>1847</sup> Andrew Timothy Kendall v DPP [2008] EWHC 1848 (admin) (QB) para.14

sought to recruit members to the BNP, ‘that did not mean that he was not at the same time motivated by such hostility.’<sup>1848</sup> Kendall’s appeal was rejected but no reference to Article 17, as in the case of *Norwood*, was made.

Thus, in all the aforementioned cases, the persons prosecuted who were allegedly stirring up racial hatred, all members of the BNP, were convicted of an offence under the Public Order Act. This reflects an homogeneity in the judiciary’s approach to such cases and also the dependence on the public order preservation framework as one which has habitually been relied on in the realm of challenging the far-right. In the case against Tyndall and Morse, the 1936 Public Order Act was the only route available for the Court. In Griffin’s case, the approach of the Court was clear as it relied on the special provisions on racial hatred, with Jews, which were the targets of some of the impugned material in the magazine, falling within the sphere of a race. In light of the above, two conclusions can be drawn from the judicial approaches in *Norwood* and *Kendall*. The first conclusion is two-fold and is drawn from the fact that, in both cases, the display of racist materials was dealt with by the general offence of causing harassment, alarm or distress through words or behaviour, as provided for by Article 5 of the Public Order Act 1986, rendered racially aggravated through the Crime and Disorder Act. In *Norwood*, there existed no option to adopt the tailor-made Part 3A of the Public Order Act 1986 that deals with religious hatred since the Racial and Religious Hatred Act had not yet been passed. However, the racial aggravation clause was utilised notwithstanding the fact that Section 28 (4) of the Crime and Disorder Act holds that a racial group means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origin. This is interesting given that the Courts, to date, have found that Muslims fall outside the framework of the racial group definition. However, in *Norwood*, the Court had no trouble in finding this crime to be racially aggravated even if the hated group in the posters was Muslim. As noted by the Court, ‘the District Judge, on the evidence before him, was entitled to find the first limb of Section 5 in its aggravated form proved, namely that the display of the poster was racially insulting to Muslims.’<sup>1849</sup> This sentence is in stark contrast to previous discussion of the understanding of a racial group by the executive, the legislature and the judiciary and as extrapolated on above. The Court made a departure from the

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<sup>1848</sup> Andrew Timothy Kendall v DPP [2008] EWHC 1848 (admin) (QB) para.14

<sup>1849</sup> Mark Anthony Norwood v Director of Public Prosecutions, [2003] EWCH 1564 (QB), para.33

norm, thereby, rejecting the appeal but did not offer any explanation for the reasons of its choice and position therein, which would have been of great normative and judicial value. The second part of this conclusion is that, in *Kendall*, the Court proceeded to convict the accused of the racially aggravated form of the offence created by Section 5 of the Public Order Act 1986 even though Part 3A had entered into force by the time of the hearing. This creates some kind of confusion since it is not clear why the former avenue was chosen by the CPS rather than the religious hatred provisions of the Act. Lastly, it must be noted that, in both cases, the Courts clearly demonstrated that the types of material used, therein, are in fact racist and unacceptable, regardless of the alleged political intent to put forth a message and/or to recruit members to the BNP. As underlined by one commentator ‘the defendants chose to make the obvious racist content with the veneer of political debate.’<sup>1850</sup> However, the Courts readily saw through this, giving no excuse due to their alleged political mission regardless of the fact that political speech is particularly protected within the framework of free speech.<sup>1851</sup> What remains from these cases is a precedent in which material which is hateful, such as ‘Islam out of Britain – protect the British people’ is not permitted, even if it does not call people to violence. Such cases are a strong tool that can be referred to by the judiciary when tackling hateful expression uttered or disseminated by the far-right.

Notwithstanding the above cases, which were significant in demonstrating the judiciary’s approach to the far-right and reflecting its interpretation and use of the Public Order Act and the Crime and Disorder Act as tools to challenge speech and material which stir up hate, a more recent case, one brought against BNP members, falls outside the aforementioned homogeneity of the Courts. More particularly, in 2006, Griffin, leader of the BNP and Mark Collett, the party’s head of publicity, were accused of using words or behaviour intended or likely to stir up racial hatred as provided for by Section 18 of the Public Order Act 1986<sup>1852</sup> after an undercover BBC documentary<sup>1853</sup> presented speeches they made at a gathering in 2004. Amongst other comments

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<sup>1850</sup> Christopher J. Newman & Peter Rackow, ‘Undesirable Posters and Dubious Symbols: Anglo-German Legal Solutions to the Display of Right-Wing Symbolism and Propaganda; (2011) 75 *Journal of Criminal Law* 2, 151

<sup>1851</sup> Baroness Hale in *Campbell v MGN Ltd.* [2004] UKHL 22, [2004] 2 A.C. 457, 499, para. 50

<sup>1852</sup> Daniel Trilling, ‘*Bloody Nasty People – The Rise of Britain’s Far Right*’ (eds. Verso 2012) 123

<sup>1853</sup> BBC 2004 documentary entitled ‘The Secret Agent’ after it went undercover to infiltrate the BNP in the north-west of England: <<https://www.youtube.com/watch?v=77p1ZCKT5KQ&list=PL2A69506A0B53BD9B>> [Accessed 15 June 2015]

were references to Islam as a ‘wicked, vicious faith,’ holding that Muslims were turning the UK into a ‘multi-racial hell hole,’ that ‘these 18, 19, and 25-year-old Asian Muslims are seducing and raping white girls in this town right now’<sup>1854</sup> while asylum seekers were compared to cockroaches.<sup>1855</sup> The pair argued that their speech fell within the boundaries of the freedom of expression, that they did not demonstrate hatred towards Muslims, ethnic minorities or asylum seekers but, instead, that they opposed multiculturalism. Also, in relation to Griffin’s statements about Islam, he argued that this constituted an attack against a religion rather than a race and, thus, at the time, they did not fall within the framework of the Public Order Act as the Racial and Religious Hatred Act had not yet come into force.<sup>1856</sup>

At their trial at the Crown Court, Griffin and Collett were cleared of half the charges against them but the jury remained divided on the other charges, and a retrial was ordered<sup>1857</sup> during which they were cleared of all charges.<sup>1858</sup> Following the end of this trial, a number of Cabinet Ministers voiced concerns over the legal framework holding that it was not sufficient to tackle such incidents.<sup>1859</sup> For example, Lord Falconer stated that ‘I think we should look at them [the current laws] in the light of what’s happened here, because what is being said to young Muslim people in this country is that we as a country are anti-Islam, and we have got to demonstrate without compromising freedom that we are not.’<sup>1860</sup> On one level, it could be argued that the reason for their acquittal was indeed the lacking legal framework at the time which did not protect religions such as Islam and its followers from hatred. On a second level though, *Norwood* also dealt with hateful expression against Islam at a time when the judiciary did not have access to prosecuting religiously hateful offences and yet a guilty verdict was still delivered, making the first argument less convincing. This point is further accentuated by the fact that the accused were found innocent in relation to all speeches made, regardless of some directly falling within the

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<sup>1854</sup> BBC Documentary: The Secret Agent (July 2004):

<<https://www.youtube.com/watch?v=77p1ZCKT5KQ&list=PL2A69506A0B53BD9B>> [Accessed 15 June 2015]

<sup>1855</sup> BBC Documentary: The Secret Agent’ (July 2004):

<<https://www.youtube.com/watch?v=77p1ZCKT5KQ&list=PL2A69506A0B53BD9B>> [Accessed 15 June 2015]

<sup>1856</sup> Solicitor General: House of Commons Debate ( 23 November 2006) c682

<sup>1857</sup> CPS Statement: CPS prosecution for inciting racial hatred results in acquittal for Nick Griffin and Mark Collett (10 November 2006):<[http://www.cps.gov.uk/news/latest\\_news/165\\_06/](http://www.cps.gov.uk/news/latest_news/165_06/)> [Accessed 15 June 2015]

<sup>1858</sup> Daniel Trilling, ‘*Bloody Nasty People – The Rise of Britain’s Far Right*’ (eds. Verso 2012) 123

<sup>1859</sup> House of Commons – Standard Note: ‘The Racial and Religious Hatred Act 2006’ SN/PC/03768 (6 November 2009) 4 [Accessed 25 July 2015]

<sup>1860</sup> House of Commons – Standard Note: ‘The Racial and Religious Hatred Act 2006’ SN/PC/03768 (6 November 2009) 4 [Accessed 25 July 2015]

established definitional framework of a racial group. Either way, this case has moved away from the precedent set from the previously discussed cases which deal with such hatred, with the government quick to note and discuss the possible loopholes in the legal framework.

#### 5.4 Using Part 3A of the Public Order Act 1986 to Challenge Religious Hatred

There is one case relevant to prohibiting religious hatred in the sphere of the far-right which was also the first time that the newly acquired religious hatred provisions had been set in motion. This was a 2010 case against Anthony Bamber,<sup>1861</sup> a BNP activist and candidate for the local elections at the material time. Bamber distributed leaflets in which Muslims were accused of being responsible for heroin trade from Afghanistan and Pakistan and stating that it was time for the Muslims to apologise and pay compensation for this ‘crime against humanity.’<sup>1862</sup> He was charged with seven counts of distributing threatening written material intended to stir up religious hatred and was cleared by a jury on all counts.<sup>1863</sup> His acquittal is indicative of the high threshold that needs to be met if religious hatred is to be proved in the framework of Part 3A of the Public Order Act 1986.

There is another case which involves an interesting incorporation of Part 3A of the Public Order Act 1986 into the framework of non-admission of a far-right representative from the Netherlands to the UK. In the case of *GW v An Immigration Officer, Heathrow*,<sup>1864</sup> the Asylum and Immigration Tribunal dealt with the refusal of admission of a far-right politician who sought to visit the country for purposes of expressing his views on Islam. More particularly, in 2009, Geert Wilders, a member of the Dutch Parliament, brought forth an appeal against the decision to prevent him from entering the UK to show his film ‘Fitna.’<sup>1865</sup> Wilders was to be the guest of two members of the House of Lords and show his film to the House of Lords, the House of

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<sup>1861</sup> This case is unreported so analysis is based on secondary sources

<sup>1862</sup> Hope not Hate: ‘Preston BNP activist distributed anti-Muslim leaflets’: <<http://www.hopenothate.org.uk/news/home/article/1645/preston-bnp-activist-distributed-anti-muslim-leaflets>> [Accessed 10 May 2015]

<sup>1863</sup> Hope not Hate: ‘Preston BNP activist distributed anti-Muslim leaflets’: <<http://www.hopenothate.org.uk/news/home/article/1645/preston-bnp-activist-distributed-anti-muslim-leaflets>> [Accessed 10 May 2015]

<sup>1864</sup> *GW v An Immigration Officer, Heathrow* [2009] UKAIT 00050, 12 October 2009

<sup>1865</sup> Paragraph 3 of the judgement, the film ‘interposes readings from the Koran, the holy book of Islam, with images of atrocities committed around the world, with the implications that the relevant suras of the Koran encourage or permit the acts portrayed’

Commons and to the press and general public, a presentation which was to be followed by a question and answer session.<sup>1866</sup> The applicant received a notification from the Secretary of State for the Home Department (SSHD) which held that his presence in the country would ‘pose a genuine, present and sufficiently serious threat to one of the fundamental interests of society. The SSHD is satisfied that your statements about Muslims and their beliefs, as expressed in your film ‘Fitna’ and elsewhere, would threaten community harmony, and, therefore, public security in the UK. If, in accordance with Regulation 21 of the Immigration European Economic Area Regulations 2006, the immigration officer is satisfied that your exclusion is justified on grounds of public policy and/or public security, you will be refused admission to the UK under Regulation 19...’<sup>1867</sup> Regulation 21(1) holds that a relevant decision to reject the admission of an EEA national may be taken on the grounds of public policy, public security or public health. Despite the contents of that letter, Wilders travelled to the UK but was refused entry. He subsequently appealed against this decision, based on his right of free movement and right of freedom of expression.<sup>1868</sup> The prosecution based its case on Part 3A of the Public Order Act 1986 which prohibits hatred against persons on religious grounds. The Court found that the freedom of expression clause, as provided for in Section 29J, ‘prevents the conduct which it described from being an offence under Part 3A. It does not permit conduct that would amount to an offence under the sections of the Public Order Act 1986 that are not within Part 3A. In the paragraph that followed, the Court immediately turned to other parts of the Act, holding that any prospect of success would arise from the reliance on other sections therein, with a particular emphasis on Section 5,<sup>1869</sup> underlining the interrelations between the regulation in Section 21(1) and the potential of a breach of the peace or potential breach of the peace. However, no further extrapolation between Section 29J and its decision to rely on other sections of the clause was made, thereby, implicitly denoting that the Court concluded Wilders’ speech to fall within the ambit of Section 29J, albeit lacking explanation on the reasons for this apparent conclusion. No other reference was made to the Public Order Act 1986 in the Court’s analysis.

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<sup>1866</sup> GW v An Immigration Officer, Heathrow [2009] UKAIT 00050, 12 October 2009, para.4

<sup>1867</sup> GW v An Immigration Officer, Heathrow [2009] UKAIT 00050, 12 October 2009, para.5

<sup>1868</sup> GW v An Immigration Officer, Heathrow [2009] UKAIT 00050, 12 October 2009, para.7

<sup>1869</sup> GW v An Immigration Officer, Heathrow [2009] UKAIT 00050, 12 October 2009, para.24

In reaching its conclusion as to whether the applicant was legitimately denied entrance to the UK, the Court found that there was no evidence that an issue of public disorder would arise due to his presence and activity there. More particularly, the Court held that there was no public disorder evident from his stay in the Netherlands, his visits to other European countries and his previous visit to the UK. Moreover, his views and film are readily available on the internet, in publications and in the news. Further, the Court noted that the planned meeting and showing of the film in 2009 occurred without Wilders' presence and occurred without any issue of public disorder.<sup>1870</sup> Thus, it held that any evidence put forth for public disorder was 'not only entirely speculative'<sup>1871</sup> but also 'contrary to the available evidence.'<sup>1872</sup> As a result, the Court found that the Home Department's decision was illegitimate and disproportionate to the aim pursued.

For comparative purposes, and although Part 3A of the Public Order Act was not used (which is a finding in itself), a reference will be made to *R (on the application of) Geller and Spencer v The Secretary of State for the Home Department*,<sup>1873</sup> in which the applicants, Islamophobes who address the public and write on the subject of Islam and the West in an Islamophobic manner,<sup>1874</sup> intended to address a rally planned by the EDL in Greenwich on Saturday 29 June 2013, soon after the brutal murder of Fusilier Lee Rigby on 22 May 2013.<sup>1875</sup> The Metropolitan Police advised the Home Secretary that their participation in the EDL rally would likely 'undermine community cohesion and may provoke serious violence.'<sup>1876</sup> The Secretary of State found that their behaviour fell within the framework of unacceptable behaviour which forms the basis for excluding and deporting individuals from the UK. It must be noted that this is a non-statutory power and potentially very broad.<sup>1877</sup> Geller and Spencer applied for judicial review of this

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<sup>1870</sup> *GW v An Immigration Officer, Heathrow* [2009] UKAIT 00050, 12 October 2009, para.28

<sup>1871</sup> *GW v An Immigration Officer, Heathrow* [2009] UKAIT 00050, 12 October 2009, para.29

<sup>1872</sup> *GW v An Immigration Officer, Heathrow* [2009] UKAIT 00050, 12 October 2009, para.29

<sup>1873</sup> *R (on the application of) Geller and Spencer v The Secretary of State for the Home Department* [2015] EWCA Civ 45

<sup>1874</sup> For example, they have said, amongst others that 'Al-Qaeda is a manifestation of devout Islam...it is Islam' (Geller) and: 'Islam is a religion and is a belief system that mandates warfare against unbelievers for the purpose for establishing a societal model that is absolutely incompatible with Western society': *R (on the application of) Geller and Spencer v The Secretary of State for the Home Department* [2015] EWCA Civ 4, para. 14

<sup>1875</sup> In 2013, Fusilier Lee Rigby was attacked and killed by two Islamist extremists on the streets of Woolwich, south-east London. The men told passers-by that they had killed a soldier to take revenge for the killing of Muslims by the British army.

<sup>1876</sup> *R (on the application of) Geller and Spencer v The Secretary of State for the Home Department* [2015] EWCA Civ 4, para.6

<sup>1877</sup> Letter from the Metropolitan Police to the SSHD as contained in para. 10 of the case.

decision but the House of Lords rejected it following a discussion on the freedom of expression and of peaceful assembly, set against the backdrop of public order. The Court found that ‘this was a public order case where the police had advised that significant public disorder and serious violence might ensue from the proposed visit.’<sup>1878</sup> The Court also looked at the fact that the applicants would partake in an EDL rally, at a time where community ties were tense due to the brutal murder of Rigby.<sup>1879</sup> Relying on the significance of public order, the Court limited the activities of EDL, in relation to allowing it to host international speakers and, thus, limited far-right extremists themselves from entering the country for this purpose. What was conspicuously missing from the discussion, in antithesis with Wilders’ case was any extrapolation or justification on the grounds of Part 3A of the Public Order Act 1986.

So, in the sphere of non-admission to the UK, the Courts accepted Wilders’ appeal against the decision of the immigration officer and, thus, the Secretary of State for the Home Department, but a few years later rejected Geller and Spencer’s request for judicial review. Both of the above cases were considered in the sphere of maintaining public order but, even so, their outcomes differ and it might be concluded that this variation may be reflective of the type of activity the persons were to become involved with in the UK, namely a presentation at institutions such as the House of Lords conference room, on the one hand, and an EDL demonstration on the other, with the latter being notorious for the possibility of resulting in public disorder.

## 6. The Far-Right Movement and Anti-Terror Legislation

In addition to the above tools, domestic Courts have access to anti-terror legislation, which can be of use when it comes to challenging the activities of extreme right-wing groups engaged in serious violence, as such violence is understood by the anti-terror legislation. The relevant pieces of legislation are the 2000 and 2006 Terrorism Acts. For purposes of this analysis, an evaluation of the definition of terrorism, a consideration of the proscribed organisations, the grounds upon which an organisation can be proscribed and the legal effect of being a member of and/or supporting a proscribed organisation will all be looked at as well as the offences of the encouragement of terrorism and the dissemination of terrorist publications.

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<sup>1878</sup> *GW v An Immigration Officer, Heathrow* [2009] UKAIT 00050, 12 October 2009, para.37

<sup>1879</sup> *GW v An Immigration Officer, Heathrow* [2009] UKAIT 00050, 12 October 2009, para.37



Section 1 of the Terrorism Act 2000 defines terrorism as the use or threat of action that seeks to influence the government or an international governmental organisation or to intimidate the public, or a section of the public, where the use of threat is made to advance a political, religious, racial or ideological cause. Such actions include, amongst others, serious violence against a person and serious damage to property. Such actions further entail those taken for the benefit of a proscribed organisation while section 1 of the Terrorism Act 2006 makes it an offence to make a statement which is ‘likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement for them to the commission, preparation or instigation of acts of terrorism or Convention offences.’ Schedule 2 of the Terrorism Act 2000 includes a list of proscribed organisations with Section 3 empowering the Secretary of State to add or remove organisations from the list. Although no far-right association is currently included on the list, such an association could, theoretically, be included in Schedule 2 if there were sufficient grounds for proscription, as incorporated by Section 21 of the Terrorism Act 2006. More particularly, this section holds that such proscription occurs in the event that an organisation promotes or encourages terrorism, as defined in Section 1 of the 2000 Act. Furthermore, Section 11 of the 2000 Act provides that a person commits an offence if he belongs to or professes belonging to a proscribed organisation. Section 12 holds that a person commits an offence if he supports such an organisation while wearing uniform of a proscribed organisation in public which is rendered an offence by Section 13 therein.

Anti-terror legislation has been utilised in the ambit of non-party groups and, particularly in relation to violent groups such as the Aryan Strike Force. This is because the political parties and other more rigidly formed groups of the far-right in the UK may incite racism, promote racist ideas and beliefs but do not function within the realm of terrorism as this is understood and incorporated in anti-terror legislation. More particularly, they do not carry out actions such as serious violence to persons or properties which are incorporated in the 2000 definition. In May 2010, Ian Davison, a founding member of the Aryan Strike Force, and his son, Nicky Davison, a member of the group, were convicted of terrorism-related offences.<sup>1880</sup> The arrests came after the Police became aware of the ideas expressed through the Aryan Strike Force’s website and

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<sup>1880</sup> This case is unreported (R v Heaton and Hannington 2010) so analysis is based on secondary sources.

searched Davison's home. This search resulted in the discovery of the chemical 'ricin' made by Ian Davison which was capable of resulting in about ten deaths. The CPS held that terrorism-related charges resulted from the finding of the chemical, Ian Davison's internet posts which encouraged far-right violence<sup>1881</sup> and the fact that the pair collected and distributed terror manuals such as the Anarchist's Cookbook<sup>1882</sup> and The Poor Man's James Bond.<sup>1883</sup> As a result of the above, Ian Davison was charged and pleaded guilty to six offences, namely preparing for acts of terrorism contrary to Section 5(1) of the Terrorism Act 2005, one act of producing a chemical weapon contrary to Section 2(1)(b) of the Chemical Weapons Act 1996, three charges of possessing a record or information likely to be useful to a person committing or preparing an act of terrorism contrary to Section 58(1)(b) of the Terrorism Act 2000 and one of possessing a prohibited weapon contrary to Section 5 (1)(b) of the Firearms Act 1968. Nick Davison faced the charges of possessing a record or information likely to be useful to a person committing or preparing an act of terrorism contrary to Section 58 (1) (b) of the Terrorism Act 2000 and was found guilty of these charges.<sup>1884</sup> A month after the Davisons' convictions, Michael Heaton and Trevor Hannington,<sup>1885</sup> also members of the Aryan Strike Force, were charged for their speech and activities.<sup>1886</sup> The pair uploaded internet posts on the group's website calling for Jews to be destroyed, referring to them as 'scum.'<sup>1887</sup> The Court heard that Heaton, who admitted to being a founding member of the Aryan Strike Force, had posted three thousand messages on the Aryan Strike Force website between January and June 2008. The judge characterised his words as being of the most 'insulting and extreme nature' marked by 'violent racism.'<sup>1888</sup> Hannington admitted to being the website's administrator with one of his posts reading 'kill the Jew, kill the Jew, burn down a synagogue today! Burn the scum.'<sup>1889</sup> Furthermore, in a police raid on their houses, a variety of weapons were found and Hannington admitted owning books such as the Anarchist's

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<sup>1881</sup> CPS Statement: 'Far Right Extremist Father and Son Convicted of Terrorism Offences' (14 May 2010):

<[http://www.cps.gov.uk/news/latest\\_news/118\\_10/](http://www.cps.gov.uk/news/latest_news/118_10/)> [Accessed 28 July 2015]

<sup>1882</sup> This book includes, amongst others, methods to make explosives and sabotage communications:

<sup>1883</sup> This is made up of four volumes which was created for the far-right movement in America and contains practical details for paramilitary organisations such as bomb making and survival skills: <<http://www.amazon.com/Poor-Mans-James-Bond-vol/dp/0879472308>>

<sup>1884</sup> CPS Statement: 'Far-Right Extremist Father and Son Convicted of Terrorism Offences' (14 May 2010):

<[http://www.cps.gov.uk/news/latest\\_news/118\\_10/](http://www.cps.gov.uk/news/latest_news/118_10/)> [Accessed 28 July 2015]

<sup>1885</sup> This case is unreported so analysis is based on secondary sources

<sup>1886</sup> CPS Statement: 'Eastern Eye Article - We Prosecute Terrorists No Matter What their Background or Beliefs' (30 June 2010): <[http://cps.gov.uk/your\\_cps/our\\_organisation/eastern\\_eye.html](http://cps.gov.uk/your_cps/our_organisation/eastern_eye.html)> [Accessed 28 July 2015]

<sup>1887</sup> Alex Deane, 'Big Brother Watch: The State of Civil Liberties in Britain' (eds. Biteback 2010)

<sup>1888</sup> Alex Deane, 'Big Brother Watch: The State of Civil Liberties in Britain' (eds. Biteback 2010)

<sup>1889</sup> Alex Deane, 'Big Brother Watch: The State of Civil Liberties in Britain' (eds. Biteback 2010)

Cookbook and the Terrorist Encyclopedia,<sup>1890</sup> all of which are considered useful tools to someone preparing or committing an act of terrorism.<sup>1891</sup> Due to the above speech and activity, Heaton faced the charge of soliciting murder, an offence contrary to Section 4 of the Offences Against the Person Act 1861<sup>1892</sup> with four charges of using threatening, abusive or insulting words likely to stir up racial hatred, contrary to Section 18 of the Public Order Act 1986. Hannington faced one charge of soliciting murder contrary to Section 4 of the Offences Against the Person Act 1861, one charge of disseminating terrorist publications contrary to Section 2 of the Terrorism Act 2006, three charges of possessing a record containing information likely to be useful to a person committing or preparing an act of terrorism, contrary to Section 58(1) (b) of the Terrorism Act 2000 and two charges of using threatening, abusive or insulting words likely to stir up racial hatred contrary to Section 18 of the Public Order Act 1986.<sup>1893</sup> Both were cleared of soliciting murder but, before the trial, Hannington pleaded guilty to the remaining six charges under the Terrorism Act 2006 and the Public Order Act 1986. Heaton was found guilty on all four racial hatred charges that he faced under the Public Order Act. The trial judge ordered the weapons to be destroyed, along with the defendants' home computers.<sup>1894</sup> It must be noted that when the CPS considers whether to prosecute offences pertaining to terrorism in the realm of speech, it takes into account that the freedom of expression incorporates the right to offend and that 'behaviour that is merely annoying, rude or offensive does not necessarily constitute a criminal offence' but notes that, in relation to radicalisation such speech comes with the 'desire to kill, maim or cause a person or group of people immense fear for their personal safety through the threat of (often) extreme violence based on their colour or religion...'<sup>1895</sup>

Notwithstanding the above use of anti-terror legislation in the sphere of challenging far-right extremism, it must be noted that this framework is habitually used in relation to those associated with groups such as *ISIS* or *Al' Qaida* rather than with right-wing terrorism because, as noted by

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<sup>1890</sup> A book which contains, *inter alia*, methods of making bombs: <<http://www.textfiles.com/anarchy/MISCHIEF/tte.txt>>

<sup>1891</sup> CPS Statement: 'Michael Heaton and Trevor Hannington Convicted' (25 June 2010): [http://www.cps.gov.uk/news/latest\\_news/124\\_10/](http://www.cps.gov.uk/news/latest_news/124_10/) [Accessed 15 July 2015]

<sup>1892</sup> Offences against the Person Act 1861 1861 c. 100

<sup>1893</sup> CPS Statement: 'Michael Heaton and Trevor Hannington Convicted' (25 June 2010): <[http://www.cps.gov.uk/news/latest\\_news/124\\_10/](http://www.cps.gov.uk/news/latest_news/124_10/)> [Accessed 15 July 2015]

<sup>1894</sup> Alex Deane, *'Big Brother Watch: The State of Civil Liberties in Britain'* (eds. Biteback 2010)

<sup>1895</sup> CPS Statement: 'Prosecution Policy and Guidance – Violence, Extremism and Related Criminal Offences' (2011)

the government in 2011, making particular reference to *Al'Qaida* related terrorism due to the particular time of drafting, the far-right was less widespread, systematic or organised than the extremism of religious extremism.<sup>1896</sup> In fact, the government has received some criticism for alleged use of this ambit solely for tackling extremism by those who allege to be functioning in the name of Islam. Further, the government noted that extreme-right wing terror activities are habitually carried out by lone wolves or a small group rather than an organised network.<sup>1897</sup> This is not to say that the anti-terror framework is never used. For example, the CPS noted that ‘the recent conviction of neo-Nazi extremists Michael Heaton and Trevor Hannington serves yet again to dispel the myth that terrorism prosecutions are focused on the Muslim community.’<sup>1898</sup> Moreover, it was not only legislation and its enforcement that came under fire but, also, the policy framework in relation to combatting violent extremism. More particularly, the Prevent Strategy was developed in 2006 and aimed to counter attraction towards extreme ideologies. The government has received criticism for using this framework to focus almost solely on Islamist extremism. As a result, the 2011 ‘Prevent’ review responded by broadening the strategy’s focus better to incorporate far-right threats.

## 7. Constitutional Law: Treatment of Political Parties by National Law

### 7.1 Registration of Political Parties

Given that this dissertation is examining the far-right movement in England and Wales as manifested in the form of, *inter alia*, political parties, the following section will provide an overview of the laws and regulations that exist for the registration and functioning of political parties and groups in the electoral process. Also, it will explain the first-past-the post system which is particularly important given that the latest general elections saw UKIP receiving only one seat in Parliament notwithstanding that it received the third largest number of votes. Understanding the laws, regulations and systems that affect political parties is significant for purposes of conceptualising the effects they may have on the development of far-right parties.

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<sup>1896</sup> HM Government, Prevent Strategy (2011), para.5.10

<sup>1897</sup> HM Government, Prevent Strategy (2011), para.5.10

<sup>1898</sup> CPS Statement: ‘Eastern Eye Article - We Prosecute Terrorists No Matter What Their Background or Beliefs’ (30 June 2010): <[http://cps.gov.uk/your\\_cps/our\\_organisation/eastern\\_eye.html](http://cps.gov.uk/your_cps/our_organisation/eastern_eye.html)> [Accessed 28 July 2015]

The Political Parties, Elections and Referendums Act 2000<sup>1899</sup> is the governing legislation for the registration and functioning of minor and major political parties in the UK. The difference between a major and a minor political party is that the latter can only take part in parish council elections in England and community council elections in Wales.<sup>1900</sup> The Electoral Commission is the competent authority for the assessment of applications for the registration of new parties and the monitoring of the functioning of a political party.<sup>1901</sup> If a group is not registered with the Commission, its candidates can only stand as independent candidates without the use of names or emblems.<sup>1902</sup> Important for this dissertation is the Act's reference to the prohibition of names and descriptions which accompany the party name and emblems of a political party for reasons of being offensive or that they include words the publication which would be likely to amount to the commission of an offence.<sup>1903</sup> Thus, this law would allow the Electoral Commission to prohibit emblems, such as Nazi swastikas or discriminatory images in relation to Islamic symbols, if it considered such emblems to fall within the realm of offensiveness. It would also allow the prohibition of words which could, *inter alia*, constitute a call to violence against a particular ethnic or religious group. So, on one level this may be considered positive as it allows the country to keep out parties with obnoxious and offensive emblems, but this, in itself, does not do much to prohibit far-right parties who wish to contest elections who can easily hide behind neutral emblems. It must also be noted that far-right parties have realised that, for purposes of gaining support on the electoral front, a toned-down image is a central prerequisite as hardliner ideologies have been unsuccessful in gaining support in this country so, discriminatory emblems or words would come with a certain stigma and would, regardless of the aforementioned legislative provision, attach a certain stigma to a political party and prevent its effective advancement. Other administrative rules have also come to limit parties, including far-right parties from contesting elections as a party (rather than individual members with no affiliation to a party). For example, on the 8<sup>th</sup> January 2016, the Electoral Commission de-registered the BNP

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<sup>1899</sup> The Political Parties, Elections and Referendums Act 2000, c.41

<sup>1900</sup> The Political Parties, Elections and Referendums Act 2000, c.41, Part II section 28 & 34

<sup>1901</sup> The Political Parties, Elections and Referendums Act 2000, c.41, Part I

<sup>1902</sup> The Political Parties, Elections and Referendums Act 2000, c.41, Part II section 28

<sup>1903</sup> The Political Parties, Elections and Referendums Act 2000, c.41 Name: s.3A(c) and (d), description: s.28(A), Emblems: s.29 (b) (c) Communication with the Electoral Commission on 29<sup>th</sup> December 2015 revealed that in 2015 no party has been banned due to an offensive emblem. The Commission updated its record keeping for 2015 and can thus inform us only for that particular year. However, the representative of the Commission noted that he did not think that many emblems have been rejected by the Commission.

for failure to conform to the annual confirmation of registration details with the Commission and pay the annual fee of £25. However, the BNP re-registered.

In relation to a party's constitution, although a party must submit its constitution to the Electoral Commission, there is no provision in the law which stipulates that the Electoral Commission can reject a party which seeks to promote values and principles which, for example, go against human rights and equality. Instead, it is the Equality and Human Rights Commission which is the competent authority to deal with issues pertaining to a party's constitution. The Equality and Human Rights Commission (hereinafter the Commission) has been mandated by the UK Parliament to challenge discrimination and to protect and promote Human Rights, functioning in all of the UK apart from Northern Ireland.<sup>1904</sup> More specifically, the Commission was created by the Equality Act 2006,<sup>1905</sup> which merged the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission.<sup>1906</sup> Under Section 8 of the 2006 Act, the Commission has a statutory duty to, amongst others, work towards the elimination of unlawful discrimination and the elimination of unlawful harassment. Under the 2006 Act, the Commission can apply to a County Court for an injunction to restrain the commissioning of acts that constitute unlawful discrimination.<sup>1907</sup> The current anti-discrimination legislation is found in the form of the Equality Act 2010, which was passed to amalgamate over one hundred and sixteen pieces of legislation into one Act, the most relevant of these for purposes of the present discussion being the Race Relations Act 1976, the Employment Equality (Religion or Belief) Regulations 2003 and Part 2 of the Equality Act 2006 which provided for, amongst others, the prohibition of discrimination on grounds of religion or belief. The Act seeks, *inter alia*, to 'reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics.'<sup>1908</sup> Thus, the Act has a wide scope, setting out the protected characteristics that fall within its ambit, including, amongst others, race and religion<sup>1909</sup> and prohibiting direct and indirect discrimination occurring on these

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<sup>1904</sup> The Commission was established by the Equality Act 2006 c.23, Part I

<sup>1905</sup> Equality Act 2006 c.3

<sup>1906</sup> Equality Act 2006 c.3, Part 1

<sup>1907</sup> Equality Act 2006 c.3, section 24

<sup>1908</sup> Introductory text of Act

<sup>1909</sup> Equality Act 2010 c.15, section 4

grounds or due to the victim's association with a person with a protected characteristic.<sup>1910</sup> Further, the Act prohibits harassment<sup>1911</sup> and victimisation<sup>1912</sup> on the grounds of such characteristics. It must also be noted that Section 153 enables the Welsh ministers to impose specific duties on a public authority through regulations, something which was finalised by the Welsh Assembly and entered into force on 6 April 2011.

In its guidelines to political parties, the Commission notes that a party's constitution must not exclude members on grounds of a protected characteristic such as race or religion or charge him or her higher membership fees on grounds of their protected characteristic.<sup>1913</sup> Further, it must not impose a condition which is hard to comply with due to such a characteristic.<sup>1914</sup> Interestingly, in its guidelines to political parties, the only requirements it sets out in the framework of non-discrimination pertain to membership. There is nothing referred to therein in the realm of, for example, prohibiting a party from discrimination against particular groups in society. In the case against the BNP, the Commission instigated proceedings against the BNP in relation to its Constitution which it alleged was racially discriminatory.<sup>1915</sup> There were three separate cases brought before the national Courts, one that dealt directly with the provision of BNP's constitution that only allowed membership of white persons, one that dealt with the scope of the order issued in the first case, with the Commission arguing that the BNP did not fulfill the obligations included therein and one arising from a dispute regarding the costs of the second case. The last case will not be further assessed as it is not directly relevant to the legal analysis of this section as it dealt with issues of cost.

