

**Hate Crime and Hate Speech in
Europe:
Comprehensive Analysis of
International Law Principles, EU-wide
Study and National Assessments**

P R I S M



WORDS ARE WEAPONS.

PREVENTING REDRESSING & INHIBITING HATE SPEECH IN NEW MEDIA



PRISM is a project co-financed by the Fundamental Rights and Citizenship Programme of the European Union

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Executive Overview

This report serves as a component of the Preventing Redressing & Inhibiting hate Speech in new Media (PRISM) Project, incorporating seven different assessments into one comprehensive study.

Part one concerns European and international law principles applicable for the prevention and repression of hate crime, particularly hate speech. This foundational document examines the role of international law, the European Union, and the Council of Europe as they pertain to addressing hate-based crime, while also analyzing the relationships that exist between the phenomenon of hate speech and racism, discrimination, and freedom of expression. With regard to hate speech versus freedom of expression, the report details the ways in which different states balance tackling hate speech with protecting freedom of expression, and the positions of Amnesty International and the UN, OSCE and OAS' Special Mandates on the right to freedom of expression concerning this topic. Finally, jurisprudence in this field deriving from the United Nations Committee on Human Rights, the European Court of Human Rights, and the US Supreme Court is also looked at in detail.

The second part constitutes a comparative analysis of national legislation and its effectiveness on hate crime and hate speech across the European Union. This analysis is based on the responses received by UNICRI via the dissemination of a comprehensive legal questionnaire on hate crime and hate speech, which was sent out to Equality Bodies, government ministries, and other stakeholders in each EU Member state. Entities from 18 different EU countries were able to respond, allowing UNICRI to analyze their responses and identify trends with respect to the formulation of national legislation, adherence to international protocols, legal procedures for countering these issues, information on reporting mechanisms and national entities active in this field, and general awareness among various societal stakeholders concerning hate crime and hate speech throughout Europe.

Finally, the last five components of this document constitute in-depth national reports, focusing on the PRISM Project's five focus countries, namely: France, Italy, Romania, Spain and the UK. Each of these reports examine national legal frameworks and procedures pertaining to discrimination, hate crime, hate speech, and, particularly, hate speech in new media; moreover, the effectiveness of this legal architecture, existing procedural and reporting mechanisms, and jurisprudence in these areas are also analyzed. Additionally, information is provided at the end of each report on the major institutions and associations working on discrimination-related issues at the national level, and a set of conclusions is also put forward, giving insights into the work that needs to be done to further tackle risks in this field.

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Repression of hate speech: its foundations in international and European law

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Report on international and European law

Repression of hate speech: its foundation in international and European law

1. Definition of hate speech. Sources and content of applicable international and European law

1.1. International law

In order to identify hate speech contents in the social media, it is worth recalling some international and regional legal sources applicable to the matter.

The first, and most important one, is art. 20, para. 2, of the **International Covenant on Civil and Political Rights (ICCPR)** of 1966, which establishes that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” This norm has to be read in connection with the limits to freedom of expression set by art. 19, para. 3, of the same Covenant, limits “necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals”.

The difference between the two norms is clearly explained by **General Comment n. 34 by the Committee on Human Rights**, which also contains an authoritative interpretation of art. 20 (2). Point 51 of that Comment is redacted in the following terms: “What distinguishes the acts addressed in article 20 from other acts that may also be subject to limitations, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19. The acts referred to in article 20, paragraph 2, must cumulatively (a) advocate, (b) be for purposes of national, racial or religious hatred, and, (c) constitute incitement to discrimination, hostility or violence. By “advocacy” is meant public forms of expression that are intended to elicit action or response. By “hatred” is meant intense emotions of opprobrium, enmity and detestation towards a target group. “Incitement” refers to the need for the advocacy to be likely to trigger imminent acts of discrimination, hostility or violence. It would be sufficient that the incitement relate to any one of the three outcomes: discrimination, hostility or violence.”¹

Violence is only one of the possible results of hate speech, which could aim at diminishing the rights of the targeted group by making it an object of discrimination. Hate speech may also be used to stereotype a group by identifying and highlighting one or more of its asserted negative characteristics. By such denigration, a climate of hostility against group members is eventually created.

¹ General Comment n. 34 by the Committee on Human Rights, see <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

Other important norms of international and European law reiterate the necessity of outlawing at least extreme manifestations of hate speech.

Article 4 of the **Convention for the elimination of racial discrimination (CERD)** reads as follows: “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*:

(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;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

General Recommendation n. 7 of the Committee on the Elimination of Racial Discrimination has explicitly reaffirmed the mandatory character of this norm.² It seems also worth recalling **General Recommendation n. 15 of the same Committee**,³ specifically concerning the measures to eradicate incitement to or acts of discrimination, which i.a. clearly affirms, “States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced”.

Art. 13 (5) of the **American Convention on Human Rights** contains a formulation, which is narrower than that of the ICCPR. The text of art. 13 (5) is the following, “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered offenses punishable by law”. In fact, it fails to include explicitly “hostility” and “discrimination” among the aims pursued by hate speech and resorts rather vaguely to the expression “any other similar action”.⁴

1.2. Council of Europe

² General Recommendation n. 7 of the Committee on the Elimination of Racial Discrimination, in http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=11.

³ General Recommendation n. 15 of the Committee on the Elimination of Racial Discrimination in <http://www1.umn.edu/humanrts/gencomm/genrxv.htm>.

⁴ American Convention on Human Rights in <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=443&IID=1>

Following **Recommendation (97)20 of the Council of Europe, 30 October 1997** - “the term ‘hate speech’ shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”.

Another important development in the framework of Council of Europe is represented by the adoption, on 28 January 2003, of the **Additional Protocol to the Convention on Cybercrime**, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. Following this Protocol “‘racist and xenophobic material’ means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors (art. 1 (1)).” States parties are bound to criminalise the following conducts, “distributing, or otherwise making available, racist and xenophobic material to the public through a computer system” (art. 3); “threatening, through a computer system, with the commission of a serious criminal offence as defined under its domestic law, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics” (art. 4); “insulting publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics” (art. 5); “distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party” (art. 6); “aiding or abetting the commission of any of the offences established in accordance with this Protocol, with intent that such offence be committed” (art. 7).

1.3. European Union

Turning to the European Union, the **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, approved by the Council of the European Union, affirms that “racism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States.” Therefore, this Decision obliges each Member State of the European Union to take the measures necessary to ensure that public inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, as well as publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes are punishable.

The European Union has recently reaffirmed its commitment against hate speech with increasing emphasis. On 29 June 2015, intervening during the Committee on Civil Liberties, Justice and Home Affairs hearing on Anti-Semitism, Islamophobia and hate speech at the European Parliament, the First Vice-President of the European Commission, Timmermans, formulated the following remarks, "I think we need to look at the new areas where hate speech is propagated, which is mainly on the Internet. And the Commission takes that very seriously indeed. And we will need to look for strategies to tackle the issue. Things that people will not say in the public sphere when they meet other people, they will easily propagate on the Internet. They will easily say the most horrible things about other people on the Internet. And it gets a life of its own. There is a whole mythology surrounding the age-old stories of Jews being detached from the countries where they live in because they have some sort of cosmopolitan idea of doing away with national interest, etc. This stuff that has been going on for centuries is back, and it is big again on the Internet".⁵

Timmermans also took into consideration the means through which hate speech could be best opposed. In this regard, he formulated the following remarks, "And incitement to hate on the Internet is huge. Do you then ban the internet? Of course not. That is not the way forward. But do you make sure you have legislation that can intervene when things get out of hand and go into the criminal arena? Yes, we need to look at that. I think it is important that we continue our debate with the providers, of how we can find ways of solving the issue. I think it is very important that we work with companies on this. I think it is important that we mobilise the radicalisation awareness network on counter-narratives. To demystify a lot of the nonsense that is there. Not by creating your own mystification but by placing facts as a reaction to that. We need to identify, monitor and report on websites with racist, xenophobic or other hateful content. I think this is very important. And action should be taken in this area. I also believe we need more platforms for best practices, in education, in dealing with the public sphere, in dealing with the media. I think there is a lack of exchange on what works in Member States. I also think we need to look at the experiences at the political level of Member States dealing with the different issues. Meetings will be important for that. The Commission will certainly facilitate them, and we will work closely with LIBE and with the European Parliament to make sure that we have the right actions in place or that we can help Member States create action at the national level that is highly necessary. I also hope that Parliament and Commission can work together to finally have the adoption of the horizontal equal treatment directive. I think this is very important."

1.4. A tentative definition of "hate speech"

Summing up the various elements contained in the aforementioned dispositions, one can affirm that "hate speech" constitutes denigration of the reputation of a social group, stereotyped by some particular national, racial or religious characteristics, accompanied by incitement to hostility, violence and discrimination against that group.

⁵ Committee of the European Parliament on Civil Liberties, Justice and Home Affairs, hearing on Anti-Semitism, Islamophobia and hate speech http://ec.europa.eu/commission/2014-2019/timmermans/announcements/transcript-first-vice-president-timmermans-closing-remarks-during-committee-civil-liberties-justice_en.

Hate speech jeopardizes the rights of an ethnic, religious or national group, in clear violation of the principles of equal dignity of and respect for the cultural differences among human groups.

The criminalisation of hate speech will depend by the characteristics of existing national legislation, which can differ. Nevertheless, States are bound, recurring certain conditions, to criminalise hate speech. In order to proceed to the mapping of hate speech, it is useful to dispose of a broad and comprehensive definition, which may include patterns of hate speech that are not necessarily linked to the enacting of a criminal law norm. Nevertheless, they represent manifestations of a xenophobic and/or racist mentality in clear violation of the aforementioned principles and norms.

This Report will take into more detailed consideration the relationship existing amongst hate speech and several fundamental principles of international human rights law. Thus, it will be briefly analysed as a tool apt to facilitate the pursuing of certain general aims of international law, like the struggle against racism and the struggle against discrimination. More space will be subsequently devoted to the rather controversial and delicate issue of the possible contradiction between the need to repress hate speech and the guarantee of freedom of expression, at its turn undoubtedly constituting an essential principle of international law. The analysis of the jurisprudence issued on the matter by UN Committee on Human Rights, US Supreme Court and European Court of Human rights will constitute the occasion for identifying some trends existing at international and regional levels. Finally, some conclusive remarks will be formulated.

2. Hate speech and racism

Racism is one of the main scourges affecting the international community. Far from being definitively defeated by law and by the evolution of social feelings, it resurges periodically, drawing its lymph from situations of crisis and want, affecting popular and impoverished sectors of more or less affluent societies.

Presently, migrations and refugees flows originating from many poor countries, situations of environmental degradation and devastating armed conflicts may trigger new waves of racism inside destination countries, where they seek asylum and place their hopes for a better and dignified existence.

Less than one year ago, the debate dedicated to racial discrimination in the III Committee of the General Assembly of United Nations highlighted a situation in which “flouting international law, racism pervades all countries.”⁶

In some ways, this situation is due to historically ancient and deep-rooted problematics, like that of people of African descent. In the words of Mireille Fanon-Mendes-France, Chair of the Working Group on People of African Descent, “Despite the diversity of situations of people of African descent, common human rights concerns included structural racism that had contributed to poverty, poor living conditions and low levels of political participation.” In order to counter such negative factors, it is certainly necessary to unleash a cultural and legal campaign against public discourses aimed at maintaining or even worsening the situation of structural racism, defaming the social groups, which bear this burden. It is well understandable that hate speech formulated by racist groups, diffused nowadays through many means of communication, including social media, constitutes an obstacle to the overcoming of structural racism and of the situation of marginalisation to which peoples of African descent and other historical minority groups are subjected since a long time, e.g. Roma communities.

Mutatis mutandis, the need to fight hate speech applies also to the situation of “new racism,” which is developing itself in the countries of immigration, especially Europe. Due to the cultural differences, the hate speech can take in this context the features of islamophobia.

It is also worth recalling that in 2013, the Committee on the Elimination of Racial Discrimination adopted its **General Recommendation n. 35**⁷ specifically devoted to the need to combat racist hate speech. The Committee observed, “While the term hate speech is not explicitly used in the CERD, this lack of explicit reference has not impeded the Committee from identifying and naming hate speech phenomena and exploring the relationship between speech practices and the standards of the Convention.”

In general terms, “Racist hate speech addressed in Committee practice has included all the specific speech forms referred to in article 4 directed against groups recognized in article 1 of the Convention — which forbids discrimination on grounds of race, colour, descent, or national or ethnic origin — such as indigenous peoples, descent-based groups, and

⁶ III Committee of the General Assembly of United Nations, Sixty-ninth session, 37th & 38th Meetings (AM & PM), 3 November 2014, in <http://www.un.org/press/en/2014/gashc4115.doc.htm> .

⁷ General Recommendation n. 35 of the Committee on the Elimination of Racial Discrimination, in http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=11 .

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.”

The approach adopted by the Committee has been targeted to fight in the most effective way hate speech in all its forms. At this point, it is necessary to be aware that “racist hate speech can take many forms and is not confined to explicitly racial remarks. As is the case with discrimination under article 1, speech attacking particular racial or ethnic groups may employ indirect language in order to disguise its targets and objectives.”

However, the Committee recommended “that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.”

Keeping this in mind, the Committee suggested to confine criminal sanctions to a definite set of hypothesis. “In the light of the provisions of the Convention and the elaboration of its principles in general recommendation No. 15 and the present recommendation, the Committee recommends that the States parties declare and effectively sanction as offences punishable by law:

(a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means;

(b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin;

(c) Threats or incitement to violence against persons or groups on the grounds in (b) above;

(d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination;

(e) Participation in organizations and activities which promote and incite racial discrimination”.

It is worth observing that, in comparison with the text of art. 20 of the ICCPR, the Committee on Racial Discrimination prefers at letter (b) to utilize the word “contempt” instead of that of “hostility”.

Paragraph 12(m) of the World conference against racism, racial discrimination, Xenophobia and related intolerance resolution 2001/11, the Un Sub-commission on Human rights acknowledged “[t]he incompatibility between freedom of speech and campaigns promoting hate, intolerance and violence on the basis of racism, racial discrimination and xenophobia, particularly in the digital age.”

3. Hate speech and discrimination

Eliminating discrimination in all its forms represents, at least since the approval of the United Nations Charter in 1945, one of the most important objectives of international law. Without specifically mentioning “discrimination”, art. 1 of the Charter confers *i.a.* to United Nations the task of achieving “international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”

The struggles to fight discrimination and, conversely, promote equality are without doubt necessary to concretise two of the most important principles of international human rights law. These principles are enshrined in art. 26 of the ICCPR, whose text reads as follow, “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.”

Concerning in particular racial discrimination, art. 1 (1) of the CERD affirms at its turn that “1. In this Convention, the term “racial discrimination” shall mean 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”.

In order to eradicate discrimination, State parties to CERD undertake, in conformity to art. 2 (1) of that Convention, “a) ...to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; b) ... not to sponsor, defend or support racial discrimination by any persons or organizations” Each State party “ c) shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; d) ... shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization; e) undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.”

The concept of discrimination lies at the very heart of “hate speech.” In order to exert its divisive and destructive action, discrimination is built generally on a false perception of others. Human groups are identified following certain characteristics, like their way of living, religion, language, physical aspect, ideology and others and exposed to hatred and contempt.

In that way “hate speech” represents a sort of ideological and psychological basis of discrimination, motivating, through the artificial building of such false images and representations, the behavior of institutions and ordinary people that can translate into discriminatory acts. Therefore, combating hate speech is necessary in order to deprive discrimination of this basis. Such a struggle requires employing different means, from the dissemination in the communicative and educative systems of correct discourses

demolishing the negative myths built up by hate speech, until, at least in the gravest cases, the application of criminal sanctions to its authors.

In fact discrimination is explicitly recalled by art. 20 of the ICCPR as one of the aims towards which hate speech is directed, concretizing itself into “any advocacy of national, racial or religious hatred that constitutes incitement” to it, as well as to hostility and violence.

There are certainly various degrees and ways of acting of discrimination. Jews during the Third Reich were depicted as wealthy parasites responsible for the crisis and poverty of German people. Roma today, in Italy and elsewhere, are generally represented as thieves, dirty and lacking of discipline. Migrants and asylum-seekers are described as a danger for European welfare. During the recent European history, some peoples, like the Greek, have been told to be lazy and living on the shoulders of others. And so on.

All these narratives are not only based on lies and defamation. They are also aimed at creating social targets on which direct the rage and frustration of ordinary people. As such, they represent, with no doubts, a very serious danger for human coexistence and cooperation.

In order to promote the repression of hate speech as a useful tool for combating discrimination, it appears necessary to proceed to an interpretation of art. 20 of the ICCPR, which conceives the three possible forms of hatred there enunciated as different aspects of one and the same social category. In fact, religion, nationality and “race” (a concept nowadays deprived of any scientific reason or validity but usable in order to summarize some exterior physical characteristics of persons) are very closely interrelated features of social groups, which are perceived as such evidencing the different features in relation to these three fundamental and constitutive elements of their identity frequently appearing interrelated among them, especially in the social imaginary.

In this framework it is worth mentioning **General Recommendation n. 30 of the Committee on the elimination of racial discrimination**, concerning discrimination against non-citizens and in particular its points specifically addressed to combating hate speech, requesting State parties to “11. Take steps to address xenophobic attitudes and behaviour towards non-citizens, in particular hate speech and racial violence, and to promote a better understanding of the principle of non-discrimination in respect of the situation of non-citizens; 12. Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of “non-citizen” population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large.”⁸

4. Hate speech and freedom of expression

4.1. A delicate balance to be struck

⁸ General Recommendation n. 30 of the Committee on the elimination racial discrimination, in http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=11

Freedom of expression is undoubtedly one of the most important principles supporting democracy at internal and international levels. Giving people the possibility of saying what they want, especially of criticizing established authorities and powers, represents in itself a fundamental guarantee of the rights of everybody. As affirmed by Thomas David Jones, freedom of expression constitutes “an innate and instinctive right of human beings” and “a recognized juridical norm in customary international law”.⁹ However, “this norm is not absolute in character.”¹⁰ There are precise limitations, which derive from the need to protect high-standing values. For instance, “racially defamatory falsehood is not language that comes within the ambit of protection secured by the principle of freedom of expression as defined and construed in the international legal context.”¹¹

In fact, the applicable international law treaties explicitly mention some of these limits. Take first of all art. 19, para. 3, of the same Covenant, which enunciates the limits “necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.”

There is, moreover, the specific duty of criminalizing certain types of public speech which, following art. 20 of the ICCPR, requests all States to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

A limitation of freedom of expression can hence be derived, in the case of hate speech, either by the need to protect the reputation of individual and social groups, or by the obligation, incumbent on States, to outlaw public speeches directed to advocating hatred constituting incitement to discrimination, hostility or violence.

The present circumstances of social life and communication require a wide interpretation of such concepts. The diffusion of social medias amplifies the sphere of public communication giving to every individual connected to such medias the possibility to express his opinion. This represents undoubtedly an unprecedented occasion to improve the quality of democratic participation and free circulation of thought, but at the same time it multiplies the threats to peaceful coexistence originating from hate speech.

Such phenomenon represents a perversion of free speech and not at all an aspect of it. Freedom, in general terms, has to be exerted in a legal framework constituted by the rights of others not be defamed. This applies as well to individuals, who have at their disposition legal tools and institutes like libel, as to groups. The protection of the rights of these has to be stronger than that of individuals, due to various historical reasons and to the persisting need to overcome certain longstanding problems afflicting national societies and the international community, such as racism and discrimination.

New challenges arise from the possibilities of certain political groups to use the new communication channels in a perverted manner in order to spread their discourse finalised to marginalize certain social or ethnic groups.

⁹ T. D. JONES, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations*, Martinus Nijhoff Publishers, 1998, p. 34.

¹⁰ *Ibidem*.

¹¹ *Ibidem*.

The dangerous impact of such a discourse is magnified by some phenomena, like the economic crisis, unemployment, reduction of social guarantees, international migrations due to conflicts, environmental degradation and increasing poverty in a series of geopolitical areas. These phenomena in fact are liable to weaken social cohesion fuelling the tendency to a war of all against all, and especially that to a war among the poor, who are the most likely to be the victims of the crisis. Moreover, certain groups of power may be inclined to create false targets in order to deviate the attention of the masses from the real reasons of crisis and of the worsening of living conditions. Historically, this is in fact the main reason for the birth and development of widespread racist attitudes.

The lessons of the past, even of the recent one, show us how dangerous it can be to allow discourses depicting some social or ethnic groups as “parasites” or particularly dedicated to crime and unlawful activities. The accumulation of such propaganda, particularly through social media, can pave the way to increasing hostility against such groups, fertilising the soil for mass expulsions, pogroms and even genocide. There is therefore an urgent need to put a halt to such discourses. The direct source of such a limitation at the international level is clearly enshrined in the aforementioned art. 19 and 20 of the ICCPR, as well as in other international treaties like the CERD (art. 4).

Moreover, we have to keep in mind that the repression of hate speech is linked to the promotion of international values of high importance, which are connected with the principle of equality, namely the struggle against racism and against discrimination. As emphasized by the website “Art. 19”, “the inherent dignity and equality of every individual is the foundational axiom of international human rights. It is, therefore, perhaps not surprising that international law condemns statements which deny the equality of all human beings.”¹²

Repression of hate speech also represents an essential condition for the development of intercultural dialogue based on sharing basic common values. Among such values, in fact, one of the most important and strategic ones is the promotion of equality. On the contrary, hate speech aims at linking social, ethnic and cultural groups with certain fossilized characteristics, generally negative ones. Emphasizing such characteristics denies equality and even the possibility of a fruitful dialogue and confrontation among the groups, based primarily on reciprocal respect and recognition of possible differences, to be taken as the basis to forge a new global identity, which is one of the most important challenges for international community and humanity as a whole in the present phase of globalization, i.e. intensification of flows among countries and regions.

Stereotyping, that is the undue generalization of certain asserted negative features of social, ethnic and religious groups represents a hurdle for intercultural dialogue. For instance, attributing to Islamic faith as a whole the positions expressed by certain fundamentalist organisations may have the effect of increasing the marginalisation and discrimination of the growing Islamic population in countries like the European ones or the US. Such generalisations provoke a spiraling of accusations and counteraccusations, which benefit ultimately only the extremist groups on both sides, fostering racism and civil strife and curtailing the possibility of dialogue, mutual comprehension and the rise of a new intercultural identity based on commonly shared values.

¹² <https://www.article19.org/pages/en/hate-speech-more.html> .

Given all these implications, it appears untenable to defend unconditionally the priority of free speech as a paramount and absolute imperative for international and national societies. A series of arguments apply and have been elaborated by the legal doctrine favorable to the limitation of free speech, precisely in sake of the repression of hate speech. These arguments are meant to counter the so-called “paternalistic objections to hate speech regulation” raised in the framework of the debate concerning the elaboration of antiracism rules in US campuses.¹³ “Campus racism” seems to represent in fact a very interesting phenomenon, which reflects certain trends that are developing in the Western world.

4.2. Different views among States

The dialectic relationship between freedom of expression and hate speech is differently conceived inside the international community. It is notable the case of the United States, which formulated the following reservation to art. 20, para. 2, of the ICCPR: “That article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.”¹⁴ In accordance with the interpretation affirmed by its Supreme Court, the United States “have taken the view that only incitement which is intended to cause imminent violence justifies restricting such a fundamental right.”¹⁵ Such an interpretation leaves out the other possible aims of incitement banned by that norm, namely “discrimination” and “hostility”.

In this regard, it has been correctly observed, “hate speech – that is, speech designed to promote hatred on the basis of race, religion, ethnicity or national origin – poses vexing and complex problems for contemporary constitutional rights to freedom of expression. The constitutional treatment of these problems, moreover, has been far from uniform as the boundaries between impermissible propagation of hatred and protected speech vary from one setting to the next. There is, however, a big divide between the United States and the other Western democracies. In the United States, hate speech is given wide constitutional protection, while under international human rights covenants and in other Western democracies, such as Canada, Germany and the United Kingdom, it is largely prohibited and subjected to criminal sanctions.”¹⁶

An excessively restrictive interpretation of the duty to pursue hate speech appears however to be in contrast with the letter of the norms and the practice of some international bodies competent for the matter.

¹³ See R. DELGADO, D. H. YUN, “Pressure valves and bloodied chickens: an analysis of paternalistic objections to hate speech regulation”, in *California Law Review*, July 1994.

¹⁴ K. ASH, “US Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence, in *Northwestern Journal of International Human Rights*, 2, 1, Spring 2005, in <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1018&context=njihr> Reservations to that article have also been formulated by Belgium, Denmark, Finland and Iceland. See also the US reservation to CERD in <http://www1.umn.edu/humanrts/usdocs/racialres.html>

¹⁵ See the aforementioned website of the association “Art. 19”, <https://www.article19.org/pages/en/hate-speech-more.html>.

¹⁶ M. ROSENFELD, “Hate speech in constitutional jurisprudence: a comparative analysis”, *ibn Cardozo Law Review* 1523, (2002-2003).

Aforementioned **General Recommendation n. 15 of the Committee on the Elimination of Racial Discrimination** affirms, “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. This right is embodied in article 19 of the Universal Declaration of Human Rights and is recalled in article 5 (d) (viii) of the CERD. Its relevance to article 4 is noted in the article itself. The citizen's exercise of this right carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance.”

4.3. The position of Amnesty International

It is also worth recalling the stance of Amnesty International (AI) on the matter. Being an important NGO working for the defense of civil and political rights, Amnesty International seems particularly worried not to excessively harm the principle of freedom of expression. In a document adopted on 28 August 2012 as a “Written contribution to the thematic discussion on Racist Hate Speech and Freedom of Opinion and Expression organized by the United Nations Committee on Elimination of Racial Discrimination.”¹⁷

AI recognizes that “prejudicial discourse can fuel discrimination and other human rights abuses”, but at the same time it affirms that “robust protection of freedom of expression is a powerful and essential tool for combating racial discrimination and violence,” warning that “excessive restrictions on freedom of expression may ... undermine many other human rights,” and emphasises the risk that, paradoxically, the persons protected by hate speech provisions could be victims of those provisions. In order to avoid such dangers States should pay attention to laws and policies on “hate speech,” drafting laws and policies in a clear and narrow manner. In particular, the prohibitions required under art. 4 (a) of the Convention on the elimination of all forms of racial discrimination should serve a legitimate aim under international human rights law and be necessary and proportionate to achieving that aim.

At the same timer, States should adopt a “holistic approach” not limiting themselves to prohibit hate speech but fulfilling the positive obligations under art. 7 of the same Convention, especially in the fields of teaching, education, culture and information.

In the same vein, the restrictions to free speech allowed by art. 19 (3) and 20 of the ICCPR should meet a three-part text composed by the following elements: “1) they must be aimed at the protection of national security, public order, public health or morals, or respect for the rights and reputations of others; 2) they must be provided by law; and 3) they must be necessary (i.e. proportionate and the least restrictive possible) to achieve the intended aim.”

Quoting the UN High Commissioner for Human Rights, Navanethem Pillay, AI further stresses that in order to draw the line that separates protected from unprotected speech, a thorough assessment of the circumstances of each case is necessary. Furthermore, those laws should contain an “intent requirement”, as deductible i.a. by the meaning to be attributed to the word “advocacy.”

¹⁷Amnesty International, written contribution to the thematic discussion on Racist Hate Speech and Freedom of Opinion and Expression organized by the United Nations Committee on Elimination of Racial Discrimination, 28 August 2012 in <http://www.ohchr.org/Documents/HRBodies/CERD/Discussions/RacistHatespeech/AmnestyInternational.pdf>

4.4. The position of the "Special Mandates"

A valuable attempt to balance the two principle was contained in a Joint Statement, formulated in 2001 by the UN, OSCE and OAS Special Mandates on the right to freedom of expression. It formulates the conditions to be respected by laws aiming at the repression and criminalization of hate speech, namely the illegitimacy of penalization of true statements, of statements not intended to incite discrimination, hostility or violence. At the same time, the Joint Statement called for the respect of the right of journalists to decide how best to communicate information and ideas to the public, and it affirmed the illegitimacy of prior censorship and the necessity to keep any imposition of sanctions by courts in strict conformity with the principle of proportionality.¹⁸

More recently, in 2010, representatives of these institutions plus one of the African Commission on Human and Peoples' Rights (ACHPR) expressed their concerns about following features of criminal defamation law in general: "a) The failure of many laws to require the plaintiff to prove key elements of the offence such as falsity and malice. b) Laws which penalise true statements, accurate reporting of the statements of official bodies, or statements of opinion. c) The protection of the reputation of public bodies, of State symbols or flags, or the State itself. d) A failure to require public officials and figures to tolerate a greater degree of criticism than ordinary citizens. e) The protection of beliefs, schools of thought, ideologies, religions, religious symbols or ideas. f) Use of the notion of group defamation to penalise speech beyond the narrow scope of incitement to hatred. g) Unduly harsh sanctions such as imprisonment, suspended sentences, loss of civil rights, including the right to practise journalism, and excessive fines."¹⁹

Of course, hate speech repression should not be used as disguised means or an excuse to silence critical voices or unduly censor journalists, bloggers and other subjects exerting their right to receive and impart information on facts or legitimate opinions. Specifically concerning the communication on Internet, following principles, contained in a 2011 Declaration on the freedom of expression in Internet adopted by the aforementioned representatives of UN, OSCE, OAS and ACHPR²⁰ should apply: "a) Freedom of expression applies to the Internet, as it does to all means of communication. Restrictions on freedom of expression on the Internet are only acceptable if they comply with established international standards, including that they are provided for by law, and that they are necessary to protect an interest which is recognised under international law (the 'three-part' test). b)

¹⁸ Joint Public Statement by the UN, OSCE and OAS Special Mandates on the right to freedom of expression, <https://www.article19.org/pages/en/hate-speech-more.html> .

¹⁹ The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information "Tenth anniversary Joint Declaration: ten key challenges to freedom of expression in the next decade, in <http://www.osce.org/fom/99558?download=true> .

²⁰ The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on freedom of expression and the Internet, *Ibidem*.

When assessing the proportionality of a restriction on freedom of expression on the Internet, the impact of that restriction on the ability of the Internet to deliver positive freedom of expression outcomes must be weighed against its benefits in terms of protecting other interests. c) Approaches to regulation developed for other means of communication – such as telephony or broadcasting – cannot simply be transferred to the Internet but, rather, need to be specifically designed for it. d) Greater attention should be given to developing alternative, tailored approaches, which are adapted to the unique characteristics of the Internet, for responding to illegal content, while recognising that no special content restrictions should be established for material disseminated over the Internet. e) Self-regulation can be an effective tool in redressing harmful speech, and should be promoted. f. Awareness raising and educational efforts to promote the ability of everyone to engage in autonomous, self-driven and responsible use of the Internet should be fostered ('Internet literacy')."

5. Jurisprudence

5.1. Jurisprudence of the UN Committee on Human Rights

The UN Committee on Human Rights acknowledged the full compatibility among the principle of freedom of expression and the limitations put by art. 19 and art. 20, para. 2, which "are compatible with and complement each other."²¹

Consequently, the Committee, handling some cases of hate speech, squarely rejected the allegations of certain individuals, who claimed to be protected by the principle of free speech. The Committee balanced such principle with the necessity not to leave unpunished clear expressions of racial hatred directed to create a climate of hostility, violence and discrimination against minority groups. It is also interesting to notice that the two "historical" cases regarding hate speech and freedom of opinion before the Human Rights Committee both ended with decisions aimed at repressing one specific aspect of it, namely anti-Semitism.

In *J.R.T. and the W.G. Party v. Canada* (1983), the applicants invoked the principle of free speech against the decision taken by Canadian authorities to curtail a telephone service diffusing anti-Semitic messages. They claimed to be the "victims of infringements by the Canadian authorities of the right to hold and maintain their opinions without interference, in violation of article 19 (1) of the ICCPR, and the right to freedom of expression and of the right to seek, receive and impart information and ideas of all kinds through the media of their choice, in violation of article 19 (2) of the Covenant."²²

The decision to close down that telephone service was based on Section 13 (1) of the Canadian Human Rights Act of 1 March 1978. Section 13(1) reads as follows: "It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by

²¹ Point 50 of General Comment 34, cit.

²² *J.R.T. and the W.G. Party v. Canada* (1983), in <http://www1.umn.edu/humanrts/undocs/html/104-1981.htm> .

reason of the fact that the person or those persons are identifiable on the basis of a prohibited ground of discrimination.” “Prohibited grounds of discrimination” are, following Section 3 of the same Act, “race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and physical handicap.”

The Human Rights Tribunal appointed by the Canadian Human Rights Commission found out that “although some of the messages are somewhat innocuous, the matter for the most part that they have communicated is likely to expose a person or persons to hatred or contempt by reason of the fact that the person is identifiable by race or religion and in particular, the messages identify specific individuals by name.” The Tribunal therefore ordered to cease the emission of messages of that content. However, in the wake of the appeal decision of the Federal Court, the Canadian Human Rights Commission recorded a new message from the telephone service of the W. G. Party, complaining that “we are now denied the right to expose the race and religion of certain people, regardless of their guilt in the destruction of Canada” and adding “those who do not believe there is a preponderance of certain racial and religious minorities involved in the corruption of our Christian way of life will never understand the simple basis of our way of life-the common denominator.” Another message affirmed, “some corrupt Jewish international conspiracy is depriving the callers of their birthright and that the white race should stand up and fight back”. Mr. T. was then condemned for contempt of the Court, having disobeyed the order of the Human Rights Tribunal and his appeal was rejected. The Committee decided that “the opinions which Mr. T. seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20 (2) of the Covenant to prohibit.”

Another interesting case dealt with by the Committee on Human Rights is *Faurisson v. France*²³(1983). This case is particularly meaningful from the point of view of the balance to be struck between freedom of expression and hate speech. Faurisson had been convicted by the 17th *Chambre correctionnelle* of the *Tribunal de grande instance* of Paris on the basis of the French law of 13 July 1990, denominated *Loi Gayssot*²⁴, criminalizing whoever denies crimes against humanity, as defined by art. 6 of the Statute of the International Military Tribunal annexed to the Agreement of London of 8 August 1945²⁵. Faurisson had violated

²³ *Faurisson v. France* , <http://www1.umn.edu/humanrts/undocs/html/VWS55058.htm> .

²⁴ Loi du 13 juillet 1990, in www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00000532990&categorieLien=id .

²⁵ The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of

this Law, affirming publicly that he had "... excellent reasons not to believe in the policy of extermination of Jews or in the magic gas chambers ... I wish to see that 100 per cent of the French citizens realize that the myth of the gas chambers is a dishonest fabrication." The Committee upheld the conviction because with such statements Mr. Faurisson had violated the rights and reputation of others and that the restriction "served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism" and was necessary since the denial of the existence of the Holocaust constituted the principal vehicle for anti-Semitism.

Since the year 2000 the jurisprudence of the UN Human Rights Committee on the matter become more varied, incorporating, besides anti-Semitism, other utterances of hate speech, in particular concerning the stereotyping of migrant communities in Europe.

In *Malcom Ross v. Canada* (2000)²⁶, a teacher was subjected to certain disciplinary measures because of his anti-Semitic attitudes and declarations. The Committee posed itself the question "whether the restriction on the author's freedom of expression was necessary to protect the right or reputations of persons of the Jewish faith." It recalled "the exercise of the right to freedom of expression carries with it special duties and responsibilities," which presents a "particular relevance within the school system, especially with regard to the teaching of young students." It observed, "the influence exerted by school teachers may justify restraints in order to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory." The Committee also took note of the fact that Canadian Supreme Court had found that "there was a causal link between the expressions of the author and the 'poisoned school environment experienced by Jewish children in the School district."

In *The Jewish community of Oslo and others* (2005),²⁷ the Committee took in consideration Mr. Sjolje's statements. He declared that "people and country are being plundered and destroyed by Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts." To support such statements Mr. Solje had invoked the authority of Rudolf Hess and Adolf Hitler. The Committee considered "these statements to contain ideas based on racial superiority or hatred" and that "the deference to Hitler and his principles and 'footsteps' must in the Committee's view be taken as incitement at least to racial discrimination, if not to violence." The Committee also noted, "the principle of

or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c)CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. See <http://avalon.law.yale.edu/imt/imtconst.asp> .

²⁶ *Malcom Ross v. Canada*, <http://www1.umn.edu/humanrts/undocs/736-1997.html> .

²⁷ *The Jewish community of Oslo and others v. Norway*, <http://www1.umn.edu/humanrts/country/decisions/30-2003.html> .

freedom of speech has been afforded a lower level of protection in cases of racist and hate speech”, concluding that “the statements of Mr. Sjolie, given that they were of exceptionally/manifestly offensive character, are not protected by the due regard clause, and that accordingly his acquittal by the Supreme Court of Norway gave rise to a violation of article 4, and consequently article 6, of the Convention” against all forms of racial discrimination.

The case *Saada Mohamad Adan (2010)*²⁸ seems even more interesting. It concerns a complaint for the violation of art. 4 of CERD by the Danish politician Pia Kjørsegaard. Ms. Kjørsegaard had publicly stated, “most Somalis carry out genital female mutilation as something quite natural”. The Committee noted, “these offensive statements can be understood to generalize negatively about an entire group of people based solely on their ethnic or national origin and without regard to their particular views, opinions or actions regarding the subject of female genital mutilation.” The Committee further considered that “the fact that statements were made in the context of a political debate does not absolve the State party from its obligation to investigate whether or not such statements amounted to racial discrimination” and reiterated that “the exercise of the right to freedom of expression carries special duties and responsibilities, in particular the obligation not to disseminate racist ideas.” The Committee concluded that articles 2, paragraph 1(d), and 4 of the Convention have been violated “in the light of the State party's failure to carry out an effective investigation to determine whether or not an act of racial discrimination had taken place,” and that “the lack of an effective investigation into the petitioner's complaint under section 266 (b) of the Criminal Code also violated his right, under article 6 of the Convention, to effective protection and remedies against the reported act of racial discrimination.” Therefore, the petitioner was entitled to receive adequate compensation by the State, which was also requested to ensure “that the existing legislation is effectively applied so that similar violations do not occur in the future.”

The case *TBB-Turkish Union in Berlin/Brandenburg(2013)*²⁹ concerned the contrariety to CERD of the statement made by Mr. Sarrazin in a magazine in which Turkish population was presented “as a segment of the population who live at the expense of the State and who should not have the right to live on the territory of the State party and that the State party failed to provide protection against such discrimination.”

Sarrazin had also declared that “a large proportion of the Turkish population does not have any productive function except for the fruit and vegetable trade, that they are neither able nor willing to integrate into German society and encourage a collective mentality that is aggressive and ancestral” and that “he would generally prohibit influx of migrants, except for highly qualified individuals and stop providing social welfare for immigrants.”

The Committee observed that Sarrazin’s statements contained “ideas of racial superiority, denying respect as human beings and depicting generalized negative characteristics of the Turkish population, as well as incitement to racial discrimination in order to deny them access to social welfare and speaking about a general prohibition of immigration influx except for highly qualified individuals, within the meaning of article 4 of the Convention.”

²⁸ *Saada Mohamad Adan v. Denmark*, <https://www1.umn.edu/humanrts/country/decisions/43-2008.html> .

²⁹ *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, <http://www2.ohchr.org/English/bodies/cerd/docs/CERD-C-82-D-48-2010-English.pdf> .

The Committee rejected Germany's position invoking the need to limit the repression of hate speech to the cases where public peace was likely to be disturbed. It observed that "the criterion of disturbance of the public peace, which is taken into consideration in the evaluation if statements reach the threshold of dissemination of ideas based upon racial superiority or hatred, does not adequately translate into domestic legislation the State party's obligation under article 2, paragraph 1 (d), in particular as neither article 2, paragraph 1 (d), nor article 4 contain such a criterion."

No violation of CERD was, on the contrary, found out in the cases *A.W.R.AP. v. Denmark* (2007)³⁰ and *P.S.N. v. Denmark* (2007)³¹ because some anti-Islamic statements were directed "at persons of a particular religion or religious group, and not at persons of a particular "race, colour, descent, or national or ethnic origin" since they "specifically refer to the Koran, to Islam and to Muslims in general, without any reference whatsoever to any race, colour, descent, or national or ethnic origin" also in the light of the fact "that the Muslims currently living in the State party are of heterogeneous origin", originating" from at least 15 different countries", being of "diverse national and ethnic origins, and consist of non-citizens, and Danish citizens, including Danish converts." Nevertheless, in both cases the Committee felt the necessity to take note "of the offensive nature of the statements complained" reiterating that "freedom of speech carries with it both duties and responsibilities". It also took the opportunity to remind the State party "of (a) the considerable increase in reported cases of widespread harassment of people of Arab and Muslim backgrounds since 11 September 2001; (b) the increase in the number of racially motivated offences; and (c) the increase in the number of complaints of hate speech, including by politicians within the State party."

5.2. Jurisprudence of the European Court for Human Rights

The jurisprudence of the European Court on Human Rights (ECHR) on hate speech is characterised, on one hand, by the reaffirmation of the importance of freedom of speech as a basis for democratic society. On the other hand, there is an increasing awareness of the need to halt hate speech, especially for the European social and political tensions created by the attempt of some political groups to profit from the problems originated by migrations of people of different provenience and cultural background.

Rather emblematic of the traditional trend of that Court to emphasise the importance of free speech is the affirmation, made in the decision of *Handyside v. United Kingdom*, of 7 December 1976, that "The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it 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 the State or any sector of the population. Such are the demands of that pluralism,

³⁰

A.W.R.AP.

v.

Denmark,

http://www.worldcourts.com/cerd/eng/decisions/2007.08.08_AWRAP_v_Denmark.htm .

³¹ *P.S.N. v. Denmark*, <https://www1.umn.edu/humanrts/country/decisions/36-2006.html> .

tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued".

The ECHR has devoted special attention to the role of the press and the need to safeguard information. It is indicative in this sense the decision rendered in *Jersild v. Denmark* (1994)³², which originated by the conviction of a journalist author of a television report on the so-called Greenjackets, a racist group active in that country. The Court was not convinced by the argument, developed by Danish national authorities, "that the Greenjackets item was presented without any attempt to counterbalance the extremist views expressed." It valorised in this regard the circumstance that "both the TV presenter's introduction and the applicant's conduct during the interviews clearly dissociated him from the persons interviewed, for example by describing them as members of 'a group of extremist youths' who supported the Ku Klux Klan and by referring to the criminal records of some of them", that "the applicant also rebutted some of the racist statements for instance by recalling that there were black people who had important jobs" and that "taken as a whole, the filmed portrait surely conveyed the meaning that the racist statements were part of a generally anti-social attitude of the Greenjackets". Therefore, although "the item did not explicitly recall the immorality, dangers and unlawfulness of the promotion of racial hatred and of ideas of superiority of one race... in view of the above-mentioned counterbalancing elements and the natural limitations on spelling out such elements in a short item within a longer programme as well as the journalist's discretion as to the form of expression used", the Court did not consider the absence of such precautionary reminders to be relevant. In more general terms, the Court affirmed that "news reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of 'public watchdog'". In the light of the need to favour such vital role "the punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so".

The rather recent decision in the *Féret v. Belgium* case (2009)³³ may be indicative of the decision of the Court to engage more actively in the struggle against hate speech. The applicant was chairman of the political party "Front National-Nationaal Front" (the "Front National"), editor in chief of the party's publications and owner of its website, and a member of the Belgian House of Representatives. He had been condemned, under Belgian law of 30 July 1981³⁴, to 250 hours of community service related to the integration of immigrants and to a 10-month suspended prison sentence, and declared ineligible for ten years, for having diffused some leaflets presenting foreign communities in Belgium as "criminally-minded and keen to exploit the benefits they derived from living in Belgium". The Court observed that such leaflets "also sought to make fun of the immigrants concerned, with the inevitable risk

³² *Jersild v. Denmark*, <http://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22hate%20speech%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%22001-57891%22%5D%7D>

³³ *Féret v. Belgium*, <http://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-93626%22%5D%7D>.

³⁴ Belgian Law of 30th July 1981, <http://www.equalrightstrust.org/content/belgium-law-30-july-1981-suppress-certain-acts-inspired-racism-or-xenophobia>.

of arousing, particularly among less knowledgeable members of the public, feelings of distrust, rejection or even hatred towards foreigners”.

The Court, recognising that “freedom of expression was important for everybody, it was especially so for an elected representative of the people: he or she represented the electorate and defended their interests”, reiterated that “it was crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. The impact of racist and xenophobic discourse was magnified in an electoral context, in which arguments naturally became more forceful. To recommend solutions to immigration-related problems by advocating racial discrimination was likely to cause social tension and undermine trust in democratic institutions. In the present case there had been a compelling social need to protect the rights of the immigrant community, as the Belgian courts had done”.

The cases concerning the Turkish situation seem rather peculiar, since the country is characterised by a longstanding conflict among the State and groups calling for self-determination and a larger autonomy of the Kurds.

One of these cases, *Erdođdu and İnce v. Turkey* (1999)³⁵, concerned the penal prosecution of the editors of the review *Demokrat Muhalefet!* (“Democratic Opposition!”) for having published an interview with a Turkish sociologist on the relationship among Turks and Kurds. The Court judged that “the conviction and sentencing of the applicants were disproportionate to the aims pursued and therefore not ‘necessary in a democratic society’”. This is because notwithstanding that “‘duties and responsibilities’ which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tension” and that “particular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence...where such views cannot be categorised as such, Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media”. A similar position was taken in the cases *Sürek v. Turkey* (4) (1999)³⁶ and *Sürek and Özdemir v. Turkey* (1999)³⁷.

Also in *Arslan v. Turkey* (1999)³⁸ the Court judged that the criminal sanctions inflicted to a writer who had published a book on the Kurdish issue were excessive. The Court observed that “the applicant is a private individual and that he made his views public by means of a literary work rather than through the mass media, a fact which limited their potential impact

³⁵ *Erdođdu and İnce v. Turkey*, <http://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22hate%20speech%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%222001-58275%22%5D%7D>

³⁶ *Sürek v. Turkey* (4), <http://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22HATE%20SPEECH%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%222001-58298%22%5D%7D>.

³⁷ *Sürek and Özdemir v. Turkey*, <http://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22HATE%20SPEECH%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%222001-58278%22%5D%7D>.

³⁸ *Arslan v. Turkey*, <http://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22arslan%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%222001-58271%22%5D%7D>.

on “national security”, public “order” and “territorial integrity” to a substantial degree” and noted in addition “that although certain particularly acerbic passages in the book paint an extremely negative picture of the population of Turkish origin and give the narrative a hostile tone, they do not constitute an incitement to violence, armed resistance or an uprising; in the Court’s view this is a factor which it is essential to take into consideration”. In fact, the intensity of the speech and its likeliness to create a climate favorable to violent acts appears a decisive criterion³⁹, although one subjected to a wide margin of discretionary appreciation by Courts, as shown by the oscillations of the US Supreme Court.

More significant appears, in cases like the Turkish ones, the circumstance that object of the sharp critics criminalized by the national legal system were State activities and not social groups as such. It reminds us of one of the basic characteristics of the repression of hate speech, namely fostering the rights of oppressed people against racism and discrimination.

5.3. Jurisprudence of the US Supreme Court

The predominance of the free speech argument against the need to repress hate speech has been more or less coherently upheld by the US Supreme Court, which issued six major landmark rulings on the matter since 1949 until recent times (2011)⁴⁰. It is useful to review them briefly.

In *Terminiello v. the City of Chicago* (1949), the Court decided that free speech "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest ... There is no room under our Constitution for a more restrictive view"⁴¹.

Likewise, in *Brandenburg v. Ohio* (1969), the Court declared that the freedom of speech of the petitioner, a member of Ku Klux Klan, had to be protected, because "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"⁴².

In *National Socialist Party v. Skokie* (1977)⁴³, US Supreme Court decided, for similar reasons, to permit a Nazi March in the small, ethnically Jewish town of Skokie in the outskirts of Chicago.

In *R.A.V. v. City of St. Paul* (1992), an ordinance charging the petitioner for having burnt a cross on a black family’s lawn was declared “facially invalid under the First Amendment” because, i.a., “the ordinance’s content discrimination is not justified on the ground that the ordinance is narrowly tailored to serve a compelling state interest in ensuring the basic

³⁹ See the case *Sürek v. Turkey (1)*, in [http://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22HATE%20SPEECH%22\],%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22:\[%22001-58279%22\]}](http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22HATE%20SPEECH%22],%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-58279%22]}).

⁴⁰ For a synopsis see <http://civilliberty.about.com/od/freespeech/tp/Hate-Speech-Cases.htm>

⁴¹ *Terminiello v. the City of Chicago*, <https://supreme.justia.com/cases/federal/us/337/1/case.html> .

⁴² *Brandenburg v. Ohio* , http://www.oyez.org/cases/1960-1969/1968/1968_492 .

⁴³ *National Socialist Party v. Skokie*, <https://supreme.justia.com/cases/federal/us/432/43/> .

human rights of groups historically discriminated against, since an ordinance not limited to the favored topics would have precisely the same beneficial effect”⁴⁴.

On the same footing, another “cross-burning” case, *Virginia v. Black* (2003), was decided according to the principle that State may “choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm”⁴⁵.

Finally, in the case *Snyder v. Phelps* (2011)⁴⁶, US Supreme Court affirmed the right of Westboro Baptist Church to picket the funeral of a US Marine Corporal in order to protest against the alleged spread of homosexuality in the armed forces of the country. The decision was motivated i.a. by the fact that “the “special protection” afforded to what Westboro said, in the whole context of how and where it chose to say it, cannot be overcome by a jury finding that the picketing was “outrageous” for purposes of applying the state law tort of intentional infliction of emotional distress. That would pose too great a danger that the jury would punish Westboro for its views on matters of public concern”.

In some cases, however, US Supreme Court derogated to the principle of free speech.

It is here worth mentioning the decision in the case *Beauharnais v. Illinois*, upholding the detention of the president of White Circle League, Inc., arrested on January 7, 1950 for distributing on Chicago street corners leaflets calling “to halt the further encroachment, harassment and invasion of white people...by the Negro”. The Supreme Court decided that *Beuharnais'* speech amounted to libel and was therefore beyond constitutional protection⁴⁷.

Similarly, in the case of *Chaplinsky v. New Jersey*⁴⁸, the US Supreme Court affirmed that “it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words -- those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace”. In that case that the appellations ‘damned racketeer’ and ‘damned Fascist’, pronounced by the appellant, were considered to be “epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace”.

6. Conclusive remarks

At the end of the day, the repression of hate speech seems to be necessary to create a social and cultural climate favorable to the realisation of essential principles of international human rights, like the struggle against racism and against discrimination more in general. Countering the spread of hate speech may promote a fruitful intercultural dialogue, which respects differences, but at the same time it may create shared values.

⁴⁴ *R.A.V. v. City of St. Paul* , <https://www.law.cornell.edu/supct/html/90-7675.ZS.html> .

⁴⁵ *Virginia v. Black* , <https://supreme.justia.com/cases/federal/us/538/343/case.html> .

⁴⁶ *Snyder v. Phelps*, <https://supreme.justia.com/cases/federal/us/562/09-751/> .

⁴⁷ *Beauharnais v. Illinois*, http://www.oyez.org/cases/1950-1959/1951/1951_118 .

⁴⁸ *Chaplinsky v. New Jersey*, <https://supreme.justia.com/cases/federal/us/315/568/case.html> .

However, one must admit that it is not easy to keep the necessary balance between freedom of speech and the need to repress hate speech. It imposes a duty of caution on the State organs entitled to enact repressive and prohibitive measures against hate speech. Judicial bodies, in particular, should exert a strong and in-depth vigilance to avoid that such measures, with the excuse of curtailing hate speech, diminish the rights to be critical of the conduct of public entities, thus representing a disguised way to hamper legitimate dissent.

A strong differentiation has to be introduced, in this regard, between legitimate critic of State organs and stigmatisation of social groups as such. The European Court of Human Rights' warned that "the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician has expressed this concept. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries."⁴⁹

Yet, the task of prohibiting hate speech directed against minorities and groups victims of racism and discrimination should be performed relentlessly. No State should refrain from such normative and executive activity, which is required by important norms of international law and reaffirmed by the bodies competent to interpret them and to guarantee their effectiveness.

Of course, such punitive activity could not be self-sufficient and even less its exercise could exempt States from wider-range undertakings in the educative and communicational field. Repression of hate speech should be coordinated with these and enacted in a comprehensive framework of action aimed at eradicating racism and discrimination, representing an essential part of it, which, at least in the most evident and grave cases, is not at all forfeitable or negligible.

Special attention has to be devoted to the possibilities of multiplying hate speech attacks offered by social media.

In its recent Report issued in July 2015 ECRI (European Commission against Racism and Intolerance, a Human Rights Body of the Council of Europe) remarked, "2. The Internet has become an important vehicle for promoting racism and intolerance. Hate speech through social media is rapidly increasing and has the potential to reach a much larger audience than extremist print media were able to reach previously. In this context, ECRI continues to recommend that member States sign and ratify the Council of Europe's Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems"⁵⁰.

The growing importance of INTERNET and especially social media as means for the spread of free speech, but also of hate speech, calls for a special responsibility of public and private entities supervising the activities of such networks. Social media, like Facebook, Twitter and the like, should adopt codes of conduct, which reflect the need to halt hate speech. The

⁴⁹ See i.a. the aforementioned case *Erdođdu and İnce v. Turkey*.

⁵⁰European Commission against Racism and Intolerance, Annual Report on ECRI'S activities covering the period from 1 January to 31 December 2014
https://www.coe.int/t/dghl/monitoring/ecri/activities/Annual_Reports/Annual%20report%202014.pdf

important principles affirmed by UN Committee on Human rights and European Court of Human Rights concerning hate speech should also be applied to social media and new forms of communication. This requires however the full collaboration of the operators of such media who, in this as well as in other fields, should not subtract themselves to their legal duties.

As recommended by the *Unione forense per la tutela dei diritti umani*, an Italian association of lawyers, it appears extremely necessary and urgent, in order to counter such a noxious phenomenon, "to establish a new model of tighter cooperation between social networks and Institutions in order to effectively draft general and abstract rules for preventing and discouraging the spread of discriminatory contents through the web"⁵¹.

Opening a direct confrontation with social networks to actively involve them in the struggle against hate speech would in fact confer to this struggle more efficacy. At the same time, it would affirm, in relation to such nowadays extremely powerful (and may be not adequately controlled and accountable) entities, the special duties and responsibilities whose respect is required, following international norms and jurisprudence here exposed, by everyone who makes use of the fundamental right of free speech. Even more, then, by the guardians of these new and wide virtual spaces where freedom cannot mean dissemination of concepts liable to become poison for the peaceful coexistence, co-operation and interaction of human beings and social groups.

The need to make this joint effort compels of course all States, as well as the regional organizations and the UN, to adopt a homogenous approach on the matter, overcoming differences in interpretation and in action.

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⁵¹ Unione Forense per la tutela dei diritti umani, Observations submitted to the Committee on the elimination of racial discrimination for the thematic discussion on "racist hate speech", in <http://www.unionedirittiumani.it/wp-content/uploads/2012/07/Information-paper-on-racist-hate-speech-Italian-network-on-racial-discrimination.pdf>.

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Comparative Analysis: Legislation and Existing Legal Procedures for addressing Hate Crime and Hate Speech across the European Union

P R I S M



WORDS ARE WEAPONS.

PREVENTING REDRESSING & INHIBITING HATE SPEECH IN NEW MEDIA



PRISM is a project co-financed by the Fundamental Rights and Citizenship Programme of the European Union

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Abbreviations

ADV	<i>Anti Discriminatie Voorziening</i>
CNR	<i>Consiglio Nazionale delle Ricerche</i>
CoE	Council of Europe
Equinet	European Network of Equality Bodies
EU	European Union
FRA	European Union Agency for Fundamental Rights
LEA	Law Enforcement Agency
LGBT	Lesbian, Gay, Bisexual, and Transgender
NGO	Non governmental organization
PPS	Public Prosecutor Service
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
PRISM	Preventing, Redressing and Inhibiting hate Speech in new Media
UN	United Nations
UNAR	<i>Ufficio Nazionale Antidiscriminazioni Razziali</i>
UNICRI	United Nations Interregional Crime and Justice Research Institute

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Executive Summary

The following report represents an integral part of the “PRISM - Preventing, Redressing and Inhibiting hate Speech in new Media” Project, serving as a macro-level comparative analysis of the various legislation and legal mechanisms present within EU Member States to combat hate crime and hate speech, especially hate speech in new media.

This assessment is based on the responses received by UNICRI via the dissemination of a questionnaire pertaining to this general topic, which was sent out to government entities and national Equality Bodies present in each EU country. Based on the answers provided by those entities able to respond, the following general trends were derived with respect to definitions of hate crime and hate speech, national legislation and adherence to international protocols, legal procedures for countering these issues, information on reporting mechanisms and national entities active in this field, and general awareness among various societal stakeholders concerning hate crime and hate speech.

Firstly, disparities with regard to terminology are a key obstacle facing stakeholders in this field. Definitions of hate speech and hate crime have not been harmonized across national borders, and many states have failed to officially recognize or codify definitions within their own national legislation or guiding principles. While this environment has allowed for states to tailor legislation and policy to meet localized cultural needs and particularities, the existence of little harmonization at the international level poses risks to victims as online hate speech becomes increasingly more common, even beyond national borders. This scenario calls for states to work in closer cooperation and define effective parameters and bias categories in order to achieve a balanced approach to combating hate-based crime. The adherence of Member States to EU Council Framework Decision 2008/913/JHA and Directive 2000/43/EC is a step in the right direction; however, the failure of some EU countries to ratify the Additional Protocol of the Council of Europe’s Convention on Cybercrime can generate concern, as this provision serves as a legal basis for addressing hate speech in new media.

The state of national legislation concerning hate speech online is also currently in flux. The nature of some, potentially outdated, legislation being applied to hate speech cases may stand in contrast with the national laws of other countries, which explicitly refer to the illicit nature of hate speech in multimedia environments and have enhanced penalties for hate-based crimes being carried out in this sphere.

At the procedural level, disparities exist with respect to reporting mechanisms available for victims to denounce hate crime / hate speech incidents. While reporting directly to police stations is a method accepted by all states surveyed, other forms of reporting, such as through the use of mobile phone applications, reporting to Equality Bodies, via third parties, or anonymously are absent in many countries, restricting the ways in which victims can access support and legal services in the wake of an incident.

The data collected concerning hate crime and hate speech incidents are often kept in isolation and are not shared among different law enforcement authorities or with national Equality Bodies. The data sharing that does exist is often carried out via informal channels

and on an ad-hoc basis, making it difficult to establish long-term cooperation among different government agencies and actors. In countries where official data sharing instruments are in place, the separation of databases, and lack of effective mitigation as pertains to data protection concerns, act as impediments.

The lack of effective information sharing mechanisms contributes to an uneven distribution of knowledge and low levels of hate crime / hate speech awareness within institutions not having access to the full range of data available concerning hate-based crime. As many EU countries have succeeded in the creation of specific departments within their respective national police forces or prosecutorial offices for dealing with biased-motivated crime, it would be an added value if these entities regularly engaged with multiple actors, such as NGOs and Equality Bodies, to contribute to the dialogue and information sharing needed in this field.

Finally, a lack of training and awareness has been identified as one of the main obstacles facing efforts to combat hate crime and hate speech. As each country surveyed takes a different approach to awareness and training, dialogue among stakeholders at the European level is vital for sharing best practices and developing new approaches to address these topics, particularly the emerging issue of hate speech in new media.

As members of LEAs and judicial actors in some states receive no mandatory training, or only acquire general training on hate-based crime topics via the administration of general human rights courses, cross-sectoral and transnational discourse is needed to identify gaps in national training programs and develop multifaceted, compulsory plans for increasing the awareness of government actors about hate crime and hate speech.

Additionally, the level of awareness amongst the private sector and the general public is another concern for experts. While some EU countries organize active public awareness campaigns in this field, some others only target one area of bias, or are generally underfunded. Other countries have no such campaigns operating in any capacity. National governments and NGOs often lack engagement with the private sector on this issue, a sector which is generally not very aware of the risks related to hate crime and hate speech, but which could serve as a vital partner for helping and supporting NGOs, for instance, in administering public awareness campaigns and further actions of this kind. Through these different measures, the low awareness levels for the general public and private sector, as perceived by the experts surveyed, could be reversed, paving the way for a more informed and proactive society when it comes to combating and preventing hate crime and hate speech.

Despite the improvements still needed in addressing the legal issues associated with hate crime and hate speech, EU Member States have made great strides in incorporating the fight against hate-based crimes into their respective national agendas. Each country surveyed maintains some mechanisms and programs, often of a unique nature, for addressing this topic. As the means through which hateful rhetoric can be propagated diversify, EU Member states should be encouraged to adapt and develop concerted, harmonious strategies to promote awareness and dialogue, enact targeted legislation, encourage reporting and ensure proper assistance to victims and potential victims.

Introduction

The topics of hate crime and hate speech find themselves present in a number of contexts within today's globalized society. Media such as television and radio have long provided channels through which the public could receive information on issues related to current events, sports, arts and entertainment, and particularly developments in politics. These methods of communication, while generally perceived as streamlined in comparison with today's multimedia environment, have at times served as podiums for the dissemination of hate speech and as means to advocate for violent hate crimes to be committed against certain groups or individuals based on racial origin, ethnicity, religion, sexual orientation or other characteristics.

However, the advent and development of the Internet has vastly changed the landscape in which we communicate, allowing for messages and news content to reach the global public at the click of a mouse or the touch of a screen. Within this environment, a variety of new media entities have surfaced, both with respect to personal communication and fora offering widespread dissemination of content. Messaging applications and programs and social networking sites have allowed for users to easily expand their network of connections worldwide.

News organizations have traditionally taken advantage of the opportunities offered by the Internet, and all major news outlets at least maintain up-to-date websites, with many offering smartphone services and are active via a range of social media platforms. The birth of social media, in particular, has blended the concepts of personal and interpersonal communication, allowing individual users, news organizations, companies, politicians, and others to circulate information to a global audience.

This revolution in communication technology has produced real societal benefits, from the aforementioned messaging capabilities, to news alerts being able to reach individuals in remote corners of the globe and the Internet providing a platform through which citizens can advocate for government and corporate accountability and transparency. Additionally, the Internet provides multiple opportunities in the fields of education and personal development, serving as a learning platform that can provide skills and information to individuals unable to reach physical education facilities.

Nevertheless, modern technology's ability to give a global voice to anyone with an Internet connection poses an array of issues with respect to some fundamental rights, such as the right to non-discrimination, human dignity etc., as well as to the topics of hate crime and hate speech. Computer screens, acting as barriers between victims and perpetrators, have increased the threshold for hateful rhetoric, while reducing the sensitivities that may exist in face-to-face interactions. In addition to the sheer volume of ideologically themed websites in existence online, sections reserved for user commentary on many news sites, YouTube, Twitter, Facebook, and others offer fora for dialogue and discussion, but can often become hubs for racist or discriminatory speech.

Within Europe, hate speech in new media represents an emerging area of concern for non-governmental organizations (NGOs), governments, law enforcement agencies (LEAs), and the public at large. Due to the borderless nature of the Internet, hate speech in new media is difficult to tackle, with many states often lacking proper legislation, internal and external cooperative mechanisms, enforcement capabilities, standards of proof, and strong civil society organizations active in this field. Mitigating the threat requires that multiple actors, both national and international, work together to develop a sustainable and proactive approach to combating hate speech. With this in mind, the PRISM - Preventing, Redressing and Inhibiting hate Speech in new Media - Project was developed.

PRISM is a project funded by the Fundamental Rights and Citizenship Programme of the European Commission's Directorate General for Justice and Consumers. It is mainly aimed at developing effective strategies and practices for awareness raising, information and dissemination, both for increasing denunciations and reporting, and for promoting a more conscious use of language, in order to prevent and reduce the use and impact of hate speech.

The project addresses the need to improve professional skills for preventing and fighting hate speech in terms of a different and more responsible use of language, as well as for identifying, investigating and reporting hate crimes and defending victims, as well as highlighting the need to raise awareness on the social risks of hate speech among young people.

In particular, PRISM aims to fulfil the following goals:

- To raise awareness, among both stakeholders and the population of the countries involved, about online hate speech;
- To reduce the level of tolerance for online hate speech;
- To promote the training of lawyers and LEAs in identifying, investigating and fighting hate speech and hate crime;
- To monitor online hate speech and increase data collection and reporting on this phenomenon;
- To develop effective tools and redress mechanisms for combating online hate speech;
- To promote networking and cooperation between Lawyers' Associations and National Anti-Discrimination agencies in the fight against online hate speech and hate crime;
- To increase victims' possibilities to apply for criminal and civil justice.

Within this framework, the United Nations Interregional Crime and Justice Research Institute (UNICRI), which is part of a Consortium made up of eleven partners from the five EU project countries (France, Italy, Romania, Spain and UK) carried out a comparative analysis of the

legislation and its effectiveness on hate crime and hate speech, including hate speech online and in new media, in the 28 European Union (EU) Member States.

Moreover, the existing situations in the five focus countries have also been analyzed, through the production of country reports concerning the topics of hate speech and hate crime. Those reports have been included within the wider framework of this document.

Specialized training courses for representatives from the law enforcement and legal communities will also take place in these focus countries, in addition to seminars being held to educate journalists and bloggers on the hate speech issue. Moreover, large-scale public awareness raising initiatives will be carried out through PRISM's Information Campaign on Hate Speech and Hate Crime.

The comparative analysis herewith presented examines the data obtained through the questionnaire that was sent out to the Equality Bodies,⁵² government institutions, and other relevant stakeholders active on hate crime and hate speech topics within each of the 28 EU Member States. The comparative analysis of the information received aims to present a macro picture of how EU countries are tackling these issues within their legal frameworks, and, particularly, how they are addressing the evolving phenomenon of hate speech in new media.

A complete breakdown of the research methodology employed in carrying out this phase of the PRISM Project, in conjunction with a step by step comparative review and analysis of Member States' responses to each section of the questionnaire will be discussed in the ensuing chapters. Each of the chapters in this report is representative of the areas delineated in the questionnaire, allowing for a targeted assessment of the responses given by the entities within the Member States who chose to participate. The conclusions and major findings obtained from this analysis will be highlighted in the study's final chapter, offering an assessment of the gaps present within certain EU states' approach to hate crime and hate speech, while conversely underlining good practices carried out by others and advocating a way forward for combating incidents of hate speech in the future.

⁵² "Equality bodies are independent organisations assisting victims of discrimination, monitoring and reporting on discrimination issues, and promoting equality. They are legally required to promote equality and combat discrimination in relation to one, some, or all of the grounds of discrimination covered by European Union (EU) law – gender, race and ethnicity, age, sexual orientation, religion or belief and disability"; this description and more information can be found via: Equinet, (2013), "What are equality bodies?", available at: <http://www.equineteurope.org/-Equality-bodies->

Research Methodology

As a part of the Transnational Research component of PRISM, embodied in Workstream 1 of the project, certain Consortium partners, particularly UNICRI and the *Consiglio Nazionale delle Ricerche* (CNR), were tasked with analyzing national and international legal frameworks and their effectiveness, with emphasis being placed on the effectiveness of reporting mechanisms, denouncements, legal procedures, and police performance related to hate speech and hate crime within the EU.

