

1.1 Regulating Hate Speech in the EU

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Notwithstanding the perplexities associated with defining hate speech as a result of the free speech debate, the EU managed, after seven long years of negotiations (European Commission 2014: 1), to take a major leap forward in 2008 with its Framework Decision on Combatting Racism and Xenophobia through Criminal Law (Council of the European Union 2008). As is reflected in its title, this is not a document dealing with hate speech per se but, instead, with some of the phenomena underlying such speech. However, it was hate speech that kept the negotiations going for so many years and, particularly, the significant divergences in the legal traditions of EU member states vis-à-vis free speech (European Commission 2014:

1). These varying understandings of hate speech also mean that, regardless of the Framework Decision at the EU level, there is little coherence amongst EU member states on the definition of hate speech. To this end, in February 2017, the European Parliament put forth a motion for a resolution on establishing a common legal definition of hate speech in the EU (European Parliament 2017).

In light of this, this section will consider the main characteristics of the legal frameworks of the ten countries participating in the C.O.N.T.A.C.T. project.⁶ This will allow us to see how hate speech is approached on a decentralised (member-state) level and determine possible convergences and divergences amongst the member states themselves. Before moving on, however, it is worth noting that the term ‘hate speech’ is not found in any of the legislations of the C.O.N.T.A.C.T. project partner countries; rather, all these countries transposed or acceded to the United Nation’s ICCPR (UN General Assembly 1966) and ICERD (UN General Assembly 1965), with the UK making a reservation to the relevant articles on the grounds of free speech. As will be demonstrated below, regardless of the ratification or accession to the aforementioned UN documents, the transposing laws are not the ones habitually relied upon to tackle hate speech. A relevant example is Denmark, where a court was faced with the statement ‘*negroes are less intelligent than Europeans*’, which falls within the framework of statements pertaining to racial superiority, prohibited by the ICERD; yet, this was deemed to be permissible speech, as it was made as part of a political debate.⁷ With this in mind, we can now turn to the legal provisions of each C.O.N.T.A.C.T. partner country in alphabetical order below.

The main anti-hate speech legislation in Cyprus is *The Combatting Certain Forms and Expressions of Racism and Xenophobia by means of Criminal Law 134 (I) of 2011*, which transposed the Framework Decision into national law. Cyprus chose to incorporate the provision of punishing only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting. Cyprus went a step further from the protected characteristics of the supra-national level and also passed Law 87 (I)/2015 amending the Criminal Code. This amendment incorporates Article 99A into the Criminal Code, which punishes hate speech targeted at a person or person’s sexual orientation or gender identity. In sum, there is no explicit definition of hate speech in Cyprus but, instead, a transposition of supra-national documents which offer their own appraisals of hate speech and which set out varying thresholds. This results in a discordant legal setting which, nevertheless, has the positive feature of going beyond the hierarchy of hate embraced by the supra-national framework by incorporating the grounds of sexual orientation and gender identity as protected characteristics in the sphere of hate speech. Still, the above legislation has not yet been used in Court and there is no national case-law relevant to the issue of hate speech.

⁶It should be noted that the information provided in this section in relation to each member state’s national context has been synthesised from the desktop research conducted by C.O.N.T.A.C.T. partners in each member state during the first stages of the project, rather than this section’s author.

⁷Judgment no. 1.4.8, Western High Court.

In Denmark, hate speech is connected to Section 266b of the Danish Penal Code which criminalises expressions that “publicly or with intent to disseminate to a wider circle, threaten, insult or degrade a group of persons on the basis of race, skin colour, nationality, ethnicity, faith or sexual orientation”. Evidently, this definition is more extensive than its supra-national counterparts, as it includes grounds such as sexual orientation. Important to this understanding of hate speech is that expressions must be made publicly or with an intention to disseminate to a wider circle, and, therefore, private conversations do not fall within the prohibited sphere. Unlike Cyprus, Denmark has relevant case-law which, *inter alia*, sheds light on the meaning of terms used in Section 266b. For example, the statement ‘*coloured people like you are not allowed in my parents’ apartment*’ which was uttered in a nursing home, was not considered by a District Court to be punishable, as the nursing home was deemed as not constituting a public place.⁸

In Greece, the main national legislation is Law No 927/1797 on punishing acts or activities aimed at racial discrimination, as amended by Law 4285/2014 that implements the Framework Decision. Article 1 deals with 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 involved and 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. The scope of protected characteristics of this law is, together with Lithuania and Spain, discussed below, one of the most extensive in the C.O.N.T.A.C.T. partner countries, incorporating grounds such as disability, which is not found elsewhere. While there have been several relevant cases before Greek courts, one characteristic example which demonstrates a threshold that needs to be met, in terms of the impact of the speech and its publicity, involved a Golden Dawn member. In this case, the defendant stated on camera that ‘*we are ready to open the kilns. To make soaps. Not for the people, since ... we may fall sick ...*’ These were some of the phrases he used to refer to migrants. The court decided that, even if these phrases were exaggerations, they demonstrated the accused’s intention publicly to provoke people to cause harm to migrants, so that the rest of them would be convinced to abandon Greece.⁹