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<sup>1910</sup> Equality Act 2010 c.15, section 13 – direct discrimination, section 19 - indirect discrimination

<sup>1911</sup> Equality Act 2010 c.15, section 26

<sup>1912</sup> Equality Act 2010 c.15, section 27

<sup>1913</sup> The protected characteristics under the 2010 Equality Act include: age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation

<sup>1914</sup> Equality and Human Rights Commission Guidelines to Political Parties <<http://www.equalityhumanrights.com/your-rights/service-users/parliaments-and-political-parties/how-equality-law-applies-political-parties>> [Accessed 15 May 2015]

<sup>1915</sup> Commission for Equality and Human Rights v Griffin Queen's Bench Division (Administrative Court) 17 December 2010 [2010] EWHC 3343 (Admin)

*7.1 (i) Case 1: BNP's Membership Policy Amounting to Unlawful Discrimination*

In 2009, the Commission sent a letter to the BNP<sup>1916</sup> noting that, since the prevention of discrimination by political parties falls within its statutory duties, it was concerned regarding the party's failure to comply with the Race Relations Act 1976 as a result of its Constitution and membership criteria, its recruitment and employment policies and the provision of services to the public. In relation to the first concern, the Commission noted that it considered the BNP Constitution and membership criteria to discriminate on racial grounds since it restricts membership to white persons. On this point, the Commission underlined that the party violated Section 25 of the Race Relations Act 1976 which outlawed discrimination by association. In relation to employment policies, the Commission noted that only members can apply for employment with the BNP, thereby extending the discrimination on the grounds of race within that field as well. Lastly, the Commission referred to one of Griffin's speeches in which he stated that one 'would expect ethnic minorities to continue to go to the Labour party.' As a result, the Commission voiced its concerns over the BNP's provision of services to all members of the public regardless of race. The Commission requested amendments and undertakings for purposes of rectifying the above alleged discrimination against racial groups as exercised through the practices, policies and procedures of the BNP. Since the BNP took no steps or measures adequately to redress the issue put forth by the Commission, the latter instigated proceedings against the three defendants, each board members of the BNP, seeking orders to restrain the BNP from applying certain provisions related to membership which it considered to be directly discriminatory on the grounds of race, contrary to Sections 1(1)(b) and 25(2)(a) of the Race Relations Act 1976. In Court, the Commission focused only on membership and, thus, indirectly on employment policy but not, directly or indirectly, on the provision of services to the general public.<sup>1917</sup>

More particularly, Section 1(1)(b) provides that a person discriminates against another if:  
he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but:

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<sup>1916</sup> Letter sent by the Commission for Equality and Human Rights to Nick Griffin (22 June 2008) Ref. No: JW/SB

<sup>1917</sup> Equality and Human Rights Commission v Griffin and others [2010] EqLR 42



- (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and
- (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and
- (iii) which is to the detriment of that other because he cannot comply with it.

Further, Section 25(2)(a) provides that:

It is unlawful for an association to which this section applies, in the case of a person who is not a member of the association, to discriminate against him:

- (a) in the terms on which it is prepared to admit him to membership; or
- (b) by refusing or deliberately omitting to accept his application for membership.

The County Court judge held that ‘the BNP are likely to commit unlawful acts of discrimination within section 1 (b) of the Race Relations Act 1976 in terms on which they are prepared to admit persons to membership under the 12<sup>th</sup> Constitution.’<sup>1918</sup> As such, the BNP provided an undertaking that the party would take all the necessary measures to revise the constitution to ensure that it did not directly or indirectly discriminate against any potential member. The Court was adjourned twice before the BNP finally submitted the revised version of its Constitution. Although this version removed the requirement that members must be white persons, it incorporated a new provision, namely, that new members must adhere to, *inter alia*, the ‘continued creation, fostering, maintenance and existence of a unity and of the integrity of the Indigenous British’<sup>1919</sup> and to ‘stemming and reversing the immigration and migration of peoples into our British Homeland that has, without the express consent of the Indigenous British, taken place since 1948, and to restoring and maintaining, by legal changes, negotiation and consent, the Indigenous British as the overwhelming majority in the make up of the population of and expression of culture in each part of our British Homeland.’<sup>1920</sup> As a result of the aforementioned developments, the judge held that there no longer existed a case of direct discrimination against a

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<sup>1918</sup> Equality and Human Rights Commission v Griffin and others [2010] EqLR 42, para.23

<sup>1919</sup> BNP Constitution Version 12.1 clause 3.2.1

<sup>1920</sup> BNP Constitution Version 12.1 clause 3.2.3

particular racial group but underlined that the requirement for new members to adhere to the aforementioned principles rendered the Constitution indirectly discriminatory and unlawful.<sup>1921</sup> As such, he ordered the defendants to cancel the requirement for adherence to the aforementioned principles as conditions for membership and to revise the Constitution for the purposes of the requested amendments.<sup>1922</sup> Finally, the judge held that the BNP should pause the recruitment of new members until its Constitution was duly amended.<sup>1923</sup> All this was ordered to be effectuated within a set time-frame.<sup>1924</sup>

### *7.1 (ii) Case 2: Non-Adherence by the BNP to the Court Order?*

Shortly after, the Commission brought a new case, arguing that the BNP had not adequately fulfilled the conditions of the Court Order and requested an order for the defendants to be committed for contempt and for the sequestration of the BNP's assets.<sup>1925</sup> More particularly, the Commission decided to commence proceedings since, notwithstanding that membership was no longer intertwined with an adherence to the party's principles and objectives,<sup>1926</sup> the right to attend or vote at any official meeting could only be ensured if a person adhered to the aforementioned principles and objectives. So, the Commission's second case against the BNP dealt with the scope of the Order made by Judge Collins and not the general question regarding the BNP's Constitution. As noted by the Court, the crux of the dispute was whether the Court Order, described above, was directed only in relation to becoming a member of the BNP or whether it could continue to be applied once admitted as a member of the party.<sup>1927</sup> To this end, the Court found that the party had, indeed, been adequately restructured in response to the Order which was directed on the terms under which a person is admitted as a member and no violation of this Order emanated from the party having adherence conditions for subsequent activity

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<sup>1921</sup> Equality and Human Rights Commission v Griffin and others [2010] EqLR 42

<sup>1922</sup> Equality and Human Rights Commission v Griffin and others [2010] EqLR 42

<sup>1923</sup> Equality and Human Rights Commission v Griffin and others [2010] EqLR 42

<sup>1924</sup> Equality and Human Rights Commission v Griffin and others [2010] EqLR 42

<sup>1925</sup> The Commission for Equality and Human Rights v Nicholas John Griffin, Tanya Jane Lumby, Simon Darby CO/9651/2010 High Court of Justice, QBD Administrative Court 17 December 2010 [2010] EWHC 3343 (Admin)

<sup>1926</sup> The Commission for Equality and Human Rights v Nicholas John Griffin, Tanya Jane Lumby, Simon Darby CO/9651/2010 High Court of Justice, QBD Administrative Court 17 December 2010 [2010] EWHC 3343 (Admin), para. 16

<sup>1927</sup> The Commission for Equality and Human Rights v Nicholas John Griffin, Tanya Jane Lumby, Simon Darby CO/9651/2010 High Court of Justice, QBD Administrative Court 17 December 2010 [2010] EWHC 3343 (Admin), para.2

within the party.<sup>1928</sup> A couple of issues can be determined from the role of the Equality and Human Rights Commission in relation to political parties. Firstly, that the powers set out in its guidelines are not extensive so as to incorporate powers to prohibit objectives which are discriminatory against a particular group. This is illustrated by the fact that in its above case against Griffin, it called for an end to the restrictive and discriminatory membership and, subsequently, candidate policy, but did not focus on the actual content of the policy, namely that the opposition to any form of integration or assimilation of...the indigenous British could be regarded as an exclusionary and discriminatory view of the nation and a foundation for subsequent discriminatory and racist activity and rhetoric. The second point that can be discerned is that imposing rules regarding membership restrictions on grounds such as race, does not seriously hamper the activities of a far-right party. In Griffin's case, to put it briefly, the BNP got away with it on technical terms and is, thus, able to impose indirectly discriminatory requirements on those who want to proceed in the party.

The Court's decision in this realm can be deemed as rather problematic since, essentially, the Court requested that the principle of non-discrimination is applied for purposes of ensuring membership of the BNP, but makes no equivalent requirement for this principle to continue in subsequent activities within the party. By carrying out a literal reading of the Court Order, the judgement resulted in limiting the principles of non-discrimination and equality to membership conditions only. Another point that must be noted is the actual efficacy of the Commission's guidelines in relation to the general framework through which the far-right is challenged. To illustrate this point, one may consider UKIP's Constitution which stipulates that the party will conduct itself in a way so as not to discriminate positively or negatively against any person on grounds of, amongst others, their race or religion.<sup>1929</sup> This is a broad clause that refers to the general conduct of the party and not just within the sphere of membership thereto. However, even if this party's Constitution meets the objectives of the Commission's guidelines in relation to membership adopting a general non-discriminatory character, this does not stop it from being a party that promotes discriminatory rhetoric. Important to this discussion is the argument put

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<sup>1928</sup> The Commission for Equality and Human Rights v Nicholas John Griffin, Tanya Jane Lumby, Simon Darby CO/9651/2010 High Court of Justice, QBD Administrative Court 17 December 2010 [2010] EWHC 3343 (Admin), para.7

<sup>1929</sup> UKIP Constitution, Article 2.4

forth above in relation to offensive emblems. The new far-right and parties who seek to be successful in the electoral process are aware of the risks of being linked, by the public, to doctrines such as that of racism or fascism. As such, a party may partly circumvent such attachment by depositing a neutral constitution which makes no reference to potentially offensive words or themes. To illustrate this point one may consider UKIP's Constitution which notes that its objectives are to ensure national sovereignty, cease the UK's membership of the EU and refrain from making any treaty or join any international organisation which would weaken its national sovereignty. It makes no reference to other issues that it takes up in its rhetoric such as anti-immigration and anti-Islam stances. Even more striking is the provision in the BNP's Constitution which notes that they are 'implacably opposed to... National Socialism in all its forms (including Fascism and Nazism).'<sup>1930</sup> Taking into account the foundations and history of this party and the rhetoric and activity it has developed in the field of, for example, anti-immigration and anti-Islam, this provision may appear rather bizarre. However, one may well assume that it was incorporated in the BNP's general effort to neutralise its image to the electorate and, more importantly, disassociate itself from the principles it refers to in the above article. This, in itself, demonstrates that, not only do limitations on a party's formal documents and emblems have little effect on tackling extremist elements but formal documents themselves can be used and abused by political parties as a tool to ploy and even manipulate the electorate.

In sum, parties are under legislative scrutiny to put forth a non-offensive emblem but, bizarrely, the same legislation does not incorporate any provisions regarding the prohibition of offensive provisions in parties' constitutions. Further, the Commission has guidelines for political parties which are restricted to prohibiting discrimination in relation to party membership and, as such, constitutions which promote general discriminatory rhetoric avoid scrutiny once again. However, regardless of legislative control, it appears that parties who are serious about gaining electoral success will avoid having a discriminatory constitution for reasons of summoning more support. What is significant for this discussion is that any form of legislative scrutiny on a party's formal documents, which is rather limited in England and Wales, does not contribute to making it less racist or xenophobic but merely prompts it to hide certain realities which it needs to do anyhow to gain mainstream support. The only achievement the above-discussed provisions and

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<sup>1930</sup> BNP Constitution version 14.4, Article .2.7

guidelines could achieve would be to oust obnoxious right-wing symbols and, to some extent maintain some form of fairness *vis-à-vis* membership conditions but, as per the case of Griffin, such fairness does not extend to general participation in the party.

## 7.2 Post-Registration Phase

### 7.2.1 The Electoral Process

The first-past-the-post system is the electoral system for gaining seats in the British Parliament and for local elections in England and Wales. Proportional representation is used only for the election of the devolved governments of Scotland, Northern Ireland and Wales,<sup>1931</sup> and for European Parliament elections.<sup>1932</sup> Under first-past-the-post, voters of each constituency can only vote for one candidate and it is the candidate getting the most votes that gets elected to Parliament. Bluntly put, the remaining votes are of no use. There are several advantages and disadvantages of this system, with the former including its effectiveness in terms of time and cost and the latter including the promotion of tactical voting, undemocratic since many votes are lost and, importantly for this dissertation, unfair to smaller parties. It ‘presents a profound challenge for insurgents...who have to build or discover concentrated pools of support that are sufficient to win locally.’<sup>1933</sup> This system leads voters to worry about the possibility of a vote to a small party such as UKIP being a wasted one. This was reflected in a 2012 survey which revealed that 24% of voters considered a vote to UKIP as a wasted one.<sup>1934</sup> Furthermore, donors may be ‘more reluctant to invest in parties that have little chance of victory.’<sup>1935</sup> At the same time it contributes to decreasing the moral of the members of such parties who are almost *de facto* shut out of Westminster. Thus, this system is a serious obstacle to small parties, whether these are far-right parties or not, entering the British Parliament. Although the purpose of this system is not to keep out far-right parties from the government, its effect is exactly this and, as such, can be considered an effective tool for challenging the far-right. As noted above, this system greatly affected the

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<sup>1931</sup> Ron Johnston, Charles Pattie, Dannie Dorling & David Rossiter, *From Votes to Seats: The Operation of the UK Electoral System since 1945* (eds. Manchester University Press 2001)

<sup>1932</sup> Ron Johnston, Charles Pattie, Dannie Dorling & David Rossiter, *From Votes to Seats: The Operation of the UK Electoral System since 1945* (eds. Manchester University Press 2001)

<sup>1933</sup> Robert Ford & Matthew Goodwin, *Revolt on the Right – Explaining Support for the Radical Right in Britain* (eds. Routledge 2014) 221

<sup>1934</sup> Lord Ashcroft ‘UKIP: They’re Thinking What We’re Thinking Understanding the UKIP Temptation’ Published by Lord Ashcroft: <<http://lordashcrofthpolls.com>> [Accessed 20 December 2015]

<sup>1935</sup> Robert Ford & Matthew Goodwin, *Revolt on the Right – Explaining Support for the Radical Right in Britain* (eds. Routledge 2014) 221

results of the UKIP in the 2015 general elections. However, on the other hand, it has the potential to push major parties in a populist direction<sup>1936</sup> if they wish to rally the support of someone who may be wary of a lost vote but embraces the mandate of parties such as UKIP. This, thereby, may result in keeping far-right parties from effectively entering the government but, instead, leads to the normalisation of right-wing extremism within the mainstream which is a dire effect in itself but may also normalise support for non-party far-right activities which are potentially linked to violence. An example to illustrate the latter is the fact that some evidence exists to demonstrate that Powell's 'rivers of blood' speech established a fertile setting in which parties, such as the violent National Front, could develop.<sup>1937</sup>

### Conclusion

The UK has refrained from incorporating major international documents in the form of the ICCPR and the ICERD, with no equivalent of Article 20 of the former or Article 4 of the latter in its national law. Notwithstanding requests from the UN Committees to proceed with ratification, the country has, over time, remained steady in its position regarding non-ratification of the documents. It has imposed reservations to the two articles above which are very telling of its general position in relation to limiting rights such as expression for purposes of, for example, preventing racial discrimination or advocacy for hatred. However, insofar as an individual or movements, including those belonging to the far-right, pose a risk to public order then the relevant freedoms discussed above fall down the hierarchy of importance. In relation to public order, the Public Order Act 1986 provides two separate mechanisms that can be used for racially and religiously hateful expression, acts or material, namely Parts 3 and 3A, which respectively deal particularly and exclusively with speech, material and activities which involve stirring up racial and religious hatred. Even though provisions which tackle these phenomena have been developed, the use of Section 5 of the same Act which deals with general harassment, alarm and distress, in its racially or religiously aggravated form, as established by the Crime and Disorder Act, is an option often adopted. This is because it is easier to handle given that, unlike its racial and religiously hateful counterparts, no approval is needed by the Attorney-General to proceed. In addition to issues that may arise *vis-à-vis* the tools to be used during a prosecution, issues of

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<sup>1936</sup> Pippa Norris, 'Radical right. Voters and Parties in the Electoral Market' (eds. Cambridge 2005) 232

<sup>1937</sup> Matthew J. Goodwin, *New British Fascism – Rise of the British National Party* (eds. Routledge 2011) 28

coherence in respect of whether or not the CPS actually decides to prosecute a case have also come up in the field of the far-right. More particularly, it decided not to proceed with the prosecution of a case which involved the distribution of leaflets which, amongst others, prompted support for a white power party. The CPS noted that ‘this amounted to no more than free political speech, however controversial.’<sup>1938</sup> So, following its establishment, the CPS has sought to pursue conviction for the relevant cases but, at the same time, has decided not to prosecute on a particular case which, taking into account the content of the above seems slightly incongruous. In addition to the public order sphere, anti-terrorism legislation has been put into force when dealing with violent non-party groups, namely Aryan Strike Force and Volunteer Force. Such legislation is, thus, reserved for the overtly violent groups in the realm of the far-right movement, with violence being, as provided for in the Terrorism Act 2000, serious violence. It is only within the anti-terrorism sphere that associations can be proscribed. What is inconspicuously missing from the above processes adopted to tackle expression, acts and material of the far-right is a consideration of the effects of these phenomena on groups such as the victims themselves and their communities. This is not a point which interests the country, instead, it lies faithful to its history, placing great importance on looking at societal damage and prevents this predominantly by working through the realm of maintaining public order.

As well as the effects of speech, acts and materials of far-right groups insofar as these lead to public harm, in one way or another, this country also has several tools which can be used in the sphere of far-right parties contesting elections. The majority of such tools have not been purposely designed to tackle the harms of the far-right or any other harmful movement but the effects of some tools are significant. First and foremost, the first-past-the post system, although not particularly designed to keep far-right political parties far away from government has achieved just that. Thus, from the moment a far-right political party that seeks to contest elections is created it is faced with this grave obstacle. On the other hand, however, it prompts mainstream parties more habitually to adopt populist rhetoric. Further, the laws governing the registration of a political party may, to a certain extent, keep the far-right element (as well as other elements) out. These include rules such as the prohibition of offensive emblems, names or

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<sup>1938</sup> CPS, CPE 2008: Annex C: Review of Incitement to Racial Hatred Cases for 2006/07, case 10.

descriptions (although an offensive constitution is not banned in any law *per se*). However, as discussed, this is not a concrete method through which far-right parties can be kept out of the system as they can readily camouflage their intentions and mandate through a seemingly neutral appearance and constitution. What is evidently lacking in the UK (and therefore England and Wales) is legislation or regulation which may directly be applied to prohibit, *inter alia*, a racist constitution. The Electoral Commission has no power over this whilst the Equality and Human Rights Commission regulations limit its powers to ensuring non-discrimination *vis-à-vis* party membership. Further, practical bureaucratic rules of the competent authority in charge of the registration and functioning of political parties, the Electoral Commission, have resulted in parties such as the BNP being removed from the electoral roll.<sup>1939</sup> Thus, as well as the great effects brought about by the electoral system itself, we also see small rules here and there which appear in different phases of the life cycle of a political party, including a far-right one, that may cause major trouble for them.

Further, the use of the non-discrimination framework in the realm of the far-right in England and Wales has been interesting. On the one hand, it has been used by the Equality and Human Rights Commission to challenge the racist membership criteria of the BNP. On the other, however, it has predominantly been used by far-right members themselves to challenge what they perceive as discrimination against them, in the work place and in relation to trade union membership due to their affiliation to the far-right movement. In the work place, domestic Courts have found dismissal due to membership of a far-right political party to constitute fair dismissal while the Employment Appeal Tribunal underlined the limited prospects of success in a discrimination case in the realm of access to employment by a BNP member. As far as is possible, and with the limited number of cases available, one can denote a partial pattern *vis-à-vis* the judiciary's stance regarding the employment of far-right extremists. However, exclusion from a trade union due to membership of the BNP has been found to constitute unfair exclusion.

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<sup>1939</sup> In the past, the National Front was also removed due to non-admission of its annual renewal fee. They subsequently re-registered. This can be found on the Electoral Commission's website: <<http://search.electoralcommission.org.uk/Search/Registrations?currentPage=1&rows=10&query=national%20Front&sort=RegulatedEntityName&order=asc&open=filter&et=pp&et=ppm&et=tp&et=perpar&et=rd&register=gb&register=ni&register=none&regStatus=registered&regStatus=deregistered>> [Accessed 10 December 2015]



In light of the above, England and Wales embrace the significance of the freedom of expression but can readily limit speech if issues of public order, terrorism or anti-social behaviour arise. Assemblies are also readily prohibited if public order or anti-social behaviour issues arise. What is clear is that England and Wales are not ready and willing to proscribe associations if such associations do not amount to terrorist organisations. However, their electoral system directly prevents ‘insurgent’ parties from entering the government, no matter what their ideology. It could thus be concluded that the doctrinal approach underlying the jurisdiction’s approach to the far-right is not militant democracy as can be reflected, amongst others, in its reservation on Article 20 of the ICCPR which notes that it is to be interpreted in line with Article 19 and 21. Instead, England and Wales places a great emphasis on ensuring public order. Regardless of the jurisdiction’s intention in this realm, this approach allows them to purport a libertarian badge of non-interference but, in practice, the laws and system do not allow racist or religious hatred which affect public order, while small parties (including far-right parties) remain out of the government. The current reality in relation to the country’s approach to the far-right will not be affected on a legislative or judicial level due to the country’s departure from the EU as the former was not developed to conform or incorporate EU legislation whilst the latter is driven by national legislation including the HRA which ratifies a CoE not an EU instrument. The only directly relevant issue that arises is the ceasing of the applicability of the combined Article 2 and Article 7 TEU mechanism upon the departure of the UK from the EU. Nevertheless, as discussed previously, this has proved to be a dormant tool with no practical efficacy to-date.

## CHAPTER SEVEN: GREECE

### Introduction

This chapter will map out the domestic legal framework that can be utilised to challenge right-wing extremist movements in Greece. Policy consideration is scarce in this chapter as there exist very few policy documents relevant to the issues under consideration. The chapter analysis will be effectuated against the backdrop of a contextual discussion, which will be composed of three spheres. Namely, there will be a brief overview of the country's legal and political system, as established by its constitution, which will facilitate an understanding of the subsequent analysis, looking at issues such as primary sources of law and the functioning and powers of the judiciary. This will also demonstrate the differentiation between England and Wales as a common law system and Greece as a civil law system. Furthermore, given the country's recent experience of a military dictatorship and the ramifications this has had on the development of the far-right, a brief insight into this period of history will be provided with emphasis on its interrelationship with post-dictatorship right-wing extremism. Lastly, the section will set out a backdrop of the far-right in Greece, looking at its development following the post-dictatorship period and its composition today. In relation to Minkenberg's structure composed of political parties, non-party movements and the subculture milieu, in Greece today, the far-right scene is dominated by *The Popular Association - Golden Dawn* (Λαϊκός Σύνδεσμος -Χρυσή Αυγή) – hereinafter Golden Dawn, a registered political party simultaneously acting as a violent subculture movement but with a rigid rather than loose structure. As such, rather than displaying a clear placement of Minkenberg's entities as was the case in England and Wales, the Greek case incorporates a mélange of entities, which make up one group with two faces. It must be noted from the onset that MPs, including the leadership of Golden Dawn and other members, are currently on trial for, *inter alia*, leading or participating in a criminal organisation. The trial commenced following the murder of anti-fascist musician Pavlos Fyssas in September 2013 by a Golden Dawn member. After the contextual setting has been established, the chapter will provide an overview of the definitional framework of key terms including racial discrimination and incitement to racial and religious violence as these emanate from the country's legislation. As is the case for England and Wales, relevant definitions discussed in chapter one are repeated here due to the particularities which may stem from the legal and policy frameworks of the particular country and the relevance of national terminology on the implementation of legal or policy measures in the

sphere of challenging the far-right. What becomes immediately obvious is the lacking definitional framework of relevant terms in comparison with England and Wales due to the fact that, although references to certain terms are incorporated into some legislation, there exist less relevant cases in which discussions on key terms can be developed and given that, apart from the National Action Plan on Human Rights 2014-2016, there are no policy documents relevant to the issues at stake. Against the aforementioned contextual and definitional setting, the chapter will consider the interpretation and incorporation of the country's obligations as these emanate from international and European documents. More particularly, the section will consider the status of the ICCPR and ICERD in national law with emphasis on Article 20(2) of the former and Article 4 of the latter. In order to determine the State's adherence to international obligations, potential reservations and/or declarations made on provisions of international conventions shall be assessed. On a Council of Europe level, it will look at Law 239/1953 which incorporated the European Convention of Human Rights (ECHR) into national law. On this level, it must be noted that Protocol 12 to the Convention was signed by Greece in 2000 but has not yet been ratified. Further, the Additional Protocol to the Convention on Cybercrime concerning the Criminalisation of Acts of a Racist and Xenophobic Nature committed through Computer Systems, discussed in chapter four has been signed but not ratified by the country. As with the chapter on England and Wales, although no further discussion will, thus, arise from this document, the fact of non-ratification is a finding in itself in the realm of the tools available for a State to challenge hate. However, the National Action Plan on Human Rights 2014-2016 noted that one of the State's priorities is the adoption of the draft law ratifying the additional protocol to the Cybercrime Convention.<sup>1940</sup> It is noteworthy that the Action Plan does not refer to the ratification of Protocol 12 to the ECHR as a priority. On an EU level, the analysis of the Framework Decision on Combatting Certain Forms and Expressions of Racism and Xenophobia by means of criminal law,<sup>1941</sup> which has been transposed by Law 4285/2014,<sup>1942</sup> will not be

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<sup>1940</sup> Ministry of Justice - General Secretariat of Transparency and Human Rights - Human Rights – National Action Plan (*Δικαιώματα του Ανθρώπου – Εθνικό Σχέδιο Δράσης*) 2014-2016 (2014) 204

<sup>1941</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law

<sup>1942</sup> Amendment of Law 927/1979 and Harmonisation with Framework Decision 2008/918/JHA of the 28<sup>th</sup> November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law and other Provisions (Τροποποίηση του ν. 927/1979 (Α' 139) και Προσαρμογή του στην Απόφαση – Πλαίσιο 2008/913/ΔΕΥ της 28ης Νοεμβρίου 2008, για την Καταπολέμηση Ορισμένων Μορφών και Εκδηλώσεων Ρατσισμού και Ξενοφοβίας Μέσω του Ποινικού Δικαίου και Άλλες Διατάξεις)

discussed in the section on international and European obligations but, rather, in the national legal framework as this tool has amended the principal legal instrument that tackles issues relevant to challenging the far-right, namely Law 927/1979 on The Punishment of Acts or Activities which Pursue Racial Discrimination (*Περί Κολασμού Πράξεων ή ενεργειών Αποσκοπούσων εις Φυλετικές Διακρίσεις*). This is also the case for Law 3304/2005 on the Implementation of the Principle of Equal Treatment regardless of Racial or Ethnic Origin, Religion or other Beliefs, Disability, Age or Sexual Orientation (*Εφαρμογή της Αρχής της Ίσης Μεταχείρισης ανεξαρτήτως Φυλετικής ή Εθνοτικής Καταγωγής, Θρησκευτικών ή άλλων Πεποιθήσεων, Αναπηρίας, Ηλικίας ή Γενετήσιου Προσανατολισμού*) which transposed EU Directives 2000/76/EC and 2000/43/EC. As is the case with the anti-racist law mentioned above, Law 3304/2005 will be dealt with in the national legal framework even though it transposes European Union law given that it is the only anti-discrimination legislation which exists in Greece. After assessing Greece's adherence to international and European obligations, the chapter will look at the country's domestic legal framework in the realm of challenging far-right movements. To this end, it will firstly pinpoint how the key freedoms of expression, assembly, association and non-discrimination are established therein. This starting point is based on the premise that regulative measures need to be designed following a balance of the aforementioned rights and interests on the one hand and the potential harm resulting from right-wing rhetoric and activity on the other. After this framework is set out, the chapter will appraise the role of criminal law in relation to the far-right, looking particularly at Law 927/1979, as amended by Law 4285/2014 mentioned above, and relevant provisions of the Greek Penal Code such as those on racial aggravation and criminal and terrorist organisations. Law 3304/2005 will then be looked at which, apart from a general provision in the country's constitution, is the only source in Greek law tackling the issue of discrimination. It must be noted that the need to consider anti-discrimination legislation more extensively in this chapter, in comparison to its English and Welsh counterparts stems from its relevance to discriminatory and exclusionary activities conducted by Golden Dawn and its members in relation to the provision of goods and services, such as the provision of soup kitchens to Greeks only. As will be further assessed below, relevant legislation has seldom been relied upon to challenge the far-right in Greece, a reality which has led to a state of impunity for the criminal activities of Golden Dawn and an issue that became a key concern for national and international human rights institutions and non-governmental

organisation such as the ICERD committee, ECRI and the Ombudsperson, with relevant reports and positions discussed in this chapter. Although some members of Golden Dawn were convicted for their criminal activities and the Court recognised their affiliation with Golden Dawn, before the murder of Fyssas, no steps were taken against the organisations. As such, the jurisprudential analysis will take place simultaneously with the legislative analysis as quantitatively the existence of relevant case-law does not merit a separate section as was the case for England and Wales. Furthermore, the chapter will proceed to appraise how national law treats political parties before registration and during their functioning. The purpose is to determine what tools and sub-tools are available and can be used for challenging far-right parties contesting elections. By considering all the above frameworks, this chapter incorporates all means and methods directly or indirectly available to Greece for purposes of challenging the far-right. The chapter will then conclude on key themes identified throughout this chapter, making reference to the compatibility between national law and international and European law and, more generally, appraising whether the current system is well-equipped when confronting the far-right.

## 1. Contextual and Definitional Framework

### 1.1 Overview of Greek Political and Legal System

Greece is a civil law system with a national constitution. It is a parliamentary republic. In 1924, following a referendum, the Monarchy was abolished and a new constitution was adopted in 1927 which, amongst others, established Greece as a parliamentary republic for the first time. However, in 1936, this form of government was abolished following the establishment of a dictatorship by Ioannis Metaxas.<sup>1943</sup> The requirement of a new constitution following the socio-political turmoil created by the invasion and occupation of Greece by Nazi Germany in 1941 and the civil war that occurred from 1946-1949 led to the adoption of a new constitution in 1952 which established a constitutional monarchy. This was in force up until 1975 following the fall of the military dictatorship (μεταπολίτευση). This period planted the seeds of public will and democracy, promoted political and individual rights as well as principles such as social solidarity, as reflected in the 1975 constitution in force today, amended in 1986 and then in 2001 and 2008.

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<sup>1943</sup> Ioannis Metaxas is a controversial figure in Greek history because, on the one hand, he was a dictator but, on the other, he is admired for his famous rejection of Mussolini's Italy request to allow the Italian army passage to occupy certain strategic places in Greece. This event continues to be commemorated with national parades in Greece and Cyprus

The 1986 amendment focused on limiting presidential competences and in 2001 the amendment was broad ranging, establishing new institutions and guarantees, which advanced the political and administrative system of the country and the ambit of human rights protection. The basic aim of the 2001 amendment was to bring the Greek constitution in line with European and international realities and obligations which had emerged at the beginning of the century. The constitution provides that Greece is a parliamentary republic.<sup>1944</sup> The legislative powers reside with the parliament and the President, the executive powers with the President and the government and the judicial powers with the courts.<sup>1945</sup> The courts are not obliged to comply with legal provisions which they deem to be unconstitutional.<sup>1946</sup> Article 30 provides that the President is the regulator of the State, elected by the parliament for a period of five years. The constitution is the primary source of law and all other sources must comply with it. Legislation may come from the parliament but also from other authorities such as the President in the form of decrees and the Ministers in the form of decisions, which are then approved by Parliament.<sup>1947</sup> The President promulgates and publishes the statutes and issues the decrees necessary for their execution. The President can issue general regulatory decrees which have the force of a Statute.<sup>1948</sup> The Supreme Administrative Court elaborates all decrees of a regulatory nature.<sup>1949</sup> A body which is relevant and significant to the issues under consideration in this chapter is the Ombudsperson, an independent authority established under Article 103 of the Constitution, with its role set out in Law 2477/1997<sup>1950</sup> and subsequently enhanced by Law 3094/2003.<sup>1951</sup> In relation to the current study, the Ombudsperson has jurisdiction over public bodies for violations of principles of equal treatment<sup>1952</sup> and conducts research and publishes special reports on the implementation and promotion of the principle of equal treatment without discrimination on grounds such as racial or ethnic origin or religious or other beliefs.<sup>1953</sup> One such special report

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<sup>1944</sup> Article 1(1) Greek Constitution

<sup>1945</sup> Article 26 Greek Constitution

<sup>1946</sup> Article 87 (2) Greek Constitution

<sup>1947</sup> Article 73 Greek Constitution, European Network of Legal Experts in the Non-Discrimination Field, Athanasios Theodoridis, 'Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report 2013 – State of affairs up to 1<sup>st</sup> January 2014' 6

<sup>1948</sup> Article 43(2) Greek Constitution

<sup>1949</sup> Article 95(1)(d) Greek Constitution

<sup>1950</sup> Founding Law: Ombudsperson, Public Administration Inspectors and Auditors Body (Ιδρυτικός Νόμος - Συνήγορος του Πολίτη, Σώμα Επιθεωρητών-Ελεγκτών Δημόσιας Διοίκησης)

<sup>1951</sup> The Ombudsperson and other Provisions (Συνήγορος του Πολίτη και άλλες Διατάξεις)

<sup>1952</sup> Article 1, Law 3094/2003

<sup>1953</sup> Article 5(3) Law 3094/2003

was a 2013 report on hate crime in Greece discussed in this chapter. The Ombudsperson cannot initiate or participate in judicial proceedings with its maximum powers being the referral of a case to the prosecutor or competent administrative authority for investigation.

The electoral system of the country is a form of reinforced proportional representation. This means that parties take the number of seats in parliament proportional to the number of votes received, with the winning party taking a bonus of fifty seats in the three-hundred seat parliament. This could potentially affect the representation of smaller parties in parliament. In addition, for an entity/individual candidate to enter parliament it/he/she must receive at least 3% of valid votes,<sup>1954</sup> thereby placing another obstacle in the way of smaller parties. Since 1974, the Greek political scene has been dominated by two parties namely the centre left *PASOK - Pan-Hellenic Socialist Movement (ΠΑΣΟΚ – Πανελλήνιο Σοσιαλιστικό Κίνημα)* and *New Democracy (Νέα Δημοκρατία)*. However, following their demise due to the dissatisfaction of the electorate in their social and financial policies, particularly their alignment with the Memorandums of Understanding(s),<sup>1955</sup> the rise of smaller parties was facilitated.