In order to achieve this objective, the PRISM team first conducted background research on the European and International legal frameworks established to combat acts of hate crime and hate speech. Subsequently, UNICRI developed a questionnaire aimed at soliciting information from European stakeholders and experts on hate crime and hate speech issues. The questionnaire's purpose was to meet the requirements of the project workstream, collecting data on legal frameworks, and also assessing the effectiveness of national policies, as outlined above.

The questionnaire consisted of a total of thirty-nine questions, addressing four key areas, containing multiple subcategories. A copy of the questionnaire is attached as an annex to this report.

Before distributing the questionnaire to stakeholders in all EU Member States, UNICRI staff administered a pilot phase, through which a draft of the questionnaire was sent out to a select group of three entities in order to gain feedback on the length of the document and the relevance of the questions asked. The *Centre interfédéral pour l'égalité des chances* in Brussels, the EU Network of Equality Bodies (Equinet), and Italy's *Ufficio Nazionale Antidiscriminazioni Razziali* (UNAR), with the latter entity also being a partner in the PRISM Project, were asked to participate in this stage. These two entities are the official Equality Bodies of Belgium and Italy, respectively. Their comments on the nature and framework of the document proved valuable in tailoring the questions to address the most relevant issues regarding hate crime and hate speech legislation at the national level, while also helping to formulate targeted questions on the sections of the questionnaire focusing on reporting mechanisms, associations, and awareness. Properly highlighting these areas has allowed UNICRI to identify gaps in national mechanisms for dealing with hate crime and hate speech issues on a country-by-country basis. This is particularly useful for Workstream 3 of the project, which first addresses the training needs of the project's five target countries, with the subsequent development of training courses for LEAs and legal professionals being a final objective of this phase. Following this procedure, the questionnaire was also sent to project partners for a final review before being sent out to the intended recipients.

As a next step, Equinet provided UNICRI with a list of contacts for the Equality bodies working in each of the 28 EU Member States. The questionnaire was sent out to representatives from each of these entities in April of 2015.

Additionally, in early May, a reminder email was sent out to the Equality Bodies who had not responded to our initial request, kindly asking for feedback by 18 May. While a number of Equality Bodies were able to provide answers to the questionnaire in full, many others were

only able to partially fill out the questionnaire, and still others were not able to do so at all due to either a lack of resources, or because their specific entity does not deal with the issue of hate speech.

This issue prompted UNICRI to widen its scope, expanding beyond the realm of Equality Bodies, such as national ombudspersons and anti-discrimination councils, to also directly solicit participation from ministries of justice, the interior, and other official cabinet-level bodies dealing with discrimination issues, which vary on a state-by-state basis. In order to obtain this contact information, UNICRI liaised with the EU Agency for Fundamental Rights (FRA), which was able to forward the questionnaire to a large pool of initially undisclosed recipients at the national level of Member States, composed of ministerial bodies, law enforcement agencies and NGOs. Those who were able to fill in the questionnaire sent their responses to UNICRI, which were subsequently reviewed and included in this analysis, along with the responses from the Equality Bodies.

By 1 September 2015, UNICRI had received filled-in anonymous questionnaires from entities in 18 countries. The figure below indicates national origin of the entities that were able to fill out and return the questionnaire for inclusion in this analysis:



Figure 1: List of the national origin of entities participating in the questionnaire.

Eight responses were received from various Equality Bodies active in the responding states, while 12 questionnaires came from government ministries or one of their respective agencies. For Italy, a joint questionnaire was submitted, which incorporated feedback from both an Equality Body and a government entity. In the cases of Germany, Latvia, and Portugal, two questionnaires were received from each country. For Germany and Portugal, one response came from a ministerial entity and the other from an Equality Body, whereas both responses from Latvia came from ministerial entities. In total, 21 questionnaires (from 18 countries) were received.

As stated in the introduction, the answers received through the dissemination of the questionnaire make up the basis for the comparative analysis that follows. Subsequent to its initial compilation, a draft of this report was shared with the responding entities to ensure that their statements were reflected correctly. A window of two weeks was provided to receive any additional feedback.

This assessment begins by presenting some information on the definitions of hate speech and hate crime, as delineated by EU Member States, and outlines their responses to questions on their legislative and normative frameworks for dealing with these issues. It then goes on to provide a further descriptive analysis of the results of the questionnaire, strictly following the document's structure to provide a coherent mapping of the responses of those entities surveyed.

The presentation of the results of the questionnaire is based entirely on the answers provided by the participating entities and does not necessarily reflect the viewpoints of UNICRI or its partners.

Definition and Legislation

After a preliminary question, inquiring as to the competency of the responding entity to address issues of hate speech and hate crime, the first section entitled *Definition and Legislation*, consisted of nine broad questions to gain a general understanding of definitions, legislation, and policy related to hate speech and hate crime at the national level, while also inquiring into states' compliance with international and EU regulations and incorporation of these norms within national frameworks. Following this introductory set of questions, more targeted inquiries were made within three ensuing subsections with respect to hate crime, hate speech, and hate speech online.

Responses regarding the existence of official legal definitions for hate speech and hate crime at the national level were mixed. Most countries do not maintain a clearly defined definition of either hate speech or hate crime. While many hate based acts are spelled out and subsequently criminalized within national Criminal Codes, strict definitions of hate crime and hate speech have generally not been delineated. Exceptions are the Netherlands and Croatia, which do have a clear definition of hate crime in their Criminal Codes. The Croatian respondent to the questionnaire described their country's definition as follows:

"In accordance with the Criminal Code, hate crime is a crime committed because of race, colour, religion, national or ethnic origin, disability, gender, sexual orientation or gender identity of another person. Such actions shall be taken as an aggravating circumstance if this law does not expressly provide heavier punishment."

For the Netherlands, hate crime is simply defined as *"offences with a discriminatory background"*.

Additionally, many states do employ working definitions, some of which rely on the Organization for Security and Co-operation in Europe's (OSCE) Office for Democratic Institutions and Human Rights' (ODIHR) model definition as a basis.⁵³

Other countries, including the Czech Republic, base their Criminal Code, with relation to hate speech and hate crime, on provisions in the Charter of Fundamental Rights and Freedoms.

Eighteen countries⁵⁴ provided a list of the main national laws present in their country related to hate crime and hate speech. The national Criminal Codes of each of the responding

⁵³ The OSCE/ODIHR definition of hate crime is as follows: *"A criminal act motivated by bias towards a certain group. For a criminal act to qualify as a hate crime, it must meet two criteria:*

- *The act must be a crime under the criminal code of the legal jurisdiction in which it is committed;*
- *The crime must have been committed with a bias motivation.*

'Bias motivation' means that the perpetrator chose the target of the crime on the basis of protected characteristics. A 'protected characteristic' is a fundamental or core characteristic that is shared by a group, such as "race", religion, ethnicity, language or sexual orientation. The target of a hate crime may be a person, people or property associated with a group that shares a protected characteristic." More information can be found via: "Hate Crime", TANDIS - Tolerance and Non-Discrimination Information System, OSCE / ODIHR, available at: <http://tandis.odihr.pl/?p=ki-hc>

countries were the bodies of law where the most frequent references to hate speech and hate crime issues could be found.

All of the 18 responding countries specified certain bias categories in their legislation, which help to identify segments of society that may be particularly targeted in acts of discrimination, hate crime and hate speech. Every respondent mentioned variations of the terms race, religion, ethnic origin, nationality, and sexual orientation when formulating their answers concerning the types of bias categories referred to in their national legal frameworks. Other commonly mentioned categories include age, disability, and language. Additionally, variations of categories related to civil status, wealth or social status, political belief, union belief, health, and education also appeared in a few of the responses, while Ireland specifically cited membership of the travelling community as an additional category of bias.⁵⁵ The example of Ireland's reference to the travelling community serves to highlight how the wording of national legislation in this field can have strong cultural linkages and peculiarities, often making it difficult to harmonize legislation and definitions concerning these issues at the international level.

On the issue of national policies related to hate crime and hate speech, 15 countries⁵⁶ out of the 18 listed such measures. As was the case with national legislation, many of these policies do generally specify and target certain categories of bias. In this case, most policies were directed towards issues of racism. However, Belgium's National action plan against homophobia from 2013, Italy's National LGBT Strategy, and Portugal's long-term National Plan for Gender Equality, Citizenship and Non-Discrimination 2014-2017 show that national policies in this area do go beyond race related matters. Only some initiatives, such as Sweden's participation in the Council of Europe's (CoE) No Hate Speech Movement and the Czech Republic's Campaign against Racism and Hate Violence, focus heavily on the prevention of hate crime and hate speech, and campaign against hate speech online.

Lithuania's Public Security Development Programme for 2015-2025 should also be highlighted here, as it is quite comprehensive in its approach to tackling discrimination. The strategic purpose of the Programme is to make Lithuania a safer State, capable of providing effective protection of fundamental human rights and freedoms and public security. As an example of just one of the tasks (guidelines) of the Programme, the respondent noted its commitment: *"to prevent the spread of criminal acts committed in order to express hatred towards a group of persons or a person belonging thereto on grounds of race, nationality, language, descent, religion sexual orientation or other bias motives."*

⁵⁴ These countries include: Bulgaria, Belgium, Croatia, Cyprus, Czech Republic, Finland, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Spain, and Sweden.

⁵⁵ *"The Irish Traveller Community represents an indigenous minority group defined largely by its supposedly 'traditional' lifestyle of mobility within the Irish state"*; definition taken from: Ruckstuhl, Ina, (Feb. 2015), "The making of the Irish Traveller Community Mobility discourse, settlement policies and the Irish state 1950-2010", International Migration Department, University of Oxford, p. 2, available at: <http://www.imi.ox.ac.uk/pdfs/wp/wp-109-15.pdf>

⁵⁶ These countries include: Bulgaria, Belgium, Cyprus, Czech Republic, Finland, Germany, Greece, Ireland, Italy, Latvia, Lithuania, the Netherlands, Portugal, Spain, and Sweden.

Next, the survey asked stakeholders to list and describe any national legislation, according to sector, that incorporates hate crime and/or hate speech provisions within its text.⁵⁷ The following table was formulated and inserted into the questionnaire to allow respondents to enter the names of specific legislation dealing with such issues. However, within this assessment, the table has been reformatted to highlight the macro picture results, concerning which countries maintain hate crime/ hate speech legislation pertaining to the listed sectors.

Table 1: Hate crime / hate speech legislation pertaining to specific sectors.

Employment	Media	Education	Welfare	Sports	Other
Croatia	Croatia	Croatia	Croatia	Belgium	Finland – Criminal Code
Czech Republic	Czech Republic	Czech Republic	Czech Republic	Croatia	Croatia – Anti-Discrimination Act
Germany	Germany	Ireland	Ireland	Greece	Czech Republic - Criminal Code 40/2009 and Administrative Offence Act 200/1990
Greece	Lithuania	Portugal	Portugal	Portugal	Portugal - Law nr 134/99, of 28 of August
Ireland	Malta			Spain	Spain - Royal Decree 2816/1982
Portugal	Portugal				
	Spain				

Compliance with International Legislation

The next set of questions, 8-10, addressed the issue of States’ compliance with international legislation related to racism and xenophobia, which have a bearing on hate crime and hate speech regulation at the national level.

Three pieces of legislation were highlighted in this section of the questionnaire, namely:

- The Council of Europe’s Cybercrime Convention and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems of 28 January 2003;
- EU 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;

⁵⁷ Countries surveyed providing answers to this request: Belgium, Croatia, Czech Republic, Germany, Greece, Ireland, Lithuania, Malta, Portugal, and Spain.

- Directive 2000/43/EC of 29 June 2000 on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

Stakeholders were asked whether or not their countries' national legislation is fully compliant with the above-mentioned international protocols, with the responses being mixed. This was particularly true in relation to compliance with the CoE Cybercrime Convention's additional protocol as it is not a piece of EU legislation, and therefore does not need to be categorically accepted by EU Member States.

Starting with the Cybercrime Convention and its additional protocol, 9 of the 15 countries that replied to this question stated that they were in full compliance with both of these measures.⁵⁸ Of the six responding countries not in compliance, Belgium, Bulgaria, and Italy have ratified the Convention, but not yet the Additional Protocol, which is the most important element of the convention with respect to racist hate speech online as it focuses on acts of racism and xenophobia carried out via computer systems.⁵⁹ Greece, Ireland, and Sweden, alternatively, have neither ratified the convention, nor its Additional Protocol.⁶⁰

With respect to ratification of the Additional Protocol by EU Member States, aside from the previously mentioned cases of Italy, Belgium, Greece, and Sweden, Austria, Estonia, and Malta have also signed, but not ratified this measure. However, the Maltese respondents to our questionnaire said that Malta's national legal framework is in compliance with both the Convention and the Additional Protocol, specifically stating that: *"Malta signed the relative Convention and Additional Protocol on the 28th January, 2003, and transposed the relative provisions into national law."*

According to data put out by the CoE, the following EU countries have neither signed nor ratified the Additional Protocol: Bulgaria, Hungary, Ireland, Slovakia, and the UK.

For the sake of clarity, a diagram has been constructed based on data obtained from the CoE, highlighting which EU States have or have not signed/ratified the Additional Protocol.⁶¹

⁵⁸ The 9 countries in full compliance are: Czech Republic, Finland, Germany, Latvia, Lithuania, Malta, the Netherlands, Portugal, and Spain.

⁵⁹ The Additional Protocol has been signed, just not ratified by both of these countries.

⁶⁰ Greece and Sweden have signed the Additional Protocol, while Ireland has neither signed nor ratified this measure. A full listing of all states that have signed and ratified the CoE's Cybercrime Convention can be found at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=&DF=&CL=ENG>

⁶¹ Data on the ratification of the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems can be found at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=189&CM=&DF=&CL=ENG>

EU Member States and the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems

Ratified and Signed:	Signed, but not Ratified:	Neither Signed nor Ratified:
Croatia	Austria	Bulgaria
Cyprus	Belgium	Hungary
Czech Republic	Estonia	Ireland
Denmark	Greece	Slovakia
Finland	Italy	United Kingdom
France	Malta	
Germany	Sweden	
Latvia		
Lithuania		
Luxembourg		
Netherlands		
Poland		
Portugal		
Romania		
Slovenia		
Spain		

Figure 2: Status of EU Members with respect to the CoE Cybercrime Convention’s Additional Protocol.⁶²

Regarding Question 9 on compliance with the EU 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, entities from 16 countries responded.⁶³ Twelve of these, except for the German (Equality Body) and Italian stakeholders, which expressed some doubt, stated that their countries were in full compliance with the Decision.

The respondent from the German Equality Body explained that: *“In view of the German Government, Council Framework Decision 2008/913/JHA of 28 November 2008 is fully implemented by section 130 of the German Criminal Code (Bundestagsdrucksache 17/3124, (Council Framework Decision 2008/913/JHA of 28 November 2008). However, the Fundamental Rights Agency [has] expressed doubts towards its correct implementation, as the requirement of disturbance of public peace has to be met and is restricting the scope of punishability [...]”*.

⁶² Council of Europe, “Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems CETS No.: 189”, Treaty Office, available at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=189&CM=&DF=&CL=ENG>

⁶³ Entities from the following countries responded to this question: Belgium, Bulgaria, Cyprus, Czech Republic, Finland, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Portugal, Spain, and Sweden. Croatia chose not to respond to this question.

However, the German respondent from the government stated that Germany is actually in full compliance with the Decision, leading to a divergence of opinion between the two respondents. The government stakeholder said that:

“In Germany, the Framework Decision was implemented in 2010 with effect as per 22 March 2011. To this end, it became necessary to amend the wording of section 130 of the Criminal Code (StGB). The previous version referred to no more than “segments of the population,” but not to individuals. By contrast, the Framework Decision demands that the corresponding provisions of criminal law not only cover the incitement to hate and violence against certain groups, but also against individual members of such groups. The statutory provision of the law was adjusted correspondingly [...]”.

The Italian response noted that there were two main issues concerning compliance with this Directive, as evaluated by the European Commission:

“In accordance to the European Commission report on the implementation of the Council Framework Decision 2008/913/JHA, there are two main issues (that the Italian Parliament is still addressing): a) introducing criminal offences for denying or grossly trivializing genocide, crimes against humanity and war crimes; b) penal responsibility of juridical persons.”

On the issue of national legislation being fully compliant with Directive 2000/43/EC of 29 June 2000 on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Question 10), the results were quite similar. Representatives from 17 countries responded to this question, with all of them affirming that their national legislation is fully compliant with this Directive.⁶⁴

Many of the respondents, including the one from the German government, noted the specific legislation in which the Directive was transposed. However, the German Equality Body provided a bit of extra information concerning the rectification of proceedings against the country’s transposition of the Directive, citing that: *“The EU commission declared the compliance when it ceased the infringement proceedings against Germany concerning the correct implementation of Directive 2000/43/EC, http://europa.eu/rapid/press-release_IP-10-1429_de.htm?locale=EN.”*

The following three subsections on hate crime, hate speech, and hate speech online, target these issues on an individual basis, inquiring about clear references of these topics in national Constitutions and legislation. Detaching these areas from the more comprehensive inquiry made via Question 3, which asked for main legislation generally related to hate speech and hate crime, these subsections have allowed the research team to hone in on these issues and assess whether countries address these topics in a separate manner from the umbrella issues of racism and discrimination.

Hate Crime

⁶⁴ The responding countries were: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Portugal, Spain, and Sweden.

Questions 11 and 12 focused specifically on hate crime. Question 11 asked whether the Constitution or national principles of the responding country contain provisions regarding hate crime as such. Representatives from 16 of the 17 responding countries implied or directly answered “no” to this question, signifying that hate crime, in particular, was not particularly singled out in these States’ respective Constitutions.⁶⁵ Sweden, however stated that *“Agitation against a national or ethnic group is listed in the Freedom of the Press Act and the Fundamental Law on Freedom of Expression.”* These laws, considered vital, have been included in the Swedish Constitution.

Fifteen of these of the respondents, with the exception of Ireland, indicated that there were indirect constitutional provisions in place to address hate crime. Many of the indirect provisions cited related to the general issue of “discrimination,” the assurance of “equality,” and other similar topics. The Italian stakeholder, for example, stated that:

“Hate crime as definition is not mentioned, but the Italian Constitution is considered the highest level legislative tool regarding discrimination (Art. 3 guarantees the equal dignity of all citizens and the principle of equality before the law “without distinction based on sex, race, language, religion, political opinion, or personal and social conditions). Moreover, whilst Art.2 [of the Constitution] recognizes human rights, Art. 10 and the last modification of Art. 117 note that international treaties once ratified by the country are equal to National laws. This includes the effectiveness of important legislative means as regards the European Convention of Human Rights, the Treaty of European Union and the European Convention of Human Right.”

Other similar statements highlighting these issues were made by the respondents; yet, Lithuania’s response was distinct. While its Constitution does not specifically use the term “hate crime,” the expert did cite an excerpt that references the term “hatred” in Article 25, which while referenced in many States’ national legislation on discrimination and racism, it is a rarer occurrence to be present in a constitutional framework. The Constitution’s Article 27 is also relevant with respect to hate crime as it prohibits the justification of crime on the grounds of conviction, religion, or belief:

“Excerpt from Article 25 of the Lithuanian Constitution

Freedom to express convictions and to impart information shall be incompatible with criminal actions—incitement of national, racial, religious, or social hatred, violence and discrimination, with slander and disinformation.

Article 27

A human being’s convictions, practiced religion or belief may not serve as justification for a crime or for failure to execute laws.”

Question 12 went one level further, asking stakeholders if, under their national legislation, there are special provisions that address hate crime as a result of racism and/or discrimination. Respondents from 13 countries answered yes, while Spain and Belgium stated that there are no special provisions that address hate crime as a result of racism

⁶⁵ The responding countries were: Belgium, Bulgaria, Finland, Croatia, Cyprus, Czech Republic, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Portugal, Spain, and Sweden.

and/or discrimination.⁶⁶ However, of the 13 stakeholders answering in the affirmative, none of them cited legislation where the specific term of “hate crime” was used. References to terms such as “hatred,” “inciting hatred,” “discrimination,” and others were employed instead.

Hate Speech

Questions 13-15 specifically concern hate speech. In Question 13, mirroring the section on hate crime, experts were asked whether the Constitution or national principles of the responding country contain provisions regarding hate speech as such. Of the experts surveyed, those from 16 countries were able to provide information on their Constitutions with respect to hate speech.⁶⁷ With the exception of Lithuania and Sweden, stakeholders from each of the responding countries stated that their Constitutions do not have provisions directly addressing hate speech. Twelve countries from this group, however, did reference indirect provisions within their respective Constitutions that can be understood to protect against hate speech.⁶⁸ As was the case with the above section on hate crime, these indirect provisions generally focus on discrimination.

Lithuania’s Constitution was markedly different from the rest on the issue of hate speech. The responding Lithuanian stakeholder stated that constitutional provisions do directly address hate speech, and cited the Constitution as follows:

“The Constitution of the Republic of Lithuania - Excerpt from Article 25

Freedom to express convictions and to impart information shall be incompatible with criminal actions—incitement of national, racial, religious, or social hatred, violence and discrimination, with slander and disinformation.”

This is one of the same provisions mentioned above in relation to hate crime, but it is worth repeating here, as the Article directly pertains to hate speech, and ensures its incompatibility with Lithuania’s national principles.

For Sweden, the responding stakeholder also wrote that the country’s Constitution directly deals with hate speech, explaining that:

“In Sweden, provisions on the freedom of expression are contained in the Fundamental Laws constituting the Swedish Constitution. A general rule is found in the Instrument of Government, while the Freedom of the Press Act and the Fundamental Law on Freedom of Expression provide specific rules regarding freedom of expression in relation to the media

⁶⁶ The 13 countries answering “yes” were: Croatia, Cyprus, Czech Republic, Finland, Germany, Greece, Ireland, Italy, Latvia, Malta, the Netherlands, Portugal, and Sweden. Bulgaria and Lithuania did not respond to this question.

⁶⁷ The 16 responding countries were: Belgium, Bulgaria, Cyprus, Czech Republic, Finland, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Portugal, Spain, and Sweden.

⁶⁸ These 12 countries are: Belgium, Bulgaria, Czech Republic, Finland, Germany, Greece, Italy, Latvia, Malta, the Netherlands, Portugal, and Spain.

protected by these Fundamental Laws. The Freedom of the Press Act applies to books, newspapers and magazines and other printed matter. The Fundamental Law on Freedom of Expression applies to, inter alia, sound radio transmissions, television, CD and DVD discs and websites operated by certain mass media undertakings or which have been granted a certificate of constitutional protection.

The Freedom of the Press Act and the Fundamental Law on Freedom of Expression provide particularly strong protection for freedom of expression. One of the aspects of this protection is that criminal liability for content published in the media protected by these Fundamental Laws may come into question only for the crimes listed therein. (See Chapter 7, Section 4 of the Freedom of the Press Act, to which Chapter 5, Section 1 of the Fundamental Law on Freedom Expression refers.)

Agitation against an ethnic or national group, which is the specific provision on hate speech, appears on this list. So do the two other criminal offences that are relevant to our implementation of Article 1 of Framework Decision 2008/913/JHA, i.e. unlawful threat and inciting rebellion. These crimes may therefore be punished in accordance with the applicable provisions of the Penal Code even when committed through a medium protected by the Freedom of the Press Act or the Fundamental Law on Freedom of Expression.”

Questions 14 and 15 referred to legislation on hate speech and the penalties for committing such acts. With regard to national legislation, Question 14 asked if there are special provisions that address hate speech as a result of racism and/or discrimination. The 16 responding countries affirmed that there is national legislation in their respective States that addresses hate speech as a result of racism and/or discrimination.⁶⁹

Question 15 was a multipart inquiry that started out by asking: *Does your country penalise acts of hate speech? Is it considered a criminal offence? It then went further, asking: If not, is it considered a civil offence? Which types of fines are issued?*

Cyprus was the only country among the respondents that did not consider hate speech as a criminal offence, stating that: *“Defamation is considered as a civil offence”* in Cyprus. The parties from Belgium, Bulgaria, the Czech Republic, Finland, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Portugal, Spain, and Sweden all cited laws within their Criminal Codes, or otherwise, that criminalize hate speech.

Malta, Portugal, Latvia, and the Czech Republic also pointed out that apart from the criminalization of hate speech, civil provisions also exist for tackling this issue. Finland noted that its criminal penalties also include the issuance of fines. The German Equality Body, in regard to hate speech being a criminal or civil offence, stated that: *“It is both, but there is no special provision for a civil offence. However, general prohibitory injunctions and compensation under civil law are possible in cases of incitement to hatred.”*

⁶⁹ Belgium, Bulgaria, Cyprus, Czech Republic, Finland, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Portugal, Spain, and Sweden.

As an example of the types of laws and penalties in place, the Czech stakeholder, whose country maintains both criminal and civil legislation for dealing with hate speech, referenced and explained the provisions as follows:

“Criminal Code 40/2009 of the Czech Republic

Section 355 prohibits the defamation of a “nation, race, ethnic or other group of persons”, including on grounds of an individual group’s “real or perceived race, membership of an ethnic group, nationality or political or religious convictions or lack thereof”; in this case, racist motivations can only be considered as an aggravating circumstance where the offence was committed via the press, film, radio, television, a publicly accessible computer network or other similarly effective means. There is the punishment for two years of imprisonment, or for three years when aggravating circumstances present.

Section 356 prohibits incitement to racial, national, ethnic, class or religious hatred and the promotion of restrictions on human rights and freedoms. There is only one provision. The perpetrator shall be punished with up to two years of imprisonment. In case the perpetrator commits the offence using the press, film, radio, television, publicly accessible computer network or other similarly effective means, it is punishable with from six months to three years of imprisonment. The same goes for the offence committed within the group proclaiming the discrimination, violence or racial, ethnic, class, religious or other violence.

Administrative Offence Act 200/1990

Sec. 49 – offences against peaceful coexistence – causing a harm because of someone’s pertinence to the national minority, ethnic origin, race, colour, gender, sexual orientation, language, religion, political or other opinion, membership in political parties, in union trades, social origin, property, kin, health condition or marital status”

Aside from addressing acts of hate speech from both a civil and criminal perspective, Section 355 of the Criminal Code of the Czech Republic considers the use of various forms of media to commit such crimes as an aggravating factor. This provides a good segue into the realm of hate speech online, as this provision will also be discussed by the Czech expert in the next section as he highlights the need for comprehensive legislation in this subfield.

Hate Speech Online

Hate speech online was the final issue addressed in this section. This topic represents a niche area with respect to hate crime and hate speech, and one in which serious risks are starting to emerge. A comprehensive project concerning the risks associated with online hate speech was previously carried out via “Light On”, an endeavour also financed by the Fundamental Rights and Citizenship Programme of the EU and in which UNICRI was an active partner.⁷⁰ As one of the objectives of the PRISM Project’s questionnaire, researchers wanted to analyse the depth of legislative measures employed by EU Member States to combat hate-related

⁷⁰ More information and resources on “Light On – Cross-community actions for combating the modern symbolism and languages of racism and discrimination”, including the Light-On Toolkit and Training Manual can be found at: http://www.unicri.it/special_topics/hate_crimes/

crimes, touching upon the wider topic of discrimination, then narrowing the focus to hate crime, hate speech, and, finally, hate speech online. As will be explained in detail, the responses regarding legislation in this area were complex, with stakeholders having multiple views on what constitutes specific legislation concerning hate speech online or in new media.

Question 16 of the questionnaire was a multi-part question, which inquired if countries have specific legislation concerning hate speech online or in new media. The respondents were then asked to name such provisions, if they were in place.

As a follow-up, stakeholders were questioned as to the effectiveness of these laws, and whether or not more specific legislation should be enacted to tackle hate speech online. Finally, respondents were asked to assess the state of victim assistance within existing national legal framework.

Respondents from Bulgaria, Croatia, Greece, Latvia, Malta, the Netherlands, Portugal, and Spain stated that their respective countries do have specific legislation concerning hate speech online. Belgium, Cyprus, the Czech Republic, Germany, Italy, Lithuania, Poland, and Sweden, on the other hand, do not have specific legislation of this kind. The Finnish and Irish experts did not answer the first part of this question, but did provide information later in the section, concerning the Finnish and Irish legal frameworks' abilities to deal with hate speech in this environment.

Highlighting first those countries that have specific legislation on hate speech online or in new media, and who provided further information on the topic,⁷¹ Croatia, in its answer, referenced its Criminal Code provisions as being evidence of this, saying that:

"The same law stipulates public incitement to violence and hatred as a crime. The one who through the press, radio, television, computer system or network, at a public meeting or otherwise publicly incites or publicly makes available leaflets, images, or other materials that call for violence or hatred directed against a group of people or a member of the group due to their race, religion, national or ethnic origin, origin, color, sex, sexual orientation, gender identity, disability or any other characteristic shall be sentenced with imprisonment up to three years".

In Greece: *"there is a specific provision of art. 3 of law 4285/2014 concerning jurisdiction in cases of hate speech offences committed on the Internet."* Concerning the effectiveness, the Greek respondent said that: *"As law 4285/2014 is still very new, its effectiveness and possible needs for revision will be examined in due time."*

Latvia has four different legal provisions in this field, two of which specifically mention data processing systems, while, in others, the Internet can easily be interpreted as a relevant domain of application:

"Latvian Criminal Law Code: Section 78. Triggering of National, Ethnic and Racial Hatred

⁷¹ The Bulgarian respondent provided no further information on the nature of the legal provisions governing hate speech in new media, other than stating that they are within the domain of the country's Council for Electronic Media.

(1) For a person who commits acts directed towards triggering national, ethnic, racial or religious hatred or enmity, the applicable punishment is deprivation of liberty for a term not exceeding three years or temporary deprivation of liberty or community service, or a fine.

(2) For a person who commits the same acts, if they are committed by a group of persons, a State official, or a responsible employee of an undertaking (company) or organisation, **or if it is committed utilising automated data processing systems**, the applicable punishment is deprivation of liberty for a term not exceeding five years or temporary deprivation of liberty or community service, or a fine.

Latvian Criminal Law Code: Section 150. Triggering of Social Hatred

(1) For a person who commits acts directed towards triggering hatred on basis of person's gender, age, disability, or any other characteristics, if by such acts substantial harm is caused, the applicable punishment is temporary deprivation of liberty or community service, or a fine.

(2) For a person who commits the acts provided for in Paragraph one of this Section where it is committed by a State official, or a responsible employee of an undertaking (company) or organisation, or a group of persons, **or if it committed utilising automated data processing systems**, the applicable punishment is deprivation of liberty for a term not exceeding three years or temporary deprivation of liberty, or community service, or a fine.

Article 2352.1 of the Civil Law provides that “[e]ach person has the right to bring court action for the retraction of information that injures his or her reputation (honour) and dignity, if the disseminator of the information does not prove that such information is true.”

If information, which injures a person's reputation (honour) and dignity, is published in the press, then where such information is not true, it shall also be retracted in the press. If information, which injures a person's reputation and dignity, is included in a document, such document shall be replaced. In other cases, a court shall determine the procedures for retraction.

**The Law “On the Press and Other Mass Media”
Section 7. Information not for Publication**

It is prohibited to publish information which is an official secret or other secret especially protected by law that promotes violence and the overthrow of the prevailing order, advocates war, cruelty, racial, national or religious superiority and intolerance, and incites to the commission of some other crime.

(..)

It is prohibited to publish information that injures the honour and dignity of natural persons and legal persons or slanders them.

(..)”

Noting that, the Latvian expert did not believe that these provisions were effective enough: “There should be at least strong and effective self-regulatory measures of mass media.”

The Maltese stakeholder also declared that Malta has specific legislation on hate speech in new media, yet the legal provision referenced displays no direct linkage to this environment:

“The Maltese Criminal Code deals with hate speech under Article 82A(1) which is currently worded in the following manner:

Whosoever 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 thereby to stir up violence or hatred against another person or group on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion or whereby such violence or racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months.”

Regarding effectiveness, the Maltese stakeholder addresses the lack of references to new media, saying that:

“There is no specific reference to the 'online' context, although, the broad drafting of the law may also include formal acts perpetrated in a purely online context. Maltese jurisprudence on this offence is scarce. There is one case on this point, Police v Norman Lowell. Mr. Lowell is a political figure in Malta who gained popularity for making outrageous statements against irregular immigrants and non-Maltese nationals. He was prosecuted in relation to three separate political meetings he conducted in the name of his political party 'Imperium Europa' and an article he published entitled 'Coming Cataclysmic Crises'. Videos of the meetings and the article were posted on the respective website www.vivamalta.org.

In the second instance, the Court of Criminal Appeal discussed the intention and formal act required by Article 82A. The Court highlighted the element of 'probability' in that no actual violence needs to result from the incitement, but it is enough if it might have encouraged such violence. In considering the probability of resulting in violence, there is no need for certainty beyond reasonable doubt.”

In briefly addressing the issue of victim assistance, the expert stated that: *“It would be helpful to enact specific legislation on this topic. However, the existing legal framework appears suitable enough to provide assistance to victims.”*

In the Netherlands, articles 137D and 137E of the Penal Code deal with this issue. These provisions put no restrictions on where hate speech committed “in public, orally or in writing or image” can be condemned. The Dutch respondent stated that “this behavior can also occur online or in new media.” Additionally, on effectiveness, the stakeholder believed that the Penal Code is effective and incisive enough, particularly since article 137D also targets individuals accused to disseminated hate, which can include website administrators.

In the case of Portugal, the ministerial respondent cited Article 240 of the Criminal Code, which is based on the provisions of the country's Cybercrime Law (109/2009 of 15 September), as being applicable to this field.

With regard to the effectiveness of this provision, the respondent further stated that: *"The Portuguese law could be strengthened by the inclusion of all possible variants of crime motivated by hate, as well as by including a precise definition of what is a hate crime or a hate speech."*

Finally, Spain also has legal provisions in this field: *"Paragraph 3 of [...] Art. 510 [of the] Criminal Code addresses this issue."*

The specific paragraph mentioned by the stakeholder refers to the penalties imposed upon acts of hate speech, which were meticulously laid out in the preceding provisions of Article 510:

"The penalties provided for in the preceding paragraphs shall be imposed in their upper half when the acts have been conducted through a medium of social communication, through the internet or through the use of information technology, so that they became accessible to a large number of people."

On effectiveness, the Spanish stakeholder wrote: *"Since this provision has yet to enter into force [entered into force on July 1, 2015], it's too early to judge. But in principle, a deterrent effect can be expected. It will certainly depend on the degree of enforcement."*

As has been portrayed in the previous paragraphs, multiple interpretations exist concerning what constitutes addressing hate speech online within legislative frameworks. References, terminology used, interpretations, and levels of effectiveness vary by country, making the regulation of hate speech within the borderless environment of cyberspace a complex task.

Concerning the 8 previously mentioned countries stating that they do not have specific legal provisions to tackle hate speech in new media, special reference should still be made to their responses to Question 16.

The stakeholders from Cyprus did not offer any further comment other than stating that their country does not possess legislation of this kind. Belgium, the Czech Republic, Germany, Italy, Lithuania, Poland, and Sweden all provided some additional feedback.

The Belgian respondent said that the current measures in place to tackle hate speech in new media are not effective: *"a crime committed using the press (including internet) and diffusing a message has to be judged by a special court (also competent for [other crimes, i.e.] murder), called Cour d'Assises. One exception: when the message concerns racism, the normal criminal court will handle the case. This procedure is quicker, easier and less expensive. This exception doesn't apply to the anti-discrimination legislation."*

The Belgian expert went on to say that legislation should be enacted on this issue, but cites a specific reservation regarding the *“need for clarification on responsibilities of the different actors.”*

The Czech Republic does not have specific legislation in this field, other than the already mentioned Criminal Code provisions that were cited in Question 15. The Czech stakeholder did not count these measures as fitting the criteria of comprehensive and effective legislation, stating that: *“The provisions of the Criminal Code (sec. 355, 356) are not effective enough. The use of the provisions, in practice, is rather isolated. The criminal law is not comprehensive. Some groups of people are protected more than the others. For the illustration the sexual orientation, age and disability are not covered by the Criminal Code at all.”* It is important to highlight the Czech stakeholder’s comments, as they reflect the diversity of opinion concerning what constitutes effective legislation in this domain, particularly when contrasted with some of the countries claiming to have adequate legislation to address hate speech online. As crimes of this nature grow in cyberspace, it is important that all countries have a common understanding and framework for combating such activity.

According to the German respondents, there is not any specific legislation dealing with hate speech in new media at the national level. Concerning the different forms of hate speech, and addressing hate speech online, the German government respondent stated that:

“Different forms of hate speech are distinguished only insofar as the law provides for different forms in which this offence may be committed. These forms (public speech, dissemination of writings, communication via the internet) are all equivalent with each other.”

Moreover, in reference to the possibility of enacting special legislation dealing with this hate speech online, the German Equality Body said that: *“We suppose that special legislation will hardly be known by the perpetrator and is therefore not likely to minimise online hate speech and hate crime. But it can offer useful guidelines for providers and victims on how to proceed in such cases. Victim’s support doesn’t have to be put in effect through legislation. It is rather a question of establishing enough service points for them.”*

Italy, as well, stated that they have no laws specifically addressing hate speech online, but they do cite their conventional laws on hate speech, particularly the Reale-Mancino Law, as being applicable to this field. However, this law does not mention cyberspace, computerized processes, or any of the similar terminology employed by some of the other States responding to the questionnaire. The Italian stakeholder’s initial response is listed below:

“Italy doesn’t have a specific legislation related to hate speech online but the Reale-Mancino Laws is the legal provision adopted in case of crimes committed by web. When, after a deep investigation, the web-site “Stormfront” was closed in Italy, the aggravated circumstances foreseen by Mancino-Reale Law were applied.”

On effectiveness, the stakeholder said that the *“Italian legal provision against hate crime and hate speech is effective for the characteristics that are covered by the Mancino-Reale*

Law.” However, this Law does not, as of yet, contain a clause addressing the topic of sexual orientation, which is a serious concern.

In Lithuania, *“article 170 of the Criminal Code is applied in cases of hate speech online or in new media.”*

In Poland, while there is no specific law in this field, the country has developed guidelines for prosecutors concerning online hate speech. The Polish respondent’s answer was the following:

“On 27 October 2014 The Guidelines for prosecutors on hate crimes committed via Internet were signed by Prosecutor General. The Guidelines were sent to all the prosecutors to apply. The document contains guidelines concerning securing and recording evidences, the possibility of cooperation with other public institutions and NGOs, undertaking action of other than legal kind by the prosecutors. The aim is to facilitate conducting the investigations and unify the methodology of investigating hate crimes committed via Internet.”

Although no specific hate speech in new media legislation is in place in Sweden, *“the relevant provisions are medium neutral and are furthermore applicable also to crimes committed through media protected by the Freedom of the Press Act or the Fundamental Law on Freedom of Expression. “*

Finally, as stated above, experts from both Ireland and Finland did not provide a clear “yes or no” answer to whether or not their countries maintain specific legislation dealing with hate speech online. However, it is implied that existing general legislation on hate speech and hate crime are used to address this issue.

In Finland: *“The general provisions cover also hate speech and hate crime online and in new media. Offences committed online have been specifically taken into consideration in the drafting of the existing legal framework.”*

Similarly for Ireland, the Hatred Act of 1989 addresses hate crime and hate speech in depth. Some specific sections of the Act, as highlighted by the stakeholder in replying to Question 2, are also relevant for Question 16, and could be construed as relating to hate speech in new media:

“Under sections 2 and 3 of the 1989 Act, it is an offence to use words, behave, publish or distribute written material, or broadcast any visual images or sounds which are threatening, abusive or insulting and are intended, or, having regard to all the circumstances, are likely to stir up hatred.

Under section 4, it is an offence to prepare or be in possession of any written material with a view to distributing, displaying, broadcasting such material or to make or be in possession of a recording of sounds or visual images where it is likely to stir up hatred.”

Question 17 was related to the efficiency of codes of conduct or Terms of Service (TOS) agreements put in place by Internet Service Providers (ISPs) to combat hate speech cases.

Additionally, stakeholders were asked: *Has your Country enacted any law concerning TOS?; and, Are there any specific good practices currently being employed in your country concerning these issues?*

Stakeholders from 9 countries responded concerning the effectiveness of TOS agreements.⁷² Respondents from Belgium, Germany, Latvia, Malta, the Netherlands, and Portugal affirmed that codes of conduct and TOS agreements are efficient tools to combat hate speech. Spain also tended to agree, but stated that: *“They are necessary tools, but stronger enforcement measures through the Criminal Code are also needed.”*

The Croatian expert was the only respondent stating that these types of agreements are not efficient, saying:

“No, because it is often impossible to react to hate speech in real time. It is not easy to answer whether it is better to remove all remotely questionable comments or preserve interactivity of the Internet. However, without removing every possibility to comment or limiting the anonymous, it is necessary to strengthen the administrative capacities to be able to react as soon as possible and remove unacceptable and hate comments and inform the prosecution authorities about extreme cases.”

The Czech stakeholder expressed some doubt over the issue, but did not give a yes or no answer to the question, instead citing the situation in the Czech Republic with respect to its TOS Law:

“According to the Act on Certain Information Society Services 480/2004, the providers of online discussions may be responsible for the content submitted by the users. The section 5 says that the providers may be responsible when they knew about the content against the law and did not adopt the appropriate measures. However, the providers are not obliged to look for the vile content. Consequently, the providers hire the people who moderate the discussion. These people delete the posts that are in violation with law. However, this is not stated in the law and it is rather a reflection of the corporate social responsibility.”

Respondents from the Czech Republic, Portugal (ministry), and Finland stated that their countries have enacted laws concerning TOS. Conversely, Belgium, Germany, Italy, Malta, and the Netherlands have not.

The Portuguese response was directly related to data retention for the purposes of carrying out an investigation, a relevant issue for cases of online hate speech:

“Portugal has approved Law nr 32/2008 of 17 July that transposes into national law the Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

⁷² The respondents were from: Belgium, Croatia, Czech Republic, Germany (equality body), Latvia, Malta, the Netherlands, Portugal (ministry), and Spain.

This law establishes provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law.

Moreover, to all crimes committed by internet applies the special procedural regime contained in Law of cybercrime (109/2009) that imposes obligations to Internet Service Providers such as expedited preservation of stored computer data (article 16), expedited preservation and partial disclosure of traffic data (articles 13 and 12) as well the obligation to a service provider offering its services in the territory of the Party to submit subscriber information relating to such services in that service provider's possession or control (article 14)."

Additionally, while not citing any EU Directives, the Finnish respondent did refer to the country's Information Society Code, which addresses this issue. The exact response of the stakeholder was that: *"The Information Society Code (tietoyhteiskuntakaari, 917/2014) includes provisions on communications service agreements, see English translation at <https://www.finlex.fi/en/laki/kaannokset/2014/en20140917>'."*

The Maltese stakeholder, while stating that Malta does not have any specific legislation on TOS, said that efficient regulations were in place to address this issue.

For the final component of Question 17, dealing with good practices in this area, experts from Belgium, Germany (Equality Body), Greece, Italy, Malta and Finland expressed that their countries do have good practices in place concerning codes of conduct and TOS agreements.

Examples of such practices include the publication of documents, like the Delete Cyberhate brochure,⁷³ put out by Belgium's Interfederal Centre for Equal Opportunities; Italy's establishment of channels of communication between Italian law enforcement and web giants, such as Google and Facebook; and the implementation of campaigns and projects to address hate crime and hate speech, such as *No Hate speech* and *Do not Hate*.

In addition, the German respondent from the Equality Body mentioned that: *"There are low-threshold services by the German prosecution services to report illegal online contents,"* and the Greek respondent stated that:

"The Ministry of Justice, Transparency and Human Rights is drafting a bill concerning the establishment of a new inter-ministerial body, a National Board against Racism and Intolerance with the participation of the Greek Ombudsman, the National Commission for Human Rights, UNHCR, RVRN and representatives of various Ministries. The main goal of the above mentioned body will be to assist the Secretary General for Transparency and Human Rights in developing anti-racist policies and in particular in drafting a National Action Plan against Racism and Intolerance. In this framework the establishment of a hate speech observatory will also be examined."

⁷³ Brochure available online in Dutch and French at: <http://www.diversiteit.be/delete-cyberhate>

Existing legal procedures to counter hate crime and hate speech

The following section of the questionnaire deals with issues related to the existence of certain legal procedures that have been implemented to contrast hate crime and hate speech incidents. Questions asked pertained to the identification of specific case-law, jurisprudence, reporting mechanisms, and legal procedures in general.

Concerning who is liable for prosecution in the case of hate speech, answers varied by country. Specifically, we inquired not only as to the liability of the authors of hate related content/speech, but also to that of other actors involved in the publishing process, such as editors, printers, and corporations. Inquiries were also made as to how countries balanced prosecuting cases of hate speech with ensuring the fundamental right to freedom of expression.

Each of the responding entities expressed that various actors can be held liable for incidents of hate speech. For Belgium and Malta, it was put forth that only the authors of hate speech could be held liable, which also includes corporations.

In its answer, the Belgian stakeholder strongly emphasized the country's commitment to the principle of freedom of the press and noted that as long as the author of any hate speech related content is a resident of Belgium, other entities such as press outlets, disseminators, publishers, and others cannot be prosecuted. Only the author in this case can be held liable.

Similarly, for Latvia, the expert responded by saying that the Public Prosecutor had the right to decide who would be liable for hate speech incidents, but noted that *"The criminal liability for hate speech will be imposed to the person who in fact has committed the criminal offence"*.

In the case of Italy, authors and their legal representatives can be prosecuted. While in Lithuania and Portugal, the definitions of those who could be prosecuted for hate speech were similar, being persons and legal entities and any natural or legal person, respectively.

Of the other respondents, namely stakeholders from Bulgaria, Cyprus, the Czech Republic, Finland, Germany, Ireland, Poland, and Spain, a broader view was taken with respect to liability, many of the respondents often making reference to terms such as disseminators / distributors, abettors, editors, suppliers, and broadcasters, along with the perpetrators, who could be prosecuted for hate speech.

However, in the answer given by the Czech expert, he noted that for the Czech Republic, an assertion to who could be prosecuted was theoretical, as there have not been enough cases in the country dealing with this issue.

Finland also produced a significant variation in its answer, stating that while actors can be prosecuted under the country's Criminal Code:

“The public prosecutor is responsible for prosecution. However, the public prosecutor may not bring charges for defamation or aggravated defamation unless the injured party has reported the offence for the bringing of charges. The Prosecutor-General may yet order that charges be brought, if the offence has been committed through the use of the mass media and a very important public interest requires that charges be brought. If the public prosecutor has decided not to prosecute, the injured party may bring charges himself. The scope of liability is based on general provisions on the Criminal Code.”

Corporate liability of some kind with respect to hate speech was possible in all of the countries answering this question, which included: Belgium, Bulgaria, Czech Republic, Finland, Germany, Greece, Ireland, Italy, Latvia, Malta, Portugal, Spain, and Sweden.

However, the Swedish stakeholder did note that while corporate liability exists under the Penal Code, there was an exception for cases being tried under the Freedom of the Press Act or the Fundamental Law on Freedom of Expression. In these cases, the principle of sole responsibility applies.

With reference to attaining a balance between protecting the universal principle of freedom of expression and prosecuting incidents of hate speech, countries have often taken to weighing national and international legislation, including Criminal Codes, national Constitutions, and international treaties prohibiting hate speech and discrimination against laws enshrining freedom of expression. In many instances, the case-law derived is used to further develop norms for fairly addressing hate speech. In their responses to the questionnaire, the stakeholders from Finland, Germany, Greece, Ireland, Italy, Malta, Poland, Portugal, and Sweden specifically alluded to legal interpretation and balance of this kind being important parts of their national structures with regard to dealing with hate speech issues. However, it can be safely assumed that slight variations on this method for finding balance between prosecuting hate speech and freedom of expression is a norm across the EU.

Other, more distinctive, answers regarding balancing these two issues included the one from the Belgian stakeholder, who specifically pointed out that his country closely follows the European Court of Human Rights for guidance in this matter, while the Czech stakeholder noted that the Czech Republic heavily invokes the principle of proportionality on such issues. The Swedish expert expressed similar sentiments regarding proportionality, saying that: *“to incur criminal liability, the expression should exceed the limits of an objective discussion of the group in question.”*

The Dutch and Latvian respondents’ answers seemed to reflect their countries having more of an experts-based, case by case approach. The Dutch stakeholder said that finding a balance in terms of hate speech and freedom of expression was *“the responsibility of the public prosecutor and the judge”*. Similarly, the Latvian respondent noted the country’s reliance on expert examination in such situations.

In addition to the abovementioned method employed by Poland and other States to attain balance in this area, the Polish respondent further noted that *“Prosecutors use also Guidelines on conducting proceedings in hate crimes cases issued by Prosecutor General.”*

The Cypriot expert stated that there have not been an adequate number of cases dealing with hate speech in Cyprus to proffer a definitive response.

The remaining themes of this section addressed whether or not countries had juridical procedures *stricto sensu* to deal with issues of hate crime and hate speech, the adequacy of national legislation to prosecute these issues, and the need for any additional provisions that could be implemented to better prosecute hate speech and hate crime. The existence of national databases related to the compilation of information on jurisprudence for cases of hate crime and hate speech was also inquired upon.

The table below provides a breakdown of the countries, which chose to respond, that do and do not have juridical procedures *stricto sensu* for addressing hate crime and hate speech. The results indicate a divergence in policy among EU Member States as to whether cases of hate speech and hate crime should be handled differently from other crimes with respect to juridical procedure. However, allocating special procedures for these issues seems to be the exception rather than the norm.

Table 2: Responding EU Member States with Juridical Procedures *stricto sensu* for Hate Crime and Hate Speech.

Juridical procedures <i>strictosensu</i> for Hate crime and Hate speech	
Yes	No
<i>Germany</i> ⁷⁴	<i>Belgium</i>
<i>Latvia</i>	<i>Czech Republic</i>
<i>Malta</i>	<i>Finland</i>
<i>Portugal</i>	<i>Greece</i>
	<i>Italy</i>
	<i>Poland</i>
	<i>Spain</i>
	<i>Sweden</i>

Regarding the adequacy of national laws to deal with hate speech and hate crime, the vast majority⁷⁵ of respondents indicated that their national legislation was sufficient for prosecuting hate crime and hate speech. Only the Cypriot stakeholder indicated that a possible deficiency exists in Cyprus’ legislation, stating that:

“So far, no legal proceedings achieved criminal conviction for hate speech, nor racist motivation has been recognised for (racist) crimes. In our opinion, a separate legislation that will deal specific with hate crime and hate speech should be adopted.”

⁷⁴ Response from the German equality body.

⁷⁵ These include the respondents from: Belgium, Finland, Germany (ministry), Greece, Italy, Latvia, Lithuania, Malta, the Netherlands, Portugal, and Spain.

Concerning the implementation of additional provisions to national legislation for facilitating enhanced prosecution of hate crime and hate speech cases, the Maltese and Portuguese experts expressed the possibility of such additions, but did not have a firm stance on the issue. The Latvian, Dutch, and Finnish stakeholders were opposed to any additions, while the Belgian and Lithuanian respondents were in favor, citing restrictions on current judicial procedure in their respective countries dealing with discrimination issues.

The Belgian answer concerned the interpretation of jurisprudence and the failure of allowing for enhanced penalties. The respondent said that:

*“Every crime offense should have enhanced penalties and not only a restricted list as it is the case today. Apply the exception of racist messages to messages inspired by the anti-discrimination law. In the current state of affairs, Belgium doesn’t respect the jurisprudence of *Vejdeland and other vs. Sweden*⁷⁶ (sexual orientation should be treated in the same way as categories such as race, ethnicity and religion, which are commonly covered by hate speech and hate crime laws, because they are fundamental to a person’s sense of self and used as a marker of group identity).”*

The Lithuanian respondent, likewise, expressed adversity towards his country’s conditions for conducting pre-trial investigations, particularly in cases dealing with libel or insults:

“Pre-trial investigation in respect of criminal acts under some Articles of the Criminal Code (for example, Article 140 “Causing Physical Pain or a Negligible Health Impairment”, Article 145 “Threatening to Murder or Cause a Severe Health Impairment to a Person or Terrorisation of a Person”, [and] Article 154 “Libel” can be commenced only if there is a complaint filed by the victim or a statement by his authorised representative or at the prosecutor’s request. It is negotiable whether pre-trial investigation should be commenced in all cases of hate crime (despite whether there is a complaint filed by the victim or a statement by his authorised representative or at the prosecutor’s request).”

As a final assessment tool for evaluating legal procedures for tackling hate crime and hate speech, an inquiry was made concerning the existence of national databases for logging information on hate crime and hate speech jurisprudence. Of the respondents, Belgium, Greece, and Malta stated that they have specific databases containing such information. Portugal (ministry) and Italy noted that such information could be accessed through the use of filter technologies that are present within their larger databases on jurisprudence. The German Equality Body stated that only hate crime case law pertaining to Section 130 of the country’s Criminal Code, on incitement to hatred, could be filtered. Sweden and Latvia also maintain publicly accessible databases of jurisprudence, but only deriving from the higher courts and the content is not exclusive to hate speech and hate crime. The Czech Republic, Lithuania, Poland, and Spain simply stated that no databases on hate crime and hate speech jurisprudence exist in their countries.

⁷⁶ European Court of Human Rights, (2012), “Case of *Vejdeland and Others v. Sweden*”, available at: <http://hudoc.echr.coe.int/eng?i=001-109046>

This overall lack of uniformity, as concerns national databases, hints at the differing amounts of resources devoted to tackling hate crime and hate speech and the varying awareness levels of these issues among EU Member States. As pointed out by some of the respondents earlier on, certain EU countries have only dealt with hate speech, in particular, via a handful of court proceedings. Highlighting sound jurisprudence on these issues, while simultaneously offering a centralized national location for accessing information in this field is a powerful resource for national societies and international legal actors intent upon building their knowledge base of jurisprudence on hate crime and hate speech.

Reporting

The methods through which victims can report incidents of hate speech and hate crime vary by country, highlighting the innovative nature of some governments and NGOs in providing their respective publics with access to resources for remedying these issues. The graphic below provides information on the various channels through which incidents can be reported, as conveyed by the countries responding to the questionnaire.



Figure 3: Means of reporting hate crime / hate speech incidents in responding EU Member States.

Within the “other” category, Spain, Poland, and the Netherlands provided information on specialized reporting mechanisms present in their countries that do not necessarily fit the mould of the other categories presented, making them worth noting.

In Spain, victims are also able to report incidents of this kind directly to the judiciary, while in Poland, reports can be made via email or letter to the specialized to Human Rights Protection Team of the Ministry of the Interior.

In the Netherlands complaints can also be made to the Council for Anti-Discrimination Services (*Anti Discriminatie voorziening*, ADV), which registers incidents of discrimination, including those that constitute hate speech or hate crime. There is also the option of reporting incidents of this nature to MiND, which particularly deals with hate speech online. A description of MiND has been provided by the Dutch respondent:

“MiND is the Dutch online hotline for discrimination and hate speech on the internet. The goal is to keep websites hosted in the Netherlands and which publish information in Dutch free of discriminatory utterances. If an internet user encounters discriminatory utterances on the internet (incl. social media and (chat functionality of) games) he can report them online on the website www.mindnederland.nl”.

Concerning the most used methods for reporting incidents of hate speech and hate crime, entities from nine countries⁷⁷ were able to provide information. As a general trend, reporting incidents to the police station, whether by phone or in person, was the most utilized channel, followed by online communications. These include the use of email and online forms, both anonymous and identifiable. This upswing in online reporting reflects greater use of technology by EU citizens, and awareness of these methods could also be a positive development for reporting online hate speech, a crime which is clearly linked to the cyber sphere. This is especially true since many victims may not immediately think to call or visit the local police station over such a matter as online hate speech.

As pertains to the difficulties in reporting incidents of hate crime and hate speech, trends were similar across all of the countries surveyed. In summary, a lack of trust in law enforcement by victims and a general lack of awareness of hate crime and hate speech issues, both on the part of the authorities and citizens were major impediments to reporting. The responses of the Cypriot and Italian stakeholders highlight the obstacles to reporting, and the reasons behind underreporting in their countries, respectively. Similar sentiments were echoed by a number of other respondents.

The Cypriot response on the difficulties of reporting:

- *“Difficult to prove racist motivation*
- *There are no policemen or prosecutors with expertise on such issues*
- *Victims (especially if undocumented) do not trust police to report*
- *Lack of awareness among people of what constitutes hate speech and hate crime*
- *Inadequate training and sensitivity among policemen who receive allegations/complaints”*

The Italian response on the reasons behind underreporting:

⁷⁷ The respondents were from: Belgium, the Czech Republic, Finland, Greece, Latvia, Malta, the Netherlands, and Portugal.

“The general reasons for under-reporting are the same as in every other country, as highlighted by several international agencies involved in preventing/fighting hate crimes/hate speeches:

- *Fear of secondary victimization (victim’s shame)*
- *Fear of retaliation*
- *Fear for deportation (for illegal immigrants)/fear of police forces/lack of confidence in police investigation*
- *Lack of victim support system*
- *Cultural and language barriers*
- *Victim doesn’t want to recognize the bias motivation*
- *Victims blames herself/himself*
- *Victim believes that nothing is going to change”*

In overcoming these obstacles, respondents repeatedly brought up the need for awareness initiatives targeting the general public, and both awareness and training for law enforcement. The need for dialogue between authorities and the public regarding hate crime, and particularly hate speech, was also an issue that seemed to be of great concern. Engagement in this area will result in confidence building, leading to an environment where members of the public will be able to confidently approach knowledgeable authorities for reporting incidents of hate crime and hate speech. Additionally, the Lithuanian respondent, in particular, also mentioned the relatively small number of NGOs present in country for dealing with these topics. This underlines the need for robust civil society organizations to be present throughout Europe, as the proliferation of the Internet, and technology in general, has created an environment where hate speech online is a critical issue, and support to the public is necessary.

Information Sharing

Concerning the existence of information sharing mechanisms to facilitate data sharing among law enforcement agencies and with other entities, the Belgian, Dutch, German (ministry), Greek, Italian, Maltese, Polish, Portuguese (ministry), and Swedish respondents stated that their countries’ have some sort of information sharing system for dealing with hate crime and hate speech incidents. The Cypriot, Czech, Lithuanian, and Finnish stakeholders, on the other hand, expressed that their countries had no regular information sharing mechanisms in place for making available such data. However, even for the countries maintaining these mechanisms, their abilities are often limited. Legal restrictions, particularly data protection, were mentioned as problems for efficient data sharing in Italy and Malta, while the Belgian expert cited the separation of police and judicial databases as being impediments to effectiveness in that country. Greece noted the importance of having a cooperation pattern between civil society organisations and law enforcement agencies, something which has not yet been established at the formal level. Nevertheless, this contact does take place in Greece at an informal level in order to identify and then implement ways of cooperation. The Czech Republic and Finland highlighted the overall issues of distrust among entities and a general lack of coordination, respectively. In summary, the process of

sharing data on hate crime and hate speech incidents is by no means standardized across Europe, and major legal, organizational, and trust issues need to be remedied before effective data sharing can become a reality and standard practice.

Information on National Entities

As has been demonstrated throughout this assessment, each EU Member State maintains a different approach to combating hate crime and hate speech. In light of these circumstances, the PRISM Consortium attempted to gain a basic understanding of the various entities present at the national level, both within and outside of the governmental sector, tasked with addressing issues of hate speech and hate crime. These entities, depending on their framework and status with respect to the government, often advise victims of their rights, maintain data concerning hate crime and hate speech incidents, and, in some countries, can represent victims in court or issue legally binding decisions to remedy events of this nature. All of the responding stakeholders⁷⁸ were able to provide the name of at least one association or NGO dealing with hate crime or hate speech issues within their respective countries, signifying the presence of strong civil society mechanisms in this field being active across Europe. Many of these associations and NGOs focus on Lesbian, Gay, Bisexual, and Transgender (LGBT) rights, immigration-related topics, hate crime and hate speech in general, and/or generic human rights issues.

As regards national authorities tasked with addressing hate crime and hate speech, the answers of the respondents varied.⁷⁹ A general trend was for States to maintain bodies of this sort within government ministries, such as ministries of the Interior; Justice; Health, Social Services, and Equality; and others. Additionally, it is common to find authorities addressing topics of hate crime and hate speech within national law enforcement bodies, or the Office of the Public Prosecutor. In many cases, experts noted that their countries have multiple national authorities dealing with these topics, spread across a number of different government offices / law enforcement agencies.

As per the information provided by those surveyed, in Germany, Lithuania, Malta, Portugal, and Sweden the decisions taken by national entities, such as police, public prosecutors, and inspectorates, can be legally binding, substantially adding to the competencies of such bodies. This enhanced capability seems to derive from these entities' close working relationship with national courts, and judicial systems at large. For Belgium, Cyprus, the Czech Republic, Ireland, the Netherlands, and Poland, decisions on such matters are not legally binding, unless ruled on by a court of law.

However, when explaining the impact of their national authorities with non legally binding powers, the stakeholders from Belgium, Cyprus, the Czech Republic, the Netherlands, and Poland illustrated the valuable role these bodies play, particularly with regard to activities such as awareness raising, victim assistance, data collection, and acting as advisory bodies, an example being local bureaus of the Netherlands' ADV, as described above. In the case of Cyprus, the country's *Anti-Discrimination Body* even maintains the power to issue fines against perpetrators of discriminatory acts.

⁷⁸ Respondents identifying NGOs and associations in their countries included stakeholders from: Belgium, Cyprus, Czech Republic, Finland, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Spain, and Sweden.

⁷⁹ Those surveyed from Belgium, Cyprus, Czech Republic, Germany, Greece, Finland, Ireland, Lithuania, Malta, the Netherlands, Poland, Portugal, Spain, and Sweden listed national authorities in their countries dealing with hate crime and hate speech.

Moreover, another indicator for evaluating the preparedness and capacity of national authorities to deal with hate crime and hate speech issues centers around whether or not countries maintain a specialized department within their national police force and/or an ad hoc public prosecution office tasked with addressing biased-motivated crime. Respondents from the Czech Republic, Finland, Latvia, and Lithuania stated that their countries did not have such instruments, while the Belgian, Cypriot, Greek, Irish, Italian, Maltese, Dutch, Polish, Portuguese, Spanish, and Swedish experts stated that their countries do maintain such departments. In the case of Germany, the Equality Body stated that to their knowledge, no such body exists in the country. However, the respondent from the German government said that the “the Federal Ministry of the Interior is competent in this regard”.

Specific information on these specialized entities was provided by some stakeholders, with the data being listed in the table below:

Table 3: Responding Countries with specialized departments focusing on biased-motivated crime.

Country	Department focused on biased-motivated crime, as identified by respondents
Belgium	<i>There is a prosecutor that specializes in hate crime, hate speech, and discrimination in every office. The same is true for the police, with one officer specializing in these issues present at every station.</i>
Cyprus	<i>Police Office for Combating Discrimination</i>
Greece	<i>There are 2 police departments and 68 police offices specialized in dealing with bias motivated crimes. There are also ad hoc public prosecutors in the regions of Athens and Piraeus.</i>
Ireland	<i>Garda (Police) Racial Intercultural & Diversity Office</i>
Italy	<i>National Police:</i> <ul style="list-style-type: none"> ○ <i>Central Directorate for the Anti- terrorism police;</i> ○ <i>Central Directorate for Immigration and Border Police;</i> ○ <i>Central Directorate for Special Units – Communication Police Service</i> ○ <i>Central Anti-crime Directorate – Central Operations service</i> <i>Carabinieri:</i> <ul style="list-style-type: none"> ○ <i>Carabinieri Headquarters – Central Operations service</i>
Netherlands	<i>The National Police maintain a Program of Diversity and Inclusion.</i>

	<i>Public Prosecutor Service (PPS): National Expertise Centre on Discrimination of the PPS</i>
Poland	<i>In General Police Headquarters there is a Criminal Service Bureau which monitors hate crime. The Department of Preparatory Proceedings within the General Prosecutor's Office.</i>
Portugal	<i>The Criminal Police (Policia Judiciária) and the Attorney General's Office, at the district level.</i>
Spain	<i>Offices of the Public Prosecutor</i>
Sweden	<i>Specific hate crime units within the Swedish Police Authority are located in the three metropolitan regions in Sweden and the National Operations Department is responsible for the follow-up on a national level.</i>

Awareness of Hate Crime and Hate Speech

As a final focus, awareness issues regarding hate crime and hate speech were examined. Through the distribution of the questionnaire, participants were asked to provide pertinent information on training activities, campaigns, and awareness among various stakeholders at all levels of national society. In general, most countries require public authorities, such as police and State prosecutors, to be trained on issues related to hate crime and hate speech. According to the respondents of the questionnaire, Belgium, Cyprus, Finland, Germany, Greece, Ireland, Italy, Malta, the Netherlands, Poland, Portugal, Spain, and Sweden all have regular trainings on these issues. The Czech, Latvian, and Lithuanian stakeholders declared that their countries do not regularly hold such trainings; however, in Latvia, hate crime is included as part of the human rights training program for judges. It is worth noting that in the Czech Republic, trainings on racism and hate violence are offered for law enforcement and local stakeholders, but these courses are not regular and are administered by an NGO rather than the government.

While the prevalence of trainings in many European States is a positive sign and serves to increase awareness on hate crime and hate speech, the trend seems to be that these courses only target a narrow subset of public actors, which may include police, judges, and/or prosecutors, as mentioned above. In many cases, just one of these groups, likely the police, receives training at the national level. The lack of a comprehensive approach to awareness, with trainings targeting a multitude of different actors, is a weakness.

The trainings for judges and prosecutors in Germany, as described by the government respondent, seem to take on a holistically-themed approach to educating legal officials on hate-based crimes:

“All aspects of hate crime / hate speech, such as the critical discussion and debate of racism, political extremism (right-wing radicalism and Neo-Nazism) and discrimination (xenophobia, LGBT etc.) as well as the protection of victims, are important subjects of the continuous training provided to judges and prosecutors. The German Judicial Academy offers regular training seminars that deal with these issues and the challenges that the judiciary and society as a whole face in their regard. Apart from the subject-specific issues, the seminars also approach the topics on an interdisciplinary and behaviour-related level [...] Additionally, seminars are offered on a regular basis on the topics of the judiciary and Islam, the judiciary and Judaism”.

The effectiveness of trainings was lauded by the Belgian, Maltese, Dutch, German (ministry), Polish, Portuguese (ministry), and Spanish respondents; however, the Spanish expert noted that the trainings *“need to be continued and expanded systematically to reach all relevant actors.”* The Cypriot, Czech, and Finnish experts all claimed that the trainings within their countries are not effective, as administered in the current format. For the Czech stakeholder, the main issue was that the trainings are not mandatory, while for the Cypriot and Finnish stakeholders, emphasis was placed on the need for more in-depth training, also towards a wider audience.