The main relevant Italian Law is Law 205/1993 which makes it a crime to “propagate ideas based on racial superiority or racial or ethnic hatred, or to instigate to commit or commit acts of discrimination for racial, ethnic, national or religious motives.” The law also punishes those who “instigate in any way or commit violence or acts of provocation to violence for racist, ethnic, national or religious motives.” Although there are no strict thresholds to meet, such as public order, as is the case of Cyprus for example, Italy limits itself to the protected characteristics of ethnicity and religion, as provided for by the supra-national level.

⁸Judgment no. 1.4.6 The District Court (Hillerød).

⁹Decision 65738/2014 (Single-member Court of Athens).

In Lithuania, the central provision dealing with this issue is Article 170 of the Criminal Code entitled ‘Incitement against Any National, Racial, Ethnic, Religious or Other Group of Persons.’ This article punishes the handling or distribution of impugned material and expression, which incites hatred, violence, discrimination or contempt for a person or persons belonging to a group defined by sex, sexual orientation, race, nationality, language, descent, social status, religion, convictions or views. This definition is particularly broad including grounds such as sex but also convictions, which are not necessarily affiliated with religion. Its threshold is also low, with discriminatory expression also falling in the net of prohibited expression. Interestingly, in relation to the punishment of expression (rather than material), the article also renders ridiculing expression a punishable offence. It also punishes a person who publicly incites violence against a person or persons of a particular group. To give an example from case law, a defendant was found guilty for publicly mocking a person of Asian origin in front of others with obscene epithets saying that *‘foreigners are not welcome here.’*¹⁰ This demonstrates the low threshold necessary in Lithuania for finding speech hateful.

The central provision in Malta is Article 82 of the Maltese Criminal Code, which punishes any person who

uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting or otherwise conducts himself in such a manner, with intent to stir up violence or racial hatred against another person or group on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion.

The protected characteristics are also broad in Malta, although not as broad as, for example, Greece, which also incorporates the grounds of disability, Lithuania, which also includes sex or as Romania and Spain discussed below.

In Romania, Article 369 of the Criminal Code prohibits “public incitement by any means, hatred or discrimination against a class of persons.” Order 137 of 2000 sets out the protected characteristics which are race, nationality, ethnicity, language, religion, social, belief, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV infection and membership of a disadvantaged group. This is the only country to incorporate HIV positive persons as protected by hate speech legislation and which incorporates a broad ground of disadvantaged groups. Moreover, by incorporating discrimination, the threshold of prohibition remains low.

As for Spain, although, like for other countries, there is no legislative definition of hate speech, the Constitutional Court held that hate speech is a “heavy burden of hostility that incites, directly or indirectly, violence by way of humiliation.”¹¹ The main piece of legislation is Article 510 of the Criminal Code on the incitement to hate crime, violence and discrimination. This punishes those who provoke discrimination, hate or violence against groups or associations due to racist,

¹⁰Criminal case No. 1A-407-337/2009, Panevėžys district court.

¹¹The Constitutional Court in its STC 176/1995 (Case Makoki).

anti-Semitic reasons or any other reasons related to ideology, religion or belief, family situation, belonging to an ethnic group or race, national origin, gender, sexual preference, illness or handicap. The grounds for protected characteristics in Spain are extensive and the thresholds low, incorporating, for example, discrimination and not requiring, for example, the disturbance of public order.

Turning to the UK, 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 plays, the distribution, showing or playing of a recording and/or the broadcasting of a programme in a cable programme service. 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. However, in relation to religious hatred, 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.

Therefore, in relation to religious hatred, the threshold is higher, since expression such as insulting a particular religion is deemed permissible.

From the above approaches to hate speech and the variations therein, it could be argued that, although some common elements can be discerned, “hate speech seems to be whatever people choose it to mean” (Kiska 2012: 110) As we have seen in the previous section, at the supra-national EU level, protected groups are limited to ethnic and religious groups, demonstrating an adoption of a hierarchy of hate in such arenas, with some characteristics perceived as simply being more important than others. At the national level, countries such as Lithuania, Romania, Spain and Malta have an extensive conceptualisation of protected groups whilst others such as Italy limit themselves to those set out by the UN and the EU. The thresholds of what is considered prohibited speech also varies amongst countries, with Italy having a lower threshold, prohibiting, for example, ideas of racial superiority, and Cyprus incorporating safety nets such as the impact of public disorder. On a last but important note, these conceptual variations of definitions render effective challenging of online hate on the borderless medium known as the internet particularly complex.