## 1.2 Dictatorship – Regime of the Colonels

On the 21<sup>st</sup> April 1967, a group of right-wing colonels carried out a *coup d'état*, which resulted in the country being run by a Regime of the Colonels (*Καθεστώς των Συνταγματάρχων*) also known as the Junta (*Χούντα*). It ended on the 24 July 1974. The interrelation between post-Junta far-right groups with the Colonel's Regime had traditionally 'rendered them illegitimate in the eyes of Greek voters.'<sup>1956</sup> In addition, the country's experience with the Nazi invasion in 1941 rendered affiliation with fascist or Nazi ideologies unpopular. As such, the part of the electorate with right-wing extremist ideologies was attracted to the centre-right *New Democracy* as this option was considered more legitimate than resorting to supporting extreme-right parties.<sup>1957</sup> Notwithstanding the above, by 2012 over 400,000 Greeks had voted for Golden Dawn, a party

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<sup>1954</sup> Article 5 Law 3231/2004 Election of Members of Parliament Law (Εκλογή βουλευτών Νόμος)

<sup>1955</sup> A total of three Memorandum of Understanding have been signed between the European Commission (on behalf of the Stability Mechanism), Greece and the Bank of Greece. Financial support is given to Greece but under the condition that certain 'adjustments' are made (austerity measures)

<sup>1956</sup> Sofia Vasilopoulou & Daphne Halikiopoulou, *The Golden Dawn's Nationalist Solution – Explaining the Rise of the Far-Right in Greece* (eds. Palgrave 2015) 21

<sup>1957</sup> Sofia Vasilopoulou & Daphne Halikiopoulou, *The Golden Dawn's Nationalist Solution – Explaining the Rise of the Far-Right in Greece* (eds. Palgrave 2015) 21

which embraces the principles enshrined in fascism and Nazism. The relationship between Golden Dawn and the *Junta* is clear since the links are present and obvious both historically and on a practical level. In 1973, Nikolaos Michaloliakos, the leader of Golden Dawn, joined the 4<sup>th</sup> August party (4<sup>η</sup> Αυγούστου) named after the date of a military coup in 1936. This party was founded by Constantinos Plevris, a far-right extremist holocaust denier and LAOS member of Parliament who had been brought to trial for his book ‘Jews – the Whole Truth’ (*Εβραίοι – Όλη η Αλήθεια*) in 2007. Michaloliakos was arrested for political violence and convicted in 1978 for bombings in Athens. He remained imprisoned for ten months and during his stay met the leader of the Junta, George Papadopoulos. In 1984, Papadopoulos founded a new far-right party from prison, the *National Political Union* (*Εθνική Πολιτική Ένωσις*) and appointed Michaloliakos as leader of the party’s youth wing.<sup>1958</sup> In 1985, following a conflict between the two, Michaloliakos departed from this party to establish the Golden Dawn magazine which promoted ideas pertaining to National Socialism.<sup>1959</sup> Moreover, on a practical level, leaders of the Colonels’ Regime embraced Greek supremacist thinking which is evident in Golden Dawn’s belief system.<sup>1960</sup> Notwithstanding the above and the established links between Golden Dawn members and the Junta, the former ‘selectively mentions the Junta in its materials,’<sup>1961</sup> aware of the general public’s position when it comes to the country’s experiences under the dictatorship.

### 1.3 The Face of the Far-Right in Greece: General Overview

This section will provide an overview of the phenomenon of right-wing extremism in Greece following the fall of the Junta up until today. After 1974, far-right extremist groups carried out violent activities such as bombings and personal attacks.<sup>1962</sup> It must be noted that, even though many of the attacks’ masterminds were arrested, far-right violence of that period was ‘largely under-recorded, under-reported and under-studied, in contrast with the violence of far-left

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<sup>1958</sup> Human Rights First ‘We’re not Nazis, but...The Rise of Hate Parties in Hungary and Greece and Why America should Care (August 2014) 83

<sup>1959</sup> Nikos Hasapopoulos, ‘Golden Dawn – History, Personalities and the Truth’ (*Χρυσή Αυγή - Η Ιστορία, τα Πρόσωπα και η Αλήθεια*) (eds. Livani 2013) 17

<sup>1960</sup> Human Rights First ‘We’re not Nazis, but...The Rise of Hate Parties in Hungary and Greece and Why America should Care (August 2014) 82

<sup>1961</sup> Sofia Vasilopoulou & Daphne Halikiopoulou, ‘The Golden Dawn’s Nationalist Solution – Explaining the Rise of the Far-Right in Greece’ (eds. Palgrave 2015) 58

<sup>1962</sup> Robert McDonald, ‘Pillar and Tinderbox: The Greek Press and the Dictatorship’ (eds. Marion Boyars 1983) 187-188



groups.’<sup>1963</sup> In relation to political participation, during this period far-right parties had traditionally remained on the margins of the political system,<sup>1964</sup> partly because of the reason stated above, namely the rawness of the public’s wounds resulting from their experience with a far-right system and the interconnection between the far-right and the Junta. The birth of the post-Junta far-right of Greece as a movement was essentially a ‘reaction to leftist internationalism rather than... a positive identification with the Greek nation.’<sup>1965</sup> Parties of this ideology which appeared on the scene include the *Hellenic Front* (*Ελληνικό Μέτωπο*), the *Front Line* (*Πρώτη Γραμμή*), *National Democratic Union* (*Εθνική Δημοκρατική Ένωση*), the *National Alignment* (*Εθνική Παράταξη*), the *Progressive Party* (*Κόμμα Προοδευτικών*) and the *National Political Union* (*Εθνική Πολιτική Ένωση*). The youth wing of the *National Political Union* became a ‘breeding ground for future far-right leaders including Golden Dawn leader Nikos Michaloliakos...’<sup>1966</sup> In general, the post-Junta extreme right-wing parties sought to ‘protect the Helleno-Christian tradition but stayed short of the nationalist overtones that characterize the contemporary far-right in Greece.’<sup>1967</sup> Examples of some form of political representation of the far-right include the 1977 national parliamentary elections in which the *National Alignment* received 6.8% of the vote and five seats, the 1981 European Parliament elections in which the *Progressive Party* received 1.96% of the vote and one seat<sup>1968</sup> and the 1984 European Elections when the *National Political Union* received 2.3% of the vote and one seat.<sup>1969</sup>

In more recent times, the far-right scene was initially dominated by *LAOS*. *LAOS* was established in 2000 after its leader George Karatzaferis, a previous parliamentarian of New Democracy, came into conflict with that party. Another founding member was the aforementioned

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<sup>1963</sup> Sappho Xenakis, ‘A New Dawn? Change and Continuity in Political Violence in Greece’ (2012) 24 *Terrorism and Political Violence* 3, 441

<sup>1964</sup> Sofia Vasilopoulou & Daphne Halikiopoulou, ‘The Golden Dawn’s Nationalist Solution – Explaining the Rise of the Far-Right in Greece’ (eds. Palgrave 2015) 20

<sup>1965</sup> Antonis A. Ellinas, ‘The Rise of Golden Dawn: The New Face of the Far-Right in Greece’ (2013) 18 *South European Society and Politics* 4, 545

<sup>1966</sup> Antonis A. Ellinas, ‘The Rise of Golden Dawn: The New Face of the Far-Right in Greece’ (2013) 18 *South European Society and Politics* 4, 546

<sup>1967</sup> Antonis A. Ellinas, ‘The Rise of Golden Dawn: The New Face of the Far Right in Greece’ (2013) 18 *South European Politics and Society* 4, 545

<sup>1968</sup> Antonis A. Ellinas, ‘The Rise of Golden Dawn: The New Face of the Far Right in Greece’ (2013) 18 *South European Politics and Society* 4, 546

<sup>1969</sup> Antonis A. Ellinas, ‘The Rise of Golden Dawn: The New Face of the Far Right in Greece’ (2013) 18 *South European Politics and Society* 4, 546

Constantinos Plevris.<sup>1970</sup> LAOS is ‘explicitly nationalist and xenophobic,’<sup>1971</sup> calling for the ‘protection of the nation, the genus, the faith, the history and the cultural identity’<sup>1972</sup> of Greece and for ‘the expulsion of illegal immigrants.’<sup>1973</sup> LAOS has also proved to be anti-Semitic with its leader publicly denying the Holocaust, uttering racist speech against Jews and relating Jews with the crime and theories regarding their world control through ‘international Zionism.’<sup>1974</sup> In 2002, the party included four Golden Dawn representatives on its local election listing.<sup>1975</sup> In those elections, the party performed well receiving 13.6% of the vote in the Athens-Pireaus area.<sup>1976</sup> LAOS entered the European Parliament in 2004 with 4.12% of the vote and one seat<sup>1977</sup> and the national parliament in 2007 with 3.8% of the vote and ten seats<sup>1978</sup> and again in 2009 with 5.6% of the vote and fifteen seats.<sup>1979</sup> By 2012, the party’s support fell after it ‘lost its outsider status’<sup>1980</sup> following its support of the Memorandum of Understanding and its participation in the 2011-2012 government which worked on the second bailout. As a result, in May 2012, the party’s vote fell to 2.9% and 1.6% in June of the same year, resulting in its losing all its seats in parliament.<sup>1981</sup> Some of this party’s electorate then supported Golden Dawn. This contributed to the fact that Golden Dawn is substantially the only entity which has inhabited the

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<sup>1970</sup> Kostas Pittas & Thanasis Kampagiannis, *The Fascist Threat and the Fight to Eliminate it* (*Η Φασιστική Απειλή και η Πόλη για να την Τσακίσουμε*) (2<sup>nd</sup> ed Marxist Bookshop 2013) 19

<sup>1971</sup> Antonis A. Ellinas, ‘The Rise of Golden Dawn: The New Face of the Far Right in Greece’ (2013) 18 *South European Politics and Society* 4, 547

<sup>1972</sup> Antonis Ellinas, *The Media and the Far Right in Western Europe: Playing the Nationalist Card* (eds. Cambridge University Press 2010) 137

<sup>1973</sup> Antonis Ellinas, *The Media and the Far Right in Western Europe: Playing the Nationalist Card* (eds. Cambridge University Press 2010) 137

<sup>1974</sup> Anna Frangoudi, *Nationalism and the Rise of the Far-Right* (‘Ο Εθνικισμός και η Άνοδος της Ακροδεξιάς’) (eds. 2013 Aleksandria) 23

<sup>1975</sup> Dimitris Psaras, *The Black Bible of Golden Dawn: The Documented History of a Nazi Group* (*Η Μαύρη Βίβλος της Χρυσής Αυγής, Ντοκουμέντα από την Ιστορία και τη Δράση μιας Ναζιστικής Ομάδας*) (eds. 2012 Polis) 354

<sup>1976</sup> Election Results:

<<http://www.ypes.gr/el/Elections/CityElections/ResultsofElections/2002/>> [Accessed 15 February 2016]

<sup>1977</sup> Election Results: <<http://www.ypes.gr/el/Elections/ElectionsEuropeanParliament/ResultsofElections/2004/>> [Accessed 15 February 2016]

<sup>1978</sup> Election Results (LAOS): < <http://ekloges-prev.singularlogic.eu/v2007/pages/index.html>> [Accessed 15 February 2016]

<sup>1979</sup> Election Results (LAOS): < <http://ekloges-prev.singularlogic.eu/v2009/pages/index.html>> [Accessed 15 February 2016]

<sup>1980</sup> Antonis A. Ellinas, ‘The Rise of Golden Dawn: The New Face of the Far Right in Greece’ (2013) 18 *South European Politics and Society* 4, 547

<sup>1981</sup> Election Results (LAOS):

< [http://ekloges-prev.singularlogic.eu/v2012a/public/index.html#{"cls":"party","params":{"id":16}}](http://ekloges-prev.singularlogic.eu/v2012a/public/index.html#{)> [Accessed 15 February 2016]

Greek far-right scene following the fall of LAOS. Given the domination of the scene by this party and the central role it plays in this chapter, it will be examined alone in the section below.

### 1.3.1 Golden Dawn

#### 1.3.1 (i) Golden Dawn – Historical Development and Ideological Profile

Golden Dawn is a registered political party whose roots can be traced back to December 1980 when its current leader, Nikolaos Michaloliakos, along with other right-wing extremists he had worked with within the framework of the party *4<sup>th</sup> August* and *ENEK (Unified Nationalist Movement) (ENEK- Ενιαίο Εθνικιστικό Κίνημα)* issued the national socialist magazine Golden Dawn. The magazine ‘espoused blatantly Nazi ideology’<sup>1982</sup> and often glorified Hitler<sup>1983</sup> with its first issue in December 1980 noting that the group pursued a revolution for a Golden Dawn ‘which will lead humanity again to nature and the Greek ideals of civilization’<sup>1984</sup> This was the beginning of a new life with ‘no place for Zionists, their products and their agents.’<sup>1985</sup> In a 1993 edition on racism, the magazine wrote that: ‘Greeks are eminently racist ... Racism is not beating a negro in the street or burning a Filipina. Racism is the right to difference, the dislike of merger, the maintenance of a clean race and when we say clean race we mean the expulsion of foreign elements which do not conform with our nature and traditions.’<sup>1986</sup> In 1983, the group running the publication of this magazine sought to organise itself into a political party and, so, Michaloliakos filed a declaration for the establishment of a political party entitled ‘Popular Association – Golden Dawn’ (*Λαϊκός Σύνδεσμος – Χρυσή Αυγή*). The party’s statutes hold that it is a popular movement with ‘faith in the ideology of nationalism.’<sup>1987</sup> It is a party which promotes anti-Semitism and which, as far back as the 1990s, was involved in violent activity, something which has been a characteristic of its actions as will be extrapolated below. Moreover,

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<sup>1982</sup> Human Rights First ‘We’re not Nazis, but... The Rise of Hate Parties in Hungary and Greece and Why America should Care (August 2014) 82

<sup>1983</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6,

<sup>1984</sup> Golden Dawn magazine, Issue 1 (December 1980): ‘μια Χρυσή Αυγή που θα οδηγήσει και πάλι τον Άνθρωπο στην φύση και το Ελληνικό Ιδεώδες του πολιτισμού’

<sup>1985</sup> Golden Dawn magazine, Issue 1 (December 1980): ‘μια Ζωή στην οποία δεν θα υπάρχει θέση για τους Σιωνιστές, τα προϊόντα τους και τους πράκτορές τους’

<sup>1986</sup> Golden Dawn magazine (20/3/93) text entitled ‘Greeks and Racism’: ‘Έλληνες και ρατσισμός – Ο Έλληνας είναι ο κατεξοχήν ρατσιστής...Ρατσισμός δεν είναι το ξυλοφόρτωμα ενός νέγρου στο δρόμο ούτε το κάπνισμα ενός Φιλιπινέζου. Ρατσισμός είναι το δικαίωμα στη διαφορά, η αντιπάθεια της συγχώνευσης, η διατήρηση της φυλής καθαρής. Κι όταν λέμε καθαρή φυλή εννοούμε την αποτίναξη στοιχείων ξένων, αταίριαστων προς τη φύση και τις παραδόσεις μας.’

<sup>1987</sup> Statutes of the political party with the name ‘Popular Association Golden Dawn’ ‘Καταστατικό του Πολιτικού Κόμματος με την Επωνυμία «Λαϊκός Σύνδεσμος Χρυσή Αυγή», pg.2

it endorses populist xenophobic and racist rhetoric with its party statutes holding that it is ‘against demographic alteration, through the millions of illegal immigrants and the dissolution of Greek society, which is systematically pursued by the parties of the establishment of the so-called Left.’<sup>1988</sup> It was founded and continues to be led by the same person who has been part of the Greek nationalist movement since the age of sixteen and was imprisoned in the 1970s for illegal possession of explosives. The party embraces a biological conceptualisation of race and subsequently endorses biological as well as cultural racism with its statute underlying that ‘for nationalism, the People is not just an arithmetic total of individuals but the qualitative composition of humans with the same biological and cultural heritage.’<sup>1989</sup> In relation to how it was established, as noted by its leader in a 2012 interview ‘we started in a Leninist way: we decided to issue a newspaper, Golden Dawn and build a party around it. Back in the 1980s we flirted with all sorts of ideas of the interwar years, including National Socialism and fascism. But by the 1990s we had settled the ideological issues and positioned ourselves in favour of popular nationalism.’<sup>1990</sup> The party remained politically dormant up until 1993 where it capitalised on the issue of the name ‘Macedonia’ to be given to a Former Yugoslav state.<sup>1991</sup>

Essentially, after the 1990s, Golden Dawn sought to avoid identification with National Socialism and adopt a Greek Nationalist Party.<sup>1992</sup> However this move has been deemed ‘superficial’<sup>1993</sup> with National Socialism remaining the ideological backdrop of Golden Dawn.<sup>1994</sup> Even today, the party’s symbol remains a Greek meander which appears very similar to the Nazi swastika

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<sup>1988</sup> Statutes of the political party with the name ‘Popular Association Golden Dawn’ ‘Καταστατικό του Πολιτικού Κόμματος με την Επωνυμία «Λαϊκός Σύνδεσμος Χρυσή Αυγή», pg.2

<sup>1989</sup> Positions: political positions (Θέσεις: Πολιτικές Θέσεις) Available online at <<http://www.xryshaygh.com/index.php/kinima>>

<sup>1990</sup> Antonis A. Ellinas, ‘The Rise of Golden Dawn: The New Face of the Far-Right in Greece’ (2013) 18 *South European Society and Politics* 4, 548

<sup>1991</sup> Antonis A. Ellinas, ‘*The Media and the Far Right in Western Europe: Playing the Nationalist Card*’ (eds 2010 Cambridge University Press, New York)

<sup>1992</sup> Dimitris Psaras, ‘*The Black Bible of Golden Dawn: The Documented History of a Nazi Group*’ (‘*Η Μαύρη Βίβλος της Χρυσής Αυγής, Ντοκουμέντα από την Ιστορία και τη Δράση μιας Ναζιστικής Ομάδας*’) (eds. 2012 Polis) 250-251

<sup>1993</sup> Vasiliki Georgiadou, ‘The Electoral Rise of Golden Dawn. Revenge Vote of the Doubtful and the New Political Opportunities’ (‘*Η Εκλογική Άνοδος της Χρυσής Αυγής. Ψήφος – Ρεβάνς των Επισηφιών και Νέες Πολιτικές Ευκαιρίες*’) in Giannis Voulgaris and Ilias Nikolakopoulos ‘*The Double Electoral Earthquake*’ (Διπλός Εκλογικός Σεισμός) (Themelio 2014) 185

<sup>1994</sup> Vasiliki Georgiadou, ‘The Electoral Rise of Golden Dawn. Revenge Vote of the Doubtful and the New Political Opportunities’ (‘*Η Εκλογική Άνοδος της Χρυσής Αυγής. Ψήφος – Ρεβάνς των Επισηφιών και Νέες Πολιτικές Ευκαιρίες*’) in Giannis Voulgaris and Ilias Nikolakopoulos ‘*The Double Electoral Earthquake*’ (Διπλός Εκλογικός Σεισμός) (Themelio 2014) 185

and its leader has often been seen using the Nazi salute.<sup>1995</sup> As noted in the pre-trial report of the investigative judges drafted for purposes of requesting parliament to lift the immunity of Golden Dawn's MPs in the sphere of the current trial (hereinafter pre-trial report), although the party alleges that their salute is an ancient Greek salute also used by the dictator Ioannis Metaxas, their National Socialist belief system is evident in, amongst others, their hidden constitution discussed in section 1.3<sup>1996</sup> and also in pictures depicting one of their MPs and seven other people with the Nazi swastika.<sup>1997</sup> The National Socialist belief system of Golden Dawn was also referred to in the Prosecutor's recommendations to the Appeals Council (*Συμβούλιο Εφετών*) in the sphere of the current trial (hereinafter Prosecutor's recommendations), through examples such as the Nazi salutes and evidence collected for purposes of the trial including Nazi flags and Nazi military uniforms. Further, Golden Dawn adopts the *Führerprinzip* (leader principle) characteristic of the regime in Nazi Germany.<sup>1998</sup> In fact, in the pre-trial report and Prosecutor's recommendations, reference was made to the absolute hierarchy and omnipotence of the leader.<sup>1999</sup> Golden Dawn has strong ties with the German neo-Nazi group named *Free South Network*, inviting it to visit the Greek Parliament.<sup>2000</sup> As is the case with other neo-Nazi groups in Europe, Golden Dawn commemorates Adolf Hitler's birthday on the 20<sup>th</sup> April each year.<sup>2001</sup> In more recent years, the leadership has attempted to avoid the reference to National Socialism in public speeches so as to sanitise its image and attract a wider range of voters. In the 2014 election campaign for example, Golden Dawn candidates disassociated themselves from violence, stopped uttering anti-Semitic speech and kept away from references to National Socialism, all with the hope of broadening the

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<sup>1995</sup> Fundamental Rights Agency, 'Racism, Discrimination, Intolerance and Extremism: Learning from Experiences in Greece and Hungary' (2013) 23

<sup>1996</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305. 19 February 2014, 20

<sup>1997</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305. 19 February 2014, 13

<sup>1998</sup> Dimitris Psaras, '*Golden Dawn before Justice*' (*'Η Χρυσή Αυγή Μπροστά στη Δικαιοσύνη'*) (eds. Rosa Luxemburg Foundation 2014), 37

<sup>1999</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305. 19 February 2014, 13-14, Prosecutor's Recommendation to the Appeals Council regarding the Prosecution of Golden Dawn members and Members of Parliament (15 October 2014), 32

<sup>2000</sup> Fundamental Rights Agency, 'Racism, Discrimination, Intolerance and Extremism: Learning from Experiences in Greece and Hungary' (2013) 23

<sup>2001</sup> Human Rights First 'We're not Nazis, but...The Rise of Hate Parties in Hungary and Greece and Why America should Care (August 2014) 83

range of its electorate.<sup>2002</sup> It can be said that, notwithstanding efforts to disassociate itself from National Socialism, this ideology not only continues to lie at the foundation of Golden Dawn but it is the issue that sets it apart from the other post-Junta far-right entities<sup>2003</sup> and from other far-right parties in the European Union. It has also made statements glorying the ‘enlightened leadership of Adolf Hitler.’<sup>2004</sup> Interesting in relation to the nature of the party are the secret statutes deposited at the Supreme Court by journalist Dimitris Psaras,<sup>2005</sup> for purposes of the ongoing trial. It must be noted that Golden Dawn denies that this document belongs to its party,<sup>2006</sup> notwithstanding that references had been made to another such document from the first editions of the Golden Dawn magazine issued over twenty years ago. However, it has been referred to and relied upon in the pre-trial report and also in the Prosecutor’s recommendations.<sup>2007</sup> The statutes reveal, amongst others, that the party is founded on principles of National Socialism and biological racism, it inherently believes in the supremacy of the Greek race, endorses the leader principle and ensures a rigid hierarchy and strict discipline. More particularly, amongst others, the statutes hold that the candidate members of Golden Dawn are ‘only Aryans by blood, Greek by descent...’<sup>2008</sup> whilst a candidate may only be someone who ‘accepts the...principles of National Socialism and is determined to fight without reservation for their effectuation.’<sup>2009</sup> They believe blood to be ‘the supreme carrier of the biological virtue of our race.’<sup>2010</sup> The statutes also underline the importance of the leader’s principle holding that ‘for us, the Greek national socialists there was never any dilemma, the democratic model of

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<sup>2002</sup> Human Rights First ‘We’re not Nazis, but...The Rise of Hate Parties in Hungary and Greece and Why America should Care (August 2014) 14

<sup>2003</sup> Sofia Vasilopoulou & Daphne Halikiopoulou, *The Golden Dawn’s Nationalist Solution – Explaining the Rise of the Far-Right in Greece* (eds. Palgrave 2015) 16-17

<sup>2004</sup> Dimitris Psaras, *The Black Bible of Golden Dawn: The Documented History of a Nazi Group* (*‘Η Μαύρη Βίβλος της Χρυσής Αυγής, Ντοκουμέντα από την Ιστορία και τη Δράση μιας Ναζιστικής Ομάδας*) (eds. 2012 Polis) 40

<sup>2005</sup> A journalist who has researched Golden Dawn extensively

<sup>2006</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305. 19 February 2014, 13-14

<sup>2007</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305 (19 February 2014) 13. Prosecutor’s Recommendation to the Appeals Council regarding the Prosecution of Golden Dawn members and Members of Parliament (15 October 2014), 26

<sup>2008</sup> Άρθρο 12. 1: ‘υπονήφια μέλη της χρυσής αυγής δύνανται να είναι μόνο Άριοι κατά το αίμα, έλληνες στην καταγωγή’

<sup>2009</sup> Άρθρο 1.2: ‘Στην Χρυσή Αυγή εντάσσεται ως δόκιμο μέλος οποιός αποδέχεται τις κοσμοθεωρητικές βιοθεωρητικές και πολιτικές αρχές του εθνικοσοσιαλισμού και είναι αποφασισμένος να αγνωστή χωρίς συμβιβασμούς για την πραγμάτωσή τους.’

<sup>2010</sup> Άρθρο 4: ‘Το αίμα είναι ο υπέρτατος φορέας των βιολογικών αρετών της φυλής μας’

governance...has no place in our movement...we believe in the principle of the leader as fundamental for State legitimacy.’<sup>2011</sup> It also notes that ‘discipline which emanates from the hierarchy of Golden Dawn is necessary for the effectuation of the objectives of the movements.’<sup>2012</sup> Interestingly, the Prosecutor’s Recommendations highlighted that the belief system of the members and MPs was ‘criminally indifferent.’<sup>2013</sup> However, this document contains no assessment of when such opinion becomes expression and when such expression may become destructive. Further, there is also a paramilitary element to this group, with the pre-trial report referring to evidence that depicts members of Golden Dawn carrying out military training including gun use, targetting, combat, self-defence and provision of first aid. Further, the self-sacrifice of members for purposes of ensuring the objectives of the party are noted in Article 10 of its secret constitution. The Prosecutor’s Recommendations refer to the militant and hierarchal structure of this group.<sup>2014</sup> As noted, this party is ‘no ordinary ultra nationalist party. No other extreme-right party in Europe is as stridently racist, nativist and violent, none is so unapologetically anti-Semitic and none so openly calls for the overthrow of the State.’<sup>2015</sup>

In addition to the National Socialist foundation of Golden Dawn, it is ‘against parliamentary democracy and treats it with contempt,’<sup>2016</sup> with Michaloliakos stating directly that ‘we reject democracy.’<sup>2017</sup> The party does not try to hide this characteristic with an example being the party spokesman’s statement in 2012 in which he said ‘we do not like the petty MP posts, we do not

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<sup>2011</sup> *Attorneys of the Civil Action: Memo of the Civil Action of the Anti-Fascist Movement for the Trial of Golden Dawn (Υπόμνημα της Πολιτικής Αγωγής του Αντιφασιστικού Κινήματος για τη Δίκη της Χρυσής Αυγής)*(eds. Marxist Bookshop 2015) 20

‘Για μας τους έλληνες εθνικοσοσιαλιστές δεν υπήρξε ποτέ κανένα δίλλημα, ο δημοκρατικός τρόπος διακυβερνήσεως, ο βασιζόμενος στην τυχάρπαστη πλειοψηφία των πολλών δεν είχε θέση στο κίνημά μας... πιστεύουμε στην αρχή του αρχηγού ως θεμέλιο πολιτειακής νομιμότητας.’

<sup>2012</sup> Άρθρο 10: ‘Η πειθαρχία που διέπει την ιεραρχική δομή της Χρυσής Αυγής είναι αδήριτη ανάγκη για την πραγματοποίηση των σκοπών της κινήσεως και αποτελεί συνειδητοποιημένη κατάσταση για κάθε μέλος.’

<sup>2013</sup> Prosecutor’s Recommendation to the Appeals Council regarding the Prosecution of Golden Dawn members and Members of Parliament (15 October 2014), 26

<sup>2014</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305. 19 February 2014, 13-14, Prosecutor’s Recommendation to the Appeals Council regarding the Prosecution of Golden Dawn members and Members of Parliament (15 October 2014), 30

<sup>2015</sup> 30 October 2013: Press conference of the Director of Internal Affairs (of the Police) Panagiotis Stathis following the investigation of accusations of police and Golden Dawn cooperation. Cited in Human Rights First ‘We’re not Nazis, but... The Rise of Hate Parties in Hungary and Greece and Why America should Care (August 2014) 87

<sup>2016</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH (2013)6, 4-3

<sup>2017</sup> Nikolaos Michaloliakos, ‘For a Great Greece in a Free Europe’ (‘Για μια Μεγάλη Ελλάδα σε μια Ελεύθερη Ευρώπη’) (2<sup>nd</sup> edn. Ascalon 2000) 17 ‘Αρνούμαστε τη δημοκρατία’

want them at all. Of course we take advantage of some privileges of this membership, we now have a permit for a firearm, there is no possibility for an immediate arrest upon the commission of a criminal offence and it is a bit easier for us to move around.’<sup>2018</sup> Further, in one of its magazine’s issues, it held, amongst others that, ‘we say yes to everyone, we become the good guys of the system, we bless, with every way...the guilty political system...but we have a goal to use our actions as the Trojan Horse and destroy the system...’<sup>2019</sup> As such, the MPs of this party ‘consciously try to devaluate the Parliament, the institutions and principles of the State.’<sup>2020</sup>

Further, this party is ‘staunchly and indiscriminately anti-immigrant.’<sup>2021</sup> The party’s statute, as deposited in the Supreme Court in 2012, which the party alleges to be the first and only true version, provides that it is ‘against the demographic alteration, through the millions of illegal immigrants and the dissolution of Greek society, which is systematically pursued by the parties of the establishment of the so-called left.’<sup>2022</sup> Parliamentarians of this party have been quick and consistent in demonstrating their racist belief-system with ample examples existing to illustrate this point. In 2012, a Golden Dawn MP Eleni Zaroulia referred to migrants in Greece as ‘sub-humans who have invaded our country, with all kinds of diseases.’<sup>2023</sup> It is noteworthy that there was no reaction and no measures were taken against her by parliament. This is unlike the European Parliament where, in 2016, Martin Schulz expelled Golden Dawn MP Eleftherios Synadinos following his remarks that Turks are ‘barbarians,’ ‘dirty,’ and ‘dogs.’<sup>2024</sup> The hateful

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<sup>2018</sup> Statement made on 25/11/2012 in Crete: «Δεν γουστάρουμε τα βουλευτικά... Εκμεταλλευόμαστε τα προνόμια αυτής της ιδιότητας. Έχουμε οπλοφορία πλέον με άδεια. Δεν έχει αυτόφωρο αν γίνει κανένα επεισόδιο και είμαστε πιο άνετοι στις κινήσεις μας».

<sup>2019</sup> Golden Dawn Magazine issue 134/2007: ‘Λέμε ναι σε όλους, γινόμαστε καλά παιδιά του συστήματος, ευλογούμε με κάθε τρόπο και με όλα τα “Κύριε ελέησον” που διαθέτουμε το ένοχο πολιτικό σύστημα και όλα αυτά ασφαλώς με το αζημίωτο, αλλά έχουμε σκοπό να χρησιμοποιήσουμε τις ενέργειές μας σαν Δούρειο Ίππο για να αλώσουμε το σύστημα...’

<sup>2020</sup> Prosecutor’s Recommendation to the Appeals Council regarding the Prosecution of Golden Dawn members and Members of Parliament (15 October 2014), 110

<sup>2021</sup> Sofia Vasilopoulou & Daphne Halikiopoulou, *The Golden Dawn’s Nationalist Solution – Explaining the Rise of the Far-Right in Greece* (eds. Palgrave 2015) 3

<sup>2022</sup> Golden Dawn’s Constitution (2012) given to Antonis Ellinas by the political party: Antonis A. Ellinas, ‘The Rise of Golden Dawn: The New Face of the Far Right in Greece’ (2013) 18 *South European Politics and Society* 4, 545

<sup>2023</sup> Statement made in parliament in 2012: «Κάθε λογής υπάνθρωπο που έχει εισβάλει στην πατρίδα μας και με τις κάθε λογής αρρώστιες που κουβαλάει».

<sup>2024</sup> 9 March 2016: The president of the European Parliament, Martin Schulz, expelled the mp, explaining that his decision was in accordance with the article 165 of the EU. “It is a blatant violation of human rights upon which the EU is unswerving and bows to. (Here), there is an effort to outflank the red lines, so that racism becomes acceptable.



stance of Golden Dawn has not been restricted to words only but is evident in their exclusionary activities and violence. More particularly, over the last few years Golden Dawn has and continues to provide welfare services such as health services, soup kitchens, blood donation and job centres for Greeks only.<sup>2025</sup> Through this method, Golden Dawn seeks to appear to be supporting the people, making up for the lacking social infrastructure in times of financial crisis. The party also alleges to fund these activities through the salaries of the MPs thus ‘alluding to the ultimate ideals of sacrifice, selflessness and popular supremacy.’<sup>2026</sup> Further, Golden Dawn is anti-Semitic, accusing Jews or Zionists of attempting to eradicate Greece through globalisation.<sup>2027</sup> Examples of such a belief can be reflected in the recital of a passage from the Elders of Zion by member of parliament Elias Kasidiaris. They are anti-Roma, with examples of their actions including supporting a demonstration against the registration of thirty Roma pupils in a school in Lamia in 2012.<sup>2028</sup> They also disseminate hate against the Muslim minority of Turkish origin who live in Thrace with members of this community having reported hate speech and threats and violence carried out by Golden Dawn.<sup>2029</sup> Although outside the sphere of this dissertation, it must be highlighted that they are also homophobic and transphobic.<sup>2030</sup> Moreover, it has been noted that hate speech has risen substantially since 2009, a point which is directly interrelated with the rise of Golden Dawn.<sup>2031</sup> In light of the above, Golden Dawn has been described as belonging to the ‘extreme right category of the broader far-right label’<sup>2032</sup> due to the embracement of Nazi ideals, its dangerous approach to democracy and its anti-immigrant, anti-minority rhetoric.