In addition to government actors, awareness raising among the general public is of vital importance for stemming the tide of hate speech and hate crime incidents. Bulgaria, Cyprus, the Czech Republic, Finland, Italy, Malta, the Netherlands, Poland, Portugal, and Sweden all have national public awareness programs in this field. The Belgian, Irish, Lithuanian, and Spanish respondents stated that their countries did not have such programs. Similar to the situation for training public officials, some of the public awareness programs have a narrow focus, targeting certain segments of society. For example, the public may be aware of the ramifications of hate speech against immigrant communities, but may fail to be educated on hate related crimes committed online or those affecting the LGBT community. In many cases, NGOs are responsible for public awareness campaigns, making these organizations, which are often strapped for cash, choose the most financially feasible option for public awareness. Additionally, NGOs often specialize in one particular area or theme, making public discourse on all aspects of hate crime and hate speech a difficult objective to achieve.

Finally, respondents were asked to rate, in their opinion, the level of hate speech awareness among six different sectors of society: law enforcement agencies, the public, prosecutors, the private sector, policymakers, and associations/NGOs. The rating system was based on a scale from one to five, with one being the lowest and five the highest. The results serve as a simple barometer to measure the perceptions held by stakeholders routinely dealing with hate speech, giving insight into the different areas of society that lack awareness on these issues.⁸⁰

⁸⁰ The Portuguese stakeholder responding to this section was from the ministerial sector, rather than an equality body.

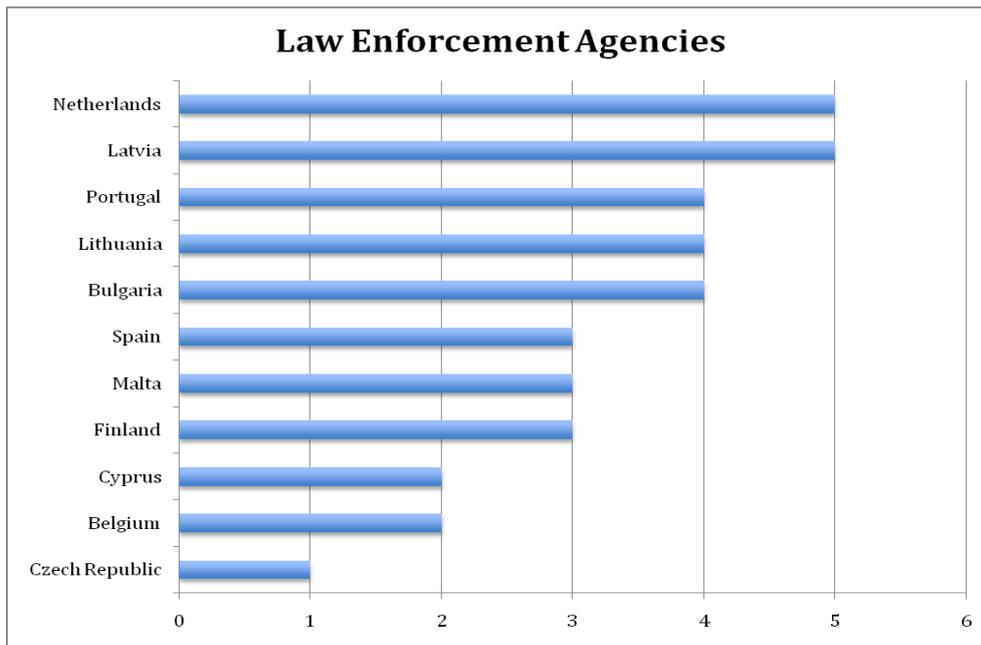


Figure 4: Respondents' perceptions of LEA awareness levels in their respective countries.

Despite low ratings on the part of the Belgian, Cypriot, and Czech respondents, others generally rated their national LEAs as average or above concerning hate speech awareness. LEAs serve as vital national entities for reporting any form of criminal activity, with hate speech not being an exception. However, as cited by stakeholders earlier on, more training is often needed to adequately address the issue. Moreover, increased public awareness can in turn lead to increased reporting of hate speech incidents, effectively alerting LEAs to the depth of this phenomenon on a more regular basis.

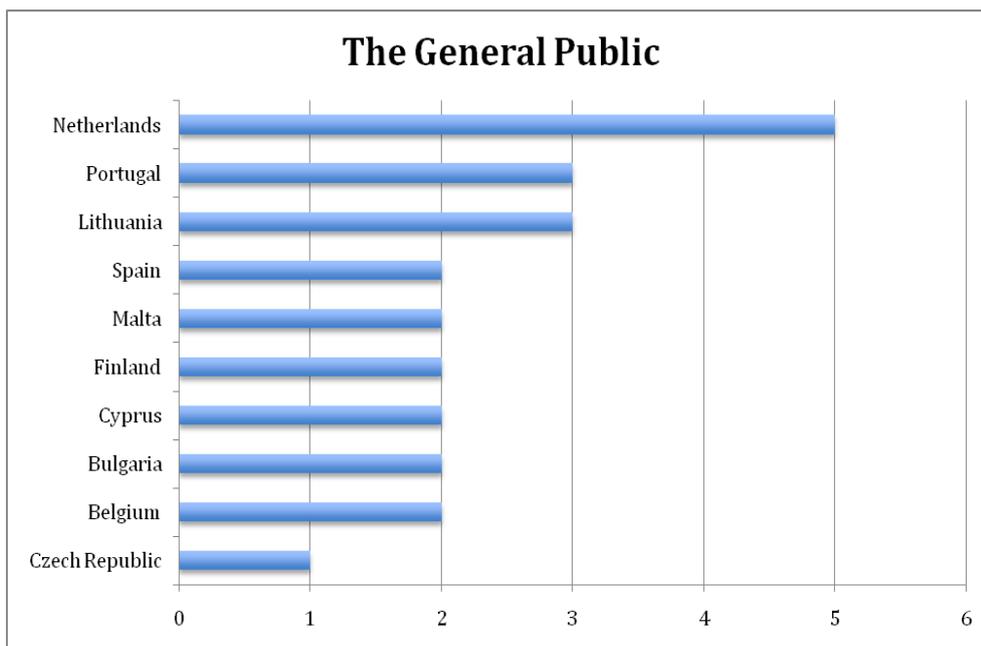


Figure 5: Respondents' perceptions of public awareness levels in their respective countries.

Aside from the Dutch respondent, all others rated public awareness of hate speech at average or below. This was true for States actively engaged in public awareness campaigns, and those which do not. Following the private sector, the general public was the second lowest rated entity, signifying the need for stronger measures and potentially better-funded campaigns to effectively increase public awareness of hate speech.

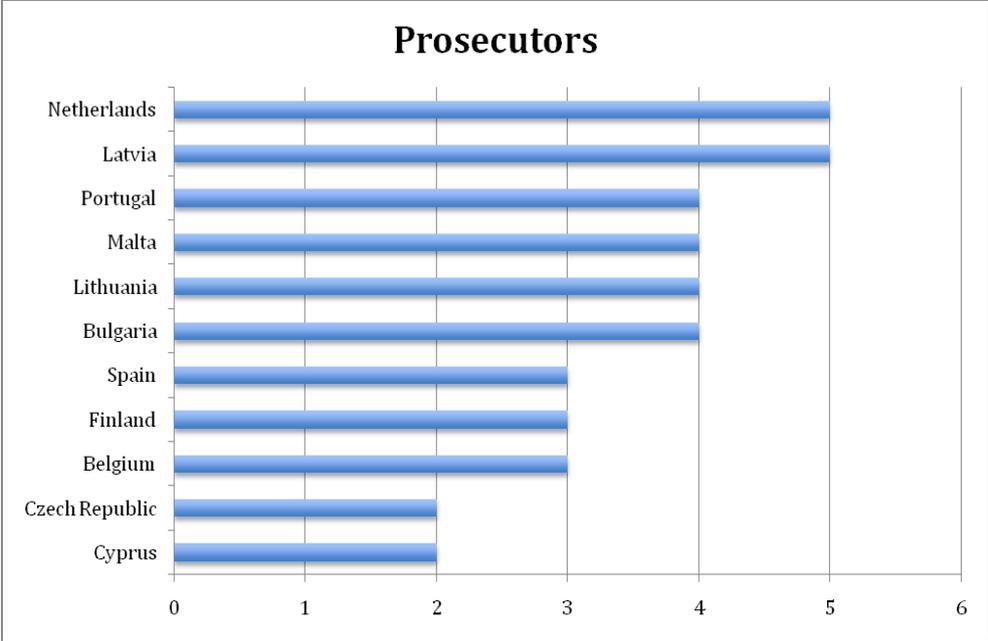


Figure 6: Respondents’ perceptions of the awareness levels of prosecutors in their respective countries.

Following Associations / NGOs, prosecutors were the second highest rated category for having awareness of hate speech. This can be attributed in part to the many training programs dealing with hate crime and hate speech that are routinely offered, or are considered mandatory, for prosecutors and other legal actors in certain EU States, as described earlier in this section. The Cypriot and Czech stakeholders were the only respondents to rate the awareness level at “2” for prosecutors; however, this reflects their earlier views expressed on the need for more robust training for public officials.

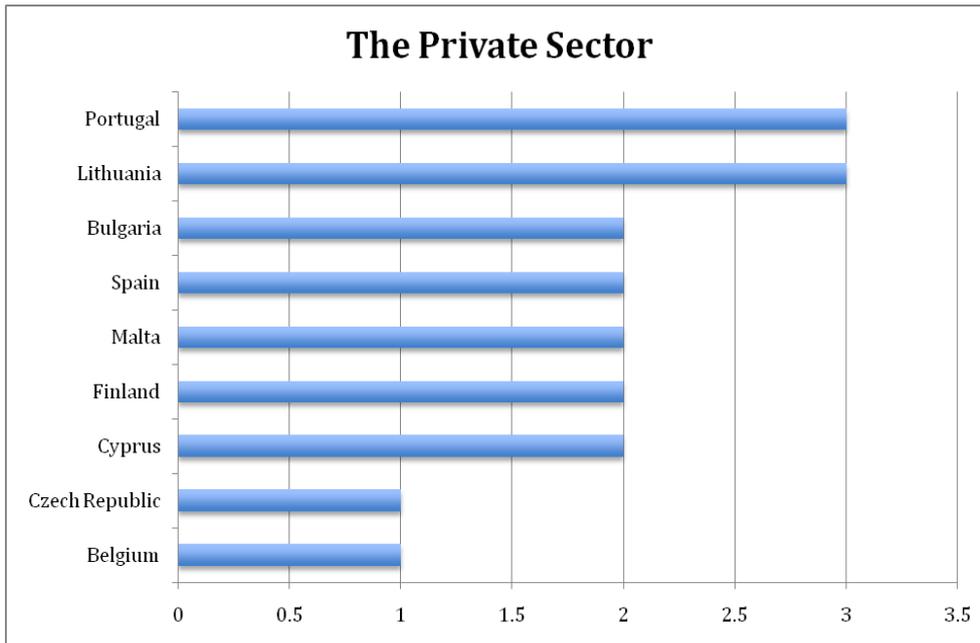


Figure 7: Respondents' perceptions of Private Sector awareness levels in their respective countries.

The private sector received the lowest scores concerning hate speech awareness, with only the Portuguese (ministry) and Lithuanian stakeholders giving their countries an average rating of "3." This perceived lack of awareness by the private sector, across multiple EU countries, makes it a vital area for future informational and awareness raising campaigns addressing hate speech, both in general and in new media.

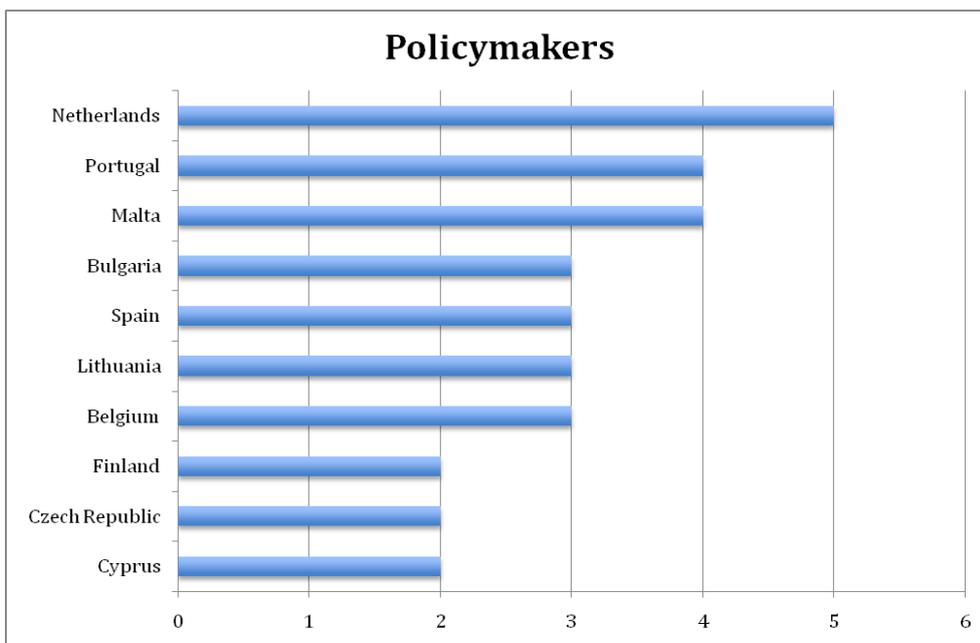


Figure 8: Respondents' perceptions of Policymaker awareness levels in their respective countries.

Respondents frequently rated policymakers in their home countries as having an above-average level of awareness with respect to hate speech. This is potentially do to the number of States having official policies and public campaigns for addressing hate speech, in addition to national legislation on the issue. Only the Finnish, Czech, and Cypriot respondents rated their national policy makers as having a level of awareness that was below average (2).

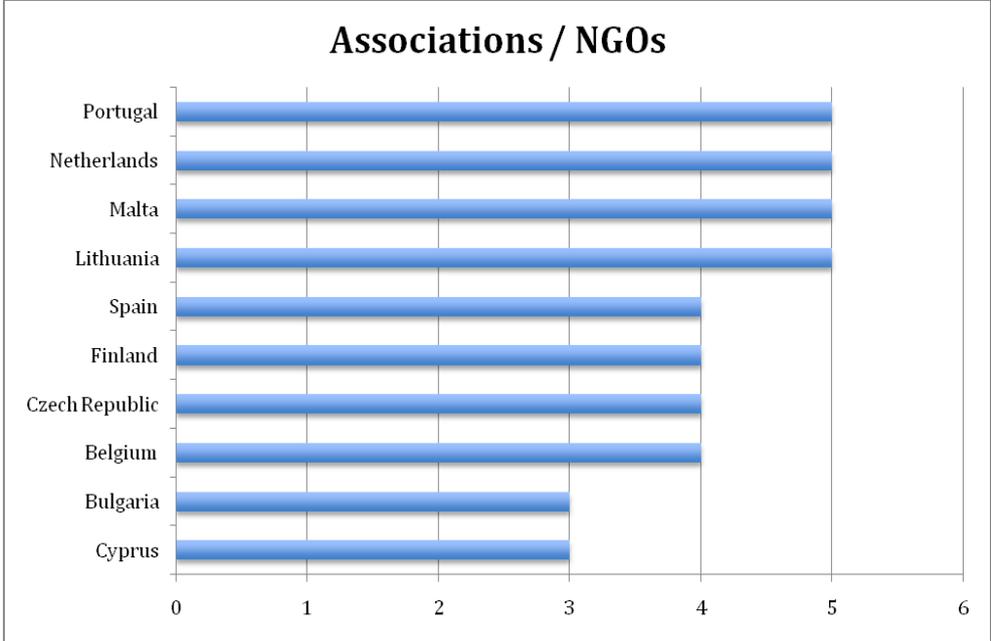


Figure 9: Respondents’ perceptions of NGO & association awareness levels in their respective countries.

Associations and NGOs were rated as having the highest levels of awareness with respect to hate speech. This does not come as a surprise since a wide range of organizations in this sector deal with hate speech in some capacity, whether directly or as a result of work on matters related to general discrimination, immigration, the LGBT community, or some other field. NGOs often serve as a primary resource for victims and offer a wealth of knowledge concerning the hate speech issue.

Conclusions

The realization of this assessment has allowed for the development of a general picture pertaining to the legal aspects associated with hate crime and hate speech in the EU. While stakeholders from every EU Member State were not able to respond to the questionnaire, and thus contribute to this analysis, the information obtained has been valuable in assessing the major developments associated with these issues.

As the EU and its respective Member States continue their efforts to address hate crime and hate speech, certain areas of weakness should be recognized and dealt with in order to maintain a unified approach to tackling these phenomena at the European level. As has been discussed in detail, the lack of standardized definitions and terminology pertaining to hate-based crime is of particular concern as each State often employs its own working definitions of these topics, which are then reflected in the formulation of national legislation, leading to general imbalances across European legal frameworks. This is also true concerning the implementation of international protocols, particularly the Council of Europe's Convention on Cybercrime and its Additional Protocol, which do not command a universal level of adherence among all EU countries.

In summary, every EU country maintains its own strategy for addressing hate crime and hate speech. While this poses a series of problems for EU-wide harmonization, each country's ability to offer a wealth of information, experience, and varying perspectives on these issues can serve as a positive asset for building well-rounded legal mechanisms and European policy in the long term, if States come together and agree to tackle these topics in a concerted manner.

The answers of the respondents as relates to training, awareness, and the state of civil society in national contexts also represent areas with some room for improvement. As portrayed in this assessment, the groups officially being trained to address hate speech and hate crime vary by country, and for some countries, regular training in this field is neither mandatory nor widely available. Moreover, national trainings often only target one or two groups of stakeholders, such as judges, a single LEA, or prosecutors, with the risk of creating educational gaps among sectors of the legal community, while other stakeholders are left out of such knowledge-building activities.

This situation influences the overall awareness levels of hate crime and hate speech among certain areas of society, particularly government and legal entities. Governments need to do more to increase awareness, not only in the public sector, but also among the general population. The analysis shows that further improvements could be developed, even in the countries where public awareness campaigns for hate-based crime do exist, especially since these initiatives are often under-funded or focus on only a few categories of bias.

A key objective for all stakeholders moving forward should be to promote increased dialogue and information sharing on hate-based crime, while getting more players, such as entities from the private sector, involved in awareness activities. Moreover, highly

knowledgeable stakeholders, particularly NGOs, need to be supported in their work and provided with clear channels of communication with governments and LEAs.

With the growth of the Internet and various advancements in communications technology, the means through which individuals can commit hate-based acts have multiplied, and the effects of such incidents can reach global audiences in a matter of seconds. Hate crime and hate speech, as committed in traditional settings, are still challenging issues for policymakers, LEAs, and other actors. However, as the threat of hate speech new in media increases, national stakeholders should carefully evaluate current legal conditions, awareness levels, and victim assistance services present in their respective countries, adapting to rapidly changing circumstances in concert with other EU Member States.

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Appendix: The Questionnaire

PRISM Questionnaire: Legislation and Existing Legal Procedures to Counter Hate Crime and Hate Speech

PRISM – Preventing, Redressing and Inhibiting hate Speech in new Media – is a project funded by the Fundamental Rights and Citizenship Programme of the EU Commission’s DG Justice, which intends to develop effective strategies and practices for awareness raising, information and dissemination, both for increasing denouncements and reporting, and for promoting a more conscious use of language, in order to reduce the use and impact of hate speech. The project addresses the need to improve professional skills for fighting hate speech in terms of a different and more responsible use of language, in identifying, investigating and reporting hate crimes and defending victims, as well as highlighting the need to raise awareness on the social risks of hate speech among young people.

Within this framework, the Consortium is carrying out a comparative analysis of the legislation on hate crime and hate speech, including hate speech present online and in new media, in the 28 EU Member States. Moreover, it will analyse, in-depth, the existing situation in the five project countries: Italy, UK, Romania, France and Spain.

The PRISM team has developed this questionnaire to be completed by European stakeholders and experts on hate crime and hate speech. Its purpose is to collect information on the legal framework that affects these issues, and also to assess the effectiveness of these policies with regard to hate speech and hate crime. The results of the questionnaire will be analysed and a comparative report will be published in autumn 2015.

We are very grateful for your assistance in completing this questionnaire. We understand that it may not be possible to provide answers to all questions, but we are thankful to you in providing as much information as you can. Information provided will not be shared, and will be aggregated and anonymised.

If you would like to follow up this questionnaire with an interview we would be delighted to speak with you (please email Arthur Brocato at: brocato@unicri.it).

Contact Information

The following information is requested to ensure that data pertaining to hate crime and hate speech is collected from each of the 28 EU Member States, providing a balanced and comprehensive view of these issues from across the European Union.

Name of respondent:

Title/role:

Organisation/Department:

Telephone number:

Please include country dialling code.

Email address:

Please choose your country: *

Mark only one oval.

- Austria
- Belgium
- Bulgaria
- Croatia

- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Ireland
- Italy
- Latvia
- Lithuania
- Luxembourg
- Malta
- Netherlands
- Poland
- Portugal
- Romania
- Slovakia
- Slovenia
- Spain
- Sweden
- United Kingdom

* Required

Q1: Are you the national body mandated to address issues of hate crime and hate speech within your country?

-If not, could you please provide the contact information for the appropriate institution that we should submit this questionnaire to?

-In any case, please feel free to provide any information that you believe would be relevant for responding to this questionnaire.

Definition and Legislation

In this section, we are seeking to understand the basic conceptualization of hate crime and hate speech at the national level and information on current legislation in your country with regard to these topics and the general issue of discrimination. In particular, we require information on national regulations and policies that may include implementation guidelines and compliance with international and EU regulations.

Q2: Please provide the definitions of hate crime and hate speech as delineated at the national level. If no such official definitions exist, please provide the working definitions employed by your institution.

Q3: Please list the main national legislation present in your country related to hate crime and hate speech.

Please include reference to any implementing guidelines. Where possible, please provide dates of enforcement.

Q4: Does this legislation specify certain bias categories as they pertain to vulnerable elements present within society? (Please list the categories - e.g. discrimination by ethnicity, religion, sexual orientation, etc).

Q5: Please list the main policies present in your country related to hate crime and hate speech.

Please provide details of the policies in place that affect hate crime and hate speech.

Q6: Does these policies specify certain bias categories as they pertain to vulnerable elements present within society? (Please list the categories - e.g. discrimination by ethnicity, religion, sexual orientation, etc).

Q7: Please list and describe any national legislation, according to sector, that incorporates hate crime and/or hate speech provisions within its text.

Employment	Media	Education	Welfare	Sports	Other

Q8: Is your country’s national legislation fully compliant with the provisions of the Council of Europe’s Cybercrime Convention and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems of 28 January 2003?

- Yes
- No

-Please Explain.

Q9: Is your country’s national legislation fully compliant with the provisions of 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?

- Yes
- No

-Please Explain.

Q10: Is your country’s national legislation fully compliant with the provisions of Directive 2000/43/EC of 29 June 2000 on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin?

- Yes
- No

-Please Explain.

Hate Crime

Q11: Does your Constitution or national principles contain provisions regarding hate crime as such?

-If so, does it provide general safeguards or targeted provisions on these issues?

Please add legislation references where available.

-If not, how does the Constitution or national principles provide indirect measures to tackle hate crime? Which articles can issues of hate crime fall under?

Q12: Under your national legislation, are there special provisions that address hate crime as a result of racism and/or discrimination?

Please add legislation references where available.

- If available, please provide a link to the document (preferably in English) or send it to: brocato@unicri.it

Hate Speech

Q13: Does your Constitution or national principles contain provisions regarding hate speech as such?

-If so, does it provide general safeguards or targeted provisions on these issues?

Please add legislation references where available.

-If not, how does the Constitution or national principles provide indirect measures to tackle hate speech? Which articles can issues of hate speech fall under?

Q14: Under your national legislation, are there special provisions that address hate speech as a result of racism and/or discrimination?

Please add legislation references where available.

- If available, please provide a link to the document (preferably in English) or send it to: brocato@unicri.it

Q15: Does your Country penalise acts of hate speech? Is it considered a criminal offence?

-If so, how many and which are the relevant provisions addressing this issue? Does your criminal system distinguish among different forms of hate speech? Who is liable for this type of offence? (E.g. the creator of the content, the publisher, the host of the content, the facilitator of the contents' distribution, and/or other) What are the penalties for committing such offences?

Please add legislation references where available.

-If not, is it considered a civil offence? Which types of fines are issued?

Please add legislation references where available.

Hate Speech Online

Q16: Does your country have specific legislation concerning hate speech online or in new media?

-If so, which are the provisions involved? Please add legislation references where available.

- Do you think these provisions are effective and incisive enough? Please explain.

-If not, do you believe that enacting specific legislation on this topic would be helpful in order to tackle instances of hate speech and hate crime? Considering the absence of specific online/new media legislation, do you consider the existing legal framework on discrimination, hate crime, and/or hate speech suitable enough to provide assistance to victims?

Q17: Do you think codes of conduct or terms of Service (TOS) agreements put in place by Internet Service Providers (ISPs) are efficient tools to combat hate speech cases?

- Has your Country enacted any law concerning TOS?

- Are there any specific good practices currently being employed in your country concerning these issues?

Existing legal procedures to counter hate crime and hate speech

In this section we would like to gain knowledge on the legal framework, and actual application of laws, related to hate crime and hate speech. In particular, we would like to obtain information relating to details of legal procedures, case-law, jurisprudence, and reporting mechanisms with respect to hate crime and hate speech.

Q18: Who is liable for prosecution, and, who should be prosecuted with regard to hate speech? (E.g. editors, authors)

- Is corporate liability possible in this scenario?

Q19: How does your country balance prosecuting cases of hate speech with ensuring the fundamental right of freedom of expression?

- Please cite one or two key cases to serve as examples.

Q20: In your country, are juridical procedures *strictosensu* provided to tackle hate crime and hate speech issues (I.e. civil/ criminal court procedures?)

Q21: In your view, is your national legislation adequate to prosecute offences related to hate crime and hate speech?

Please explain with examples where possible.

Q22: In your view, could additional provisions be included into your NATIONAL legislation for enhanced prosecution of such cases?

Q23: Is there an existing database at the national level that logs information on jurisprudence related to cases concerning hate crime and hate speech?

Reporting

Q24: Which are the existing mechanisms at national level for individuals to report incidents of hate crime / hate speech? Please specify if these mechanisms apply to reporting hate crime, hate speech, or both.

- Reporting to the police station
- Reporting to the public prosecutor's office
- Online reporting (through online forms – to the police / to the Equality Body etc.)
- Reporting through mobile phone applications
- Toll free number (of Equality Body / associations working with victims etc.)
- E-mail address (police / Equality Body etc)
- Third party reporting
- Anonymous reporting
- Online reporting mechanisms developed by social networking sites (please specify)
- Other (please specify)

Q25: Statistically speaking, which are the most used mechanisms? And at which rate are these mechanisms successful?

Q26: Are there any information sharing mechanisms in your country to facilitate data sharing, or the like, between law enforcement agencies and other entities?

- Which are the main problems identified with regard to information sharing between law enforcement agencies and civil society organisations?

Q27: Is there any specific obstacle to reporting this kind of incident (E.g. Is it difficult to prove? Are law enforcement agencies skilled enough in processing these reports? Are specific provisions rarely applied? Are victims confident enough to report to the police? ...) Please specify if particular obstacles only refer to reporting hate speech or hate crime, rather than both.

In your opinion, in which ways could these obstacles be removed?

Q28: Please cite statistics from the last 3 years on the number of reports filed with your entity regarding hate crime and hate speech issues. How are these reports categorized with regards to bias motivation and targets?

Information on National Entities and Country-level Hate Crime and Hate Speech Statistics

This section aims to gain an understanding of the various entities and their work present at the national level, both within and outside of the governmental sector, tasked with addressing issues of hate speech and hate crime, while also attempting to gather relevant national statistics on these topics.

Q29: Please provide basic information on the national authorities responsible for hate speech and hate crime prevention in your respective country.

Q30: Are the decisions taken by these bodies legally binding?

- If not, what is the real impact of these decisions? How do they provide responses to victims of hate crime and hate speech?

Q31: Is there a specific department within the national police force dealing with biased-motivated crime? And/or is there an ad hoc public prosecution office on hate crime?

Q32: Could you provide information on the major national associations, networks, or NGOs dealing with issues of discrimination and/or hate crime in your country? List 3-5 entities fitting this description

Awareness

This section focuses on the issue of awareness with respect to hate crime and hate speech, gathering pertinent information on training activities, campaigns, and levels of awareness among various stakeholders.

Q33: Are there regular trainings in your country regarding hate crime and hate speech for prosecutors, law enforcement agencies, the national Equality Body, officers from civil society organizations, and other relevant stakeholders?

-If so, are these trainings effective in promoting an understanding of the national legal framework, its implementation, and challenges regarding hate speech and hate crime?

Q34: Is there any national awareness campaign targeting the general public that addresses issues of hate crime and hate speech? In your opinion, is it effective?

Q35: In your view, please rate on a scale from 1 to 5 the overall awareness level of the following groups as it concerns hate speech (with 1 being the lowest level of awareness and 5 being the highest):

Law Enforcement Agencies	1	2	3	4	5
The general public	1	2	3	4	5
Prosecutors	1	2	3	4	5
The private sector	1	2	3	4	5
Policymakers	1	2	3	4	5
Associations / NGOs	1	2	3	4	5

Additional Information

Q36: Please provide any additional information you may deem important in relation to the issues of hate crime and hate speech.

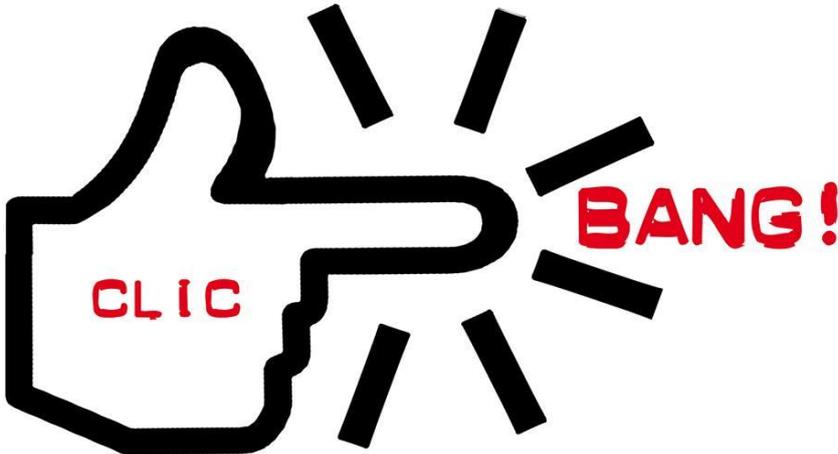
Q37: Would you be available to be contacted by a member of the PRISM Consortium in order to obtain more information on this questionnaire?

Q38: Would you like to receive updates and reports/publications from the PRISM Project?

Q39: Have you found this questionnaire useful in its purpose of obtaining information on the effectiveness of hate crime and hate speech legislation at the national level?

France: In-depth Country Study on Hate Crime and Hate Speech conducted within the Framework of the PRISM Project

P R I S M



WORDS ARE WEAPONS.

PREVENTING REDRESSING & INHIBITING HATE SPEECH IN NEW MEDIA



PRISM is a project co-financed by the Fundamental Rights and Citizenship Programme of the European Union

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Introduction

Issues pertaining to racism and discrimination have long plagued Europe and the international community at large, contributing to societal discord and conflict, which require the involvement of various stakeholders to redress. With cutting-edge developments in communication technology in particular, new platforms have emerged through which individuals can commit acts of discrimination and, in particular hate speech. Considering cyberspace's seemingly infinite nature, in addition to the already existing areas through which discriminatory practices can take place, policing these issues has become an extremely difficult task.

In light of this expanding landscape, the PRISM Project – Preventing Redressing & Inhibiting Hate Speech in New Media – was developed and aims to assess the EU and its Member States' ability to tackle this issue. As a component of the PRISM Project, the consortium of partners is examining the legal frameworks of five EU Member States with respect to legislation, jurisprudence, reporting and redress mechanisms, and an array of other criteria for dealing with incidents of discrimination in this area. The following report focuses on the state of France's legal framework for tackling discriminatory issues.

While France's Constitution does not recognize the singularity of different rights, it does enshrine general principles such as *equality of all citizens before the law, without distinction of origin, race or religion*, under which the main social and civil rights and principles are contained.

Other instruments, such as the French Criminal Code, the country's Press Freedom Act, the General Anti-discrimination Law of 2001, and others, all address issues of discrimination, providing a solid legal framework in this area.

Effectiveness and jurisprudence in this domain, however, have provided mixed results, with many judges not handing out strong sentences for crimes involving hate speech, and many discrepancies have arisen with respect to enforcing French anti-discrimination law due to conflicts of jurisdiction in the international sphere.

However, on a more positive note, French civil society is strong in this domain, with an array of different organizations and associations working on the topic of discrimination.

Further work is needed within France to fully combat hate speech; yet, as will be shown in the following report, a comprehensive framework is in place to start addressing this issue with a high degree of accuracy.

The French Legal Framework

France has signed and ratified the most relevant International Conventions and European Union Charters as regards fundamental rights and freedoms. However, France has signed neither Protocol 12 of the European Convention for the Protection of Human Rights and fundamental freedoms, nor the United Nations Convention on the Protection of the Rights of All Migrant Workers and members of their families.

According to a 2014 report produced by Amnesty International, France has not yet withdrawn its reservation concerning Article 27 of the International Covenant on Civil and Political Rights. France has also not signed the Framework Convention for the Protection of National Minorities, or the Convention on the Participation of Foreigners in Public Life at Local level. Additionally, it has neither ratified the European Convention on Nationality, nor the European Charter for Regional or Minority Languages.⁸¹

Table of International Treaties and Conventions

Title	Open for Signature	Ratified
European Convention on Human Rights (ECHR)	4 Nov. 1950	3 May 1974
International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)	21 Dec. 1965	28 July 1971
International Covenant on Economic, Social and Cultural Rights (ICESCR)	16 Dec. 1966	4 Nov 1980
International Covenant on Civil and Political Rights (ICCPR)	16 Dec. 1966	4 Nov 1980
The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	18 Dec. 1979	14 Dec 1983
Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	10 Dec. 1984	18 Feb 1986
European Convention on Transfrontier Television (ECTT)	5 May 1989	21 Oct 1994
International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families (CMW)	18 Dec. 1990	Not Signed Not Ratified
Charter of fundamental rights of the EU	2 Oct. 2000	1 Dec. 2009
Council of Europe Convention on Cybercrime	23 Nov. 2001	10 Jan 2006
Additional Protocol to the Convention on Cybercrime on racist acts committed through computer systems	28 Jan. 2003	10 Jan 2006
Convention on the Rights of Persons with Disabilities (CRPD)	30 Mar. 2007	18 Feb 2010

⁸¹ Amnesty International (2014), "Submission to the European Commission against racism and intolerance", available at: <http://www.refworld.org/pdfid/533e68334.pdf>

General Legal Framework on Discrimination

The Constitution

The French Constitution was adopted on 4 October 1958 and was recently reformed in 2008 through the Constitutional Revision Law on the modernization of the institutions of the Fifth Republic of 23 July, which amended some provisions regarding the role of the executive and augmented the powers of the parliament.⁸²

Most of the provisions of the French Constitution deal with the structure of the government and the relationship between different authoritative bodies. As it does not contain a list of basic principles and rights, the main national source of law as regards fundamental rights and freedom is the preamble to the Constitution of 1958, which refers back to the preamble to the previous Constitution of 1946, which, in turn, references the Declaration of Human Rights of 1789.

Since 1973, when the Constitutional Court referred to the principle of equality for the first time, this principle has been either linked to Article 1 of the 1789 Declaration of Human Rights, the preamble of the 1946 Constitution, or to Articles 2 and 3 of the 1958 Constitution.

As regards the principle of non discrimination, it is recognized under the Constitution, via its Preamble of 1946 that prohibits discrimination on the basis of sex, race, belief and trade union activity, as well as in the current Constitution through Article 2, which states that "*the nation ensures equality before the law of all citizens, whatever their ethnic origin, race or religion*".⁸³

As one of the leading pieces of legislation, Article 2 enshrines the principle of Equality before the law: France guarantees the equality of all citizens, without distinction of origin, race or religion in respect of all beliefs, and, therefore, excludes making reference to particular minorities.

Although there are no specific provisions dealing with racism and discrimination as such, it can be stated that these issues are condemned since both the Preamble and the Constitution of 1958 provide for the principle of respect for human rights and the

⁸² Fabbrini F., "Kelsen in Paris: France's Constitutional Reform and the introduction of *A Posteriori* Constitutional Review of Legislation", German Law Journal Vol.09 No.10, available at: https://www.germanlawjournal.com/pdfs/Vol09No10/PDF_Vol_09_No_10_1297-1312_Articles_Fabbrini.pdf

⁸³ Lokiec P., "Discrimination Law in France", University Paris XIII, available at: http://www.jil.go.jp/english/events/documents/clls08_lokiec.pdf

universality of the principle of equality, hence the principles against racism and discrimination can be considered as part of this classification.⁸⁴

In order to have a better understanding of the legal provisions that have an indirect effect on hate crime and hate speech issues, listed below are the most important constitutional provisions, beginning with the Preamble of the Constitution of 1946:

- Preamble of the Constitution of 1946: *“On the morrow of the victory of the free peoples of the world over those regimes that attempted to enslave and to degrade the human person, the French people reaffirm that each human being, irrespective of race, religion, or belief, possesses inalienable and sacred rights. (...) France constitutes with the peoples of Overseas (Outre-mer) a Union based on equality of rights and duties, irrespective of race or religion.”* It adds that: *“Each has a duty to work and the right to obtain employment. No one can be attacked in his work or employment by reason of his origins, opinions or beliefs”*. In addition, *“the free communication of ideas and opinion is one of the most important human rights. Every citizen has the right to speak, write and print freely, unless this freedom is abused in cases determined by law”*.⁸⁵
- Preamble of the Constitution of 1958: *“The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, and to the rights and duties as defined in the Charter for the Environment of 2004. By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development”*.

As regards the provisions of the Constitution, the most relevant pieces of legislation in connection to this Report are listed below:⁸⁶

- Article 1: guarantees the principle of Equality of all citizens before the law and explicitly mentions race: *“France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis. Statutes shall promote equal access by women and men to elective offices and posts as well as to position of professional and social responsibility”*.

⁸⁴ Latraverse S. (2011), “Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC Country Report 2010 France, European Network of Legal Experts in the non-discrimination field, available at: http://www.non-discrimination.net/content/media/2010-FR-Country%20Report%20LN_FINAL_0.pdf

⁸⁵ Preamble to the Constitution of 27 October 1946, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst3.pdf

⁸⁶ The full text of the French Constitution is available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constiution_anglais_oct2009.pdf and at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006071194>

- Article 2: *“The language of the Republic shall be French. The national emblem shall be the blue, white and red tricolour flag. The national anthem shall be La Marseillaise. The maxim of the Republic shall be “Liberty, Equality, Fraternity”. The principle of the Republic shall be: government of the people, by the people and for the people”.*
- Article 55: specifies that Treaties and International conventions ratified by France are of superior value to national law, which therefore includes all criteria pertaining to discrimination enumerated therein: *“Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party”.*
- Article 71-1: provides for the establishment of the Defender of Rights (*Défenseur des droits*), a body entitled to ensure respect for the rights recognized by the French legal system: *“The Defender of Rights shall ensure the due respect of rights and freedoms by state administrations, territorial communities, public legal entities, as well as by all bodies carrying out a public service mission or by those that the Institutional Act decides fall within his remit. Referral may be made to the Defender of Rights, in the manner determined by an Institutional Act, by every person who considers his rights to have been infringed by the operation of a public service or of a body mentioned in the first paragraph. He may act without referral. The Institutional Act shall set down the mechanisms for action and the powers of the Defender of Rights. It shall determine the manner in which he may be assisted by third parties in the exercise of certain of his powers. The Defender of Rights shall be appointed by the President of the Republic for a six-year, non-renewable term, after the application of the procedure provided for in the last paragraph of article 13. This position is incompatible with membership of the Government or membership of Parliament. Other incompatibilities shall be determined by the Institutional Act. The Defender of Rights is accountable for his actions to the President of the Republic and to Parliament”.*

Experts have pointed out that non discrimination is a constitutional principle,⁸⁷ and that the discriminatory criteria listed in the Constitution is not to be considered exhaustive since the Constitutional Council has indeed decided that the list of grounds is open and additional grounds can be added.⁸⁸

Before the Constitutional Reform of 2008, constitutional anti-discrimination provisions could only be challenged before the Constitutional Council by members of parliament within the period before the provisions were signed into law by the president. After the Constitutional Reform, a direct constitutional recourse against enacted legislation at the request of the *Conseil d’Etat* or the Court of Cassation was established and enshrined in article 61.1 of the Constitution: *“If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the*

⁸⁷ Representation permanente de la France auprès de l’O.S.C.E, “Tolerance and non-discrimination II Working Session 2 France’ s Reply”, available at: <http://www.osce.org/odihr/105724?download=true>

⁸⁸ Latraverse S. (2011), “Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC Country Report 2010 France, European Network of Legal Experts in the non-discrimination field, available at: http://www.non-discrimination.net/content/media/2010-FR-Country%20Report%20LN_FINAL_0.pdf

matter may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council, within a determined period. An Institutional Act shall determine the conditions for the application of the present article”.

It is important to note that despite the 2008 Reform giving more tangible value to the rights of citizens with respect to constitutional protections, private citizens were already in the position to impugn secondary legislation on constitutional grounds before the *Conseil d'Etat*, as long as the provision of law challenged was not the “mere repetition of a duly enacted law”⁸⁹. In addition, the French Equality body, can analyse the conformity of legislation to constitutional requirements when it issues recommendations to the government after the procedure of challenging the conformity of legislation to Constitutional anti-discrimination provisions.⁹⁰

The Penal Code

The criminal Code, as well as the Press Law, which will be analyzed below, provide for the punishment of private and public communication that is either defamatory, or insulting, or incites discrimination, hatred or violence against a person or a group of persons on the basis of place of origin, ethnicity, nationality, race, religion, sex, sexual orientation or disability. The Gayssot Act, adopted in 1990, added a subsection to Article 24 of the Law of 29 July 1881. The subsection relates to freedom of the press and the prohibition of declarations that justify or deny crimes against humanity, such as the Holocaust⁹¹. The Criminal Code was later amended in 2003 by the *Loi Lellouche* in order to elevate racist motives to the status of aggravating factors in punishing crimes. The *Loi Lellouche* provides for stricter penalties for crimes of violence based on racist grounds, therefore introducing the notion of racially motivated crimes and allowing judges to issue higher penalties than those they would apply in the case of a similar act of violence not motivated by racism. The Law points out which are the criteria for defining the motivation of the offence, for example “*spoken or written words, images, items, or acts of any kind that are injurious to the honour or esteem of the victim, or group of persons including the victim, by virtue of their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion*”.⁹²

Another Law against violent crimes motivated by bias based on sexual orientation was issued on 18 March 2003, providing the same penalties introduced for racist motives. In 2004, after one year, this Law was extended and also applied to the topics of threats, theft and extortion motivated by bias. The aggravated penalties for both racist and homophobic

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ E-Civis, The National Council for Combating Discrimination, and the Permanent Election Authority (2014), “Comparative study on legislation sanctioning hate speech and discrimination in the European member states of the European Union”, available at: <http://discursfaradiscriminare.ro/wp-content/uploads/2014/10/Comparative-Study.pdf>; Josephs J. (2008), “Holocaust denial legislation: a justifiable infringement of freedom of expression”, Centre Perelman de philosophie du droit Université Libre de Bruxelles, available at: <http://www.philodroit.be/IMG/pdf/WP-philodroit2008-3-Josephs.pdf>

⁹² Camus J. (2011), “Racist Violence in France”, ENAR, available at: <http://cms.horus.be/files/99935/MediaArchive/Racist%20Violence%20Report%20France%20-%20online.pdf>

crimes consist of life imprisonment, instead of 30 years, for murder, and fifteen years imprisonment, rather than ten, for violent attacks leading to permanent disability.⁹³

The Law known as "Perben II", issued on 9 March 2004, includes a provision that makes sending death threats, stealing or extorting money from an individual based on his/her race, an aggravating factor in a crime.⁹⁴ The main provisions of the Criminal Code relevant to the aim of this Report are listed below:⁹⁵

Article 132-76: *"Where provided for by law, the penalties incurred for a felony or a misdemeanour are increased when the offence is committed because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion. The aggravating circumstances defined in the first paragraph are established when the offence is preceded, accompanied or followed by written or spoken words, images, objects or actions of whatever nature which damage the honour or the reputation of the victim, or a group of persons to which the victim belongs, on account of their actual or supposed membership or non-membership of a given ethnic group, nation, race or religion".*

Article 132-77: *"In the cases provided for by law, the penalties incurred for a felony or a misdemeanour are increased where the offence is committed because of the victim's sexual orientation. The aggravating circumstances defined in the first paragraph are established when the offence is preceded, accompanied or followed by written or spoken words, images, objects or actions of whatever nature which damage the honour or the reputation of the victim, or a group of persons to which the victim belongs, on account of their actual or supposed sexual identity"*

These two provisions were introduced by Act no. 2003-88 of 3 February 2003 and establish as an aggravating circumstance the commitment of a crime when justified on the basis of the above mentioned grounds. Perpetrating a crime or an offence on the basis of the real or perceived basis of race, ethnicity, nationality, religion, sexual orientation or sexual identity of the victims constitutes an aggravating circumstance. Thus, the Criminal Code establishes specific penalty enhancements for some crimes, such as murder, rape, violence and threats of violence, when they are perpetrated on the basis of the grounds mentioned above.

Article 212-1: provides for the punishment of life imprisonment for crimes against humanity, more specifically as regards the deportation, enslavement, summary execution, or abduction of persons, for political, philosophical, religious or racial reasons. *"Deportation, enslavement or the massive and systematic practice of summary executions, abduction of persons followed by their disappearance, of torture or inhuman acts, inspired by political, philosophical, racial or religious motives, and organised in pursuit of a concerted plan against a section of a civil population are punished by criminal imprisonment for life. The first two*

⁹³ McClintock M. (2005), "A Survey of Violent Hate Crimes in Europe and North America", Human Rights First, available at: <https://www.humanrightsfirst.org/wp-content/uploads/pdf/everyday-fears-080805.pdf>

⁹⁴ Camus J. (2011), "Racist Violence in France", ENAR, available at: <http://cms.horus.be/files/99935/MediaArchive/Racist%20Violence%20Report%20France%20-%20online.pdf>

⁹⁵ McGuire K., Bogusia Puchalska, Michael Salter, "State of the Union Report: a road map addressing reform possibilities based upon a comparative analysis of the legal regulation of hate speech and hate crime", Daphne III Programme, available at: <https://www.uclan.ac.uk/research/explore/projects/assets/stateofunion10.pdf>

paragraphs of article 132-23 governing the safety period are applicable to felonies provided for by the present article”.

Article 212-2: deals with aggravated war crimes, establishing that the same acts as those referred to in Article 212-1, but committed during a war, are punishable by life imprisonment.

Article 225-1: provides a legal definition of Discrimination: *“Considered as discrimination is any distinction made between individuals based on their origins, their sex, their family situation, the fact of being pregnant, their physical appearance, their name, their state of health, their level of disability, their genetic characteristics, their moral behaviour, their sexual orientation, their age, their political opinions, their trades union activities, their belonging or not belonging, either true or imagined, to a particular ethnic group, country, race or religion. Considered also as discrimination is any distinction made between companies or organisations based on the origins, the sex, the family situation, the physical appearance, the name, the state of health, the level of disability, the genetic characteristics, the moral behaviour, the sexual orientation, the age, the political opinions, the trades union activities, the belonging or not belonging, either true or imagined, to a particular ethnic group, country, race or religion of the members or of certain members of those companies or organisations”.*⁹⁶

Article 225-2: deals with discriminatory behaviour. It stipulates that the refusal to supply goods, services or accommodation, hindering the normal exercise of an economic activity, refusal to recruit, and the dismissal or making the supply of goods, services or jobs subject to a discriminatory condition are punished by imprisonment for up to two years. Moreover, there is a provision for a fine to be administered, and an additional penalty is stipulated in Article 225-19 for the deprivation of civic rights and a permanent, or five-year, closure of the convicted person’s firm, depending on the judgment.

Article 432-7: deals with discrimination perpetrated by a person exercising public authority. This offence also covers the form of denial of a right granted by the law and hindering the normal exercise of an economic activity of any kind, which is punished by imprisonment for up to 3 years and a fine. Additional penalties are provided for in Article 432-17 and include deprivation of civic rights, prohibition to engage in a particular occupation, and the confiscation of subject matter or proceeds from the offence.

Article R. 624-3: regulates discriminatory defamation, stating as follows:⁹⁷ *“Defamation committed in private against a person or a group of people on account of their origin or their actual or supposed membership or non membership of a particular ethnic group, nation, race or religion shall carry the fine for fourth-class summary offences”.*

⁹⁶ Commission National Consultative des droits de l’ homme (2013), “Contribution of the CNCDH to the 2nd cycle of the UPR of France”, available at: <http://nhri.ohchr.org/EN/IHRS/UPR/Documents/CNCDH%20contribution%20for%20UPR%20Dec%202012.pdf>

⁹⁷ CoE (2008), “Blasphemy, insult and hatred: finding answers in a democratic society”, *Science and technic of democracy*, No. 47, Venice Commission, available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD%282010%29047-e>

Article R. 624-4: Discriminatory Insults are criminalized as follows: *“Insults committed in private against a person or a group of people on account of their origin or their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion shall carry the fine for fourth class summary offences”*.

Article R. 625-7: (Decree No. 2005-284 of 25 March 2005) punishes non-public incitement to discrimination, hatred or racial violence, covering, for example, incitement in a letter missive. *“Incitement, committed in private, to discrimination against or hatred or violence towards a person or a group of people on account of their origin or their actual or supposed membership or non-membership of a particular ethnic group, nation, race or religion shall carry the fine for fifth-class summary offences (a maximum of €1 500, which may be doubled in some instances of reoffending, together with any additional penalties)”*.

Criminal Code of Alsace and Moselle

Although France abolished the crime of blasphemy in 1791, it still persists in the region of Alsace and Moselle, where the local Criminal Code forbids blasphemy against God. It contains two relevant provisions as regards the issue of hate speech.⁹⁸

Article 166: criminalizes and punishes blasphemy as follows: *“Anyone who causes offence by making insulting public statements that blaspheme against God, or publicly insults one of the Christian denominations or a religious community established within the Confederation and recognised as a corporation, or the institutions or ceremonies of these religions, or commits an insulting and offensive act in a church or other place used for religious assemblies, shall be subject to a prison sentence of up to three years”*.

Article 167: states that: *“Anyone who uses assault or threats to prevent a person from practising the religion of a religious community established in the State ..., or who deliberately creates disorder or disturbance in a church in order to impede or disrupt the liturgy or certain religious ceremonies ..., shall be subject to a prison sentence of up to three years”*.

Civil Legislation

Freedom of the Press Act of 29 July 1881

The Press Freedom Act of 29 July 1881 guarantees freedom of expression while respecting public order. Manifestations of racism and xenophobia are considered to violate public order, and are therefore sanctioned.⁹⁹

⁹⁸ *Ibid.*

⁹⁹ Representation permanente de la France auprès de l'O.S.C.E., “Tolerance and non-discrimination II Working Session 2 France’s Reply”, available at: <http://www.osce.org/odihr/105724?download=true>

This is one of the most relevant pieces of legislation as regards hate speech. By means of this Law, France prohibits publications of a defamatory or insulting nature. Since the date of its entry into force, the Press Act has been slightly modified, as it has survived since 1881. For example, the “*Guigou Law*” enacted on 15 June 2000 abolished prison terms, but not fines, for press offences such as defamation and insults. The offence of “insulting a foreign head of State,” formerly prohibited by Article 36 of the Law, was abolished in 2004. On the contrary, some offences were expanded with higher penalties, including imprisonment, for defaming or insulting persons on the basis of race, religion, sexual orientation or physical disability.

Below, the different relevant sections of this Act are referenced, in order to have a clear map of the different types of behaviour that are condemned.¹⁰⁰

Article 23:¹⁰¹ specifies that those who directly incite others to commit a crime or misdemeanour will be punished as accomplices. This applies to provocations manifested in different forms and ways, such as speech, writing, print, drawings, paintings, insignia, images or any other similar medium: *“speeches, shouts or threats expressed in public places or meetings, or by written words, printed matter, drawings, engravings, paintings, emblems, pictures or any other written, spoken or pictorial aid, sold or distributed, offered for sale or displayed in public places or meetings, either by posters or notices displayed for public view, or by any means of electronic communication”*.¹⁰²

Article 24: this provision criminalizes incitement to racial discrimination, hatred, or violence on the basis of one’s origin or membership (or non-membership) in an ethnic, national, racial, or religious group, specifically stating that: *“those who, by one of the means set forth at Article 23, incite hatred or violence against a person or group of persons on account of their origin or membership or non-membership of a given ethnic group, nation, race or religion, or his true or supposed sexual orientation or gender identity will be penalised by a year imprisonment and a 45000 Euro fine or by one of the two penalties only”*.¹⁰³ Article 24, paragraph 6, prescribes that *“anyone who, using one of the means set forth in the preceding Article has directly caused any of the terrorist acts set forth in Book IV, Title II of the Penal Code or has advocated such acts, shall be subject to five years imprisonment and a fine of 45,000 euros.”*¹⁰⁴

¹⁰⁰ CoE (2008), “Blasphemy, insult and hatred: finding answers in a democratic society”, *Science and technic of democracy*, No. 47, Venice Commission, available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD%282010%29047-e>

¹⁰¹ Section 23 as amended by Act No. 72-546 of 1 July 1972, Official Gazette of 2 July 1972; and Act No. 85-1317 of 13 December 1985, Section 18-i, Official Gazette of 24 December 1985.

¹⁰² Barak-Erez D., Scharia D. (2011), “Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law”, Harvard College, available at: http://harvardnsj.org/wp-content/uploads/2015/01/Vol.-2_Barak-Erez_and_Scharia_Final.pdf

¹⁰³ Legislationline, “Press Freedom Act of 29 July 1881”, available at: <http://www.legislationline.org/documents/action/popup/id/15730>

¹⁰⁴ Barak-Erez, D., Scharia, D. (2011), “Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law”, Harvard College, available at: http://harvardnsj.org/wp-content/uploads/2015/01/Vol.-2_Barak-Erez_and_Scharia_Final.pdf

Article 26: punishes an offence of the President of the Republic, committed by a means enumerated in Article 23, by a fine of 45,000 Euros.¹⁰⁵

Article 27: prohibits publication, distribution or reproduction of false or fabricated news, or news wrongly attributed to third parties, where this is done in bad faith and the news could potentially undermine public peace. A fine of 45,000 Euros is applied in this case. When false news may undermine the discipline and morale of the army, or hinder the war effort, the fine may reach as high as 135,000 Euros.

Article 29: states that any allegation or imputation of an act that undermines the honour of, or esteem towards, the person or body to which the act is attributed, constitutes libel. Publication or reproduction of such an allegation or imputation is punishable, even when made in the form of a question, or if it targets a person or body not specifically named, as long as their identification is possible by the terms of the speech, cries, threats, writings or printed material, placards or posters.

Article 29.2: Defines an insult as: *“Any offensive expression, contemptuous term or invective not based on fact shall constitute an insult”*.

Article 30: provides that defamation of the courts, armed forces, established bodies and public administrations, by a means listed in Article 23, is punishable by a fine of 45,000 euros.

Article 31: establishes that the penalties listed in Article 30 apply to defamation of the following individuals because of their functions or positions:

“The same penalty shall apply to defamation committed by the same means against one or more ministerial staff members, a member of either House of Parliament, a public officer, a depositary or agent of public authority, a minister of one of the state-funded religions or a citizen asked to perform a public service or hold public office on a temporary or permanent basis, on account of his or her duties or position, or against a juror or witness on account of his or her testimony. Defamation concerning the private lives of such individuals is covered by Section 32 below”.

Article 32:

“Defamation committed against private individuals by one of the means set forth in Article 23 shall carry a fine of 12000 Euros. Defamation committed by the same means against a person or a group of people on account of their origin or their membership or non-membership of a particular ethnic group, nation, race or religion shall carry a one-year prison sentence and a fine of 45000 Euros, or one of these penalties only. In the event of a conviction for one of the offences set forth in the preceding paragraph, the court may additionally order: public display or dissemination of the judgment under the conditions set forth in Article 131-35 of the Criminal Code”.

¹⁰⁵ McCracken P. (2012), “Insult Laws: insulting to press freedom, a guide to evolution of insult laws in 2010”, World Press Freedom Committee and Freedom House, available at: <https://www.freedomhouse.org/sites/default/files/Insult%20Law%20Report.pdf>; Wessing, T. (2006), “Defamation and Privacy Law and procedure in England, Germany and France”, available at: https://www.taylorwessing.com/uploads/tx_siruplawyermanagement/IP_Defamation_and_privacy.en.pdf

Article 33:

“Insults delivered by the same means against the bodies or persons mentioned in Articles 30 and 31 of the present Act shall carry a fine of 12000 Euros. Unprovoked insults committed by the same means against private individuals shall carry a fine of 12000 Euros. Insults delivered under the conditions set forth in the preceding paragraph against a person or group of people on account of their origin or their membership or non-membership of a particular ethnic group, nation, race or religion shall carry a six-month prison sentence and a fine of 22500 Euros. In the event of a conviction for one of the offences set forth in the preceding paragraph, the court may additionally order: a) public display or dissemination of the judgment under the conditions set forth in Article 131-35 of the Criminal Code”.

Article 35: *“Truth of the defamatory fact, solely if it relates to their functions, may be established by normal means for allegations against established bodies, the armed forces, public administrations and against all those listed in Art. 31. Truth of defamatory or insulting allegations may also be established against directors or administrators of any industrial, commercial or financial enterprise that publicly seeks (investments through) savings and loans. The truth of defamatory facts may be proven, except: a) When the allegation concerns the person’s private life; b) When the allegation refers to facts that are more than 10 years old; c) When the allegation refers to a fact that constitutes an infraction that has been amnestied or is subject to the statute of limitations, or when the conviction was expunged through rehabilitation or review”.*

Article 37: *“Public contempt of ambassadors or plenipotentiaries, envoys, chargés d'affaires and other diplomatic agents accredited to the Republic of France is punishable by a fine of 45,000 Euros”.*

Article 48: *“1) In cases of insult or defamation of the courts and other bodies listed in Article 30, prosecution shall take place only after they have deliberated in a general assembly and have requested prosecution, or, if the body has no general assembly, upon complaint by the head of the body or the minister to whom the body is attached. 2) In cases of insult or defamation of one or more members of either House of Parliament, prosecution shall take place only upon complaint by those concerned. 3) In cases of insult or defamation of public officials, those entrusted with public authority or the agents of public authority other than ministers, and of citizens entrusted with a public service or mandate, prosecution shall take place either upon their complaint or automatically upon the complaint of the minister to whom they are attached. 4) In cases of defamation of a juror or witness, as provided by Article 31, prosecution shall follow the complaint of the person who claims to have been defamed. 5) In cases of offense against heads of state, or insult of foreign diplomats, prosecution shall take place after their request to the Foreign Affairs Minister and its referral by him to the Justice Minister”.*¹⁰⁶

¹⁰⁶ McCracken P. (2012), “Insult Laws: insulting to press freedom, a guide to evolution of insult laws in 2010”, World Press Freedom Committee and Freedom House, available at: <https://www.freedomhouse.org/sites/default/files/Insult%20Law%20Report.pdf>; Wessing T. (2006), “Defamation and Privacy Law and procedure in England, Germany and France”, available at: https://www.taylorwessing.com/uploads/tx_siruplawyermanagement/IP_Defamation_and_privacy.en.pdf

Act of 9 December 1905

This piece of legislation, issued in 1905 during the Third Republic, regulates the separation of Church and State. Since Section 33 establishes that Sections 31 and 32 of the Law are applied *“only where the nature or circumstances of the disturbance, insults or assault in question do not attract more severe penalties under the provisions of the Criminal Code”*, this piece of legislation has residual value, being applied only when the requirements necessary for the application of the Criminal Code (or any other law that can be applied to the same issues) are missing.¹⁰⁷

Section 31:

“Anyone who causes an individual to practise or refrain from practising a religion, to belong or cease belonging to a religious association, or to contribute or refrain from contributing to religious expenses, either by means of assault, violence or threats or by instilling a fear of losing his or her job or putting his or her person, family or wealth at risk, shall be subject to the fine for fifth-class summary offences and a prison sentence of six days to two months or one of these penalties only”.

Section 32:

“Anyone who prevents, delays or interrupts a religious service by causing disorder or disturbance at the premises used for such services shall be subject to the same penalties”.

Section 33:

“The provisions of the preceding two sections shall apply only where the nature or circumstances of the disturbance, insults or assault in question do not attract more severe penalties under the provisions of the Criminal Code”.

Directive 2000/43/EC, which constitutes the most important piece of EU legislation dealing with discrimination and racism, was initially transposed into the French legal system through Law no.1006-2001 of 16 November 2001, the Law of Social Modernization no. 2002-73 of 17 January 2002, and the *HALDE* Law, no 2004-1486 of 30 December 2004, which establishes the *High Authority Against Discrimination and for Equality* - a specialised body dealing with discrimination. This completed the transposition of directive 2000/43/EC.

Following the enactment of these laws, the French Government passed other important provisions in order to better implement European Directive, Law no 2008-496 of 27 May 2008, which completed the transposition of Directives 2000/43, 2000/78, 2002/73, 2004/113 and 2006/54 and amends the Labour Code, Law no 83-634 of 3 July 1983 on the Rights and Obligations of Civil Servants, and the Penal Code.¹⁰⁸

¹⁰⁷ CoE (2008), “Blasphemy, insult and hatred: finding answers in a democratic society”, Science and technic of democracy No. 47, Venice Commission, available at: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD%282010%29047-e>

¹⁰⁸ Latraverse S. (2011), “Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC Country Report 2010 France, European Network of Legal Experts in the non-discrimination field, available at: <http://www.refworld.org/pdfid/4ed65afe2.pdf>

Circular no. 86-120 of 13 March 1986; Circular no. 2002-102 of 25 April 2002; Circular no. 2007-171 of 13 November 2007

As regards access to public education services, no discrimination can be made between pupils of French nationality and those of a foreign nationality. The current legislative framework addressing this issue is now made up of different pieces of legislation, with the most relevant legal provisions being mentioned below:

Circular no. 86-120 of 13 March 1986: deals with the admission and integration of foreign pupils into schools, *colleges*, and *lycées*;

Circular no. 2002-102 of 25 April 2002: is entitled “Mission and organisation of academic centres for the schooling of newly arrived and travelling children (CASNAV)”. These centres, referenced in the title, have been established in order to provide stakeholders with relevant information and to help them to come up with adequate pedagogical solutions to the problems that school teachers face with regards to the issue of newly arrived and travelling children. These stakeholders play a role in the decision-making process, notably regarding the relationship between national Education and its partners.

Circular no. 2007-171 of 13 November 2007: regulates the implementation of the obligation of education institutions to provide all pupils with general information on the acquisition conditions of French nationality for children born in France to foreign parents.¹⁰⁹

Law 86-1067 of 30 Sept 1986 on Freedom of communication (Act Leotard)

Article 15 of this Law, in line with Article 24 of the Law of 29 July 1881 on the freedom of the press, provides that: “*The Higher Audiovisual Council monitors (...) that the programs made available to the public by an audiovisual communication service does not contain any incitement to hatred or violence for reasons of race, sex, morals, religion or nationality*”, therefore prohibiting publications of a defamatory or insulting nature.¹¹⁰

Law Combating Discrimination no. 2001-1066 of 16.11.2001¹¹¹: The French Parliament adopted a General Anti-Discrimination Law in 2001, which partially transposed the content of EU directive 2000/43/EC¹¹² and prohibits both direct and indirect discrimination in respect to a broad range of situations. This piece of legislation regulates discrimination in the field of employment and work, and in doing so, it amends two other Laws, the Employment Code, for both the private and the social economy sectors, and the Law of July 1983 on the rights and obligations of public sector officials. The Anti-Discrimination Law of 2001 introduces the discriminatory grounds of sexual orientation and age into these two pieces of legislation.

¹⁰⁹ Eurydice (2007-2008), “The Education System in France”, available at: <https://www.phil-fak.uni-duesseldorf.de/fileadmin/Redaktion/Institute/Sozialwissenschaften/BF/Lehre/Materialien/Weitere/Eurybase.France.07-08.pdf>

¹¹⁰ CoE and ELSA (2014), “International Legal Research Group on hate speech online”, available at: http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

¹¹¹ JILPT Comparative Labour Law Seminar (2008), “New Developments in Employment discrimination Law”, available at: <http://www.jil.go.jp/english/reports/documents/jilpt-reports/no6.pdf>

¹¹² GELD, “Group to study and combat of Discrimination”, available at: <http://www.france.qrd.org/texts/discrimination/equalitybodies/geld.pdf>

On the five criteria prohibited by the EU Directives of 2000, the law bans discrimination in the fields of access to work experience and training courses at companies (Employment Code and Criminal Code), as well as in access to employment and any position in life at work (Employment Code and Law of 1983).

Furthermore, the Anti-Discrimination Law provides a definition of direct and indirect discrimination concerning all criteria, both in the Employment Code and in the Law of July 1983 for the civil service. It provides for the shifting of the burden of proof to the defendant in the Employment Code: the applicant or employee must present evidence which only suggests the existence of discrimination, whereas the defendant must prove that there were grounds for his or her behaviour as a result of objective elements unrelated to any discrimination. It also allows trade unions and associations to take legal action, based on the Employment Code, for discrimination on behalf of the applicant or employee in question, as long as the applicant does not object or gives his or her written consent. The Anti-Discrimination Law also extends the investigative powers of labour inspectors in terms of discrimination; it introduces measures into the Employment Code encouraging social partners to conclude collective agreements to ensure equality of treatment between employees, with no distinction on the grounds of race or ethnic origin.¹¹³

Law No. 2001-397 of 9 May 2001 on equality between women and men at work¹¹⁴:

This Law provides for the development of negotiations on gender equality at industry, sector and company level in order to fight against discrimination between men and women in the professional sphere.¹¹⁵

Law on Social Modernisation 2002: includes a chapter on combating moral harassment in the work place, one on providing civil remedies, and another devoted to burden of proof. Article 169 of the Law on Social Modernisation was modified by Article 4 of Law no. 2003-6 of 3 January 2003, concerning the burden of proof in cases of moral harassment.¹¹⁶

Law no 2005-102 on Disability: imposes a duty to integrate disabled children into the mainstream school system.¹¹⁷

Law 396-2006 of 31 March 2006 on Equal Opportunities grounds: race and religion.¹¹⁸: This Law strengthened the powers of the High Authority to Combat Discrimination and Promote

¹¹³ ISM CORUM (2008), "National activity report France anti-discrimination and diversity training", available at: http://ec.europa.eu/justice/discrimination/files/antidiscrimination_training_france_en.pdf

¹¹⁴ Düvel W., Schömann I., Clauwaert S. (2004), "Non-discrimination in the European Union Implementation of Directives 2000/78/EC and 2000/43/EC", ETUI, available at: <http://library.fes.de/pdf-files/gurn/00382.pdf>

¹¹⁵ Jartie J. (2007), "Issue Histories France: Series of Timelines of Policy Debates", IWM, available at: http://www.quing.eu/files/results/ih_france.pdf

¹¹⁶ Chahrokh H., Klug W., Bilger V. (2004), "Migrants, minorities and legislation: Documenting legal measures and remedies against discrimination in 15 Member States of the European Union", EUMC, available at: http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_9_politikalar/1_9_5_azinlik_politikasi/EUMC - 2004 - Migrants minorities and legislation Documenting legal measures and remedies against discrimination in 15 Member States of the European Union.pdf

¹¹⁷ McColgan A. (2013), "National protection beyond the two EU Anti-discrimination Directives", European Commission, available at: http://ec.europa.eu/justice/discrimination/files/final_beyond_employment_en.pdf

¹¹⁸ CESifo DICE (2007), "National Legal and Institutional Framework to Fight Labour Market Discrimination on Gender and Ethnic Grounds", available at: <https://www.cesifo-group.de/ifoHome/facts/DICE/Labour-Market->

Equality (HALDE), which can now impose fines for acts of discrimination. The Law also provides for actions to help combat discrimination in the field of television and radio broadcasting (CSA, *Conseil supérieur de l'audiovisuel* – High Audiovisual Council, which was established by Law of 17 January 1989).¹¹⁹

Law 2008-496 of 27 May 2008: Article 1 of Law 2008-496, which completed the transposition of Directive 2000/43/EC, extends the definition of discrimination to include giving instructions to discriminate or to harass. These acts can be criminalized on first instance, rather than requiring multiple incidents to warrant prosecution.

The Law also provides for protection against discrimination on grounds of race in several areas of life outside employment, such as education, access to goods and services, health, social protection and social advantages, and to all grounds prohibited by the directives.

Article 2.1 of Law 2008-496 prohibits discrimination on the basis of sex.¹²⁰

Law 2012-496 of 6 August 2012: France amended its legislation on sexual harassment, prohibiting discrimination on the (new) ground of sexual identity, both in the Criminal and Labour Codes. Hence, in the area of employment, any discrimination on the basis of sexual identity is prohibited *ex article 1132-1* of the French Labour Code, whereas criminal law now punishes hate crime on the ground of sexual identity. In this piece of legislation, the protection against discrimination on other grounds such as age, disability and religion or belief, is restricted to the area of employment.¹²¹

Law for the City and Urban Cohesion No 2014-173 of 21 February 2014: The Parliament amended the Programme Law for the City and Urban Cohesion by creating a new ground of discrimination based on place of residence. The new ground has been added to the list of protected grounds contained in different sources of law, such as Article L1132-1 of the Labour Code, Article 225-1 of the Criminal Code and in the general Anti-Discrimination Law 2008-496 of 28 May 2008. However, an exception in favour of positive actions has been provided, as the law specifies in article L1133-5 of the Labour Code and article 225-3 of the Penal Code, that favourable measures taken for the benefit of residents of a territory do not constitute discrimination.¹²²

[and-Migration/Labour-Market/Anti-discrimination-Gender/national-framework-anti-discrimination-gender-ethnic/fileBinary/national-framework-anti-discrimination-gender-ethnic.pdf](#); to see the whole text of the law please visit: <http://www.gibraltarlaws.gov.gi/articles/2006-37o.pdf>

¹¹⁹ “French Ministry of Foreign Affairs (2006), Equal opportunities Action in France”, available at: http://ambafrance-us.org/IMG/pdf/Equal_opportunities_action.pdf

¹²⁰ Latraverse S. (2011), “Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC Country Report 2010 France”, European Network of Legal Experts in the non-discrimination field, available at: <http://www.refworld.org/pdfid/4ed65afe2.pdf>

¹²¹ Amnesty International (2013), “Submission to the French Government on Violence and Discrimination on the ground of gender identity”, available at:

<https://www.amnesty.org/download/Documents/12000/eur210012013en.pdf>

¹²² Latraverse S. (2014), “Programme Law for the City and Urban Cohesion n° 2014-173 of 21 February 2014”, European Network of Legal Experts in the non discrimination field, available at: <http://www.non-discrimination.net/content/media/FR-119-Residence.pdf>

Law no.2014-366 of 24 March 2014: Within Article 1 of this Law, Parliament adopted an amendment to Law n.89-462 of 6 July 1989 on the Rights of Landlord and Tenant, extending the protection against discrimination in access to housing to all prohibited grounds of discrimination enumerated in Article 225-1 of the Penal Code (in 2012 the Defender of Rights had alerted the Minister of Housing that existing legislation did not cover the ground of age in protection against discrimination in access to housing).¹²³

With regards to discrimination against Muslims, French civil legislation provides limited protection against discrimination on the ground of religion or belief, where the protection is limited to the area of employment. As stated in French legislation, differences in treatment on the basis of religion or belief in employment do not constitute discrimination if they are based on a determining occupational requirement. According to Amnesty International experts, with reference to this specific basis of discrimination, *the French state fails to ensure that its domestic legislation is interpreted according to international standards*, noticing also that *the principle of secularism and neutrality seems to play a key role in introducing restrictions on the wearing of religious and cultural symbols and dress in private employment*.¹²⁴

Amnesty International has therefore argued that France should adopt anti-discrimination legislation that is more in line with anti-discrimination provisions enshrined by international and regional human rights treaties, including the International Covenant on Civil and Political Rights. French legislation seems not to prohibit all forms of hate crimes, for example ones on the grounds of disability, migrant status or socio-economic status of the victims.¹²⁵

Legal Framework on Racism

Before analyzing the specific legislation applied to racism issues, it is important to point out that French doctrine has always refused to recognize the concept of race and ethnic origin, so, within the French context, any approach to origin must be based on objective indications. Origin and race are concepts that the law prohibits to take into consideration, whereas “national origin” seems to be the only admissible reference to origin. According to the European network of legal experts in the non-discrimination field, this approach has the consequence of endangering the effectiveness of the legal protection against discrimination, considering that the only objective component of origin is national origin.¹²⁶

¹²³Latraverse S. (2014), “Law no 2014-366 of 24 March 2014 for Access to Housing and Renovated Urban Planning (Law ALUR)”, European Network of Legal Experts in the non discrimination field, available at: <http://www.non-discrimination.net/content/media/FR-118-Law%20introducing%20the%20protection%20of%20the%20ground%20of%20age%20in%20acces%20to%20housing.pdf>

¹²⁴ Amnesty International (2014), “Submission to the European Commission against racism and intolerance”, available at: <https://www.amnesty.org/download/Documents/8000/eur210012014en.pdf>

¹²⁵ *Ibid.*

¹²⁶ Latraverse S. (2011), “Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC Country Report 2010 France”, European Network of Legal Experts in the non-discrimination field, available at: <http://www.refworld.org/pdfid/4ed65afe2.pdf>

France maintains many antiracist laws. The Act of 1 July 1972 formed the basis of this body of law, while the Act of 13 July 1990 completed it by codifying the offence of disputing crimes against humanity.

The Criminal Code, which entered into force in 1994, amended, supplemented, and created a number of provisions on racism, introducing more stringent penalties for racist offences.

Penal Code

There are several provisions in the Criminal Code banning racism and punishing racist acts. In the above section, analyzing the criminal provisions on discrimination, some of them mention racism and race as a ground protected by French discrimination law. Listed below are some other provisions dealing specifically with racism, although it should be pointed out that in order to have a complete legal framework on racism, the list should be interlaced with some of the above-mentioned discrimination provisions referencing race as a protected ground.

Article 211-1: provides a definition of the term genocide as *“total or partial destruction of a national, ethnic, racial or religious group in accordance with a concerted plan, or the submitting of a group to living conditions such as to entail the total or partial destruction of the group, measures to prevent births, forced transfer of children”*. In the sentence for committing acts of genocide, as stipulated by the Article, is life imprisonment.

Article 226-19: of the Criminal Code punishes the recording of data, from which the race, origin, or religion of the person involved is distinguishable. The sentence associated with committing this crime is imprisonment for up to 5 years and a fine.¹²⁷ The Article is written as follows: *“Except in cases provided for by law, the recording or preserving without the express agreement of the persons concerned, of computerised personal data which directly or indirectly reveals their racial origins, political, philosophical or religious opinions, or trade union affiliations, or their health or sexual orientation, is punished by five years’ imprisonment and a fine of €300,000. The same penalty applies to the recording or preserving in a computerised memory of name-bearing information relating to offences, convictions or supervision measures outside the cases provided for by law”*.

With regard to the previously mentioned Act of 29 July 1881 (Press Act), this piece of legislation was amended through the Act of 1 July 1972. Therefore, a remark on the relevant changes is referenced below:

Article 24 bis (as amended by the Law of 1 July 1972): states that *“those who have disputed, by one of the means stated in article 23A, the existence of one or more crimes against humanity as they are defined by the article of the statute of the International Military Tribunal, annexed to the London Agreement of 8 August 1945, and which were committed by members of an organisation declared criminal by the application of Article 9 of the above-*

¹²⁷ IFDL (2012), “Ad Hoc Information Report Data protection: Redress mechanisms and their use”, available at: https://fra.europa.eu/sites/default/files/access_to_data_protection_remedies_country_fr.pdf

*mentioned statute or by a person found guilty of such crimes by a French or an international tribunal, will be punished with the penalties foreseen by the sixth paragraph of the Article 24”.*¹²⁸

Civil Legislation

The Law of 10 January 1936, as amended by **Law 72–546 of 1 July 1972 (Anti Racism Act or Pleven Law)**, calls for the disbandment of an organisation when it propagates racial discrimination or racial hatred. This provision was put into place in order to dissolve any militant groups. The term militant groups specifically refers to groups defined by Section 1 of the Law of 1936, those that incite discrimination, hatred or violence.¹²⁹

The statute of 1972 establishes that unless a legitimate reason exists, discrimination on ethnic, national, racial or religious grounds constitutes an offence, when committed against an individual, an association or a company.¹³⁰

This part of the Act is incorporated both in the Criminal Code, specifically in article 416 on the repression of discriminatory acts, and in the Freedom of Press Act of 1881, within Article 24.¹³¹

The Law of 1 July 1972 also criminalizes some offences related to normal encounters in everyday life, for example the refusing to provide a service based on racial reasons.¹³² A detailed description is in the paragraph below.

Act 72-546 of 1 July 1972 on combating racism: part of the legal framework regulating the right to freedom of thought, conscience and religion and which amends the Press Act of 29 July 1881¹³³, provides for the punishment of a certain number of everyday racists acts such as the refusal to provide a good or dismissal for racial reasons.¹³⁴ It also punishes incitement

¹²⁸ Whine M. (2008), “Expanding Holocaust Denial and Legislation Against It”, *Jewish Political Studies Review* 20:1-2, available at: <http://jcpa.org/article/expanding-holocaust-denial-and-legislation-against-it/>

¹²⁹ EUMC (2012), “Anti-discrimination legislation in EU Member States”, available at: http://www.pedz.uni-mannheim.de/daten/edz-b/ebr/02/ART13_France-en.pdf; Uwe B. (2006), “Limits of political freedom in democratic constitutional states: a comparative study on Germany, France and the USA”, SSOAR, available at: http://www.ssoar.info/ssoar/bitstream/handle/document/31061/ssoar-2006-2-backes-limits_of_political_freedom_in.pdf?sequence=1;

¹³⁰ Coliver S. (1992), “Striking a balance Hate Speech, Freedom of expression and Non discrimination”, available at: <http://www.article19.org/data/files/pdfs/publications/striking-a-balance.pdf>

¹³¹ EU network of independent experts on fundamental rights (2005), “Combating racism and xenophobia through criminal legislation: the situation in the EU member states”, available at: http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdf_opinion5_2005_en.pdf

¹³² French Ministry of Foreign Affairs (2007), “Combating Racism and Antisemitism in France”, available at: http://ambafrance-us.org/IMG/pdf/Combating_racism_and_antisemitism.pdf

¹³³ Human rights committee (1997), “Consideration of reports submitted by states parties under article 40 of the covenant, Third periodic reports of States parties due in 1992”, available at: http://www.univie.ac.at/bimtor/dateien/france_ccpr_1997_report.pdf

¹³⁴ French Ministry of Foreign Affairs (2007), “Combating Racism and Antisemitism in France”, available at: http://ambafrance-us.org/IMG/pdf/Combating_racism_and_antisemitism.pdf

to discrimination, defamation of an individual based on his origin, or his membership or lack thereof in a particular ethnic, national, racial or religious group, and, lastly, punishes injurious behaviour directed against an individual for those same reasons.¹³⁵

Act No. 90-615 of 13 July 1990 punishing all racist, anti-Semitic and xenophobic acts:

Law No. 90-615 of 13 July 1990, sanctioning any act of racism, anti-Semitism or xenophobia, defines racism and xenophobia as being “*any discrimination based on the fact of belonging or of not belonging to a certain ethnic group, nation, race or religion (...)*”.¹³⁶

Section 4 deals with associations working to counter racial and religious discrimination and states that: “*The Act allows associations working to counter racial and religious discrimination to exercise the right of reply in the audiovisual sector*”.

The Besson Act of 31 May 1990: was enacted in order to implement the right to housing: its Section 1 provides that “*Guaranteeing the right to housing is a duty of solidarity incumbent upon the whole nation*”. It must be underlined, however, that the Nation does not bear the obligation to provide housing to anyone upon request, but must provide assistance to those who meet the statutory criteria to qualify for it. The right to housing is therefore not “enforceable”, considering that it gives no entitlement to relief through the courts for those who cannot find somewhere to live.¹³⁷

In line with this piece of legislation, the **Circular of 26 August 2012 on Discrimination against Roma** provided some guidance to authorities in terms of safeguards to be put in place before evictions. However, it is a legally non-binding tool and French civil law does not prohibit forced evictions and does not require authorities to put in place all the safeguards established by international law with regard to the rights of information. Migrant Roma are still often affected by forced evictions: this is in violation of France’s obligation to fulfil the right to adequate housing, including the prohibition on the forced eviction of individuals and communities.¹³⁸

Memorandum from the Ministry of Justice on measures against racism, issued on the **16 December 1992**, requires prosecutors to enhance measures against racism, particularly with regard to the press. It also invites prosecutors to cooperate closely with associations to combat racism.¹³⁹

¹³⁵ UN International Human Rights Instrument (1996), “Core document forming part of reports of states parties France the reports of states parties France”, available at: <http://www.refworld.org/pdfid/3ae6ae01c.pdf>

¹³⁶ E.U. network of independent experts on fundamental rights (2005), “Combating racism and xenophobia through criminal legislation: the situation in the EU member states”, available at: http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdf_opinion5_2005_en.pdf

¹³⁷ Loison M. (2007), “The Implementation of an Enforceable Right to Housing in France”, Centre Maurice Halbwachs (CMH). available at: http://www.feantsaresearch.all2all.org/IMG/pdf/ejh_vol1_eval2.pdf

¹³⁸ Amnesty International (2014), “Submission to the European Commission against racism and intolerance”, available at: <https://www.amnesty.org/download/Documents/8000/eur210012014en.pdf>

¹³⁹ ECRI (1997), “Legal measures to combat racism and intolerance in the member States of the Council of Europe France”, available at: http://www.coe.int/t/dghl/monitoring/ecri/legal_research/national_legal_measures/France/France_SR.pdf

Hate Speech Law

In a Country such as France, which boasts an independent press, an effective judiciary and a functioning democratic political system, freedom of speech and press are guaranteed. However, some limitations exist in order to balance these freedoms with the rights of others. Anti-defamation laws prohibit racially or religiously motivated verbal and physical abuse. In addition, written and oral speech that incites racial hatred and denies the Holocaust are illegal. When hate speech reaches the level of threatening to incite terrorism, authorities may deport non-citizens for publicly using hate speech to achieve those aims.¹⁴⁰

The principal source of hate speech legislation is the Press Law of 1881, in which Section 24 criminalizes incitement to racial discrimination, hatred, or violence on the basis of one's origin or membership (or non-membership) in an ethnic, national, racial, or religious group. Likewise, a Criminal Code provision makes it an offence to engage in similar conduct via private communication.¹⁴¹

There is no clear definition of hate speech spelled out within French law, but a commonly accepted definition does exist. Hate speech consists of “those types of discourse that seek to intimidate, incite violence or prejudice against a person or group of people based on various characteristics, such as their race, gender and religion, in the forms of written as well as verbal incitements and some public behaviour”.¹⁴²

There are several parameters identified by the European Court of Human Rights (ECHR) that could assist interpreters of the law in identifying which facts constitute hate speech, and therefore do not fall under the protection of freedom of expression. The first criteria are the content and the intention of the statement, which together form the pragmatic force of speech. In addition, the status of the perpetrator and the form and impact of the speech represent additional parameters.¹⁴³ For example, when a speech amounts to a call for violence, xenophobia or racism, and threatens the public order, it will be denominated as hate speech and will be subject to sanctions since all the criteria leads to the identification of a statement characterized by harmful content.¹⁴⁴

Law concerning Hate Speech Online

¹⁴⁰ McGuire K., Puchalska B., Salter M. (2012) “State of the Union Report: A Road Map Addressing Reform Possibilities Based upon a comparative analysis of the Legal Regulation of Hate Speech and Hate Crime”, Daphne III Programme, available at: <http://clock.uclan.ac.uk/10452/1/stateofunion10.pdf>

¹⁴¹ The Legal Project, “European Hate Speech Laws”, available at: <http://www.legal-project.org/issues/european-hate-speech-laws>

¹⁴² CoE and ELSA (2014), “International Legal Research Group on hate speech online”, available at: http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

¹⁴³ Jagnić Nenadić G., Juršetić A., Krajnović T., Pendeš A., Pekas M., Dojčinović I. (2014), “An introductory report on legal matters regarding online hate speech in Croatia and Europe”, available at: <http://hrcak.srce.hr/file/199880>

¹⁴⁴ European Court of Human Rights (2013), “Fact Sheet Hate speech”, Press Unit, available at: <http://www.theewc.org/uploads/content/archive/Fact%20sheet%20on%20hate%20speech2.pdf>

Hate speech on the Internet can be considered as an offence under the Law of 1881, as its Chapter IV on freedom of the press prohibits crimes committed through the press, or by any other means of publication (Section 23 of Chapter IV).

Law of 6 January 1978: regulates computers, files and freedom, but does not mention any specific provision on harmful content.¹⁴⁵

Act 2004-575 of 21 June 2004: states that confidence in the digital economy is a step forward towards a more incisive prevention and enforcement system on the Internet. According to this piece of legislation, Internet service providers and hosts have to contribute to the prevention of the dissemination of paedophilic, revisionist and racist data.¹⁴⁶

The Effectiveness of the French Legal Framework towards Hate Crime and Racism

Before analyzing the effectiveness of the French legal framework on hate speech, it is important to briefly mention the difficulty in drawing a line between hate speech and the principle of freedom of speech, since the line between prohibited and permitted speech is often blurred. This phenomenon can obviously lead to arbitrary judgements and unpredictable enforcement of the law, depending on where boundaries lie on a case by case basis.¹⁴⁷

As stated in the above section on the Legal Framework, the Press freedom Law provides for the possibility of imprisonment as a penalty for many offences. However, French judges rarely apply these provisions, regarding them as obsolete or excessive.¹⁴⁸

The European Network of legal experts in the non-discrimination field point out that effective implementation of discrimination law *entails considerable modification in the practice of judicial actors and in the way NGOs and Trade Unions perceive their function in the judicial process and social dialogue.*

Therefore, it seems to be indispensable to train judges and lawyers in order to provide them with a better understanding of the antidiscrimination legal framework, as well as the one concerning hate speech.¹⁴⁹

¹⁴⁵ CoE and ELSA (2014), "International Legal Research Group on hate speech online", available at: http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

¹⁴⁶ French Ministry of Foreign Affairs (2007), "Combating Racism and Antisemitism in France", available at: http://ambafrance-us.org/IMG/pdf/Combating_racism_and_antisemitism.pdf

¹⁴⁷ Sullum J. (2015), "A defence of France Hate speech Laws: people often say offensive things without being punished", Hit & Run Blog, available at: <http://reason.com/blog/2015/01/20/a-defense-of-frances-hate-speech-laws-pe>

¹⁴⁸ Reporters without borders (2014), "Saving independent Journalism, 30 years defending media", available at: https://rsf.org/files/RSF_30ANS_EN_WEB.pdf

¹⁴⁹ Latraverse S. (2011), "Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC Country Report 2010 France", European Network of Legal Experts in the non-discrimination field, available at:

FRA has classified France as a Country that provides “good data” with respect to the data are published and the bias- motivated cases are recorded within the country. In 2010, there were 886 cases concerning racism registered in France, in addition to 466 cases involving antisemitism, 127 extremist cases, and 100 islamophobic cases.¹⁵⁰

French hate speech laws have been criticized by some as being *hypocritical*. The criticism stems from the fact that, in their opinion, hate speech laws allow for the punishment of only some statements that make fun of some religions. The same treatment is not applied to statements that make fun of other religions, an example being the content put out by the French satirical magazine *Charlie Hebdo*.¹⁵¹

Procedural Issues and Mechanisms

Access to justice and effective remedies are essential in order to enforce the non discrimination law provisions belonging to national and EU / International legal frameworks. The definition of remedy is commonly accepted as any means by which the violation of a right is prevented, redressed, or compensated. It can be of a judicial nature, e.g. action or lawsuit, or non-judicial, for instance through an ombudsman and mediation.

All discrimination complaints against a private party must be presented before the civil courts, but the salaried employees must bring their claim before the Labour Court. The time limit for filing a claim is five years and the plaintiff has to be represented by a lawyer.

When not pertaining to the competency of the labour court, all the cases will be handled by the District Court or the Regional Court (*tribunal de grande instance- TGI*), depending on the amount of compensation involved or requested. Also in this case the plaintiff must be represented by a lawyer, however the statute of limitations for filing a claim is ten years, as opposed to the five years for cases tried before the Labour Court.¹⁵²

The Law of 16 November 2001 allows representative trade unions and NGOs, which have been in existence for over five years, to participate in the proceedings. In addition, Article 31 of the New Code of Civil procedure recognises the legal status before the civil courts of any person who has a legitimate interest in the dismissal or granting of the action.

With respect to housing discrimination, the Law of 17 January 2002 extends the right of action of NGOs to collective and individual recourse.

http://www.migpolgroup.com/public/docs/196.2010_FRANCE_Countryreportonmeasurestocombatdiscrimination_EN.pdf

¹⁵⁰ FRA (2012), “Making hate crime visible in the European Union: acknowledging victim’s rights”, available at: http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf

¹⁵¹ Why evolution is true, “Are the French hate speech laws hypocritical?”, available at: <https://whyevolutionistrue.wordpress.com/2015/01/16/are-the-french-free-speech-laws-hypocritical/>

¹⁵² Van Aelst H., Balbirnie E., Salvo E. (2014), “Racism and related discriminatory practices in employment in France”, ENAR Shadow Report 2012-2013, available at: <http://cms.horus.be/files/99935/MediaArchive/publications/shadow%20report%202012-13/France.pdf>

With regards to the remedy provided by the French legal framework to cases of discrimination, the general principle in French civil law is to remedy the prejudice by the “award of compensatory pecuniary damages”, therefore “indemnifying the financial and non material damages, without further pecuniary sanction or punitive damages”.¹⁵³ In cases of discrimination at work, article L 1134-4 of the Labour Code also regulates the possibility for victims to request the annulment of the discriminatory measure concerned, which often consists in the reintegration of the employee after a dismissal.¹⁵⁴

Although French procedural law sets out a comprehensive set of legal paths to allow victims to make use of their rights on the basis of anti discrimination law, the existing difficulties in proving discrimination facts must be highlighted. As already mentioned above, The Racial and Employment Equality Directives stipulate that people who feel they have faced discrimination must only establish before a court, or other competent authority, facts from which it may be presumed that there has been discrimination. In order to transpose the European legislation into the National legal framework, situation testing has been introduced through the Law of March 9 2006, which added Article 225-3-1 to the Penal Code as evidence of discrimination in criminal courts by the jurisprudence of the *Cour de Cassation*. It has not been used yet as evidence in civil cases due to the strict requirements for fairness prescribed by civil procedure law.¹⁵⁵

With the specific reference to the employment field, evidence of discrimination remains difficult to demonstrate as the law requires that discrimination has to rely on explicit evidence.¹⁵⁶

As regards the fines that judges usually apply to discrimination cases, there is a tendency to apply very low levels of sanctions, so, in effect, pecuniary loss minimal.¹⁵⁷

Concerning NGOs’ *locus standi*, when they work to combat discrimination on the grounds of ethnic origin, race or religion, they can be civil parties in some criminal actions. Despite the fact that the Code of Administrative Justice does not contain any specific provision as regards NGO participation, they are commonly allowed to intervene before administrative courts, as long as the NGO works to achieve a goal that corresponds to the subject matter of the case. NGOs are also allowed to make submissions in civil cases and before the labour courts.¹⁵⁸

As regards the former Equality Body, the French Ombudsman (*Mediateur de la Republique*), it was established in 1973 and existed until 2011, when along with the Equal Opportunities and Anti-Discrimination Commission (HALDE), its functions were absorbed by the newly

¹⁵³ Latraverse S. (2013), “Country Report France 2013 on measures to combat discrimination”, European Network of legal experts in the non discrimination field, available at:

http://www.non-discrimination.net/content/media/2013-FR-Summary%20country%20report%20LN_final.doc

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ European Commission Justice (2011), “How to present a discrimination claim: handbook on seeking remedies under the EU Antidiscrimination Directives”, available at: http://ec.europa.eu/justice/discrimination/files/present_a_discrimination_claim_handbook_en.pdf

¹⁵⁸ *Ibid.*

formed Defender of Rights. In its role, the Ombudsman defended individual rights and liberties within the framework of relations with administrations. It also promoted the rights of children, fought against discrimination, while simultaneously promoting equality. Lastly, it promoted ethics in relation to security issues. The Ombudsman fought against discrimination in the fields of employment, housing, education and access to goods and services, on the basis of the nineteen criteria prohibited by the law, among them the qualifiers of ethnicity, nationality, race, religion and origin.¹⁵⁹

However, a former Deputy in the Ombudsman's office in charge of discrimination stated that the Ombudsman was not held in high esteem by the public as concerned the significance of its mission on discrimination issues, so this might have had a negative effect on the Ombudsman's visibility and, therefore, also on the number of individual complaints filed.¹⁶⁰

Article 41 of the Constitutional Law passed by the Government on 21 July 21 2008 established the Defender of the Rights, (*Défenseur des droits*, DDD), which serves as an independent authority with constitutional roots and extended powers. Its powers and jurisdiction have been precisely defined by Organic Law no. 2011-333 of 29_March 2011, which came into force on 1 May 2011.¹⁶¹

The Defender of Rights, which, as mentioned, also assumed the work which was previously carried out by the HALDE and Ombudsman, deals primarily with two kinds of activities. On the one hand, it deals with cases of discrimination and, on the other, in promoting equality.¹⁶² The Defender of Rights has the competency to propose legislative reform, to pursue actions for the promotion of rights and to carry out research in all the different fields of its mandate, which covers all grounds of discrimination, direct and indirect, prohibited by national laws and international Conventions duly ratified by France.¹⁶³ The Defender of Rights also has the competency to investigate individual and collective complaints, following requests from individuals, NGOs, trade unions or members of Parliament It can request explanations from any public or private person, including communication of documents or any supporting information. It resolves claims through mediation, issues recommendations to State or private parties, and presents observations before the courts, *ex officio* or upon request of the court or the parties. It can also propose penal transactions for situations covered by the Criminal Code.¹⁶⁴

¹⁵⁹ Van Aelst H., Balbirnie E., Salvo E. (2014), "Racism and related discriminatory practices in employment in France", ENAR Shadow Report 2012-2013, available at: <http://cms.horus.be/files/99935/MediaArchive/publications/shadow%20report%202012-13/France.pdf>

¹⁶⁰ *Ibid.*

¹⁶¹ *About-France.com*, "Changes to the Constitution in 2008", available at: <http://about-france.com/constitutional-changes-2008.htm>

¹⁶² Representation permanente de la France auprès de l'O.S.C.E, "Tolerance and non-discrimination II Working Session 2 France's Reply", available at: <http://www.osce.org/odihr/105724?download=true>

¹⁶³ Latraverse S. (2013), "Country Report France 2013 on measures to combat discrimination", European Network of legal experts in the non discrimination field, available at: http://www.non-discrimination.net/content/media/2010-FR-Country%20Report%20LN_FINAL_0.pdf

¹⁶⁴ Latraverse, S. (2013), "Executive Summary Country Report France 2013 on measures to combat discrimination", European Network of legal experts in the non- discrimination field, available at: http://www.non-discrimination.net/content/media/2013-FR-Summary%20country%20report%20LN_final.doc

Another Institution working on the protection of human rights from a broader and more general perspective, not focusing only on discrimination, is the National Consultative Commission for Human Rights that was set up by the Decree of 30 January 1984, which was later replaced by Law No. 2007- 292 of 5 March. The Commission provides the Prime Minister with advice on different issues pertaining to human rights, both in the national and international context.¹⁶⁵ It is composed of representatives of international and non-governmental organisations specializing in the field of human rights law, national experts, and members of Parliament. The modalities of operation of the Commission under the new Law are better described in Decree No. 2007-1137, relating to the composition and operation of the National Consultative Commission for Human Rights, which was adopted by the Prime Minister on 26 July 2007.¹⁶⁶

With the aim of combating everyday racial discrimination, the “*green number 114 against discrimination*”, a toll-free hotline to report incidents was established and has been in service since 16 May 2000. The initiative has proven to be successful and is a good tool for estimating the extent of ordinary discrimination. In fact, *Le Monde*, on 10 August 2000, stated that nearly 2,000 calls were received per day.¹⁶⁷

Jurisprudence

Generally speaking, there are neither many prosecutions nor penal sanctions imposed for discriminatory acts as such, but of the cases that are prosecuted, it is easier to address those related to discrimination in the employment and press fields. Consequently, discrimination provisions seem to be rarely applied by judges and law enforcement.¹⁶⁸

As it was previously mentioned, each category of discrimination is not defined in France’s anti-discrimination legislation. As the list for possible grounds of discrimination is very broad, judges do not approach a case by checking whether the discriminatory act fall under a ground provided for by law. Instead, they try to appreciate/ evaluate the adverse effect in comparison to a group and the behaviour of the defendant in relation to a prohibited ground, such as sexual orientation, sex, origin, or physical appearance.¹⁶⁹

Before analyzing some of the most relevant and recent judgments issued in the field of discrimination and hate speech, it is important to recall the decision taken by the

¹⁶⁵ EUMC (2012), “Anti-discrimination legislation in EU Member States”, available at: http://www.pedz.uni-mannheim.de/daten/edz-b/ebr/02/ART13_France-en.pdf

¹⁶⁶ International Review of the Red Cross (2007), “National implementation of international humanitarian law Biannual update on national legislation and case law January – June 2007”, available at: <https://www.icrc.org/eng/assets/files/other/irrc-867-nat-impl-ihl.pdf>

¹⁶⁷ United Nations General Assembly (2000), “Report of the Special Rapporteur of the Commission on Human Rights on contemporary forms of racism, racial discrimination, xenophobia and related intolerance”, available at: <http://www.un.org/documents/ga/docs/55/a55304.pdf>

¹⁶⁸ EUMC (2012), “Anti-discrimination legislation in EU Member States”, available at: http://www.pedz.uni-mannheim.de/daten/edz-b/ebr/02/ART13_France-en.pdf

¹⁶⁹ Latraverse S. (2011), “Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC Country Report 2010 France”, European Network of legal experts in the non discrimination field, available at: <http://www.refworld.org/pdfid/4ed65afe2.pdf>

Constitutional Council, dated 22 January 1990, on the allocation of supplementary National Solidarity funds. Through this decision, France decided that Article 2 of the Constitution must be interpreted widely in order to afford foreigners protection against discrimination. According to this judgment, any person residing in the territory of the French Republic is entitled to fundamental constitutional rights and freedoms.¹⁷⁰ It is important to also invoke the Constitutional Council Decision of 9 May 1991 addressing the Act on the Statute of the Territorial Unit of Corsica, which reaffirms that the French people are a single, indivisible entity, without differentiation according to origin, race and religion.¹⁷¹

Judgements on Discrimination

- On 12 November 2008, the *Cour de Cassation*, in Case No. 07-83398, overturned the judgment of the *Douai* Court of Appeal dated 25 January 2007,¹⁷² that condemned a French politician for making homophobic statements in the newspaper *La Voix du Nord*. The original sentence included the issuance of a fine of €11,500 for damages to the associations, which constituted the civil parties in the case, in addition to the defendant being ordered to pay the costs for publishing the judgement. The Court of Cassation argued that the restriction on freedom of expression violated the defendant's rights under Article 10 of the ECHR.¹⁷³

As another example, in 2008, actress Brigitte Bardot was convicted of inciting racial hatred for her criticism of the ritual slaughter of sheep during a traditional Muslim feast. She was ordered to pay a fine of €15,000. The incident represented the fifth time she was fined for inciting racial hatred against Muslims since 1997.¹⁷⁴

Judgements on Hate Crime

- In 2003, an important judgment was issued by the European Court of Human Rights with regard to the issue of Holocaust denial. This was a significant judgement in the field of hate crime as adversaries of legislation against Holocaust denial have argued that such laws restrict the basic human right of freedom of expression. The case in question involves French philosopher Roger Garaudy, a Holocaust denier, who had appealed against the dismissal of an earlier appeal to the French Court of Cassation,

¹⁷⁰ EUMC (2012), "Anti-discrimination legislation in EU Member States", available at: http://www.pedz.uni-mannheim.de/daten/edz-b/ebr/02/ART13_France-en.pdf

¹⁷¹ Toffin G. (2010), "How to Combine Citizenship and Diversity? France, India and Nepal", *European Bulletin of Himalayan Research* 37: pp. 27-55, available at: http://himalaya.socanth.cam.ac.uk/collections/journals/ebhr/pdf/EBHR_37_02.pdf

¹⁷² Benoît-Rohmer F. (2010), "Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity", FRA, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1355-LGBT-2010_thematic-study_FR.pdf

¹⁷³ Article 19 (2013), "Responding to hate speech against LGBTI people", available at: <http://www.refworld.org/pdfid/525b9eb64.pdf>

¹⁷⁴ The Legal Project, "European Hate Speech Laws", available at: <http://www.legal-project.org/issues/european-hate-speech-laws>

following his conviction for several offences involving Holocaust denial. In its decision of 24 June 2003, the European Court of Human Rights cited Articles 10 and 17 of the ECHR in its decision, noting that: *“There are limits to freedom of expression; the justification of a pro-Nazi policy cannot enjoy the protection of Article 10¹⁷⁵ and the denial of clearly established historical facts-such as the Holocaust-are removed by Article 17 from the protection of Article 10. As regards the applicant’s convictions for denying crimes against humanity, the Court refers to Article 17: in his book the applicant calls in question the reality, degree and gravity of historical facts relating to the Second World War which are clearly established, such as the persecution of Jews by the Nazi regime, the Holocaust and the Nuremberg trials. Denying crimes against humanity is one of the most acute forms of racial defamation towards the Jews and of incitement to hatred of them”*.¹⁷⁶

Judgements on Hate Speech

- In 2002, four Muslim organizations filed a complaint against the controversial French writer Michel Houellebecq, accusing him of inciting religious hatred and making racial insults for stating that Islam was "stupid" and "dangerous" in a 2001 interview with Lire literary magazine. The Mosque of Paris, the Mosque of Lyon, the National Federation of French Muslims, and the Islamic League sued Lire for publishing the interview. They were seeking damages of around €45,000 from Houellebecq and Lire, but a panel of three judges in Paris acquitted Houellebecq on the ground of free speech. The writer could have faced up to 18 months in jail, or a €70,000 fine if found guilty. The court ruled that although the author's comments were "without a doubt characterised by neither a particularly noble outlook nor by the subtlety of their phrasing, they did not constitute a punishable offence". The court agreed with Houellebecq's defense that the "dumbest" remark "did not contain any intent to verbally abuse, show contempt for or insult the followers of the religion in question".¹⁷⁷
- In 2005, politician Jean Marie Le Pen, runner-up in the 2002 presidential election, was convicted of inciting racial hatred for comments made to *Le Monde* in 2003 about the consequences of Muslim immigration in France. France's highest court convicted Jean-Marie Le Pen of inciting racial hatred for telling a *Le Monde* that Muslims would one day run France and strike fear into the hearts of the non-Muslim population. The ruling of the Court of Cassation came just over two years after Le Pen

¹⁷⁵ To see the entire text of the ECHR, please visit: https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Convention_ENG.pdf

¹⁷⁶ Whine M. (2008), "Expanding Holocaust Denial and Legislation Against It", *Jewish Political Studies Review* 20:1-2, available at: <http://jcpa.org/article/expanding-holocaust-denial-and-legislation-against-it/#sthash.q6FrLnbC.dpuf>

¹⁷⁷ The Legal Project, "European Hate Speech Laws", available at: <http://www.legal-project.org/issues/european-hate-speech-laws>; Fouchè G. (2002), "Houellebecq in court over race hate accusations", *The Guardian*, available at: <http://www.theguardian.com/books/2002/sep/17/michelhouellebecq>; *BBC News* (2002), "French author cleared of race hate", available at: <http://news.bbc.co.uk/2/hi/entertainment/2349879.stm>

was originally convicted in the same case. In February 2005, the Court of Cassation confirmed the 2004 ruling against the president of the National Front Party. Le Pen was ordered to pay a €10,000 fine for his remarks and an additional €5,000 in damages and interest to the League of Human Rights, which had filed the suit.¹⁷⁸

Judgements on Hate Speech Online

- **LICRA v. Yahoo!**: On 11 April 2000, two French NGOs, the French Union of Jewish Students (UEJF) and the League Against Racism and anti-Semitism (LICRA) sued Yahoo! Inc. in a French Court of emergency proceedings, called the "Tribunal de grande instance de Paris".¹⁷⁹ They denounced the Yahoo.fr website because it offered over 12,000 Nazi objects for sale online. These Nazi items were being made accessible to Internet users in French territory, while the display of Nazi items in France is strictly prohibited by the French Criminal Code. Yahoo! representatives argued that the Yahoo.fr site has its headquarters in the United States, where the sale of such objects is legal, and, therefore, the French courts have no jurisdiction over the website. The French judge rejected the argument and ordered Yahoo! to block access from France to Nazi apologist and negationist web pages,¹⁸⁰ therefore making it impossible for French users to access sites selling race hate memorabilia.¹⁸¹ Yahoo! later sued UEJF and LICRA in the U.S. District Court for the Northern District of California in San Jose with the aim of obtaining a declaration on the enforceability of the French court's judgment within the United States. Yahoo! argued that the French ruling violates the right to free speech.¹⁸² The District Court ruled in favour of Yahoo! in the first instance, but the French parties filed an appeal with the Ninth U.S. Circuit Court of Appeals in San Francisco, which sided with the French parties. Yahoo! then asked the appeals court to again hear the case with a full panel of 11 judges. That appeal was argued in March 2005, and the court's decision was issued in January 2006.¹⁸³ The Ninth Circuit Court of Appeals, formed by 11 judges, reversed and assigned the case for dismissal without reaching a clear-cut conclusion. Acknowledging that it was a "close question," eight judges found that there was specific jurisdiction in California over the French parties, while the other three found

¹⁷⁸ *Daily News* (2006), "France's far-right leader Le Pen convicted of inciting racial hatred", available at:

<http://www.hurriyetdailynews.com/frances-far-right-leader-le-pen-convicted-of-inciting-racial-hatred.aspx?pageID=438&n=frances-far-right-leader-le-pen-convicted-of-inciting-racial-hatred-2006-05-12>

¹⁷⁹ As the case was tried in this particular court, Yahoo! Inc. was not prosecuted via a criminal trial in France. This case, however, was a civil action led by French NGOs.

¹⁸⁰ "United Nations General Assembly (2000), Report of the Special Rapporteur of the Commission on Human Rights on contemporary forms of racism, racial discrimination, xenophobia and related intolerance", available at: <http://www.un.org/documents/ga/docs/55/a55304.pdf>

¹⁸¹ Frydman B., Rorive I. (2002), "Fighting nazi and anti-semitic material on the internet: the yahoo! case and its global implications", PCMLP - Oxford University Law Faculty - University of Brussels, available at: <http://www.philodroit.be/IMG/pdf/yahoo.pdf>

¹⁸² Perez J. (2006), "Yahoo Loses Appeal in Nazi Memorabilia Case", *PC World*, available at: <http://www.pcworld.com/article/124367/article.html>

¹⁸³ *Ibid.*

there was none. Three judges within the eight-judge majority, however, voted to dismiss the case for lack of prudential ripeness, resulting in a majority of six votes for dismissal.¹⁸⁴ This controversial case is important and paradigmatic since it leaves unresolved several key procedural questions, and it shows that the topic of online jurisdiction is still an issue that needs to be addressed. This is particularly true as it is still not clear which is the competent authority to handle such cases, and also to which extent national legislation can be applied to cyberspace since the nature of the Internet is borderless.

- In October 2012, the use of a specific anti-Semitic hashtag on Twitter occurred. At that time, Twitter pulled offensive tweets that used the hashtag *#UnBonJuif*, or “a good Jew”. In response to complaints received by the Union of French Jewish Students regarding the hashtag, the Union asked Twitter to reveal the identifying information the offensive tweeters. Twitter refused on the basis of the protection of free speech, and stated that the removal of the individual tweets should be considered a sufficient response. The student group therefore decided to bring the case to court. In January 2013, a civil court in Paris, the *Tribunal de Grande Instance*, decided that Twitter had to deliver - within two weeks – the IP addresses and any identifying information of the users liable for having tweeted anti-Semitic content, so that they could be prosecuted. With the aim of preventing racial hatred, French judges also ordered Twitter to develop an efficient mechanism within its platform allowing users to alert administrators about illicit content.¹⁸⁵ Following the judicial order, a debate on procedural issues was had, which included doubt being cast on the competence of the French authorities to address this case. Since Twitter’s data is stored in the United States, the company argued that it would need an order from an American Court before it could disclose personal details stored on US servers.¹⁸⁶
- On 21 January 2015, three French Twitter users were fined for sending tweets that included homophobic hashtags. The ruling represented the first time a French court handed out convictions for homophobic abuse on Twitter. In this specific case, the offensive tweeters posted tweets using the hashtag "let's burn the gays on..." (*#brûlonslesgayssurdu*). The case had been brought to court by the French charity *Comité Idaho*, which organizes the *International Day Against Homophobia* in France. It had filed a complaint against the users for inciting hatred and violence on the basis of sexual orientation. Considering that the maximum sentence that can be imposed for this crime is up to a year prison and a €45,000 fine, the punishments issued

¹⁸⁴ Trooboff P. (2006), “Recent ‘Yahoo!’ Ruling”, *The National Law Journal*, available at: <https://www.cov.com/~media/files/corporate/publications/2006/03/oid6796.ashx>

¹⁸⁵ Norvese R. (2013), “Il Tribunale di Parigi vs Twitter: quale giudice competente?”, *Media Laws*, available at: <http://www.medialaws.eu/il-tribunal-de-grande-instance-di-parigi-vs-twitter-quale-giudice-competente/>

¹⁸⁶ Greenhouse E. (2013), “Twitter’s Speech Problem: Hashtags and Hate”, *The New Yorker*, <http://www.newyorker.com/news/news-desk/twitters-speech-problem-hashtags-and-hate>

against the tweeters were rather light, with one of them being fined €300, while the other two were forced to pay €500 each.¹⁸⁷

Institutions and Associations

In France, there are several organizations dealing with discrimination and racism issues. Below is a list of the main associations addressing these topics, and there is also a general summary their specific functions and activities.

- **1) ICARE (Internet Centre Anti-Racism Europe)¹⁸⁸**: is a website that has been established by the Magenta Foundation and the European NGO, United for Intercultural Action.¹⁸⁹ ICARE is a virtual network devised to support and be used by NGOs and organizations that are in charge of improving universal human rights protection and raising non-discrimination standards. ICARE's main role is to provide services adapted to the needs of NGOs and to European civil society in general.¹⁹⁰
- **2) Inter-LGBT** is an NGO that was established to fight against discrimination perpetrated on the basis of morals, sexual orientation or gender identity, and serve as a channel to promote human rights and fundamental freedoms. Inter-LGBT organizes the annual LGBT Pride Parade and Festival in Paris, participates in policy dialogue and social projects, and supports and promotes the visibility of LGBT organizations and the emergence of a collective strategy.¹⁹¹
- **3) LDH (*Ligue des Droits de l'Homme*)¹⁹²** The fight against racism, anti-Semitism and xenophobia is part of the missions of the LDH, an organization defending human rights. The LDH acts both nationally and locally through its 300 sections. It raises citizens' awareness, calls out to elected representatives, speaks in schools and works with criminal courts. This last element is important as it is an engagement not only in legal actions, but also a pedagogical action influencing public opinion. The action of the LDH towards criminal laws, together with other anti-racism organizations, is a lever to fight against racism and enables an assessment of the climate in society.

In 2014, the criminal cases in which the LDH was involved illustrate not only daily racist acts but also the constant incitation to racial hatred, which takes place on the Internet, the persistence and recurrence of abusive statements made by French

¹⁸⁷ Flückiger S. (2015), "France hands out first fines for anti-gay tweets", *The Local*, available at: <http://www.thelocal.fr/20150121/twitter-homophobic-france>; McCormick J. (2015), "France: Twitter users fined for hashtags saying gay people should be burned", available at: <http://www.pinknews.co.uk/2015/01/21/france-twitter-users-fined-for-hashtags-saying-gay-people-should-be-burned/>

¹⁸⁸ ICARE, Internet Centre Anti Racism Europe, available at: <http://www.icare.to/abouticare.html>

¹⁸⁹ European network against racism, nationalism, fascism and in support of migrants and refugees (2003), "Report on activities 2003", available at: <http://www.unitedagainstracism.org/archive/pages/anrep03.htm#3>

¹⁹⁰ United Nations General Assembly (2000), "Report of the Special Rapporteur of the Commission on Human Rights on contemporary forms of racism, racial discrimination, xenophobia and related intolerance", available at: <http://www.un.org/documents/ga/docs/55/a55304.pdf>

¹⁹¹ Inter-LGBT, Equaljus, available at: <http://www.equal-jus.eu/node/459>

¹⁹² LDH, available at : <http://www.ldh-france.org/>

politicians with the aim to trigger hatred, not to mention repetitive anti-Semitism from some authors of the far-right.

Additionally, the LDH has worked with international control organizations since 1997. Recently, the LDH provided a detailed report to ECRI for the Council of Europe in this field of fight against racism. In April 2015, the LDH, after sending an alternative report, was present in Geneva for the assessment of France by CERD. This was also the case in July 2015 for the assessment of France by the Human Rights Committee, as an alternative report of the LDH had also been recorded earlier.

- **4) LICRA (*Ligue Internationale Contre le Racisme et l' Antisemitisme*)** is one of the oldest organizations combating racism and related issues. It was established in 1927 as LICA (International League Against Anti-Semitism) to defend Human rights and to fight anti-Semitism. With the subsequent rise of Nazism and fascism in Europe, LICA extended its mandate to fight against racism and discrimination. The acronym LICRA was adopted in 1979.¹⁹³ The organization started out by providing legal assistance to victims of discrimination, and it soon developed other fields of intervention with the aim to prevent acts of racism and anti-Semitism and promote social cohesion. Throughout the years, LICRA has examined and highlighted the alarming social impacts of hate speech and the societal concern created by this phenomenon. The NGO has moved to develop partnerships and create tools to fight against cyber-hate, with almost 2 000 cyber-hate reports being filled out per year in the context of LICRA's reporting mechanism. In 2013, the NGO also established the first racism reporting smart phone application "App' Licra".¹⁹⁴
- **5) NGO SOS Homophobia** was established on 11 April 1994 and is a not-for-profit association that carries out different activities with the aim of tackling homophobic discrimination and violence. It is composed of volunteer members from throughout France. SOS homophobia's main goal is to provide victims of homophobic abuse with any support they may need through the development of different activities, such as providing an anonymous testimonial hotline through which victims of homophobic abuse can speak out, be listened to, and above all, be given the means to take action by themselves; through the establishment of a website to allow victims to submit their testimony online; acting as a civil partner in the judicial system with victims of homophobic abuse; conducting homophobia prevention activities; organizing homophobia awareness activities; and advocating for recognition of the Homosexual person's dignity (through workshops in professional environments such as companies, government offices, etc.). Lastly, SOS Homophobia also publishes an annual report, based on the data received through the hotline and website in order to describe France's overall situation with respect to homophobia.¹⁹⁵ Just to give some data, between 2011 and 2012, "SOS Homophobie" recorded the highest increase in victim testimony since the entity was established: +27%, with the

¹⁹³ LICRA, Ligue Internationale contre le racisme et l' antisemitisme, available at: <http://www.licra.org/>

¹⁹⁴ No hate web No hate speech, "Who are we? INGOs of the Council of Europe", available at: <http://nohateweb.eu/nhw/en/who-are-we/>

¹⁹⁵ Sos homophobie, Equaljus, available at: <http://www.equal-jus.eu/node/28>

organization recognizing that the Internet and social networks facilitate the propagation of abusive, homophobic behaviour.¹⁹⁶

- **6) SOS-Racisme¹⁹⁷:** was founded in 1984 and is another French NGO fighting against racism. The organization offers assistance to discrimination victims, stands as a plaintiff in discrimination trials, and provides targeted support to immigrants and racial minorities that are facing discrimination. Other activities carried out by the organization include writing reports and investigating discrimination cases, with the aim of raising awareness among society and policy makers in discrimination issues. In order to give an interesting and concrete example of the activities conducted by this NGO, it is worth mentioning that on the nights of 17 and 18 March 2000, it carried out an anti-discrimination operation. This operation was organized to identify nightclubs that practice racial discrimination, and to collect evidence necessary for taking court action on this issue. As part of the operation, 88 clubs in 20 major cities were visited. Racial discrimination was observed at the entrance to 45 out of the 88 clubs that were inspected.¹⁹⁸
- **7) The *Conseil Supérieur de l'Audiovisuel* (CSA):** was created in 1986 by the Law of 17 January 1989. It is an independent administrative body responsible for regulating audiovisual communication, *ex* Act 86-1067 of 30 September 1986, and for guaranteeing the freedom of communication. It contributes to the fight against discrimination in favour of social cohesion in the sphere of audiovisual communication.¹⁹⁹
- **8) The Equal Opportunity and Antidiscrimination Commission, HALDE:** was established in 2004.²⁰⁰ HALDE acted as a legal adviser (*auxiliaire de justice*), and administrative, civil and criminal courts could ask for its advice when deciding a case.²⁰¹ Some experts argue that before the creation of HALDE, the institutional framework for combating discrimination in France was insufficient due to the lack of a complete institutional architecture.²⁰² In December 2008, HALDE's President and

¹⁹⁶ Guichard L., Sisteron A., Sigogne D. (2014), "Internet advanced promotional tools application for increasing awareness of social exclusions movement Sexual bias exclusion", *Pink News*, available at: <http://netaware.ue.katowice.pl/wp-content/uploads/2014/06/France-A-Sexual-bias-exclusion.pdf>

¹⁹⁷ SOS Racisme, available at: <http://sos-racisme.org/>

¹⁹⁸ United Nations General Assembly (2000), "Report of the Special Rapporteur of the Commission on Human Rights on contemporary forms of racism, racial discrimination, xenophobia and related intolerance", available at: <http://www.un.org/documents/ga/docs/55/a55304.pdf>

¹⁹⁹ Representation permanente de la France auprès de l'O.S.C.E, "Tolerance and non-discrimination II Working Session 2 France's Reply", available at: <http://www.osce.org/odihr/105724?download=true>

²⁰⁰ CESifo DICE (2007), "National Legal and Institutional Framework to Fight Labour Market Discrimination on Gender and Ethnic Grounds", available at: <https://www.cesifo-group.de/ifoHome/facts/DICE/Labour-Market-and-Migration/Labour-Market/Anti-discrimination-Gender/national-framework-anti-discrimination-gender-ethnic/fileBinary/national-framework-anti-discrimination-gender-ethnic.pdf>

²⁰¹ European Commission Justice (2011), "How to present a discrimination claim: handbook on seeking remedies under the EU Antidiscrimination Directives", available at: http://ec.europa.eu/justice/discrimination/files/present_a_discrimination_claim_handbook_en.pdf

²⁰² Borrillo D. (2013), "Bridging the Divide – Integration of the Functions of National Equality Bodies and National Human Rights Institutions Country France", UCL, available at: <https://www.ucl.ac.uk/laws/bridging-the-divide/docs/btd-france-exec-summary>

government ministers signed a Charter for equality for the French State's administration. The Charter's focus is internal as its aim is to take all the procedural measures necessary to avoid discrimination, particularly with regard to the recruitment phase and career development of civil servants, while its other objective is to ensure the equal treatment of public officials.²⁰³ HALDE was dissolved in 2011, and replaced by the Defender of Rights.

- **9) The Interministerial Committee against Racism and Anti-Semitism (CILRA):** was established in 2003 and is comprised of relevant government ministers. The Committee is chaired by the Prime Minister and its main objective is defining policy guidelines for combating acts of racism and anti-Semitism. It also ensures the effectiveness and coherence of the actions taken by various ministries, both in forestalling such acts and ensuring that exemplary sanctions are imposed when these acts do occur.²⁰⁴
- **10) The National Consultative Commission for Human Rights, (CNCDDH)**²⁰⁵ is the official body in charge of promoting human rights in France. CNCDDH was established in 1947 with the mandate to support and stimulate the Government and Parliament in carrying out different activities, such as promoting proposals on all subjects pertaining to human rights and international humanitarian law, and adopting positions expressed in reports, studies or opinions. The Government is therefore allowed to present to the Commission any question that falls within the Commission's competence, having either a national or international impact. The Commission is composed of 64 members who represent the main NGOs dealing with human rights issues, as well as members of the main trade unions, religious organisations, and independent experts in this area. Thanks to this heterogeneous composition of the Commission, the institution is able to fulfil its mission on a fully independent basis.²⁰⁶ With regard to hate speech as such, CNCDDH has also recently devoted its activities to combat hate speech and its implications on the Internet. After the plenary meeting that took place on 12 February 2015, CNCDDH issued an *Opinion on the fight against online hate speech*, in which it stated that "*Hate speech is not just speech; it can, in fact, trigger violence, in some cases very extreme, as demonstrated by the terrorist crimes committed on 7 and 9 January 2015 in Paris, which were themselves inspired by the death and hate propaganda widely present on the web*". It has also pointed out that in order to tackle this emerging issue, it is necessary to make "*a new assessment of the situation to be carried out as a matter of urgency with a view to outlining new strategies for fighting these issues*". In light of

²⁰³ Representation permanente de la France auprès de l'O.S.C.E., "Tolerance and non-discrimination II Working Session 2 France's Reply", available at: <http://www.osce.org/odihr/105724?download=true>

²⁰⁴ Representation permanente de la France auprès de l'O.S.C.E., "Tolerance and non-discrimination II Working Session 2 France's Reply", available at: https://www.google.it/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0CDUQFjAC&url=http%3A%2F%2Fwww.osce.org%2Fodihr%2F105724%3Fdownload%3Dtrue&ei=23txVczvLsOfsgGYo4OQQC&usg=AFQjCNGR2l1OzybTs2TelWX78Xj5b0Z3xA&sig2=2_S17PtbaJ4rQRU2SpfTsQ

²⁰⁵ CNCDDH, Commission Nationale Consultative Des Droits De L' Homme, available at: <http://www.cncddh.fr/>

²⁰⁶ CNCDDH (2013), "Contribution of the CNCDDH to the 2nd cycle of the UPR of France", available at: <http://nhri.ohchr.org/EN/IHRS/UPR/Documents/CNCDDH%20contribution%20for%20UPR%20Dec%202012.pdf>

these considerations, a specific working group was created in September 2014, which, to date, has held several hearings.²⁰⁷

Conclusions

Racist speech, propaganda, and dissemination, especially on the Internet, is a phenomenon that is growing due to the deficiency of international and national regulation. Thousands of Internet sites, as identified by several reliable studies, continue to spread their messages of hatred with impunity.²⁰⁸ The French Government recently launched a campaign with the aim to tackle racism and hate speech, especially after the attack on the French satirical magazine, *Charlie Hebdo*.²⁰⁹

France has already embedded in its legislative framework some good pieces of legislation which can effectively tackle the issue of hate crime and hate speech in new media. Although France possesses an almost complete legal framework for dealing with hate crime and hate speech, it must be said that it is the effectiveness of such legislation that counts the most in the repression of such phenomena.

Another challenge is achieving a fair balance between freedom of expression and the goal of eradicating hate speech. As exemplified by the Yahoo and the Twitter cases, French Courts seem to justly apply law provisions prohibiting racial hatred and any type of hate speech; however, the main difficulty in enforcing hate speech laws, specifically when it comes to hate speech online, is constituted by jurisdictional issues between States.

It can therefore be argued that effectively tackling racist hate speech is not only a matter of having good substantive law, which France does not lack, but also in having stronger [international regulation](#) of social networks in order to effectively prohibit and punish racist propaganda.

²⁰⁷ CNCDH (2015), "Opinion on the fight against online hate speech", available at: http://www.cncdh.fr/sites/default/files/15.02.12_avis_lutte_discours_de_haine_internet_en.pdf

²⁰⁸ *Ibid.*

²⁰⁹ Chrisafis A. (2015), "France launches major anti-racism and hate speech campaign", *The Guardian*, available at:

<http://www.theguardian.com/world/2015/apr/17/france-launches-major-anti-racism-and-hate-speech-campaign>

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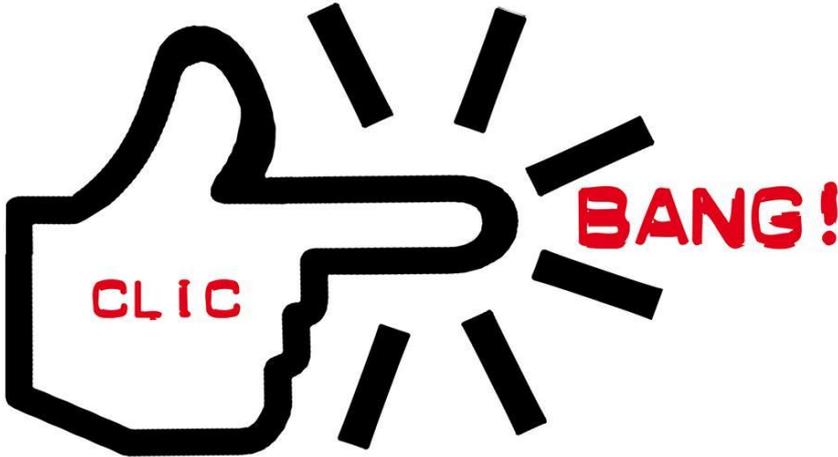
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Italy: In-depth Country Study on Hate Crime and Hate Speech conducted within the Framework of the PRISM Project

P R I S M



WORDS ARE WEAPONS.

PREVENTING REDRESSING & INHIBITING HATE SPEECH IN NEW MEDIA



PRISM is a project co-financed by the Fundamental Rights and Citizenship Programme of the European Union

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Introduction

Tackling hate-based crime has been a major objective of European countries. The legal frameworks of EU Member States, through national initiatives and the implementation of European legislation, are generally well-established with respect to addressing hate crime and hate speech and in ensuring fundamental rights for all individuals and groups residing in their national territories. However, with advancements in technology, particularly the Internet, the means through which hate-based crimes can be committed have been radically altered. Hateful messages sent over social media platforms, for example, can reach a global audience, having a profound effect on numerous people and possibly inciting discriminatory or blatantly violent sentiment aimed at one group or another.

The rate at which such crimes can occur, and the sheer number of persons they can affect, tests existing legal frameworks to their maximum. This environment has the potential to expose any loopholes in legislation, while concurrently challenging the training and knowledge of law enforcement officials, legal professionals, and judges on these matters.

As part of the PRISM's in-depth study on hate speech and hate crime at the national level, the Consortium has chosen Italy as one of the project's five focus countries. The following report provides information on the country's legal framework to combat discrimination, racism, hate crime, and hate speech, while subsequently assessing its overall effectiveness. Additionally, the report examines the procedural mechanisms in place to redress hate-based incidents, and the areas where improvement is needed, such as training. Jurisprudence on hate crime and hate speech, including hate speech in new media, is presented, along with a listing of some of the major associations and NGOs active in Italy on topics related to this field.

The report begins below by presenting an overall picture of Italy's legal framework with respect to adherence to international protocols, examining which affect compliance in the international sphere has on national legislation.

The Italian Legal Framework

Italy has signed almost every International Convention for the protection of human, civil, political rights as well as the main Conventions against discrimination, racism and for the protection of specific categories, such as disabled people and migrants. As summarised below in Table 1, in particular, Italy is a party to the following international treaties: the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), the International Convention on the Rights of Children (CRC) and the Convention relating to the Status of Refugees (“1951 Refugee Convention”). The only exception is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW). Italy has also ratified the 1951 Convention relating to the Status of Refugees and the 2000 Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against transnational Crime.²¹⁰

With specific regard to hate speech in new media, the focal issue of this report, it is important to note that the Council of Europe’s (CoE) Cybercrime Convention was duly signed and ratified by Italy in 2008, although the Additional Protocol to the Convention, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems has been signed without any reservation, the ratification bill is currently pending at the Chamber of Deputies. In the last couple of years, nonetheless, the Italian Government has issued some pieces of legislation concerning racial discrimination, incitement to hatred, and cybercrime. Since there is no specific regulation of hate crime and online hate speech as such, the following analysis will focus on the principles and rules in force and applicable to these facts. It is nonetheless important to highlight that the need to strengthen the protection against hate speech, through the classification of these acts as criminal offences, must be balanced with the principle of freedom of speech, which the Italian Constitution recognizes as a fundamental freedom within its Article 21.

In fact, the Italian legal system is based on the Constitution of the Italian Republic, which came into force in 1948. Its Article 21 represents a landmark achievement, functioning as a pillar within the democratic order, guaranteeing pluralism and the spread of information. However, freedom of expression needs to be balanced with other fundamental rights, as it is not unconditional and unlimited: the sixth paragraph of the Article itself contains a limit pertaining to decency and morality. In addition, the maintenance of public order should be considered as an implicit limit to freedom of speech, given that public security must be guaranteed in order to ensure the inviolability and practice of fundamental rights enshrined in the Constitution.²¹¹

Table of International Treaties and Conventions

²¹⁰ United Nations Human Rights, Office of the High Commissioner for Human Rights, Country Visits, available at: <http://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/CountryVisits.aspx>

²¹¹ The Council of Europe and ELSA (2014), “International Legal Research Group on hate speech online”, available at: http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

Title²¹²	Open for Signature	Ratified
European Convention on Human Rights (ECHR)	4 Nov. 1950	26 Oct 1955
International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)	21 Dec. 1965	5 Jan 1976
International Covenant on Economic, Social and Cultural Rights (ICESCR)	16 Dec. 1966	15 Sept 1978
International Covenant on Civil and Political Rights (ICCPR)	16 Dec. 1966	15 Sept 1978
The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	18 Dec. 1979	10 Jun 1985
Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	10 Dec. 1984	12 Jan 1989
European Convention on Transfrontier Television (ECTT)	5 May 1989	12 Feb 1992
International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families (CMW)	18 Dec. 1990	Not Signed Not Ratified
Charter of fundamental rights of the EU	2 Oct. 2000	1 Dec. 2009
Council of Europe Convention on cybercrime	23 Nov. 2001	5 Jun 2008
Additional Protocol to the Convention on cybercrime on racist acts committed through computer systems	28 Jan. 2003	Signed but not ratified yet
Convention on the Rights of Persons with Disabilities (CRPD)	30 Mar. 2007	15 May 2009

General Legal Framework on Discrimination

The Constitution

The Italian legal system does not include a specific Constitutional provision for the crime of hate speech, but an indirect protection against this phenomenon can be found in other legal provisions, which regulate broader and more general issues such as discrimination and freedom of speech, and within which hate speech issues can be included. The highest level legislative tools regarding discrimination are laid in the 1947 Italian Constitution

²¹² CoE, Convention for the Protection of Human Rights and Fundamental Freedoms, available at: <http://conventions.coe.int/Treaty/Commun/print/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>; United Nations Human Rights, Office of the High Commissioner for Human Rights, available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CAT&Lang=en; CoE, Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems CETS No.: 189, available at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=189&CM=&DF=&CL=ENG>

(*Costituzione della Repubblica Italiana*), which entered into force in 1948. The most relevant provisions are listed below²¹³:

Article 2: recognises human rights and enshrines the principle of equality before the law along with the prohibition of discrimination on the basis of sex, race, language, religion, political opinions and personal or social conditions for all, citizens or non-citizens.

“The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled”.

Article 3: guarantees ‘equal dignity’ of all citizens and the principle of equality before the law *“without distinction based on sex, race, language, religion, political opinion, or personal and social conditions”*, and Italy’s Constitutional Court has repeatedly interpreted the article as applicable to all persons within Italian territory.

“All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country”.

Article 8: recognizes the right to freedom of religion: *“All religious denominations are equally free before the law. Denominations other than Catholicism have the right to self-organisation according to their own statutes, provided these do not conflict with Italian law. Their relations with the State are regulated by law, based on agreements with their respective representatives”.*

Article 10.1: proclaims that the Italian legal system shall conform to the generally recognized principles of international law and the latest modification of Article 117 notes that international treaties, once ratified, are part of the Italian legal system, achieving a even higher value than national laws, constituting a parameter against which to evaluate the legitimacy of ordinary national laws. International Treaties include the effectiveness of important legislative means, such as the European Convention of Human Rights, the Treaty of European Union and the European Convention of Human Right.²¹⁴

“The Italian legal system conforms to the generally recognised principles of international law. The legal status of foreigners is regulated by law in conformity with international provisions and treaties. A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian Constitution shall be entitled to the right of asylum under the conditions established by law. A foreigner may not be extradited for a political offence”.

Article 19: proclaims the right to freedom of religion and the right to asylum, and determines that the legal status of foreigners shall be regulated by law in conformity with international

²¹³ Senato della Repubblica, “Constitution of the Italian Republic”, available at: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

²¹⁴ UNICRI (2014), “Light on: Investing and reporting online hate speech training manual”, available at: http://unicri.it/special_topics/hate_crimes/Training_Manual.pdf

law and treaties (Articles. 10.4 and 10.2).²¹⁵ *“Anyone is entitled to freely profess their religious belief in any form, individually or with others, and to promote them and celebrate rites in public or in private, provided they are not offensive to public morality”.*

Article 21: enshrines freedom of expression, although establishing some limits: *“Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication.*

The press may not be subjected to any authorisation or censorship. Seizure may be permitted only by judicial order stating the reason and only for offences expressly determined by the law on the press or in case of violation of the obligation to identify the persons responsible for such offences. In such cases, when there is absolute urgency and timely intervention of the Judiciary is not possible, a periodical may be confiscated by the criminal police, which shall immediately and in no case later than 24 hours refer the matter to the Judiciary for validation. In default of such validation in the following 24 hours, the measure shall be revoked and considered null and void. The law may introduce general provisions for the disclosure of financial sources of periodical publications. Publications, performances, and other exhibits offensive to public morality shall be prohibited. Measures of preventive and repressive measure against such violations shall be established by law”.