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But this is not happening from me,” Schulz said: “So, according to article 165 of the regulation, in combination with article 11, mister Synadinos is excluded immediately from the session and the chamber,”

<sup>2025</sup> Sofia Vasilopoulou & Daphne Halikiopoulou, *The Golden Dawn’s Nationalist Solution – Explaining the Rise of the Far-Right in Greece* (eds. Palgrave 2015) 58

<sup>2026</sup> Sofia Vasilopoulou & Daphne Halikiopoulou, *The Golden Dawn’s Nationalist Solution – Explaining the Rise of the Far-Right in Greece* (eds. Palgrave 2015) 58

<sup>2027</sup> See for example: Apostolos Karaikos ‘Zionism and Globalisation’ (‘Σιωνισμός και Παγκοσμιοποίηση’) (2012): <<http://www.xryshaygh.com/enimerosi/view/siwnismos-kai-pagkosmiopoihsh>> [Accessed 30 March 2016]

<sup>2028</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH (2013)6, 3

<sup>2029</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6, 11

<sup>2030</sup> As reflected in, for example, the discriminatory talks that accompanied parliamentary debate regarding the passing of the civil union in Greece

<sup>2031</sup> European Commission against Racism and Intolerance: Report on Greece (24 February 2015) para. 34

<sup>2032</sup> Sofia Vasilopoulou & Daphne Halikiopoulou, *The Golden Dawn’s Nationalist Solution – Explaining the Rise of the Far-Right in Greece* (eds. Palgrave 2015) 6

### 1.3.1 (ii) Golden Dawn and Violence

Golden Dawn uses violence to instill fear amongst its political opponents and those groups it considers to be sub-humans (using the words of its MP Zaroulia as referred to above). These predominantly include migrants, but also Roma, with incidences of violence against Muslim minorities in Thrace having been recorded. Golden Dawn has also carried out violence against persons belonging to the LGBTI community. Golden Dawn has hit squads (τάγματα εφόδου) composed of members with particular physical features, knowledge of martial arts and use of weapons, especially trained in hard conditions. They wear black clothes or clothes with military colours, with the logo of Golden Dawn, military boots and helmets with short or no hair. They possess weapons such as knives, iron bars and bats.<sup>2033</sup> A particularly significant description of the violence carried out by Golden Dawn was put forth by the president of the National Commission on Human Rights<sup>2034</sup> for purposes of the pre-trial report. More particularly, he held that the violence conducted by Golden Dawn, which is a centrifugal element of the party's public appearance, works on two levels. Firstly, there is the public violence in which members of Golden Dawn carry out violent acts, such as those carried out against market stalls of immigrants and often record and upload them on the internet as a form of the party's identity and success. There is also the secret type of violence which occurs at night and is directed at more vulnerable groups such as refugees.<sup>2035</sup> Unlike its electoral development which was slow and fractured, Golden Dawn's use of violence became apparent more quickly, commencing in 1987 and becoming more systematic by 1992.<sup>2036</sup> Essentially, up until the early 2000s, this party worked as a violent subculture working on the streets, remaining electorally marginalised. The backdrop which facilitated this was the fact that 1992 was the year during which a 'nationalist and xenophobic wave erupted.'<sup>2037</sup> This occurred due to the fall of the regime in Albania and the

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<sup>2033</sup> Prosecutor's Recommendation to the Appeals Council regarding the Prosecution of Golden Dawn members and Members of Parliament (15 October 2014), 42

<sup>2034</sup> The National Commission on Human Rights is an independent advisory body to the State specialised in human rights issues

<sup>2035</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305. 19 February 2014, 21

<sup>2036</sup> Dimitris Psaras, *The Black Bible of Golden Dawn: The Documented History and Action of a Nazi Group* ('*Η Μαύρη Βίβλος της Χρυσής Αυγής, Ντοκουμέντα από την Ιστορία και τη Δράση Μιας Ναζιστικής Ομάδας*') (eds. 2012 Polis) 63

<sup>2037</sup> Dimitris Psaras, *The Black Bible of Golden Dawn: The Documented History and Action of a Nazi* ('*Η Μαύρη Βίβλος της Χρυσής Αυγής, Ντοκουμέντα από την Ιστορία και τη Δράση Μιας Ναζιστικής Ομάδας*') (eds. 2012 Polis) 63

influx of immigrants to Greece. Racism and xenophobia were starkly promoted by the media which placed a great emphasis on the alleged criminality of foreigners. To add to the rising feelings of insecurity was the dispute about the name of Macedonia.<sup>2038</sup> As such, the xenophobic stance adopted by the media as well as the mainstream political parties created fertile ground upon which Golden Dawn could (violently) disseminate its own message and agenda. Targets of Golden Dawn were initially political opponents such as leftists but, in the years that followed, other groups such as refugees and migrants were incorporated therein,<sup>2039</sup> with multiple attacks being recorded over the next years, with such violence remaining unpunished.<sup>2040</sup> One of the most serious attacks took place in 1998 when the second in charge, Antonis Androutsopolous, nearly killed a student and seriously wounded two others, all members of a leftist group. After being on the run for several years, he decided to hand himself in and, in 2006, was convicted and sentenced to twelve years in prison,<sup>2041</sup> but remained imprisoned for only four and a half years. The case is further discussed in section 5. This occurrence resulted in the party suspending its activities for a while.<sup>2042</sup> Unfortunately, the number of violent activities carried out by Golden Dawn, even the known attacks, are so many that it is impossible to make reference to all of them in this chapter. However, some of the most serious known examples of Golden Dawn violence include the killing of a Pakistani immigrant cycling to work, the murder of anti-fascist musician Pavlos Fyssa and a serious attack against an Egyptian fisherman, all discussed in this chapter. In addition, members of this party are infamous for destroying the market stalls of immigrant vendors and raiding places which migrants inhabit.<sup>2043</sup> It must be noted that, although Pavlos Fyssas' murder was the murder of a person who Golden Dawn considered a political opponent and this does not, therefore, fall within the examination grounds of this dissertation, it will nevertheless be considered firstly due to the severity of the act but, secondly, due to the

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<sup>2038</sup> Dimitris Psaras, *The Black Bible of Golden Dawn: The Documented History and Action of a Nazi Group* ('*Η Μαύρη Βίβλος της Χρυσής Αυγής, Ντοκουμέντα από την Ιστορία και τη Δράση Μιας Ναζιστικής Ομάδας*') (eds. 2012 Polis) 63

<sup>2039</sup> Katerina Toidou & Giorgos Pittas, *'Golden Dawn's File – Neo Nazi Crimes and How to Stop them'* ('*Φάκελος Χρυσή Αυγή – τα Εγκλήματα των Νεοναζί και πως να τους Σταματήσουμε*') (eds. Marxist Bookshop 2013) 15

<sup>2040</sup> Katerina Toidou & Giorgos Pittas, *'Golden Dawn's File – Neo Nazi Crimes and How to Stop them'* ('*Φάκελος Χρυσή Αυγή – τα Εγκλήματα των Νεοναζί και πως να τους Σταματήσουμε*') (eds. Marxist Bookshop 2013) 13

<sup>2041</sup> Antonis A. Ellinas, 'The Rise of Golden Dawn: The New Face of the Far Right in Greece' (2013) 18 *South European Politics and Society* 4, 548

<sup>2042</sup> Antonis A. Ellinas, 'The Rise of Golden Dawn: The New Face of the Far Right in Greece' (2013) 18 *South European Politics and Society* 4, 548

<sup>2043</sup> Human Rights First 'We're not Nazis, but...The Rise of Hate Parties in Hungary and Greece and Why America should Care (August 2014) 91

ramifications of this murder on the prosecution of Golden Dawn's leadership and membership. In fact, the connection between Golden Dawn and the racist crime that has marked Greek reality over the past few years is a central theme of the current trial. Although the violence carried out by this party has fallen following the arrests in 2013 and the trial, it continues to be a reality in Greece. Further, as well as individual attacks, there have been attacks on religious and cultural centres, migrant organisations and homes in which migrants live.<sup>2044</sup>

Given the dramatic rise of such violence and given that there exist no systematic recordings of such crimes by the State, the National Human Rights Commission, the UNHCR in Greece and a number of NGOs set up the Racist Violence Recording Network. However, this is not present throughout Greece and is completely dependent on the will of victims to report such crimes to the network. As such, any findings are not reflective of the full extent of the situation *vis-à-vis* racist crime in Greece.<sup>2045</sup> Further, given the rise in such violence, the Ombudsperson drew up a special report on hate crime in Greece which included research carried out for sixteen months from the 1<sup>st</sup> January 2012 – 30<sup>th</sup> April 2013. This found that two hundred and eight one cases<sup>2046</sup> of such violence took place in the particular timeframe.<sup>2047</sup> In seventy one cases, the perpetrators were involved or appeared to be involved with Golden Dawn. Importantly, from January – April 2012, three reports of Golden Dawn violence were made but from the period from May until the end of 2012, fifty four such reports were made. Further, in the first four months of 2013, whilst the number of reports for racist incidents fell, the involvement of Golden Dawn rose to 46.50% of the incidents.<sup>2048</sup> The report's findings have been described in the report as the 'tip of the iceberg'<sup>2049</sup> given that the majority of attacks are not reported or are reported and not recorded or recorded without the racist motive.<sup>2050</sup> Indicative of this reality is the 2013 statement made by

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<sup>2044</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6, 3

<sup>2045</sup> European Commission against Racism and Intolerance: Report on Greece (24 February 2015) para. 611

<sup>2046</sup> Ombudsperson: Special Report: The Phenomenon of Racist Violence in Greece and How it Can be Tackled' (To Φαινόμενο της Ρατσιστικής Βίας στην Ελλάδα και η Αντιμετώπισή του') (September 2013) 7: The majority of victims were Asian from Pakistan, Bangladesh and Afghanistan and Africans – from Egypt, Morocco and Algeria.

<sup>2047</sup> Ombudsperson: Special Report: The Phenomenon of Racist Violence in Greece and How it Can be Tackled' (To Φαινόμενο της Ρατσιστικής Βίας στην Ελλάδα και η Αντιμετώπισή του') (September 2013) 65

<sup>2048</sup> Ombudsperson: Special Report: The Phenomenon of Racist Violence in Greece and How it Can be Tackled' (To Φαινόμενο της Ρατσιστικής Βίας στην Ελλάδα και η Αντιμετώπισή του') (September 2013) 12

<sup>2049</sup> Ombudsperson: Special Report: The Phenomenon of Racist Violence in Greece and How it Can be Tackled' (To Φαινόμενο της Ρατσιστικής Βίας στην Ελλάδα και η Αντιμετώπισή του') (September 2013) 7

<sup>2050</sup> Ombudsperson: Special Report: The Phenomenon of Racist Violence in Greece and How it Can be Tackled' (To Φαινόμενο της Ρατσιστικής Βίας στην Ελλάδα και η Αντιμετώπισή του') (September 2013) 7

staff members of Doctors of the World in Greece who held that they received one to six victims of racist violence who need medical attention each week.<sup>2051</sup>

In light of the above, we are not confronted with the case of a political party with a violent past which, following electoral success opted to rid itself of its violent identity. Rather, we are confronted with an organisation with two faces, one of a political party, notwithstanding that this political party directly and openly rejects principles of a liberal democracy, and, two, of a violent subculture movement with a rigid, rather than loose structure.

### *1.3.1 (iii) Golden Dawn's Electoral Development*

From 1994 up until 2010 Golden Dawn remained a marginalised political party with limited electoral success, receiving, for example, 0.11 and 0.07 % of the vote in national and European elections respectively<sup>2052</sup> After suspending its activities for a short while following Androutsopoulos' conviction, in its 2007 general assembly it decided to contest the next local, national and European elections.<sup>2053</sup> In the 2009 national and European elections it received 0.29 and 0.46% of the vote respectively and no seats in either one.<sup>2054</sup> However, in 2010 it saw a rise in its electoral support at a local level, with its leader receiving 5.29 % of the Athens vote.<sup>2055</sup> As Michaloliakos noted, 'in 2010 we said we should take over Athens in order to spread the message to the rest of Greece as well. We strategically participated in this election for this reason. We knew we would succeed.'<sup>2056</sup> It is important to note that he received particular support in the sixth district of Athens which houses the area of Agios Panteleimonas. As noted, 'the high concentration of immigrants...and the seeming abandonment of the area by the State highlighted the electoral potential...'<sup>2057</sup> In fact, the party resorted to anti-immigrant violence in the

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<sup>2051</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6, 3

<sup>2052</sup> Antonis A. Ellinas, 'The Rise of Golden Dawn: The New Face of the Far-Right in Greece' (2013) 18 *South European Society and Politics* 4, 548

<sup>2053</sup> Antonis A. Ellinas, 'The Rise of Golden Dawn: The New Face of the Far Right in Greece' (2013) 18 *South European Politics and Society* 4, 548

<sup>2054</sup> Antonis A. Ellinas, 'The Rise of Golden Dawn: The New Face of the Far-Right in Greece' (2013) 18 *South European Society and Politics* 4, 548

<sup>2055</sup> Antonis A. Ellinas, 'The Rise of Golden Dawn: The New Face of the Far-Right in Greece' (2013) 18 *South European Society and Politics* 4, 548

<sup>2056</sup> Antonis A. Ellinas, 'The Rise of Golden Dawn: The New Face of the Far Right in Greece' (2013) 18 *South European Politics and Society* , 549

<sup>2057</sup> Antonis A. Ellinas, 'The Rise of Golden Dawn: The New Face of the Far Right in Greece' (2013) 18 *South European Politics and Society* 4, 549

particular area to gain such support. The great leap forward, however, was taken in the national elections of May 2012 in which the party's performance rose to 6.97%, gaining twenty-one seats out of the three-hundred in parliament.<sup>2058</sup> In the national elections of June 2012 it received 6.92% of the vote and eighteen seats in parliament.<sup>2059</sup> Over 400,000 Greeks voted for this party during this period, an occurrence which has been described as a 'double electoral earthquake.'<sup>2060</sup> Since then, notwithstanding the extremist and violent nature of this party, it has managed to gather sizeable electoral support and continued to maintain such support even following the arrest of its leadership and members of parliament in 2013. Even after the party's MPs and some members were arrested and detained for their role in leading and/or participating in a criminal organisation, contrary to Article 187 of the Criminal Code, the party managed to maintain its electoral support, gaining 9.8 % of the vote in the 2014 European elections, sending three members to the European Parliament and coming in third place.<sup>2061</sup> In the 2015 national elections of January, their support fell slightly in comparison to the previous national elections, gaining 6.28% of the vote and 17 members of parliament. However, due to the results of other parties it moved to third place. The slight fall of January 2015 was quickly rectified by September of the same year in which Golden Dawn received 6.99% of the vote and eighteen members of parliament.

In light of the above, it becomes evident that once Golden Dawn began succeeding electorally, the path it chose to follow was two-sided. On the one hand, it sought to establish an external image of a mainstream political party free of links to, amongst others, National Socialism whilst simultaneously continuing to carry out violent street activities that fall within the framework of a violent subculture movement rather than a political party.<sup>2062</sup> Following its electoral success, it decided to demonstrate its legitimacy as a political party rather than as a violent movement by

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<sup>2058</sup> Electoral Results: <[http://ekloges-prev.singularlogic.eu/v2012a/public/index.html#{"cls":"main","params":{}}](http://ekloges-prev.singularlogic.eu/v2012a/public/index.html#{)> [Accessed 15 February 2016]

<sup>2059</sup> Electoral Results: <[http://ekloges-prev.singularlogic.eu/v2012b/public/#{"cls":"main","params":{}}](http://ekloges-prev.singularlogic.eu/v2012b/public/#{)> [Accessed 15 February 2016]

<sup>2060</sup> Dimitris Psaras, 'Golden Dawn before Justice' (*Η Χρυσή Αυγή Μπροστά στη Δικαιοσύνη*) (eds. Rosa Luxemburg Foundation 2014), 25 'διπλός εκλογικός σεισμός'

<sup>2061</sup> Electoral Results: <[http://ekloges-prev.singularlogic.eu/may2014/e/public/index.html#{"cls":"main","params":{}}](http://ekloges-prev.singularlogic.eu/may2014/e/public/index.html#{)> [Accessed 15 February 2016]

<sup>2062</sup> Dimitris Psaras, 'Golden Dawn before Justice' (*Η Χρυσή Αυγή Μπροστά στη Δικαιοσύνη*) (eds. Rosa Luxemburg Foundation 2014), 26

depositing a set of Statutes at the Supreme Court, even though it had no obligation to do so.<sup>2063</sup> The last but one article of these Statutes holds that this document constitutes the first such document, notwithstanding that references had been made to another such document from the first editions of the Golden Dawn magazine issued over twenty years ago. With this move it sought to appear a legitimate party, with a legitimate constitution, removing any possibility of being attached to the secret constitution which had been deposited at the Supreme Court by Dimitris Psaras.

### *1.3.1 (iv) Reasons for Golden Dawn's Rise*

Golden Dawn saw a dramatic rise in a country which had experienced a Nazi invasion in 1941 and military dictatorship from 1967-1974. How was it possible for a nation who had lived through the dire effects of fascism and Nazism to vote Golden Dawn into third place? On one level, this question could be answered by quoting the financial crisis. The first Memorandum of Understanding was signed in 2010 and two followed in 2012 and then in 2015. This led to major austerity measures such as spending cuts, tax increases and reforms, moving the country into a great economic depression. As noted in the 2014 country report submitted by Greece to the Human Rights Committee, 'in times of economic crisis, extremist organisations or individuals attempt to exploit the anger or the discontent of some segment of the population to advance their social and political agenda.'<sup>2064</sup> Whilst the exploitation of people's insecurities and discontent in such a financially dire period is a reality, the financial crisis itself is not a sufficient reason to explain the rise of this violent far-right party. As argued, other European countries which were also affected by the crisis such as Portugal, Ireland, Spain, Cyprus and Italy did not witness such a rise of the far-right.<sup>2065</sup> Instead, as will be demonstrated below, the case of Greece saw the translation of the economic crisis into a simultaneous socio-political crisis, set against the backdrop of a rise in immigration.

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<sup>2063</sup> Dimitris Psaras, 'Golden Dawn before Justice' (*Η Χρυσή Αυγή Μπροστά στη Δικαιοσύνη*) (eds. Rosa Luxemburg Foundation 2014), 28

<sup>2064</sup> HRC: Consideration of reports submitted by States Parties under article 40 of the Covenant, Greece CCPR/C/GRC/2 (21 February 2014) 31, 32

<sup>2065</sup> As argued, other European countries which were also affected by the crisis such as Portugal, Ireland, Spain, Cyprus and Italy did not witness such a rise of the far-right.

The reality is that, apart from the consequences of the financial crisis, the rise of Golden Dawn was facilitated by the interrelated political crisis. Society became frustrated with and lost confidence in the effectiveness of the traditionally dominant political parties, namely *PASOK* and *New Democracy*, blaming them for their situation and no longer having confidence in these parties of the State. For example, good governance indicators between 2003 and 2013 demonstrate that the trust of the people in the political system declined with perceptions of government stability falling from 61.5% in 2003 to 39.3% in 2013, government effectiveness falling from 75.1% to 67% and people's confidence in judicial impartiality and effectiveness falling from 73.7% to 63.5%.<sup>2066</sup> As well as these figures, practical examples exist which demonstrate the people's dismay with the leading parties, such as an 'increase in incidents of public insults against politicians and the disruption of high symbolic public events.'<sup>2067</sup> What became apparent is that the financial crisis came hand in hand with a political crisis, with society losing confidence in the political system, resulting in the demise of the two main parties. For example, in 2012, *PASOK* and *New Democracy* which were the political parties habitually voted for by the Greek people, averaging 83.8% of the vote in ten elections between 1981-2009 fell to 32% of the vote in the May 2012 election.<sup>2068</sup> As such, the fall of the two traditionally dominant parties, subsequently making way for the rise of smaller parties.

In addition to the above, the rhetoric of Golden Dawn was facilitated due to the normalisation of racism occurring on a political and institutional level. In Greece, nationalism is evident in the rhetoric of all parties 'regardless of ideology or other social cleavages.'<sup>2069</sup> This foundational setting enables adoption of racist and xenophobic rhetoric as mainstream rhetoric on a political level. As noted by the Council of Europe Commissioner for Human Rights, Greek politicians stigmatise groups such as migrants and the Roma whilst immigrant control measures further stigmatise migrants.<sup>2070</sup> He argued that this 'reinforces the influence of racist parties such as

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<sup>2066</sup> Worldwide governance indicators, Greece: <<http://info.worldbank.org/governance/wgi/index.aspx#countryReports> > [Accessed 1 February 2016]

<sup>2067</sup> Antonis A. Ellinas, 'The Rise of Golden Dawn: The New Face of the Far Right in Greece' (2013) 18 *South European Politics and Society* 4, 556

<sup>2068</sup> Antonis A. Ellinas, 'The Rise of Golden Dawn: The New Face of the Far Right in Greece' (2013) 18 *South European Politics and Society* 4, 544

<sup>2069</sup> Sofia Vasilopoulou & Daphne Halikiopoulou, 'The Golden Dawn's Nationalist Solution – Explaining the Rise of the Far-Right in Greece' (eds. Palgrave 2015) 81

<sup>2070</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6, 1



Golden Dawn, triggers further intolerance and leads to the trivialisation of racism in society.<sup>2071</sup> Examples of such political speech include the reference in 2012 by the Prime Minister of the time that irregular migrants had ‘occupied’ certain areas, carrying out ‘illegal activities.’<sup>2072</sup> In the same year, the Minister of Public Order and Citizen Protection held that because of irregular migration the ‘country perishes. Ever since the Dorians’ invasion 4000 years ago, never before has the country been subjected to an invasion of these dimensions...this is a bomb on the foundations of the society and the state.’<sup>2073</sup> Soon after, on its website, Golden Dawn held that this statement was a ‘vindication of the positions of the party.’<sup>2074</sup> The above statements were made within the framework of the infamous Xenios-Zeus<sup>2075</sup> operation which commenced in July 2012 in which 4,500 police officers, using racial profiling as their key tool, entered the centre of Athens, making thousands of arrests as a means of cracking down on irregular migration. It must be noted that Golden Dawn acted simultaneously with this mission, with violent attacks happening all over the country.<sup>2076</sup>

Thus, racist rhetoric is not confined to the political discourse of the far-right and racist activities are institutionalised, as illustrated in the Xenios-Zeus operation. This normalisation of racism allows for the speech and activities of Golden Dawn to appear more acceptable both by society and its institutions. In addition to this, on a societal level, rising sentiments of racism and xenophobia facilitated the rise of Golden Dawn with such sentiments already having commenced in the 1990s. More particularly, from the beginning of the 1990s, the Eurobarometer demonstrated a drastic change in the sentiments of Greek society towards foreigners and especially migrants. Within four years, from 1991 – 1994, Greece moved from the last place to the first place in relation to anti-immigrant sentiments. At the same time, Golden Dawn’s

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<sup>2071</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6, 4

<sup>2072</sup> Prime Minister’s speech to the parliamentary group of New Democracy, 4 November 2012:

<<http://www.primeminister.gov.gr/2012/11/04/9815>> [Accessed 24 February 2016]: «κυρίως, στα κέντρα των πόλεων που είχαν καταληφθεί από λαθρομετανάστες και είχαν παραδοθεί στις παράνομες δραστηριότητές τους»

<sup>2073</sup> Article in newspaper ‘To Vima’ (6 August 2012): «λόγω της παράνομης μετανάστευσης χώρα χάνεται..από την εισβολή των Δωριέων, 4000 χρόνια πριν, ποτέ μέχρι σήμερα η χώρα δεν έχει υποστεί μια εισβολή τέτοιων διαστάσεων... αυτό είναι μία βόμβα στα θεμέλια της κοινωνίας και του κράτους»

<sup>2074</sup> Publication on Golden Dawn’s website on 14 July 2012: <<http://www.xryshaygh.com/>>: «δικαίωση των θέσεων μας»

<sup>2075</sup> This is an ironic name since Xenios Zeus denotes hospitality

<sup>2076</sup> Amnesty International: ‘Imperium in Imperio: Culture of Bad Treatment and Impunity in the Greek police’ (2014) <<https://www.amnesty.gr/news/ektheseis/article/20068/kratos-en-kratei-koyltoyra-kakometaherisis-kai-atimorisiastin>> [Accessed 5 February 2016]

systematic attacks against political opponents and, in turn, against migrants commenced. In fact the Human Rights Committee placed its discussion on the rise of extremism in Greece against the backdrop of the unprecedented rise in irregular migration.<sup>2077</sup> In sum, the racist and xenophobic character of Golden Dawn was facilitated by the racism and xenophobia that existed on both an institutional and societal level which at first tolerated and, in terms of the electorate, endorsed it in relatively large numbers.

### *1.3.1 (v) Golden Dawn's Impunity: A Facilitating Factor of its Rise*

The above section sought to extrapolate on the conditions which created a fertile ground upon which the far-right Golden Dawn managed to gain electoral support. However, when considering this group's development, it is also significant to take into account how and why it was able to carry out violent activities amounting to hate crime without the interference of the State. There are several serious allegations that Golden Dawn infiltrated the police force and, in this way, managed to ensure impunity for their violent activities.<sup>2078</sup> For example, in Athens polling stations, where members of the Greek police along with other Greek citizens voted during the 2012 national elections, Golden Dawn percentages were far above the national average, ranging from 17.2% to 23.04%. It is estimated that 'more than 50% of the police officials in these polling stations voted for Golden Dawn.'<sup>2079</sup> As well as voting for this party, video footage has emerged which shows police officers standing by as Golden Dawn members threw stones at opposition groups.<sup>2080</sup> In light of these realities, the Ombudsperson spoke of the 'passive stance' taken by the police towards hate crime incidents.<sup>2081</sup> In fact, following the arrests of Golden Dawn MPs and members, the Minister of Public Order instructed the Chief of Police and the Director of Internal Affairs to investigate the allegation of police involvement and/or facilitation of Golden Dawn's violent activities. Although eight senior officials were suspended pending the investigation, in 2014 the Director held that fifteen police officers had been arrested, ten of whom were found to be 'directly or indirectly linked to the criminal activities of Golden

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<sup>2077</sup> HRC Concluding Observations: Greece (3 December 2015) CCPR/C/GRC/CO/2, 31

<sup>2078</sup> Human Rights First 'We're not Nazis, but...The Rise of Hate Parties in Hungary and Greece and Why America should Care (August 2014) 26

<sup>2079</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6, 122

<sup>2080</sup> Human Rights First 'We're not Nazis, but...The Rise of Hate Parties in Hungary and Greece and Why America should Care (August 2014) 100

<sup>2081</sup> Ombudsperson: Special Report: The Phenomenon of Racist Violence in Greece and How it Can be Tackled' (Το Φαινόμενο της Ρατσιστικής Βίας στην Ελλάδα και η Αντιμετώπισή του') (September 2013) 66

Dawn.’<sup>2082</sup> He concluded, however, that, following the investigation and although ‘extremist behaviour’<sup>2083</sup> had been identified in two hundred and three policemen/women, ‘there was no evidence of cells or factions of para-constitutional forces in the Greek police.’<sup>2084</sup> This has been deemed not to be reflective of the real situation with the link between the police and Golden Dawn being reiterated by several national and international organisations such as Amnesty International.<sup>2085</sup> The link between Golden Dawn and the general inertia of the police to act in cases involving groups such as migrants or Roma, deeply hampers the victims’ access to justice as they do not immediately carry out investigatory activities such as going to the crime scene, finding and examining witnesses and collecting material, a reality which has contributed to the impunity of Golden Dawn.<sup>2086</sup> As well as the police, other institutions have been deemed to have facilitated the implementation of Golden Dawn’s objectives with there existing an ‘outrageous cover-up of Golden Dawn’s actions by the Greek Police, State mechanism and the ministries.’<sup>2087</sup> In this ambit, it must be noted that only an estimate of 1-2% of Golden Dawn attacks over the past twenty years have reached the courts,<sup>2088</sup> demonstrating a failure of the State to crack down on the violent and even fatal actions of this party. In relation to the judiciary, for the cases that do eventually reach the courts, the circumstances are no better. As noted by one lawyer ‘the impunity of the organisation has to do not only with the police but also with the judiciary.’<sup>2089</sup> The impunity could be based on lack of knowledge on relevant legal provisions, as

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<sup>2082</sup> 30 October 2013: Press conference of the Director of Internal Affairs (of the Police) Panagiotis Stathis following the investigation of accusations of police and Golden Dawn cooperation. Cited in Human Rights First ‘We’re not Nazis, but... The Rise of Hate Parties in Hungary and Greece and Why America should Care (August 2014) 101

<sup>2083</sup> 30 October 2013: Press conference of the Director of Internal Affairs (of the Police) Panagiotis Stathis following the investigation of accusations of police and Golden Dawn cooperation: «Ακραίες συμπεριφορές από 203 αστυνομικούς σε Άμεση Δράση, Αλλοδαπών, Αθήνα, Πειραιά και Δυτική Αττική»

<sup>2084</sup> 30 October 2013: Press conference of the Director of Internal Affairs (of the Police) Panagiotis Stathis following the investigation of accusations of police and Golden Dawn cooperation: «δεν διαπιστώνει συγκρότηση πυρήνων ή φραξιών ή παρασυνταγματικών πόλων στην Ελληνική Αστυνομία»

<sup>2085</sup> Amnesty International: ‘Imperium in Imperio: Culture of Bad Treatment and Impunity in the Greek Police’ (2014):<<https://www.amnesty.gr/news/ektheseis/article/20068/kratos-en-kratei-koyltoyra-kakometaherisis-kai-atimorisiastin>> [Accessed 5 February 2016]

<sup>2086</sup> Dimitris Psaras, ‘The Black Bible of Golden Dawn: The Documented History of a Nazi Group’ (*Η Μαύρη Βίβλος της Χρυσής Αυγής, Ντοκουμέντα από την Ιστορία και τη Δράση μιας Ναζιστικής Ομάδας*) (eds. 2012 Polis) 166

<sup>2087</sup> *Attorneys of the Civil Action: Memo of the Civil Action of the Anti-Fascist Movement for the Trial of Golden Dawn (Υπόμνημα της Πολιτικής Αγωγής του Αντιφασιστικού Κινήματος για τη Δίκη της Χρυσής Αυγής)* (eds. Marxist Bookshop 2015), 6

<sup>2088</sup> Katerina Toidou & Giorgos Pittas, ‘Golden Dawn’s File – Neo Nazi Crimes and How to Stop them’ (*Φάκελος Χρυσή Αυγή – τα Εγκλήματα των Νεοναζί και πώς να τους Σταματήσουμε*) (eds. Marxist Bookshop 2013) 45

<sup>2089</sup> Katerina Toidou & Giorgos Pittas, ‘Golden Dawn’s File – Neo Nazi Crimes and How to Stop them’ (*Φάκελος Χρυσή Αυγή – τα Εγκλήματα των Νεοναζί και πώς να τους Σταματήσουμε*) (eds. Marxist Bookshop 2013) 46

noted by the Council of Europe Commissioner for Human Rights,<sup>2090</sup> but could also stem from bias. According to a research study conducted in 2008 and considering records of the Criminal Appeals Court in Athens, the criminal treatment of persons differentiates according to racial criteria, with the key finding of the research being that migrants, especially migrant men aged thirty-five to fifty who are labourers, receive unequal treatment when it comes to sentencing in comparison to Greeks.<sup>2091</sup> Although this finding considered the position of foreigners when defendants in criminal trials, it nevertheless demonstrates a tendency of racism and xenophobia within the judiciary, which has the potential to taint significantly the outcome of trials that involve potential racist motives. Such a stance could partly contribute to the fact that racist motives have seldom been found in cases involving Golden Dawn, as discussed in section 5. A prejudicial and/or indifferent stance to foreigners was also reflected on an executive level in 2012. More particularly, in receiving a report by the National Human Rights Committee, which highlighted the issue of racist violence, a former Cabinet Secretary stated that ‘we are not interested in the human rights of foreigners.’<sup>2092</sup>

As such, Golden Dawn enjoyed a large degree of impunity due to the stances adopted by the different organs of the State, either due to their indifference to the issue and/or due to their own prejudicial approaches to some of the groups which Golden Dawn targetted but also due to the direct link between Golden Dawn’s activities and the police. This state of impunity allowed Golden Dawn to reap its violent seeds sown in the Greek community and develop itself into a criminal organisation, a status for which it is being prosecuted today.

The Greek State proved to be unwilling to take an active stance against the rhetoric and violence of Golden Dawn up until the moment that Pavlos Fyssas, an ethnic Greek, was murdered by a Golden Dawn member after a hit squad appeared at the café where he was sitting with his friends and subsequently chased him in the streets. This is notwithstanding that the Greek judiciary had been faced with several cases before that of Fyssas in which courts became aware of Golden Dawn and its activities. One of the most significant demonstrations of the judiciary’s knowledge

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<sup>2090</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6,9

<sup>2091</sup> Research conducted by Vasilis Karidis (Professor of Criminology and Assistant to the Ombudsperson) 2008

<sup>2092</sup> UNHCR, Marcus Walker & Marianna Kakaounaki: ‘Greece Struggles to Outlaw its Golden Dawn Fascist Party’ (2013)

of the intentions and means of the functioning of Golden Dawn was the case of Antonis Androustopoulos.<sup>2093</sup> Androustopoulos was found guilty of attacks that took place in 1998 against three persons who belonged to a leftist group called the *Socialist Revolution Organisation (ΟΣΕ - Οργάνωσης Σοσιαλιστική Επανάσταση)*. In its judgement, the Court underlined that he had acted along with other people who were all members of Golden Dawn and that they had decided to kill Dimitris Kousouris. Androustopoulos and his accomplices had managed ‘with great savagery and barbarianism to cause multiple wounds to his head and body.’<sup>2094</sup> As well as acknowledging the affiliation with Golden Dawn, the Court described the relationship between the party and the hit squads and confirmed that the violent activities occurred within the framework of the party rather than on an individual basis.<sup>2095</sup> Further, the Court held that the group had the capacity of attempting to kill those it considers enemies of its ideology, as was the case with Kousouris.<sup>2096</sup> Even though the defendant sought to challenge this point at the Supreme Court by holding that he had been convicted because he was a member of a group which differed ideologically to that of the victim, the Court rejected this argument and found homicidal intent.<sup>2097</sup> The Court passed judgement in 2009, sentencing him to twenty one years in prison whilst the Appellant Court lowered his sentence in 2010 to twelve years.

There are other cases, both before and after Androustopoulos where courts have also made reference to perpetrators’ links with Golden Dawn. For example, in case 30841A/2011,<sup>2098</sup> the Court held that the two people who were charged with attempted homicide against two others claimed to be members of Golden Dawn.<sup>2099</sup> According to case 4020/2006,<sup>2100</sup> the Court held that in 2001, the perpetrator participated in a public assembly whose participants carried out violent activities against persons and properties. ‘Particularly, he participated in the group Golden Dawn which was concentrated outside the main entrance of the courthouse and attacked police forces and members of the *Socialist Labour Party*, throwing yogurts and sharp objects and causing

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<sup>2093</sup> Case 161, 162, 163/2009) which was upheld by case 11167/2010 of the Supreme Court.

<sup>2094</sup> Case 161, 162, 163/2009

<sup>2095</sup> Case 161, 162, 163/2009

<sup>2096</sup> *Attorneys of the Civil Action: Memo of the Civil Action of the Anti-Fascist Movement for the Trial of Golden Dawn (Υπόμνημα της Πολιτικής Αγωγής του Αντιφασιστικού Κινήματος για τη Δίκη της Χρυσής Αυγής)* (eds. Marxist Bookshop 2015) 23

<sup>2097</sup> Case no 1607/2010

<sup>2098</sup> Another case in which Golden Dawn was referred to and its violent activities includes case 4775/2009

<sup>2099</sup> Case 30841A/2011

<sup>2100</sup> Case 4020/2006

damages to parked cars.’<sup>2101</sup> It must be noted that the systematic reaction of Golden Dawn’s leadership to any reference of the party’s involvement in crimes was to argue that their members had not been part of the particular occurrence and to attribute the reference to the party to a plot of their political opponents, trying to appear as victims of the system.<sup>2102</sup>

Moreover, the parliament was also confronted with the party’s violence and the issue of lifting the immunity of some of the MPs for cases that took place in 2007 and 2012. More particularly, the parliament lifted the parliamentary immunity of the party spokesperson, Ilias Kasidiaris, charged with taking part in a robbery and causing bodily harm in 2007.<sup>2103</sup> In 2012, the Parliament lifted the parliamentary immunity of three Golden Dawn MPs so that the Court could proceed with the charges of falsification of authority and destruction of foreign property after they participated in destroying the stalls owned by migrant street vendors and carried out identification/documentation checks on such persons.<sup>2104</sup>

In light of the above, it becomes clear that the police and the judiciary were aware of the violent actions of Golden Dawn, its hit squad tactics, its homicidal intent in certain cases and the link between such intent and its ideology and, importantly, conceptualised all the above crimes within the sphere of the organisation, rather than considering them as individual acts with no affiliation to any organisation. Further, the parliament was confronted with the involvement of some of the party’s MPs in violent activities against persons and property. Notwithstanding this, there were no ramifications for the party itself and the State never considered the prohibition of Golden Dawn, never took a sincere and effective stance on cracking down on its leadership but, rather, let Golden Dawn flourish and extend its violence and, at times, homicidal intent towards political opponents and other groups such as migrants. All this changed when Pavlos Fyssas was murdered.

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<sup>2101</sup>Dimitris Psaras, *The Black Bible of Golden Dawn: The Documented History of a Nazi Group* (*‘Η Μαύρη Βίβλος της Χρυσής Αυγής, Ντοκουμέντα από την Ιστορία και τη Δράση μιας Ναζιστικής Ομάδας*) (eds. 2012 Polis) 170

<sup>2102</sup>Dimitris Psaras, *‘Golden Dawn before Justice’* (*Η Χρυσή Αυγή Μπροστά στη Δικαιοσύνη*) (eds. Rosa Luxemburg Foundation 2014), 13

<sup>2103</sup>Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6, 3

<sup>2104</sup>European Network of Legal Experts in the Non-Discrimination Field, Athanasios Theodoridis, ‘Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report 2013 – State of affairs up to 1<sup>st</sup> January 2014’ 134, Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6, 3

### 1.3.1 (vi) *The Murder of Pavlos Fyssas – The Turning Point*

For several years, Golden Dawn acted violently against migrants, political opponents and other groups they considered not to belong to their world theories and belief system, without fear of any serious repercussions from the State and its institutions. This reality altered almost immediately following the murder of Pavlos Fyssas, an ethnic Greek anti-fascist musician, on the evening of the 17<sup>th</sup> (towards 18<sup>th</sup>) September 2013 by Georgios Roumpakias, a member of the party's council in the area of Nikea, with the aid of a hit squad who had chased Fyssas from a café he was in through the streets.<sup>2105</sup> It was only after the murder of an ethnic Greek that Greece witnessed 'an unprecedented mobilization of law enforcement mechanisms'<sup>2106</sup> which resulted in the arrest and prosecution of the leadership and some members of the party for, *inter alia*, leading and participating in a criminal organisation in contravention of Article 187 of the Greek Criminal Code. As underlined by ECRI, the 'fact that hundreds of attacks against foreigners, including several killings, had not resulted in any steps against this organisation but that this required the death of a Greek is, in itself, worrying.'<sup>2107</sup> It must be noted that just a few months earlier, the murder of Pakistani immigrant, Shehzad Luqman, by Golden Dawn members had not led to an equivalent response by the authorities.