Article 117: enshrines, in its first paragraph, the obligation of the State and of the Regions to abide by EU and International treaties and conventions when issuing domestic legislation, stating as follows: *“Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations”.*

The Penal Code

The Italian Criminal Code was approved in 1930 and entered into force in 1931, during the fascist period. As a consequence, there are no specific provisions criminalising racism, except for Article 415, which criminalises the incitement to social hate. Over the years, however, a number of amendments have been introduced. The Italian Criminal Code contains general provisions and specific aggravating circumstances for dealing with this issue.

Law n. 645 of 1952: implemented the XII final and transitory disposition of the Constitution against racist propaganda and fascism, therefore introducing the crime of apology of fascism and prohibiting the reorganization of the fascist party. The first Article of this piece of legislation provides as follows: *“For the purposes of the twelfth transitory and final (first paragraph) of the Constitution, it was reorganizing the dissolved fascist party when an association, a movement or at least a group of at least five people pursue their undemocratic goals of the fascist party, enhancing, or threatening using violence as a method of political struggle or advocating the suppression of the freedoms guaranteed by the Constitution or denigrating democracy, its institutions and values of strength, or acting racist propaganda, which addresses its activities to the exaltation of leaders, principles, facts And methods of That party or its outward manifestations of character turns fascist”.* Article 2 continues as

²¹⁵ For further information, please see United Nations Human Rights, Office of the High Commissioner for Human Rights, “Country Visit in Italy”, available at: <http://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/CountryVisits.aspx>

follows: *“Anyone who promotes organizes or directs associations, movements or groups indicated in article 1, shall be punished with imprisonment from five to twelve years and a fine ranging from two to twenty million dollars. Anyone participating in such associations, movements or groups shall be punished with imprisonment from two to five years and a fine ranging from 1,000,000 to 10,000,000 lire. If the association, movement or group takes in all or part of the character of armed or paramilitary organization, which makes use of violence the penalties mentioned in the preceding paragraphs shall be doubled. The organization is considered armed if the promoters and participants, however, the availability of weapons or explosives Are Stored any where. Without prejudice to article 29, first paragraph, of the Criminal Code, the conviction of the promoters, organizers or leaders of the matter in any case, the deprivation of rights and of the offices specified in art.28, second paragraph, points 1 and 2 of the Criminal Code for a period of five years. The condemnation of the participants matters for the same period of five years deprivation of rights ex article 28, second paragraph, no1, Penal Code”.*²¹⁶

Subsequently, **Law n. 654/1975** specifically introduced racism and discrimination crimes, but did not list discrimination or racism as aggravating elements in regard to other offences. This Law ratifies and implements the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) opened for signature on 7 March 1969, as amended by *Decreto legge* [Law Decree] 122/1993.²¹⁷

Originally, Article 3, paragraph 1 of the Law punished by imprisonment from 1 year up to 4 years *“(letter a) who spread, by any means, ideas based on the superiority or racial hatred, or (letter b) who incites in any way to discrimination or incite to commit violent acts or provokes to violence, towards people who are apparently a national, ethnic or racial group”*. This provision applies *“unless the facts committed constitute a more serious crime”*. Originally, participants of any association or organization having the aim to incite to hatred or to racial discrimination were also punished by imprisonment of 1 year up to 5 years. For promoters of these types of groups/ associations the penalty was increased.

The crime established by the first paragraph of Article 3 of Law 654/1975 was later modified by Article 1 of the legislative Decree 122/1993 (later replaced by Law 205/1993) and subsequently by Article 13 of Law n. 85 of 24 February 2006.

This sequence of laws was enacted in order to ratify Article 4 of the ICERD, which required States to *“declare as crimes punishable by the law every act consisting in the spread of ideas based on racial hatred and superiority, every incitement to racial discrimination as well as any violent act or any incitement to those type of acts against any race or group of individuals on the basis of their colour or ethnic origin, as well as any help given in racial activities, including their financing”*. The Convention also requires that States declare illegal

²¹⁶ Christians L.L. (2011), “Expert workshop on the prohibition of incitement to national, racial or religious hatred- Annex – European Legislations, Italy”, available at: <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/Annexes/Italy.pdf>

²¹⁷ Cartabia M. (2008), “Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Italy”, FRA, available at: http://fra.europa.eu/sites/default/files/fra_uploads/326-FRA-hdgs0-NR_IT.pdf

and ban organizations and propaganda activities inciting racial discrimination and to make the participation in such organizations and activities a crime.²¹⁸

Law n. 205 of 1993, also known as the “Mancino Law”

The most important Italian legal instrument for prosecuting racist and other hate violence acts is Law n. 205 of 1993, commonly referred to as the “Mancino Law”, which converted Legislative Decree No. 122 of 26 April 1993 on urgent measures in respect of racial, ethnic and religious discrimination. This Law replaced the above mentioned Law 654/1975, and was supplanted by the Mancino Law’s Article 1: *“Except where the acts in question constitute a more serious offence, the following penalties shall apply for the purposes of implementing Article 4 of the Convention: a) anyone who, by any means whatsoever, disseminates ideas based on racial or ethnic superiority or hatred, or commits or incites others to commit discriminatory acts on racial, ethnic, national or religious grounds, shall be subject to a maximum prison sentence of three years; b) anyone who, by any means whatsoever, commits or incites others to commit acts of violence or acts designed to provoke violence on racist, ethnic, national or religious grounds shall be subject to a prison sentence of six months to four years; 2. [Deleted by the Act]; 3. Any organisation, association, movement or group whose aim is Blasphemy, insult and hatred including inciting discrimination or violence on racial, ethnic, national or religious grounds shall be prohibited. Anyone who participates in such an organisation, association, movement or group, or helps it with its activities, shall be subject – solely on account of such participation or the provision of such assistance – to a prison sentence of six months to four years. Anyone who promotes or runs such an organisation, association, movement or group shall be subject – on this account alone – to a prison sentence of one to six years”.*

Law n. 205/1993 also replaced Article 3 of Law 654/1975, which punished incitement to commit or the commission of violent acts or provocation on racial, ethnic, national or religious grounds. The Mancino Law’s Article 3 provides for a general aggravating circumstance for all offences committed with the aim to spread discrimination on racial, ethnic, national or religious ground or in order to help organisations with such purposes.²¹⁹ It states as follows: *“Where offences carrying a sentence other than life imprisonment are committed for reasons of ethnic, national, racial or religious discrimination or hatred, or for the purpose of facilitating the activities of an organisation, associations, movement or group pursuing these goals, the sentence shall be increased by half”.*²²⁰ Therefore, its article 3 allows the judge to increase the sentence imposed for a crime by up to half of the penalty if the crime was committed *“with the purpose of discrimination or hatred based on ethnicity, nationality, race, or religion, or in order to facilitate the activity of organizations, associations, movements, or groups that have this purpose among their objectives”.* It is important to

²¹⁸ Pavich G., Bonomi A. (2014), “Reati in tema di discriminazione: il punto sull’evoluzione normativa recente, sui principi e valori in gioco, sulle prospettive legislative e sulla possibilità di interpretare in senso conforme a costituzione la normativa vigente”, *Diritto penale contemporaneo*, available at: http://www.penalecontemporaneo.it/upload/1412690237PAVICH-BONOMI_2014.pdf

²¹⁹ McGuire K., Puchalska B., Salter M. (2010), “State of the union report: a road map addressing reform possibilities based upon a comparative analysis of the legal regulation of hate speech and hate crime”, available <https://www.uclan.ac.uk/research/explore/projects/assets/stateofunion10.pdf>

²²⁰ CoE (2010), “Blasphemy, insult and hatred: finding answers in a democratic society”, Venice Commission, available at: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(2010\)047-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2010)047-e)

point out that this aggravating circumstance cannot be balanced by the judge with the mitigating ones.²²¹ A sentence for a racially motivated offence can be increased up to one half of the minimum sentence envisaged for the offence. The aggravating circumstance of racist or other hate purpose has a very extensive sphere of application, as it can be applied to any crime, except those punishable by life in prison, being the harshest penalty under Italian criminal law. Any racially aggravated offence is prosecuted *ex officio*.²²²

Although this aggravating circumstance exists, the minimum and maximum penalties are decreased by the Mancino Law compared with those provided for in Law 654/1975. However, the Mancino Law added religion to the original discrimination grounds. The penalty framework is completed by the insertion of accessory penalties characterized by a re-educational nature, mentioned in paragraphs 1 *bis* and 1 *sexies*. Lastly, a new type of offence was created by the Mancino Law, which punishes “*Anyone who, in public meetings, expresses or displays symbols and emblems typical of organizations, associations or groups mentioned in Article 3 of Law 654/1975*”.²²³

Law 85 of 2006

Article 13 of Law 85/2006 has again modified the penalties originally envisaged by Law 654/1975. Specifically, providing the choice of financial or imprisonment penalties as alternatives, i.e. the judge can decide to apply either a penalty of imprisonment up to one year and six months or a fine up to 6,000 Euros. Furthermore, Law 85/2006 changed the description of criminalised behaviours. In fact, the law no longer punishes those who spread hate by any means, but, instead, those who promote ideas based on superiority or racial/ethnic hatred; no longer those who incite, but those who instigate to commit or actually commit discriminatory acts based on racist, national, ethnic or religious grounds; no longer those who incite, but those who instigate to commit or actually commit violence or provocative acts to violence based on racist, ethnic, national or religious grounds.

It has been noted that to understand the rationale of such changes it would be compulsory to know the exact difference of meaning, as intended by the legislator, between the terms “instigate” and “incite” and between the terms “spread” and “promote”. Although some judges have provided a different interpretation, the Italian Supreme Court (*Corte di Cassazione*)²²⁴ has stated that there is no real difference of meaning between the terms, so that the real change introduced by Law 85/2006 would be only the decrease of penalty, without any modification to the type of conduct prohibited.²²⁵

²²¹ Pavich G., Bonomi A. (2014), “Reati in tema di discriminazione: il punto sull’evoluzione normativa recente, sui principi e valori in gioco, sulle prospettive legislative e sulla possibilita’ di interpretare in senso conforme a costituzione la normativa vigente”, *Diritto penale contemporaneo*, available at: http://www.penalecontemporaneo.it/upload/1412690237PAVICH-BONOMI_2014.pdf

²²² UNICRI (2014), “Light on: Investing and reporting online hate speech training manual”, available at: http://unicri.it/special_topics/hate_crimes/Training_Manual.pdf

²²³ *Ibid.*

²²⁴ Cass., Sez. III, 7 maggio 2008 (dep. 03/10/2008), n. 37581, Mereu, Rv. 241072.

²²⁵ Pavich G., Bonomi A. (2014), “Reati in tema di discriminazione: il punto sull’evoluzione normativa recente, sui principi e valori in gioco, sulle prospettive legislative e sulla possibilita’ di interpretare in senso conforme a costituzione la normativa vigente”, *Diritto penale contemporaneo*, available at: http://www.penalecontemporaneo.it/upload/1412690237PAVICH-BONOMI_2014.pdf

The decreased penalties expected in these circumstances are in contrast with EU Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia, which provides more severe punishments than those laid out in Italian legislation, with the aim to combat the spread of racism and xenophobia.²²⁶

In addition, it is worth noting that the Criminal Code in its Article 724 makes specific reference to “blasphemy” and “religious insult”, which is punishable with a fine of 51 to 309 euros.

After having analyzed the above mentioned pieces of legislation, the main relevant articles of the **penal code** should also be mentioned:

Article 302: stipulates that *“Any person who incites another person to commit intentional offences shall be punished, if the person incited does not agree to commit the offence or agrees but the offence is not committed, by imprisonment from one to eight years.”*

In Italy incitement can only be punished when there is what is known in the Italian penal law as an “actual risk” that the incited person will imminently commit the offences provided for under Article 302 of the Criminal Code. If the requirement of “actual risk” is missing, or if there is a long time gap between the alleged incitement and the commission of the offence, this will fall under ‘lawful incitement’, which is protected by the freedom of expression principle enshrined in the Constitution. The requirement of the so-called actual risk is due to the fear that a broader ban on inciting “discrimination or hostility” will be abused by governments or will discourage citizens from engaging in legitimate democratic debate.²²⁷

Article 402: formerly regulated insults to the State religion: *“Anyone who insults the State religion in public shall be subject to a prison sentence of up to one year”*, but it was declared unconstitutional by the Constitutional Court in its judgment No. 508 of 20 November 2000.

Article 403: states that *“Anyone who insults religion in public by offending those who profess it shall be subject to a fine from 1.000 up to 5.000 Euro. Anyone who insults religious believes by insulting a minister of the Catholic Church shall be subject to a fine from 2000 up to 6000 Euros”*²²⁸. This is how the Article 402 was amended by Article 7 of the above mentioned Law 24 February 2006, n. 85.

Article 404: regulates the Insulting the State religion through offenses against property *“Anyone who, in a place of worship, a public place or a place open to the public, insults the State religion by offending against religious property, an object of religion or an object clearly associated with religious practice, shall be subject to a fine from 1000 to 5000 Euros. Anyone who commits such an offence during a religious service celebrated in a private place*

²²⁶ Unione forense per la tutela dei diritti umani (2012), “Observations I submitted to the Committee on the Elimination of Racial Discrimination for the Thematic Discussion on “racist hate speech”, available at: <http://www.unionedirittiumani.it/wp-content/uploads/2012/07/Information-paper-on-racist-hate-speech-Italian-network-on-racial-discrimination.pdf>

²²⁷ The Council of Europe and ELSA (2014), “International Legal Research Group on hate speech online”, available at: http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

²²⁸ This article was last revised by Article 8 of Law 85 of 24 February 2006.

by a minister of the Catholic Church shall be subject to the same penalty. Anyone who destroys, disperses and makes unusable, in public and intentionally, objects that are used during the cult, is punished with the imprisonment up to 2 years”.

Article 405: provides regulation for religious ceremonies, *“Anyone who impedes or disrupts a religious service, ceremony or practice performed with the assistance of a minister, in a place of worship, a public place or a place open to the public, shall be subject to a prison sentence of up to two years. Where such behaviour is coupled with violent or threatening acts towards individuals, it shall be subject to a prison sentence of one to three years.”*

Article 594: criminalizes insults²²⁹, *“Damaging the honour or the dignity of a person is punished with detention up to 6 months or with a fine up to 516€. The same punishment is applied if the mean of realising the act are telegram, phone, written act or painting. In case the infraction implies the attribution of a determined deed, the punishment applied is detention up to one year or a fine up to 1.032€. The punishment is higher in case the infraction is committed in the presence of several persons”.*

Article 595: criminalises defamation²³⁰, stating that *“Whoever harms the reputation of others when communicating with many people, apart from the cases provided for in the preceding article shall be punished with imprisonment up to one year or a fine of up to 1.032 Euro. If the offence consists in assigning a determined fact, the penalty will be applicable with imprisonment up to two years, or a fine of up to 2.065 Euro. If the crime is done through the media or by any other means of publicity, or in a public act, the penalty is imprisonment applicable to six months to three years or a fine of not less than 516 Euro”.*

Article 724: punishes blasphemy and insulting the dead, *“Anyone who blasphemes against the Divinity in public, by means of invective or insults, shall be subject to an administrative fine of 51 to 309 Euro. The same penalty shall apply to anyone who publicly insults the dead”.*

Civil Legislation

Civil Code

The Italian Civil Code came into force in 1942, and it contains different provisions that pertain to aspects of discrimination, regulating these issues with regard to civil matters, such as contracts. According to the Civil Code, it is impossible to stipulate any contract providing for racial discrimination, and, as a consequence, according to **Article 1418** any contract containing any clause that directly or indirectly provokes racial discrimination is void, even if subscribed.

Aside from the Civil Code, Italy has several third level anti-discrimination regulations, which are listed below:

²²⁹ CNCD (2014), “Comparative Study on legislation sanctioning hate speech and discrimination in the Member States of the European Union”, available at: <http://discursfaradiscriminare.ro/wp-content/uploads/2014/10/Comparative-Study.pdf>

²³⁰ *Ibid.*

Legislative Decree 286 of 1998 on immigration, the so-called *Testo unico sull'immigrazione*, contains several provisions dealing with the principle of equality between citizens and foreigners in relation to the judicial protection of rights and legitimate interests when dealing with the public administration and accessing public services. Article 2 establishes that fundamental human rights, as envisaged by the national and international legal framework, must be recognized for all immigrants and foreigners.

Article 43 specifically addresses the issue of discrimination, providing a definition of what constitutes an action of discrimination based on racial, ethnic, national or religious grounds, regardless of whether it is directed against Italian citizens, EU citizens, or stateless persons. This article is followed and complemented by Article 44, which regulates civil action against discrimination, establishing that in case of any act or behaviour by any private entity or public administration producing discrimination based on racial, ethnic or religious grounds, the judge can order the immediate termination of the discriminatory behaviour and adopt any other decision aimed at eliminating the effects of discrimination.²³¹

However, while specific norms previously existed, the current ones have often been deemed poor and not in line with European standards.²³²

Legislative Decrees 215 and 216 of July 9, 2003

These are two key legislative provisions that were enacted by the Italian Government in 2003 with the aim of implementing Directive 2000/43/EC on equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC on equal treatment in employment and occupation. While Legislative Decree 215/2003 covers racial and ethnic discrimination, Legislative Decree 216/2003 covers the ground of religion and belief, disability, age and sexual orientation. Their field of application is different, as the former applies to all the sectors covered by Directive 2000/43/EC and the latter deals only with employment and occupation, as does Directive 2000/78/EC.²³³ These Legislative Decrees do not specifically punish hate speech. However, Legislative Decree 215/2003 is important as it established the "*Ufficio Nazionale Antidiscriminazioni Razziali*" (UNAR), which is an independent authority for promoting equality; furthermore, UNAR tackles direct and indirect discrimination and offers procedural solutions for remedying situations of this nature.²³⁴

Legislative Decree 5/2010, modification of Legislative Decree 198/2006 - Code of Equal Opportunities between men and women

In December 2009, after a formal warning from the European Commission, the Italian government transposed European Directive 2006/54/EC on equal opportunities and equal treatment of men and women in work and employment through the above-mentioned legislative Decree. The Decree introduces important norms into the Italian legal framework,

²³¹ Decreto Legislativo 25 luglio 1998, n. 286 - Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, available at:

http://www.governo.it/Presidenza/USRI/confessioni/norme/dlegislativo_286_1998.pdf

²³² UNICRI (2014), "Light on: Investing and reporting online hate speech training manual", available at:

http://unicri.it/special_topics/hate_crimes/Training_Manual.pdf

²³³ Favilli C. (2012), "Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC Country report 2011 Italy", European network of legal experts in the non-discrimination field, available at:

http://www.non-discrimination.net/content/media/2011-IT-Country%20Report%20LN_final.pdf

²³⁴ See, <http://www.unar.it/unar/portal/?lang=en>

which protect women's jobs and ban several forms of discrimination. The Decree also reinforces the capabilities of existing Equal Opportunity Bodies.²³⁵

The Code of Equal Opportunities (Decree 198/2006), after having been modified by Decree 5/2010, qualifies as discrimination in a work relationship *"Any less favourable treatment due to the condition of pregnancy, maternity or paternity, including adoptive, or due to the ownership and use of relative rights"* (Article 25, para. 2-bis).²³⁶

More precisely, Article 25 of Legislative Decree No. 198 of 11 April 2006, as modified by Article 1, paragraph 1, letter p, number 1, of Legislative Decree No.5 of 25 January 2010, defines the concepts of direct and indirect discrimination as follows: *"1. Pursuant to this heading, direct discrimination is any disposition, criterion, practise, act, agreement, or behaviour, as well as order to implement an act or behaviour which causes a prejudicial effect discriminating between men and women workers on the ground of sex. 2. Pursuant to this heading, there is indirect discrimination when an apparently neutral disposition, criterion, practise, act, agreement, or behaviour places, or can place, workers of a given sex in a position of particular disadvantage with respect to workers of the other sex, unless it refers to requirements essential to the performance of the working activity, provided that the objective is legitimate and the means employed for its achievement are appropriate and necessary. 2-bis According to this heading, discrimination refers to any treatment being less favourable on the ground of the pregnancy, the motherhood or fatherhood"*.²³⁷

Law n. 101 of 6 June 2008: provides for an explicit shift of the burden of proof from the plaintiff (victim) to the defendant (perpetrator), in civil and administrative law, in cases of *"prima facie"* discrimination, which are protected by the EC anti-discrimination Directives 2000/43/EC and 2000/78/EC. The shift of the burden of proof occurs if the complainant produces factual elements that can consistently show the presumption of the existence of discriminatory acts or behaviours. Finally, harassment on grounds of racial or ethnic origin may now be considered as an unwanted conduct that is 'humiliating or offensive'.²³⁸

Legal Framework on Racism

Most of the pieces of legislation analyzed above, under the section on discrimination, deal with racism and mention racism as an aggravating circumstance for the commitment of any crime.

²³⁵ UNICRI (2014), "Light on: Investing and reporting online hate speech training manual", available at: http://unicri.it/special_topics/hate_crimes/Training_Manual.pdf

²³⁶ Corsetti F., Pagano G., Parravano A., Valente F. (2014), "Reconciling Work and Family Life in Europe: A Comparative Perspective", University of Cassino, available at: <https://www2.le.ac.uk/departments/law/research/ewl/files/european-working-group-on-labour-law-italy-report-2014-pdf>

²³⁷ United Nations, Committee on the Elimination of Discrimination against Women (2011), "Responses to the list of issues and questions with regard to the consideration of the sixth periodic report Italy", available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/AdvanceVersions/CEDAW-C-ITA-Q6-Add1.pdf>

²³⁸ Hammarberg T. (2009), "Report Following his visit to Italy", available at: http://unipd-centrodirittiumani.it/public/docs/CoE_rapp_ita_0409.pdf

Penal Code

With specific regard to the Criminal legislative framework, an important law was enacted by the European Union in 2008, Framework Decision 2008/913/JHA, which requires Member States to include in their legislation specific provisions to combat racist and xenophobic speech, such as those types of expressions directed to spread ideas founded on racial or ethnic hatred and the incitement to commit acts of violence on racial, ethnic or religious grounds. The main provisions of the Criminal Code have already been listed above. However, in this section it should be kept in mind that Italian legislation punishes organizations, associations, movements or groups that have, as aims, incitement to discriminate or incitement to violence, which is motivated by racial, ethnic or religious reasons. An aggravating circumstance is also provided for any type of crime committed on the basis of racial hatred.²³⁹

It must be also highlighted that in the European Commission Against Racism and Intolerance (ECRI) Report submitted in 2012, authorities have considered the legislation currently in force in Italy to go beyond the minimum criteria recognized in the 2008 framework decision: in particular, Italian law carries heavier penalties and punishes certain types of behaviour, even if there is no threat to public order.²⁴⁰

Civil Legislation

The Legislative Decree n. 215 of 9 July 2003 –analyzed above- can be considered the main piece of legislation dealing with racism, having transposed the EU Directive 2000/43/EC. The Legislative Decree introduced in the Italian legal framework important regulatory and administrative provisions ensuring the implementation of effective instruments of protection against all forms of discrimination on grounds of race or ethnic origin according to a comprehensive approach based on the principle of equal treatment in the public and private sectors, with respect to access to employment, occupation, social protection, healthcare and social benefits, education, goods, and services.²⁴¹

Hate Speech Law

Before analyzing the main pieces of legislation with regards to hate speech as such, it is worth mentioning the distinction made by the UN Special Rapporteur Frank La Rue with regards to different types of expressions: the first category deals with “*expression that constitutes an offence under international law and can be prosecuted criminally*”; the second concerns “*expression that is not criminally punishable but may justify a restriction and a civil*

²³⁹ Ministry of Foreign Affairs (2014), “Italy’s contribution in relation to the request of the Office of the High Commissioner for the Human Rights of the United Nations pursuant to HRC Resolution A/HRC/21/30 on the “Elaboration of international complementary standards to the International Convention on the Elimination of All forms of Racial Discrimination”, available at: <http://www.ohchr.org/Documents/Issues/Racism/AdHoc/6thSession/Italy.pdf>

²⁴⁰ ECRI (2012), “ECRI Report on Italy fourth monitoring cycle”, available at: <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Italy/ITA-CbC-IV-2012-002-ENG.pdf>

²⁴¹ *Ibid.*

suit”; and lastly “*expression that does not give rise to criminal or civil sanctions, but still raises concerns in terms of tolerance, civility and respect for others*”. Therefore, when dealing with hate speech cases, it is important to distinguish between these different types of expressions in order to understand if a harmful expression falls under the protection of the law in the national legal framework of reference. The contents of those different types of expressions raise many issues of principle and therefore require different legal responses.²⁴²

Although Italy does not have an agreed legal definition of hate speech, Article 3 of Law 654/1975, mentioned above, provides a general definition by describing it as “*crime of propaganda of ideas based on ethnic or racial hatred*” and “*violence or instigation to violence for racial, ethnic, national or religious reasons*”.

Despite of the existence of several international recommendations to firmly counter the dissemination of hate speech with effective measures, hate speech is not regulated through a specific legislation. However, the 1993 **Mancino Law** established that “*inciting in any way or committing violence or acts of provocation to violence based on racist, ethnic, national or religious motives*” constitutes a crime punishable by six months to four years in prison. The same law also established that “*propagating ideas based on racial superiority or racial or ethnic hatred, or inciting to commit or commit acts of discrimination for racial, ethnic, national or religious motives*” is a crime punishable by up to three years prison.

However, in January 2006 the Parliament adopted **Law 85**, which weakens the penalties against hate speech and instigation to racial discrimination. Law 85/2006 decreased the original penalty provisions: in case of racism or discriminative instigation, the punishment is reduced to one year and six months of imprisonment, which can, however, be substituted by the judge with a fine.

The most recent amendment, approved by the Chamber of Deputies but still pending in front of the Senate, would add homophobia and transphobia to the already existing aggravating circumstances. However, an additional sub-amendment, known as the Verini Amendment, would modify the *Mancino Law* so that the penalties related to discrimination would not concern “*organizations in the fields of politics, unions, culture, health care, education, religion or cults*”. Many human rights organizations, as well as several politicians and civil society have raised concerns over the practical effects of such provision. According to such criticisms, the Verini Amendment would exclude the persecution of those political parties and social organizations which openly hold discrimination based on sexual orientation as one of their specific features.

In 2006, Law 85 amended the previous criminal regulations, halving the penalty for the crime of propagating (formerly “spreading”) ideas based on racial superiority or hatred and instigation (formerly “incitement”) to commit acts of discrimination for racial, ethnic, national or religious motives, and thus reducing the scope of this circumstance. As already

²⁴² United Nations General Assembly (2011), “Promotion and protection of the right to freedom of opinion and expression”, available at: <http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf>

stated, the amendment changes the penalty: in case of racism or discrimination incitement, the corresponding punishment can either be a fine or imprisonment.²⁴³

Law concerning Hate Speech Online

The Secretary General of the United Nations has recently stated that the use of the Internet to spread hate speech is one of the most important challenges to human rights as a consequence of modern technological development. *“The technical difficulty of regulating the content of messages broadcast through the Internet makes it a particularly effective means of misusing the freedom of expression and inciting discrimination and other abuses of human rights. This aspect of the Internet poses particular problems for Governments as protectors of human rights”*.²⁴⁴ Each nation has taken a different approach in balancing dignity and free speech.

Legislative Decree no. 70 of 9 April 2003 on electronic commerce implements Directive 2000/31/EC regulating some legal aspects in relation to information society services, specifically the electronic commerce in the internal market, with the aim to create a legal framework to ensure the free movement of information society services between EU member States. Generally speaking, Article 17 of Legislative Decree no. 70/2003 states that there is not a universal obligation of supervision for Internet Service Providers (ISPs) on users’ publications and downloads. The article expressly enunciates that *“the provider is not subject to a general duty of monitoring the information transmitted, nor to a general duty of actively seeking facts or circumstances that can be considered illegal”*.²⁴⁵ However, Article 17 states that the provider is in charge of notifying the judicial or administrative authority in charge of the surveillance activities about any illicit activities or information belonging to the addressee of the service.

The ISP is also responsible for sharing with judicial authorities any relevant information for the identification of the addressee using its service with the aim of identifying and preventing illicit activities. The provider bears civil responsibility with regard to the content of the service when, upon request of the administrative or judicial authority in charge of surveillance activities, it has not acted to impede access to that content, or if, having been aware of the illicit nature of the content of the service for a third person, has not notified the competent authority.²⁴⁶ The ISP, therefore, has the obligation to immediately remove from its available content the information which turned out to be unlawful, or to disable access to such information following a proper order by the competent authorities.²⁴⁷

²⁴³ UNICRI (2014), “Light on: Investing and reporting online hate speech training manual”, available at: http://unicri.it/special_topics/hate_crimes/Training_Manual.pdf

²⁴⁴ The Secretary-General (2000), “Preliminary Report of the Secretary-General on Globalization and Its Impact on the Full Enjoyment of All Human Rights”, 11 26-28, U.N. Doc. A/55/342 (Aug. 31, 2000).

²⁴⁵ The Council of Europe and ELSA (2014), “International Legal Research Group on hate speech online”, available at: http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

²⁴⁶ Decreto legislativo 9 aprile 2003, n. 70, INTERLEX, available at: <http://www.interlex.it/testi/dlg0370.htm#17>

²⁴⁷ Gianni, Origoni, Grippo & Partners (2011), “News about Internet Service Providers’ Liability”, available at: http://www.gop.it/doc_publicazioni/85_8mipi6ffej_eng.pdf

The effectiveness of the Italian legal framework towards hate crime and racism

The European Commission against Racism and Intolerance (ECRI) published its report on Italy in 2012. Firstly, ECRI noted in the report that Italy has made racist intent an aggravating circumstance, as Section 3 of the Law 205/1993 introduced a general aggravating circumstance for all offences committed with the intent to discriminate on different grounds, such as race, ethnic origin, nationality or religion, or in order to help organisations with such purposes. The Law also states that any racially aggravated offence is prosecuted *ex officio*.²⁴⁸

ECRI recommended that the Italian authorities strengthen their efforts to provide teachers with proper training in delivering intercultural education and that they strengthen the human rights dimension of civic education courses. The final aim should be to promote awareness in young people through innovative courses aimed at eliminating prejudices and encourage them to report incidents of racism.

The network of Italian associations on racial discrimination has stressed the need for a comprehensive training program for the judiciary in order to enhance the understanding of the forms and boundaries of hate speech under both international and national law. This concern is due to the lack of awareness by judges and law enforcement (police officers and public prosecutors) of international human rights treaties and specific national legislation; trainings of this kind will encourage effective *ex officio* prosecutions of these criminal acts.²⁴⁹

With specific regard to the lesbian, gay, bisexual and transgender (LGBT) Community, the International Centre for advocates against discrimination (ICAAD) expressed its concern since the protection of the LGBT community has been hindered by provisions in Italy's Criminal Code, especially because prohibitions on hate speech do not cover homophobia. As mentioned above in the paragraph on legislation, the Parliament opposed the approval of a rule against acts of discrimination targeting LGBT persons.²⁵⁰

In its report on Italy from 2012, the UN Committee on the Elimination of Racial Discrimination (CERD)²⁵¹ recommended that Italy include racist motivations among the general aggravating circumstances provided by Article 61 of the Criminal Code. From a procedural point of view, the Committee suggests that Italy should take necessary measures to effectively prosecute and punish cases of dissemination of ideas of racial superiority and

²⁴⁸ McClintock M. (2005), "A Survey of Violent Hate Crimes in Europe and North America", Human Right First, available at: <https://www.humanrightsfirst.org/wp-content/uploads/pdf/everyday-fears-080805.pdf>

²⁴⁹ The Council of Europe and ELSA (2014), "International Legal Research Group on hate speech online", available at: http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

²⁵⁰ United Nations, Human Rights Council (2014), "Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21", available at: http://www.ristretti.it/commenti/2014/ottobre/pdf5/onu_italia.pdf

²⁵¹ Committee on the Elimination of Racial Discrimination (2012), "Consideration of reports submitted by States parties under article 9 of the Convention: concluding observations of the Committee on the Elimination of Racial Discrimination: Italy", CERD/C/ITA/CO/16-18, available at: www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ITA.CO.16-18.pdf

of incitement to racist violence or crime, in accordance with the provisions of national legislation and in line with Article 4 of the Convention. The main concern seems to be the prevalence of racist discourse, particularly directed against Roma, Sinti and non-citizens. In particular, discriminatory statements have often occurred in political debate. The Committee also pointed out that the fundamental right to freedom of expression finds a limit when consisting in dissemination of ideas of racial superiority or incitement to racial hatred.

Another cause of concern noted in the CERD Report is the increase of racial discrimination cases in the media and on the Internet, particularly on social networks (see the judgments analyzed below). For these reasons, the Committee on Racial Discrimination encouraged Italy to invite the media to strictly respect the Charter of Rome in order to avoid racist, discriminatory or biased language. It also encouraged Italy to ratify the Additional Protocol to the European Convention on Cybercrime concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems. Systematic data collection on racist hate crimes has also been recommended by the Committee.²⁵²

Regarding data reporting, it is worth noting that Italy regularly reports hate crime data to the OSCE Office for Democratic Institutions and Human Rights (ODIHR).²⁵³ Information reported to ODIHR concerns incitement to hatred as well as other hate speech offences. Hate crime data are collected by law enforcement authorities and the ministry of Interior, based on cases presented to the courts, but they are not made publicly available. According to OSCE/ODIHR Italy usually reports hate crimes without distinguishing them from cases of hate speech and/or discrimination.

Table of official data on hate crimes in Italy

Year	Hate crimes recorded by police	Prosecuted	Sentenced
2013	472	Not available	Not available
2012	71	Not available	10
2011	68	31	19
2010	56	Not available	60
2009	134	Not available	Not available

Source: OSCE/ODHIR, Hate Crime Reporting Italy, available at: <http://hatecrime.osce.org/italy>

Table of 2013 hate crimes recorded by bias motivation and type

Bias motivation	Type of crime	Recorded by police
Racism and xenophobia	Physical assault	60
	Damage to property	12
	Vandalism	4
	Threats/ threatening behaviour	100

²⁵² McGuire K., Puchalska B., Salter M. (2010), “State of the union report: a road map addressing reform possibilities based upon a comparative analysis of the legal regulation of hate speech and hate crime”, available at: <https://www.uclan.ac.uk/research/explore/projects/assets/stateofunion10.pdf>

²⁵³ See, OSCE/ODHIR, “Hate crime Reporting Italy”, available at: <http://hatecrime.osce.org/italy>

Bias motivation	Type of crime	Recorded by police
	Unspecified	18

Source: OSCE/ODHIR, Hate Crime Reporting Italy, available at: <http://hatecrime.osce.org/italy>

In 2012, Italian authorities adopted the “2013-2015 National Strategy to prevent and combat discrimination on grounds of sexual orientation and gender identity”. As a result, courses and workshops for National Police and Carabinieri on prevention of hate crime against LGBT were carried in 2014. Furthermore, a National action plan against racism, xenophobia and intolerance was reported as being in development,²⁵⁴ although as of the time of writing it has not been put into effect.

Furthermore, Italian authorities have taken many important steps with respect to training and awareness on these issues. In particular, Italy is implementing ODIHR’s Training against Hate Crimes for Law Enforcement (TAHCLE) program, which is designed to improve police skills in recognizing, understanding and investigating hate crimes. For this purpose, a Memorandum of Understanding was signed between ODIHR and the Department of Public Security - Central Directorate of Criminal Police of the ministry of Interior. The first training sessions took place in 2014 and included training for 100 junior National Police officers and 60 Carabinieri, as well as a training course for trainers of Police chief executives and Carabinieri officials.²⁵⁵

The Observatory for Security against Acts of Discrimination (OSCAD), in collaboration with the National Office against Racial Discrimination (UNAR), has organized workshops with a specific focus on prevention and countering hate crimes. Two-thousand eight-hundred National Police Officers were trained on the topic of improving attitudes towards victims of violence; acquiring best practices in dealing with discriminatory crime based on bias against sexual orientation, race/ethnicity, and gender.

At the local level, within each police department (*Questura*), there is a specialised unit named the General Investigations and Special Operations Division (DIGOS), which conducts investigations on incidents of discrimination, particularly anti-Semitism. Staff receive specific training and become highly qualified in this field. They work alongside associations and within communities, being able, in this way, to obtain direct information on hate crime.²⁵⁶ In addition, the Postal and Communications Police (*Polizia Postale e delle Comunicazioni*) is the specialised Body of the in charge of monitoring web sites and investigating cyber crime and online discrimination. It collects reports of violations from victims and provides assistance through its own website.²⁵⁷ It is also worth noting that a dedicated section of the UNAR website has been created to allow Internet users to directly report any racist or

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ OHCHR (2014), “Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21”, United Nations, available at: http://www.ristretti.it/commenti/2014/ottobre/pdf5/onu_italia.pdf

²⁵⁷ The Council of Europe and ELSA (2014), “International Legal Research Group on hate speech online”, available at: http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

discriminatory material. When coming across any illicit content, UNAR notifies the Postal and Communications Police so that they can start a criminal investigation.

Countries are encouraged by OSCE to build databases on all forms of discrimination, and a national reporting system in accordance with the existing regional and provincial observatories connected to territorial antennas, associations, centres and NGOs in order to enable an effective exchange of information. In Italy, UNAR has concluded agreements with different Regions (such as Sicily, Puglia, Emilia Romagna, Liguria and Piedmont; with the provinces of Messina, Mantova, Pistoia and Rome) and OSCAD, in order to encourage the victims and witnesses of racist incidents to bring cases before the courts in order to obtain access to effective civil and administrative law remedies.²⁵⁸

ECRI asked that the Italian authorities publicly denounce all manifestations of racist behaviour or racial discrimination made by members of the police or via public statements made by politicians, while simultaneously establishing independent commissions investigate such incidents.

Regarding online hate speech, in parallel with the need for specific legislation dealing with hateful expressions on the web, ECRI has strongly requested that ISP associations establish codes of conduct and mechanisms for the detection and reporting of websites, as well as to encourage a “model global uniform Internet contract”. Providers are therefore urged to monitor and shut down any websites that host expressions of hatred, and to respect the best practices that have been defined so far.²⁵⁹

In conclusion, the main issues with regard to the effectiveness of the Italian legal framework on discrimination and hate crime are the exclusion of certain categories (such as hate crimes against LGBT or disabled persons,) from the Mancino Law of 1993, and the limited application of the aggravating circumstance of racial hatred by the police and public prosecutors. The general public has been unaware of the existence of this aggravating circumstance, and law enforcement has often been rather restrictive in applying it.²⁶⁰

In addition, it is worth mentioning once again that in 2011 the Italian Parliament rejected the anti-homophobia Law (the so-called “*Legge Concia*”), by voting against the introduction of aggravating circumstance for crimes that are related to victims’ sexual orientation.

Procedural Issues and Mechanisms

In Italy, anyone who has suffered discrimination or harassment on the basis of race or ethnic origin can go to court in order to enforce the principle of equal treatment through a rapid and effective civil action. This action is characterized by the absence of any formality because the complaint can be submitted without the necessary assistance of a lawyer. The new legislation has broadened the category of people entitled to act before the court: aside

²⁵⁸ The Council of Europe and ELSA (2014), cited.

²⁵⁹ *Ibid.*

²⁶⁰ Baussano L.F., “Racism and related discriminatory practices in Italy. ENAR Shadow Report 2010-2011”, p. 35, available at: <http://cms.horus.be/files/99935/MediaArchive/publications/shadow%20report%202010-11/14.%20Italy.pdf>

from the victim, associations and other non-profit institutions fighting against discrimination can appear before the court. This possibility has been given to those associations enrolled in an *ad hoc* list, which is approved periodically by Decree of the ministry for Equal Opportunities and the Labour and Social Politics ministry.²⁶¹

With regard to the procedure for filing a complaint on discrimination-related issues, in 2011 a procedural revision was introduced. Article 28 of Legislative Decree n. 150/2011 revoked the special procedure for anti-discrimination cases established by Legislative Decree 286/1998 on Immigration, replacing it with Article 702-bis of the Civil Procedural Code, which provides for simplified proceedings. Only in urgent cases can a judge issue a temporary order, the violation of which is considered a criminal offence. In addition, all antidiscrimination cases can be addressed by a specific procedure called pre-trial mediation, which was initially introduced by Decree 216/2003, only with regard to employment and occupation-related claims, but has now been extended to all antidiscrimination cases.

With specific regard to criminal proceedings, this paragraph will report on the main phases involved in a criminal procedure. Prosecutors conduct the pre-trial investigation with the help of law enforcement staff, the police and *Carabinieri* assigned to judicial police functions. Once the first phase of investigation is concluded, the prosecutor either requests that the Judge for Preliminary Investigations (*Giudice delle Indagini Preliminari*, GIP) dismiss the case if there is a lack of probable cause, or asks the GIP to commit the case to trial if there is a trustworthy allegation. The GIP can approve or reject the prosecutor's conclusions, and may order the prosecutor to continue the investigation. The decisions taken by the inferior court are not final until all appeals, at the second and third levels, have been examined.²⁶²

Apart from *stricto sensu* judicial procedures, since 2004 a UNAR Contact Center and a toll free number (800.90.10.10) have been set up to assist in matters related to discrimination incidents. The Contact Center provides relevant information and support to victims of discrimination through different types of activities, such as collecting – also online - complaints and reports on facts, events and actions which hinder equal treatment on the basis of ethnicity or race. The center provides immediate assistance and solves cases or helps victims to present before the court. Every enquiry will be concluded via a final communication to the user.²⁶³

Court decisions

A number of court decisions have been taken, both with regard to discrimination issues and hate speech, as well as hate speech online. Some of the most groundbreaking and interesting cases are mentioned and analyzed below.

Judgements on Discrimination

²⁶¹ Ministero per le pari opportunità, “Un ufficio contro le discriminazioni razziali”, available at: <http://www1.interno.gov.it/mininterno/export/sites/default/it/assets/files/12/2005127151028.pdf>

²⁶² The Council of Europe and ELSA (2014), “International Legal Research Group on hate speech online”, available at: http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

²⁶³ Ministero per le pari opportunità, “Un ufficio contro le discriminazioni razziali”, available at: <http://www1.interno.gov.it/mininterno/export/sites/default/it/assets/files/12/2005127151028.pdf>

DISCRIMINATION ON THE BASIS OF DISABILITY

This case involved a male nurse who was selected for employment by a health service after an open competition. During the selection process, the complainant was diagnosed with night epilepsy, and as a consequence the health service refused to grant him an employment contract on the basis of his impossibility to do night shifts due to his diagnosis. He therefore went to Court, alleging discriminatory dismissal on the ground of disability.

The Court of Bologna made the following considerations: firstly, it found that an illness such as night epilepsy amounts to a disability as interpreted by the Court of Justice of the European Union (CJEU) in the case *HK Danmark* (11 April 2013, C-335/11). Secondly, the vacancy seemed to require a healthy worker with full capacity, but as the illness was diagnosed after the complainant applied for the open competition, he had acted in good faith. The Court of Bologna also said that the refusal to issue the contract constituted a discriminatory act on the grounds of disability. The Court ordered the health service to pay compensation amounting to an estimated six months' salary, which is what the claimant would have gained if he had been hired. With the aim of bolstering its decision, in its ruling the Court referred directly to the UN CRPD and its ratification both by Italy and the EU.²⁶⁴

Cases on Hate Crime

Racial hatred is a phenomenon that has occurred on a number of occasions in Italy, in particular within political debate. Two indictments are described below.

1) On 13 September 2009, four supporters of the "Lega Nord" political party attacked two foreign waiters during a meeting in Venice. After one year, on 29 September 2010, the public prosecutor accused the defendants of injuries and damages with the aggravating circumstance of racial hatred.

2) On 25 January 2011, the Court of Parma convicted 10 policemen accused of beating and insulting a Ghanaian boy because "*they thought he was an associate in crime of a pusher*". They have all been accused with the aggravating circumstance of racial hatred.²⁶⁵

Judgements on Hate Speech

Before analyzing some specific decisions on hate speech in new media, it is important to point out that the Italian Supreme Court (*Corte di Cassazione*) in its ruling of 26 April 2011 established that insulting a foreign person with sentences such as: "*African, go back [to] eating bananas, monkey!*" constitutes the aggravating circumstance of ethnic and racial hatred.²⁶⁶

Judgements on Hate Speech Online

Tribunale di Milano, IV Sezione Penale, Decision no. 1972 of 24 February 2010

²⁶⁴ The European Network of experts in the non discrimination field (2014), "European Antidiscrimination Law Review", available at: <http://ec.europa.eu/justice/discrimination/files/adlr-18-2014-final.pdf>

²⁶⁵ Baussano L.F., "Racism and related discriminatory practices in Italy. ENAR Shadow Report", available at: <http://cms.horus.be/files/99935/MediaArchive/publications/shadow%20report%202010-11/14.%20Italy.pdf>

²⁶⁶ *Ibid.*

The Tribunal of Milan, in its decision no. 1972 of 24 February 2010, affirming that “*the Internet is not a boundless plain where everything is allowed and nothing is forbidden*”, condemned three former executives of Google Italy for not having avoided the publication of a video on the web, which portrayed a child affected by the Down syndrome being insulted and beaten by some classmates. The decision has been then completely overturned in the Court of Appeal by the appeal judgment no. 8611 of 27th of February 2013²⁶⁷ that discharged the three defendants, stating that the actual intention to commit the crime was missing, which - under the Italian criminal law - is a necessary requirement for this type of crime.²⁶⁸

Tribunale di Padova, 20 April 2011

In 2011, a local politician affiliated with the Lega Nord party and councillor of the town of Padua, published on Facebook the following post referring to Roma and Sinti people: “*They make me want to throw up*”, along with an array of other statements. On the basis of the Mancino Law, which condemns propaganda of racial hatred, ideas and incitement to commit racist acts, the Court of Padua condemned him to a fine of 4,000 euros, and he was banned for three years from political propaganda.²⁶⁹

Corte di Cassazione, III Sezione Penale, Decision No. 33179 of 31 July 2013

In 2013, the Supreme Court issued a very important decision concerning online hate speech, deciding for the first time a case of hate speech on the Internet by ruling against the administrators of the Italian section of the website *Stormfront.org*, which promoted Neo-Nazi ideas. In the first instance, the Tribunal of Rome issued a decision against the Neo-Nazi website where authors frequently incited hatred and violence on the base of racial, ethnic and religious grounds. The Tribunal therefore condemned the website administrators for creating an association with the purpose of instigating discrimination on race and religious grounds. The trial continued before the Supreme Court, which confirmed the sentence of the Tribunal of Rome, declaring a violation of Article 3, paragraph 3 of Act 654/1975, as well as applying the provisions regulating criminal organizations to all virtual communities that incite racial discrimination and hatred.²⁷⁰ In addition to the sanctions imposed on the administrators, the decision of the Supreme Court resulted in the removal of the Italian

²⁶⁷ Monfrini F. (2013), “Court of Appeals Overturns Conviction of Google Italy Executives, Redefines Liability of Hosting Providers Under Privacy Legislation”, Privacy Europe, available at:

<https://www.privacy-europe.com/blog/court-of-appeals-overturns-conviction-of-google-italy-executives-redefines-liability-of-hosting-providers-under-privacy-legislation/>

²⁶⁸ The Council of Europe and ELSA (2014), “International Legal Research Group on hate speech online”, available at: http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

²⁶⁹ Unione forense per la tutela dei diritti umani (2012), “Observations I submitted to the Committee on the Elimination of Racial Discrimination for the Thematic Discussion on “racist hate speech”, available at: <http://www.unionedirittiumani.it/wp-content/uploads/2012/07/Information-paper-on-racist-hate-speech-Italian-network-on-racial-discrimination.pdf>

²⁷⁰ *La Repubblica* (2013), “Processo Stormfront, antisemitismo sul web. Condannati i quattro gestori del sito”, available at: http://roma.repubblica.it/cronaca/2013/04/08/news/processo_stormfront-56185639/; Angeli F.

(2014), “Motivazioni della sentenza nei confronti di quattro estremisti antisemiti di Stormfront Italia”, *La Repubblica*, available at:

<http://www.osservatorioantisemitismo.it/articoli/motivazioni-della-sentenza-nei-confronti-di-quattro-estremisti-antisemiti-di-stormfront-italia/>

section of the website to ensure the protection of individuals from racial discrimination and xenophobia. This judgement constitutes the very first application of legislation against hate speech and propaganda on the Internet in Italy, hence setting a precedent to be taken into account in the future.²⁷¹

Corte di Cassazione, V Sezione Penale, Decision No. 25756 of 18 June 2015

A very recent judgment issued on 18 June 2015 by the Supreme Court of Italy, concerning acts of harassment on the basis of race, clarified the field covered by aggravating circumstance consisting of discriminatory intent. The Court said that persecutory acts are aggravated by discriminatory intent or racial, ethnic, national and religious hate when such acts consist in a conscious manifestation of the feeling of hatred or discrimination based on race or ethnic origin, aimed at excluding equal treatment conditions.²⁷²

Institutions and Associations

A number of institutions and associations are active in Italy with regard to discrimination and racism.

The Associazione 21 luglio²⁷³ is an independent non-profit organization in charge of promoting the rights of the Roma and Sinti communities in Italy through the protection of children's rights and by tackling any form of discrimination or intolerance. Its research department periodically produces reports that contain data and information on the main issues regarding Roma and Sinti in Italy, such as their living conditions and the degree to which they are discriminated against. The Association also presents reports to institutions and political decision makers, as well as disseminates public appeals and prepares reports for the United Nations. It also pays particular attention to the issue of discrimination and incitement to discriminatory behaviour that takes place in the media; Associazione 21 luglio constantly monitors media, blogs and websites across Italy that could potentially circulate discriminatory messages or incite racial hatred towards Roma and Sinti people. If necessary, the Association can undertake legal actions related to situations of violations of human rights and incitement to racial hatred, even when perpetrated through the media and the web. Associazione 21 luglio conducts activities to raise awareness of human rights violations and promotes positive experiences, in order to tackle all the discriminatory behaviours affecting Roma and Sinti people in Italy.²⁷⁴

The Associazione Studi giuridici sull'Immigrazione (ASGI), is an association founded in 1990 with the aim of promoting research, analysis, the spread of information and raising awareness on the issues of discrimination on different grounds (such as race, ethnic origin and many others), on immigration and asylum matters, and citizenship at the national,

²⁷¹ The Council of Europe and ELSA (2014), "International Legal Research Group on hate speech online", available at: http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

²⁷² Studio Legal Canestrini (2015), "Atti persecutori e aggravante razziale", available at: <http://www.canestrinilex.com/risorse/atti-persecutori-e-aggravante-razziale-cass-2575615/>

²⁷³ Associazione 21 Luglio (2012), available at: <http://www.21luglio.org/brief-description-of-associazione-21-luglio>

²⁷⁴ *Ibid.*

European and International levels. ASGI promoted an initiative known as “*Justice Initiative*”, which provides for legal assistance, advocacy initiatives, research and technical assistance to promote human rights of minorities, especially Sinti and Roma.²⁷⁵

The National Office Against Racial Discrimination (UNAR), as briefly described above, conducts a variety of different activities to combat against any form of racism or intolerance. More specifically, it provides for judicial assistance, carries out inquiries and raises awareness, disseminating information and knowledge on pertinent issues.

In order to offer pro-bono judicial assistance to alleged victims of racial or ethnic discrimination, UNAR has promoted the establishment of Agreement Protocols with lawyers’ associations.²⁷⁶

The mandate of UNAR had been recently extended to deal with the elimination of discrimination on the grounds of sexual orientation and gender identity, although not specifically included in legislation. ECRI has recommended that Italy give UNAR a more prominent role. The same position is also shared by *Associazione 21 Luglio*, which recommended that Italy makes more efforts in addressing hate speech against Roma and Sinti by reinforcing the mandate of UNAR.²⁷⁷

As previously mentioned, it is possible to report hate speech and discrimination cases online via UNAR’s website located at: <http://www.unar.it/>. UNAR’s Contact Center, available at the following number: 800 901010, collects reports from victims and witnesses of discrimination cases.²⁷⁸

The Observatory for Security against Acts of Discrimination (OSCAD) was established in 2010 within the ministry of the Interior, to help victims of hate crime in the concrete fulfilment of the principle of equality before the law and to protect them against discrimination. OSCAD belongs to the Public Security Department (Dipartimento della pubblica sicurezza - Direzione centrale della polizia criminale), being part of both the *Polizia di Stato* ed *Arma dei Carabinieri* law enforcement agencies . As a member of the law enforcement community, OSCAD carries out different activities: it receives reports of discriminatory acts relating to the world of security, from institutions, professional or trade associations as well as private individuals, in order to monitor the phenomenon of discrimination based on different grounds, such as race or ethnic origin, nationality, religion, gender, age, and language; it follows up on the outcomes of discrimination complaints lodged with police agencies; it maintains contact with associations and institutions, both

²⁷⁵ ASGI (2012), “Comitato per l’ eliminazione della discriminazione razziale: Revisione in Italia”, available at: http://asgi.it/wp-content/uploads/public/1_asgidocumenti.ita.pdf

²⁷⁶ Christians L.L. (2011), “Expert workshop on the prohibition of incitement to national, racial or religious hatred- Annex – European Legislations, Italy”, available at: <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/Annexes/Italy.pdf>

²⁷⁷ Human Rights Council (2014), “Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights United Nations (2014), Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21”, available at: http://www.ristretti.it/commenti/2014/ottobre/pdf5/onu_italia.pdf

²⁷⁸ Presidenza del Consiglio dei Ministri Dipartimneto della Gioventù e del Servizio Civile, “Lotta all’ odio e all’ intolleranza nel web”, available at: <http://www.nohatespeech.it/menu-destro/segnala/>

public and private, dedicated to combating discrimination; it prepares training modules to qualify police operators for anti-discrimination activity and participates in training programs with public and private institutions; and it promotes measures to prevent and fight discrimination. Despite the variety of actions undertaken by agency, reporting an act of discrimination to OSCAD does not replace a formal complaint with the police authorities.²⁷⁹ OSCAD therefore is committed to tackling under-reporting and promoting exchanges of investigative information; training and exchanging best practices at the international level; and monitoring discrimination. In 2012, OSCAD carried out intensive training activities for officers and law enforcement officials in the field of human rights, anti-discrimination and hate crime.²⁸⁰

The Online Hate Prevention Institute (OHPI) is a platform that enables citizens to report hate crime and hate speech incidents. The activities carried out by the institute include research, campaigning, public education, policy work, and law reform recommendations. OHPI seeks ways of changing online systems to make them more effective at reducing the risk to the community that online hate creates. Ultimately, OHPI aims to find ways to create systemic change that reduces the risk of harm both now and into the future.²⁸¹ On this online platform, an e-book on how to combat anti-Semitic online hate speech was launched on 1 July 2015, with the aim of providing guidelines on how to report offensive expressions on the most used online platforms, such as YouTube and Facebook.²⁸²

The Unione forense per la tutela dei diritti umani (UFTDU)²⁸³ is a lawyers' association founded in 1968 with the aim of spreading and promoting the understanding and awareness of domestic and international legal instruments for human rights, advocating for their concrete and effective observance from a judicial, strajudicial, administrative and legislative point of view. UFTDU has also cooperated with different international organizations, in particular the Council of Europe, the European Union and the OSCE.

Conclusions

Italy has quite a complete legal framework to address cases of hate speech in new media, although there is neither an official definition of hate speech nor hate speech online. Hate speech cases are covered by different legal provisions, both contained in the Criminal Code, or other pieces of legislation, such as the Mancino Law of 1993 (and subsequent revisions).

²⁷⁹ Polizia di Stato (2014), "Osservatorio per la Sicurezza contro gli atti discriminatori – OSCAD", available at: <http://www.poliziadistato.it/articolo/22017/>

²⁸⁰ United Nations, Human Rights Council (2014), "Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21", available at: http://www.ristretti.it/commenti/2014/ottobre/pdf5/onu_italia.pdf

²⁸¹ The Online hate prevention Institute (2014), "What we do", available at: <http://ohpi.org.au/what-we-do/#sthash.Vudm3asj.dpuf>

²⁸² The Online hate prevention Institute (2015), How to Combat Online Antisemitism (eBook), available at: <http://ohpi.org.au/how-to-combat-online-antisemitism-ebook/>

²⁸³ "Unione Forense per la tutela dei diritti umani", available at: <http://www.unionedirittiumani.it/profilo/>

Frequent cases of hate speech have occurred in Italy and the Italian Courts have often applied sanctions, on the basis of the main existing legislation, therefore the effectiveness of the legislation seems to be quite satisfactory.

The main concern as regards Italy is the ratification of the Additional Protocol to the Convention on Cybercrime and the need to train judges, prosecutors and law enforcement for achieving more effective reporting mechanisms and application of legislative provisions.

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<<http://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/CountryVisits.aspx>>

Romania: In-depth Country Study on Hate Crime and Hate Speech conducted within the Framework of the PRISM Project

P R I S M



WORDS ARE WEAPONS.

PREVENTING REDRESSING & INHIBITING HATE SPEECH IN NEW MEDIA



PRISM is a project co-financed by the Fundamental Rights and Citizenship Programme of the European Union

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Introduction

Issues pertaining to discrimination and prejudice have long had a negative impact on societies around the globe, affecting cohesiveness, socio-economic conditions, the political sphere, and a host of other areas, effectively marginalizing groups based on characteristics ranging from sexual orientation to ethnic and religious affiliation.

Government and prominent societal actors have often struggled to combat these issues, while others have historically helped to encourage prejudices and discriminatory practices. With the evolution of modern communication technology, in particular, new means have been made available for promoting understanding and bridging gaps between different societal elements; yet, these developments have also opened multiple channels through which potential offenders can promote hateful rhetoric and even advocate physical abuse.

Hate speech in new media is a serious issue facing countries around the world, with EU Member States not being immune to this phenomenon. The proliferation in the use of social media, forums, and commentary sections on even mainstream news sites, has provided environments through which hate speech can be propagated to a mass audience. In light of these developments, an objective of the PRISM Project aims to assess the EU's ability to combat hate speech in new media. With this goal in mind, the project is examining the legal frameworks of five EU Member States with respect to legislation, jurisprudence, reporting and redress mechanisms, and an array of other criteria for dealing with incidents of discrimination, and additionally assessing their relevance for addressing hate speech in new media. The following report focuses on the State of Romania's legal framework for tackling discriminatory issues.

In general, Romania has maintained a good legal framework with respect to discrimination and racism. This has been particularly true since the country entered the EU in 2007, adopting European policies and legislation on these issues. However, instances of discrimination and hate speech have been widespread in Romania, including in the political arena, targeting the country's Roma population. Romania's slow implementation of a strategy for integrating the Roma into the national social fabric, in addition to the absence of a national law addressing hate speech, have been major impediments to progress in this field. Moreover, deficiencies in the level of awareness and training for judicial officials and members of law enforcement concerning hate speech are also major obstacles which need to be tackled.

Nevertheless, the formation of the National Council for Combating discrimination (NCCD) and the activities of civil society organizations have played a major role in redressing incidents of discrimination and hate speech across Romania, while also spreading awareness on these issues. Further development is needed with respect to strengthening Romania's defense against hate speech and discrimination; however, as will be shown through this assessment, the country possesses a strong foundation on which it can base its future policies and practices.

The Romanian Legal Framework

Romania is a Constitutional Republic with a democratic, multi-party, parliamentary system. Over the years, Romania has been involved in promoting the overarching principles of the United Nations, including through the dissemination of the ideals, principles and norms enshrined in the United Nations Charter, the Universal Declaration of Human Rights and relevant international human rights instruments. Romania strongly supports all mechanisms and instruments for the full and effective implementation and development of international human rights law, signing and ratifying the major regional and international treaties and protocols in the field of human rights, international humanitarian law and refugee law.

To date, Romania has ratified the most important universal treaties²⁸⁴, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on the elimination of all forms of Racial Discrimination against Women, the Convention on the Rights of the Child and its Optional Protocol, the Convention against Torture and other cruel, inhuman or degrading treatment or punishment, the Convention on the Prevention and Punishment of the Crime of Genocide, the four Geneva Conventions and their two Additional Protocols, and the Rome Statute of the International Criminal Court. The provisions of these Treaties and of the Universal Declaration of Human Rights are directly applicable within the Romanian legal framework. Furthermore, in accordance with the Romanian Constitution, where a conflict occurs between the covenants or treaties on fundamental human rights ratified by Romania and national law, the international norms prevail, unless the Constitution or the national legislation provides for higher levels of protection.²⁸⁵

Romania has accepted the competence of the Committee of the Elimination of Racial Discrimination under Article 14 of the relevant Convention and has created a National Council for Combating Discrimination which represents the first institution of this nature in Central and Eastern Europe. The main function this council involves ensuring the implementation of the principle of equality among citizens, without interference from other public authorities.²⁸⁶

In addition, in 2007 Romania became a Member State of the European Union. Since 2007, the Romanian media has become much more interested in EU affairs, NGOs have started to work on EU and international issues in cooperation with European institutions and other Member States. Some NGOs have started to put pressure on national authorities, requiring them to work for the fulfilment of the higher criteria on justice and anti-corruption. Romania is now well represented in all important EU Bodies, such as the Council of Ministers and the European Economic and Social Committee. Moreover, Romanian MEPs are active members

²⁸⁴ Council of Europe (CoE), Convention for the Protection of Human Rights and Fundamental Freedoms, available at: <http://conventions.coe.int/Treaty/Commun/print/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>; United Nations Human Rights, Office of the High Commissioner for Human Rights, available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CAT&Lang=en

²⁸⁵ Human Rights Council, Permanent Mission of Romania to the United Nations New York, (2006), available at: <https://www.google.it/url?sa=t&rct=j&q=&esrc=s&source=web&cd=65&cad=rja&uact=8&ved=0CEQQFjAEODw&url=http%3A%2F%2Fwww.un.org%2Fga%2F60%2Felect%2Fhrc%2Ffromania.pdf&ei=F8kSVcbgGdLhaLGvgPgP&usq=AFQjCNFKIOaIQLLpLJeL2WjtJ4jP3uPHNg&sig2=ZcvBf1ToEqOffgwZ7hBX8A>

²⁸⁶ *Ibid.*

of parliamentary committees on gender equality, the labour market, public health, and consumer protection.²⁸⁷

The most important and targeted pieces of International legislation, as regards the issues encompassed in this report, are The European Convention on Cybercrime and its Additional Protocol, which provide for the criminalization of acts of racist and xenophobic nature committed through computer systems. They were both signed and ratified by Romania, although the country has formulated a reservation to a provision of the Protocol. Romania has reserved the right not to apply the provisions of Article 5 paragraph 1 of the Protocol, dealing with insults made through a computer system on racist and xenophobic grounds. The reservation cannot be withdrawn as long as slander and defamation are not considered criminal offences under national law.²⁸⁸

Despite its progressive integration, the European Commission has recently urged Romania to implement a more efficient judicial process also with regards to hate speech and intolerance, since these issues have continued to take place, in particular through the media and via some public authorities.²⁸⁹

²⁸⁷ Avery G., Faber A., and Schimdt A., "Enlarging the European Union: Effects on the new Member States and the EU", Trans European Policy Studies Association, available at: https://www.um.edu.mt/_data/assets/pdf_file/0017/71054/Enlarging_the_European_Union.pdf

²⁸⁸ CoE (2014), Ecri Report on Romania (fourth monitoring cycle), available at: <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/romania/ROM-CbC-IV-2014-019-ENG.pdf>

²⁸⁹ European Commission (2012), "Report from the commission to the European Parliament and the council on Progress in Romania under the Cooperation and Verification Mechanism", available at: http://ec.europa.eu/cvm/docs/com_2012_410_en.pdf

Figure 1 – International Legal Instruments ratified by Romania²⁹⁰

International and EU instruments Ratified by Romania	Open for Signature	Ratified
European Convention on Human Rights (ECHR)	4 Nov. 1950	20 June 1994
International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)	21 Dec. 1965	15 Sept. 1970
International Covenant on Economic, Social and Cultural Rights (ICESCR)	16 Dec. 1966	9 Dec. 1974
International Covenant on Civil and Political Rights (ICCPR)	16 Dec. 1966	9 Dec. 1974
The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	18 Dec. 1979	7 Jan. 1982
Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	10 Dec. 1984	18 Dec. 1990
European Convention on Transfrontier Television (ECCT)	5 May 1989	13 July 2004
International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families (CMW)	18 Dec. 1990	Not signed Not ratified
Charter of Fundamental Rights of the EU	2 Oct. 2000	1 Jan. 2007
Council of Europe Convention on Cybercrime	23 Nov. 2001	12 May 2004
Additional Protocol to the Convention on Cybercrime on racist acts committed through computer systems	28 Jan. 2003	16 July 2009
Convention on the Rights of Persons with Disabilities (CRPD)	30 Mar. 2007	31 Jan. 2011

General Legal Framework on Discrimination

The Constitution

The Romanian Constitution was adopted in 1991 and was revised in 2003. It enshrines the most important principles and liberties of a democratic nation and also provides some norms which criminalize discrimination. Reported below there are the main provisions on Discrimination, Racism and other provisions relevant to hate speech issues.²⁹¹

²⁹⁰ United Nations Human Rights, Office of the High Commissioner for Human Rights, available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=143&Lang=en

²⁹¹ Constitution of Romania, available at: <http://www.partylaw.leidenuniv.nl/party-law/4c8b8c9c-a990-43a9-b47c-1a567287acdc.pdf> ; CNCD, 2014, "Comparative study on legislation sanctioning hate speech and discrimination in the member states of the European Union", available at: <http://discursfaradiscriminare.ro/wp-content/uploads/2014/10/Comparative-Study.pdf>

Article 1(3): Human dignity: *“Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed.”*

Article 4(2): Condemnation of all types of discrimination: *“Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin.”*

Article 6(1): Expression and preservation of ethnic, cultural, linguistic and religious identity of national minorities. *“The State recognizes and guarantees the right of persons belonging to national minorities to the preservation, development and expression of their ethnic, cultural, linguistic and religious identity.”* (2) Equality and non discrimination for national minorities in relation to the other Romanian citizens. *“The protection measures taken by the Romanian State for the preservation, development and expression of identity of the persons belonging to national minorities shall conform to the principles of equality and non-discrimination in relation to the other Romanian citizens”.*

Article 16: The principle of equality before the law. *“(1) Citizens are equal before the law and public authorities, without any privilege or discrimination. (2) No one is above the law. (3) Access to public, civil, or military positions or dignities may be granted, according to the law, to persons whose citizenship is Romanian and whose domicile is in Romania. The Romanian State shall guarantee equal opportunities for men and women to occupy such positions and dignities. (4) After Romania's accession to the European Union, the Union's citizens who comply with the requirements of the organic law have the right to elect and be elected to the local public administration bodies.”*

Article 29: Freedom of religious belief *“No one may be compelled to adopt an opinion or to adhere to a religion contrary to his/her beliefs. (2) Freedom of conscience is guaranteed; it must be manifested in a spirit of tolerance and mutual respect. (3) All religions are free and are organized according to their own regulations under the law. (4) Within the relations between religions any forms, means, acts or actions of religious enmity are banned.”*

Article 30: Enshrines the principle of Freedom of Expression. (1) *Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public are inviolable.*(2) *Any censorship shall be prohibited.*(3) *Freedom of the press also involves the free setting up of publications.*(4) *No publication shall be suppressed.* (5) *The law may impose an obligation for the media to make public their financing source.* (6) *Freedom of expression shall not be prejudicial to the dignity, honour, privacy of person, and the right to one's own image.* (7) *Any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morality shall be prohibited by law.* (8) *Civil liability for any information or creation made public falls upon the publisher or producer, the*

author, the producer of the artistic performance, the owner of the copying facilities, radio or television station, under the terms laid down by law. Indictable offences of the press shall be established by law.