A noteworthy consequence of Golden Dawn's trial has been underlined by the Racist Violence Recording Network which has found a significant drop in hate crime following the mass arrests of Golden Dawn members and leaders. More particularly, it recorded eighteen incidents for the period between October and December 2013 whilst the average number of the previous three-month period came to fifty incidents.<sup>2108</sup> Whilst a positive consequence of the arrest of Golden Dawn members, the above finding also demonstrates the damaging consequences of the fact that the Greek State was much too slow to take measures against the party.<sup>2109</sup> Moreover, the Network concluded that the above finding demonstrates that such crime was perpetuated by the

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<sup>2105</sup> *Attorneys of the Civil Action: Memo of the Civil Action of the Anti-Fascist Movement for the Trial of Golden Dawn (Υπόμνημα της Πολιτικής Αγωγής του Αντιφασιστικού Κινήματος για τη Δίκη της Χρυσής Αυγής)* (eds. Marxist Bookshop 2015) 82

<sup>2106</sup> Heinrich Böll Stiftung, 'Racism and Discrimination in Greece Today' (Ρατσισμός και Διακρίσεις στην Ελλάδα Σήμερα') (2014) 8

<sup>2107</sup> European Commission against Racism and Intolerance: Report on Greece (24 February 2015) para. 73

<sup>2108</sup> Racist Violence Recording Network Annual Report 2013: <[http://rvrn.org/wp-content/uploads/2014/04/Report2013\\_EN.pdf](http://rvrn.org/wp-content/uploads/2014/04/Report2013_EN.pdf)> 5

<sup>2109</sup> Racist Violence Recording Network Annual Report 2013: <[http://rvrn.org/wp-content/uploads/2014/04/Report2013\\_EN.pdf](http://rvrn.org/wp-content/uploads/2014/04/Report2013_EN.pdf)> 5

infamous hit squads of the party.<sup>2110</sup> However, although these crimes have decreased, they still continue albeit less numerously. The Head of Doctors of the World in Greece noted that, due to the fact that the hit squads no longer have the safety net of impunity, there is a tendency to resort to other measures such as threatening and humiliating their target groups.<sup>2111</sup> Furthermore, whilst the arrests of Golden Dawn members and the ongoing trial have led to the decrease in its violent activities, the current reality has not affected their electoral support as the figures in section 1.3 demonstrate.

Fyssas' murder has also affected the way in which one particularly serious racist crime has been dealt with, namely, that against Egyptian fishermen in Pireaus. In 2012, a Golden Dawn hit squad, made up of at least twenty persons, attempted to enter the house resided in by the fishermen. They did not manage to break the door which was a metal door and so they went to the roof where the victim Embarak Abouzid was sleeping. They attacked him with metal rods and wooden bats and seriously injured him on his head and face as well as on his chest.<sup>2112</sup> The Prosecutor of Pireaus Magistrates Court chose to prosecute the defendants for grievous bodily harm with intent and, although the defendants had been recognised by the brothers of the victim, had been let free with some restrictions whilst, importantly, no examination of the destructiveness of Golden Dawn was incorporated in the investigation or subsequent prosecution. It was only following the murder of Fyssas and the submittal of this case to the investigators (as well as others), for purposes of demonstrating the criminal activities of Golden Dawn, that there was a supplementary prosecution, incorporating the crime of attempted homicide.<sup>2113</sup>

Thus, the key pointers to underline considering the murder of Pavlos Fyssas in relation to right-wing extremism are three. Firstly, the Greek State was idle and apathetic to the group's violent activities up until the point that they murdered an ethnic Greek, even if there was a plethora of evidence of hate crimes carried out predominantly against migrants before that, including the murder of Pakistani immigrant, Shehzad Luqman, just a few months before Fyssas' murder.

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<sup>2110</sup> Racist Violence Recording Network Annual Report 2013: <[http://rvrn.org/wp-content/uploads/2014/04/Report2013\\_EN.pdf](http://rvrn.org/wp-content/uploads/2014/04/Report2013_EN.pdf)> 5

<sup>2111</sup> Human Rights First 'We're not Nazis, but...The Rise of Hate Parties in Hungary and Greece and Why America should Care (August 2014) 94

<sup>2112</sup> Prosecutor's Recommendation to the Appeals Council regarding the Prosecution of Golden Dawn members and Members of Parliament (15 October 2014), 75

<sup>2113</sup> Civil Action (Case files ABM Φ2013/3990, ABM Φ2012/979 and 979A) 14



Secondly, that by finally deciding to take action against Golden Dawn, the activities of the infamous hit squads decreased but were not eliminated completely and, thirdly, that although the criminal procedure taken against Golden Dawn may have decreased the violent streak of the party, it did not affect its electoral performance.

### *1.3.1 (vii) Golden Dawn's Trial*

On 28 September 2013, eleven days after the murder of Pavlos Fyssas, the police arrested MPs and members of Golden Dawn on charges including the participation in or leadership of a criminal organisation. The Minister of Public Order and Protection of Citizens sent a document from the Greek police to the Supreme Court's Prosecutor regarding the activities of Golden Dawn's MPs. In this document, it was noted that their activities 'are not isolated incidents...they undermine the rule of law, offend human rights and human dignity, endanger public order and the internal security of the country, go against the democratic tradition and legal culture of the country as well as its obligations as they emanate from international and European human rights law.'<sup>2114</sup> Based on this, and following the instructions of the Supreme Court's Prosecutor, a preliminary investigation was conducted by the Supreme Court for purposes of determining whether crimes had been conducted by supporters and members of the political party, particularly those related to leading or participating in a criminal organisation.<sup>2115</sup> This investigation found that there were sufficient indications to justify the prosecution of the members/MPs of this organisation, particularly in relation to Article 187 of the Criminal Code.<sup>2116</sup> Although this article will be discussed further in section 5.4, for purposes of clarity, reference will be made here to the key points found therein. Article 187(1) of the Criminal Code punishes, with imprisonment of up to ten years whoever establishes or participates in a criminal organisation. Whoever leads such an organisation receives a prison sentence of at least ten years.<sup>2117</sup> The article holds that a criminal organisation is an entity which includes three or more members that aims to commit an array of offences including, *inter alia*, homicide with intent, grievous bodily harm, arson and kidnapping.<sup>2118</sup> Following the preliminary investigation of the Supreme Court, two investigative judges were appointed to conduct a pre-trial investigation for

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<sup>2114</sup> Case 4003/173/315661/19-902913

<sup>2115</sup> Case 413 a/28-9-2013

<sup>2116</sup> Case 413 a/28-9-2013

<sup>2117</sup> Article 187 (3) Criminal Code

<sup>2118</sup> Article 187 Criminal Code

purposes of requesting the Parliament to lift the immunity of Golden Dawn MPs, as set out by Article 62 of the constitution.<sup>2119</sup> At the same time as the above procedure for lifting the immunity of the MPs, an investigative officer was appointed the task of investigating the crimes committed by members of the party including Pavlos Fyssas' murder,<sup>2120</sup> the attacks against *PAME (All-Workers Militant Front) - (ΠΑΜΕ - Πανεργατικό Αγωνιστικό Μέτωπο, ΠΑΜΕ)*<sup>2121</sup> and the attacks against the Egyptian fishermen.<sup>2122</sup> Subsequently, a competent Prosecutor made a recommendation to the Appeals Council (*Συμβούλιο Εφετών*)<sup>2123</sup> based on which the Council prosecuted all parliamentary members and other members of the party for offences such as those related to a criminal organisation and/or homicide. In the Prosecutor's Recommendation, all the known criminal activities conducted by Golden Dawn since 2008 are described. In total, this case has seventy-six defendants who are MPs and members of Golden Dawn. It must be noted that Greek law provides that pre-trial detention can occur for a time period of up to eighteen months and, since this time frame has been surpassed, all the defendants in the trial have now been released, with different forms of restrictions. For example, Roumpakias, the murderer of Pavlos Fyssas, is under house arrest whereas the leader of Golden Dawn must appear at a police station three times per month.<sup>2124</sup>

The trial against Golden Dawn commenced on the 20<sup>th</sup> April 2015 and stopped for a period of five months from the 12<sup>th</sup> January 2016 due to strikes of the Athens Bar Association. The Association gave special leave for the continuation five months after the onset of the strikes, more particularly on the 20<sup>th</sup> May 2016.<sup>2125</sup> In the case against Golden Dawn, the prosecution is seeking to demonstrate that Golden Dawn is a criminal organisation and that its leadership and members are guilty of leading and/or participating in a criminal organisation, as prohibited by Article 187 of the Criminal Code. The State is viewing the criminal acts of its members and MPs

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<sup>2119</sup> Case 490/29-9-2013

<sup>2120</sup> Case 618/18-9-2013

<sup>2121</sup> Case 625/27-9-2013

<sup>2122</sup> Case 39/13-6/2012

<sup>2123</sup> Article 187 of the Criminal Code provides that it is the Appeals Council which has the role of prosecuting persons for violations of this article

<sup>2124</sup> Case 1247/2015

<sup>2125</sup> During a strike, the Athens Bar Association is entitled to provide leave for the continuation of extraordinary cases.

as indicative and reflective of the criminality of Golden Dawn itself.<sup>2126</sup> As noted in the Prosecutor's Recommendation, none of the party's MPs can argue 'convincingly that he/she was unaware of the party's criminal activities, which systematically and for a long period of time were being committed by and for the party.'<sup>2127</sup> It is through this approach that it seeks to prosecute its members and MPs and dismantle Golden Dawn which is looked at through the lens of a criminal organisation rather than a political party. The victims of Golden Dawn's crimes and/or their relatives are part of the proceedings as a civil party in three cases, namely, the murder of Pavlos Fyssas, the attempted murder and attacks on Egyptian Fishermen and the attempted murder against PAME unionists. The prosecution will seek to prove that Golden Dawn consisted of about one thousand central cadres and about three to four hundred junior members, divided into cells of four or five members in all parts of Greece.

As such, following Fyssas' murder, the State mobilised itself, for the first time, against Golden Dawn, seeking to dismantle this group by looking at it through the lens of a criminal organisation, thereby attaching criminal responsibility to its leadership and members whilst simultaneously dismantling the organisation itself. It also prompted the police to conduct an investigation into its own members and their links to Golden Dawn, albeit with questionable results. An array of issues arise in relation to the trial, namely the temporal delay of instigating any form of proceedings against Golden Dawn as a violent and criminal entity, notwithstanding the role of the State as an indifferent bystander in allowing this party and its hit squad to spread terror on the streets, and the worrying connotation of the fact that the push factor for action emanated only following the murder of an ethnic Greek.

### 1.3.2 The Far-Right in Greece: Concluding Comments

The far-right in Greece is dominated by one extremist and violent group, Golden Dawn, who bears the characteristics of a violent subculture movement (albeit strictly organised and disciplined) and has the legal status of a registered political party, contesting elections and

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<sup>2126</sup> Look at, amongst others, Prosecutor's Recommendation to the Appeals Council regarding the Prosecution of Golden Dawn members and Members of Parliament (15 October 2014), 65

<sup>2127</sup> Prosecutor's Recommendation to the Appeals Council regarding the Prosecution of Golden Dawn members and Members of Parliament (15 October 2014), 110: 'Ουδείς εκ των Βουλευτών του ως άνω πολιτικού κόμματος, είναι σε θέση να ισχυριστεί ευπροσώπως και με πειστικότητα ότι ήταν ανυποψίαστος για τις εγκληματικές πράξεις, οι οποίες εξακολούθητικά και επί μακρό χρονικό διάστημα διαπράττονταν εξ ονόματος και για λογαριασμό του κόμματος στο οποίο ανήκει.;

participating in the national and European parliaments. Although other parties came and went, with some demonstrating more extended success than others, for example *LAOS*, such successes were short-lived. Golden Dawn, on the other hand, has remained on the subculture/street scene from the time of its inception and on the political scene with success since 2012. Along with parliamentary seats which have contributed to the rise in hate speech and xenophobic and racist policies and rhetoric on a political level, this party has dramatically deteriorated the daily existence, predominantly of migrants, but also of other groups such as ethnic minorities, through hate speech and hate crimes against them. This party's rhetoric and activities went unfettered for a long period of time, up until the point one of its members murdered an ethnic Greek. Only at that point did the tables turn and did the State and its institutions decide, rather than ignoring and/or facilitating the activities of this party, to use the law against it. The outcome of the unprecedented trial against Golden Dawn is awaited. Also, in the event of the imprisonment of MPs and members and the dismantling of this party, it remains to be seen what the next day will bring for the far-right in Greece and, importantly for the State's attitude and stance towards the far-right, considering the criminal activities of Golden Dawn on the one hand and the ultra-protection provided to the role of a political party in the national constitutional order on the other.

## 1.4 Definitional Framework

### 1.4.1 Racial and Religious Groups

Race is not defined in national legislation or case-law, as is the case with, amongst others, international documents. There is no definition of religion but an understanding of what is deemed to fall in the framework of religion is facilitated in comparison to race, given that religion is partly described, although not defined, in Article 13 of the constitution. This article holds that 'all known religions shall be free.'<sup>2128</sup> However, there is no further discussion in relevant case-law or policy regarding the religions which are considered to be known. It has been argued that the constitution 'protects publicly known religions but not mystical and secret practices or dogmas.'<sup>2129</sup> This could denote that the State will accept what it considers to be mainstream religions and probably be hostile to sects. The only clear indication is that the

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<sup>2128</sup> 'Κάθε γνωστή θρησκεία είναι ελεύθερη'

<sup>2129</sup> European Network of Legal Experts in the Non-Discrimination Field, Athanasios Theodoridis, 'Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report 2013 – State of affairs up to 1<sup>st</sup> January 2014' 22

Christian Eastern Orthodox Church does not fall within the ambit of ‘known religions’ but, rather is referred to as the ‘dominant religion’ in Article 3 of the constitution. Further in Article 198(2) of the Criminal Code on blasphemy, reference is made to the prohibition of blasphemy insofar as this is directed either to the dominant religion or ‘another religion tolerated in Greece.’ However, there is no extrapolation in the legislation, case-law or policy providing an understanding of which religions are considered tolerated and not tolerated in Greece. There exist no definitions of the terms racial groups and religious groups in national legislation, case-law or policy.

#### 1.4.2 Public Incitement of Violence and Hatred and Prohibition of Revisionism– A Substitute for Hate Speech?

As is the case with England and Wales, Greek legislation offers no definition of hate speech but, instead, the provision relating to inciting violence, hatred and discrimination must be relied upon when seeking to tackle this phenomenon. Greece also provides for a prohibition of publicly condoning, trivialising or maliciously denying the existence or severity of certain international crimes. The first element, namely inciting violence, hatred and discrimination, is defined by Article 1 of Law 972/1979 as amended by Law 4285/2014. It punishes any person who ‘intends, publicly or orally or through the press, through the internet or in any other way or manner, to incite, promote, arouse or promote actions which may cause discrimination, hatred or violence against a person or group of persons due to their race, religion, genealogical origins, ethnic or racial origin, sexual orientation, gender identity or disability, in a way which poses a danger to public order or constitutes a threat to the life, liberty or physical integrity of the above persons.’ However, no definition of the majority of terms contained in the above articles are provided for either in legislation, case-law or policy. In fact, the only terms relevant to the above section which are given some definition, albeit not in the law under consideration, are those of discrimination and racial discrimination, discussed further on. Part two of the same article refers to speech which seeks to result in property damage insofar as such property is utilised by the above mentioned groups, only if such actions cause damage to public order. As such, this article can be seen, to an extent, as a substitute for a definition of hate speech but the effects of the speech must either result in public harm or serious individual harm. Therefore, Greece opted to take the restrictive approach offered by the Framework Decision which holds, amongst others,

that for offences concerning racism and xenophobia, States may choose to punish conduct which is likely to disturb public order. In the event of property damage as harm, there must be a necessary correlation to the infliction of public disorder. Further, Greece chose to incorporate the requirement of ‘threatening,’ an option provided for by Article 12 of the Framework Decision, but did not include the other optional provisions, namely that of conduct which is abusive or insulting, which depicts a less severe case in comparison to the situation of threatening conduct. This demonstrates Greece’s desire to adopt a restrictive approach when it comes to conceptualising and subsequently prosecuting conduct which may, amongst others, result in racial hate. As per the Framework Decision but also the old law, the perpetrators must intend for such harm to be the result of his/her/their speech and/actions. It must be noted that the requirements regarding public order or serious individual harm were not a necessity in the old law and, as such, the 2014 amendments rendered the conceptualisation of hateful expression more restrictive. Further, the old law incorporated offensive speech as prohibited speech in Article 2, something which is not incorporated in the amended law. In addition, following the incorporation of the Framework Decision, Greek law also contains another form of hate speech in Article 2. More particularly, this article punishes whoever publically, orally or through the press or the internet or through any other means condones, trivialises or maliciously denies the existence or the severity of crimes of genocide, war crimes, crimes against humanity, the Holocaust and Nazi crimes which have been recognised by international courts or the Greek parliament and this behaviour is directed against a group of persons determined by their race, colour, religion, descent, racial or ethnic group, sexual orientation, gender identity or disability, insofar as such behaviour is manifested in a way which can incite violence or hatred or is of a threatening or abusive character against such a group or a member of such a group. In relation to the parliament’s role in recognising such crimes, this has been deemed unconstitutional in the case against historian Heinz Richter discussed in section 4.1.1. Thus, unlike England and Wales, condoning, trivialising or denying the severity or existence of international crimes, such as the Holocaust, is punishable. However such punishment is dependent on certain factors constituting safety nets for freedom of expression such as the necessity of intention on the part of the perpetrator and the establishment of a link between the speech and the incitement to violence or hatred. In relation to religion, it must be noted that, unlike England and Wales, the Greek Criminal Code provides for the offence of blasphemy. The relevant provision is Article 198(2),

therein, which holds that anyone who publicly and maliciously reviles the Eastern Orthodox Church of Jesus Christ or another religion tolerated in Greece is punished with imprisonment of up to two years. This provision has not been used to prosecute any religiously hateful/offensive speech uttered by the far-right movement.

#### 1.4.3 Racial and Religious Aggravation and Hate Crime: Two in one

Before amendments brought about by Law 4285/2014, the Greek Penal Code contained Article 79(3) which held, amongst others, that committing an act out of hate based on ethnic, racial, religious hate or hate due to the descent of the victim constitutes an aggravating circumstance. However, Law 4285/2014 abolished the part of Article 79(3) on such aggravation and introduced Article 81A to the Code and entitled it ‘Racist Crime.’ This article provides that if an act is committed due to the perpetrators’ hatred based on certain grounds, his/her sentence is increased. The new law adds colour, sexual orientation, gender identity and disability to the grounds of hatred existing in the previous article and enhances the sentences for hate crimes. Interestingly, the new provision of the Criminal Code is entitled ‘Racist Crime’ but does not, in fact, deal with racist crime only but with a variety of other crimes such as homophobic crimes. This discrepancy in the title of the article is reflective of the general limited definitional framework of the particular country. Moreover, although entitled racist crime, it essentially deals with aggravation and sentencing rather than a legal definition and conceptualisation of racist or hate crime.

#### 1.4.4 Discrimination and Harassment

Law 474/1990, which ratified the ICERD adopts the latter’s definition of racial discrimination and, thereby, provides a definitional framework of this phenomenon for Greece. More particularly, Article 1(1) of the Law holds that: ‘racial discrimination means any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.’<sup>2130</sup> There is no definition of religious discrimination in any national legislation, case-law or policy document.

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<sup>2130</sup> Άρθρο 1(1) - φυλετική διάκριση σημαίνει κάθε διάκριση, αποκλεισμό, περιορισμό ή προτίμηση με βάση τη φυλή, το χρώμα, την προέλευση ή την εθνική ή εθνοτική καταγωγή που έχει σκοπό ή αποτέλεσμα την αναίρεση ή

Further, Law 3304/2005, which harmonises national law with the EU Equality Directives 2000/78/EC and 2000/43/EC, conceptualises discrimination with regards to the application of the principle of equal treatment and particularly direct and indirect discrimination in the manner set out in the directives with the former referring to less favourable treatment than another would have been given in a comparable situation<sup>2131</sup> and the latter referring to an apparently neutral provision, criterion or practice that would put a person belonging to a particular group at a disadvantage compared to others.<sup>2132</sup> The particular piece of legislation incorporates harassment or any other offensive conduct, which creates an intimidating, hostile, degrading, humiliating or offensive environment and which has the purpose or effect of, *inter alia*, creating a hostile, humiliating or aggressive environment, to fall within the definitional framework of discrimination.<sup>2133</sup>

#### 1.4.5 Public Order

This section will consider how public order is defined by national law. Unlike with England and Wales, in which far-right extremism is criminally challenged predominantly within the framework of public order legislation, Greece's criminal order theoretically challenges the far-right through the anti-racist Law 927/1979, adding the element of public order as one of the requirements in finding an offence, such as incitement to racial hatred, as described in section 5.1. Public order within the anti-racist law is a significant issue and, as such, analysis of the meaning of public order within the Greek legal order is necessary so as to facilitate a subsequent understanding of the applicable laws. In the pre-trial report and the Prosecutor's Recommendation, public order was briefly defined. These documents note that public order is the 'serenity, tranquility and peace and orderliness in the society of a State'<sup>2134</sup> in which there exists 'a regulated legal order, which threatens and imposes penalties against the offenders of

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εξασθένηση της αναγνώρισης, απόλαυσης ή άσκησης, επί ίσοις όροις, των ανθρωπίνων δικαιωμάτων και των θεμελιωδών ελευθεριών στον πολιτικό, οικονομικό, κοινωνικό, πολιτισμικό ή άλλο τομέα της δημόσιας ζωής.

<sup>2131</sup> Article 3(1) and Article 7(1) of Law 3304/2005

<sup>2132</sup> Article 3(b) and Article 7(1)(b) of Law 3304/2005

<sup>2133</sup> Article 2 of Law 3304/2005

<sup>2134</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305. 19 February 2014, 8, Prosecutor's Recommendation to the Appeals Council regarding the Prosecution of Golden Dawn members and Members of Parliament (15 October 2014), 11: 'Δημόσια Τάξη είναι η κατάσταση γαλήνης, ηρεμίας, ειρήνης και ευταξίας στην κοινωνία ενός κράτους.'



legal rules, with the purposes of ensuring the exercise of individual, social or collective and state legal interests.<sup>2135</sup>

In light of the above, it is clear that the definitional framework of Greece in relation to terms relevant to the legislation that can be used to challenge the far-right is relatively lacking, especially in comparison with England and Wales. This is firstly because, as opposed to England and Wales, Greece does not contain many definitions within its legislation whilst the limited case-law and policy on the matter prevents the existence of extensive interpretation of such terms. Either way some minimal extrapolation on terms facilitates an improved understanding of the legal framework.

### 3. International and European Framework

This section shall consider whether and, if so, how Greece has applied and interpreted its obligations in the realm of challenging right-wing extremism as these emanate from international and European conventions. Article 28 (1) of the constitution holds that recognised rules of international law, as well as international conventions which have come into force through ratification on a national level, constitute an integral part of Greek Law and override any conflicting law. All international rules and conventions involving foreigners are applied upon the condition of reciprocity. In addition, following Greece's accession to the EU, EU law takes supremacy over any national laws that may conflict with it.<sup>2136</sup>

Greece signed the ICERD in 1966 and ratified it in 1970 through Legislative Decree 494/1970. It was the anti-racist Law 927/1979 (subsequently amended in 2014) which sought to give effect to the ICERD. This country carried out the ratification, making no reservation to the articles therein. However, it did not make a declaration under Article 14 of the ICERD and, as such, victims of a

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<sup>2135</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305. 19 February 2014, 8, 'η κατάσταση στην οποία προσβάλλονται με βλάβη η διακινδύνευση τα από αυτή επιλεγόμενα ως προστατευόμενα έννομα αγαθά του κοινωνικού συνόλου, ως αποτέλεσμα της ύπαρξης ρυθμιστικής έννομης τάξης, η οποία απειλεί και επιβάλλει κυρώσεις κατά των παραβατών κανόνων δικαίου με σκοπό να διατηρούνται αλώβητα τα ατομικά, κοινωνικά ή συλλογικά και κρατικά έννομα αγαθά.'

<sup>2136</sup> European Network of Legal Experts in the Non-Discrimination Field, Athanasios Theodoridis, 'Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report 2013 – State of affairs up to 1<sup>st</sup> January 2014' 4

violation cannot seek recourse to the competent Committee through the individual complaints procedure. This, therefore, directly restricts the efficacy of the document in the realm of challenging the far-right as victims cannot find justice on a supranational level. This would have been particularly important for Greece given that, on a national level, the competent authorities were unwilling to use this tool as one of prevention, protection or punishment in the realm of far-right rhetoric and activities. As discussed in chapter three, Article 4 is a particularly useful tool, and in order to ensure that it is effectively implemented, States Parties 'have not only to enact appropriate legislation but also to ensure that it is effectively enforced.'<sup>2137</sup> However, this Convention has not been relied upon at all for challenging the far-right in Greece as illustrated by the fact that the State never considered Article 4 as a tool for challenging Golden Dawn. Although an extensive analysis of Law 927/1979 will take place in section 5, a few points must be put forth in relation to its conformity with the ICERD and particularly Article 4 therein, which is the most relevant to tackling the far-right as manifested in organised or semi-organised movements. More particularly, Article 1(4) of Law 927/1979 as amended by Law 4285/2014 holds that the establishment or participation in an organisation or league of persons of any form, which systematically seeks the perpetration of acts such as the incitement to, *inter alia*, discrimination which pose a danger to public order or constitute a threat to the life, liberty or physical integrity of the persons concerned, are to be prohibited. However, this is far from Article 4 of the ICERD which places no further requirement, other than the resulting individual or group harm against the victim or victims, without the prerequisite of other consequences such as public disorder. The reason for this discrepancy is that the same instrument, namely the anti-racist Law 927/1979, has been used to give effect both to the ICERD and the Framework Decision 2008/913/JHA. In relation to the prohibition of racist organisations, the former imposes no obligation as to, for example, the existence of an interlink between the organisation's actions and public disorder whilst the latter does not tackle the prohibition of organisations *per se*, although it does refer to the responsibility of legal as well as natural entities. Thus, the national anti-racist law takes the necessity to prohibit hateful organisations, as this emanates from the ICERD, and intertwines the optional link established by the Framework Decision insofar as particular conduct may result in, for example, public disorder. It must be noted that, before the

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<sup>2137</sup> UN Committee on the Elimination of Racial Discrimination, General Recommendations No. 07 (1985) and No. 15 (1993)

2014 amendments to the anti-racist law, Article 1(2) of Law 927/1979 prohibited the leading of or participation in an organisation which pursues organised propaganda or activities of any kind pertaining to racial discrimination. As such, pre-2014 there were no restrictions of thresholds, making no requests for public disorder for example but, at the same time, offering a wider range of grounds upon which the law can be used.

Further, Greece ratified the ICCPR in 1997 with Law 2462/1997 with no reservations. Although individual complaints can be communicated to the treaty body of this Convention given that Greece ratified the Optional Protocol in 1997, recognising the competence of the Human Rights Committee to receive individual complaints, there is no jurisprudence relevant to the far-right or to Articles 19 and 20 which are directly applicable when it comes to challenging the far-right.

The European Convention on Human Rights was signed by Greece on 19 September 1974 and ratified on 20 September 1974 by Law 239/1953. This law was repealed following the departure of Greece from the Council of Europe. After the fall of the Junta, Greece became a member of the Council of Europe again and the Convention became part of national law for a second time in 1974 by Law 53/1974. It may appear slightly bizarre, given that although the dictatorship decided to cease Greece's membership of the Council of Europe it nevertheless ratified the ICERD in 1970, as mentioned above. Protocol 12 of the Convention on the general prohibition of discrimination was signed by Greece on the 4 November 2000 but has not yet been ratified. Further, on a Council of Europe level, in 2003, Greece signed the Additional Protocol concerning the Criminalisation of Acts of a Racist and Xenophobic Nature committed through Computer Systems although it has not yet ratified this document. In the National Action Plan on Human Rights for the period 2014-2016, it was stated that the ratification of this Additional Protocol is a central objective for purposes of improving the current legislative framework.<sup>2138</sup> No mention is made in the Action Plan of the ratification of Protocol 12 of the European Convention on Human Rights.

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<sup>2138</sup> Ministry of Justice - General Secretariat of Transparency and Human Rights: 'Human Rights National Action Plan 2014-2016' (*Δικαιώματα του Ανθρώπου – Εθνικό Σχέδιο Δράσης 2014-2016*) (2014)

In light of the above, the major instruments and particularly the ICERD and the ICCPR which directly prohibit certain types of hateful rhetoric and activity and the ECHR which limits freedoms such as that of expression, assembly and association are part of national law. So, such ratifications allowed for the infiltration of militant democracy into the national legal system of this country. Moreover, the relevant provisions were part of the legal system before the onset of the systematic criminality and dissemination of hateful rhetoric carried out and conducted by Golden Dawn. As such, it cannot be alleged that the country lacked in terms of legislation when it came to imposing criminal or other restrictive measures to the rhetoric and activities of groups such as Golden Dawn. Also, during this time, the country had the legislative capacity to prohibit Golden Dawn from further conducting its activities if it sought to interpret ‘organisations’ as contained in the ICERD and in the national legislation ratifying it, in a manner which also encompasses political organisations and namely political parties, especially those using the guise of a political party to perpetrate crime and violence and spread fear amongst the community. What becomes immediately apparent when considering public discussion on Golden Dawn and its criminal activities and, as noted by the Council of Europe Commissioner for Human Rights on the issue, is that such discussion appears to ‘ignore or not to take duly into account a number of relevant international and European human rights standards which legally bind Greece’<sup>2139</sup> and can be used or could have been used all these years in which Golden Dawn has been carrying out its criminal activities and recited its hateful rhetoric with impunity. The above documents and articles were not taken into account or implemented by competent authorities, up until the point where this organisation became empowered through impunity and facilitated through socio-economic circumstances, discussed above, to become a criminal organisation. What must be reiterated is that it was never an option for Greece whether or not it was to implement relevant provisions which emanate from its international and European commitments but, rather, a constitutional commitment. The fact remains that for years Golden Dawn was acting and speaking relentlessly in direct contravention to the letter and spirit of the supranational documents referred to above but Greece, in turning a blind eye to its obligations as these arise from the documents, allowed it to continue to do so unfettered.

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<sup>2139</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6, 6

#### 4. National Legal Framework

This section shall provide an analysis of the domestic legal framework of Greece that can be relied upon when challenging far-right extremism. For purposes of this analysis, the section will look at the relevant legislation in the sphere of speech, material and activities of far-right entities and consider how, in practice, the judiciary has interpreted and applied such legislation when confronted with the far-right movement. Appraising the judicial analysis and interpretation of relevant legislation is not a straightforward task given the fact that relevant jurisprudence is minimal. Before proceeding with an insight into the legislation and jurisprudence (where available) and, given that the problem questions within this dissertation are assessed through a human rights lens, the section will firstly establish the foundational framework that will facilitate any subsequent discussion by providing an overview of how relevant human rights are understood and provided for in the Greek legal order. To this end, it will set out how the freedoms of expression, association and assembly are conceptualised and incorporated into domestic law. After the human rights framework is established, the chapter will consider the criminal laws that can be used to tackle the far-right, looking at anti-racist laws as well as provision from the Criminal Code on aggravation and sentencing but, due to Golden Dawn's trial, will also look at criminal organisations and their prohibition as so established by the Criminal Code. Also, there will be an analysis of the relevant provision of the Criminal Code on terrorist organisations. It will then proceed to assess the limited amount of existing case-law that exists that interprets and applies the legislative framework. Furthermore, in relation to jurisprudence, an overview of the case against Golden Dawn, which is still ongoing, will be effectuated given the severity of this case in the framework of challenging the far-right. After considering the criminal law framework, the section will assess non-discrimination law as a tool for challenging the far-right in Greece. The section will then consider the law regulating the registration and functioning of political parties as procedures emanating from the law may, in themselves or in conjunction with each other, affect the development of the far-right, regardless of whether such laws, regulation and systems have the purpose of countering such movements. This approach is necessary since it will enable an understanding of the handling of all the entities which make up the far-right and the manner in which they are tackled by the country.

#### 4.1 Human Rights: Conceptual Backdrop

Article 2(1) of the Greek constitution holds that ‘respect and protection of the value of the human being constitute the primary obligations of the State.’<sup>2140</sup> Personal freedom is established by Article 5(1), but this is not absolute given that this is permissible ‘insofar as they do not infringe the rights of others or violate the constitution or morals.’<sup>2141</sup> The constitution contains a non-destruction clause in the form of Article 25 (3) which holds that ‘the abusive exercise of rights is not permitted.’<sup>2142</sup> As such, militant democracy and the need to protect society and others from destructive forces emanating from abusive use of rights and freedoms is codified on a national level in the country’s constitution. The constitution provides for the freedom of expression, freedom of assembly and freedom of association, which are all tools habitually used and abused by the far-right with Greece constituting a primordial example of such abuse with Golden Dawn having acted with a state of impunity for several years, advancing itself, its rhetoric and acts and calling upon the freedoms above as the means to do so. In relation to the freedom of association, it must be underlined that political parties hold a particularly significant place in the Greek Legal Order and a certain overprotection thereof may be deemed to exist. The almost absolutist approach adopted by the non-prohibition of political parties has had a significant effect on the handling of Golden Dawn.

##### 4.1.1 Freedom of Expression

Freedom of expression is provided for in Article 14 of the constitution which is entitled ‘Freedom of the Press.’ Part 1 of this Article holds that ‘every person may express and propagate his thoughts orally, in writing and through the press in compliance with the laws of the State.’<sup>2143</sup> Parts 2 – 9 of the article focus solely on the press. Thus, the constitution essentially provides for free expression with the sole restriction being that such expression must comply with national laws. Rather than separating freedom of opinion and expression,, the constitution refers to the freedom of expression and the freedom to propagate such expression. However, it could hardly

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<sup>2140</sup> ‘Ο σεβασμός και η προστασία της αξίας του ανθρώπου αποτελούν την πρωταρχική υποχρέωση της Πολιτείας.’

<sup>2141</sup> ‘Ο καθένας έχει δικαίωμα να αναπτύσσει ελεύθερα την προσωπικότητά του και να συμμετέχει στην κοινωνική, οικονομική και πολιτική ζωή της Χώρας, εφόσον δεν προσβάλλει τα δικαιώματα των άλλων και δεν παραβιάζει το Σύνταγμα ή τα χρηστά ήθη.’

<sup>2142</sup> ‘Η καταχρηστική άσκηση δικαιώματος δεν επιτρέπεται.’