Article 31: The Right to Information: *(1) A person's right of access to any information of public interest shall not be restricted. (2) The public authorities, according to their competence, shall be bound to provide correct information for the citizens as to public affairs and matters of personal interest. (3) The right to information shall not be prejudicial to the measures of protection of young persons or to national security. (4) Public and private media shall be bound to provide correct information to the public opinion. (5) Public radio and television services shall be autonomous. They must guarantee for any important social and political group the exercise of the right to be on the air. The organization of these services and the Parliamentary control over their activity shall be regulated by an organic law.*

Article 40 (2): Stipulates that *“the parties or organizations which, through their goals or activities, militate against political pluralism, against the principles of the legitimate state or against Romania’s sovereignty, integrity or independence are unconstitutional.”*

Article 50: The Protection of Disabled Persons *“Persons with disabilities enjoy special protection. State ensures a national policy of equal opportunities, prevention and treatment of disability to enable effective participation of persons with disabilities in community life while respecting the rights and duties of parents or guardians.”*

The scope of the constitutional equality clause covers all fundamental rights, and the equality and non-discrimination clause applies to all citizens. The grounds specifically spelled out by the Constitution in the context of the equality principle are race, nationality, ethnic origin, language, religion, gender, opinion, political adherence, property and social origin.

There are some grounds for discrimination which are not mentioned in the Constitution, such as disability, age or sexual orientation, which are instead referenced in Directive 2000/78/EC. However, the Constitution mentions protection against discrimination on the additional grounds of language, opinion, political adherence, property or social origin. With regards to equality on grounds of religion, Article 4 of the Constitution, where this principle is enshrined, should be read in conjunction with Article 29 providing for freedom of conscience, phrased as freedom of thought, opinion, and religious beliefs.²⁹²

The Romanian Constitution provides for equality and non-discrimination in broad terms, but its provisions are not self-enforcing, and subsequent legislation is necessary for the effective implementation of all these principles. These principles have been implemented in practice by specific anti-discrimination legislation adopted in August 2000 through delegated Governmental Ordinance 137/2000 (hereafter referred to as 2000 Anti-discrimination Law or GO 137/2000). GO 137/2000 was subsequently amended in 2002, 2003, 2004, 2006 and three times in 2013, in order to enhance transposition of Directive 2000/43/EC and Directive

²⁹² Iodarche, R. (2014), “Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013 Romania”, European network of legal experts in the non-discrimination field, p.21, available at: <http://www.refworld.org/pdfid/541acc0f4.pdf>

2000/78/EC. The Law introduces a mixed system of civil and administrative remedies (for minor offences), which can be pursued either separately or simultaneously.²⁹³

The Penal Code

On 1 February 2014, the New Criminal Code (Law no. 286/2009)²⁹⁴ entered into force. The new law was issued with the aim of simplifying and accelerating criminal proceedings, and above all to transpose European legislation into national law and ensure the observance of human rights provisions of the Constitution and the signed international treaties. With regard to discrimination provisions, the law introduced some amendments of relevance.²⁹⁵ Below is a list of the relevant provisions dealing with the issues analyzed in this report.

Article 77 (h) of the Criminal Code: Discriminatory intent is considered an aggravating circumstance. It includes the commission of a crime by reason of race, nationality, ethnicity, language, religion, sex, sexual orientation, opinion, political belonging, convictions, wealth, social origin, age, disability, chronic disease, or HIV/AIDS.

“The following constitute aggravating circumstances: the offence was committed for reasons related to race, nationality ethnicity, language, gender, sexual orientation, political opinion or allegiance, wealth, social origin, age, disability, chronic non-contagious disease or HIV/AIDS infection, or for other reasons of the same type, considered by the offender to cause the inferiority of an individual from other individuals”. These are the same areas covered by the EU Anti-discrimination Directives.

Article 223: Sexual Harassment in work-related relations is condemned.

“1) Repeatedly soliciting sexual favours as part of an employment relationship or a similar relationship, if by so doing the victim was intimidated or placed in a humiliating situation, shall be punishable by no less than 3 months and no more than 1 year of imprisonment or by a fine. (2) Criminal action shall be initiated based on a prior complaint filed by the victim”.

Article 282: Disciplines torture by a civil servant on grounds of discrimination.

“(1) The act of a public servant holding an office that involves the exercise of state authority or of other person acting upon the instigation of or with the specific or tacit consent thereof to cause an individual pain or intense suffering, either physically or mentally:

a) to obtain information or statements from that person or from a third-party

b) to punish them for an act committed by them or by a third party or that they or a third party is suspected to have committed

c) to intimidate or pressure them or a third-party

d) for a reason based on any form of discrimination, shall be punishable by no less than 2 and no more than 7 years of imprisonment and a ban on the exercise of certain rights.

²⁹³ *Ibid.*, p.3.

²⁹⁴ Legislationline, Criminal Codes, available at: <http://www.legislationline.org/documents/section/criminal-codes/country/8>; Law #286 of 17 July 2009 of the Criminal Code, available at: http://www.legislationline.org/download/action/download/id/5895/file/Romania_Criminal_Code_am2012_EN.pdf

²⁹⁵ Iordache, R. (2014), “New Criminal Code enters into force on 1 February 2014”, European network of legal experts in the non-discrimination field, available at: <http://www.equalitylaw.eu/country/romania>

(2) If the act set out in par. (1) has resulted in bodily harm, the penalty shall consist of no less than 3 and no more than 10 years of imprisonment and a ban on the exercise of certain rights.

(3) Torture that resulted in the victim's death shall be punishable by no less than 15 and no more than 25 years of imprisonment and a ban on the exercise of certain rights.

(4) The attempt to commit the offences set out in par.

(5) No exceptional circumstance, regardless of its nature or of whether it involves a state of war or war threats, internal political instability or any other exceptional state, can be raised to justify torture. The order of a superior or of a public authority cannot be called upon to justify torture either.

(6) The pain or suffering that result exclusively from legal penalties and which are inherent thereto or caused by them do not constitute torture”.

Article 297: Criminalises abuse in the exercise of authority on the basis of a protected ground.

“(1) The action of the public servant who, while exercising their professional responsibilities, fails to implement an act or implements it faultily, thus causing damage or violating the legitimate rights or interests of a natural or a legal entity, shall be punishable by no less than 2 and no more than 7 years of imprisonment and the ban from exercising the right to hold a public office.

(2) The same punishment applies to the action of a public servant who, while exercising their professional responsibilities, limits the exercise of a right of a person or creates for the latter a situation of inferiority on grounds of race, nationality, ethnic origin, language, religion, gender, sexual orientation, political membership, wealth, age, disability, chronic non-transmissible disease or HIV/AIDS infection”.

Article 369: Incitement to hatred or discrimination is also condemned.

“Inciting the public, using any means, to hatred or discrimination against a category of individuals shall be punishable by no less than 6 months and no more than 3 years of imprisonment or by a fine”. This provision aims to punish incitement of the public, by any means, for hatred or discrimination against a category of persons. Considering the aim of this report, this article is one of the most important provisions since it sanctions hate speech as incitement to discrimination. This article already existed in the previous version of the Criminal Code, where it contained the listing criteria or grounds of discrimination (Article 317); the current provision has not kept that list because it is now present in the special Law relating to discrimination, which is Ordinance 137/2000, analyzed below.²⁹⁶

Article 381: Infringement of the free exercise of religion is punished.

“(1) The act of preventing or disturbing the freedom to practice any ritual specific to a religion, which was organized and operates according to the law, shall be punishable by no less than 3 months and no more than 2 years of imprisonment or by a fine.

(2) The act of compelling a person, by coercion, to take part in the service of any religion or to perform a religious act related to the practice of a religion shall be punishable by no less than 1 and no more than 3 years of imprisonment or by a fine.

²⁹⁶ CNCD (2014), “Comparative study on legislation sanctioning hate speech and discrimination in the member states of the European Union”, available at: <http://discursfaradiscriminare.ro/wp-content/uploads/2014/10/Comparative-Study.pdf>

(3) The same penalty shall apply to compelling an individual, by violence or threats, to perform a religious act forbidden by the religion, organized according to the law, to which they belong.

(4) Criminal action shall be initiated based on a prior complaint filed by the victim.”

This provision applies only the field of religion. Therefore, it deals with those religions which are organised and function in accordance with the law, excluding religious denominations which do not meet the legal requirements for recognition and registration by the State.²⁹⁷

Article 438: Criminalises genocide

“1) The act of committing, with the goal of destroying, in whole or in part, a national, ethnic, racial or religious group, one of the following offences:

a) Killing members of the group;

b) Harming the bodily or mental integrity of members of the group;

c) Subjecting the group to living conditions of a nature that will lead to their physical destruction in whole or in part;

d) Enacting steps to prevent births within the group;

e) Forced transfer of children belonging to one group to a different group, shall be punishable by life imprisonment or no less than 15 and no more than 25 years of imprisonment and a ban on the exercise of certain rights.

(2) If the acts described in par. (1) are committed in wartime, shall be punishable by life imprisonment.

(3) Conspiracy to commit the crime of genocide shall be punishable by no less than 5 and no more than 10 years of imprisonment and a ban on the exercise of certain rights.

(4) Incitement to commit the crime of genocide, committed directly, in public, shall be punishable by no less than 2 and no more than 7 years of imprisonment and a ban on the exercise of certain rights”.

Article 439: Addresses crimes against humanity.

“1) The act of committing, as part of a generalized or systematic attack on a civilian population, one of the following offences:

a) killing persons;

b) subjecting a population or parts of it to living conditions of a nature that will lead to their physical destruction in whole or in part, with the goal of destroying it;

c) slavery or trafficking in human beings, especially women or children;

d) deportation or forced transfer, in violation of the general rules of international law, of persons legally located on a certain territory, by expelling them to another state or territory or by using other means of constraint;

e) torturing persons who are under the perpetrator’s guard or under control in any other form, causing them to sustain physical or psychological harm, or grave physical or psychological suffering, that goes beyond the consequences of penalties accepted by international law;

f) rape or sexual assault, compelling to engage in prostitution, forced sterilization or illegal detention of a woman who was forced to become pregnant, with a goal to change a population’s ethnic composition;

²⁹⁷ The European Network of legal experts in the non-discrimination field (2014), “European Antidiscrimination Law Review”, available at: <http://ec.europa.eu/justice/discrimination/files/adlr-19-2014-final.pdf>

- g) harming certain persons' physical or psychological integrity;*
- h) causing certain persons to go missing, by force, with a goal to deprive them of the protection of the law, for an extended period, by kidnapping, arresting or detention, on orders or authorization, support or endorsement, from a state or a political organization, followed by refusal to admit that the person is deprived of freedom or to provide genuine information on the intentions concerning them or on their location, as soon as such information is requested;*
- i) imprisonment or any other form of serious deprivation of freedom, in violation of the general rules of international law;*
- j) persecution of a specific group or community, by deprivation of fundamental human rights or by grave restriction of their exercise of those rights, on political, racial, national, ethnic, cultural, religious, or sexual grounds or based on other criteria recognized as inadmissible under international law;*
- k) other similar inhuman acts that cause grave suffering or physical or psychological harm, shall be punishable by life imprisonment or no less than 15 and no more than 25 years of imprisonment and a ban on the exercise of certain rights.*
- (2) The same penalty applies to acts stipulated in par. (1) and committed as part of an institutionalized regime of systematic oppression and domination of one racial group over another, with the goal of maintaining the existence of that regime”.*

It is useful to point out that prior to the entry into force of the new Criminal Code, it had already been amended through the Law 278/2006 of 4 July 2006 (*Legea 278/2006*) to specifically punish crimes motivated by homophobia. Prior to 2006, Article 247 of the Criminal Code, (now Article 297), on abuse in the exercise of authority against the rights of the person, did not mention 'sexual orientation'.²⁹⁸ The same amendment introduced discriminatory intent as an aggravating circumstance in the commission of a criminal offence and extended the number of grounds for crimes sanctioned by Articles 247 and 317 of the Criminal Code, which were in force at that time.²⁹⁹

Civil Legislation

Regarding discrimination with respect to civil and administrative law provisions, it is worth mentioning a few pieces of legislation, as the Romanian legal framework does not provide a comprehensive and unique source of law dealing with discrimination as such:

- **Articles 70-77 of the Civil Code:** in Articles 70-77 of the new Romanian Civil Code, adopted in 2009, the respect to privacy and human dignity are enshrined, giving the same protection for individual patrimonial and non patrimonial rights.³⁰⁰ In particular, the first paragraph of Article 72 stipulates the right of everyone to respect to his/her

²⁹⁸ Turcanu, F. (2010), "Right-wing extremism and its impact on young democracies in the CEE-countries. State, society, NGOs on Right-wing extremism in Romania", p.8, available at: <http://www.fesbp.hu/common/pdf/Turcanu20101119.pdf>

²⁹⁹ Iodarche, R. (2008), "Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2007 Romania", European network of legal experts in the non-discrimination field, available at: http://www.migpolgroup.com/archive/public/docs/170.2007_Countryreportonmeasuresstocombatdiscriminati_on_Romania_EN.pdf

³⁰⁰ Sabau-Pop, I. (2014), "The new codes anchored in the realities of the European Union", in *Juridical Current* 2014, available at: http://revcurentjur.ro/arhiva/attachments_201401/recjurid141_15F.pdf

dignity, while in the following paragraph the content of this right is expressed, consisting of the honour and reputation of the person and the prohibition of any prejudice with respect to dignity or reputation, without the consent of the right holder or without the compliance of the limits of Article 75. These prejudices may take the form of an insult, which can be defined as the use of offending expressions or slander. As mentioned above, article 75 provides for two categories of limitations on the exercise of the right to dignity, such as limits that may be imposed by State authorities and limitations that might be necessary for the exercise of rights of others. For example, it does not constitute a violation of this right if the infringements are permitted by law or by international conventions and covenants on human rights to which Romania is party to (art. 75 par. (1)), nor the exercise of rights and freedoms in good faith and in compliance with the covenants and the international conventions to which Romania is part of (Article 75 par. (2)).³⁰¹

- **Romanian Labour Code (Articles 5, 6):** In 2013, the Romanian Labour Code³⁰² was amended through Law no. 2/2013, which deals with the regulations concerning employment disputes. Before the entry into force of this provision, Law no.62/2011 regarding Social Dialogue came into force. This piece of legislation is mentioned here as it has some specific provisions on discrimination. The Labour Code, in Article 5, provides for the principle of equal treatment between employees, specifically stating that: *“1) The principle of equal treatment for all employees and employers shall operate within the framework of the employment relationships. (2) Any direct or indirect discrimination against an employee based on sex, sexual orientation, genetic characteristics, age, national affiliation, race, colour, ethnicity, religion, political option, social origin, disability, family situation or responsibility, trade union affiliation or activity shall be prohibited. (3) The acts and deeds of exclusion, distinction, restriction or preference, based on one or several of the criteria referred to in paragraph (2), which have the purpose or effect of denying, restraining or removing the recognition, enjoyment or exercise of the rights provided for in the labour legislation shall constitute direct discrimination. (4) The acts and deeds apparently based on other criteria than those referred to in paragraph (2), but which effect to a direct discrimination, shall constitute indirect discrimination.”*³⁰³

Article 6, prohibits discrimination on the basis of different grounds of discrimination. *“Art. 6. [employee protection] (1) An employee engaged in an occupation shall enjoy working conditions adequate to the activity carried out, social protection, health and safety at work, and respect of his/her dignity and conscience, without discrimination. (2) An employee engaged in an occupation shall be recognized the right to collective bargaining, the right to protection of personal data, and the right to protection against unlawful dismissals. (3) Any discrimination based on sex shall, as regards all elements and conditions of compensation, be prohibited for equal work or work of equal value.”* The same principle is furthermore enshrined with regards to wage

³⁰¹ Ion, P. (2014), “Human Dignity In Romanian Civil Law”, University of Craiova, p.5, available at: http://mecanica.ucv.ro/ScoalaDoctorala/Temp/Rezumat/Paraschiv_Rezumat%20eng.pdf

³⁰² Law No 40/2011 amending and supplementing the Law No 53/2003 - Labour Code

³⁰³ Text available at: <http://www.ilo.org/dyn/travail/docs/1630/>

issues in Article 159, specifically dealing with the legal definition of wage and equal treatment: “(1) A wage is the consideration of the activity performed by the employee under the individual employment contract. (2) An employee shall have the right to a wage expressed in money for the activity performed under the individual employment contract. (3) When setting and providing the wage, any discrimination based on sex, sexual orientation, genetic characteristics, age, national affiliation, race, colour, ethnicity, religion, political option, social origin, disability, family situation or responsibility, trade union affiliation or activity shall be prohibited”.

- **Government Ordinance no. 137/2000:** G.O. no. 137 from 31 August 2000, subsequently approved through Law 48/2002, regulates the prevention and sanctions of all forms of discrimination. This ordinance came into force in 2000 and is known as “the Antidiscrimination Law”, as it is the main source of legislation dealing with discrimination.³⁰⁴ In some of its regular reports on Romania’s progress towards accession, the European Commission criticised Romanian legislation as regards its substantive content, in particular the concepts of indirect discrimination, harassment and victimisation, the burden and standard of proof, as well as the independence of Romania’s Equality Body, the National Council for Combating Discrimination (NCCD).³⁰⁵ In order to solve these issues and ensure a transposition process in compliance with EU law, in addition to other international standards, G.O. 137/2000 was modified and integrated by G.O. no. 77/2003, approved through Law 27/2004 and then modified again by Law 324/2006. These modifications were followed by three more in 2013³⁰⁶ in order to make the law compliant with EU legislation and other international standards.³⁰⁷ The legal framework that is now in force guarantees the transposition of the provisions of Council Directive 2000/43/CE on Racial Equality and also Directive 2000/78/CE, which provides specific regulation for equal treatment in the employment field. Within its text, two categories of provisions can be distinguished: the first deals with general principles and definitions together with the mechanism for combating discrimination and the second includes several sections of special provisions conceived as examples of discrimination in various fields.³⁰⁸ Article 2 defines discrimination as “any distinction, exclusion, restriction or preference based on race, nationality, ethnic appurtenance, language, religion, social status, beliefs, sex or sexual orientation, appartenance to a disfavoured category or any other criterion, aiming or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms in the

³⁰⁴Numhauser-Henning, A., and Laulom S. (2012), “Harassment related to Sex and Sexual Harassment Law in 33 European Countries”, European Legal experts in the discrimination field, available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/final_harassement_en.pdf

³⁰⁵ ERRC (2013), “For consideration by the European Commission on the Transposition and Application of the Race Directive and on the legal issues relevant to the Roma Integration”, Written Comments by ERRC, available at: <http://www.errc.org/cms/upload/file/romania-red-written-comments-5-april-2013.pdf>

³⁰⁶ Romanian Law 61/2013; Romanian Emergency Ordinance 19/2013; Romanian Law 189/2013.

³⁰⁷ OSCE (2006), “National Council for Combating Discrimination. Preventing and combating all forms of discrimination in Romania”, available at: <http://www.osce.org/odihr/21578?download=true>

³⁰⁸ Ionescu, I. (2005), “Summary of legislation implementing Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation with respect to sexual orientation in Romania”, available at: <http://media.leidenuniv.nl/legacy/Romania%20-%20Summary%20of%20legislation%202006.pdf>

political, economic, social and cultural field or in any other fields of public life".³⁰⁹ More specifically, Article 2(5) provides a definition of harassment, stating that: "Harassment, which is sanctioned by law, includes any behaviour which, on grounds of race, nationality, ethnic origin, language, religion, social category, belief, gender, sexual orientation, membership of a disadvantaged category, age, handicap, refugee status, being an asylum seeker, or on any other ground, has the effect of creating an intimidating, hostile, degrading and offensive environment". This definition does not particularly refer to the purpose or effect of violating the dignity of a person. The concept of harassment is also stated in the Equal Opportunities Law (see below, Law 202/2002).³¹⁰ Article 4 instead provides a definition of Disadvantaged group "the category of persons that is either placed in a position of inequality as opposed to the majority of citizens due to personal (identity) differences or is faced with rejection and marginalisation". Article 15 relates directly to hate speech as it states that: "Under the present ordinance, unless the act is subject to criminal law, any public behaviours, having the character of nationalist-chauvinistic propaganda, incitement to racial or national hatred or conduct which has the purpose or aim at affecting dignity or creating an intimidation, hostile, degrading, humiliating or offensive atmosphere directed against a person, group of persons or a community and related to their belonging to a certain race, nationality, religion, social category or to a disadvantaged category or belief, sex or sexual orientation thereof." As regards the offences mentioned in Article 15, Article 26 states that the sentence for these crimes consists of a fine of 1000 to 30000 lei, if perpetrated against a person, or a fine of 2000 lei to 100000 lei if perpetrated against a group of people or a community. The Ordinance also stipulates that the Council or the Court itself may compel the person responsible for committing the act of discrimination to publish, in the public media, a summary of the judicial ruling.³¹¹ After all of the modifications made in 2013, current legislation provides for a mixed system of remedies of a civil and administrative nature. Additionally, Article 19 of the anti-discrimination Law provides for the establishment of the National Council for Combating discrimination (NCCD).³¹² However, the scope of the anti-discrimination Law was substantially diminished after a series of decisions were upheld in 2008 by the Romanian Constitutional Court (RCC), which limited both the mandate of the NCCD and of the civil courts in relation to cases of discrimination generated by legislative provisions.³¹³ This Law is enforceable nation-wide and is complemented by relevant provisions found in area-specific legislation, such as legislation regarding the rights of persons with disabilities, laws on equal opportunities for men and women, the Criminal code and the Labour code. It

³⁰⁹ ILO (2003), Observation (CEACR), adopted in 2002 and published in the 91st ILC session (2003), available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2212167

³¹⁰ Numhauser-Henning A., and Laulom S. (2012), "Harassment related to Sex and Sexual Harassment Law in 33 European Countries", European Legal experts in the discrimination field, available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/final_harassement_en.pdf

³¹¹ CNCD (2014), "Comparative study on legislation sanctioning hate speech and discrimination in the member states of the European Union", available at: <http://discursfaradiscriminare.ro/wp-content/uploads/2014/10/Comparative-Study.pdf>

³¹² Iodarche R. (2014), "Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013 Romania", European network of legal experts in the non-discrimination field, p.3, available at: <http://www.refworld.org/pdfid/541acc0f4.pdf>

³¹³ Detailed analysis of the activities of the NCCD can be found in the section below entitled legal procedure.

must be pointed out that in case of conflict among different provisions all dealing with discrimination, the 2000 Anti-discrimination Law would prevail as *lex specialis*.³¹⁴

- **Law 48/2002 (16/1/2002) on the Prevention and Sanction of All Forms of Discrimination:** This Act, which adopts and substantially amends the above analyzed Government Ordinance, in its Article 1 and 2 proclaims the principle of equality between all citizens and the prohibition of all discrimination, notably that based on gender. Article 1 stipulates that the principle of equality between citizens is guaranteed in a number of fields, among which is included the right to be protected against any violence or abuse, the right to inherit, and the right to an equal pay for equal work. Gender discrimination is defined in Article 2.1 as any differentiation, exclusion, restriction or preference based on sex. Article 2.4 adds that positive measures aiming to protect disfavoured groups do not constitute discrimination: these must be measures taken by public authorities or private entities in favour of a person, a group of persons or of a community, and aim to ensure their natural development and the effective achievement of their right to equal opportunities, as opposed to other persons, groups of persons or communities. Article 2.5 states that the elimination of all forms of discrimination will be realized through the adoption of special measures of protection for those who do not enjoy equal opportunities, and through sanctions against discriminatory behaviours enumerated in the Act. The Act applies, according to Article 3, to all natural and legal persons, public or private, and its scope includes: employment conditions; recruitment and promotion criteria; access to all levels of professional orientation, refresher courses and professional training; social protection and social security; public services or other services, access to goods and facilities; the education system; and enforcement of public peace and order. Law 48/2002 also gives a list of fields where gender discrimination is prohibited: Equal employment opportunities: exercise of an economic activity or of a profession (Art. 5); work relations and social care (Art. 6); hiring conditions (in this respect, employment agencies shall ensure free and equal access to all job advertisements, (Art.7); right to social security benefits (Art. 8); access to administrative, legal, health, and other public services, to goods and facilities (Art. 10); access to education (Art. 15); freedom to choose one's residence (Art. 17); and access to public places (Art. 18). Lastly, Article 19 prohibits behaviour which offends dignity or creates an intimidating, hostile, degrading or offending atmosphere on the basis of one's gender. Regarding sanctions, Infractions of Act 48/2002 are punishable by fines ranging from 1 million Romanian lei to 10 million lei if the discrimination affects a natural person; from 2 million lei to 20 million lei, if the discrimination concerns a group of persons. Moreover, *ex* Article 20, discrimination victims are entitled to an indemnity proportionate to the damage suffered, as well as to the restoration of the *status quo ante* or the annulment of the situation created by the discrimination event. Article 22 also states that NGOs dealing with Human Rights issues can institute proceedings when discrimination against a community or group of persons is alleged in their field of activity. They can also represent a natural person who is the victim of discrimination.³¹⁵

³¹⁴ *Ibid.*, p. 8.

³¹⁵ Legislationline, OSCE, available at: <http://www.legislationline.org/topics/country/8/topic/84>

- **Emergency Ordinance No. 31 of 13 March 13 2002**: According to this provision, fascist or xenophobic symbols, uniforms and gestures are punishable with imprisonment of between six months to five years. Article 3 provides that establishing a fascist, racist or xenophobic organisation is punishable by imprisonment of 5 to 15 years and the loss of certain rights. Article 4 punishes the dissemination, sale or manufacture of fascist symbols, of a racist or xenophobic nature and possession of such symbols with imprisonment, ranging from 6 months up to 5 years and the loss of certain rights. Article 5 states that promoting the culture of persons guilty of committing a crime against peace and humanity or promoting fascist, racist or xenophobic ideology through propaganda, committed by any means, is punishable by imprisonment from 6 months to 5 years and the loss of certain rights. Article 6 states that the denial of the holocaust in public or to the effects thereof is punishable by imprisonment from 6 months to 5 years with the loss of certain rights. However, it allows for the dissemination, sale or manufacture (or storage for the purpose of dissemination) of the mentioned symbols, as well as their public use, only if these objects are being used for the purpose of art, science, research or education.³¹⁶
- **Romanian Law 76/2009**: reviewed and subsequently approved the enactment of **Emergency Ordinance 75 of 11 July 2008** concerning measures taken to solve financial issues in the area of justice-related work. While, the Emergency Ordinance weakened the mandate of the national Equality Body in relation to discrimination in the area of salary related rights and benefits of civil servants; Law 76/2009 superseded this action and repealed the provision, so that now the NCCD and the regular Courts remain responsible for dealing with cases of discrimination, also with regard to the salary-related rights of civil servants.³¹⁷
- **Law 202/2002**: on equal opportunities and treatment between men and women regulates measures to promote equal opportunities and treatment for women and men in all spheres of public life in Romania and defines specific terms in the field, such as: equal opportunities for women and men, gender discrimination, direct, indirect discrimination, harassment and sexual harassment, equal pay for work with equal value, positive actions and multiple discrimination.³¹⁸ This Law, together with the Anti-discrimination law (G.O. 137/2000), transposes Directives 2006/54 and 2004/113/EC, providing adequate compliance of Romanian national legislation to the

³¹⁶ Christians, L.L., “Romania 2011 Expert workshop on the prohibition of incitement to national, racial or religious hatred - Annex – European Legislations”, available at: <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/Annexes/Romania.pdf>

³¹⁷ Iodarche, R. (2012), “Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC, Country Report 2011 Romania”, available at: http://www.non-discrimination.net/content/media/2011-RO-Country%20Report%20LN_final.pdf

³¹⁸ *National Review* (2014), Romania: “Implementation of the Beijing Declaration and Platform for Actions (1995) and the outcomes of the twenty-third special session of the General Assembly (2000) in the context of the twentieth anniversary of the Fourth World Conference on Women and the adoption of the Beijing Declaration and Platform for 2015”, available at: http://www.unwomen.org/~media/Headquarters/Attachments/Sections/CSW/59/National_reviews/Romania_review_Beijing20.pdf

European Union framework on harassment on the grounds of sex and sexual harassment. As regards harassment, the definition available here is: *‘any undesirable gender-based behaviour, with the purpose or effect of negatively affecting the dignity of a person and to create a degrading, intimidating, hostile, humiliating or offensive environment’*, while sexual harassment is defined as *“any undesirable sex-related behaviour expressed in a verbal, nonverbal or physical manner with the purpose or effect of negatively affecting the dignity of a person and to create a degrading, intimidating, hostile, humiliating or offensive environment”*. Article 4(g) provides that *“sex-based discrimination shall be understood as direct and indirect discrimination, harassment and sexual harassment of a person by another person, at the workplace or in any other place where that person performs activities”*. The provisions of the Equal Opportunity Law are applicable to the fields of labour, education, health, culture and public information, politics, decision making, access to and supply of goods and services and to any other field regulated by special laws. *Ex* Article 3, the Law is not applicable to religious cults; however, the fields covered by the Romanian national legislation are more than the ones provided for by Directives 2006/54/EC and 2004/113/EC.³¹⁹

- **Law No. 677/2001:** concerns the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data. The purpose of the Law is to guarantee and protect an individual’s fundamental rights and freedoms, with specific reference to the right to personal, family and private life within the processing of personal data.³²⁰
- **Law 148/2000:** regulates Publicity, Advertising, and Communication issues. Law no. 148/2000 establishes that advertising has to be decent, fair and developed in the spirit of social responsibility. Article 6(d) of this provision explicitly prohibits discrimination based on race and other grounds. The Law states the following: *“Advertising is illegal if: a) it is misleading; b) it is subliminal; c) it offends human dignity and public morality; d) it includes discrimination based on race, sex, language, origin, social origin, ethnic identity or nationality; e) it infringes religious or political beliefs; f) it damages the image, honour, dignity and privacy of individuals; g) it exploits people’s superstition, credulity or fear; h) it damages the safety of people or incites to violence; i) it encourages a behaviour prejudicial to the environment; j) it promotes the sale of goods or services that are produced or distributed contrary to law.”*³²¹

Legal Framework on Racism

³¹⁹ Numhauser-Henning, A., and Laulom S. (2012), “Harassment related to Sex and Sexual Harassment Law in 33 European Countries”, European Legal experts in the discrimination field, available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/final_harassement_en.pdf

³²⁰ *Ibid.*

³²¹ Petcu, D. and Suciuc S. (2013), “Legal framework for advertising communication”, Tibiscus University of Timișoara, Politehnica University of Timișoara, available at: http://fse.tibiscus.ro/anale/Lucrari2013/Lucrari_vol_XIX_2013_095.pdf

While many of the provisions listed above deal not only with discrimination, but also to some degree with racism, they have been categorized within the wider framework of discrimination to ensure a more universal approach to the topic. However, the following two pieces of legislation particularly target racism and are listed in a separate section.

Civil Legislation

- **Ordinance 11/2006:** is a specific piece of legislation dealing with racism in the area of sport. Ordinance 11/2006 regulates racism in stadiums in order to prevent and reduce this phenomenon. The ordinance bans materials that might incite spectators to racial hatred and xenophobia and holds event organizers responsible for incidents taking place in this sphere. The legislative act establishes tough fines and consequences for the commitment of racist and violent acts by spectators or organisers in stadiums. Hooligans can be prohibited from attending sporting events for a period of 6 months up to 3 years.³²²
- **Law 4/2008:** With the aim of strengthening Ordinance 11/2006, Law 4/2008 on preventing and combating violence related to sporting competitions, games and racist manifestations was adopted. In this way, Law 4/2008 classifies as a criminal offence the use, within sports arenas, of fascist, racist and xenophobic symbols and lays out the relevant sanctions related to these offences.³²³

Hate Speech Law

A legal definition of hate speech does not exist. However, experts in the field have attempted to define it as “any speech, gesture or conduct, writing, or display which is forbidden because it may incite violence or prejudicial action against or by a protected individual or group, or because it disparages or intimidates a protected individual or group”.³²⁴ Despite the lack of a legally binding definition of hate speech and a specific source of legislation on the topic, the laws regarding discrimination and, in particular the Criminal Code provisions that incriminate the hate instigation, can be applied extensively to hate speech cases. A specific provision on hate speech is the previously-mentioned Law 278/2006, which amended the Criminal Code. It introduced hate speech as a form of incitement to discrimination based on any of the grounds of discrimination sanctioned by the anti-discrimination law, rectius by the current Article 369 of the Criminal Code (ex article 317).³²⁵

³²² Nicolae, V. (2006), “Racism in Romanian football”, Show Racism The Red Card, available at: <http://www.theredcard.ie/news/?p=88>

³²³ CoE (2013), “Consultative visit to Romania on the implementation of the Convention 14-17 November 2012”, available at: http://www.coe.int/t/dg4/sport/Commitments/violence/T-RV%282013%293%20FINAL_EN_Draft_report_Consultative_visit_Nov2012_with%20Romanian%20comments.pdf

³²⁴ CoE and ELSA (2014), “International Legal Research Group on hate speech online”, p. 426, available at: http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

³²⁵ Iodarche R. (2008), “Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2007 Romania”, European network of legal experts in the non-discrimination field, available at: http://www.migpolgroup.com/archive/public/docs/170.2007_Countryreportonmeasuresstocombatdiscriminati on_Romania_EN.pdf

The forms of hate speech expressly considered by Romanian law are “instigation to hatred” and “discriminatory acts”: both are enshrined in the Constitution as limits of the fundamental right of freedom of expression, but only the former is considered a Crime, sanctioned by imprisonment or criminal penalties (Romanian criminal Code); the latter constitutes contravention, therefore it is punishable only by an administrative pecuniary penalty.³²⁶

Law concerning Hate Speech Online

The Internet is a place where people often feel free to express their opinions, and, yet, it can also serve as a breeding ground for criminal activity. Users often do not experience and do not feel any judicial constraint in terms of what they can write and do online and they are often unaware of the laws and regulations existing and applicable to certain behaviour. In addition, although anonymity is often perceived as a shield against statements and other actions which could constitute offences or criminal acts, it cannot be used as a tool for expressing racist or xenophobic ideas online, even on the basis of the right to free speech. The pieces of legislation that are applied to Internet services, as part of the information society services, are the following:³²⁷

1. **Government Emergency Ordinance no. 111 of 14 December 2011:**³²⁸ later modified by Law no. 140 from 18 July 2012³²⁹ dealing with electronic communications. This emergency ordinance establishes the general legal framework for activities connected to electronic communication networks and services, and adopts the measures necessary for promoting competition in this field. In addition, it provides the regulatory framework the relations between providers of electronic communication networks and services and end-users. The ordinance specifically codifies end-users’ rights and the obligations required of providers of electronic communication networks and services.

2. **Law no. 304/2003:** addresses universal service and the rights of users regarding networks and electronic communication services.³³⁰ Article 3 of the Law states that: *“The right of access to the universal service represents the right of all end-users in the Romanian territory to benefit from the provision of services which are within the scope of the universal service, at a certain quality level, irrespective of geographical location and at affordable prices. (2) The services which are within the scope of the universal service are the following: a) provision of access to the public telephone network, at a fixed location; b) directory enquiry services and making available of directories of subscribers; c) access to public pay telephones”*.

³²⁶ CoE and ELSA (2014), “International Legal Research Group on hate speech online”, available at: http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

³²⁷ *Ibid.*

³²⁸ To see the entire text of the E.O., please visit:

http://www.ancom.org.ro/en/uploads/links_files/oug_2011_111_en.pdf

³²⁹ To see the entire text of the law, please visit:

https://jutalaw.co.za/media/filestore/2012/08/Electronic_Communications_Amendment_Bill_2012_Part1.pdf

³³⁰ For the entire text of the E.O., please visit: http://www.ancom.org.ro/Portals/57ad7180-c5e7-49f5-b282-c6475cdb7ee7/legea_304_2003_republicata_mai%202008_en.pdf

Article 4 enshrines the principle of non discrimination in establishing the policy and the strategy for the implementation of universal service stating that *“The Ministry of Communications and Information Technology shall establish the policy and the strategy for the implementation of universal service, whilst observing the principles of transparency, objectivity, proportionality and non discrimination”*.

3. **Law no. 365/2002 on E-Commerce:** The purpose of this Law is to establish the conditions for administering services to the information society, providing security for e-commerce, issuing and using electronic payment instruments, using identification data for the performance of financial operations, insuring a favourable framework for free movement and developing security mechanisms these services.

As can be understood from the paragraph above, Romanian law provides for the regulation of different online issues, such as Ecommerce, Copyright, Internet child pornography and also privacy and human rights.³³¹ However, there are no specific sources of law dealing with hate speech online.³³² Particular aspects related to online content are subject to Law no. 365/2002, which regulates electronic commerce. This Law states that general laws regarding civil and criminal liability are applicable also to the providers or suppliers of online services. Therefore, the Romanian Civil Code provisions related to tort or contractual liability are applicable whenever the providers cause to any third party damage related to defamation as result of an extra-contractual action or a breach of a contractual obligation. Similarly, any conduct of an online provider that constitutes an infringement of criminal law will fall under the Criminal Code provisions.³³³ Hence, on the basis of the dispositions of Law no. 365/2002, when a case of hate speech online occurs, the service supplier or the host will face the following obligations:

1. It will be responsible for the discriminatory or racist content produced by its agents, but it will not be responsible for the discriminatory or racist content hosted or conveyed in transit without the host/provider’s knowledge, since Article 11 of Law no. 365/2002 on service provider liability states that *“1) The service providers are subject to the legal provisions regarding the civil, criminal or contravention liability as long as the law does not provide otherwise. (2) The service providers are responsible for the information they provide. (3) The service providers are not liable for the information that is sent, stored or to which they facilitate the access under the conditions provided by arts. 12-15”*.

2. A hosting service must inform any user on the way in which personal data will be treated, protected, stored and eventually transmitted to other people. Any user is entitled to ask the operator to change, block, delete or anonymize any information that may cause damage (Law no. 677/2001).

3. In accordance with Article 16 of Law 365/2002, in the case of illegal content or activities being carried out on their systems, the obligations of the service providers are the following:

³³¹ For a comprehensive list of Romanian IT Laws, please visit: http://www.legi-internet.ro/en/legi_rom.htm

³³² For a complete referencing of IT Laws, please see: <http://www.legi-internet.ro/en/romanian-itc-legislation-and-articles.html>

³³³ Baiculescu C. (2008), “Online Business in Romania”, World Online Business Law, p.22, available at: <http://www.musat.ro/pdf/World%20Online%20Business%20Law%20-%20Catalin%20Baiculescu,%20Horatiu%20Dumitru.pdf>

*“1) The service providers are bound to notify the competent public authorities right away, about activities that seem illegal carried out by the recipients of their services or about information supplied by these ones that seem illegal. (2) The service providers are bound to communicate the authorities mentioned at paragraph (1) right away, at their request, information that may allow the identification of the recipients of their services with whom these providers have concluded contracts regarding the permanent information storage. 3) The service providers are bound to interrupt, temporarily or permanently, the transmission into a communication network or the storage information supplied by a recipient of the respective service, especially by eliminating the information or by blocking the access to it, the access to a communication network or the supply of any other information society service, if these measures were required by a public authority, ex-officio or at the receipt of a claim or complaint from any person. (4) The claim mentioned at paragraph (3) can be made by any person who considers himself (herself) prejudiced by the contents of the respective information. The claim or complaint is made in writing, showing the reasons that substantiate it and will compulsorily be dated and signed. The claim cannot be forwarded if a trial has already been initiated with the same subject and with the same parties. (5) The decision of the authority must be motivated and is notified to the involved parties within 30 days from the date the claim or complaint has been received or, if the authority acted ex-officio, within 15 days from the date it has been issued. (6) The interested person can appeal against a decision made according to the provisions of paragraph (3), within 15 days from the notification, to the competent court. The claim is judged in emergency procedure by citing the parties. The sentence is final”.*³³⁴

4. Article 11 of Government Decision 1308/2002 for the approval of the Methodological Norms for the application of Law 365/2002 on electronic commerce provides for a procedure that allows any person to complain against illegal activities conducted by the service addressee or about the apparent illegal information they deliver.³³⁵ It states as follows: *“(1) The service providers of information society services offering the services provided for by arts. 12 to 15 of the law are not bound to monitor the information they send or store and are nor bound to actively search for data regarding apparently illegal activities or information in the domain of information society services that they supply. (2) The obligations provided for by art.16 paragraph (1) and (3) of the law are considered as fulfilled if the service providers having received a complaint or claim from any person regarding apparently illegal activities carried out by the recipients of his (her) services or regarding apparently illegal information supplied by those, notifies in 24h at the latest, the competent public authorities and take all the measures not to alter the respective information. (3) The service providers have the obligation to implement a free of charge procedure by means of which complaints or claims may be sent to them from any person regarding the apparently illegal activities carried out by the recipients of their services or regarding apparently illegal information supplied by those. (4) The procedure mentioned in paragraph (3) must:*

³³⁴ For the full text of Law no.365 of 7 June 2002 on electronic commerce, please visit: <http://www.legi-internet.ro/en/e-commerce.htm>

³³⁵ For the full text of Law no. 1308 dated 11/20/2002, please visit: <http://www.legi-internet.ro/en/standecommerce.htm>

a) be available by electronic means also;
b) ensure the receipt of complaints or claims within 48h at the most from the moment of they were sent.
(5) The provider is bound to make the procedure provided for by paragraph (3) public on his (her) own Internet page.”

5. Finally, the NCCD has the obligation to inform The ministry of Communications and Information Society about any decision that may influence the service providers.³³⁶

As regards cybercrime *stricto sensu*, it is prosecuted under Law 161/2003, the Anti-Corruption Law, along with some other specific provisions under the previously mentioned Law 365/2002 on Electronic Commerce. Additional regulatory elements include the Law on Free Access to Information of Public Interest (2001); the Law on the Protection of Persons concerning the Processing of Personal Data and the Free Circulation of Such Data (2001); and the Law on the processing of personal data and the protection of privacy in the electronic communications sector (2004).³³⁷ In conclusion, Romania does have existing legislation in place redressing and prohibiting hate speech, although not specific and detailed, so that anonymity and freedom of speech are restricted if another person’s rights are infringed upon.³³⁸

The Effectiveness of the Romanian Legal Framework towards Hate Crime and Racism

As regards the effectiveness of the Romanian legal framework on discrimination and racism, and therefore the effectiveness of the national legislation in response to hate crime and hate speech events, the main problems and concerns are discussed in the following section.

In its third report from 2014, the European Commission against Racism and Intolerance (ECRI) made recommendations to the Romanian authorities for ensuring that the Anti-discrimination Law is fully applied. The main concern is to guarantee that the existing criminal law provisions against racism have a real deterrent effect, and that the maximum penalties provided by law for these offences are actually applied.

While it is commendable that Romania maintains a comprehensive criminal legal framework in the field of racism, ECRI notes that public insults and defamation against a person or a group of persons on the grounds of their “race, colour, language, religion, citizenship or national/ethnic origin” are not prohibited under criminal law, contrary to what is recommended in GPR No. 7 paragraph 18 (b). The response of the Romanian authorities to

³³⁶ CoE and ELSA (2014), “International Legal Research Group on hate speech online”, available at: http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

³³⁷ Levin, A., and Ilkina D. (2013), “Securing Cyberspace: A Comparative Review of Strategies Worldwide”, Ted Rogers School of Management and Ryerson Universities, Privacy and Cyber crime Institute, available at: http://www.ryerson.ca/content/dam/tedrogersschool/privacy/AODAforms/Ryerson_cyber_crime_final_report_%20AODA.pdf

³³⁸ CoE and ELSA (2014), “International Legal Research Group on hate speech online”, available at: http://files.elsa.org/AA/Final_Report_OHS_Final.pdf

this observation is that those acts cannot be criminalised since insults and defamation are not considered offences under the Criminal Code, insults being punished as administrative offences by Article 3 of Law 61/1991. However, ECRI points out that the high incidence of hate speech in traditional media, as well as on the Internet, requires an adequate criminal measure, in addition to the actions of redress provided by the Anti-discrimination and Audiovisual Laws. In ECRI's point of view, the lack of criminalization of these provisions represents a legal gap that could be filled by limiting the prohibition of insults and defamation only to those cases which are related to racism and racial discrimination.

As regards the implementation of the law, ECRI recommended that Romanian authorities make an effort to train judges, magistrates, lawyers and law-enforcement officials in order to have a better understanding of the existing law and to apply it more fully. ECRI also recommended that the authorities conduct awareness raising activities so that victims of discrimination may become informed of their rights and benefit from the Anti-discrimination Law and the powers of the NCCD.³³⁹

There is no relevant information with regards to the application of racist motivations as an aggravating factor, or the application of criminal law provisions against racism. Experts have also reported that there is no single institution in charge of the systematic collection of data concerning the breach of criminal law provisions against racism, and there is no official information or statistics on the issue. ECRI points out that this information could be a useful tool in evaluating the effectiveness of criminal law provisions against racism. In its 2014 Report, ECRI recommends that the authorities elaborate a comprehensive data-collection system on the application of criminal law provisions in order to record the number of investigations carried out by the police, the cases referred to the prosecutor, the number of cases pending before the courts and their judgments.³⁴⁰

In recent years, international monitoring Bodies have expressed particular concern about racism in Romania. ECRI noted in its 2014 report that *"Stigmatising statements against Roma are common in the political discourse, encounter little criticism and are echoed by the press, the audiovisual media and on the Internet. No effective mechanism is in place to sanction politicians and political parties which promote racism and discrimination."* In line with these statements, the UN Committee on the Elimination of Racial Discrimination (CERD) stated in its 2010 Concluding Observations on Romania that it was *"concerned at reports of the spread of racial stereotyping and hate speech aimed at persons belonging to minorities, particularly Roma, by certain publications, media outlets, political parties and certain politicians"*. CERD also expressed its concern regarding *"the excessive use of force, ill-treatment and abuse of authority by police and law enforcement officers against persons belonging to minority groups, and Roma in particular"*.³⁴¹

³³⁹ CoE (2014), ECRI Report on Romania (fourth monitoring cycle), available at: <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/romania/ROM-CbC-IV-2014-019-ENG.pdf>

³⁴⁰ *Ibid.*, p. 19.

³⁴¹ ERRC (2015), "For consideration by the United Nations Committee Against Torture, at its 54th Session (20 April to 15 May 2015)", Written comments of ERRC, available at: <http://www.errc.org/cms/upload/file/romania-uncat-submission-9-april-2015.pdf>

Procedural Issues and Mechanisms

Following the entry into force of the Anti-discrimination Law (G.O. 137/2000) the legal procedure for establishing a case of discrimination has been clarified. *Ex* Article 20 and Article 27 of Government Ordinance 137/2000, preventing and sanctioning all forms of discrimination, there are two main legal procedures for sanctioning discriminatory behaviour. According to Article 20, paragraph 3, the first involves filing a complaint with the National Council for Combating Discrimination (NCCD), where the victim has the right to request the removal of the consequences of discrimination, in addition to the re-establishment of the *status quo ante* the act of discrimination.

The second path, *ex* Article 27, paragraph 1, is a proper legal action for damages filed in a civil court - unless the act is criminal and in such a case the Criminal Code provisions apply - in order to request compensation and re-establish the situation prior to the discriminatory act or to nullify the situation created by discrimination.³⁴²

These two procedures are optional, and they are not mutually exclusive. In effect, a victim of discrimination can use them in parallel. The decisions of the Equality Body are relevant to any civil case, but they are not binding in the court system.³⁴³

1) The National Council on Combating Discrimination - NCCD

The previously mentioned national Equality Body, *Consiliul Național pentru Combaterea Discriminării*, (National Council on Combating Discrimination - NCCD) was established in 2002 and began opening regional offices in 2007. It is an autonomous public authority under the control of the Parliament, and its independence is codified in the Anti-discrimination Law. Article 19 of the Ordinance provides a list of functions of the NCCD. They include several activities which aim to prevent discrimination through awareness raising and education campaigns, research projects, compilations of relevant data, mediation between parties, and providing support for the victims. *Ex* paragraph 2 of Article 19, discrimination case investigations can be conducted *ex officio* as well as at the request of any natural or legal person. Article 19 also provides for the initial preparation of legislative bills in order to harmonise the legal provisions with the principle of equality.

The NCCD is in charge of dealing with all forms of discrimination based on race, nationality, ethnic origin, language, religion, gender, sexual orientation, age, disability, HIV positive status, belonging to a disadvantaged group or any other criterion. Moreover, Article 23

³⁴² ERRC (2013), "For consideration by the European Commission on the Transposition and Application of the Race Directive and on the legal issues relevant to the Roma Integration", Written Comments by ERRC, available at: <http://www.errc.org/cms/upload/file/romania-red-written-comments-5-april-2013.pdf>

³⁴³ The European Network of legal experts in the non-discrimination field (2014), "European Antidiscrimination Law Review", p.20, available at: <http://ec.europa.eu/justice/discrimination/files/adlr-19-2014-final.pdf>; FRA (2011), "Access to justice in Europe: an overview of challenges and opportunities", available at: https://fra.europa.eu/sites/default/files/fra_uploads/1542-access-to-justice-2011-country-RO.pdf

provides for the establishment of a Steering Board, which is a collegial, deliberative decision-making body responsible for the fulfilment of the duties prescribed by law.³⁴⁴

If the NCCD verifies the existence of an act of discrimination, there are two categories of sanctions available: administrative fines and written warnings. Written warnings are not explicitly regulated in the Anti-discrimination Law but the NCCD applies the Law on Administrative Sanctions that mentions written warnings as sanctions for administrative offences that are less serious. In the past, even in cases where the NCCD found that discrimination had occurred, it used to simply issue a recommendation, which did not have a legal nature. This practice was contested, and, in 2013, was finally declared unlawful by the High Court of Cassation and Justice. According to the Association for the Defence of Human Rights in Romania – Helsinki Committee (APADOR-CH), NCCD’s recommendations or opinions still have no legal value.

It is difficult to assess the effectiveness of its mandate and the effective, proportional and dissuasive character of the sanctions issued. This is particularly due to the NCCD practice of not issuing administrative fines, but rather sanctioning cases of discrimination only with administrative warnings or recommendations. These practices do not produce remedies that are of an effective, proportionate and dissuasive character, as warnings do not imply financial penalties.³⁴⁵

No legal fees are incurred by the NCCD. The NCCD rules on the existence of a discriminatory act and issues an administrative sanction, while compensation claims for discrimination can be decided only in a civil court.³⁴⁶

In practice, the NCCD is a quasi-judicial body, having features both of a promotional body and of a tribunal. As a positive development, in 2008, the Romanian Constitutional Court seized the chance to clarify the legal status of the NCCD during a case challenging the constitutionality of Articles 16-25 of the Anti-Discrimination Law that established the mandate of the NCCD. The Court affirmed that *“the NCCD is an administrative agency with jurisdictional mandate, which enjoys the required independence in order to carry out administrative jurisdictional activities and complies with the constitutional provisions from Art. 124 on administration of justice and Article 126 (5) prohibiting the establishment of extraordinary courts of law.”*³⁴⁷

³⁴⁴ CNCD (2014), “Comparative study on legislation sanctioning hate speech and discrimination in the member states of the European Union”, available at: <http://discursfaradiscriminare.ro/wp-content/uploads/2014/10/Comparative-Study.pdf>

³⁴⁵ The European Network of legal experts in the non-discrimination field (2014), “European Antidiscrimination Law Review”, p.20, available at: <http://ec.europa.eu/justice/discrimination/files/adlr-19-2014-final.pdf>

³⁴⁶ FRA (2011), “Access to justice in Europe: an overview of challenges and opportunities”, available at: https://fra.europa.eu/sites/default/files/fra_uploads/1542-access-to-justice-2011-country-RO.pdf; Committee on the elimination of racial discrimination (2008), “Reports submitted by States Parties under article 9 of the Convention: Sixteenth to nineteenth periodic report due in 2007 ROMANIA”, P.86, available at: http://www.bayefsky.com//reports/romania_cerd_c_rou_16_19_2008.pdf

³⁴⁷ Tăvală, E.P., “Religion and Discrimination Law in Romania”, available at: <http://www.law.cf.ac.uk/clr/research/Oxford%20--%20Romania.pdf>

NCCD's decisions can be appealed under the administrative litigation rules set out by the courts. Article 20(9) of the Anti-discrimination Law allows for the right to appeal according to the provisions of Administrative Litigation Law. The appellate court can sustain the NCCD decision, maintain it in part or can reverse the decision. Aside from the Courts of Appeal, the High Court of Cassation and Justice serves as a higher authority employed to exhaust all domestic remedies. In civil cases the Code of Civil Procedure allows for the right to appeal to the appellate courts for examining questions of law and procedural aspects, not for addressing questions concerning facts of a case.³⁴⁸

As specifically regards the procedural aspects, the decision of the NCCD is communicated to the parties within 30 days of its adoption and takes effect on the date of the communication. It can be appealed to the administrative court (Court of Appeal) within 15 days from the date of communication. Decisions that are not appealed within 15 days of law are considered accepted.

In practice, an appeal to the administrative court on NCCD's decisions consists in formulating a request to the Court of Appeal's Administrative and Fiscal Department. In terms of jurisdiction, the first instance is the Court of Appeal, since it is contesting an act issued by a central public authority (CNCD), such that the rule applies in article 10 of the first sentence of Law no. 554/2004 on administrative litigation.

The judgment of first instance from the appeal court may be appealed within 15 days of the communication from its Administrative and Fiscal Department. This appeal will then be sent to the High Court of Cassation and Justice, as required by art. 20. 1 of Law no. 554/2004. Following a final judgement from the High Court, the case is resolved irrevocably.

The petitions received by the NCCD in 2013 totalled 858, in which 61 dealt with nationality, 13 with sexual orientation, and 459 with employment and occupation. Only 3 concerned the issue of race.³⁴⁹ The chart below gives a detailed situational analysis of the complaints filed with the NCCD.

³⁴⁸ FRA (2011), "Access to justice in Europe: an overview of challenges and opportunities", available at: http://fra.europa.eu/sites/default/files/fra_uploads/1542-access-to-justice-2011-country-RO.pdf

³⁴⁹ Iodarche, R. (2014), "Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013 Romania", European network of legal experts in the non-discrimination field, available at: <http://www.refworld.org/pdfid/541acc0f4.pdf>

Figure 2 – Complaints filed with the NCCD by year and type³⁵⁰

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Ground												
Non-contagious chronic disease	0	0	6	2	3	2	4	2	0	1	6	9
Sexual orientation	1	5	6	9	6	7	6	6	3	8	3	13
HIV/AIDS	0	1	15	10	5	3	7	1	2	1	5	4
Language	0	2	1	2	2	7	11	13	8	10	43	38
Beliefs	4	12	23	19	8	10	14	13	3	2	15	14
Religion	2	9	9	11	8	12	15	6	3	5	5	11
Vulnerable group	2	0	10	6	4	26	22	9	2	14	10	13
Age	6	11	14	17	10	10	24	10	8	16	5	18
Gender	3	14	13	9	11	22	32	9	13	15	21	3
Nationality	1	12	21	39	20	39	54	28	28	33	49	61
Disability	3	31	18	21	20	70	55	49	25	42	45	42
Ethnicity	34	66	45	85	69	82	62	62	23	62	61	66
Others	52	184	108	61	132	32	159	96	42	81	69	121
Race	0	0	1	1	2	0	0	2	1	0	0	3
Social category	26	126	63	90	132	514	372	222	124	175	211	413
Total	134	473	353	382	432	836	837	528	285	465	548	858

As regards the competencies of NCCD, while the Council's role of issuing sanctions for violations of the anti-discrimination law is universally accepted, experts have doubted the ability of the NCCD to remedy consequences of discrimination and re-establish a situation which existed before an incident of discrimination occurred. Additionally, there seems to be a degree of overlap between the NCCD and the civil courts with regard to providing redress for discrimination.³⁵¹

Another ambiguity concerns the content of Article 27, paragraph 3, which states that the civil court, when addressing a complaint of discrimination, must subpoena the NCCD. The law does not define the *locus standi* of the Equality Body in litigation processes, leaving its role unclear in the procedures before the Court, as well as the binding, or not binding, nature of the opinion provided, if requested by the judge. Another unclear aspect concerns the scenario in which a victim lodges concurrently a complaint before the Equality Body and before the civil court. The lack of a legally defined position for the Equality Body leaves an arbitrary choice to the courts, which most of the time, have summoned the Equality Body as a respondent, third party, independent actor or as an expert.³⁵²

³⁵⁰ Ibid.

³⁵¹ ERRC (2013), "For consideration by the European Commission on the Transposition and Application of the Race Directive and on the legal issues relevant to the Roma Integration", Written Comments by ERRC, available at: <http://www.errc.org/cms/upload/file/romania-country-profile-2011-2012.pdf>

³⁵² ERRC (2013), "For consideration by the European Commission on the Transposition and Application of the Race Directive and on the legal issues relevant to the Roma Integration", Written Comments by ERRC, available at: <http://www.errc.org/cms/upload/file/romania-red-written-comments-5-april-2013.pdf>

2) CIVIL COURTS

The Anti-discrimination Law can also be enforced by Civil Courts if the plaintiff seeks only civil remedies under general torts procedures. Civil complaints on the ground of the Anti-discrimination Law are exempted from judicial taxes. The action for damages may be filed by a person subjected to discrimination or by an NGO working on human rights and non-discrimination. The European Network of legal experts in the non-discrimination field have pointed out that *“an action for damages requires the damage suffered by the complainant as a result of the respondent’s discriminatory behaviour to be clearly, so that the NGOs are in a difficult situation because they cannot indicate specific damage incurred by the NGOs itself: therefore a complaint to the NCCD appears to be the only viable avenue for NGOs.”*³⁵³ This explains how in practice could be difficult for victims of discrimination to obtain legal protection, in particular if we consider that in reality it is often by means of an NGO that victims feel strong and protected enough to bring a discrimination case before the Court.

As concerns the possibility of organisations such as associations, trade unions and other legal entities which have a legitimate interest in combating racism and racial discrimination to bring civil cases and being part in administrative cases or make criminal complaints, this is possible only in the field of employment. In order to better tackle discrimination issues, ECRI recommends that such organizations are entitled to bring civil cases in all fields.³⁵⁴

Another recommendation was to adopt a simplified legal aid procedure to enable victims of discrimination to gain access to the courts, in particular modifying and clarifying the requirements needed to obtain legal aid and therefore providing victims with effective access to justice.³⁵⁵

With regards to the burden of proof, the Government Ordinance No. 137/2000, as amended by the Law of 14 July 2006, introduced the concept of *“sharing the burden of proof”* before the courts and the National Council for Combating Discrimination (NCCD). *Ex Article 20 (6) and Article 27(4) “the interested person has the obligation of proving the existence of facts which allow to presume the existence of direct or indirect discrimination and the person against whom a complaint was filed has the duty to prove that the facts do not amount to discrimination”*. The burden of proof refers to cases of direct and indirect discrimination.³⁵⁶ The introduction of the burden of proof constitutes an important step forward in reforming the Romanian civil procedure law which establishes as general rule the responsibility of the plaintiff to provide the burden of proof. However, experts have pointed out that the concept as provided by Romanian law is not perfectly in compliance with the provisions of Article 8 of the Directive 2000/43 and Article 10 Directive 2000/78.³⁵⁷

³⁵³ The European Network of legal experts in the non-discrimination field (2014), “European Antidiscrimination Law Review”, available at: <http://ec.europa.eu/justice/discrimination/files/adlr-19-2014-final.pdf>

³⁵⁴ CoE (2014), “ECRI Report Romania (forth monitoring cycle)”, p. 20, available at: <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/romania/ROM-CbC-IV-2014-019-ENG.pdf>

³⁵⁵ *Ibid.*, p. 21

³⁵⁶ FRA (2011), “Access to justice in Europe: an overview of challenges and opportunities”, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1542-access-to-justice-2011-country-RO.pdf

³⁵⁷ Numhauser-Henning A., and Laulom S. (2012), “Harassment related to Sex and Sexual Harassment Law in 33 European Countries”, European Legal experts in the discrimination field, p.241, available at:

Additional provisions are stated in the amending Law of March 2013, which provides that a complainant does not have to provide proof but rather facts: “*will have to present facts from which it may be presumed that there has been direct or indirect discrimination and it shall be for the respondent to prove that the facts does not constitute discrimination*”.³⁵⁸

Jurisprudence

In the following section, some of the most relevant judgments on discrimination and hate speech, both from the Romanian Constitutional Court and the lower courts, are highlighted and analyzed. Additionally, a selection of relevant rulings from the European Court of Justice and the European Court of Human Rights, which have provided important instructions on the interpretation and application of EU legislation regulating these issues, are also discussed.

Judgements on Discrimination

Within this paragraph, a few judgements related to the issue of discrimination are reported on, in order to have a better understanding of the application of existing Romanian legislation dealing with discrimination issues.

European Court of Justice: 25 April 2013 C-81/12

This is a European Court of Justice preliminary ruling³⁵⁹ under Article 267 TFEU concerning the interpretation of Article 2(2)(a), 10(1) and 17 of Council Directive 2000/78/ EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. In this case, Accept, a non-governmental organisation whose aim is to promote and protect lesbian, gay, bisexual and transsexual rights in Romania, lodged a complaint before the National Council for Combating Discrimination (NCCD) against “SC Fotbal Club Steaua București SA (‘FC Steaua’)” and Mr. George Becali, considered to be the main decision maker in the club.³⁶⁰

Mr. Becali declared to the mass media that “*he would never hire homosexuals to play in the football team*”. The NCCD issued a decision, ruling that those statements constituted discrimination in the form of harassment, and, therefore, applied an administrative warning

http://ec.europa.eu/justice/gender-equality/files/your_rights/final_harassement_en.pdf; Espín E. (2005) “Burden of proof in Council Directives 2000/43/EC and 2000/78/EC on equal treatment (working paper)”, available at: http://www.era-comm.eu/oldoku/Adiskri/03_Burden_of_proof/2005_Espin_EN.pdf

³⁵⁸ CoE (2014), “ECRI Report on Romania (fourth monitoring cycle)”, available at: <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/romania/ROM-CbC-IV-2014-019-ENG.pdf>

³⁵⁹ To view the entire text of the ruling, please visit: InfoCuria - Case-law of the Court of Justice, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=136785&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=111405>

³⁶⁰ Marin, A., and Csonta A. (2012), “Discrimination of Roma Communities Romania National Report”, available at: https://www.gitanos.org/upload/44/68/Discrimination_of_Roma_National_Report_ROMANIA_Net_Kard.pdf

to Mr. Becali, as according to Romanian law, when the decision takes place 6 months after an incident occurs,³⁶¹ the only sanction applicable is an administrative warning, with the exclusion of fines. Mr. Becali subsequently lodged an appeal with the Bucharest Court of Appeal, addressing questions to the European Court of Justice in order to check if the nature of the sanction issued was legitimate.³⁶² The Luxembourg Court criticized the NCCD's practice of issuing administrative warnings instead of fines, stating two important principles: firstly, symbolic sanctions such as administrative warnings are not compatible with the Directive and, secondly, each remedy (sanction) stipulated by national legislation should fulfil the criteria of effectiveness, proportionality and dissuasiveness.³⁶³

NCCD: 12 December 2012 Decision 559 in file 52-2012

The plaintiff in this case was a Roma NGO, ROMANI CRISS, acting on behalf of the parents of Roma children enrolled in a Romanian school in 2011.

The case revolves around a group of 12 Roma children who were clustered together in a single classroom, separated from the other students. Asked to provide an explanation of such decision, the headmaster of the school replied that the enrolment was carried out following the order of applications so that the situation was not created on purpose, and not stemming from a decision of the school directorate.

In September 2011, the *Olt School Inspectorate*, and, in October 2011, the *Olt Prefect* conducted investigations on the issue: the former concluded that there was no segregation, whilst the latter offered the opposite opinion, stating that the conditions for their education were improper. Romani CRISS, from its own investigation, found that no teacher was initially available to teach the class and that the conditions in the classroom were significantly worse than in the others.

When forming its decision, the NCCD invoked the UNESCO 1960 Convention against Discrimination in Education, the UN Convention for the Elimination of All Forms of Racial Discrimination, and the CERD General Recommendation XIX. On the basis of its investigation, the NCCD stated that *"the system of assignment to class 1B is not transparent and that the criteria for assigning the children to one class or another, even if they seem neutral, have a discriminatory effect in relation to children belonging to a vulnerable category, without being objectively justified by a legitimate scope."*

The NCCD pointed out that school leadership holds a positive obligation *"to make sure that pupils from an ethnically defavourised group are not segregated in one classroom...it is the duty of the educational personnel to assign the children in classes in a proportional manner,*

³⁶¹ Six months is the general term of prescription under Romanian law.

³⁶² Court of Justice of the European Union (2013), "Homophobic statements by the 'patron' of a professional football club may shift the burden of proof on to the club to prove that it does not have a discriminatory recruitment policy, *The appearance of discrimination on ground of sexual orientation may be refuted by a body of consistent evidence*", available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/cp130052en.pdf>

³⁶³ Marin, A., and Csonta A. (2012), "Discrimination of Roma Communities Romania National Report", available at: https://www.gitanos.org/upload/44/68/Discrimination_of_Roma_National_Report_ROMANIA_Net_Kard.pdf

without taking into considerations criteria (such as the option of the parents) which might infringe the rights of the pupils as well as their dignity.”

Additionally, the NCCD stated that *“segregation of children has social and educational negative consequences, such as maintaining biases and stereotypes, also regarding the majority population, the failure in maintaining pupils in school, the high dropout rate, the difficulty in attracting and maintaining qualified teachers, the failure in educating pupils at the required standards so that they can access higher levels of education.”*

In conclusion, as regards the application of the national legal framework to the case here analyzed, the school was found in breach of national legislation, *rectius* the anti-discrimination law against Roma. The NCCD therefore issued a fine of 460 Euros against the school, as well as 460 Euros against the school inspectorate. The inspectorate was asked to put an end to the segregation of Roma students in the school and also to monitor the school’s activities. The decision can be challenged in court. The plaintiffs initiated, in parallel, a civil action for damages before the civil courts.³⁶⁴

This case is important as it portrays how the NCCD can play a key role in applying Romanian anti-discrimination legislation and how the international legal framework can support the rulings of national authorities, guiding the decisions of judges and experts of the field.