<sup>2143</sup> ‘Καθένας μπορεί να εκφράζει και να διαδίδει προφορικά, γραπτά και δια του τύπου τους στοχασμούς του τηρώντας τους νόμους του Κράτους.’

be argued that the constitution does not provide for opinion, it is simply the case that it incorporates free expression as if it were opinion, separating the right to propagate such expression. Further, Article 16(1) of the constitution, on education, art and sciences, holds that ‘art and science, research and teaching shall be free and their development and promotion shall be an obligation of the State. Academic freedom and freedom of teaching shall not exempt anyone from his duty of allegiance to the constitution.’<sup>2144</sup> This provision is relevant to expression which is propagated through, for example, artistic means, but also in relation to academic freedom and the issues that have arisen in the framework of academia under the amended anti-racist law and the handling of genocides and other international crimes.<sup>2145</sup> It is noteworthy that the freedom of expression constituted the basic reasoning put forth by those opposed to the 2014 amendments to the anti-racist law.<sup>2146</sup> A case relevant to this aspect of free expression and the anti-racist law is the case of Heinz Richter, an historian, who was prosecuted under the anti-racist law and particularly Article 2 therein for his book in which, in relation to the Battle of Crete (with the Nazis), he argued, amongst others, that ‘ruthless and barbaric practices were not only used by the invading troops but also by the Cretans who rebelled against them.’ The Court found Richter not guilty for three reasons, one of which was that Article 2 violated the freedom of expression and academic freedoms taking into account that laws which recognise or establish historical facts, even if they express the opinion of the majority, cannot (in a democratic and pluralist society) constitute the foundation of binding regulations which equate to legal prohibitions.<sup>2147</sup>

In addition to free expression having been cited several times as a reason for rejecting the 2014 amendments to the anti-racist law, this freedom has heavily marked the Supreme Court’s discussion of one of the few cases which occurred within the framework of the anti-racist law 927/1979, namely that against Constantinos Plevis<sup>2148</sup> for the publishing of his book ‘Jews –The Whole Truth’ (Εβραίοι – Όλη η Αλήθεια’). In its judgement, the Court noted that Law 927/1979

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<sup>2144</sup> ‘1. Η τέχνη και η επιστήμη, η έρευνα και η διδασκαλία είναι ελεύθερες η ανάπτυξη και η προαγωγή τους αποτελεί υποχρέωση του Κράτους. Η ακαδημαϊκή ελευθερία και η ελευθερία της διδασκαλίας δεν απαλλάσσουν από το καθήκον της υπακοής στο Σύνταγμα.’

<sup>2145</sup> For example Heinz Richter’s case discussed in section 4.1.1

<sup>2146</sup> Explanatory Report for amendments to Law 927/1979

<sup>2147</sup> Statement made by the Court regarding Heinz Richter’s Case (full judgement not yet available)

<sup>2148</sup> Case 3/2010

must be interpreted restrictively and in light of the provisions of Article 14(1) and 16(1) of the constitution and Article 10 (1) of the ECHR, through which the freedom of expression is established as well as the freedom of art, science, research and teaching. The Court placed a tight restriction on the implementation of the anti-racist law, citing free expression as justification for such restrictions given the particular significance it attached to such freedoms. However, it did note that free expression must be exercised in light of the obligations which arise from, amongst others, Article 2 of the constitution on the obligation of the State to protect human value, a provision which also incorporates the need to respect the racial and ethnic origin of a person. However, the Court found Plevris not guilty, not due to the significance of free speech but, rather, that his book was directed against Zionists and not Jews and, so did not constitute a racial group.<sup>2149</sup> Further on this point will be discussed in section 5.1.

#### 4.1.2 Freedom of Association and Assembly

##### *4.1.2 (i) Freedom of Association*

Article 12 of the Greek constitution provides that ‘Greeks shall have the right to form non-profit associations and unions, in compliance with the law, which, however, may never subject the exercise of this right to prior permission.’<sup>2150</sup> Article 12 further holds, in part 2 thereof, that an association may only be dissolved by a court judgement and, in part 3 holds that this also applies to unions of persons which do not constitute an association. Although this article refers to non-profit associations and unions, there is no further extrapolation on what is meant by these terms apart from the reference to agricultural and urban co-operatives as a type of association and/or union. What becomes clear is that this article does not aim to cover political parties as an entity given that these are covered by a separate article dedicated exclusively to political parties, demonstrating the significance which the Greek legal order places on such entities. More particularly, Article 29 of the constitution provides that Greek citizens with the right to vote may establish and join political parties ‘the organization and activity of which must serve the free functioning of democratic government.’<sup>2151</sup> Thus, the Greek constitution provides for the right to

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<sup>2149</sup> Case 913/2009

<sup>2150</sup> Οι Έλληνες έχουν το δικαίωμα να συνιστούν ενώσεις και μη κερδοσκοπικά σωματεία, τηρώντας τους νόμους, που ποτέ όμως δεν μπορούν να εξαρτήσουν την άσκηση του δικαιώματος αυτού από προηγούμενη άδεια.

<sup>2151</sup> Έλληνες πολίτες που έχουν το εκλογικό δικαίωμα μπορούν ελεύθερα να ιδρύουν και να συμμετέχουν σε πολιτικά κόμματα, που η οργάνωση και η δράση τους οφείλει να εξυπηρετεί την ελεύθερη λειτουργία του δημοκρατικού πολιτεύματος.



form and join political parties without making any direct reference to limitation grounds of this right. However, it does incorporate a qualification to this right, namely that political parties must serve the free functioning of a democratic State. The result of this approach is that the constitutional possibility of dismantling a political party is one of the controversial issues of Greek constitutional law, given that arguments can be put forth for either side. The Council of Europe Commissioner for Human Rights argues that this qualification could be ‘interpreted according to the principle of *effet utile* in a way that would give a practical meaning to the above constitutional meanings.’<sup>2152</sup> More particularly, the Commissioner recommended the adoption of relevant legislation or development of jurisprudence which would give effect to the aforementioned qualification and ‘restrict or prohibit, if necessary, a party for which ample evidence demonstrates that it does not serve the free functioning of democratic governance.’<sup>2153</sup> In making this recommendation, the Commissioner reiterated that such measures would be in conformity with Greece’s obligations under Article 4 of the ICERD and Article 11 and Article 17 of the ECHR.<sup>2154</sup> Further, in its latest Concluding Observations to Greece, the ICERD committee recommended that the State Party ‘concretely ban neo-nazi groups from its territory.’<sup>2155</sup> When confronted with the issue of Golden Dawn, the State habitually reiterated the absolutist position that the Greek constitutional order does not provide for the prohibition of political parties. This was notwithstanding the constitutional qualification of Article 29(1) and Greece’s international obligations. In adopting this approach, the country ignored its obligation to prohibit such an organisation (under the ICERD). It also ignored the fact that the freedom of association, as provided for by the ECHR, is not absolute and can be restricted, if such association, amongst others, damages the rights and freedoms of others. This is clear from, *inter alia*, the case-law of the ECtHR discussed in chapter four. In brief, by retaining Article 29 and particularly part 1 therein without the necessary judicial interpretation and/or legislative developments *vis-à-vis* possibilities of dismantling a political party under certain circumstances, using provisions of supranational documents, the national legal order of this country is directly violating its obligations under the ICERD and goes against the meaning of Article 11 of the ECHR. Moreover, and as noted in the pre-trial report, the requirement of Article 29 that political

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<sup>2152</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6,8

<sup>2153</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6,8

<sup>2154</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6,9

<sup>2155</sup> ICERD Concluding Observations – Greece, CERD/C/GRC/CO/19 (2009) 11

parties serve the free functioning of a democratic state means that an organisation such as Golden Dawn is not protected under Article 29.<sup>2156</sup> This is because, under the guise of a political party, it has demonstrated its real objectives with the use of, amongst others, physical and armed violence and threats against life. The report further noted that the use of Article 29 for such purposes constitutes a violation of 25(3) of the constitution on the non-abuse of rights.<sup>2157</sup> In light of this position, the pre-trial report found that it was legally possible to find members and leaders of a criminal organisation which posed as a political party guilty of offences under Article 187 of the Criminal Code. However, this should not imply that a political party can act unfettered and cause the destruction of democracy and the rights of others in a violent manner up until the point that it becomes a criminal organisation. Instead, based on ECtHR case-law, discussed in chapter four, measures should be taken before it reaches this point.

The above approach adopted by the Greek State towards the prohibition of political parties, resulted in a considerable weakness as it was unable to tackle effectively and dismantle, amongst others, far-right elements which organise themselves in the form of a political party. A few weeks after the June 2012 elections, the Council of Europe Commissioner of Human Rights held that, although Greek legislation does not clearly provide for the prohibition of political parties, Article 29(1) refers to the requirement that such parties must serve the free function of democratic government. He then posed a rhetorical question as to whether Golden Dawn serves the free functioning of democratic government.<sup>2158</sup> However, it is imperative to ensure compatibility with international and European obligations and acknowledge the destructiveness of political parties such as Golden Dawn. The issue of banning Golden Dawn has been coming and going for several years now. The viewpoint adopted almost unequivocally by the Greek political system was that it was impossible to ban the party in its entirety given that the Greek

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<sup>2156</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305. 19 February 2014, 20

<sup>2157</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305. 19 February 2014, 11

<sup>2158</sup> Dimitris Psaras, *The Black Bible of Golden Dawn: The Documented History of a Nazi Group* (*Η Μαύρη Βίβλος της Χρυσής Αυγής, Ντοκουμέντα από την Ιστορία και τη Δράση μιας Ναζιστικής Ομάδας*) (eds. 2012 Polis) 445

constitutional order does not provide for the prohibition of political parties.<sup>2159</sup> As a result of this certainty, each time a member of Golden Dawn was involved in the perpetration of a violent activity, the competent authorities avoided the investigation of the perpetrators' link to Golden Dawn and,<sup>2160</sup> subsequently, the ramifications of this interrelationship on the status of Golden Dawn as a political party. Moreover, on some occasions, relevant incidents carried out by Golden Dawn reached the parliament with the Ministry of Justice habitually condemning Nazism whilst systematically noting that an ideology cannot be persecuted but only actions.<sup>2161</sup> The direct consequences of the State's stance was that, in the name of an absolute freedom to establish and participate in political parties, Golden Dawn was not dismantled which contributed to its violent actions remaining unfettered. One of the few times the issue of banning Golden Dawn reached the parliament was in 1998. The Minister of Justice held that Golden Dawn is 'clear fascism. And as fascism it is a murderous act, a murderous ideology against the State.'<sup>2162</sup> However, he continued to note that care must be taken so that others do not say that 'in Greece ideas are persecuted.'<sup>2163</sup> Although an examination and discussion of the situation was instructed, this never took place. So, even in 1998, the State recognised the dangers posed by this party but never took constructive steps to move against it. Steps have also been taken by civil society in the realm of the party's prohibition but, to no avail. Namely, in 2011, the Greek Helsinki Monitor filed a court claim requesting the District Attorney to commence procedures for banning Golden Dawn given that it violates Article 37.5 of Presidential Decree 96/5.6.2007 in combination with Article 29 (1) of the constitution. In the application, reference was made to the Nazi salutes of party members and references and photographs of the Nazi activity of Golden Dawn, but to no avail.

The reluctance of the Greek legal order directly to incorporate provisions, which would allow for the prohibition of political parties could potentially emanate from the country's experience with

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<sup>2159</sup> Dimitris Psaras, 'Golden Dawn before Justice' (*Η Χρυσή Αυγή Μπροστά στη Δικαιοσύνη*) (eds. Rosa Luxemburg Foundation 2014), 10

<sup>2160</sup> Dimitris Psaras, 'Golden Dawn before Justice' (*Η Χρυσή Αυγή Μπροστά στη Δικαιοσύνη*) (eds. Rosa Luxemburg Foundation 2014), 10

<sup>2161</sup> Dimitris Psaras, 'Golden Dawn before Justice' (*Η Χρυσή Αυγή Μπροστά στη Δικαιοσύνη*) (eds. Rosa Luxemburg Foundation 2014), 10

<sup>2162</sup> Greek Parliament Official Minutes – deliberation 18/2/1998: 'Είναι καθαρός φασισμός. Και ως φασισμός είναι δολοφονική πράξη, δολοφονική ιδεολογία εναντίον του πολιτεύματος.'

<sup>2163</sup> Greek Parliament Official Minutes – deliberation 18/2/1998: 'πρέπει να εξετάσουμε το θέμα. Μην περιπέσουμε σε καμία άκρη και λένε ότι στην Ελλάδα διώκονται οι ιδέες.'

hostility held against certain political parties. More particularly, Greece has demonstrated a long-standing hostility to political parties with its peak being the prohibition of the '*KKE - Communist Party of Greece*' ('*ΚΚΕ- Κομμουνιστικό Κόμμα Ελλάδας*').<sup>2164</sup> In fact, during ECRI's most recent visit to Greece, many civil society organisations held that they would consider the banning of a political party 'with suspicion'.<sup>2165</sup> During the drafting period of the 1975 constitution, there were deliberations as to the possibility of including a direct limitation to Article 29, prohibiting political parties which seek to overthrow the democratic order or endanger the territorial integrity of the country. However, this possibility was not accepted.<sup>2166</sup> The temporal framework of this decision is significant given the particular sensitivity of the parties of the centre and the left to issues of prohibition given that the *KKE* had only recently been legalised.<sup>2167</sup>

It can, thus, be concluded that the temporal setting in which the 1975 constitution was drafted, which is in force today, with amendments, played a great role in relation to the way in which the freedom to found and join political parties was comprehended and designed. However, the necessity for parties to serve the free functioning of democratic government is a clear qualification of this right, establishing, at least indirectly, a limitation to its exercise. In fact, it could be argued that Golden Dawn is in contravention of the non-abuse clause found in Article 25(3) of the constitution as it has exploited the provision on political parties to establish and run a violent organisation which carries out crimes relentlessly. The fact remains that had political will existed, this provision would be interpreted as above and Greece would have conformed to its international and European obligations which stipulate the necessity to prohibit racist parties and underline the limitation grounds of free association respectively. As noted by ECRI, 'timely action'<sup>2168</sup> should have been taken against such parties so as to 'avoid an escalation of criminal

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<sup>2164</sup> Nikolaos Mavrikas, '*The Legal Personality of Political Parties as an Element of their Activities, Theory and Practice of Administrative Law*' (*Η Νομική Προσωπικότητα των Πολιτικών Κομμάτων ως στοιχείο Άσκησης της Δράσης τους.*) (eds. Τεύχος 2011)

<sup>2165</sup> European Commission against Racism and Intolerance: Report on Greece (24 February 2015) para. 26

<sup>2166</sup> Dimitris Psaras, '*Golden Dawn before Justice*' ('*Η Χρυσή Αυγή Μπροστά στη Δικαιοσύνη*') (eds. Rosa Luxemburg Foundation 2014), 12

<sup>2167</sup> Dimitris Psaras, '*Golden Dawn before Justice*' ('*Η Χρυσή Αυγή Μπροστά στη Δικαιοσύνη*') (eds. Rosa Luxemburg Foundation 2014), 12

<sup>2168</sup> European Commission against Racism and Intolerance: Report on Greece (24 February 2015) para. 26

activities.<sup>2169</sup> However, this was not done and, instead, Golden Dawn remained untouched for several years.

#### 4.1.2 (ii) *Freedom of Assembly*

Article 11 of the constitution provides that ‘Greeks shall have the right to assemble peaceably and unarmed.’<sup>2170</sup> Article 1(2) of Law 794/1971 on Public Assemblies defines, for purposes of that law, a public assembly as a pre-organised event regarding the ideology or opinion of the participants or to the participation in lectures or in the manifestation of common requests. Article 1(3) holds that religious, commercial, entertainment or athletic assemblies do not fall within the framework of this law. Presidential Decree 141/1911 on the competences of the police force defines an assembly as a pre-arranged concentration of many people for the same reason for purposes of decision-making and common action. Article 11(2) of the constitution holds that the police may be present only at outdoor public assemblies and that such assemblies may be prohibited ‘by a reasoned police authority decision, in general if a serious threat to public security is imminent, and in a specific area, if a serious disturbance of social and economic life is threatened, as specified by law.’<sup>2171</sup> Law 794/1971 on Public Assemblies provides for peaceful and unarmed assembly.<sup>2172</sup> This statute was passed during the years of the Junta but remains in force today. It has several unconstitutional provisions which are no longer valid. Article 1 (4) provides that this law is applicable only to pre-organised assemblies whilst the prohibition of instantaneous assemblies is incumbent on the free judgement of the police. The organiser of the assembly is also considered its president and this person must inform the police of the time and place of the assembly.<sup>2173</sup> Article 6(1), therein, reiterates what is held in part 2 of Article 11 of the constitution, namely that the police may prohibit a public outdoor assembly if it is determined that there is an issue of endangering public order and security, insofar as preventing this cannot be achieved through softer police measures. Softer measures may include those provided in part 4 of the article and include a change of time or place of the assembly. Any restrictions to an

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<sup>2169</sup> European Commission against Racism and Intolerance: Report on Greece (24 February 2015) para. 26

<sup>2170</sup> Οι Έλληνες έχουν το δικαίωμα να συνέρχονται ήσυχα και χωρίς όπλα.

<sup>2171</sup> Μόνο στις δημόσιες υπαίθριες συναθροίσεις μπορεί να παρίσταται η αστυνομία. Οι υπαίθριες συναθροίσεις μπορούν να απαγορευτούν με αιτιολογημένη απόφαση της αστυνομικής αρχής, γενικά, αν εξαιτίας τους επίκειται σοβαρός κίνδυνος για τη δημόσια ασφάλεια, σε ορισμένη δε περιοχή, αν απειλείται σοβαρή διατάραξη της κοινωνικοοικονομικής ζωής, όπως νόμος ορίζει.

<sup>2172</sup> Article 1.1 and Article 11 of Law 749/1971

<sup>2173</sup> Article 3(4) Law 794/1971

assembly must be communicated to the president of the assembly at least eight hours before the assembly is to take place.<sup>2174</sup> Further requirements that need to be met in order to hold an assembly are included in this article, such as certain prohibited areas where no assembly may take place, the maximum amount of persons that can take place in an assembly and the fact that assemblies may be made up only of persons on foot. Article 9 of this law provides for punishment in the form of imprisonment and a monetary fine if, amongst others, the organisers and/or members of the assembly do not inform the police of the assembly or they carry out an assembly which has been deemed prohibited or if they continue to carry out the assembly which the police has dismantled. Further, Article 171 of the Penal Code provides that whoever takes part in a prohibited public assembly is punished with imprisonment of up to six months or a monetary fine. Further, if the competent military or civil authority calls for the assembly to be dismantled and a participant of such an assembly does not follow such instructions after the third request, he or she is punished with imprisonment or a monetary fine. Article 189 of the Penal Code provides for the punishment of persons participating in violent assembly/ carrying out and/or inciting violent activities. In addition to the above, Presidential Decree 141/1911 deals with the competences of the police in relation to dealing with assemblies, providing for issues such as the use of force and the distinction of public and private assemblies.

In light of the above, Greece permits peaceful assemblies, limits the powers of the State to interfere in private assemblies and outlines the precise temporal and contextual frameworks in which the police may interfere with violent assemblies. However, despite the legislative efficiency of this country in seeking to ensure the right to peaceful assemblies whilst seeking legitimacy and measure in relation to State interference, in the latest Concluding Observations of the ICERD the Committee noted its concern regarding human rights violations committed by the police towards demonstrators and the lack of investigations into perpetrators. In addition, it noted that during demonstrations, groups of persons such as journalists and peaceful demonstrators were ‘threatened, intimidated and harassed by members of extremist groups such as Golden Dawn.’<sup>2175</sup>

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<sup>2174</sup>Article 5(5) Law 794/1971

<sup>2175</sup> Human Rights Committee Concluding Observations – Greece, CCPR/C/GRC/CO/2 (3 December 2015) 8

#### 4.1.3 Non-Discrimination

The Greek constitution contains a general non-discrimination clause in Article 5(2). This holds that ‘all persons living within the Greek territory shall enjoy full protection of their life, honour and liberty irrespective of nationality, race or language and of religious or political beliefs. Exceptions shall be permitted only in cases provided by international law.’<sup>2176</sup> However, before the transposition of Directives 2000/78/EC and 2000/43/EC into the national legal system through Law 3304/2005 ‘on the application of the principle of equal treatment regardless of racial or ethnic origin, religious or other beliefs, disability, age or status,’ the anti-discrimination framework of this country was generalised and abstract, with the general non-discrimination provision of the constitution constituting the only source of law on the issue. As such, law 3304/2005 ‘fills a conspicuous lacuna in the Greek Legal System.’<sup>2177</sup> More particularly, non-discrimination is incorporated as a general principle in the Greek constitution but it was only following the passing of the 2005 law that this abstract depiction of the principle has been put into effect, always in the areas and *vis-à-vis* the target groups set out by Directives 2000/43/EC and 2000/78/EC. An equivalent of the non-discrimination framework analysis was not effectuated in the chapter on England and Wales given that this was not necessary due to the contextual framework. More particularly, in Greece, Golden Dawn carries out activities such as soup-kitchens and blood donations for Greeks only. This, as well as other practices conducted by this party’s members, has led to the enforcement and/or relevance of the non-discrimination framework. Such practices have not been carried out by the far-right in England and Wales and, as such, the analysis of the parts of the Equality Act dealing with, for example, access to goods and services is not necessary.

Article 1 of the Greek non-discrimination law holds that its purpose is the establishment of a general anti-discrimination framework in relation to racial or ethnic origin as well as an anti-discrimination framework in relation to other grounds such as religion, disability, age or status in relation to employment. Article 4 prohibits discrimination in relation to the ‘access to and supply

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<sup>2176</sup> Όλοι όσοι βρίσκονται στην Ελληνική Επικράτεια απολαμβάνουν την απόλυτη προστασία της ζωής, της τιμής και της ελευθερίας τους, χωρίς διάκριση εθνικότητας, φυλής, γλώσσας και θρησκευτικών ή πολιτικών πεποιθήσεων. Εξαιρέσεις επιτρέπονται στις περιπτώσεις που προβλέπει το διεθνές δίκαιο.

<sup>2177</sup> European Network of Legal Experts in the Non-discrimination Field, Athanasios Theodoridis, ‘Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report 2013 – State of affairs up to 1<sup>st</sup> January 2014’ 8

of goods and services which are available to the public, including housing’ but only in respect of race and ethnic origin, a minimum standard set out by the racial equality directive. Further, Article 16.1 provides for criminal sanctions in the event of discrimination in the realm of accessing goods and services. This provision holds that ‘whoever violates the prohibition of discriminatory treatment on the grounds of ethnic or racial origin or religious or other beliefs, disability, age or sexual orientation, with respect to the supply of goods or the offer of services to the public is punished with six months’ imprisonment and a fine of 1000 – 1500 Euros.’ Article 4.2 holds that the law is applicable to differences based on nationality or to the regulation of the entrance and of third country nationals or stateless persons or the treatment linked to their legal status as third country nationals or stateless persons. This is reiterated in Article 8.2. This law is applicable to the public and private spheres.<sup>2178</sup> The law mandates three institutions for the promotion of the principle of equal treatment, one of which is the Ombudsperson, who is entrusted with the promotion of equal treatment regardless of racial or ethnic origin, religious or other beliefs, age, disability or sexual orientation in the public sector.

Thus, taking into account the provisions of Article 4(1) and 16(1) in relation to non-discrimination in relation to accessing goods and services, insofar as this discrimination is based on racial or ethnic origin, two issues pertaining to Golden Dawn may arise. Firstly, that there exists a national non-discrimination framework which may be used to punish the discriminatory activities of Golden Dawn, such as the soup kitchen and blood donations for Greeks only. Secondly, that, notwithstanding the countless number of such activities that have taken place even after the enforcement of the non-discrimination law, this law has never been used for the collective activities of Golden Dawn. Instead prosecution of such discrimination has occurred in two cases, only one of which could rely on the non-discrimination law, for reasons discussed below. Firstly, in 2013, a bus driver of a transport company of the city of Thessaloniki forced two passengers of African descent to get off the bus for no apparent reason. When the other passengers criticised this behaviour, the driver provocatively declared that he was a Golden Dawn supporter. An association, the *Nazi-Free Thessaloniki Assembly*, filed a complaint to the Organisation of Public Transportation of Thessaloniki. The case resulted in the intervention of the Misdemeanours Prosecutor of Thessaloniki who ordered a preliminary inquiry into the case.

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<sup>2178</sup> Article 4(1) Law 3304/2005



The court found the perpetrator guilty of denying access to services on racial grounds, holding that the bus driver's conduct offended the victims' dignity and created an intimidating, humiliating or offensive environment, without however referring to the term 'harassment'.<sup>2179</sup> It ordered his ten-month imprisonment suspended for three years and a fine of 1000 Euros.<sup>2180</sup> This was the first time that Article 16, which provides for criminal penalties for discriminatory behaviour in the supply of goods and services, was enforced, reflecting a nine year delay from the law's creation.<sup>2181</sup> Secondly, in 2014, a Greek doctor and member of Golden Dawn posted a 'Jews not Welcome' sign outside his office and was subsequently arrested for inciting racial discrimination, in violation of anti-racist Law 972/1979.<sup>2182</sup> This incident falls within the framework of Law 3004/2005 as the doctor, through his sign, ousted an entire ethnic and/or religious group from the provision of his services. However, the Prosecutor had to pursue this case in the realm of Law 972/1979 which can be instigated *ex officio*, due to the fact that there was no identified victim of the aforementioned conduct. Therefore, since a case cannot be brought before judicial bodies without a designated victim under the anti-discrimination law, the only path available in the realm of ethnic and racial discrimination is the anti-racist law. Thus, whilst there exists another option in the framework of supply of goods and services for persons discriminated against due to their race or ethnicity, even if no consenting victim is identified for purposes of a trial, no such alternative is available for the other groups protected by equal treatment legislation. So, the necessity of a consenting victim is a direct result of the provisions of the directives and not a deviation by the State from its European obligations. Either way, such characteristics of the law are considered by institutions, such as ECRI, to constitute shortcomings that directly affect the practical applicability and scope of the equal treatment framework of Member States which choose to apply the directives' provisions as minimally as possible.

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<sup>2179</sup> Hellenic League for Human Rights Press Release on the Conviction of the Bus Driver: <<http://www.hlhr.gr/?MDL=pages&SiteID=1027>> [Accessed 23 February 2016]

<sup>2180</sup> Hellenic League for Human Rights Press Release on the Conviction of the Bus Driver: <<http://www.hlhr.gr/?MDL=pages&SiteID=1027>> [Accessed 23 February 2016]

<sup>2181</sup> To Vima: 'A Bus Driver Removed Two Migrants from the Bus' (12 April 2013) <<http://www.tovima.gr/society/article/?aid=507428>> [Accessed 23 August 2015]

<sup>2182</sup> European network of Legal Experts in the Non-Discrimination Field: Prosecution of Golden Dawn Doctor (summary): <[http://www.equalitylaw.eu/index.php?option=com\\_edocman&task=document.viewdoc&id=1406&Itemid=295](http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=1406&Itemid=295)> [Accessed 23 February 2016]

## 5. The Far-Right Movement and Criminal Law

This section will consider how criminal law can be used for purposes of challenging the rhetoric and/or activities of the far-right. To this end, there will firstly be an analysis of the anti-racist legislation Law 927/1989 On Punishing Acts or Activities Aiming at Racial Discrimination as amended by Law 4285/2014, for purposes of harmonising the national system with Framework Decision 2008/913/JHA. Within this framework there will be an assessment of aggravation and sentencing, as provided for in the Criminal Code but amended by Law 4285/2014. Following this analysis there will be an assessment of the offence of leading or participating in a criminal organisation, as prohibited by Article 187 of the Criminal Code, which is the provision upon which the State is currently relying for purposes of dismantling Golden Dawn and prosecuting its members and leadership. After assessing the relevant provision on criminal organisations, the section will consider the anti-terror provisions available. This is significant with a view to ascertaining whether the anti-terror sphere can be relevant or useful for purposes of challenging the far-right and raising the issue that the State has chosen to steer away from anti-terror provisions in prosecuting Golden Dawn.

### 5.1 Law 927/1979 – Anti-Racist Legislation

Law 927/1979 is the central piece of legislation which seeks to combat racism as manifested through speech and activities. It was amended in 2014 through Law 4285/2014<sup>2183</sup> for purposes of harmonising national law with Framework Decision 2008/913 on combatting certain forms and expressions of racism and xenophobia by means of criminal law. The Greek legal system has had a piece of legislation tackling hateful speech and activities directed at racial and ethnic groups since 1979 and religious groups since 1984. This law was amended in 2014, with some of the amendments restricting the offences and creating higher thresholds.

Although the law is ‘on punishing acts or activities aiming at racial discrimination,’ following the 2014 amendments, it incorporated grounds such as disability as a protected characteristic and therefore, deals with a broader range of issues, falling outside the framework of racial discrimination. The report on the law’s evaluation stated that the law was rarely implemented

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<sup>2183</sup> Law amending Law 927/1979 and harmonisation with the Framework-Decision 2008/913/JHA of 28<sup>th</sup> November 2008 on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law

and deemed insufficient due to the serious challenges faced by the country in the particular temporal framework in which the amendments were being discussed. The report refers to issues such as the transition into a multicultural society and the equal protection of all persons regardless of characteristics such as physical or cultural ones. For these reasons, it was considered necessary to adopt a new and improved piece of legislation to tackle, in a more effective manner, manifestations of racist and xenophobic behaviour.<sup>2184</sup> The explanatory report refers to the risk of violating the freedom of expression when seeking to criminalise racist and xenophobic manifestations and referred to provisions that should be followed including, *inter alia*, Articles 10, 14 and 17 of the ECHR.<sup>2185</sup> The passing of the law came with ‘intense political controversy’<sup>2186</sup> with different political parties putting forth different draft laws before agreeing upon the final version. The law has been condemned before and after its passing, mainly due to concerns over free expression, with a particular focus on Article 12. For example, Greek academics, in a written statement signed by one hundred and thirty nine academics, expressed their reservation to Article 2 at the stage of its deliberation.<sup>2187</sup> In fact, during the deliberations on the bill, one of the arguments against its passing was that its provisions violate free speech, as reflected in the public deliberation on the law.<sup>2188</sup> The way in which the State tackles the issue of free expression within the realm of the law under consideration becomes clear in its report following the public deliberation at the time when the amending law was a bill. It was noted that the protection of free expression is of utmost importance and gave an example of the type of behaviour punishable under the new law, namely the incitement to violence of a mob armed with bats and chains looking for victims which do not conform with their racial, religious or cultural standards. However, this reflects the intention of the State to attach rather high thresholds to what is considered prohibited conduct under the law, underlining violence as a potential requirement. This goes against the supranational position adopted, for example, by the ECtHR.

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<sup>2184</sup> Explanatory Report for the Proposed Law on Combatting Racism and Xenophobia, para.4

<sup>2185</sup> Explanatory Report for the Proposed Law on Combatting Racism and Xenophobia, para.6

<sup>2186</sup> FRA, ‘Racism, Discrimination, Intolerance and Extremism: Learning from Experiences in Greece and Hungary’ (2013) 12

<sup>2187</sup> See for example statement made by academics: Greek Reporter: ‘Greek Academics against Anti-Racism Bill’ (3 September 2014) <<http://greece.greekreporter.com/2014/09/03/greek-academics-against-anti-racism-bill/#sthash.Ko5rxv0l.dpuf>> [Accessed 1 March 2016]

<sup>2188</sup> Public Deliberation on amendment to Law 927/1979:<<http://www.opengov.gr/ministryofjustice/?p=1012>> [Accessed 2 March 2016]

Law 927/1979 includes provisions on the criminalisation of, *inter alia*, hate speech, including the denial of international war crimes such as genocide. Article 1 deals with the public incitement to violence, hatred or discrimination against a person or group of persons due to their race, colour, religion, status, ethnic origin, sexual orientation, gender identity or disability if this poses a danger to public order or constitutes a threat to the life, liberty or physical integrity of the person or persons. Article 1 does not refer to the grounds of language and citizenship. This is not a requirement of the Framework Decision but had been recommended by ECRI.<sup>2189</sup> A person guilty of such an offence is punished with a prison sentence ranging from three months to three years and with a monetary fine of five thousand to twenty thousand euros. Part 2 of this article deals with damage to the property of persons on grounds of their protected characteristics insofar as this may cause harm to public order. A person found guilty under Article 1(2) receives the same punishment as that provided for in Article 1(1). If the incitement results in a criminal act, the punishment increases to imprisonment of at least six months and a monetary fine of fifteen to thirty thousand euros.<sup>2190</sup> This is below what is provided for in the Framework Decision which holds, in Article 3(2), therein, that the aforementioned conduct should be punishable by criminal penalties of a maximum of between one and three years' imprisonment. In sum, the above provisions punish hate speech insofar as it incites, *inter alia*, violence against a person or damage to property. However, there is no definition in the national law of, for example, what is to constitute hatred, nor any qualification made as to whether definitions offered in the Framework Decision are adopted. As well as the above, Article 1(f) criminalises hateful organisations. More particularly, this provision holds that whoever creates or participates in an organisation or league of persons in any form, which pursues the systematic perpetuation of criminal activities as described in parts 1 and 2 of the same article (harm against persons and harm against property insofar as, *inter alia*, public order is disrupted) is punished with imprisonment of three months to three years and with a monetary fine of between five and twenty thousand Euros, insofar that this is not punished more severely through another provision. Although the article on prohibited organisations incorporates the possibility of a higher punishment if one is available, the fact remains that the law gives the same punishment for an individual act which may incite hate as it does for an organised movement of persons who seek to incite hate, with the element of a group

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<sup>2189</sup> European Commission against Racism and Intolerance: Report on Greece (24 February 2015) para. 12

<sup>2190</sup> Article 1(3) Law 927/1979

denoting an organised movement, systematic activities and, potentially, more serious consequences. Nevertheless, Article 1(4) on prohibited organisations is a significant tool to combat organised and semi-organised far-right movements. Article 1(2) of the old law prohibited the establishment and participation in organisations which promote propaganda or actions pertaining to racial discrimination. With the 2014 amendments, the relevant provision extends the range of target groups which are to be protected from prohibited organisations, clarifies that an organisation can take any form and, as such, one could assume it could take the form of a political party. The new provision holds that prohibited organisations are ones which systematically carry out the activities of parts 1 and 2 of the Article, with all the restrictions and qualifications that come with them, thereby narrowing the scope of this Article in that sense. Even though the prohibition of organisations promoting racial discrimination existed in the old law, this was never used to dismantle Golden Dawn and, given that the 2014 amendments entered into force following the State's crackdown on the party which commenced in 2013, the utility of this provision in the face of Golden Dawn is non-existent. Article 2 of the law deals with publicly condoning, trivialising or maliciously denying the existence or severity of international crimes such as genocide. The construction of this article became the issue of the 2016 court case against German historian Heinz Richter mentioned above, regarding his writings on the Nazi invasion of Crete. The Court found that the new Article 2's provision that the crimes must have been recognised by, amongst other institutions, the Greek Parliament is unconstitutional. More particularly, it found that, by incorporating the provision that such crimes must have been recognised by the Greek Parliament (and not the Greek judiciary), the legislature has taken the role of the judiciary by ascertaining the legal existence of crimes. Moreover, the Court noted that the provision was purposely left out of the Framework Decision referring to the recognition of such crimes by decisions of international and/or national courts only. As such, the legislators exceeded the constitutional limits of the legislature, violated the constitutional principle of the legality of crimes and attempted to intervene unacceptably in judicial powers. Either way, the punishment for crimes that fall within this article are the same as those for Article 1 (1). Furthermore, Article 3 deals with jurisdiction when the forum used for communication is the internet and Article 4 provides for the responsibility of legal persons or a league of persons, two points which are new additions to the law following the 2014

amendments. Article 4 allows for the *ex officio* prosecution of crimes provided for in this law.<sup>2191</sup> This is not a new provision as prosecution for racist crimes (not general hate crimes on the grounds provided for in the amended law) could be prosecuted *ex officio* since 2005.<sup>2192</sup> However, as noted by the Ombudsperson, the power of *ex officio* prosecution has not been exercised by authorities.<sup>2193</sup> What is conspicuously missing from this law is the provision on aiding and abetting the crimes described in Articles 1 and 2, as so required by the Framework Decision. Instead there are some general provisions in the Penal Code that could be relied on for such purposes. In light of the above, the 2014 amendments have brought both positive and negative aspects to the current anti-racist legal framework of the country. In some respects it offers more restrictive tools to the State to challenge the far-right as is the case, for example, with the necessity for there to be an issue of public order attached to expression which incites, *inter alia*, violence as it includes a wider array of protected characteristics, even though such characteristics would not habitually have been foreseen to fall within an anti-racist framework.