NCCD: 30 April 2014 Decision 251

This ruling deals with a case of discrimination on the basis of disability. The decision in this case was also issued by the NCCD, which applied an administrative fine to a group of mayors in Romania for failing to ensure accessibility to persons with disabilities.

In 2014, the NCCD started an *ex officio* investigation into the accessibility of public transportation within the capital cities of Romania’s counties. On the basis of the anti-discrimination law, as well as the UN Convention on the Rights of Persons with Disabilities and the EU directives, the NCCD found that access to public transportation for persons with disabilities was not ensured in 39 cities. These findings allude to the practice of direct discrimination, as the situation constituted a limitation to the access of services, infringing on the right to dignity. As a consequence, the NCCD issued sanctions against the mayors of the 39 cities concerned, applying fines ranging between 224 and 454 Euros. It is important to point out that these sanctions were issued against the mayors personally, as Law 448/2006³⁶⁵, regarding the Protection and Promotion of the Rights of Disabled Persons, stipulates a personal obligation for mayors to ensure the accessibility to local transportation. In addition, the National Agency for Payments and Social Inspection was penalized with a fine of 1,135 Euros as this agency disregarded the legal obligation to ensure the accessibility

³⁶⁴ Iordache R. (2013), “Romanian national equality body sanctions segregation of Roma children in Olt county”, European network of legal experts in the non-discrimination field available at: <http://www.non-discrimination.net/content/media/RO-89-Flash%20Report%20NCCD%20Romani%20CRISS%20segregation%20decision.pdf>

³⁶⁵ Law 448/2006 of 6 December 2006. The entire text is available at: <http://www.equalrightstrust.org/ertdocumentbank/LEGE%20448%20engleza.pdf>

of local transport to persons with disabilities. None of the involved parties challenged the NCCD decision.³⁶⁶

Judgements on Hate Speech

Bucharest Court of Appeal 2014

The following case revolves around the former President of Romania, Traian Băsescu, who made offensive public statements while in office, regarding the Roma, which, along with sexual minority groups, are the most frequent targets of hate speech in the country. Mr. Băsescu was penalized twice for hate speech against Roma.

In the first case, the NGO, Romani CRISS, filed a complaint with the NCCD against President Băsescu for anti-Roma comments made during a 2010 news conference in Slovenia. While the NCCD initially declined competence to proceed in the matter, because the comments were made outside of Romania, the Council eventually acted, imposing a fine of 134 Euros against the Romanian President for saying “*very few Roma want to work*” and “*traditionally many of them live off stealing.*”

The decision made by the NCCD was subsequently challenged before the Court of Appeal by the President Băsescu. The Court of Appeal confirmed the decision of the NCCD, as the statements made by President Băsescu infringed upon Articles 2 and 15 of Government Ordinance 137/2000. The President, in his defence, declared that he did not have intention to offend anyone. This defence was not considered a justification by the Court since Article 15, states that a violation of the right to dignity “*does not entail that the author intended to generate the consequences and the statement in itself is enough to be susceptible to trigger such a result.*”

In reference to the general principle advocated by the Court, “*the Court emphasized that the offence provided by Art.15 (violation of the right to dignity) is not one of outcome but one of “danger”, so in order to be sanctioned it is not necessary that the perpetrator effectively violates the claimant’s right to dignity, given the preventive nature of the antidiscrimination legislation.*”³⁶⁷ The Court of Appeal concluded that the limitation of freedom of expression applied was legitimate and proportionate as well as necessary in a democratic society. On the basis of this reasoning, the Court of Appeal rejected the complaint of the President and endorsed the decision of the NCCD.³⁶⁸

³⁶⁶ Lordache R. (2014), “National equality body sanctions 39 mayors of main cities in the country for failure to ensure accessibility in an ex officio case”, European network of legal experts in the non-discrimination field, available at: <http://www.non-discrimination.net/content/media/RO-121-NCCD%20accessibility%20decision.pdf>

³⁶⁷ Lordache R. (2014), “Court of Appeal București maintains decision of the Romanian national equality body fining the Romanian President for discriminatory statements against nomadic Roma”, available at: <http://www.non-discrimination.net/content/media/RO-128-CAp%20confirms%20NCCD%20sanction%20Basescu%20Slovenia.pdf>

³⁶⁸ *Ibid.*

In reference to the second case, in 2007, the NCCD issued a fine against the President for the second time. This instance revolves around a recorded conversation Mr. Băsescu had with his wife, that he believed to be private, in which he referred to a female journalist saying “*how aggressive that stinky gypsy was*”.³⁶⁹

Romani CRISS lodge a complaint to the National Council for Combating Discrimination, claiming the violation of Article 2, paragraph 4 and Article 15 of Government Ordinance 137/2000. The NCCD confirmed that there had been an act discrimination committed based on ethnicity and sanctioned the President with a warning. In addition, Romani CRISS appealed the NCCD’s decision to the Bucharest Court of Appeal, with the aim of establishing the discrimination act as also being based on gender, calling on the Court to compel the President to issue a public apology.³⁷⁰ However, the Court of Appeal and the High Court of Cassation reversed the decision of the NCCD, leaving the case of hate speech unrecognized by the legal system.³⁷¹

In concluding this section on the main judicial decisions concerning discrimination and hate speech issues in Romania, it is important to mention some rulings of the Romanian Constitutional Court that have had an impact on the power of the National Council Against Discrimination. With Decision 997 of 7 September 2008 and the Decisions 818, 819, 820 of 3 July 2008,³⁷² the Constitutional Court of Romania limited both the mandate of the NCCD and that of the civil courts in relation to discrimination cases, therefore leaving a gap in the effective legal protection against acts of discrimination.³⁷³

Additionally, the mandate of the National Equality Body was already diminished after the entry into force of Emergency Ordinance 75/2008, which prohibited the NCCD in addressing

³⁶⁹ OSCE (2007), “OSCE Conference on Combating Discrimination and Promoting Mutual Respect and Understanding - Follow-up to the Cordoba Conference on Anti-Semitism and Other Forms of Intolerance Romania, Bucharest, 7-8 June 2007 General Contribution”, available at: <http://www.osce.org/cio/25544?download=true>; Lacatus G. (2011), “Challenges and trends within mass media concerning Roma and Sinti; the role of the media and of Roma organizations in countering prejudices and negative stereotypes and responding to intolerance directed at Roma and Sinti”, available at: <http://www.osce.org/odihr/83549?download=true>; http://www.romanicroiss.org/pres%20release_basescu.pdf

³⁷⁰ Romani CRISS (2008), “From hate speech to hate crime, a Roma perspective, Draft”, available at: <http://www.osce.org/odihr/33903?download=true>

³⁷¹ CNCD (2014), “Comparative study on legislation sanctioning hate speech and discrimination in the member states of the European Union”, available at: <http://discursfaradiscriminare.ro/wp-content/uploads/2014/10/Comparative-Study.pdf>; Lacatus G. (2011), “Challenges and trends within mass media concerning Roma and Sinti; the role of the media and of Roma organizations in countering prejudices and negative stereotypes and responding to intolerance directed at Roma and Sinti”, p.6, available at: <http://www.osce.org/odihr/83549?download=true>

³⁷² Romania/Curtea Constituțională/Decizia 997/2008 (7.10.2008) finding that Article 20 (3) of the Anti-discrimination Law, defining the mandate of the NCCD in relation to discrimination triggered by legislative provisions is unconstitutional; Romania/Curtea Constituțională/Deciziile 818, 819 and 820 (3 July 2008) with the CCR concluding that the dispositions of Article 1(2) letter e) and Article 27 of the Governmental Ordinance 137/2000 are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory.

³⁷³ FRA (2011), “Access to justice in Europe: an overview of challenges and opportunities”, available at: https://fra.europa.eu/sites/default/files/fra_uploads/1542-access-to-justice-2011-country-RO.pdf

complaints of discrimination in the field of salary related rights and benefits for civil servants, therefore denying effective access to judicial recourse in such cases.³⁷⁴

Institutions and Associations

A number of associations have been established in Romania with the aim of preventing and fighting against hate crime and hate speech issues, among these, it is worth mentioning two organizations in particular: *ACCEPT* and *Romani CRISS*.

ACCEPT is a non-governmental organization established in 1994. Its objective is to promote lesbian, gay, bisexual and transgender persons' rights within Romania. In doing so, one of *ACCEPT*'s main challenges is to change negative social attitudes toward LGBT people. The main activities carried out by the NGO include: identifying persons whose fundamental rights and liberties are infringed upon, on the basis of the provisions of the Romanian Constitution and the International Treaties ratified by Romania; raising awareness among the public and the media on LGBT issues; promoting the observance of the rights and liberties of LGBT people through cooperation with organizations that promote the rights of minorities. In addition, *ACCEPT* conducts lobbying and advocacy activities, with the aim of influencing public policy, as well as direct action and grass-roots and media activism.³⁷⁵

The second institution is **Romani CRISS**, whose main objective is protecting the fundamental rights of ROMA in Romania. It is an NGO, established in 1993, which provides legal assistance in cases of abuse and works to prevent and redress racial discrimination against Roma in the fields of education, employment, housing and health. The organisation has addressed the problems faced by the Roma population from a human rights perspective through activities such as conflict resolution, mediation, litigation, and advocacy.

Romani CRISS' main activities include: Documentation, monitoring and legal assistance in cases of human rights violations against Roma; the improvement of Roma children's access to education, including projects that target pre-school children; organization of awareness-raising campaigns, civic mobilisation and advocacy campaigns, as well as training of Roma and non-Roma individuals. Romani CRISS has been committed to research and studying discrimination issues, and the organization has recently published a series of research papers and best practice guides on health, education and discrimination in Europe.³⁷⁶

While the above-mentioned organizations have done much work in the struggle against discrimination in Romania, experts in the field are still very concerned³⁷⁷ as no official data on hate crime has been provided by the Romanian authorities. The lack of such data was made apparent in the OSCE's 2011 Annual Report on Hate Crime in its region. *Accept* reported only four cases of physical assault against gay men, including two physical assaults at a nightclub and one physical assault after a pride event; one case of property damage; and one case of threatening behaviour at a documentary screening in Bucharest. No official data on incidents

³⁷⁴ *Ibid.*

³⁷⁵ ACCEPT Association webpage, available at: <http://accept-romania.ro/en/despre-noi/asociatia-accept/>

³⁷⁶ Romani CRISS website available at: http://www.romanicriss.org/en/index.php?option=com_content&view=article&id=1737&Itemid=564

motivated by bias against Roma were reported to ODIHR.³⁷⁷ This complete absence of official hate crime data is concerning, portraying hate crime as an almost invisible issue.³⁷⁸

Conclusions

Although Romania has made great strides with respect to addressing issues of discrimination, both from a legislative and procedural perspective, there are still many more improvements which need to be made.

Regarding the specific topic of hate speech online, the absence of a National Audiovisual Council for Newspapers and Internet sites, while proposed but whose creation has not yet been approved, makes it harder to sanction acts of racism in the media.

Moreover, as shown in the above-mentioned court case involving the Romanian President, there is a lack of sanctioning by judges, with regard to instances of hate speech. The trend not to punish offenders who make discriminatory public statements leaves a gap in the judicial system, effectively removing the deterrent against propagating insults and racist statements.³⁷⁹

However, the role of the NCCD, and the degree to which it is currently being put to use, can constitute an important factor for putting pressure on the managers of websites to prohibit racist commentary. Nevertheless, the NCCD does have limited resources available, which creates difficulties in carrying out the organization's activities and in implementing strategies for Roma integration.

In conclusion, the most worrying trend with respect to discriminatory speech in Romania is that targeting the country's Roma population within the sphere of political discourse. This trend is partially due to the absence of an effective mechanism that sanctions politician statements which promote racism and discrimination. With the aim of creating such a mechanism, ECRI experts have pushed for further amendments to the Criminal law code in order to ensure that public insults and defamation will be prohibited.³⁸⁰

³⁷⁷ OSCE and ODIHR (2012), "Hate crimes in the OSCE region: incidents and responses", available at: http://tandis.odihr.pl/hcr2011/pdf/Hate_Crime_Report_full_version.pdf

³⁷⁸ FRA (2012), "Making hate crime visible in the European Union: acknowledging victim's rights", available at: http://fra.europa.eu/sites/default/files/fra-2012_hate-crime.pdf

³⁷⁹ Lacatus G. (2011), "Challenges and trends within mass media concerning Roma and Sinti; the role of the media and of Roma organizations in countering prejudices and negative stereotypes and responding to intolerance directed at Roma and Sinti", Roma Journalists Association, available at: <http://www.osce.org/odihr/83549?download=true>

³⁸⁰ Iodarche R. (2014), "ECRI published its fourth report on Romania", available at: <http://www.non-discrimination.net/content/media/RO-122-ECRI%20Ro%20report.pdf>

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Law no.304/2003 on the universal service and users’ rights relating to the electronic communications networks and services, republished, available at:
<http://www.ancom.org.ro/Portals/57ad7180-c5e7-49f5-b282-c6475cdb7ee7/legea_304_2003_republicata_mai%202008_en.pdf>

Law no. 365/2002 of 7 June 2002 on electronic commerce, available at:
<<http://www.legi-internet.ro/en/e-commerce.htm>>

Law no. 448/2006 of 6 December 2006, Regarding the Protection and Promotion of the Rights of Disabled Persons, available at:
<<http://www.equalrightstrust.org/ertdocumentbank/LEGE%20448%20engleza.pdf>>

Romanian IT Laws, available at: <http://www.legi-internet.ro/en/legi_rom.htm>

Standards for the application of Law no. 1308 dated 11/20/2002 on Ecommerce:
<<http://www.legi-internet.ro/en/standecommerce.htm>>

United Nations Human Rights, Office of the High Commissioner for Human Rights,
available at:
<http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CAT&Lang=en>

Spain: In-depth Country Study on Hate Crime and Hate Speech conducted within the Framework of the PRISM Project

P R I S M



WORDS ARE WEAPONS.

PREVENTING REDRESSING & INHIBITING HATE SPEECH IN NEW MEDIA



PRISM is a project co-financed by the Fundamental Rights and Citizenship Programme of the European Union

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Introduction

The advent and further development of new forms of online media in recent years has vastly expanded global channels of communication, making it possible to connect individuals, forge relationships, and promote cooperation worldwide. However, these technological advancements have also opened the doors for the proliferation of various forms of discrimination, culminating in acts of hate speech being carried out in this new environment.

The borderless nature of the Internet poses many formidable challenges for States attempting to gain a handle on discrimination issues, particularly hate speech. The presence of a computer screen, acting as a barrier between perpetrator and victim, has increased the threshold for hateful rhetoric, while reducing the sensitivities that may be more apparent in face-to-face interactions. Popular social media platforms are rife with examples of hate speech in this sphere, and online incidents have the potential to distort public opinion and carryover into the physical world, at times creating violent altercations. Stopping hate speech in its tracks is no easy task. States often lack proper legislation, internal and external cooperative mechanisms, enforcement capabilities, standards of proof, and strong civil society organizations to curtail hate speech. As threats in this field multiply, a major goal of the PRISM Project is to gain an understanding of EU Member States' preparedness and functionality with respect to dealing with hate speech online. As a component of this endeavour, the PRISM Consortium is issuing five individual EU country studies that relate to each State's legal framework for combating hate crime and hate speech and their constituent themes, including hate speech online.

This report serves as an in-depth country study of Spain, taking into consideration laws on discrimination, hate crime, hate speech, and racism, jurisprudence, procedural issues and mechanisms for dealing with these issues, and identifying Spain's various associations and institutions tasked with tackling discriminatory practices. Moreover, a special section of the report is dedicated to the topic of hate speech online, as national legislation concerning all of the abovementioned topics directly affects hate speech perpetrated across the spectrum of today's media landscape.

While Spain has ratified many of the essential international conventions dealing with the overarching issue of discrimination, and, as an EU Member State, it is in compliance with all EU legislation in this field, many uncertainties still exist with respect to confronting hate speech. Notably, there is an absence of national legislation targeting hate speech in new media, standards of proof for demonstrating discriminatory practices are difficult to attain, and there is a general lack of awareness among both law enforcement agencies and judges regarding discrimination law, in addition to the general public's unfamiliarity with reporting mechanisms available for communicating malicious incidents. These factors make Spain a unique country from which to assess the fight against hate speech in new media and to derive conclusions for how to combat this phenomenon in the future.

The Spanish Legal Framework

Spain has signed and ratified the most prominent international treaties and conventions related to human rights, civil and political rights, and discrimination.

Spain is a party to the core human rights treaties of the United Nations, including the International Convention on the Elimination of All Forms of Racial Discrimination. Other United Nations instruments ratified by Spain include the Convention on the Prevention and Punishment of the Crime of Genocide and the UNESCO (United Nations Educational, Scientific and Cultural Organization) Convention against Discrimination in Education. Spain also ratified the Convention relating to the Status of Refugees, the Protocol relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons, but not the Convention on the reduction of statelessness. Additionally, it has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

Spain is party to a number of regional instruments, including to the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocol No. 12, which addresses the prohibition of discrimination. It has also ratified the European Charter for Regional or Minority Languages; the Framework Convention for the Protection of National Minorities; the 1961 European Social Charter; and the Council of Europe’s Convention on Cybercrime.

Spain has yet to ratify the 1996 Revised European Social Charter and the 1995 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.³⁸¹

Figure 1 – International Legal Instruments ratified by Spain³⁸²

Title	Open for Signature	Ratified
European Convention on Human Rights (ECHR)	4 Nov. 1950	4 Oct 1979
International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)	21 Dec. 1965	13 Sept. 1968
International Covenant on Economic, Social and Cultural Rights (ICESCR)	16 Dec. 1966	27 April 1977
International Covenant on Civil and Political Rights (ICCPR)	16 Dec. 1966	27 April 1977
The Convention on the Elimination of All Forms	18 Dec. 1979	6 July 2000

³⁸¹OHCHR (2013), “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance”. Visit to Spain A/HRC/23/56/Add.2., available online at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-56-Add-2_en.pdf

³⁸² United Nations Human Rights, Office of the High Commissioner for Human Rights, available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CAT&Lang=en; Council of Europe, Treaty Office, Complete list of the Council of Europe’s treaties, available at: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>

of Discrimination against Women (CEDAW)		
Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	10 Dec. 1984	21 Oct 1987
European Convention on Transfrontier Television (ECCT)	5 May 1989	19 Feb 1998
International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families (CMW)	18 Dec. 1990	Not signed
Charter of fundamental rights of the EU	2 Oct. 2000	7 Dec. 2000
Council of Europe Convention on cybercrime	23 Nov. 2001	3 June 2010
Additional Protocol to the Convention on cybercrime on racist acts committed through computer systems	28 Jan. 2003	18 Dec 2014
Convention on the Rights of Persons with Disabilities (CRPD)	30 Mar. 2007	3 Dec 2007

Below, we examine the main legal instruments generally related to discrimination and racism in Spain.

General Legal Framework on Discrimination

The Constitution

The Spanish Constitution of 1978 laid down a legal framework of democratic principles and made equal treatment and non-discrimination (in conjunction with liberty, justice and political pluralism) basic pillars of the non-confessional State.

Spain signed the most important international treaties and ratified practically all of the international instruments to combat discrimination: with the Universal Declaration of human rights being explicitly mentioned within Article 10.2 of the Constitution. The principle of equal treatment is included in criminal law (racial and ethnic motives are aggravating circumstances in various offences) and labour law, and there are also several anti-discriminatory measures in the administrative, civil and educational spheres.³⁸³

- Article 1.1 states that equality is one of the superior values of the legal order, along with liberty, justice and political pluralism. *“Spain is established as a social and democratic State, subject to the rule of law, which advocates as the highest values of its legal order, liberty, justice, equality and political pluralism”*.
- Article 9.2: provides that *“it is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which*

³⁸³ For further information, please visit: http://www.upf.edu/gritim/_pdf/griip-emilie_wp4.pdf

prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life”.

- Article 10: codifies the principle of Human dignity, stating that human dignity is at the basis of political order and social peace.
- Article 13.1: Rights of foreigners - they will enjoy the public liberties enshrined in title I of the Constitution according to the law and treaties
- Article 14: The right to equality and non discrimination is stipulated, stating that *“Spanish citizens are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.”*
- Article 16: guarantees ideological and religious freedom: *“1. Freedom of ideology, religion and worship is guaranteed, to individuals and communities with no other restriction on their expression than may be necessary to maintain public order as protected by law. 2. No one may be compelled to make statements regarding his or her ideology, religion or beliefs. 3. No religion shall have a state character. The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions.”*
- Article 18: Right to honour, privacy, and one’s own image.

After referencing the abovementioned articles, it can be inferred that the Spanish Constitution is clearly “broadminded” insofar as the concept of equality is concerned. Through the addition of the phrase *any other personal or social condition or circumstance*, Article 14 leaves the door open to address any other form of discrimination. This provision is complemented by Article 9.2: this article is based on the principle that the mere right to equality does not necessarily guarantee effective equality and that, as a result, in a democracy such as Spain, which seeks to provide an adequate social protection system, the role of the public authorities is not solely to guarantee compliance with the law, but rather to take the necessary measures to ensure that equality will be effective.³⁸⁴

The Penal Code

The Spanish Penal Code³⁸⁵, adopted by Organization Act No. 10/95 of 23 November 1995, has been modified several times, with the most important modification being made in 2010,

³⁸⁴ Secretariat of State for Equality, Conference (2011), “The Role of Equality Bodies in the fight against Ethnic and Racial Discrimination”, p.27, available at: http://www.msssi.gob.es/ssi/igualdadOportunidades/docs/2011_conclusions_key_challenges_conference_council_vfacc.pdf

³⁸⁵ EU Network of Independent Experts on Fundamental Rights (2005), “Combating Racism and Xenophobia through Criminal Legislation: the situation in the EU Member States”, available at: http://ec.europa.eu/justice/fundamental-rights/files/cfr_cdf_opinion5_2005_en.pdf

and the latest in 2015. This last amendment was approved by Organic Law 1/2015, adopted on 30 March and entered into force on the 1 July 2015. This Law modifies article 510, mentioned below, which specifically addresses the hate speech issue. All references made to the Penal Code will refer to this latest version. The most relevant articles are listed below:

- Article 22.4: Racial Discrimination constitutes an aggravating circumstance. *“Committing the offence for racist or anti-Semitic reasons, or another kind of discrimination related to ideology, religion or belief of the victim, ethnicity, race or nation to which he belongs, his gender, sexual orientation or identity, illness suffered or disability”*(see the below section on effectiveness for more information)
- Article 170: In which intimidation is condemned. 1) *“Should the intimidation be of a harm which constitutes a felony is intended to cause fear among the inhabitants of a location, ethnic, cultural or religious group, or a social or professional group, or any other group of persons, and if serious enough for such harm to be inflicted, the respective higher degree of penalties than those foreseen in the preceding Article shall be imposed”*. 2) *“A sentence of imprisonment from six months to two years shall be applied to those who, for the same purpose and severity, publicly call for violent actions to be committed by armed gangs, organisations or terrorist groups”*.
- Article 174: Addressing torture by a public authority or officer. 1) *“Torture is committed by the public authority or officer who, abusing his office, and in order to obtain a confession or information from any person, or to punish him for any act he may have committed, or is suspected to have committed, or for any reason based on any kind of discrimination, subjects that person to conditions or procedures that, due to their nature, duration or other circumstances, cause him physical or mental suffering, suppression or decrease in his powers of cognizance, discernment or decision, or that in any other way attack his moral integrity. Those found guilty of torture shall be punished with a sentence of imprisonment from two to six years if the offence is serious, and of imprisonment from one to three years if it is not. In addition to the penalties stated, in all cases, the punishment of absolute barring shall be imposed, from eight to twelve years”*. 2) *“The same penalties shall be incurred, respectively, by the authority or officer of penitentiary institutions or correctional or protection centres for minors who may commit the acts referred to in the preceding Section in relation to the detainees, interns or prisoners”*.
- Article 312: Felonies Against the Rights of Workers - 1) *“Punishment by imprisonment from two to five years and a fine from six to twelve months shall apply to those who unlawfully traffic with labour.”* 2) *“The same punishment shall be incurred by whoever recruits persons or leads them to leave their place of work by offering deceitful or false employment or working conditions and whoever employs foreign citizens without work permits under conditions that negatively affect, suppress or restrict the rights they are recognised by the legal provisions, collective bargaining agreements or individual contracts”*.
- Article 314: Discrimination in Employment. This Article punishes such discrimination, both in the public and the private sectors, based, *inter alia*, on the grounds of

ideology, ethnicity, race, religion or beliefs. *“Those who commit a serious discrimination in public or private employment, against any person due to his ideology, religion or belief, belonging to an ethnic group, race or nation, gender, sexual preference, family situation, illness or handicap, due to appointment as the legal or Trade Union representative of the workers, due to relationship to other workers at the company, or due to use of any of the official languages of the Spanish State, and who do not reinstate him to the situation of equality before the law after an administrative demand or punishment, compensating the financial damage arising therefrom, shall be punished with a sentence of imprisonment of six months to two years or a fine from twelve to twenty- four months”.*

- Article 318 bis: Offences Against the Rights of Aliens. 1) *“Whoever, directly or indirectly, promotes, favours or facilitates illegal trafficking or clandestine immigration of persons from, in transit and with their destination in Spain, or with their destination in another country in the European Union, shall be punished with the penalty from four to eight years imprisonment”.* 2) *“Those who perpetrate the conduct described the preceding Section for profit or using violence, intimidation, deceit, or abusing a situation of superiority or of special vulnerability of the victim, or endangering life, personal health or integrity, shall be punished with the penalties in the upper half. Should the victim be a minor or incapacitated, this shall be punished with the penalties higher by one degree to those foreseen in the preceding Section”.*
- Article 510, 1: On the Provocation of Discrimination, it *“1. Shall be punished with imprisonment of one to four years and a fine of six to twelve months: a) Those who publicly encourage, promote or incite hatred, directly or indirectly, hostility, discrimination or violence against a group, part of it or against a particular person because of their membership in that, for reasons of racism, anti-Semitism or other concerning ideology, religion or beliefs, family situation, membership of members of an ethnic group, race or nation, national origin, gender, sexual orientation or gender identity, gender, illness or disability. b) Those who produce, develop, possess in order to distribute, provide access to third parties, distribute, disseminate or sell writings or any other material or media whose content shall be able to encourage, promote, or incite directly or indirectly hatred, hostility, discrimination or violence against a group, a part thereof, or against a particular person because of their membership in that, for racist, anti-Semitic or other related to ideology, religion or beliefs, motives, family circumstances, membership of members of an ethnic group, race or nation, national origin, gender, sexual orientation or identity, gender, illness or disability. c) Publicly deny, trivialize or exalt seriously the crimes of genocide, crimes against humanity or against people and protected in armed conflict, or exalt the perpetrators goods, when they had committed against a group or a part thereof, or against a person determined by reason of their belonging to it, for reasons of racism, anti-Semitic or other related to ideology, religion or beliefs, family situation or membership of members of an ethnic group, race or nation, their national origin, sex, sexual orientation or gender identity, gender, illness or disability, when in this way promote or encourage a climate of violence, hostility, hatred or discrimination against them.”*

- Article 510, 2: The Dissemination of Offensive Information. This “2. *Shall be punished with imprisonment of six months to two years and a fine of six to twelve months: a) Those who infringe the dignity of people through actions involving humiliation, contempt or discredit any of the groups mentioned in the previous paragraph, or part thereof, or any particular person because of their membership they racist, anti-Semitic or other related to ideology, religion or beliefs, family situation, membership of its members to an ethnic group, race or nation, national origin, gender, sexual orientation or identity reasons, for reasons of gender, illness or disability, or producing, processing, possession for the purpose of distributing, facilitate access to third parties, distribute, disseminate or sell writings or any other material or media whose content are suitable to injure the dignity to represent a serious humiliation, contempt or discredit any of the above groups, a part of them, belonging to them. b) Those who exalt or justify by any means of public expression or broadcast the crimes that had been committed against a group, a part thereof, or against a particular person because of their membership in that racially motivated, anti-Semitic or other related ideology, religion or beliefs, family situation, membership of members of an ethnic group, race or nation, national origin, gender, sexual orientation or gender identity, gender, illness or disability, or who have participated in execution. The offences are punished with a sentence of one to four years in prison and a fine of six to twelve months when it thereby promote or encourage a climate of violence, hostility, hatred or discrimination against those groups.*”
- Article 510,3: “*The penalty provided in the previous paragraphs will be imposed in the upper half when the facts had been carried out by means of a social communication, through the Internet or by using information technology, so that it is made accessible to a large number of people*”. This provision can be considered the specific one addressing hate speech in new media, therefore equipping Spain with an explicit legal basis dealing with this issue. Perpetrating the same offence through any new media tool is considered an aggravating factor, due to the larger impact that the statement might have and the number of people that can be reached through the use of these communication tools.
- Article 510.4: “*When the facts in the light of their circumstances are appropriate to alter the public peace or create a grave sense of insecurity or fear among the group, the penalty shall be imposed in the upper half, which may be raised to the higher level*”.
- Article 510.5: “*In all cases, they also impose the penalty of disqualification from profession or trade schools in teaching, sports and leisure area, for a longer time between three and ten years to the term of the sentence of imprisonment if imposed in the judgment, taking proportion to the seriousness of the offense, the number of tasks and circumstances of the offender*”.
- Article 510.6: “*The judge or court will approve the destruction, deletion or disabling of books, files, documents, articles and any kind of support to commit offenses referred to the preceding paragraphs or by means of which was committed. When the crime was committed through information and communications technology, the withdrawal*

of the contents will remember. In cases in which, through an Internet gateway or service information society solely or predominantly diffuse the contents in the preceding paragraph refers, blocking access or interruption be ordered providing the same”.

- *Article 510 bis: "When in accordance with the provisions of Article 31a a legal person is responsible for the offenses covered by the two preceding articles shall be liable to a fine of two to five years. Attended the rules established in Article 66a, judges and courts may also impose penalties laid down in subparagraphs b) to g) of paragraph 7 of Article 33. In this case it shall also apply the provisions of section 3 of Article 510 of the Penal Code."*

The new regulation brings together sections 510 and 607 of the Criminal Code to adapt to a ruling by the Constitutional Court on the crime of genocide denial, issued in 2007, and a framework decision of the European Union on the fight against racism and xenophobia of 2008. The judgment of the *Tribunal Constitucional* demanded limit the application of the crime of genocide denial cases where that conduct constitutes an incitement to hatred or hostility against minorities; in other cases, the mere denial would be protected by freedom of expression.

- *Article 511: Racial and Ethnic Discrimination in the Public Service. 1) "A sentence of imprisonment of six months to two years and a fine of twelve to twenty- four months and special barring from public employment and office for a term from one to three years shall be incurred by private individuals in charge of a public service who refuse a person a service to which he is entitled due to his ideology, religion or belief, belonging to an ethnic group or race, national origin, gender, sexual preference, gender, family situation, illness or handicap." 2) "The same penalties shall be applicable when the acts are committed against an association, foundation, society or corporation, or against its members due to their ideology, religion or belief, belonging all or some of its members to an ethnic group or race, national origin, gender, sexual preference, family situation, illness or handicap." 3) "Civil servants who commit any of the acts foreseen in this Article shall incur the same penalties in the upper half and that of special barring from public employment and office for a term of two to four years."*
- *Article 512: Discrimination by a Private Service Provider: "Those who, in the exercise of their professional or business activities, were to deny a person a service to which he is entitled due to his ideology, religion or belief, his belonging to an ethnic group, race or nation, his gender, sexual preference, gender, family situation, illness or handicap, shall incur the punishment of special barring from exercise of profession, trade, industry or commerce, for a term of one to four years." Articles 511 and 512 criminalize the individual responsible for a public service, or those people who in the course of their commercial or professional activities, deny a person access to a benefit or service to which they are entitled, where that denial is based on the grounds of their ideology, religion or beliefs, their membership of a particular ethnic, racial, or national group, their sex, sexual orientation, family situation, illness or disability.*

- Article 515: Promotion of and Incitement to racial discrimination. *“Unlawful associations shall be punishable, the following being deemed so: 1. Those whose purpose is to commit any offence or that, having been constituted, encourage commission thereof, as well as those with the object of committing or promoting commission of offences in an organised, co-ordinated, reiterated manner; 2. (Suppressed) 3. Those that, even having a lawful end as their object, use violent means or alteration or control of personality to achieve these; 4. Organisations of a paramilitary nature; 5. Those who foster, promote or incite direct or indirectly hate, hostility, discrimination or violence against persons, groups or associations due to their ideology, religion or belief, their members or any of them belonging to an ethnic group, race or nation, their gender, sexual preference, family situation, illness or handicap, or incite to do so”.* Associations are considered to be illegal if they promote or incite discrimination, hatred or violence against individuals, group or associations, including on the grounds of their ideology, religion or beliefs, or some or all of their associates’ membership in a particular ethnic group, race or nationality. Associations are considered to be illegal if they promote or incite discrimination, hatred or violence against individuals, group or associations including on the grounds of their ideology, religion or beliefs, or some or all of their associates’ membership in a particular ethnic group, race or nationality.

Article 517: *“In the cases foreseen in Sections 1 and 3 to 6 of Article 515 the following penalties shall be imposed: 1. The founders, directors and chairpersons of associations, those of imprisonment from two to four years, a fine of twelve to twenty- four months and special barring from public employment and office for a term from six to twelve years. 2. Active members, those of imprisonment of one to three years and a fine of twelve to twenty- four months”.* Articles 515.5 and 517 criminalize associations inciting people to discrimination. According to an important judgment of the Supreme Court of 11 May 1970, the mere existence of such an organisation attracts criminal sanctions, even if it does not carry out its aims. Another more recent ruling, which confirms this jurisprudence, is case number 259/2010, known as the “Blood and Honour” case. “Blood and Honour” was the name of an association known for inciting discrimination and hatred towards other groups, and maintained an ideology that included racist and anti-Semitic views. The judgement imposed by Madrid’s Provincial Court ordered the dissolution of the organization, and “clearly” established hatred and violence as reasons for liquidating associations of this kind.

- Article 607,1: Genocide. 1) *“Those who, aiming to fully or partially exterminate a national, ethnic, racial, religious or specific group determined by the disability of its members, commit any of the following acts, shall be punished: 1. With a sentence of imprisonment from fifteen to twenty years, if they were to kill any of its members. If two or more aggravating circumstances were to concur in the act, the higher degree punishment shall be imposed; 2. With imprisonment from fifteen to twenty years, if they were to sexually assault any of its members or cause any of the injuries foreseen in Article 149;178 3. With imprisonment from eight to fifteen years, if they were to subject the group or any of its members to conditions of existence that endanger their*

life or seriously affect their health, or when any of the injuries foreseen in Article 150 are caused; 4. With the same punishment, if forcible transportation of the group or its members are carried out, if they adopt any measure aimed at preventing their lifestyle or procreation, or if they forcibly transfer individuals from one group to another; 5. With imprisonment from four to eight years, if they were to cause any injury other than that stated in SubSections 2 and 3 of this Section”.

- Article 607 bis: Crimes Against Humanity. 1) “Conviction for crimes against humanity shall befall whoever commits the acts foreseen in the following Section as part of a widespread or systematic attack on the civil population or against part thereof. In all cases, committing such acts shall be deemed a crime against humanity when: 1. Due to the victim pertaining to a group or community persecuted for political, racial, national, ethnic, cultural, religious or another kind of reasons, disability, or other motives universally recognised as unacceptable under International Law; 2. In the context of an institutionalised regime of systematic oppression and domination of a racial group over one or more racial groups and with the intention of maintaining such a regime.” 2) “Those convicted of crimes against humanity shall be punished: 1. With a sentence of imprisonment from fifteen to twenty years if they cause the death of any person. A punishment higher in one degree shall be imposed if any of the circumstances foreseen in Article 139 concur; 2. With a sentence of imprisonment from twelve to fifteen years if they commit rape, and from four to six years imprisonment if the act were to consist of any other type of sexual assault; 3. With a sentence of imprisonment from twelve to fifteen years if any of the injuries of Article 149 were to take place and from eight to twelve years imprisonment if persons are subjected to conditions of existence that endanger their life or seriously affect their health, or when they are caused any of the injuries foreseen in Article 150. A sentence of imprisonment from four to eight years shall be applied if they commit any of the injuries of Article 147; 4. With a sentence of imprisonment from eight to twelve years if they deport or forcibly transport one or more persons from one State or place to another, by expulsion or other acts of coercion without authorised reasons; 5. With a sentence of imprisonment from six to eight years if they were to forcibly make pregnant any woman in order to modify the ethnic composition of the population, without prejudice to the relevant punishment, as appropriate, for other felonies; 6. With a sentence of imprisonment from twelve to fifteen years when they detain any person and refuse to recognise that custodial sentence or to report on the situation or whereabouts of the person arrested; 179 7. With a sentence of imprisonment from eight to twelve years if they were to arrest a person, depriving him of his liberty, with breach of the international rules on arrest. The punishment shall be imposed at a lower degree when the arrest lasts less than fifteen days; 8. With the punishment from four to eight years imprisonment if they commit serious torture of persons they have under their custody or control and of imprisonment from two to six years if less serious. For the purposes of this Article, torture shall be construed as submitting a person to physical or mental suffering. The punishment foreseen in this Sub-Section shall be imposed without prejudice to the relevant penalties, as appropriate, for the violations of other rights of the victim; 9. With a sentence of imprisonment from four to eight years if they commit any of the conducts related to prostitution defined in Article 187.1, and with that of six to eight years in the cases foreseen in Article 188.1.

The punishment shall be imposed from six to eight years on whoever transports persons from one place to another with the intent to sexually exploit them, using violence, intimidation or deceit, or abusing a situation of superiority or need or the vulnerability of the victim. When the conduct foreseen in the preceding Section and in Article 188.1 is committed against minors or the incapacitated, the higher degree penalties shall be imposed; 10. With a sentence of imprisonment from four to eight years if any person is subjected to slavery or kept in servitude. The punishment shall be applied without prejudice to the appropriate ones for the specific violations committed against the rights of persons. Slavery shall be construed as the situation of a person over whom another exercises, albeit de facto, all and some of the attributes of the right of property, such as buying, selling, lending or exchanging such person”.

- Article 611.6: Racial Segregation during an Armed Conflict: *“Whoever perpetrates the following acts during an armed conflict shall be punished with a sentence of imprisonment from ten to fifteen years, without prejudice to the relevant punishment for the results caused: 6. Perpetrates, orders the carrying out or maintains, with regard to any protected person, practices of racial segregation and other inhumane and degrading practices based on other distinctions of an unfavourable nature, that amount to an outrage against personal dignity”.*
- Article 616: Addresses the Prohibition of the Exercise of Public Office when committing the above mentioned crimes. *“Should any of the crimes included in the previous Chapters of this Title, except those foreseen in Article 614 and in Sections 2 and 6 of 615 bis, and in the preceding Title be committed by an authority or civil servant, in addition to the penalties stated therein, absolute barring for a term of ten to twenty years shall be imposed on him; if a private individual, the Judges and Courts of Law may order that of special barring from public employment and office for a term from one to ten years”.*

In addition to the Penal Code articles, specific provisions also exist related to anti-discriminatory measures in prison, in particular Article 3 of the Organic Law of the Penitentiary System (OLPS) 1/1979 of 26 September stipulates that all penitentiary norms must respect constitutional human rights. Prisoners must be treated with respect and human dignity.³⁸⁶

Civil Legislation

Regarding discrimination with respect to civil and administrative law provisions, it is worth mentioning a few pieces of legislation, as the Spanish legal framework does not provide a comprehensive and unique source of law dealing with discrimination as such:

³⁸⁶Forero Cuellar A., Tortosa M.C., Rivera Beiras I., Garcia- Bores Esp J.M. (2013), “Socialisation of offenders in the EU: Enhancing the role of the Civil Society (Re- Soc)”, available at: <http://www.ub.edu/ospdh/sites/default/files/documents/Re-Soc%20Ws1%20Imprisonment%20in%20Europe.%20Spain%20Country%20Report.pdf>

- Royal Legislative Decree Law 1/1995, 4 March 1995 (*La Ley del Estatuto de los trabajadores*) has a specific provision, Article 17, which prohibits direct and indirect labour discrimination on the grounds of sex, racial and ethnic origins, social condition, marital status, religion, political ideas, orientation, accession to trade unions and others.³⁸⁷
- Law on the Rights and Freedoms of Foreigners in Spain and their Social Integration (Organic Law 4/2000 of 11 January): the last revision Organic Law 2/2009 of 11 December, concerning the Discrimination of Migrants, contains two articles, 23.1 and 23.2, devoted to “anti-discrimination measures” and one article, Article 24, that establishes the applicability of judicial proceedings against any discriminatory practices that involve the infringement of fundamental rights and freedoms. **Discrimination is defined** as “any act which, directly and indirectly, entails a distinction, exclusion, restriction or preference in relation to a foreigner on the grounds of race, colour, ascendance or national or ethnic origin, or religious beliefs and practices, and whose purpose or effect is to negate or limit the recognition or exercise, in equal conditions, of human rights and fundamental freedoms in the political, economic, social or cultural spheres”. **Indirect discrimination** is defined as “any treatment stemming from criteria having an adverse effect on workers on account of their foreigners or members of a particular race, religion, ethnic group or nationality.” A limit of this provision is the lack of reference to other provisions or practices and also to the fact that it only refers to foreign workers.³⁸⁸
- Organic Law 7/1980 of 5 July 1980, on Religious Freedom: with regard to discrimination by belief, the Law establishes that: “Religious beliefs shall not constitute a reason for inequality or discrimination before the law. Religious reasons may not be a ground for preventing anyone from performing any work, activity, responsibility or public office”.³⁸⁹
- Law 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures (*Medidas fiscales, administrativas y del orden social*): has transposed the EU Racial Equality Directive 2000/43³⁹⁰ and the Employment Equality Directive 2000/78³⁹¹.

³⁸⁷ Noticias Juridicas (2016), “Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Vigente hasta el 01 de Enero de 2016)”, available at: http://noticias.juridicas.com/base_datos/Laboral/rdleg1-1995.t1.html#a17

³⁸⁸ United Nations General Assembly (2013), “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere”, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-56-Add-2_en.pdf

³⁸⁹ Niessen, J. and Chopin, I. (2004) *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, Martinus Nijhoff Publishers, p.164, available at: http://books.google.it/books/about/The_Development_of_Legal_Instruments_to.html?id=LKFTnpgH918C&redir_esc=y; Henrard K., ed. (2012), *The interrelation between the right to identity of minorities and their socio-economic participation*, Martinus Nijhoff Publishers, p. 268, available at: http://books.google.it/books/about/The_Interrelation_Between_the_Right_to_I.html?id=70MryzHigOoC&redir_esc=y

³⁹⁰ European Council (2000), Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, available at:

Chapter III of Title II contains three sections. The first section (Articles 27-28) contains a general transposition of the definitions of direct and indirect discrimination, harassment and instructions to discriminate given in the two directives. The second section (Articles 29-33) transposes various aspects of Directive 2000/43 on equal treatment irrespective of racial or ethnic origin within education, health, public services, housing and access to social services. These provisions include the possibility of adopting positive actions and measures for certain groups in order to compensate for disadvantages linked to racial or ethnic origin, the entitlement of legal entities to engage in proceedings concerning matters of racial or ethnic origin, and the inversion of the burden of proof. This section also establishes the *Council for the promotion of equal treatment and non-discrimination between persons on the grounds of racial or ethnic origin*. The Council will come under the ministry of Work and Social Affairs and will have different functions which are analyzed below.³⁹² The third section (Articles 34-43) includes measures on equal treatment and non-discrimination at work on the basis of religion or belief, racial or ethnic origin, disability, age and sexual orientation. It transposes what is provided in relation to employment and training in Directive 2000/43 and Directive 2000/78. It specifies the possibility of adopting positive action measures for certain groups in order to compensate for disadvantages experienced at work for the various labour laws so as to adapt them to the directives. In line with this aim, Articles 42 and 43 provide for the promotion of equality on various grounds in collective bargaining and the promotion of equality plans to address matters of disability in companies.³⁹³ Finally, Law 62/2003 introduces the shift of the burden of proof for civil, administrative and labour proceedings: according to Directives 2000/43 and 2000/78, the burden of proof can be shifted to the alleged discriminating agent whenever the victim of discrimination presents sufficient indications that discrimination has effectively occurred.³⁹⁴

- Royal Decree 1/1995 on the Statute of Workers: Article 4.2 establishes the right of all workers not to be discriminated against at the moment of being employed, nor during the period of employment, on the grounds of race, social status, religion, political opinion or language. Article 17.1 strengthens the previous provision, declaring void any discriminatory clauses of collective agreements, individual pacts, and unilateral decisions of discriminatory employers.³⁹⁵

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0043&from=EN>

³⁹¹ European Council (2000), Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

³⁹² See paragraph on Procedural Issues and Mechanisms.

³⁹³ Cachon L. (2011), "Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC Country Report 2010 Spain", European Network of legal Experts in the non discrimination field, available at:

<http://www.migpolgroup.com/portfolio/country-reports-on-measures-to-combat-discrimination-2010/>

³⁹⁴ For further information, see Secretariat of State for Equality (2011) "The Role of Equality Bodies in the Fight against Ethnic and Racial Discrimination", p. 33, available at: http://www.msssi.gob.es/ssi/igualdadOportunidades/docs/2011_conclusiones_key_challenges_conference_council_vfacc.pdf

³⁹⁵ For more information, see: L&E Global, Memorandum General Overview Employment Law/Spain, available at: http://knowledge.leglobal.org/wp-content/uploads/LEGlobal_Memo_Spain.pdf

The main concern as regards discrimination legislation is that the transposition of Directive 2000/43 and Directive 2000/78 was not made through an appropriate procedure: it was included in a law on fiscal, administrative and labour-related measures, without an adequate public debate capable of promoting the social awareness and public visibility these issues require. Therefore, there is an evident need for enacting a comprehensive law which, had it been approved in this legislative period, would have made it possible not only to complete the full transposition of the European Directives, but also to bring into line the levels of protection with respect to the different grounds of discrimination and set in motion adequate mechanisms for enabling the legal equality to become effective equality.³⁹⁶

Legal Framework on Racism

The following sections summarize the main legal provisions prohibiting racist acts and phenomena. It should be noted that racism can often be categorized under the broader field of discrimination; in effect, some incidents of racism may fall under the application of discrimination law, as reported in the above paragraphs, rather than under laws on racism. The section below highlights a sampling of laws within different disciplines, where there are specific provisions for dealing with the issue of racism.

Civil Legislation

There is no comprehensive legislation prohibiting racism, racial discrimination, xenophobia and related intolerance in Spain. The Spanish legal framework for combating racism and racial discrimination encompasses several pieces of legislation in different areas.³⁹⁷ They include:

- Act No. 27/2005 of 30 November 2005 on the Promotion of Education and a Culture of Peace: based on Section A, paragraph 2, of the Programme of Action on a Culture of Peace adopted by the General Assembly of the United Nations in 1999, aims at combating the dangers highlighted in 1998 by the United Nations Development Programme and provides a series of educational and research measures designed to establish a culture of peace and non-violence in Spanish society.³⁹⁸

³⁹⁶For further information, please see: Secretariat of State for Equality (2011) “The Role of Equality Bodies in the Fight against Ethnic and Racial Discrimination”, p. 27, available at: http://www.msssi.gob.es/ssi/igualdadOportunidades/docs/2011_conclusiones_key_challenges_conference_council_vfacc.pdf

³⁹⁷ United Nations General Assembly (2013), “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere”, p. 5, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-56-Add-2_en.pdf ; United Nations, Committee on the Elimination of Racial Discrimination, (2011), “Consideration of reports submitted by States parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination”, available at: <http://www.red-network.eu/resources/toolip/doc/2011/11/09/committe-on-the-elimination-of-racial-discrimination.pdf>

³⁹⁸ United Nations, Committee on the Elimination of Racial Discrimination (2009), “Reports submitted by States parties in accordance with article 9 of the Convention, 18th, 19th and 20th periodic reports of States parties due in 2008”, p. 22, available at: http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ESP.18-20_en.doc

- Organization Act No. 2/2006 of 3 May on Education: sets out the principles of the Spanish education system, which expressly includes “the transmission and implementation of values that promote personal freedom, responsibility, democratic citizenship, solidarity, tolerance, equality, respect and justice, and seek to overcome any form of discrimination”.³⁹⁹
- Organization Act No. 3/2007 of 22 March, on Effective Equality between Men and Women: aims to ensure the right to equal treatment and opportunities for men and women, in particular by eliminating discrimination against women, whatever their circumstances or status, in all walks of life, and especially in the political, civic, employment, economic, social and cultural spheres (article 1).⁴⁰⁰
- Media Law 7/2010 of 31 March on Audiovisual Communication: Article 18 prohibits any discriminatory advertisements and any commercial communication promoting hatred, or containing discriminatory content. It also foresees the setting up of a supervisory body to monitor this issue, the *National Council of Audiovisual Media*.⁴⁰¹
- Act 19/2007 of 11 July on Violence, Racism, Xenophobia and Intolerance in Sports: establishes a set of measures to eradicate violence, racism, xenophobia and intolerance in sport. Article 2 of the Act defines racist, xenophobic or intolerant acts in sports. In accordance with the aforementioned measures, the Act establishes penalties for violence, racism, xenophobia and intolerance in sport and sets up a sports disciplinary system to deal with such behavior. Depending on the severity of the acts committed, the system provides for penalties ranging from a fine of up to 650,000 Euros for very serious offences to other sanctions such as bans on organizing sporting events, the temporary closure of sports grounds or exclusion from the use of sports grounds. It also establishes the *State Commission against Violence, Racism, Xenophobia and Intolerance in Sport*, responsible for defining the relevant policies and proposing sanctions for racist or xenophobic acts.⁴⁰²
- Royal Legislative Decree 5/2000 of 4 August 2000: approved the revised text of the Law on Labour Law Infringements and Penalties.⁴⁰³ It regulates a number of infringements of labour relations: layoffs, job changes, etc. It does not include any offence in relation to discrimination.

³⁹⁹ United Nations General Assembly (2013), “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere,” p.5, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-56-Add-2_en.pdf

⁴⁰⁰ United Nations, Committee on the Elimination of Racial Discrimination (2009), “Reports submitted by States parties in accordance with article 9 of the Convention, 18th, 19th and 20th periodic reports of States parties due in 2008”, available at: http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ESP.18-20_en.doc

⁴⁰¹ Benedi Lahuerta S., “Racism and related discriminatory practices in Spain”, ENAR Shadow Report 2010-2011, available at: <http://cms.horus.be/files/99935/MediaArchive/publications/shadow%20report%202010-11/24.%20Spain.pdf>

⁴⁰² CoE (2011), Country profile Spain, information updated on 8 June 2011, p. 14, available at: http://www.coe.int/t/dg4/sport/Source/T-RV/Country_profiles/Spain_EN.pdf

⁴⁰³ European Foundation for the Improvement of Living and Working conditions, “Liability in subcontracting processes in the European construction sector: Spain”, available at: https://eurofound.europa.eu/sites/default/files/ef_files/pubdocs/2008/878/en/1/ef08878en.pdf

- Royal Decree 2816/1982 of 27th August: bans discriminatory use of the right of admission to bars, pubs, discos, nightclubs, and its text has been duplicated in most of the country's regional legal frameworks.

Experts have indicated that in the field of employment, discrimination is explicitly prohibited by current law, which provides for specific provisions on the matter. This seems to be less the case in other areas, like education, housing and social protection, where the legislation simply enshrines the principle of non discrimination, without regulating the matter with a more detailed approach.⁴⁰⁴

Spain attempted to create a new comprehensive Law in 2011, *the Draft Comprehensive Law for Equal Treatment and Non Discrimination*, also known as the *Comprehensive Strategy against Racism, Racial Discrimination, Xenophobia and Other Related forms of Intolerance* with the collaboration of the Directorate General for the Integration of Immigrants.⁴⁰⁵ The principal measures foreseen in this Strategy were the following: Improvement of the systems for gathering institutional statistical information on “racist and xenophobic incidents”, racial discrimination and other related forms of intolerance; stepping up institutional coordination and coordination with civil society; the organisation of specialised trainings for legal operators and professionals who are stakeholders in the fight against discrimination; reinforcement and development of assistance services for victims of discrimination and hate crime, as well as monitoring and evaluation systems.⁴⁰⁶

Unfortunately, this attempt to adopt a single comprehensive instrument failed due to the anticipated dissolution of the Spanish Parliament and the hosting of general elections in November 2011, which disrupted the decision-making process. The new government showed no intention of following up on the proposal.⁴⁰⁷

Hate Speech Law

There is no specific definition of hate crime or hate speech in the Spanish legal system; therefore, the terms are not used in legislation. When prosecutors and judges refer to these issues, they usually resort the working definition employed by the OSCE/ODHIR.⁴⁰⁸ The new

⁴⁰⁴ De Witte, N., Zapata-Barrero, R. (2008), “Combating discrimination of immigrant workers in Spain: from equal rights to equal opportunities”, Universitat Pompeu Fabra,, available at: http://www.upf.edu/gritim/pdf/griip-emilie_wp4.pdf

⁴⁰⁵ Movement against discrimination (2011), “News: A Law to end Discrimination”, available at: <https://movementagainstintolerance.wordpress.com/2011/03/14/news-a-law-to-end-discrimination/>

⁴⁰⁶ Secretariat of State for Equality, Conference (2011), “The Role of Equality Bodies in the fight against Ethnic and Racial Discrimination”, p.23, available at: http://www.msssi.gob.es/ssi/igualdadOportunidades/docs/2011_conclusions_key_challenges_conference_council_vfacc.pdf

⁴⁰⁷ “Developing Anti-discrimination law in Europe” (2011), available at: http://ec.europa.eu/justice/discrimination/files/comparative_analysis_2013_en.pdf

⁴⁰⁸ To see the OSCE/ODIHR's definition of hate crime, please visit: <http://www.osce.org/odihr/prosecutorsguide?download=true>

wording of Article 540 of the Criminal Code aims to solve the legislative gap that has existed until now to punish conduct relating to hate speech. However, in Spain there is currently a doctrinal debate, in which many actors prioritize the right to freedom of expression.

In addition, the Spanish legal framework does not provide any specific provision on hate speech law as such. Hate speech cases are processed indirectly under discrimination law provisions if the “speech” represents a form of discrimination or those types of acts that different law provisions penalize, depending on the type of offence produced by the act itself (e.g. instigation to violence).

The UN’s Special Rapporteur (SR) recommends that the Government to put an end to hate speech and xenophobic discourse among politicians and political leaders, as well as to strengthen the mechanism for preventing and eliminating such utterances.⁴⁰⁹

Law concerning Hate Speech Online

The use of the Internet for the dissemination of ideas and racist and xenophobic actions is a growing concern for international organisations and States. Given the evident difficulty in applying the law in this environment, the Internet is increasingly more widely used by racist and xenophobic groups for disseminating documents and mobilising actions that, otherwise, would be considered illegal. International organisations have drawn attention to the fact that items of information of this kind are housed on websites and with services providers in States that place obstacles in the way of the investigation and pursuit of these actions.⁴¹⁰ The Spanish government has allowed for the establishment of a control system which blocks extraterritorial websites that do not comply with national laws. Spain passed legislation – the so-called “Sinde Law”- which authorises judges to close Spanish sites and block access to abroad-based web pages that do not comply with national laws.⁴¹¹ The implementation of geographic location technology can further enable both servers and States to control the flow of information on the Internet through the identification of users IP address, which can be used to both restrict access and filter out odious material.⁴¹² As regards services for

⁴⁰⁹ UN General Assembly (2013), “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere”, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-56-Add-2_en.pdf

⁴¹⁰ Secretariat of State for Equality (2011), “The Role of Equality Bodies in the fight against Ethnic and Racial Discrimination”, available at: http://www.msssi.gob.es/ssi/igualdadOportunidades/docs/2011_conclusiones_key_challenges_conference_council_vfacc.pdf

⁴¹¹ TorrentFreak (2012), “Website Blocking Law implemented by New Spanish Government”, available at: <http://infojustice.org/archives/6820>

⁴¹² Banks J. (2011), “European regulation of cross-border hate speech in cyberspace: The limits of legislation”, Sheffield Hallam University, available at: http://shura.shu.ac.uk/6902/1/Banks_European_Regulation.pdf

information society and electronic commerce, Law 34/2002 of 11th July also bans discriminatory content.⁴¹³

Online Aspects

In May 2014, the Spanish government asked the State Attorney to suppress Twitter hate speech. Prosecutors have warned of the difficulty in tackling all online insults in a generalized way, as “Incitement to hatred” provisions cannot be applied to all cases. There are multiple obstacles to legally acting against online messages in a generalized fashion. In theory, internet users are subject to the same laws that address crimes such as threats, slander, humiliation and glorifying terrorism. But it is not possible to apply the “incitement to hatred” provisions to every case of online insults. Many politicians would like to see specific regulation against online hate speech, although several experts on social networks have said the Penal Code was previously sufficient to deal with the problem.⁴¹⁴

Effectiveness of the Spanish Legal Framework towards Hate Crime and Racism

The UN SR on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere, upon completion of his visit to Spain in June 2013, reported that the country has made important progress in addressing the problems of racism and xenophobia. He also stated that Spain has a strong legal framework against discrimination, important policies to combat racism and credible institutions in the fight against racism. However, it is crucial that Spain make the agenda of combating racism, racial discrimination, xenophobia and related intolerance a priority. In particular, there is a need for a clear and more visible political leadership in combating racism and xenophobia, since the struggle against racism cannot be effective unless it is led by the most senior political leadership.⁴¹⁵

As regards in particular the legal framework, the SR recommended that the Constitution explicitly guarantee to non-citizens the right to equality before the law. He also recommended improving the anti-discrimination legislation through the adoption of comprehensive legislation on racism, racial discrimination, xenophobia and related intolerance. In this regard, he encourages the Government to use the draft presented by the previous legislature as a basis⁴¹⁶, while maintaining the positive aspects it offers and improving its shortcomings, if any. He recommended the wide and effective consultation and participation of all actors in the process, including local and regional authorities, civil

⁴¹³ Prism Questionnaire submitted by the Institute of Women and for Equal opportunities. Ministry of health, social services and equality of Spain.

⁴¹⁴ *El Pais* (2014), “Spanish government asks State Attorney to crack down on Twitter hate speech”, available at:

http://elpais.com/m/elpais/2014/05/21/inenglish/1400663993_676484.html

⁴¹⁵ UN General Assembly (2013), “Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere”, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-56-Add-2_en.pdf

⁴¹⁶ Draft Comprehensive Law for Equal Treatment and Non-Discrimination.

society, NGOs and the victims of racism such as the Roma population, as well as the Office of the High Commissioner for Human Rights and other United Nations entities. The SR also recommended that the Government effectively implement the existing anti-racism laws. Adequate financial, technical and human resources should be provided while ensuring that implementation is in conformity with international human rights standards. Furthermore, measures to raise awareness about the anti-discrimination legal framework, including among the judiciary and law enforcement officials, should be strengthened. More training on human rights and racial discrimination should be provided, while ensuring that training is regular and compulsory. As regards the Penal Code, in particular, the SR recommended that Spain provide more clarity and coherence in reforming it, while ensuring that it is done in line with international human rights standards. He recommended, *inter alia*, that Spain ensure that racial motivations are harmonized throughout the Penal Code in conformity with article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, and ensure better implementation, including implementation of provisions relating to racial motivation as an aggravating circumstance.⁴¹⁷ In particular, it was specified that the various pieces of anti-discrimination legislation are not often invoked in court: there are criminal penalties but there is no inclination to apply them. This is why the creation of special or specialized prosecutors is a highly positive development.⁴¹⁸ The lack of awareness and training in the judiciary and law enforcement about such legislation was also reported.⁴¹⁹

Also according to ECRI (European Commission against Racism and Intolerance) and ENAR (European Network against Racism) some of the above mentioned provisions are rarely applied, as in the case of Article 22.4 of the Criminal Code, since the conditions regarding the aggravating circumstance are reported to be very restrictive and to be applied in few cases only. In addition, problems found related to the actual application of this provision occur at all stages of the criminal justice system: police often fail to record the racist dimension of the offences reported to them and prosecutors, judges and all actors involved would need further training on this subject.⁴²⁰

Moreover, the lack of harmonization in the provisions of the Penal Code relating to non-discrimination were also reported by the SR, including the fact that some grounds of discrimination prohibited in some articles are not included in other articles also relating to

⁴¹⁷ UN General Assembly, (2013), "Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere", p.15, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-56-Add-2_en.pdf

⁴¹⁸ Secretariat of State for Equality (2011), "The Role of Equality Bodies in the fight against Ethnic and Racial Discrimination", p.29, available at: http://www.msssi.gob.es/ssi/igualdadOportunidades/docs/2011_conclusiones_key_challenges_conference_council_vfacc.pdf

⁴¹⁹ UN General Assembly (2013), "Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere", available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-56-Add-2_en.pdf

⁴²⁰ Human Rights first (2007), "Country-by-Country, Hate crime Report Card", p.70, available at: <http://www.humanrightsfirst.org/wp-content/uploads/pdf/071217-discrim-hc-report-card-2007.pdf>

racial discrimination.⁴²¹ It is also difficult for the victims of discrimination to access the justice administration because they have no confidence in this body, they are not aware of their rights, or they choose to look inwardly rather than outwardly to deal with the effects of victimization. With this perspective in mind, having a strong and robust Equality Body could be of great help. Another procedural issue, as regards victims, is represented by the difficulties individuals face in proving the racial motivations of the perpetrators.⁴²² A good example of this challenge can be found in the Zaragoza case, which will be analyzed towards the end of this report.

With regards to the new article 510.3, added by Organic Law 1/2015 of 30 March, it will be important to assess in the future whether the introduction of this provision will improve the effectiveness of the legislation, aside from only fostering increased deterrence.

Procedural Issues and Mechanisms

Having good legal provisions in place is indispensable for the proper functioning of a State's justice system. However, the sheer existence of laws is not necessarily a guarantee of neither their effectiveness nor real equality being attained for the individual if such laws are not accompanied by appropriate regulations and policies capable of giving them meaning and of ensuring compliance. In the same way, having comprehensive procedural legislation providing for mechanisms to counter discrimination on all grounds is of vital importance. In the following paragraph a brief analysis of the main procedures available for addressing discrimination will be conducted.

Spanish law provides different mechanisms and legal procedures to tackle discrimination and allow victims of discrimination to protect their rights. As regards legal procedures *stricto sensu*, Article 53.2 of the Constitution provides for the procedural protection of human rights. It states that every citizen has the right to appeal to ordinary courts in order to defend his/her constitutional rights. The Article also grants the right to initiate a procedure of *amparo* before the Constitutional Tribunal for violations of human rights. Despite the fact that Article 53 uses the term "citizens", the Constitutional Court has determined that it also applies to non-citizens and, in fact, to all persons to whom the human rights enshrined in the Constitution are addressed.⁴²³

Therefore, the Spanish Constitution provides that all fundamental rights are protected by ordinary courts of law. Individuals can appeal to an administrative, labour or civil court in order to protect their right of freedom from discrimination in employment⁴²⁴. Moreover,

⁴²¹ UN General Assembly (2013), "Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere", available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-56-Add-2_en.pdf

⁴²² *Ibid.*

⁴²³ CoE (2004), "Legal measures to combat racism and intolerance in the member States of the Council of Europe, Spain", p. 13, available at: http://www.coe.int/t/dghl/monitoring/ecri/legal_research/national_legal_measures/Spain/Spain_SR.pdf

⁴²⁴ European Commission (2011), "Thematic Report, Application of the Regulation 1612/68", European Network of free movement of workers, available at: <http://ec.europa.eu/social/BlobServlet?docId=6669&langId=en>

appeals for protection in respect of such rights may be lodged at the Constitutional Court, once ordinary proceedings have been exhausted.

In addition to the personal liability for prosecution of hate speech, stipulated in Article 31 *bis*, Spanish law also foresees corporate liability on this issue through the combined application of Article 31 *bis* and Article 510 *bis* of the Criminal Code.⁴²⁵

The organic Law on the protection of fundamental rights contains a short procedure for civil and criminal jurisdiction and also for administrative proceedings. There are also conciliation procedures for civil and social matters. As well as having recourse to the ordinary courts and to the Constitutional Court, victims of discrimination may appeal to the Ombudsman if the issue concerns acts by the public administration, as well as to the Labour Inspectorate or to the Education Inspectorate, if the claim pertain to these fields.

The Spanish Constitution entitles any physical or legal person invoking a legitimate interest to be party to proceedings relating to the violation of fundamental rights and freedoms. Claims with respect to discrimination are normally supported by various organisations, such as non-governmental organisations (NGOs) working with members of the Roma community or immigrants, NGOs active in combating racism, or trade unions. These organisations are entitled to be party to legal proceedings.

With regard to representation by trade unions, the Labour Procedure Act, in its regulation of capacity and procedural legitimisation, specifically allows for representation by workers or their legitimate representatives, if the former are incompetent or if the plaintiff is a legal entity. Furthermore, this Law provides that trade unions, bringing a collective complaint, may appear in court for and on behalf of their members, who authorise them to do so, in order to defend their individual rights.⁴²⁶

Generally speaking, there are few specific rulings on racial discrimination in the courts, due to the fact that these cases are usually treated as violations of other types of legal rights, such as damage to property, without taking into account racist motivations. A further complication is that the individuals concerned do not bring forth many complaints, owing to bureaucracy and to the small number of convictions. However, court actions have been brought on account of discrimination – against Roma and immigrants – that have attracted a degree of public interest.⁴²⁷

Practitioners note that situational testing,⁴²⁸ which could be of great help in proving cases of discrimination, is not expressly provided for in Spanish law, but nor is it forbidden. Therefore, it might be used as a form of evidence in discrimination cases. Statistical evidence

⁴²⁵ Prism Questionnaire submitted by the Institute of Women and for Equal opportunities. Ministry of health, social services and equality of Spain.