Since its inception in 1979, this law has seldom been relied upon to combat the offences found therein,<sup>2194</sup> with biased conduct rarely being acknowledged as such by the police and/or the Courts. In fact in 2012, the Minister of Justice recognised that ‘few prosecutions for crimes regulated by Law 927/1979 have been initiated in recent years.’<sup>2195</sup> This is particularly the case regarding the law as it stood before the 2014 amendments with the post-amendment period being too short to conclude upon its application, although some positive steps can be discerned, as discussed in section 5.1. However, assessing the implementation of the anti-racist law is a complex task given the lack of relevant statistics and the absence of a central hate crime database.<sup>2196</sup> Around sixty law suits have been filed under the anti-racist law and almost all of these have come from the Greek Helsinki monitor but very few have resulted in a conviction. The law was relied upon again in the 2010 case against Constantinos Plevris, founder of the

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<sup>2191</sup> Ex officio prosecution existed since 2001 and Article 39(4) of Law 2910/2001 on ‘The Entry and Stay of Aliens in Greece. Acquisition of Greek Citizenship through Naturalisation and other Provisions’

<sup>2192</sup> Law 3386/2005 on ‘The Entry, Stay and Social Integration of Third Country Nationals in Greece’ Article 71(4)

<sup>2193</sup> Ombudsperson: Special Report: The Phenomenon of Racist Violence in Greece and How it Can be Tackled’ (Το Φαινόμενο της Ρατσιστικής Βίας στην Ελλάδα και η Αντιμετώπισή του’) (September 2013)

<sup>2194</sup> CERD Concluding Observations: Greece (14 September 2009) CERD/C/GRC/CO/16-19, 31, Fundamental Rights Agency, ‘Racism, Discrimination, Intolerance and Extremism: Learning from Experiences in Greece and Hungary’ (2013) 11

<sup>2195</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6,7

<sup>2196</sup> European Commission against Racism and Intolerance: Report on Greece (24 February 2015) para. 34

party 4<sup>th</sup> August and *Front Line* and member of *LAOS* and the newspaper '*Eleftheros Kosmos*' for Plevris' book '*Jews – The Whole Truth.*' (*Εβραίοι – 'Όλη η Αλήθεια*'). Notwithstanding that Plevris had been prosecuted *ex officio* and was convicted at first instance on the basis of Law 927/1979, receiving a fourteen month suspended prison sentence, he was subsequently acquitted by the Athens Appeal Court in 2009.<sup>2197</sup> A motion for cassation was dismissed.<sup>2198</sup> The Athens Appeal Court held that the writings were not directed at Jews 'solely because of their racial and ethnic origin; but mainly because of their aspirations to world power, the methods they use to achieve these aims and their conspiracy activities.'<sup>2199</sup> This is notwithstanding the fact that the book included extracts such as:

Adolf Hitler: The tragic leader of the German Third Reich is certainly the most impressive leadership figure of the modern age... Human history will blame Adolf Hitler for the following: 1. He could have rid Europe of the Jews, but did not; 2. He did not use the special chemical weapons, which only Germany possessed, to gain a victory... Because of the defeat of Germany then, the White Race and Europe are at risk now... The day will come when Europeans will either dominate or be destroyed. Either way they will acknowledge that Hitler was right...<sup>2200</sup>

Such an extract, the few of many equivalent extracts, demonstrates the weakness in the Supreme Court's argument that the book was not directed to Jews because of their racial and ethnic origin. The Supreme Court dismissed the appeal for cassation in the interests of law, placing great importance on free speech.<sup>2201</sup> The Council of Europe Commissioner for Human Rights noted that the judiciary did 'not manage to effectively apply Law 927/1979'<sup>2202</sup> in this case.

However, there are other examples, one of which is ongoing, which demonstrates the use of this law to combat the rhetoric of Golden Dawn. More particularly, in *Case 65738/2014*,<sup>2203</sup> the

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<sup>2197</sup> Case 913/2009

<sup>2198</sup> Case 3/2010

<sup>2199</sup> Case 913/2009: 'Ο κατηγορούμενος δεν στρέφεται κατά των Εβραίων, μόνο λόγω της φυλετικής και εθνικής καταγωγής τους αλλά κυρίως λόγω των επιδιώξεών τους για παγκόσμια κυριαρχία, των μεθόδων που χρησιμοποιούν για την ευόδωση αυτών και τη συνωμοτική τους δράση.'

<sup>2200</sup> Konstantinos Plevris '*Jews – The Whole Truth*' (*Εβραίοι – Όλοι η Αλήθεια*) (eds. 2006 electron) 881

<sup>2201</sup> Case 3/2010

<sup>2202</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6,8

<sup>2203</sup> Case 65738/2014

Court found a member and parliamentary candidate of Golden Dawn guilty of inciting racial violence against migrants in the area of Agios Panteleimonas in front of a camera. He said that ‘we are ready to open the ovens... To make soaps. Not for the people...since we may fall ill...we will take their hair and will sell it at Monastiraki.’ These were some of the phrases he used to talk about migrants in the area. The Court recognised that these statements were exaggerations but held that they demonstrated his conviction publicly to provoke people to cause harm to immigrants. His racist motive was recognised and he was sentenced to one year of imprisonment under the anti-racist law. Further, on the 16<sup>th</sup> February 2016, the Supreme Court requested Parliament to lift the immunity of three MPs of Golden Dawn so that they can be charged under the anti-racist law in relation to leaflets they disseminated which included phrases such as ‘Illegal Immigrants Out’ and ‘Greece belongs to Greece.’ Also in its newspaper and in other sources, it referred to an assembly it carried out entitled ‘a protest against illegal immigrants. No to racism against Greeks.’ It must be noted that these particular statements of Golden Dawn are much lower on the hierarchy of hate when taking into account the rhetoric and activities of this group that have been evident over the past years, as discussed in this chapter. However, no efforts were effectively made to tackle these through the anti-racist legislation. In fact, it is debatable whether the 2016 case and the statements of the party do, in fact, fall within the realm of Article 1 of the law. Either way this case potentially demonstrates a shift in the State’s approach.

Thus, although there has been a legislative framework that could have been used against acts of the far-right since 1979, this has rarely been used to tackle far-right hate, with the Council of Europe Commissioner of Human Rights noting ‘the serious gap in training and awareness concerning anti-racism legislation and practice for police, prosecutors and judges.’<sup>2204</sup> The investigation of bias at the stage in which a complaint is filed is of utmost importance since time and again it has been noted that bias motivation is not recorded by the police, even if they are confronted with a hate crime victim.<sup>2205</sup> In relation to this, the Police Circular 7100/4/3 of 2006 is a useful tool for the adequate and effective investigation of such bias. The circular requires that the police investigate the motivation of a crime, collect relevant information and report hate

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<sup>2204</sup>Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6,9

<sup>2205</sup>Fundamental Rights Agency, ‘Racism, Discrimination, Intolerance and Extremism: Learning from Experiences in Greece and Hungary’ (2013) 11



crime incidents and record, amongst others, the racial, ethnic and religious groups of the victim where relevant. However, this Circular was not accompanied by training and other methods to ensure its implementation and, as noted by the Ombudsperson, it has remained unused.<sup>2206</sup> So, as is the case with the anti-racist legislation, significant tools available to the State to challenge the far-right have remained unused.<sup>2207</sup> In addition to the limitations that emanate from lack of awareness and expertise lies the lack of trust in law enforcement agencies, particularly amongst victims of hate crime which is a result of the incidents of ill treatment of migrants and Roma especially by law enforcement officials and, at the same time, the lack of adequate investigations into hate crime.<sup>2208</sup> The lack of trust in the police also emanates from the ‘persistent and continuing allegations, some of which were officially investigated, of collusion between police officers and Golden Dawn.’<sup>2209</sup> The link between the police and Golden Dawn is a serious issue that also arose during the onset of the party’s trial. In addition, there have been several reports of the police requesting alleged victims of hate crimes to pay the amount of one hundred Euros for purposes of lodging their complaint. This practice went against the law given that Article 46 of the Code of Criminal Procedure requests that such a fee is to be paid for cases which are not prosecuted *ex officio*. Article 5 of the 2014 amending law incorporated a provision which directly excluded the payment of such fees for filing a hate crime complaint. Furthermore, up until 2014, national law placed undocumented migrants who were victims of hate crime at risk of detention and deportation. As a result, such migrants were reluctant to report the crime to the police or even to visit public health care services.<sup>2210</sup> However, Ministerial Decision 30651 of 2014 allows for the issuance of a residence permit on humanitarian grounds to migrants who are victims of or key witnesses to hate crime and are valid until the case is closed or the final court judgement is passed.<sup>2211</sup> For a permit to be issued, criminal proceedings must have been initiated. Although this is a positive step which develops the law in a manner in which it can provide

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<sup>2206</sup>Ombudsperson: Special Report: The Phenomenon of Racist Violence in Greece and How it Can be Tackled’ (Το Φαινόμενο της Ρατσιστικής Βίας στην Ελλάδα και η Αντιμετώπισή του’) (September 2013) 44

<sup>2207</sup>Fundamental Rights Agency, ‘Racism, Discrimination, Intolerance and Extremism: Learning from Experiences in Greece and Hungary’ (2013) 12

<sup>2208</sup>Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6 11

<sup>2209</sup>European Commission against Racism and Intolerance: Report on Greece (24 February 2015) para. 58, European Network of Legal Experts in the Non-Discrimination Field, Athanasios Theodoridis, ‘Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report 2013 – State of affairs up to 1<sup>st</sup> January 2014’ 133

<sup>2210</sup>Human Rights First ‘We’re not Nazis, but...The Rise of Hate Parties in Hungary and Greece and Why America should Care (August 2014) 97

<sup>2211</sup>Ministerial Decision 30651 (5 June 2014)

enhanced protection to victims of hate crime and subsequently challenge the far-right, as argued by ECRI, it would have been more effective for there to be an ‘automatic suspension of the deportation orders rather than leaving it to ministerial discretion.’<sup>2212</sup> The victim of the attempted homicide in Pireaus by members of Golden Dawn (the Egyptian fishermen case), was the first person to receive a humanitarian permit under this provision.<sup>2213</sup>

In light of the above, Greece has had anti-racist legislation since 1979 which renders criminally punishable rhetoric and activities which fall within the sphere of the far-right. This piece of legislation has undergone certain amendments since that time, bringing changes such as the incorporation of a religion protected characteristic and in 2014 underwent major changes for purposes of harmonising national law with the Council Framework Decision 2008/913/JHA. These amendments brought about several changes to the current law, broadening its scope in some respects, such as by incorporating a larger number of protected characteristics but also limiting it as is manifested in the necessary interrelation between hateful speech and public disorder. In addition, Greece recognised the need to crack down on hate crime, albeit not directly recognising the correlation between such crimes and Golden Dawn. Such recognition is manifested in, for example, the 2006 Police Circular on bias motivation and in the establishment of regional departments in Athens and Thessaloniki and special units to tackle racist violence who have the duty to conduct investigations into racist crime, carry out an *ex officio* investigation and receive complaints in person or through a hotline.<sup>2214</sup> However, there ‘is little evidence so far of their effectiveness.’<sup>2215</sup> Moreover, the anti-racist legislation remains essentially used with some sporadic reliance on the law whilst other measures, such as the anti-racist units and the Police Circular on bias motivation, have not brought about a significant change or results. Moreover, there are real and practical obstacles, such as the link between the police and Golden Dawn, especially and more evidently before the latter’s trial, which prevented victims from filing complaints. Following the assessment of the anti-racist law which, *inter alia*, prohibits certain types of rhetoric and actions against particular groups as well as the establishment and participation of groups which seek to incite certain actions through their rhetoric, it is now

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<sup>2212</sup> European Commission against Racism and Intolerance: Report on Greece (24 February 2015) para. 84

<sup>2213</sup> Civil Action (Case files ABM Φ2013/3990, ABM Φ2012/979 and 979A) 15

<sup>2214</sup> Fundamental Rights Agency, ‘Racism, Discrimination, Intolerance and Extremism: learning from experiences in Greece and Hungary’ (2013) 14

<sup>2215</sup> European Commission against Racism and Intolerance: Report on Greece (24 February 2015) para. 77

necessary to consider further provisions of Greek criminal law that can be used to challenge the far-right, namely those pertaining to aggravation and sentencing.

## 5.2 Aggravating, Sentencing and Hate Crimes

Since 2008, the aggravating circumstance of a crime has been incorporated into Article 79 (3) of the criminal law which provided (since 2008)<sup>2216</sup> that carrying out an act of ethnic, racial, religious hatred or hatred based on the victim's status constitutes an aggravating circumstance. Since 2013,<sup>2217</sup> the grounds of aggravation were extended to cover the colour, sexual orientation and gender identity of the victim. In addition it provided that a sentence in such a situation cannot be suspended. Article 79 provided courts with the opportunity to take into consideration the aforementioned circumstances at the time of sentencing. This provision acknowledged the particular weight of such a circumstance and allowed courts to take it into account so as to hand down the maximum sentence possible without the possibility of its suspension. However, it did not provide the Court with the opportunity to give a higher sentence than it could hand down for the equivalent crime which had no bias motive. The non-use of this provision can be demonstrated in some cases. A case<sup>2218</sup> that demonstrates this point occurred in 2014 when a member of Golden Dawn participated in the fascist attack of a hit squad against a hair salon run by a Pakistani immigrant. He, along with eight others entered the salon and attacked the two Pakistani employees and one Greek client. They then exited the salon and threw a self-made Molotov bomb into the property. This case did not result in the investigation of racist motives by the police. It must be noted that similar attacks continued to occur over the following weeks in the same area. The case involves Kontomos, who acted along with eight other people. He was sentenced to fourteen years and three months imprisonment as an accomplice in an attempted homicide, dangerous bodily harm, robbery and possession of explosives. However, as with the police, the court did not use the provision of aggravation due to a racist motive, as contained in Article 79(3) applicable at the material time.<sup>2219</sup> Further, in 2012, the Magistrates Court only

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<sup>2216</sup>Article 23.1 of Law 3719/2008 'Amendments for the Family, the Child, the Society and other Provisions' provides that the commission of an offence motivated by ethnic, racial or religious hatred or hatred on account of a different sexual orientation constitutes an aggravating circumstance.

<sup>2217</sup>Article 66 of Law 4139/2013 on Addictive Substances and other Provisions

<sup>2218</sup>There exist several other cases in which the violent actions of Golden Dawn have been prosecuted by the Courts without the recognition of the racist motives have been made see: < <http://www.efsyn.gr/arthro/oi-katadikes-tis-hrysis-aygis>>

<sup>2219</sup>Case 114/2014

imposed a suspended sentence of eight months and a pecuniary fine of two-hundred Euros on a Golden Dawn member who had violently attacked a member of the Muslim minority in Thrace.<sup>2220</sup> However, there are some exceptions to the non-use of the legal framework but also to the habitual inaction of the authorities. In the 2014 case of Sachzat Lukman, a migrant from Pakistan, who was stabbed to death by two members of Golden Dawn when he was on his bicycle going to work, authorities found Golden Dawn material and weapons at the perpetrators' houses. The Court recognised Article 79(3) and the 'racist fury' of the perpetrators and found them guilty of, amongst other, homicide with intent, illegal possession carrying and use of weapons. The Court did not recognise any mitigating factors and handed down the highest sentences possible, more particularly life sentences for both for the intentional homicide plus thirty-two months for the other offences.<sup>2221</sup> Although the Court placed the sentencing of the perpetrators within the framework of a racist motive, in their words, racist fury, an interesting point to make was their reference to Golden Dawn. More particularly, the Court held that their membership of this party was not relevant to criminal responsibility. This is a weak point of the judgement and reflective of the general stance of the judiciary towards Golden Dawn's actions, since they were not willing to recognise the link between the perpetration of criminal acts and Golden Dawn as a violent entity. Following Lukman's murder, Amnesty International announced that this crime was not an isolated incident and that urgent measures need to be taken.<sup>2222</sup> This case has been included in the case-file against Golden Dawn as presented to the Supreme Court.<sup>2223</sup> In *case 1079/2014*, the Court found four members of Golden Dawn guilty of attacking Pakistani immigrants working at an olive factory. According to the decision they 'acted with xenophobic and racist feelings.'<sup>2224</sup> In *case 60084/2013*,<sup>2225</sup> two members of Golden Dawn had been found guilty of the arson of a bar owned by a Cameroonian national. The Court found that their actions were 'prompted by hate due to the racial and ethnic origin of the civil plaintiff'

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<sup>2220</sup>Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6 18

<sup>2221</sup> Case 398/2014

<sup>2222</sup> Amnesty International Press Release: The Recognition of Racist Motive in the case of Sachzat Lukman' (Η αναγνώριση του ρατσιστικού κινήτρου στην υπόθεση Σαχζατ Λουκμάν) (2013): < <https://www.amnesty.gr/news/press/article/15963/i-anagnorisi-toy-ratsistikoy-kinitroy-stin-ypothesi-toy-sahzat-loykman>> [Accessed 25 February 2016] (2015)

<sup>2223</sup> *Attorneys of the Civil Action: Memo of the Civil Action of the Anti-Fascist Movement for the Trial of Golden Dawn* (Υπόμνημα της Πολιτικής Αγωγής του Αντιφασιστικού Κινήματος για τη Δίκη της Χρυσής Αυγής) (eds. Marxist Bookshop 2015) 137

<sup>2224</sup> Case 398/2014

<sup>2225</sup> Case 60084/2013

and sentenced them to forty-one months' imprisonment. However, notwithstanding some positive steps and use of the aggravation provision, the fact remains that Article 79(3) has rarely been used.<sup>2226</sup>

Part 3 of Article 79 was replaced by Article 10 of Law 4285/2014 which brought about further changes to the Criminal Code in relation to hate crimes. More particularly, Article 10 incorporates Article 81A, an article entitled 'racist crime' and provides that:

If the act is carried out of hate due to the victim's race, colour, religion, descent, ethnic origin, sexual orientation, gender identity or disability, sentencing increases as follows:

- a) in the event of a misdemeanour, for which the foreseen sentence is between ten days and one year' imprisonment, the lowest sentence is increased by six months and by one year in the rest of the cases of a misdemeanour.
- b) in the event of a felony, for which the foreseen sentence is between five and ten years' imprisonment, the lowest sentence is increased by two years and by three years for the rest of the cases of a felony; and
- c) fines are doubled

The lowest sentence is not suspendable

Thus, although this article is entitled 'Racist Crimes,' it is actually a provision on hate crime. As such, this article is significant as it embeds hate crime as a provision in itself within the Greek Criminal Code and not simply within the ambit of aggravating circumstances and sentencing, as previously set out. Also, this provision provides for higher sentences for hate crimes as opposed to the old law which simply enabled the courts to provide the highest sentence possible without suspension. Further, Article 10 amends Article 61 of the Criminal Code, incorporating the situation described in Article 81A above as a reason for depriving the perpetrator of his/her civil rights for one to five years. On the one hand this is a positive amendment, on the other however, the issue of hate crime continues directly to link the issue of hatred to sentencing and does not set out, for example, the consideration of a racist backdrop of a crime to be considered throughout judicial proceedings. No amendments were made, for example, to the Code of Criminal

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<sup>2226</sup> European Commission against Racism and Intolerance: Report on Greece (24 February 2015) para. 60

Procedure in relation to, for example, the consideration of a racist backdrop of a crime at the investigation stage. Although the 2006 Police Circular exists on the consideration of hateful motivations, as discussed in section 5.1, an amendment to the aforementioned codes and an adoption of the approach that the elements of a hate crime are to be considered throughout the entire procedure and not just in relation to sentencing would have ensured a more effective legal framework in relation to such crimes. Moreover, time will tell if Courts decide systematically and effectively to use the 2014 amendments in relation to hate crime sentencing. As noted by ECRI, authorities must closely monitor the way in which Article 81A will be used by the Courts and whether it will overcome the problems caused by Article 79(3)<sup>2227</sup>

### 5.3 Advances, Amendments and Alterations in the Sphere of Criminal Law

The Greek legal order has undergone several developments over the past few years such as the 2014 amendments which included, amongst others, an enhanced recognition of hate crimes. It has also undergone other significant amendments which should, theoretically, facilitate the access to justice of victims of hate crime. For example, since 2001 and with Law 2910/2001, crimes incorporated in the anti-racist law can be prosecuted *ex officio*, even though, as reflected in the examination of available jurisprudence, this is not relied on by authorities. Further, a Special Prosecutor<sup>2228</sup> has been appointed for the investigation of racist crimes in the region of Athens. Before the establishment of this body, legal practitioners had indicated to the Council of Europe Commissioner for Human Rights that such a development would allow for the consideration of a racist motive from the onset of proceedings, rather than merely considering such a motive at the end of the trial in terms of sentencing.<sup>2229</sup> However, this post only exists for the region of Athens with the Council of Europe Commissioner for Human Rights recommending its extension into other areas to ensure adequate and geographical fairness in relation to the effective implementation of the anti-racist law,<sup>2230</sup> insofar as the Special Prosecutor can bring about such results. Further, Presidential Decree 132.2012 established several departments and bureaus for combatting violence based on racial, ethnic or religious hatred. More particularly, two anti-racist departments were established, one in the region of

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<sup>2227</sup> European Commission against Racism and Intolerance: Report on Greece (24 February 2015) para. 14

<sup>2228</sup> Ministry of Justice - General Secretariat of Transparency and Human Rights - Human Rights – National Action Plan (Δικαιώματα του Ανθρώπου – Εθνικό Σχέδιο Δράσης) 2014-2016 (2014)

<sup>2229</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6, 65

<sup>2230</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6, 1

Attiki and one in Thessaloniki whilst sixty-eight bureaus were established in different police departments throughout the country.<sup>2231</sup> They can carry out investigations into racist attacks, carry out an *ex officio* investigation and receive complaints through a hotline.<sup>2232</sup> Although this is a positive development on a theoretical level, in 2015, ECRI noted that there was little evidence of their effective functioning.<sup>2233</sup> In addition, the barriers to reporting a hate crime have been partly tackled through Article 44(1) of Law 3386/2004 as amended. This article allows the Ministry of Interior to grant a residence permit on humanitarian grounds to migrants (third country nationals) who are victims of crimes provided for in Articles 1 and 2 of Law 927/1979 and Article 16.1 of Law 3304/2005<sup>2234</sup> in the event that a criminal prosecution has commenced and up until the moment that a final judgement has been delivered.<sup>2235</sup>

As such, within the realm of anti-racist legislation, it can be said that Greece, albeit with certain limitations, has an adequate framework of criminal law that should be relied upon to tackle the activities and rhetoric of the far-right. It cannot be doubted that over the past few years this country has taken significant steps in improving this particular aspect of its legal order, incorporating the 2008 EU Framework Decision, albeit restrictively in some areas, establishing a Special Prosecutor for racist crimes and seeking to overcome certain reporting obstacles by allowing for the granting of residence permits on humanitarian grounds for victims of hate crime. However, as noted by the ICERD Committee in its latest Concluding Observations, and as continues to be the case today, notwithstanding some positive changes brought about following the crackdown on Golden Dawn, such as the fall in hate crime and increased recognition of bias in some court cases, this country is ‘not effectively implementing legal provisions aimed at eliminating racial discrimination and in particular those relating to the prosecution and punishment of racially motivated crimes.’<sup>2236</sup> The Council of Europe Commissioner for Human Rights shares this view, arguing that there is an ‘ineffective application or non-application of the

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<sup>2231</sup> Ombudsperson: Special Report: The Phenomenon of Racist Violence in Greece and How it Can be Tackled’ (Το Φαινόμενο της Ρατσιστικής Βίας στην Ελλάδα και η Αντιμετώπισή του’) (September 2013) 29

<sup>2232</sup> European Commission against Racism and Intolerance: Report on Greece (24 February 2015) para. 77

<sup>2233</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6, 81

<sup>2234</sup> It sets out criminal penalties for offences provided for in this law

<sup>2235</sup> Provided that the person is not a risk to public order and safety. In case such persons are under medical treatment, the residence permit is granted until the termination of the treatment.

<sup>2236</sup> CERD Concluding Observations: Greece CERD/C/GRC/CO/16-19 (14 September 2009) 2

existing anti-racism legislation<sup>2237</sup> and refers to the lack of training of competent authorities as the key reason for this reality.<sup>2238</sup> In addition to the lapses between theory and practice when it comes to Greek legislation and the non-application of the law when it comes to challenging the far-right, there is one more issue that is of a more general nature that also comes into play when considering the efficacy of the current legal framework for purposes of tackling the far-right. That is the issue of access to justice. The first element of this is the fact that Greece has slow judicial proceedings. A fact that illustrates this point is that out of the six hundred and sixty two judgements delivered against Greece by the ECtHR up until the end of 2012, over half, and particularly four hundred and thirty eight, concerned the excessive length of judicial proceedings.<sup>2239</sup> The second element relates to the issue of legal aid as regulated by Law 3226/2002, which provides legal aid, to migrants and also certain groups such as victims of trafficking. However, this does not extend to victims of hate crime. For purposes of ensuring that such victims are considered on an equal footing in the national legal system, this point should be rectified. As such, along with the particular issues above which prevent the effective legal challenging of the far-right, its actors and elements, the issue of effectively accessing justice is of utmost importance as only with an improvement in this situation will victims of the far-right be able to find justice through the prosecution of the perpetrators.

#### 5.4. Criminal Organisation – Prohibition of Establishment, Leadership and Participation

Article 187 of the Criminal Code on criminal organisations is particularly significant for this dissertation given that it is the provision through which the State is attempting to tackle and potentially dismantle Golden Dawn and punish its leadership and members. Article 187(1) of the Criminal Code punishes with imprisonment of up to ten years whosoever establishes or becomes a member of a criminal organisation. Whoever leads such an organisation receives a prison sentence of at least ten years.<sup>2240</sup> The article holds that a criminal organisation is an entity which includes three or more members that aims at committing an array of offences including, *inter alia*, homicide with intent, grievous bodily harm, arson and kidnapping.<sup>2241</sup> The establishment of a criminal organisation is the provision of guidance and help with the steps necessary for the

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<sup>2237</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6, 69

<sup>2238</sup> Council of Europe Commissioner for Human Rights – Report on Greece, CommDH(2013)6, 69

<sup>2239</sup> European Court of Human Rights See Annual Report 2011, p. 160 and Annual Report 2012, p. 152

<sup>2240</sup> Article 187(3) Criminal Code

<sup>2241</sup> Article 187 Criminal Code



recruitment of members for the creation of the organisation.<sup>2242</sup> In relation to the establishment of a criminal organisation which comes with a lower sentence than running such an organisation, the Prosecutor's Recommendation refers to it as a 'momentary crime.'<sup>2243</sup> Throughout the trial documents, Michaloliakos is referred to as the founder and leader of Golden Dawn. Yet in the Prosecutor's Recommendation, in relation to Michaloliakos, no reference is made to the aspect of establishing a criminal organisation but rather his participation and leadership of a criminal organisation. The type, details or object of such crimes do not have to be pre-determined, all that is necessary is that pursuing the perpetration of such crimes is directly linked to the establishment or functioning of such a group, even if it is not required that the perpetration of such a crime reflects the will of all those who established and participate in the organisation and is not necessarily known by all members.<sup>2244</sup> In brief, there are three elements necessary for the existence of a criminal organisation under the Criminal Code. Firstly, a qualitative element in that the group must be structured, a quantitative element in that the group must be made up of three or more persons and a temporal element, in that there is requirement for ongoing action.<sup>2245</sup> The trial documents hold that the prohibitions arising from Article 187 occur for purposes of protecting public order and personal freedoms.<sup>2246</sup> Moreover, the organisation must have an objective, common to the members/leaders. This can be financial, ideological or anything else.<sup>2247</sup> Further, the Prosecutor's Recommendation noted that criminal organisations are extremely

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<sup>2242</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305 (19 February 2014) 8

<sup>2243</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305( 19 February 2014) 13

<sup>2244</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305( 19 February 2014) 19

<sup>2245</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305(19 February 2014) 7

<sup>2246</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305 (19 February 2014), 11, 26 & Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305 (19 February 2014) 8

<sup>2247</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305(19 February 2014) 10 prosecutor 11

dangerous due to their particular dynamic but also their internal objective of committing particularly serious crimes.<sup>2248</sup>

A most significant issue is the determination of who is to be considered a member of a criminal organisation since a conceptualisation of this term is important so as to understand under the criminal responsibility of Golden Dawn members. This point is elucidated in documents from the party's trial, namely the pre-trial report and the Prosecutor's Recommendation. They hold that a member of the organisation is anyone who subordinates his or her will to the will of the organisation, without his or her personal involvement in the operations of the organisation being necessary. His or her participation in the organisation is manifested by the participation in military training activities, festivities and talks, the commission of punishable acts, the propaganda of the organisation, funding of its activities, attracting new members to the organisation or any other forms of support. It is of no relevance if the decisions are taken by the majority of members or, due to the embedded principle of obedience, if they are taken by the leader, as long as any decision is considered the decision of the organisation. Mere support of the organisation's objectives extraneously does not make him or her a member. In a criminal organisation, the desire of the group for the implementation of its objectives binds all members, regardless of their involvement in the design of the criminal acts, as long as each member is aware that he or she is contributing to the implementation of the organisation's objectives through the duties granted to him/her.<sup>2249</sup> For the above to be applicable, the element of malice is required with the members/leaders of the groups wanting to be part of the membership/management of the group. Such malice is demonstrated in the participation in all types of activities and particularly having knowledge of events in which force was used and crimes were committed, the acceptance of these as desirable objectives and non-repudiation of such acts and non-departure from the group.<sup>2250</sup> As such, the definition of 'member' in the realm of a criminal organisation seems to denote that criminal responsibility extends to the active

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<sup>2248</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305(19 February 2014) 11

<sup>2249</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305 (19 February 2014) 9

<sup>2250</sup> Special Investigation Department: Athens Court of Appeal: Report to the President of the Greek Parliament regarding lifting the immunity of Golden Dawn Members of Parliament, Document Number 305 (19 February 2014) 10

members of the party even if that member does not take part in the commission of a particular crime, but, as is reasonable, does not extend to those who merely support the objectives of the party (and may even vote for this party).

It must be noted that the Criminal Organisation provision was used to imprison members of the Revolutionary Organisation 17<sup>th</sup> November in 2003. This organisation was a violent far-left organisation which carried out its crimes for twenty-seven years as an untraceable ghost organisation, carrying out over ninety attacks against Greek, American and European targets such as government officials. The important difference was that during the trial of 17<sup>th</sup> November, which ended on the 17<sup>th</sup> December 2003,<sup>2251</sup> the provision on terrorist organisations was not part of the Criminal Code since Article 187B became part of the Greek Criminal Code in 2005 following amendments brought about by Law 3251/2004<sup>2252</sup> adopted in July 2004. Unlike Golden Dawn, this organisation was habitually referred to as a terrorist organisation by competent authorities,<sup>2253</sup> the media<sup>2254</sup> and the public, something which is not the case with Golden Dawn. One will never know whether the anti-terror provision of the Criminal Code would have been used for 17<sup>th</sup> November had it existed at the time of its trial.

It must be noted that, in connection with the absolutist approach adopted by the Greek legal order towards political parties and their non-prohibition, such an approach is not applicable when confronted with a criminal organisation. The guise of a political party cannot stand in the way of prosecuting the leadership and members of a criminal organisation, just because this entity is registered as a political party.<sup>2255</sup>

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<sup>2251</sup> Appeals for sentences took place in 2005 – 2007

<sup>2252</sup> Law on European arrest warrants and amendment of Law 298/2001 on criminal organisations and other provisions.

<sup>2253</sup> See, for example, Police Press Release regarding 17<sup>th</sup> November (22 May 2003): <[http://www.astinomia.gr/index.php?option=ozo\\_content&perform=view&id=1317&Itemid=171&lang=](http://www.astinomia.gr/index.php?option=ozo_content&perform=view&id=1317&Itemid=171&lang=)>

<sup>2254</sup> See online articles such as: <<http://www.newsbeast.gr/society/arthro/386344/ti-kanoun-simera-oi-protagonistes-tis-17-noemvri>> and <<http://www.newsbomb.gr/tags/tag/31957/17-noemvrh>>

<sup>2255</sup> Lambros Margaritis & Konstantinos Hadjioannou ‘Criminal Organisations and Political Parties’ (‘Εγκληματικές Οργανώσεις και Πολιτικά Κόμματα’) 2 *Criminal Justice* (2014) 178

### 5.5. Terrorist Organisations: Core Difference

In relation to a terrorist organisation, it must be noted that right-wing extremism has not been considered within this framework by the State as is the case with England and Wales. Either way, Article 187B of the Criminal Code holds that ‘a terrorist act is the commission of a criminal activity including, *inter alia*, homicide with intent, grievous bodily harm, arson or kidnapping in a manner or to an extent or under circumstances which may seriously harm a country or an international organisation and has the aim seriously to intimidate a population or illegally force a public authority or international organisation to carry out any act or omit to do so or to seriously harm or ruin the fundamental constitutional, political or financial infrastructure of a country or of an international organisation. No definition in any legislative, jurisprudential or policy document exists regarding issues of threshold in relation to the above definition, such as what the severity of harm may be and what could constitute an intimidating circumstance for a population. This could potentially retract from the clarity of the definition and does not facilitate its suitable use. In brief, the difference between a criminal organisation and a terrorist organisation is that the latter seeks to carry out the criminal acts noted in the relevant section with the aim of achieving results such as population intimidation or serious harm to a country’s infrastructure. On the other hand, a criminal organisation is lower on the hierarchy of harm given that it is simply termed as such as it entails three or more persons who conduct criminal activities with no overarching objective to cause collective harm as is the case with a terrorist organisation. This is notwithstanding the fact that the trial documents recognised the damage caused by Golden Dawn to, amongst others, the rule of law and the rights of others.

It could be argued, that by relying on Article 187 of the Criminal Code rather than Article 187B, the authorities did not consider the activities of Golden Dawn to meet the threshold of seriously intimidating a population and/or seriously harming or ruining the fundamental constitutional or political infrastructure<sup>2256</sup> of Greece regardless of its rain of terror on the streets of Greece (predominantly Athens) and even though the trial documents recognise that the group’s activities were destructive to, amongst others, the rule of law.

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<sup>2256</sup> The financial infrastructure requirement is not deemed directly applicable to Golden Dawn’s actions

## 6. Constitutional Law: Treatment of Political Parties by National Law

### 6.1.1 Registration of Political Parties

Given that this dissertation is examining the far-right movement in Greece as manifested in the form of, *inter alia*, political parties, the following section will provide an overview of the laws and regulations that exist in Greece for the registration and functioning of political parties and groups in the electoral process. Understanding the laws, regulations and systems that affect political parties is significant for purposes of conceptualising the effects they may have on the development of far-right parties.

Article 29 of Law 3023/2002 deals with the establishment, legal personality and emblem of a political party. Part 1, therein, holds that, before a political party commences its activities, it files a founding statement at the Supreme Court in which it refers to the fact that the organisation and its activities serve the free functioning of a democratic State. Part 2, therein, holds that the party must inform the Supreme Court of its name, emblem and seat and submit, thereto, the party's constitution or the founding statement signed by at least two hundred citizens who hold the right to vote. Part 3 of the same article provides that the use of symbols, referred to in Article 37(5) of Presidential Decree 55/1999 as names and symbols of a political party, are forbidden. Relevant to this dissertation is that this law prohibited the use of names, symbols or emblems the symbols of the Junta or photographs of persons involved with the regime. Examples of the prohibition of a name can be found in a 2012 case before the Court of Cassation regarding a political party entitled *Tyrannicides* (*Τυραννοκτόνοι*) that was prohibited from taking part in the May 2012 elections given that the Court considered that this name demonstrated the intention to 'commit a criminal act'<sup>2257</sup> and that this went against Article 29 (1) of the constitution and Article 37(5) of the relevant presidential decree. However, all the party had to do was change its name so as to be able to take part in the elections. Thus, this approach demonstrates a certain level of superficiality in the judiciary's approach to potentially dangerous political parties as it merely requested a change of name, making no inquest and assessment and taking no measures in relation to the party's objectives. In 2007, the Supreme Court had decided that the name '*New Fascism*' (*Νέος Φασισμός*), to which the candidate affiliated himself, was not allowed and that he would have to put forward his candidature without any affiliation to such a title as such a title

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<sup>2257</sup> Case 4/2012: 'καταδεικνύει πρόθεση αξιόποινης πράξης.'

goes against Article 37(5) of the Presidential Decree 96/5.6.2007 in combination with Article 29(1) of the constitution.<sup>2258</sup> Two issues can be concluded here. Firstly, that the judiciary is willing to take a broad approach to the meaning of Junta affiliated symbols and emblems as it considered the title ‘*New Fascism*’ as well as ‘*Tyrannicides*’ to fall within the framework of prohibited titles as provided for in Article 37(5) of the aforementioned decree. Secondly, that rather than investigating the aims and objectives of the particular candidate/party and considering whether his/her/its ideology sought to do harm to a democratic State, the Court simply removed the problematic title attached to his candidature in one case and requested the political party to change its name in the other, providing for a superficial result. Article 29(6) of Law 3023/2002 holds that, from the date of its inception, a political party gains a legal personality for the effectuation of its constitutional mission. Thus, a political party does not have to submit its constitution but can merely submit its founding statement that includes its adherence to serving the free functioning of a democratic State. So, a political party can have a constitution which contains an array of fascist and/or racist statements and objectives but does not need to submit this to the State. At the same time, by simply pledging allegiance to the principles of Article 29 of the constitution on the necessity of a political party to serve a free functioning democracy, this does not necessarily mean that it sincerely aims to do so. Moreover, the Greek legal order has no tools which can be used for checking the sincerity of the required declaration.<sup>2259</sup> As noted by the prosecutor of the Court of Cassation to the Council of Europe Commissioner of Human Rights, this procedure is not used to ‘verify the lawfulness of the party concerned but acts in effect as a protocol book registering the applicant party.’<sup>2260</sup> In fact, once there is an approval of the founding statement of the party, there seems to be no possibility for subsequently dismantling that party whilst there is no review process of the party’s ongoing objectives and activities.<sup>2261</sup> It must be highlighted that, even if there existed an obligation in Greek law for political parties to submit their constitution before the inception of their activities, this does not necessarily correlate with the ousting of, *inter alia*, far-right parties from existence. This is because camouflaging its real intentions and objectives within a constitution is not a complex task. However, the fact that a State needs to incorporate its dedication to this principle when seeking

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<sup>2258</sup> Case 4/2007

<sup>2259</sup> Dimitris Psaras, ‘*Golden Dawn before Justice*’ (‘*Η Χρυσή Αυγή Μπροστά στη Δικαιοσύνη*’) (eds. Rosa Luxemburg Foundation 2014) 438

<sup>2260</sup> Council of Europe Commissioner for Human Rights: Report on Greece, CommDH (2013)6, 8

<sup>2261</sup> European Commission against Racism and Intolerance: Report on Greece (24 February 2015) para. 26

to be established demonstrates the weight that is attached to this requirement given that a political party can function legitimately only insofar as it accepts this principle, an issue that seems to have been ignored by the Greek State, as demonstrated in relation to its stance on Golden Dawn. Furthermore, banning a particular emblem or name does not necessarily correlate to ousting far-right elements from the political scene of the country. Either way, in the relevant law, only those related to the Junta are banned and thus others, such as the Nazi swastika are permissible, unless a broad understanding of emblems and symbols related to the Junta is adopted and, in the cases discussed above, such a broad approach was, in fact, adopted.

In relation to the above, a comparison with the treatment of associations by the Civil Code of the Country is important. More particularly, Article 79, therein, provides that for purposes of registering an association, the founders or its management must submit an application to the competent court which includes its instrument of establishment, the names of the members of its administration and the association's statutes with the signatures of the members and with the date. In fact, Article 80 of the Civil Code highlights the elements that need to be incorporated in the Constitution which include, amongst others, the association's objectives, membership and funding. As such, unlike a political party, an association must deposit its statutes which, as demonstrated in two cases which reached the ECtHR, are up for examination and scrutiny by the Courts. More particularly in *Sidiropoulos and others v Greece*<sup>2262</sup> and *L'affaire Maison de la Civilisation macédonienne et autres c. Grèce*, Greece was found in violation of Article 11 for refusing to register an association entitled the 'Home of Macedonian Civilisation' (Στέγη Μακεδονικού Πολιτισμού. The second case arose following Greece's unwillingness to conform to the *Sidiropoulos* judgement. In both cases the national judiciary had rejected the application for the association's formation on grounds pertaining to the dispute regarding the use of the name 'Macedonia.' As such, in relation to associations, the State and particularly the judiciary has the power to reject the formation of associations on grounds which they deem fit as these are not incorporated in the Civil Code. No equivalent of restriction is available for political parties with the strange result being that in Greece whilst parties such as Golden Dawn were allowed to register and subsequently enter the parliament, an association seeking to involve itself

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<sup>2262</sup> *Sidiropoulos and Others v Greece*, App no. 57/197/841/1047 (ECHR 10 July 1998)

with a matter which is historically disputed has been prevented from registering as an association, regardless of an ECtHR in its favour.

### 6.1.2 The Post-Registration Phase

The Greek legal system also provides for enhanced protection for the activities of MPs, limiting, to the extent possible, any censorship or restriction from the State. The principle of parliamentary immunity is protected by Article 62 of the constitution which holds that ‘during the parliamentary term the Members of Parliament shall not be prosecuted, arrested, imprisoned or otherwise confined without prior leave granted by Parliament.’<sup>2263</sup> However, this article provides that ‘no leave is required when Members of Parliament are caught in the act of committing a felony.’ On the last point regarding felonies, in 2012 and following the increase in violence perpetrated against groups such as migrants and arbitrary identification checks by groups of citizens which also included MPs, a new circular was prepared regarding the issue of impunity. This circular allows for the arrest of MPs if they are committing a felony even if parliamentary immunity has not been lifted.<sup>2264</sup> The principle of immunity granted to parliamentarians renders members of parliament almost untouchable with Golden Dawn conducting violent activities with little or no fear of prosecution. Following Fyssas’ murder, the parliament voted to lift this immunity so that they could be tried.

In addition, following the arrests of the Golden Dawn leadership in 2013, the Greek Parliament amended Law 3023/2002 on the financing of political parties<sup>2265</sup> and, in this way, decided that public funding may be ceased if a party’s leader or head of the parliamentary group or one fifth of its MPs are charged with involvement in a criminal or terrorist organisation. However, if the defendants are found not guilty then the suspended funds must be returned to the party. Either way, as well as the practical effect of this amendment to the functioning of a far-right party, this

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<sup>2263</sup> Όσο διαρκεί η βουλευτική περίοδος ο βουλευτής δεν διώκεται ούτε συλλαμβάνεται ούτε φυλακίζεται ούτε με άλλο τρόπο περιορίζεται χωρίς άδεια του Σώματος. Επίσης δεν διώκεται για πολιτικά εγκλήματα βουλευτής της Βουλής που διαλύθηκε, από τη διάλυσή της και έως την ανακήρυξη των βουλευτών της νέας Βουλής.

<sup>2264</sup> Athanasios Theodoridis, ‘Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC – Country Report 2013 – State of affairs up to 1<sup>st</sup> January 2014) European Network of Legal Experts in the Non-discrimination field’ 134

<sup>2265</sup> Law 3023/2002: Financing of Political Parties by the State. Income and Expenditure, Visibility, Publicity and Auditing of the Finances of Political Parties and Parliamentary Candidates (Χρηματοδότηση των Πολιτικών Κομμάτων από το Κράτος. Έσοδα και Δαπάνες, Προβολή, Δημοσιότητα και Έλεγχος των Οικονομικών των Πολιτικών Κομμάτων και των Υποψηφίων Βουλευτών)



also reflects the possibility that a criminal organisation may, in fact, be acting under the guise of a political party.

### 6.1.3 Political Parties – Concluding Comments

It appears to be a relatively easy task to register a political party in Greece, so long as you have no emblems or symbols related to the Junta, your registration is supported by two hundred signatures and you pledge allegiance to the free functioning of a democratic State. In addition to this, the State's ongoing approach has been that the Greek legal order does not allow for the prohibition of political parties. Thus, it is not only easy to register as a political party and hide your true intentions but also to continue functioning as one without the fear of prohibition unless, as with the case of Golden Dawn, your activities move into the realm of a criminal organisation. In fact, the only constructive measure the State may take against a party is the suspension of public funding in cases of serious criminal offences committed by its members and/or leadership and the prosecution of its MPs and, according to the situation as described above, this can take place with or without lifting their immunity. As such, unless the activities or rhetoric of a political party meet the high thresholds of a criminal organisation, it can seemingly act and speak freely in Greece, notwithstanding existing anti-racist legislation that prohibits, *inter alia*, organisations that incite racial or religious hatred or violence. This has been the case up until the arrest of Golden Dawn's leadership and members. It may be the case that, following the end of the trial, the State adopts a different and more cautious approach to political parties. Unfortunately, the reality is that between political parties and criminal organisations there exists a lot of space in which a group can harm the daily existence of several groups of persons and actively work against doctrines such as the rule of law and democracy.

### Conclusion

In conclusion, Greece has experienced a far-right entity, registered as a political party but simultaneously acting in the manner one would expect from a violent subculture movement, with the only difference being that instead of a loose structure, Golden Dawn is characterised by a tight structure with a strict hierarchy. The elements of the Greek legal order relevant to challenging the far-right include the anti-racist law, the provisions of the Criminal Code on aggravation and sentencing and the anti-discrimination law. With the 2014 amendments to the

anti-racist law, the relevant tools became more restrictive, probably with the aim of or under the guise of protecting freedom of expression. Relevant conditions incorporated following the 2014 amendments include the need for prohibited conduct that affects public order or causes a threat to the life, liberty or physical integrity of a person or persons. Although the far-right or comparable movements and groups are not predominantly tackled through public order legislation, as is the case for England and Wales, the issue of public order and the importance attached, thereto, when considering tackling the far-right is evident in the anti-racist law and the trial documents referred to above, in which the authors refer to the damage which criminal organisations cause to public order. Notwithstanding the above, the fact remains that the legislative tools available to the State to tackle the rhetoric and activities of Golden Dawn remained unused and, instead, this group carried out crimes with a high level of impunity. As reflected in, *inter alia*, parliamentary discussions on the banning of Golden Dawn, the strict approach taken to non-interference to freedoms, such as those of expression and association, systematically stood in the way of steps been taken against the party. Therefore, although a non-abuse of rights clause is incorporated in the Greek constitution which essentially embodies militant democracy, the State's stance towards the activities of Golden Dawn was far from this. The almost libertarian approach taken to the aforementioned freedoms and the dismissal of the need for protecting democracy had, in the case of Greece, harmful effects on individual and societal levels. Further, even in cases pertaining to the activities of Golden Dawn's that were brought to justice, the judiciary often steered away from looking at racist motives, whilst never taking any serious steps to examining the relationship between Golden Dawn and the array of violent activities occurring in Greece although acknowledging affiliation of perpetrators to Golden Dawn. At the same time, Golden Dawn disseminated hateful ideas through speech both in and out of parliament, again with no fear of repercussions. This state of affairs continued up until 2013 and up until the point that the State's inactivity and non-use of the legal tools had allowed Golden Dawn to develop extensively to the point where it could be prosecuted as a criminal organisation. The effects of this trial on today's situation include the fall of hate crime in Greece and a slight increase in the use of the above-discussed tools in some cases. This statement is made with reservation to the fact that no such systematic approach can be discerned whilst not enough case-law yet exists to make concrete conclusions on this point. As well as criminal law, Greece has an anti-discrimination framework through which the activities of a

Golden Dawn member has, on one occasion been tackled. This is minimal in comparison to the number of times the party as an organised entity has, for example, provided goods and services such as blood donations or soup kitchens to Greeks only. In addition to the non-reliance on legislative tools, it is the absolutist stance adopted by the State towards political parties, which has facilitated Golden Dawn's untouchability. This emanates from the reality that, in Greece, political parties, even ones with dangerous and undemocratic intentions, can register and function without any limitations with the only point of State intervention being when such entities cross into the threshold of a criminal organisation. Evidently the registration and (non) regulation of political parties constituted a key weakness in tackling Golden Dawn. It seems to be the case that the State had omitted to pay any consideration to the qualification of Article 29(1) insofar as political parties must serve a free functioning democracy as well as its international obligations when it comes to prohibiting racist parties. As such, two issues must be noted. Firstly, that the outcome of the Golden Dawn trial is still pending and, therefore, its effect on the State's future approach to the far-right remains unknown. What one may hope for is that the State will realise the damage of its previous inaction in relation to the far-right as well as its international and European human rights obligations. Secondly, even if the defendants on trial are found guilty and Golden Dawn is deemed a criminal organisation and thus dismantled, this will not offer a long-term solution *vis-a-vis* challenging the far-right. In this realm, the issues of its large electoral support, which continued even following the prosecution of its leadership and members, will need to be addressed. In sum, Greece has legislative tools that can be used to tackle the far-right. Acknowledging the non-absolute nature of political parties will be a good starting point for subsequent measures.

## CONCLUSION

Right-wing extremism in Europe is on the rise. The financial crisis, the arrival of large numbers of migrants and refugees, combined with the lack of coherent migration and asylum policies on national and regional scales, as well as the terrorist attacks carried out by the Islamic State, as single phenomena or in combination with each other, have created a fertile soil upon which far-right political parties, non-party groups and the subculture milieu have mobilised support. The UK's far-right political spectrum is led by UKIP, a political party endorsing far-right rhetoric, notwithstanding its attempts to appear as a mainstream party. In 2015, this country witnessed far-right non-party groups and the subculture milieu becoming smaller but more violent. Furthermore, the vote of the British people to leave the EU is worrying for a multitude of reasons, including the possibility that part of the UK's population may possess racist sentiments. It must not be ingored that anti-immigrant rhetoric was strongly utilised by the 'Yes' campaign. Moreover, the rise in hate speech and hate crime following the Brexit vote reflects that the issue of hate, racism and far-right extremism do exist in this country. Greece's far-right is essentially concentrated into one entity, namely Golden Dawn, a political party which simultaneously acts as a violent subculture milieu albeit with a rigid structure. The differences between the contextual framework of the two countries has allowed for a broad conceptualisation of the types of entities that can inhabit the far-right, the means and methods of manifestations of far-right hate and the content of such manifestations. This dissertation defends the thesis that Conventions such as the ICERD, the ICCPR and/or the ECHR and/or membership of the EU impose a supranational obligation on countries to restrict the freedoms of expression and/or assembly and/or association in the ambit of the rhetoric and/or activities of extremist right-wing entities, which target, amongst others, ethnic or religious groups. As well as the obligations imposed on a supranational level, the dissertation's position is also based on the premise that the far-right as organised in any form, be it a political party, a non-party group or the subculture milieu, poses a threat to doctrines such as the rule of law and is destructive to the rights and freedoms of its victims on a micro (individual), meso (community) and macro (societal) level.

### International and European Level

On a UN level, it was demonstrated that the doctrine of militant democracy underlies the approach taken by this institution to possible dangers to democracy. Article 4 of the ICERD lays

down a positive obligation on States to prohibit racist expression, racist violence and organisations and propaganda which promote and incite racial discrimination. Article 20 of the ICCPR prohibits any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Article 5 of the ICCPR is the non-destruction clause. In its jurisprudence and Concluding Observations, the HRC has underlined the non-permissibility of hateful expression, association and assembly whilst the CERD has underlined, *inter alia*, that prohibiting racist associations is of utmost importance. On a CoE level, although the ECHR does not incorporate a provision similar to, for example, Article 20 of the ICCPR, it nevertheless restricts the tools that can be used by destructive movements such as the far-right and/or those belonging thereto, namely the freedom of expression, the freedom of assembly and the freedom of association on the grounds of, amongst others, protecting the rights and freedoms of others. This Convention also incorporates a non-destruction clause in the form of Article 17. The analysis of Strasbourg jurisprudence demonstrates that speech and association that falls within the realm of far-right rhetoric is not permissible, without the necessity of such speech or association amounting to and/or inciting, for example, violence. On a CoE level, there also exists the Additional Protocol to the Convention on Cybercrime concerning the Criminalisation of Acts of a Racist and Xenophobia Nature Committed through Computer Systems. This criminalises, *inter alia*, the dissemination of racist and xenophobic material through computer systems as well as racist and xenophobic insults and threats disseminated through such systems. The drafters of this document acknowledged the significant role played by the Internet as a platform for the dissemination of racist and xenophobic expression. However, neither country considered in this dissertation has ratified the Additional Protocol. On an EU level, the analysis concluded that Article 7 of the TEU is the strongest EU tool for tackling the far-right due to its primacy and its innovative nature. However, these positive elements are hampered on a practical level given that this article has not yet been applied by the EU, as demonstrated in its approach to *Fidesz's* Hungary. Furthermore, there exists the Council Framework Decision on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law which criminalises activities and speech conducted by racist and xenophobic entities, a tool that can be directly used to combat the rhetoric and activities of the far-right. Thus, there are three central conclusions that can be drawn from the analysis of the instruments available at a UN, CoE and EU level. Firstly, overall speech and activities that fall within the realm of the far-right are to be

prohibited. However, the thresholds attached to the prohibition of hate speech differ. For example, the ICERD provides that all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination or incitement to violence against any race or group of persons of another colour or ethnic origin are to be prohibited. On the other hand, the ICCPR prohibits any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Thus, the two UN documents are not in conformity with one another when it comes to thresholds given that the ICCPR necessitates that the particular expression must constitute incitement whereas the ICERD allows for prohibited expression to include the dissemination of particular ideas without the need for it to amount to incitement. Not only does this limit coherence between instruments of the same institution but also offers a lower level of protection to religious groups which are not incorporated into the ICERD. Secondly, the EU Framework Decision, referred to above, prohibits the public incitement to violence or hatred, but not discrimination, 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. Member States may choose to criminalise such conduct insofar as it affects public order or if it is threatening, abusive or insulting. Thus, by leaving out the issue of discrimination and incorporating the possibility to criminalise if certain grounds are met, such as a threat to public order, the threshold of prohibited speech is raised significantly in comparison to relevant UN provisions, and renders punishment more difficult to attain. Lastly, the result of the above is that a country which is a Member State of the European Union and a party to the aforementioned international documents has differing obligations in the realm of speech and conduct of the far-right. The UK has not incorporated the ICERD or the ICCPR into national law and, as such, Article 4 of the former and Article 20 of the latter, which are central tools for States to challenge the rhetoric, activities and thus effects of the far-right, are not part of national law. The competent UN committees have reiterated that the United Kingdom must ratify these Conventions for purposes of complying with the obligations therein, but, to date, no such action has been taken. Further, the country has imposed reservations on the articles discussed above, citing the freedoms of expression and of association as the key grounds for doing so. Greece, on the other hand, has ratified both the above Conventions with no reservation, incorporating them into national law. However, their practical efficacy has been no more forthcoming than in the case of the UK given that, notwithstanding their ratification,

Greece has almost completely ignored its obligations arising therefrom, rendering them futile in challenging the far-right.

### Criminal Law as a Tool to Tackle the Far-Right:

#### The Role played by the Conceptualisation of Harm

The United Kingdom has developed a public order framework through which the rhetoric and activities of the far-right can be tackled. Although this country appears to place particular significance on the freedom of expression but also assembly and association (directly or by extension), this significance deteriorates when there is a threat to public order. The Public Order Act 1986 provides two mechanisms to tackle the type of hate looked at in this dissertation. Part 3 of the Act prohibits acts intended or likely to stir up racial hatred with such acts falling within the realm of expression such as use of words or behaviour, written material or the public performance of a play. Such acts must be threatening, abusive or insulting. It also makes the possession of racially inflammatory material an offence. Part 3A of the Act deals with hatred against persons on religious grounds and follows the structure of Part 3 but limits the *genre* of acts to those of a threatening nature, removing insulting and abusive as incorporated in the section on racial hatred. Under Part 3A, intention is necessary, unlike its racial hatred counterpart. The threshold for prosecution of religious hatred is further heightened through the inclusion of a freedom of expression provision, which seeks to avoid punishment of, *inter alia*, discussion, criticism or expression of antipathy. This provision was considered necessary by the House of Lords who held that freedom of expression had to be enhanced in the realm of religion, even if such expression is considered insulting or abusive (but not hateful). As a result of these safety nets, in the name of expression, it is very difficult to enforce Part 3A.

The public order framework was the central one which the CPS relied upon when confronted with the rhetoric and acts of the far-right in England and Wales. This is reflected in cases such as *Mark Anthony Norwood v Director of Public Prosecutions*<sup>2266</sup> and *Kendall v Director of Public Prosecutions*<sup>2267</sup> which both dealt with the conduct of BNP members. What became apparent from the jurisprudential analysis of public order cases in the realm of the far-right was the

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<sup>2266</sup> *Mark Anthony Norwood v. Director of Public Prosecutions*, [2003] EWCH 1564 (QBD)

<sup>2267</sup> *Andrew Timothy Kendall v. DPP* [2008] EWHC 1848 (admin) (QBD)

reliance by the CPS on Section 5 of the Public Order Act 1986 which prohibits general harassment, alarm and distress, rather than the provisions tailored to tackling religious or racial hatred. The CPS has opted for this route as it is an easier one, not requiring approval by the Attorney-General. Notwithstanding that there is no equivalent of the British public order framework in Greece, this doctrine does, to a certain extent, come into play in relation to challenging the far-right therein. More particularly, following the 2014 amendments made to the anti-racist Law 927/1979 for purposes of harmonising national law with the EU Framework Decision on Racism and Xenophobia, Greece incorporated the requirement that such conduct is, *inter alia*, likely to affect public order. Thus, in relation to Greece, the incorporation of the public order ground in the anti-racist legislation essentially restricted its applicability by heightening the threshold of harm within the anti-racist legislation. Further, the trial documents for the current proceedings against Golden Dawn refer to the fact that the activities of Golden Dawn constitute a threat to public order and so put forth this premise as a justification for finding that this party essentially constitutes a criminal organisation.

The central piece of criminal legislation through which speech and activities of the far-right in Greece are theoretically tackled is the anti-racist law. Although the statute is ‘on punishing acts or activities aiming at racial discrimination,’ following the 2014 amendments, it incorporated grounds, such as disability, as a protected characteristic. Law 927/1979 directly criminalises conduct defined in the Framework Decision including the public incitement to violence, hatred or discrimination against a person or group of persons due to characteristics such as race if certain grounds, such as public order are threatened. For the most part, this Law directly transposes the wording and meaning of the Framework Decision. There is no such equivalent in England and Wales which instead tackles issues, such as hate speech, through the Public Order Act 1986. The anti-racist legislation has existed in Greece since 1979 but has seldom been relied on to tackle the far-right, unlike England and Wales, which, although it has no anti-hate and/or anti-racist legislation, *per se*, has incorporated relevant issues and concepts within other frameworks. When considering the frameworks through which the two countries theoretically or practically tackle the far-right, it is significant to look at the conceptualisation of harm. More particularly, England and Wales criminalises harm resulting from, for example, racial hatred, within a public order sphere, thereby establishing a necessary link between the racially hateful



conduct, on the one hand, and the effects this has on public order on the other. Post-2014, Greece conceptualised the issue of harm by incorporating the necessity for prohibited conduct to affect public order. The central conclusion that can be drawn from this is that both countries consider societal damage, rather than individual or group harm, as the key driver for criminally challenging the far-right. In the case of Greece, it could simply be that the country saw an opportunity, in the form of the Framework Decision, to restrict the scope and applicability of the anti-racist law.

### Aggravation and Sentencing

In addition to the provisions which tackle, for example, racially hateful conduct, both countries provide for aggravating circumstances, such as racial hate, to be taken into account when sentencing a perpetrator. In relation to England and Wales, Part 2 of The Crime and Disorder Act 1998 creates certain racially and religiously aggravated offences. This provision is particularly significant in the realm of combatting far-right conduct given that it can be used in combination with Article 5 of the Public Order Act to punish relevant conduct without the obstacles that can be found in Section 3 and, even more so, Section 3A of the same Act, if such conduct falls within the sphere of the Crime and Disorder Act. In Greece, Article 81A of the Criminal Code holds that if an act occurs due to the perpetrator's hate towards characteristics such as the victim's race, colour or religion, the Court hands down an enhanced sentence to the perpetrator, one which is not suspendable and/or a higher fine. In Greece, however, as well as the habitual disregard of the Police to the potentially hateful motives of a perpetrator, a reality which affects the examination of a case at the investigative phase, a central problem in relation to aggravation and sentencing is that the judiciary has also proved unwilling to acknowledge such aggravation when handing down sentences, even in the most blatantly racist cases. The non-consideration of hateful motives by the Greek judiciary contributed to the impunity of Golden Dawn members allowing them to carry out their criminal acts. What must be underlined is that the consideration of aggravation due to, *inter alia*, racial grounds, if adequately upheld, is a strong tool to tackle the far-right since, by enhancing this mechanism, far-right crimes are placed higher on the hierarchy of severity in relation to crimes without such motives. Therefore, any disregard of the sphere of aggravation directly affects the efficacy of tackling the far-right, as reflected in the case of Greece.

## Anti-Terror Legislation as a Tool to Challenge the Far-Right

In England and Wales, anti-terror legislation has been relied upon when dealing with violent non-party groups such as Aryan Strike Force and Radical Volunteer Force. This legislation is thus, reserved for overtly violent groups. Important to note is that the proscription of an association is only permitted insofar as such as an association is of a terrorist nature, as per the 2000 Terrorism Act. However, no far-right groups have yet been proscribed within this sphere. In relation to Greece, Article 187B of the Criminal Code incorporates a provision on terrorist acts and organisations and defines such acts as the commission of a criminal activity which may seriously harm a country or an international organisation and has the aim, *inter alia*, seriously to intimidate a population or seriously to harm or ruin the fundamental constitutional, political or financial infrastructure of a country or of an international organisation. The definition of acts which fall in the sphere of terrorism differs from those falling within a criminal organisation since, in relation to the latter, there is no requirement of such acts affecting, amongst others, the infrastructure of the country. Three issues must be underlined when considering the provision on terrorist organisations as incorporated into the Criminal Code. Firstly, that although a higher threshold of harm is associated with a terrorist organisation, the penalty is the same as that of a participation or leadership in a criminal organisation. Secondly, that in the case of Golden Dawn, the State opted to utilise the criminal organisation provision, appearing to disassociate the increased severity of harm, as set out in the Criminal Code within the sphere of terrorist organisations. Thirdly, that even if the State opted to consider Golden Dawn as a terrorist organisation, the practical results of this choice would be irrelevant given that the penalties are the same as those relating to the prohibition of participating or leading a criminal organisation. This demonstrates an oddity in the legislation which, on the one hand recognises the enhanced severity of the harm that results from the formation of and participation in a terrorist organisation, yet does not attach equivalently enhanced sentences on the other.

## Non-Discrimination Framework

Comparing the use of the non-discrimination framework in England and Wales and Greece in the sphere of the far-right is interesting. In England and Wales, although the Equality Act 2010 was relied upon by the Equality and Human Rights Commission to challenge the racist membership criteria set out by the BNP, this framework has been predominately utilised by members of the

far-right, namely the BNP, to argue that they had been discriminated against in their employment due, directly or indirectly, to their membership of the BNP. The competent tribunals have essentially found non-recruitment or dismissal of BNP members to be legitimate, a legitimacy which was not, however, extended to the dismissal of a BNP member from a trade union. In relation to Greece, the Law on the Implementation of the Principle of Equal Treatment regardless of Racial or Ethnic Origin, Religion or other Beliefs, Disability, Age or Sexual Orientation 2005 has been used against a bus driver, a self-professed member of Golden Dawn, who prohibited two persons of African descent from entering the bus. In another case, which involved the prohibition of accessing medical services of a doctor to Jews in general, the anti-racist law had to be invoked since there was no identifiable victim. What is of utmost importance is the fact that Golden Dawn has systematically discriminated against persons due to their ethnicity by providing goods and services, such as soup kitchens and medical services, to Greeks only. Even though the State could not use the anti-discrimination framework unless a victim of such practices could be identified, it could have enforced the anti-racist legislation for purposes of criminalising this conduct. It chose not to, thereby, allowing this entity to continue, unchallenged, to discriminate and hate.

#### Registration and Functioning of Political Parties

The extent to which the laws and regulations governing political parties could affect the participation and development of far-right political parties was considered. What became apparent, following the inspection of the laws in each country, was that the frameworks which regulate political parties are not a serious obstacle for the far-right. In England and Wales, The Political Parties, Elections and Referendums Act 2000 prohibits the registration of political parties with offensive emblems, names or descriptions, although no equivalent regulation exists to prohibit offensive constitutions. Moreover, the term 'offensive' is not defined in the relevant law. The Electoral Commission has no power to prohibit the registration and/or functioning of a political party with a hateful constitution whilst the Equality and Human Rights Commission can only commence action for purposes of ensuring non-discrimination *vis-à-vis* party membership. Article 29 of the Greek Constitution provides that Greek citizens with the right to vote may establish and join political parties 'the organization and activity of which must serve the free functioning of democratic government.' However, the only step that needs to be taken by its

leadership for purposes of demonstrating their allegiance to this requirement is to file a founding statement at the Supreme Court referring thereto. No subsequent check can be made as to the validity and/or sincerity of this declaration by the Greek State and no monitoring of the activities of political parties can subsequently occur. As such, political parties hold a particularly sacred and almost untouchable position in the Greek legal order, something which directly contributed to the non-implication of the State in Golden Dawn's rhetoric and activities as these occurred under the guise of a political party. Thus, neither of the countries under consideration possesses militant democratic tools which can be relied upon to monitor and/or regulate and/or prohibit a political party. However, in England and Wales, action has been taken by the Equality and Human Rights Commission against BNP, due to its racist membership, and the State has relied on the Public Order framework to tackle the conduct of BNP members. On the other hand, in Greece, apart from on two occasions (not including for purposes of the current trial) where parliament lifted the immunity of Golden Dawn MPs for purposes of investigating criminal acts, the Greek State took no measures to monitor and/or restrict and/or punish the activities which were occurring within the sphere of Golden Dawn as a political party, due to the almost absolute nature such an entity enjoys in Greek Law and the resulting lack of regulatory or other measures in the realm of political parties.

#### Final Comments

In light of the above, the far-right is a phenomenon we are witnessing in Europe on a national and regional level with countries, such as Greece, demonstrating the tragic effects of the rhetoric and activities of the far-right. Far-right rhetoric and acts are prohibited on an international, European and national level, albeit with varying thresholds of harm associated with the different levels and, also, within particular frameworks. What becomes clear is that militant democracy is more emphatic as a doctrine underlying provisions and jurisprudence on a supranational level rather than on a national level, despite the infiltration of this doctrine to the framework of the latter as a result of harmonisation procedures between countries and international documents. The shortcomings of taking an opposite approach to that enshrined in militant democracy can best be illustrated in the case of Greece and the systematic denial of the State to prohibit a neo-Nazi party, in the name of free expression and association. Moreover, one of the most striking facts on a supranational level is the inactivity of the EU. More particularly, Article 7 of the TEU

which is available to EU institutions to tackle the threat of the far-right in Member States, lays dormant, even though the EU is witnessing a rise of this phenomenon in the form of governing parties, such as in Hungary, but also as facilitated by an inactive State, as was the case in Greece (up until Golden Dawn's trial). On national levels, Greece has a theoretically well-rounded legislative sphere to tackle the rhetoric and acts of the far-right but has not used the tools available. The result has been the development of Golden Dawn into a criminal organisation spreading fear and violence on the streets, a consequence which it is currently on trial for. In Greece, although there has been an anti-racist law since 1979, it has seldom been used and in England and Wales, although there is no anti-racist law, per se, the public order framework incorporates provisions on, for example, racist and religious hatred. However, England and Wales, unlike Greece, has sought to criminalise behaviour falling within this sphere whilst its Equality and Human Rights Commission commenced proceedings against the BNP for its discriminatory Constitution. Unfortunately, no such equivalent actions and measures can be seen in Greece. The reason for this has not been the lack of a legislative framework but the limited will of the State to mobilise against Golden Dawn in combination with the particularly sacred position attached to political parties, all effectuated in contravention with the country's supranational obligations. In relation to England and Wales, the legislation relevant to challenging the far-right in England and Wales will not be directly affected by the UK's exit from the EU as the relevant statutes were not created for purposes of harmonisation with EU law. However, its departure from the European family will render inapplicable the Article 7 of the TEU mechanism which, either way has never been used but, more importantly, shall prevent the country from European cooperation for purposes of tackling the far-right. In relation to political parties in England and Wales, the relative simplicity of registering political parties, the lack of control of political parties once they are registered and the absence of any legislative provision on the prohibition of political parties (unless they are an entity falling within the anti-terror framework) demonstrates the significance attached to such entities. The only issue that directly affects the development of political parties in this country is the electoral system itself, as demonstrated in UKIP's case. In addition to the public order sphere and the Greek anti-racism legislation, both countries have a non-discrimination framework as well as anti-terror provisions which may be used in regard to certain far-right acts and rhetoric. In relation to England and Wales, the non-discrimination framework has been used only in relation to the BNP's

discriminatory Constitution whilst the anti-terror legislation has been reserved for the violent subculture milieu. In Greece, although the non-discrimination framework was directly relevant to the exclusionary practices of Golden Dawn in relation to accessing goods and services, the legislation was only relied upon in one case involving a self-professed Golden Dawn member and not *vis-à-vis* the organised activities of the party, such as the soup kitchens for Greeks only. In light of the above, in Greece, the far-right, in the form of Golden Dawn, was left to operate freely for years without any restriction whilst all the suspects for the crimes that fall within the realm of a criminal organisation have been set free given that the detention period has passed without the case being finalised. Of utmost interest and significance to the far-right spectrum in Greece is, not only, the judgement of the Court in the case against Golden Dawn but, also, the effects, if any, of this judgement on the future stance of the State towards the far-right, even if this is embodied in a far-right political party. In light of the above, doctrines and elements such as public order, anti-terror and non-discrimination are all part of the legislative frameworks of the chosen case-studies, albeit being developed and incorporated in different manners. What is emphatically different in the two jurisdictions and, subsequently, what we learn from the combination of the two, is the stark variation in the approach of the State. Although Greece had the legislative tools to tackle the rhetoric and activity of Golden Dawn, it never did, leaving it instead to systematically spread fear and hate. On the other hand, small and structured steps such as the action of the Equality and Human Rights Commission against the discriminatory constitution of the BNP, bans on the activity of representatives of far-right groups such as Britain First and the prohibition of entry of Geert Wilders on grounds of public order have all constituted pieces of the puzzle of challenging the far-right in England and Wales. As such, what can be discerned from the analysis of the two jurisdictions is the need for a systematic approach to be taken by the State to challenge the far-right, through criminal and non-criminal procedures.

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