⁴²⁶ *Ibid.*

⁴²⁷ Cachón L. (2012), “Executive Summary, Country Report Spain 2011 on measures to combat discrimination”, European network of legal experts in the non-discrimination field, available at: http://www.non-discrimination.net/content/media/2011-ES-Summary%20country%20Report%20LN_final.pdf

⁴²⁸ Angel de Prada M., Actis W., Pereda C., Pérez Molina R., “Labour market discrimination against migrant workers in Spain”, Employment Department International Labour Office, Geneva, p.5 available at: http://www.oit.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_201044.pdf

has been used in some judgments, especially in cases of sex discrimination in the employment field.⁴²⁹

As regards judicial proceedings *stricto sensu*, criminal offences motivated by hate or discrimination can be reported through three possible channels: the Police and Security Forces, the Court on duty and finally through the Public Prosecutors' Offices. If what is to be reported is considered serious in nature, it is advisable to always approach the Police and Security Forces. If it is not a case involving the potential for violence, but an investigation is necessary, the recommendation is to approach an office of the Public Prosecutor.⁴³⁰ Aside from judicial tools, reporting is also possible through the use of online forms (usually sent to the Equality Body), available free of charge via a number of associations working with victims, and through email addresses run by the police or Equality Bodies.⁴³¹

Special Prosecutors working to combat discrimination, hate crime, and cybercrime have been appointed in all of the Public Prosecutors' offices in order to work on issues such as 'cyber-racism'. The designated Division Prosecutor for Computer Crimes is responsible for coordinating the actions by the prosecutors' offices in the exercise of criminal actions in relation to crimes committed through the Internet. This Special Prosecutor does so by making proposals with respect to the investigation and the formulation of the relevant accusation, determining appropriate criteria with respect to the investigation that the central government, police and security forces, and regional police corps are to carry out, and seeking a configuration of protocols of action to facilitate the exercise of such actions before the courts, all with the aim of achieving the unification of criteria of action in the suppression of these criminal acts. The Special Prosecutor is also responsible for the task of liaising with the Legal Studies Centre of the ministry of Justice for the coordination of the basic training of prosecutors in relation to the investigation of crimes committed through the Internet. This appointment is welcome as there is an increasing need for investigations concerning racist hate disseminated through the internet. According to the Catalan Specialized Prosecutor on Hatred Crimes, cyber-hate has increased notably during 2010.⁴³²

Although there is no specific national body mandated to address issues of hate crime and hate speech, there are different institutions, aside from the courts, which are responsible for fighting against racism in Spain and that contribute to supporting victims of

⁴²⁹ Cachón L. (2012), "Executive Summary, Country Report Spain 2011 on measures to combat discrimination", European network of legal experts in the non-discrimination field, available at: http://www.non-discrimination.net/content/media/2011-ES-Summary%20country%20Report%20LN_final.pdf

⁴³⁰ Secretariat of State for Equality (2011), "The Role of Equality Bodies in the fight against Ethnic and Racial Discrimination", available at: http://www.msssi.gob.es/ssi/igualdadOportunidades/docs/2011_conclusiones_key_challenges_conference_council_vfacc.pdf

⁴³¹ Prism Questionnaire submitted by the Institute of Women and for Equal opportunities. Ministry of health, social services and equality of Spain.

⁴³² Benedí Lahuerta S., "Racism and related discriminatory practices in Spain", ENAR Shadow Report 2010-2011, p.33, available at: <http://cms.horus.be/files/99935/MediaArchive/publications/shadow%20report%202010-11/24.%20Spain.pdf> ; UN General Assembly (2013), "Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere", p.15, available online at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-56-Add-2_en.pdf

discrimination.⁴³³ These institutions and their functions are listed below in chronological order.

1) The **National Ombudsperson (*Defensor del Pueblo*)** is an independent official who plays an important role in combating racism and racial discrimination. This official's role is defined by the Constitution -which entered into force in 1978 -and the individual serving in this position is elected by the Parliament for a five-year term. He/she is empowered to investigate ex officio, or upon complaints, any action or decision from the public administration that may violate constitutional rights, as well as to visit places of detention, with or without prior notice. The task of the Spanish Ombudsman is therefore to defend the fundamental rights and freedoms acquired by the Spanish people under the Constitution. In this context, he/she has the authority to submit to the Spanish Constitutional Court legislation which he/she considers to be incompatible with the Constitution.⁴³⁴

Ombudspersons exist also at a regional level, including Ombudspersons for regions such as Andalusia and Catalonia. Of the 17 autonomous communities in Spain, 11 have established Regional Ombudspersons.⁴³⁵

2) The **Office for Non-Discrimination** of the Town Council of Barcelona (OND) is a locally-based service, established in 1998, aimed at defending people's rights, whose main functions are the dissemination of human rights information and the prevention of discriminatory behaviours, as well as being the point of contact, analysis and transference for complaints on grounds of discriminatory treatment. The office plays a role of mediation and delivers legal advice for the lodging of complaints.⁴³⁶

3) The **Forum for the Social Integration of Immigrants**, created by Law 4/2000, is a collegiate consultative, informative and advisory body in the field of immigrant integration.⁴³⁷

4) Law 62/2003 established a **Council for the promotion of Equal Treatment of all Persons without Discrimination on the Grounds of Racial or Ethnic Origin**.⁴³⁸ This council was set up

⁴³³ Prism Questionnaire submitted by the Institute of Women and for Equal opportunities. Ministry of health, social services and equality of Spain.

⁴³⁴ Reif L., (1999), *The International Ombudsman Anthology*, Kluwer Law International, available at: https://books.google.it/books?id=H8OZjm_YRpgC&pg=PA319&lpg=PA319&dq=NATIONAL+OMBUDSPERSON+N+SPANISH+CONSTITUTION&source=bl&ots=climc_tUR-&sig=wASTt-z7cgalNmx3HvCTGesjZuU&hl=it&sa=X&ei=BSOJVaq_FYatU7ibgLgN&ved=0CEEQ6AEwBA#v=onepage&q=NATIONAL%20OMBUDSPERSON%20IN%20SPANISH%20CONSTITUTION&f=false

⁴³⁵ See: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-56-Add-2_en.pdf

⁴³⁶ Observatory on Human Rights of the City of Barcelona, "Good practices: The Office for non-discrimination (OND)", available at: <http://w110.bcn.cat/fitxers/dretscivils/bonesprctiquesondeng.931.pdf>

⁴³⁷ Arango J., Brey E., Maldonado Y., Moualhi D. (2011), "Country Context paper Spain", University Complutense Madrid, p. 6, available at: https://www.compas.ox.ac.uk/fileadmin/files/images/AMICALL_Logos/Amicall_-_Country_Profile_Spain_Part_1_-3-11-11.pdf

⁴³⁸ Equinet, "Council for the Promotion of Equal Treatment and non discrimination on the grounds of Racial or Ethnic origin- Spain", available at: http://www.equineteurope.org/IMG/pdf/PROFILE_REEC_ES.pdf

on 28 October 2009 and became operational on the same day. Royal Decree 1262/2007 (later modified by Royal Decree 1044/2009) regulates the composition, competencies and regulations for the council. The council has the following characteristics: it is attached to the ministry of Equality; it is a collegiate Spanish governmental body; and it has three functions as described in Article 13.2 of directive 2000/43⁴³⁹, specifically providing independent assistance to victims, conducting independent surveys and publishing independent reports. While the term “independent” does not appear in the definitions of these three functions as laid out in Law 62/2003 (as was required by the Directive), the term does appear in Royal Decree 1262/2007.⁴⁴⁰ The composition of the Council is of a governmental nature, as the Law states that the council is to be formed by all the ministries having responsibilities in the areas referred to by Article 3.1 of Directive 2000/43, with the participation of the autonomous regions, the local authorities, the employers’ organisations and trade unions, and other organisations representing interests related to the racial or ethnic origin of persons.

The Council consists of a chair and 28 members, 14 of whom are members of the public administration and 14 of whom are social partners and stakeholders. They are distributed as follows: a) there are seven members representing the central government, all with the rank of director general; b) seven members from other tiers of government; c) four members coming from social partners; d) 10 members representing organisations and associations whose activities are linked to the promotion of equal treatment and non-discrimination on the grounds of racial or ethnic origin.⁴⁴¹

As was stated above, the Council is attached to the ministry of Health, Social services and Equality and provides assistance to victims of discrimination, considers complaints, carries out awareness-raising activities and trainings on discrimination, conducts studies and formulates recommendations on the prevention of racial discrimination.⁴⁴² Challenges facing the Council include a lack of human and financial resources available for the effective functioning of the organization,⁴⁴³ as well as overcoming a low success rate in bringing discrimination cases to court and intervening in court cases on behalf of victims of discrimination. However, in reference to the last challenge, the possibility for the Council to act as a potential claimant in the interests of discriminated victims has not been provided by the law.

⁴³⁹ For an in-depth analysis of the text of the Directive, see: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0043&from=EN>

⁴⁴⁰ Cachón L. (2007), “Report on Measures to Combat Discrimination Directives 2000/43/EC and 2000/78/EC Country Report Spain”, European network of legal experts in the non-discrimination field, available at: <http://www.non-discrimination.net/content/media/2007-ES-Country%20Report%20Final.pdf>

⁴⁴¹ Cachón L. (2011), “Executive Summary, Country Report Spain 2010 on measures to combat discrimination”, European network of legal experts in the non-discrimination field, p. 8, available at: http://www.non-discrimination.net/content/media/2010-ES-Summary%20country%20Report%20LN_final.pdf.

⁴⁴² *Ibid.*

⁴⁴³ Hermanin C. and De Kroon, E. (2013), “The Race Equality Directive: a Shadow Report, Lessons learnt from the implementation in nine EU member states”, Open Society European Policy Institute, p.27, available at: http://eucenter.berkeley.edu/files/Hermanin_Race-Equality%20Directive-Shadow-Report-20130711.pdf

All of these challenges serve to demonstrate the Council's limited power and lack of independence, making the body appear to be a typical internal consultative body within the Spanish government.⁴⁴⁴

In June 2010, the Council launched a Network of Centres of Assistance for Victims of Racial or Ethnic Discrimination involving eight nation-wide NGOs. While the Network's work came to a halt in 2012, it resumed its activities on 15 March 2013. On this date, the contract of "provision of services" was signed with the *Fundación Secretariado Gitano* (FSG). In order to achieve the best possible results, FSG has the service to include six other organizations specialized in assisting victims of discrimination: ACCEM, *Cruz Roja Española*, *Fundación CEPAIM*, *Movimiento contra la Intolerancia*, *Movimiento por la Paz* and *Red Acoge*. From 15 March 2013 until 14 December 2013 (last available data), the Network has assisted in 376 cases of discrimination: 231 involving individuals and 145 pertaining to collective cases.⁴⁴⁵

Through this Network, criteria and tools have been consolidated, therefore making it possible to work more effectively in the defence of the right to equal treatment, as well as in the analysis of the situations of the victims.⁴⁴⁶ As previously said with regard to the Council's competencies⁴⁴⁷, the activities of the Network of Centres for Assisting Victims of Discrimination do not extend to judicial actions. This is why the main set of actions developed is based on extrajudicial actions, such as speaking on behalf of victims, mediation or negotiation, actions which in many cases have obtained positive results, and, at the same time, make others more sensitive to the situation. Nevertheless, experts in the field think that in the most extreme cases there is the possibility to offer victims a defence before the courts under criminal law⁴⁴⁸

The Network has been able to identify two alarming issues: firstly, a culture of acceptance regarding discrimination has developed, since suffering discrimination is something that has become routine in some people's lives; secondly, the levels of the reporting discrimination are very low: only 4% of cases are reported.⁴⁴⁹

5) The **Observatory on Racism and Xenophobia** (*Observatorio Español del Racismo y la Xenofobia*, established in 2003) in Spain also plays a key role in conducting studies and

⁴⁴⁴ Düvel W., Schömann I., Clauwaert S., "Non-discrimination in the European Union Implementation of Directives 2000/78/EC and 2000/43/EC", European Trade Union Institute, p.28, available at: <http://library.fes.de/pdf-files/gurn/00382.pdf>

⁴⁴⁵ Cachón L. (2014), "Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC Country Report Spain, European network of legal experts in the non-discrimination field", p.97, available at: <http://www.refworld.org/pdfid/541ace4c4.pdf>

⁴⁴⁶ Secretariat of State for Equality (2011), "The Role of Equality Bodies in the fight against Ethnic and Racial Discrimination", p.36, available at: http://www.msssi.gob.es/ssi/igualdadOportunidades/docs/2011_conclusiones_key_challenges_conference_council_vfacc.pdf

⁴⁴⁷ Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin.

⁴⁴⁸ Secretariat of State for Equality (2011), "The Role of Equality Bodies in the Fight against Ethnic and Racial Discrimination", p. 35, available at: http://www.msssi.gob.es/ssi/igualdadOportunidades/docs/2011_conclusiones_key_challenges_conference_council_vfacc.pdf

⁴⁴⁹ *Ibid.*

analysis on racism and discrimination and contributing to raising public awareness on issues related to discrimination.⁴⁵⁰ More specifically, it is in charge of monitoring acts of discrimination and proposing strategies for their prevention with the aim of achieving equal treatment for all. The Observatory also carries out periodic surveys on racism in Spain and conducts expert studies of the data to formulate an analysis of the situation. The Observatory has already become active in training civil servants and security forces on the issue of equal treatment and the promotion of equality in both the public and private sectors.⁴⁵¹

6) Royal Decree 891/2005 of 27 July 2005 set up the **National Roma Council** as a collegiate interministerial participatory and advisory body under the responsibility of the ministry of Health and Social Policy. This institution deals with general and specific public policy affecting the integral development of the Roma population in Spain.⁴⁵²

7) Finally, the **National Disability Council** functions as the coordinating mechanism for the implementation of the UNCRPD in Spain.⁴⁵³ It was created by Royal Decree No. 1955/2009 of 4 December 2009. Its Secretariat is located in the office of the Directorate-General for the Coordination of Sectoral Policies on Disability within the ministry of Health, Social Policy and Equality. It coordinates policies and facilitates cooperation between ministries and organizations of persons with disabilities.⁴⁵⁴

The Spanish system, with its multiple institutions dealing with discrimination, serves as a point of reference for awareness-raising and the promotion of equality and non-discrimination as well as a platform for networking.

In conclusion, the creation of the office of the Special Prosecutor has been extremely important, despite the fact that there are still many procedural issues which need to be considered and solved. As it is responsible for overseeing police forces in Spain, the ministry of Interior can also be considered as a main driving force behind combating these crimes. Since 2014 the ministry has issued a yearly report on incidents related to hate crime in Spain.⁴⁵⁵ It has also approved a specific Protocol for Police Forces in order to make sure that any hate-motivated crime is registered as such, with the aim of facilitating data sharing

⁴⁵⁰ *UN Chronicle* (2007), "State-led efforts in Eliminating Racial Discrimination: The Experience in Spain", available at: <http://unchronicle.un.org/article/state-led-efforts-eliminating-racial-discrimination-experience-spain/>

⁴⁵¹ Model United Nations, "Spain position on Ethnic and Racial Discrimination in Europe", available at: http://www4.uwm.edu/cie/model_un/data/papers/8829/MUN_Spain_Racia_crimination.doc

⁴⁵² Villagómez E., Oteo E., Carbonell D. (2009), "Case Study State Council for the Roma People (Spain)", available at: http://www.stakeholders-socialinclusion.eu/site/en/cs/ES_cs-scr

⁴⁵³ Infoblind.org (2014), "Information for Countries Spain, National implementation and monitoring", EBU The voice of blind and partially sighted people in Europe, available at: <http://www.euroblind.org/convention/article-33--national-implementation-and-monitoring/nr/2224>

⁴⁵⁴ United Nations Human Rights, Office of the High Commissioner, "Study on the implementation of Article 33 of the UN Convention on the rights of Persons with disabilities in Europe", p.35, available at: http://europe.ohchr.org/Documents/Publications/Art_33_CRPD_study.pdf

⁴⁵⁵ To see the entire text of the Report, please visit: <http://www.interior.gob.es/documents/10180/1643559/Estudio+Incidentes+Delitos+de+Odio+2014.pdf/70073437-795d-4ce1-acfc-ed92b02cf1a6>.

between law enforcement agencies and other entities. Additionally, the ministry has issued a Report on the evolution of hate crime.⁴⁵⁶

As regards the Equal treatment Council, the most important consideration is that such a body should be able to perform its tasks in an independent way, hence without being subject to instructions or a hierarchical dependence. It is therefore essential to put mechanisms into place to safeguard the independence of its president and/or its senior representation, establish the existence of a differentiated budget and permit it the freedom to approve and implement its own action plans. As regards its functions, it would be beneficial to provide the possibility to initiate *ex officio*, or at request of third parties, investigations on the existence of possible situations of discrimination, taking judicial action in defence of the rights derived from the law.⁴⁵⁷ As regards cyber hate, there are doubts as to which would be the most appropriate way to combat this phenomenon, whether it would be better to tackle it through the judicial system or through extrajudicial action. Some specialists in the field consider extrajudicial strategies more effective, although it is important to maintain the legal perspective because it helps to convey the message that hate speech is punishable by law. The real problem of the legal perspective is the scope of freedom of speech which tends to be very broad, particularly in the case of websites, blogs, and social networks located in the United States, where the freedom of speech has a very high degree of protection.⁴⁵⁸

Jurisprudence

In trying to better understand the effectiveness of the Spanish legislative framework in the field of discrimination and hate-based crime, we examined a few important decisions by the Constitutional Court of Spain and other, lower courts.

Judgements on Discrimination

1) Judgment 235/2007: On 17 November 2007, the Constitutional Court declared unconstitutional a provision of the Criminal Code concerning genocide denial, stating that only the dissemination of ideas or doctrines that “justify” crimes of genocide or seek to restore totalitarian regimes is now punishable by a prison sentence. Therefore, Holocaust denial is legal, whilst justifying the Holocaust or any other genocide is an offence and is punishable by imprisonment. In other words, the mere denial of the Holocaust is not necessarily an affront to dignity. In Spain, Holocaust denial must be accompanied by

⁴⁵⁶ Prism Questionnaire submitted by the Institute of Women and for Equal opportunities. Ministry of health, social services and equality of Spain. To see the report, please visit: <http://www.interior.gob.es/documents/10180/1643559/Estudio+Incidentes+Delitos+de+Odio+2014.pdf/70073437-795d-4ce1-acfc-ed92b02cf1a6>

⁴⁵⁷ Secretariat of State for Equality (2011), “The Role of Equality Bodies in the fight against Ethnic and Racial Discrimination”, p.3, available at: http://www.msssi.gob.es/ssi/igualdadOportunidades/docs/2011_conclusiones_key_challenges_conference_council_vfacc.pdf

⁴⁵⁸ *Ibid*, p. 51

contempt or incitement to hatred in order to be punishable within the confines of the Criminal Code.⁴⁵⁹

It must be pointed out that denial crimes are included in Council Framework Decision 2008/913/JHA of 28 November 2008 on racism and xenophobia. The Framework Decision requires Member States to punish acts “*publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity, and war crimes as defined... in the Statute International Criminal Court*” and in a separate clause requires Member States to punish “*condoning, denying or grossly trivialising*” the Holocaust. Here Holocaust denial is presented separately from other crimes of genocide. Qualifiers in the text of the Framework Decision do allow Member States to limit punishment of genocide denial to cases where it is likely “*to incite to violence or hatred*”, “*likely to disturb public order*” or is “*threatening, abusive or insulting*”.

The European Court of Human Rights agrees with Spain when it comes to genocide, but as stated in other previous rulings (the *Garaudy* ruling is a paradigmatic example), Holocaust denial *ipso facto* is an incitement to hatred. In this regard, the Spanish Tribunal stands alone.⁴⁶⁰

2) Court Decision 111/14 (Criminal Court No.6 of Barcelona): A security guard at a nightclub was convicted by the Criminal Court of Barcelona of a crime against fundamental rights and civil liberties in the form of denying the provision of a service. The case was related to two transgender people who were refused entry by the defendant to the nightclub. The penalty imposed was disqualification from the exercise of the profession of nightclub security guard for the duration of 1 year for discriminatory denial of service, and payment of 300 euros in compensation to each of the victims. Article 512 of the Criminal Code provides for the disqualification from the exercise of a profession, trade, industry or business, for a period of one to four years, for “*those who, in the exercise of their professional or business activity, deny the provision of a service to a person entitled thereto on the grounds of his ideology, religion or beliefs, his forming part of an ethnic group, race or nation, his gender, sexual orientation or family situation or any illness or disability from which he suffers*”.⁴⁶¹

It was the first time that this provision had been applied and that a person had been convicted in Spain for discrimination on the basis of sexual orientation in the field of access to services. An important role was played by the Special Prosecutor against Discrimination and Hate Crimes of Barcelona since, as it has been already pointed out above, prosecutors often do not give enough attention to these kinds of issues.⁴⁶²

⁴⁵⁹ Coderch P.S., Rubí Puig A. (2008), “Genocide Denial and Freedom of Speech”, School of Law Universitat Pompeu Fabra, available at: http://www.indret.com/pdf/591_en.pdf

⁴⁶⁰ Project for Democratic Union (2014), “Holocaust Denial as a Legal Issue in Europe”, available at: <http://www.democraticunion.eu/2014/11/holocaust-denial-legal-concept-europe/>

⁴⁶¹ Criminal Code of Spain, available at: <http://www.scribd.com/doc/139300039/Criminal-Code-Spain#scribd>

⁴⁶² Cachón L. (2014), “A court convicted a person for refusing access to a nightclub to two transsexual persons: Spain”, European network of legal experts in the non-discrimination field, available at: <http://www.non-discrimination.net/content/media/ES-21-Discrimination%20access%20public%20services%20to%20transsexual%20persons.pdf>

Judgements on Hate Crime

1) Decision of the Provincial Court of Zaragoza (3rd Section), number 195/2008, 28 March 2008, Criminal Jurisdiction, Appeal Number 159/2006⁴⁶³

The abovementioned judgment of the Provincial Court of Zaragoza partially revokes the Decision of 6 February 2006 by Criminal Court number 6 of Zaragoza. Specifically, the judgement declares that the aggravating factor of sexual or ideological discrimination, ex Article 22.4 of the Criminal Code, – applied by the Court of first instance - should not be applied to the case as there is not decisive proof for its application. The Provincial Court, in its decision, described the nature of the case as follows: *“what is understood from the proven facts is the existence of a common confrontation in the early morning in a bar between two groups of 4 to 7 young people, respectively. This confrontation was above all verbal, accompanied by the brandishing of knives, sprays and chains and some broken bottles. There is no firm demonstration of the reasons that caused the confrontation. Some say that the others “looked down on them” when they came in, and that the threats were reciprocal; also from the others against those now appealing. And the others say that these insulted them, calling them “filthy and gay”. One of those reporting affirmed in court that this latter insult might have come because at the time, “They had hugged each other”. It is also said that the premises where the confrontation started was an “alternative bar”.* Although some of the people accused wore clothes and signs which could be an indication of extreme right-wing affiliations, the Court ruled that these elements did not constitute clear proof in order to apply the charge of acting against the victims for reasons of ideological discrimination or sexual orientation, as there were no signs that the accused acted for certain ideological reasons. Therefore the application of article 22.4 of the Criminal Code was revoked by the Appeals Court. This case is of great importance in order to explain how difficult it is for victims to prove the aggravating factor of discrimination, even when cases tend to exhibit discriminatory elements.⁴⁶⁴

2) Sentence No. 419/2009 19 October 2009:⁴⁶⁵ the provincial Court in Madrid has considered ideology as an aggravating factor ex 22.4 of the Criminal Code, although this circumstance has been rarely applied by judges. The Court held that the lethal stabbing of 16-year-old antifascist Carlos Palomino by 25-year-old Josuè Estèbanez in November 2007 was provoked in part by Estebanez’s neo-Nazi beliefs.⁴⁶⁶ The victim was known to be antiracist and antifascist. The perpetrator was sentenced to 26 years of prison.⁴⁶⁷

⁴⁶³ Sentencia de la Audiencia Provincial de Zaragoza (Sección tercera) núm. 195/2008, de 28 de marzo de 2008; Criminal jurisdiction, Appeal no. 159/2006.

⁴⁶⁴ Freixes Sanjuán T., Balaguer Callejón F., Elías Méndez C. (2010), “Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity”, FRA, p.104, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1353-LGBT-2010_thematic-study_ES.pdf

⁴⁶⁵ “Sentencia N° 419/2009”, available at: http://www.google.it/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0CFsQFjAH&url=http%3A%2F%2Fwww.elpais.com%2Felpaismedia%2Fultimahora%2Fmedia%2F200910%2F19%2Fespana%2F20091019elpepunac_1_Pes_PDF.doc&ei=i4sVVbb4Oc3Vauf-gbgH&usg=AFQjCNGSe6cUEkZjrhAg2O-oaP8OfTG3kA&sig2=MdfIkWvjPLa03hZ-gv5-IQ&bvm=bv.89381419,d.d2s

⁴⁶⁶ RedNetwork (2011), “Carlos Javier Palomino, 16-year-old murdered by fascist”, available at: <http://www.red-network.eu/?i=red-network.en.items&id=159>

⁴⁶⁷ *Diario de Sevilla* (2009), “Asesinato por odio ideológico”, available at:

Judgements on Hate Speech

1) Decision of the Provincial Court of Madrid, number 455/2006, 17th Section, 28 December, Criminal Jurisdiction, Question of competence No. 19/2006

The case refers to a question of competence between a court in charge of the preliminary investigation and a court specializing in gender violence. The case refers to the publication by the plaintiff's former boyfriend of an announcement on an internet portal, giving her telephone number out for the purpose of facilitating lesbian relationships.

The following considerations and reasoning of the Court must be considered in order to classify, from a legal perspective, the conduct which is the subject of the case. Either the Penal Code or the specific measures introduced in Organic Law 1/2004 of 28 December on *Medidas de Protección Integral contra la Violencia de Género* (Measures of Integral Protection against Gender Violence) may be applied.

Among other factors, the vengeful reaction of a man who was not able to accept the end of a relationship with a former girlfriend (trying to discredit her by presenting her openly as a lesbian) is decisive in classifying the case within the regulation framework of gender violence.

With regard to the criminal punishment of expressions or actions which promote hatred towards homosexuals, the following extracts of the considerations of the judicial authority should be particularly highlighted: *"Such conduct reflects a macho concept of sexuality which implies a radical homophobia; so, from such a perspective, the public imputation of lesbianism would pursue a double purpose: to produce an effect of social repulsion and to hinder the complainant's possible future relationships with other men, in the conviction that all men would abstain from undertaking even short relationships with a lesbian [...] The perpetrator of this absurdity appears to ignore the fact that homosexual relationships have been accepted without problem by a growing majority of Spanish society as a respectable option, to the point of being accepted as the basis for a marriage or similar relationship, with the same legal effects as traditional heterosexual marriage."*

The Court underlined the fact that such conduct reflects a "macho concept" of sexuality which implies a radical homophobia. The public imputation of homosexual orientation aims in such a case to produce an effect of social repulsion and to hinder the possible future relationships of the victim. This is sufficient to regard the case as criminal. The competence of the Court on Gender Violence was acknowledged for the present case. The Provincial Court identified a macho profile crime with regards to the conduct of the defendant.⁴⁶⁸

<http://www.diariodesevilla.es/article/opinion/543331/asesinato/por/odio/ideologico.html>; Rights Equality and Diversity European Network (2012), "Annual Report 2011: combating racism xenophobia intolerance", p.47, available at: <http://www.red-network.eu/resources/toolip/doc/2012/03/17/annualreport-2011.pdf>

⁴⁶⁸ Freixes Sanjuán T. Balaguer Callejón F., Elías Méndez C. (2010), "Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity", FRA, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1353-LGBT-2010_thematic-study_ES.pdf

2) April 2014: The High Court applied a two-year jail sentence to rapper Pablo Hasel after he was convicted on charges of glorifying terrorism in 10 songs he uploaded to the video-sharing website, YouTube. Pablo Rivadulla Duró had composed songs that praised attacks carried out by Basque separatists ETA, Spanish Maoist group Grapo, al-Qaeda, the Marxist-Leninist organization Red Brigades and other terrorist groups. In some songs, he called on the terrorists to repeat their attacks. Hasel was arrested in October 2011 and was put on trial on 10 March 2014. The Court said that *“hate speech is not protected under the freedom of expression guidelines in a democratic state.”*⁴⁶⁹

The Court based its ruling and sentence on a decision by the European Court of Human Rights, which stated that “praise or justification of terrorist acts” cannot be considered freedom of speech because they “cause serious violations to the human rights of the communities that suffer” such attacks.⁴⁷⁰ Recently, the Supreme Court, through its decision of 29 February 2015, confirmed the two-year sentence previously imposed on Pablo Rivadulla.

3) May 2014. The Spanish government is considering suppressing hate speech on social networks after thousands of Anti-Semitic comments were posted on Twitter following a basketball game between Israel-Spain. Jewish groups filed an official complaint, claiming action against tweeters who made Holocaust comments after the Maccabi Tel Aviv basketball team defeated Spain's Real Madrid in the Euro League final. State prosecutors are investigating the complaint against users of a discriminatory Twitter tag, which seems to have become a trending topic on Twitter in Spain, where over 4,000 direct messages were sent on the microblogging network, and thousands more retweets were subsequently issued.⁴⁷¹

In reference to attempting to address discrimination and hate speech on social networks, a source at the Spanish ministry of Justice has said that *“It's not about writing new laws. Within Spanish law this behaviour is already penalised. It's to evaluate Twitter as a new variable within this law.”* Under Spanish law, successful prosecutions could carry prison sentences of up to two years.⁴⁷² Others point out that legislative reform would be necessary in order to better adapt to European legislation and to become more effective in the fight against racial discrimination, in particular in an environment such as the Internet. In the opinion of some experts in this field, an appropriate course of action to achieve this reform would be to pass the Draft Comprehensive Law for Equal Treatment and Non-Discrimination, submitted to Parliament on 27 May 2011.⁴⁷³

⁴⁶⁹ Perez J. (2014), “Rapper given two-year prison sentence for singing praises of terrorists”, *El Pais*, available at: http://elpais.com/elpais/2014/04/01/inenglish/1396368922_728869.html

⁴⁷⁰ *Ibid.*

⁴⁷¹ Day, P. (2014) “Anti-Semitic tweets point to hate speech problem in Spain”, Reuters, available at: <http://www.reuters.com/article/2014/05/21/us-spain-twitter-arrests-idUSBREA4K0QX20140521>

⁴⁷² *Ibid.*

⁴⁷³ Secretariat of State for Equality (2011), “The Role of Equality Bodies in the fight against Ethnic and Racial Discrimination”, available at: http://www.msssi.gob.es/ssi/igualdadOportunidades/docs/2011_conclusions_key_challenges_conference_council_vfacc.pdf

Institutions and Associations

In Spain there are several different associations that represent minority groups and categories of people who are often victims of hate crime or hate speech. These include associations that cater to immigrants, Roma, and many other groups.

At the European level, legislation guarantees the possibility for associations and organizations to play a key role in the field of hate crime. As a matter of fact, article 9(2) of Directive 2000/78/EC establishes that “*Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive*”. An important judicial ruling, which reflects the strong influence that such associations can play in this field, was issued in 2005 by the Provincial Court of Ciudad Real, the “*Audiencia Provincial de Ciudad Real*”⁴⁷⁴. In that case, the Court of first instance had ruled that the Lesbian, Gay, Transsexual and Bisexual Group of Madrid (COGAM) was not allowed to stand as an actor in a judicial hearing for damages and threats caused to a homosexual citizen. The reason behind this decision was that the organisation did not prove any links between the homophobic nature of the aggression and the facts investigated. Therefore, the association COGAM appealed the decision. The Court of appeal reversed the decision stating that engagement in popular action is a fundamental right, establishing that in this case the appellant should be allowed to stand as an actor. It was justified on the basis of the connection of the association, COGAM, with the protection of the rights and interests of homosexual, transsexual and bisexual groups, which implies the protection of individuals belonging to these groups with regard to incidents related to their sexual orientation.⁴⁷⁵

Other Associations dealing with these issues are MCL, *Movimiento contra la Intolerancia*, FSG *Fundacio Secretariado Gitano*, FELEGTB *Federacion Estatal LGBT*, and *Colegas*.⁴⁷⁶

Conclusions

This assessment has attempted to analyse how Spain has committed to implementing International and European Union legislation in order to provide a complete and effective answer to discrimination and its specific manifestations through hate crime and hate speech. Despite this undeniable effort, it is important to keep in mind that actions undertaken so far can not be considered definitive and that Spain has to take further steps in order to more effectively complete the implementation process. Some stakeholders in the field believe that

⁴⁷⁴ Audiencia Provincial de Ciudad Real [Provincial Court of Ciudad Real] Criminal jurisdiction Appeal no. 208/2005 Rapporteur: Mr José María Torres Fernández de Sevilla.

⁴⁷⁵ Freixes Sanjuán T., Balaguer Callejón F., Elías Méndez C. (2010), “Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity”, FRA, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1353-LGBT-2010_thematic-study_ES.pdf

⁴⁷⁶ Prism Questionnaire submitted by the Institute of Women and for Equal opportunities. Ministry of health, social services and equality of Spain.

more concrete solutions can be provided. They argue that there is still little awareness of anti-discrimination law in Spain among legal operators, the media, politicians and a large part of society. Moreover, European anti-discrimination law has not been fully and completely transposed in Spain. With the economic crisis, which has become not only a social crisis, but also a crisis of values, racism and xenophobia are growing. The social and economic costs of not addressing this problem seriously will be much greater than if these issues are tackled with perseverance and determination.⁴⁷⁷

⁴⁷⁷ *Ibid.*

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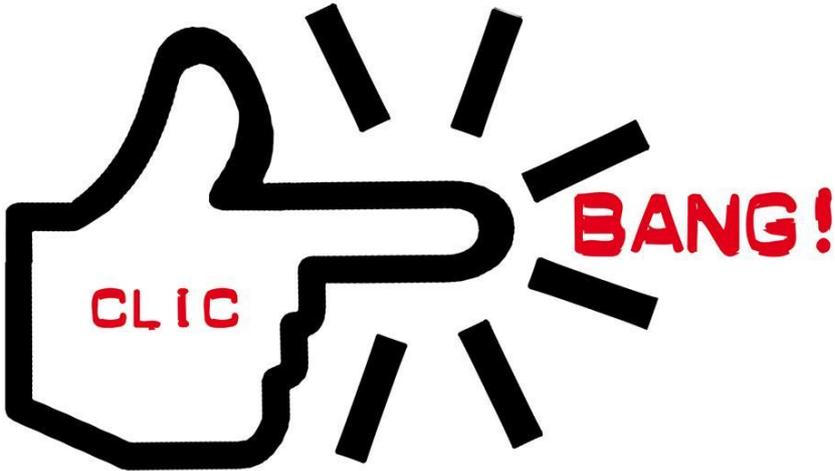
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**UK: In-depth Country Study on Hate
Crime and Hate Speech conducted within
the Framework of the PRISM Project**

P R I S M



WORDS ARE WEAPONS.
PREVENTING REDRESSING & INHIBITING HATE SPEECH IN NEW MEDIA



PRISM is a project co-financed by the Fundamental Rights and Citizenship Programme of the European Union

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Introduction

Discrimination, hate speech, and hate crime all have destabilizing effects on societal cohesiveness and human rights. Actions of this kind inflame prejudices, and can lead to serious incidents of violence, in addition to marginalizing certain groups of individuals, reducing their ability to excel within society. Many countries have enacted legislation and adopted international protocols to address these issues. However, traditionally, the effectiveness of such legislation, and the legal procedures deriving from it at the national level, have often been areas of concern for international institutions, NGOs, and other actors that monitor developments in this field. Issues such as a lack of training on the part of law enforcement, poor awareness by the general public of hate crime and hate speech topics, and few resources for victim assistance have been hallmarks of the weaknesses present within a host of countries for addressing crimes of a discriminatory nature.

With major advancements in global technology in recent years, particularly the Internet, the channels through which perpetrators can commit acts of hate speech and advocate for the perpetration of violent hate crimes have increased. The proliferation of forums, social media, and mobile messaging capabilities, in addition to the potential for anyone to create a website, has fostered a wide ranging exchange of views around the world and has arguably brought global society closer together in a positive manner. Nevertheless, bearing in mind the standard concerns regarding the effectiveness of legislation and the efficiency of procedural mechanisms for addressing hate-based crime, in conjunction with the increased risks for hate speech in new media, the PRISM Consortium aims to assess EU Member States' abilities to mitigate and prevent incidents of hate crime and hate speech via existing legislation, jurisprudence, legal procedures, mechanisms, and national civil society instruments. With this intent, the partners of the PRISM Project are taking an in-depth look at five EU countries, namely: France, Italy, Romania, Spain, and the UK. The following report focuses on the state and composition of the UK's legal framework and mechanisms for tackling discrimination and hate-based crime, highlighting both the country's strengths and weaknesses in this field.

The UK Legal Framework

The United Kingdom (UK) is a constitutional monarchy with a parliamentary government. The country is a part of and adheres to most of the international treaties and agreements which ensure fundamental human rights and freedoms, including those pertaining to the issue of discrimination. The UK has played an important role in the drafting of the European Convention on Human Rights and was also the first country to ratify it. With regard to international agreements drafted by the United Nations (UN), the UK has signed and ratified the International Convention on the Elimination of all Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination against Women, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of Persons with Disabilities.

Besides the European Convention of Human Rights, the UK has signed a number of other international treaties proposed by the Council of Europe, including the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment, the European Convention on Transfrontier Television, the Charter of Fundamental Rights of the EU, and the Convention on Cybercrime.

The United Kingdom is not a part of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, nor has it signed or ratified Protocol No.12 to the European Convention on Human Rights which has been open for signature since 2000, and which ensures a general prohibition of discrimination on any ground. The UK has not, to this day, signed the Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems.

The following table lists all the international treaties which are important with regard to discrimination in both the physical world as well as cyberspace. The table also includes the dates on which a treaty was opened for signature, and when (if) it was ratified by the UK.

Figure 1 – International Legal Instruments ratified by the United Kingdom of Great Britain and Northern Ireland⁴⁷⁸

Title	Open for Signature	Ratified
European Convention on Human Rights (ECHR)	4 Nov. 1950	8 Mar 1951
International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)	21 Dec. 1965	7 Mar 1969
International Covenant on Economic, Social and Cultural Rights (ICESCR)	16 Dec. 1966	20 May 1976

⁴⁷⁸ United Nations Human Rights, Office of the High Commissioner for Human Rights, available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=143&Lang=en; Council of Europe Treaty Office, “Complete list of the Council of Europe’s treaties”, available at: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>

International Covenant on Civil and Political Rights (ICCPR)	16 Dec. 1966	20 May 1976
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	18 Dec. 1979	7 Apr 1986
Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	10 Dec. 1984	8 Dec 1988
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment	26 Nov. 1987	24 Jun 1988
European Convention on Transfrontier Television (ECTT)	5 May 1989	9 Oct 1991
International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families (CMW)	18 Dec. 1990	Not signed Not ratified
Charter of Fundamental Rights of the EU	2 Oct. 2000	1 Dec. 2009
Convention on Cybercrime (Council of Europe)	23 Nov. 2001	25 May 2011
Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer system	28 Jan. 2003	Not signed Not ratified
Convention on the Rights of Persons with Disabilities (CRPD)	30 Mar. 2007	8 Jun 2009

Below, we examine the main legal instruments generally related to discrimination and racism in the UK.

General Legal Framework on Discrimination

The Constitution

The UK does not have a single constitutional document; rather, most of the British Constitution is embodied in a variety of written sources, such as statutes, court judgements, treaties and conventions.

Criminal Legislation

Criminal Justice Act (2003)

This Act seeks to modernize various areas of the criminal justice system, and mostly applies to England and Wales. It makes amendments to the Law regarding the powers and duties of police, dealing with offenders, jury service, civil proceedings, and others. Sections 145 and 146 are important with regard to discrimination as they stipulate increasing sentences for offences which are racially or religiously aggravated, or which are aggravated based on disability or the sexual orientation of a person.

- Section 145 of the Act addresses the ‘increase in sentences for racial or religious aggravation’. *“This section applies where a court is considering the seriousness of an offence other than one under sections 29 to 32 of the Crime and Disorder Act 1998 (racially or religiously aggravated assaults, criminal damage, public order offences and harassment etc.) If the offence was racially or religiously aggravated, the court (a) must treat that fact as an aggravating factor, and (b) must state in open court that the offence was so aggravated”*.
- Section 146 of the Act addresses the ‘increase in sentences for aggravation related to disability or sexual orientation’. *“This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2). Those circumstances are (a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on (i) the sexual orientation (or presumed sexual orientation) of the victim, or (ii) a disability (or presumed disability) of the victim, or (b) that the offence is motivated (wholly or partly) (i) by hostility towards persons who are of a particular sexual orientation, or (ii) by hostility towards persons who have a disability or particular disability”*.

Offences (Aggravation by Prejudice) (Scotland) Act (2009)⁴⁷⁹

This Act of the Scottish Parliament aggravates crimes which are motivated by malice or ill-will based on, sexual orientation, transgender identity or disability of a person. When it can be proved that an offence was the result of such malice or ill-will, the court takes this into consideration, which often leads to a longer custodial sentence or a higher fine.⁴⁸⁰

- Section 1 addresses prejudice relating to disability and states that, *“an offence is aggravated by prejudice relating to disability if (a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to a disability (or presumed disability) of the victim, or (b) the offence is motivated (wholly or partly) by malice and ill-will towards persons who have a disability or particular disability”*.
- Section 2 refers to prejudice relating to sexual orientation or transgender identity. According to this section, *“an offence is aggravated by prejudice relating to sexual orientation or transgender identity if, (a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to, (i) the sexual orientation (or presumed sexual orientation) of the victim, or (ii) the transgender identity (or presumed transgender identity) of the victim, or (b) the offence is motivated (wholly or partly) by malice and ill-will towards persons who have, (i) a particular sexual orientation, or (ii) a transgender identity with a particular transgender identity”*.

⁴⁷⁹ To see the entire text of the act, please visit:

www.legislation.gov.uk/asp/2009/8/pdfs/asp_20090008_en.pdf

⁴⁸⁰ For more information about the Scottish Government and its legislation on hate crime, please visit:

<http://www.gov.scot/Topics/archive/law-order/8978>

International Criminal Court Act (2001)⁴⁸¹

This Act gives effect to the Statute of the International Criminal Court, provides for offences under the law of England and Wales and Northern Ireland corresponding to offences within the jurisdiction of that Court, and for connected purposes.

With regard to genocide as an offence under domestic law, Article 50.1 of this act has applied the same meaning of the term as defined in Article 6 of the International Criminal Court Statute.

- Article 51.1 states that *“it is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime”*.
- Article 58.1 states that *“it is an offence against the law of Northern Ireland for a person to commit genocide, a crime against humanity or a war crime”*.

Public Order Act (1986); Parts I & II

Part I of this Act establishes a number of common law offences, amongst which the most relevant for discrimination are sections 4 and 5 concerning ‘fear and provocation of violence’ as well as ‘harassment, alarm and distress’.

- Section 4.1 pertains to ‘fear or provocation of violence’ and states that *“a person is guilty of an offence if he (a) uses towards another person threatening, abusive or insulting words or behaviour, or (b) distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked”*.
- Section 5.1 concerns the offences of harassment, alarm or distress, and states that *“a person is guilty of an offence if he (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting”*.

Crime and Disorder Act (1998) amended by Antiterrorism, Crime and Security Act (2001) and Protection of Freedoms Act (2012)

This Act makes provisions for a number of various offences, including discrimination. Specifically, provisions 28 to 33 address racially or religiously aggravated offences. The Antiterrorism, Crime and Security Act of 2001 amended the original Act by adding the offence that is aggravated by religion. The Protection of Freedoms Act of 2012, particularly

⁴⁸¹ To see the entire text of the Act, please visit:

www.legislation.gov.uk/ukpga/2001/17/pdfs/ukpga_20010017_en.pdf

Part 11 of Schedule 9, adds the offence of stalking. The relevant provisions are listed in detail in the section addressing the general framework on discrimination.

Malicious Communications Act (1988)

This Act provides for the punishment of persons who deliver letters or other articles for the purpose of causing distress or anxiety.

- Section 1 provides that “*any person who sends to another person (a) a letter or other article which conveys (i) a message which is indecent or grossly offensive; (ii) a threat; or (iii) information which is false and known or believed to be false by the sender; or (b) any other article which is, in whole or part, of an indecent or grossly offensive nature, is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated*”.

Civil Legislation

Equality Act (2010)⁴⁸²

The Equality Act of 2010 consolidated the previous anti-discrimination legislative framework, bringing together over 116 separate pieces of legislation into one single Act. The nine main acts/regulations that the Equality Act (2010) merged are:

- the Equal Pay Act (1970)
- the Sex Discrimination Act (1975)
- the Race Relations Act (1976)
- the Disability Discrimination Act (1995)
- the Employment Equality (Religion or Belief) Regulations (2003)
- the Employment Equality (Sexual Orientation) Regulations (2003)
- the Employment Equality (Age) Regulations (2006)
- the Equality Act (2006), Part 2
- the Equality Act (Sexual Orientation) Regulations (2007).

The Act simplifies, strengthens and harmonises the current legislation in order to protect people from discrimination in the workplace and within society at large. Furthermore, it established the Equality Advisory Support Service (EASS), an ad-hoc helpline providing information and advice on discrimination and human rights issues. If an unlawful discriminative act occurred on or after the 1st of October 2010, the Equality Act applies and the EASS can assist victims in understanding how to proceed with their complaints. Instead, if a discriminatory offence took place prior to October 2010, any relative legal proceedings will go forward according to the legislation under which the cases were brought, even if they may have continued after 1 October 2010. In this case, the Equality and Human Rights

⁴⁸² To see the entire text of this Act, please visit:

www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf

Commission (EHRC) can provide victims' advisers with a series of informational booklets to help take a discrimination claim to the appropriate tribunal. The EHRC was established by the 2006 Equality Act and maintains a *"statutory remit to promote and monitor human rights; and to protect, enforce and promote equality across the nine 'protected' grounds - age, disability, gender, race, religion and belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment."*

Moreover, the Parliament has passed a series of acts aimed at outlawing crime where the offender is motivated by a form of discrimination or hatred towards the victim, from the adoption of the International Criminal Court Statute to the Malicious Communications Act (1998), which targets harassing and abusive phone calls, letters or electronic communications *"for the purpose of causing distress or anxiety."* One of the most commonly used acts, which also specifically applies to crimes driven by discrimination towards the victim's race or religious beliefs (actual or perceived), is the Crime and Disorder Act (1998), amended by the Anti-terrorism, Crime and Security Act (2001) and Part 11 of Schedule 9 of the Protection of Freedoms Act (2012).

Chapter 1 of Part II lists all of the characteristics which are protected under this Act. These include age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, and sex and sexual orientation.

Chapter 2 of Part II focuses on prohibited conduct, namely on discrimination. Prohibited conduct in this section includes, amongst others, direct discrimination, combined discrimination, discrimination arising from disability, gender reassignment discrimination, pregnancy and maternity discrimination, and indirect discrimination.

- Section 5 addresses the characteristic of age and its identification. It states that *"In relation to the protected characteristics of age (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group; (b) a reference to persons who share a protected characteristic is a reference to persons of the same age group"*. Additionally, *"a reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages"*.
- Section 6 pertains to disability and clarifies that *"a person (P) has a disability if (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities"*.
- Section 7 identifies gender reassignment and states that *"a person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex"*.
- Section 8 establishes the characteristic of marriage and civil partnership, and states that *"a person has the protected characteristic of marriage and civil partnership if the person is married or is a civil partner"*.

- Section 9 pertains to race and establishes that “race includes (a) colour; (b) nationality; (c) ethnic or national origins”. Moreover, “the fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular group”.
- Section 10 addresses religion or belief, and according to this section, “religion means any religion and a reference to religion includes a reference to a lack of religion”. “Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief”.
- Section 11 identifies the protected characteristic of sex and states that “(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman; (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex”.
- Section 12 pertains to sexual orientation. It identifies sexual orientation as “a person’s sexual orientation towards (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex”.
- Section 13 of the Act deals with direct discrimination and states, (1) “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favorably than A treats or would treat others”. (2) “If the protected characteristic is age, A does not discriminate against B if A can show A’s treatment of B to be a proportionate means of achieving a legitimate aim”. (3) “If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favorably than A treats B”. (4) “If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner”. (5) “If the protected characteristic is race, less favorable treatment includes segregating B from others”. (6) “If the protected characteristic is sex (a) less favorable treatment of a woman includes less favorable treatment of her because she is breast-feeding; (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth”.
- Section 14 identifies combined discrimination, and it includes all the relevant protected characteristics such as age, disability, gender reassignment, race, religion or belief, sex and sexual orientation. It states that “a person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favorably than A treats or would treat a person who does not share either of those characteristics”.
- Section 15 addresses discrimination arising from disability. “A person (A) discriminates against a disabled person (B) if (a) A treats B unfavorably because of something arising in consequence of B’s disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim”.

- Section 16 refers to gender reassignment discrimination and states that *“a person (A) discriminates against a transsexual person (B) if, in relation to an absence of B’s that is because of gender reassignment, A treats B less favorably than A would treat B if (a) B’s absence was because of sickness or injury, or (b) B’s absence was for some other reason and it is not reasonable for B to be treated less favorably”*.
- Section 17 refers to the prohibition of pregnancy and maternity discrimination in non-work cases and therefore applies to the protected characteristic of pregnancy and maternity of services and public functions, premises, education and associations. It states that *“a person (A) discriminates against a woman if A treats her unfavorably because of a pregnancy of hers”*. Also, *“a person (A) discriminates against a woman if, in the period of 26 weeks beginning with the day on which she gives birth, A treats her unfavorably because she has given birth”*.
- Section 18 of the Act prohibits pregnancy and maternity discrimination in work cases. According to this section, (2) *“a person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavorably (a) because of the pregnancy, or (B) because of illness suffered by her as a result of it”*. (3) *“A person (A) discriminates against a woman if A treats her unfavorably because she is on compulsory maternity leave”*. (4) *“A person (A) discriminates against a woman if A treats her unfavorably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave”*.
- Section 19 involves indirect discrimination and also applies to the relevant protected characteristics of age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, and sex and sexual orientation. *“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”*.

Part 5: Chapter 1 of the Act refers to employment:

- Section 39 addresses employees and applicants, specifically prohibiting discrimination by an employer. (1) *“An employer (A) must not discriminate against a person (B), (a) in the arrangements A makes for deciding to whom to offer employment; (b) as to the terms on which A offers B employment; (c) by not offering B employment”*. (2) *“An employer (A) must not discriminate against an employee of A’s (B), (a) as to B’s terms of employment; (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service; (c) by dismissing B; (d) by subjecting B to any other detriment”*.
- Section 41 refers to the discrimination of contract workers by a principal. This section states that *“a principal must not discriminate against a contract worker, (a) as to the terms on which the principal allows the worker to do the work; (b) by not allowing the*

worker to do, or to continue to do, the work; (c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service; (d) by subjecting the worker to any other detriment”.

This Act further prohibits discrimination against a person by a firm (Section 44(1)), as well as discrimination by a firm of another partner (Section 44(2)). Section 45(1) and (2) address the issue of discrimination by limited liability partnerships, and therefore the firm must not discriminate against a person or against a member. Section 47(1) and (2) forbids discrimination by barristers against a person, or specifically a pupil or a tenant. Section 48(1) and (2) similarly prohibits advocates to discriminate against a person who is a devil or a member of a stable. Section 49(3) prohibits a person who has the power to make an appointment to a personal office to discriminate against a person while deciding to whom to offer the appointment.⁴⁸³ Also, Section 49(6) states that *“a person who is a relevant person in relation to a personal office must not discriminate against a person appointed to the office”*. Section 50(3) and (6) includes similar provisions as Section 49, but with regard to public office. Section 55(1) and (2) refer to employment service-providers and their prohibition to discriminate against seeking or using such a service. Section 57(1) and (2) forbids trade organizations to discriminate. Section 58(1) prohibits local authorities from discriminating against a member of the authority in relation to the member’s carrying out of official business.

Part 5: Chapter 2 focuses on occupational pension schemes and specifically enacts a ‘Non-discrimination rule’ which must be included in such a scheme. It states that *“a non-discrimination rule is a provision by virtue of which a responsible person (A), (a) must not discriminate against another person (B) in carrying out any of A’s functions in relation to the scheme; [...]”*.

Part 5: Chapter 3 concerns equality of terms, mostly related to the equality of gender in the work environment, and pregnancy and maternity equality.

Part 6: Chapter 1 focuses on education, and Section 85 prohibits the responsible body of a school to discriminate against a pupil in the admission and treatment process, also *“(a) in the way it provides education for the pupil; (b) in the way it affords the pupil access to a benefit, facility or service; (c) by not providing education for the pupil; (d) by not affording the pupil access to a benefit, facility or service; (e) by excluding the pupil from the school; (f) by subjecting the pupil to any other detriment”*. The same provisions apply to further and higher education, and are included in Chapter 2 of Part 6 (Section 91). Section 92 further extends the provision by prohibiting the responsible body in relation to a course to discriminate against a person. Section 93 refers to discrimination in the use of recreational or training facilities. Chapter 3 of Part 6, specifically Section 96, applies to discrimination by qualifications bodies.⁴⁸⁴

⁴⁸³ According to Part 5, Chapter 1 of the Equality Act (2010) *“A personal office is an office or post— (a) to which a person is appointed to discharge a function personally under the direction of another person, and (b) in respect of which an appointed person is entitled to remuneration.”*

⁴⁸⁴ As stipulated in Part 6, Chapter 3 of the Equality Act (2010), *“A qualifications body is an authority or body which can confer a relevant qualification.”*

Part 7 of the Act refers to discrimination by associations against a person who is applying to become a member of the association, or against a person who is already a member of such an entity. Section 108 of Part 8 addresses relationships that have ended and forbids any kind of discrimination that may arise.

Part 11 of the Act covers the advancement of equality, and Section 149 states that, “*a public authority must, in the exercise of its functions, have due regard to the need to (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act, (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it*”.

Part 12 of the Act includes provisions related to disabled persons and transport. Numerous sections of Part 12 ensure accessibility regulations for taxis, assistance dogs in taxis and private hire vehicles, regulations for accessibility in public service vehicles and rail vehicles.

The Human Rights Act (1998)⁴⁸⁵

The Human Rights Act (1998) came into force in 2000. This Act incorporates the protections of the European Convention on Human Rights into the law of the UK. The Act effects all public bodies, including courts, police, local governments, hospitals, public schools and others, as they all have to comply with the rights stated in the Convention. Moreover, the judiciary is required to follow any decision, judgment or opinion of the European Court of Human Rights (ECtHR), as well as to interpret legislation as closely as possible to the provisions of the Convention.

Schedule 1 of the Act lists all of the rights and freedoms included in the Convention. Article 14 specifically addresses the prohibition of discrimination and states the following: “*The enjoyment of the rights and freedoms set forth in this Convention 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*”.

Legal Framework on Racism

The following sections summarize the main legal provisions prohibiting racist acts and phenomena. It should be noted that racism can often be categorized under the broader field of discrimination; in effect, some incidents of racism may fall under the application of discrimination law, as reported in the above paragraphs, rather than under laws on racism. The section below highlights a sampling of laws within different disciplines, where there are specific provisions for dealing with the issue of racism.

Criminal Legislation

⁴⁸⁵ To see the entire text of the act, please visit: <http://www.legislation.gov.uk/ukpga/1998/42>

Criminal Justice Act (2003)⁴⁸⁶

Section 145 (previously mentioned) provides for the increase of sentences in cases where a crime was racially (or religiously) aggravated.

- Section 145 of the Act addresses the ‘increase in sentences for racial or religious aggravation’. *“This section applies where a court is considering the seriousness of an offence other than one under sections 29 to 32 of the Crime and Disorder Act 1998 (racially or religiously aggravated assaults, criminal damage, public order offences and harassment etc.) If the offence was racially or religiously aggravated, the court (a) must treat that fact as an aggravating factor, and (b) must state in open court that the offence was so aggravated”.*

Crime and Disorder Act (1998) amended by Antiterrorism, Crime and Security Act 2001⁴⁸⁷ and Protection of Freedoms Act (2012)⁴⁸⁸

Provisions 28 to 33 of the Crime and Disorder Act (1998) establish separate offences for crimes that were racially or religiously aggravated. As briefly mentioned above, the original version of these provisions did not include crimes which were aggravated by a victim’s religion; however, the Law was amended by the Antiterrorism, Crime and Security Act of 2001, specifically by section 39. Moreover, Part 11 of Schedule 9 of the Protection of Freedoms Act (2012) further amended Section 32 of the Crime and Disorder Act (1998) by adding the offence of stalking. The text of the relevant provisions listed below has been amended appropriately.

- Section 28 According to this article, 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 racial or religious group based on their membership of that group”.*
- Section 29 addresses ‘racially or religiously aggravated assaults’. It states that, *“a person is guilty of an offence under this section if he commits (a) an offence under section 20 of the Offences Against the Person Act 1861⁴⁸⁹ (malicious wounding or grievous bodily harm); (b) an offence under section 47 of that Act (actual bodily harm); or (c) common assault, which is racially or religiously aggravated for the purposes of this section”.*
- Section 30 focuses on ‘racially or religiously aggravated criminal damage’, and specifies that *“a person is guilty of an offence under this section if he commits an*

⁴⁸⁶ See also page 3; For the entire text of this act, please visit: <http://www.legislation.gov.uk/ukpga/2003/44>

⁴⁸⁷ To see the entire text of the Act, please visit:

www.publications.parliament.uk/pa/cm200102/cmbills/049/2002049.pdf

⁴⁸⁸ To see the entire text of the Act, please visit:

www.legislation.gov.uk/ukpga/2012/9/pdfs/ukpga_20120009_en.pdf

⁴⁸⁹ To see the entire text of the Act, please visit: www.legislation.gov.uk/ukpga/Vict/24-25/100/data.pdf

offence under section 1(1) of the Criminal Damage Act 1971⁴⁹⁰ (destroying or damaging property belonging to another) which is racially or religiously aggravated for the purposes of this section”.

- Section 31 addresses ‘racially or religiously aggravated public order offences’ and states that *“a person is guilty of an offence under this section if he commits (a) an offence under section 4 of the Public Order Act 1986⁴⁹¹ (fear or provocation of violence); (b) an offence under section 4A of that Act (intentional harassment, alarm or distress); or (c) an offence under section 5 of that Act (harassment, alarm or distress), which is racially or religiously aggravated for the purposes of this section”.*
- Section 32 deals with racially or religiously aggravated harassment and states that, *“a person is guilty of an offence under this section if he commits (a) an offence under section 2 or 2A of the Protection from Harassment Act 1997⁴⁹² (offence of harassment and stalking); or (b) an offence under section 4 or 4A of that Act (putting people in fear of violence and stalking involving fear of violence or serious alarm or distress), which is racially or religiously aggravated for the purposes of this section”.*

Football Offences Act (1991)⁴⁹³

This act makes further provisions with regard to disorderly conduct by persons attending football matches; and for connected purposes. Article 3 is especially relevant to discrimination since it establishes as an offence chanting of an indecent or racist nature at a designated football match. The article defines the term ‘chanting’ as *“the repeated uttering of any words or sounds in concert with one or more others”*. The term ‘of racist nature’ means *“consisting of or including matter which is threatening, abusive or insulting to a person by reason of his colour, race, nationality (including citizenship) or ethnic or national origins”*.

Public Order Act (1986)

Part III of this Act specifically pertains to racial hatred.

- Article 17 defines the meaning of racial hatred as *“hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins”*.
- Articles 18, 19, 20, 21 and 22 address the ‘use of words or behaviour or display of written material’; ‘publishing or distributing written material’; ‘public performance of play’; ‘distributing, showing or playing a recording’; and ‘broadcasting or including

⁴⁹⁰ To see the entire text of the Act, please visit:

www.legislation.gov.uk/ukpga/1971/48/pdfs/ukpga_19710048_en.pdf

⁴⁹¹ To see the entire text of the Act, please visit:

www.legislation.gov.uk/ukpga/1986/64/pdfs/ukpga_19860064_en.pdf

⁴⁹² To see the entire text of the Act, please visit:

www.legislation.gov.uk/ukpga/1997/40/pdfs/ukpga_19970040_en.pdf

⁴⁹³ To see the entire text of the Act, please visit:

www.legislation.gov.uk/ukpga/1991/19/pdfs/ukpga_19910019_en.pdf

programme in cable programme service' respectively. Any of these acts are offences if a person *"intends thereby to stir up racial hatred, or having regard to all the circumstances racial hatred is likely to be stirred up thereby"*.

- Article 23 addresses the act of 'possession of racially inflammatory material'. The article states that *"a person who has in his possession written material which is threatening, abusive or insulting, or a recording of visual images or sounds which are threatening, abusive or insulting, with a view to (a) in the case of written material, its being displayed, published, distributed, broadcast or included in a cable programme service, whether by himself or another, or (b) in the case of a recording, its being distributed, shown, played, broadcast or included in a cable programme service, whether by himself or another, is guilty of an offence if he intends racial hatred to be stirred up thereby or, having regard to all the circumstances, racial hatred is likely to be stirred up thereby"*.

Civil Legislation

Equality Act (2010)⁴⁹⁴

As stated above, the Equality Act (2010) merged together a number of major acts into one piece of legislation. Before 2010, the most important act with regard to racial discrimination was the Race Relations Act (1976). The entirety of this act has, however, been repealed by the Equality Act (2010). Currently, the Equality Act establishes 'race' as one of the protected characteristics under part 2 - 'equality' of the act. For the purposes of the act, and as according to Section 9, *"race includes: (a) colour; (b) nationality; (c) ethnic or national origins. In relation to the protected characteristic of race, (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group; (b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group. A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls"*.

Hate Speech Law

The Public Order Act (1986)

Section 18 of Part III specifically refers to the use of words, behaviour or display of written material, particularly pertaining to a person's color, race, nationality (including citizenship) or ethnic or national origins. The provision states the following: *"A person who uses threatening, abusive or insulting words or behavior, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if, (a) he intends thereby to stir up*

⁴⁹⁴ To see the entire text of this Act, please visit:

www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf

racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby”.

This Act was amended by the **Racial and Religious Act (2006)**, and thus extends the offence to religious hatred. **Criminal Justice and Immigration Act (2008)** further amends the Public Order Act (1986) by expanding the meaning of ‘racial hatred’ to also include *“hatred against a group of persons defined by reference to sexual orientation [...]”*.

Football Offences Act (1991)⁴⁹⁵

This Act forbids any indecent or racist chanting at designated football matches. It was amended in 1999 by the **Football Offences and Disorder Act (1999)**, and Section 3 states the following: *“It is an offence to engage or take part in chanting of an indecent or racist nature at a designated football match. For this purpose, (a) ‘chanting’ means the repeated uttering of any words or sounds (whether alone or in a concert with one more or others; and (b) ‘of a racist nature’ means consisting of or including matter which is threatening, abusive or insulting to a person by reason of his colour, race, nationality (including citizenship) or ethnic or national origins”*.

Law concerning Hate Speech Online

Hate speech online is not a separate offence under UK law. Nonetheless, the basic rule is that most offences can be committed via the Internet, just as they can be committed in the physical sphere.⁴⁹⁶ However, the Communications Act (2003) also addresses this issue.

Communications Act (2001)⁴⁹⁷

- Section 127 of this Act relates to the improper use of public electronic communications networks and states that, *“a person is guilty of an offence if he, (a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or (b) causes any such message or matter to be sent”*. Moreover, *“a person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he (a) sends by means of a public electronic communications network, a message that he knows to be false, (b) causes such a message to be sent; or (c) persistently makes use of a public electronic communications network”*.

Punishment for an offence under Section 127 can be imprisonment for up to six months and/or a fine, which is not greater than a level 5 on the standard scale.⁴⁹⁸

⁴⁹⁵ To see the entire text of the Act, please visit: <http://www.legislation.gov.uk/ukpga/1991/19>

⁴⁹⁶ College of Policing (2014), “Hate Crime Operational Guidance”, available at: <http://www.college.police.uk/What-we-do/Support/Equality/Documents/Hate-Crime-Operational-Guidance.pdf>

⁴⁹⁷ To see the entire text of this Act, please visit: <http://www.legislation.gov.uk/ukpga/2003/21>

⁴⁹⁸ The UK has a total of 5 levels in its standard scale of fines for summary offences, first introduced in the Criminal Justice Act of 1982 and which has been further amended. For level 1, the maximum fine is £200; level

Other Jurisdictions: Northern Ireland

Discrimination

Unlike in Wales and Scotland, anti-discrimination legislation in Northern Ireland is not enacted by the UK Parliament. The Northern Ireland Assembly, and not the Parliament at Westminster, is responsible for passing or amending anti-discrimination legislation. As a result, many of the provisions that apply in the rest of the UK have been reflected in the legal framework of Northern Ireland via secondary legislation.

Section 75 of the Northern Ireland Act (1998) requires public authorities in Northern Ireland to have due regard for the need to promote equality of opportunity between:

- persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- men and women generally;
- persons with a disability and persons without;
- persons with dependants and persons without.

Additionally, Section 76 of the Act prohibits discrimination by public authorities on the grounds of religious belief or political opinion.

Aside from a series of other broader and ad-hoc antidiscrimination legislative tools, which are mentioned later in this assessment, antidiscrimination laws in Northern Ireland specifically related to race are set in the Race Relations (Northern Ireland) Order of 1997. Indeed, Article 3(1) and 3(1A) prohibit direct as well as indirect discrimination and harassment on the grounds of: race, colour, ethnic or national origins, and nationality, including the Irish Traveller community. These articles principally cover the area of employment, but also include, *inter alia*, education and the provision of goods, facilities and services. Both public and private sector organizations must adhere to Article 3(1) and 3(1A).

Although religion is not mentioned as a protected ground within the Race Relations Order, individuals from religious minorities can be protected by the provision of the Northern Ireland Act. Furthermore, Section 76 of the Northern Ireland Act is wider in its application than the Race Relations Order, since it is not restricted to certain circumstances such as the provision of goods, facilities and services.

2 is £500; level 3 is £1,000; level 4 is £2,500; and level 5 is up to £5,000. For more information, please visit: <http://www.legislation.gov.uk/ukpga/1982/48/part/III/crossheading/introduction-of-standard-scale-of-fines>

Equal Pay (Northern Ireland) Act (1970)⁴⁹⁹

The Act enforces the equal treatment of men and women in work environments within Northern Ireland. Furthermore, it includes provisions on discrimination, and terms and conditions of employment.

- Section 1 is an extensive provision which lists the requirements of equal treatment for men and women engaged in the same employment. Section 1(2) states the following: *“An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the “woman’s contract”), and has the effect that, (a) where the woman is employed on like work with a man in the same employment, (i) if (apart from the equality clause) any term of the woman’s contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman’s contract shall be treated as so modified as not to be less favourable, and (ii) if [...] at any time the woman’s contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman’s contract shall be treated as including such a term; [...]”*

Sex Discrimination (Northern Ireland) Order (1976)⁵⁰⁰

- Article 3 of this Order addresses direct and indirect discrimination against women, stating that: *“(1) In any circumstances relevant for the purposes of any provision of this Order, [...], a person discriminates against a woman if, (a) on the ground of her sex, he treats her less favourably than he treats or would treat a man, or (b) he applies to her a requirement or condition which he applies or would apply to a man but (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and (iii) which is to her detriment because she cannot comply with it. (2) In any circumstance relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if, (a) on the ground of her sex, he treats her less favourably than he treats or would treat a man, or (b) he applies to her a provision criterion or practice which he applies or would apply equally to a man, but (i) which puts or would put women at a particular disadvantage when compared with men, (ii) which puts or would put her at that disadvantage, and (iii) which he cannot show to be a proportionate means of achieving a legitimate aim”.*
- Article 4 ensures that the entirety of Article 3 of this Order (apart from special treatment afforded to women in connection with pregnancy and child birth) is to be read as applying equally to the treatment of men.
- Article 4A refers to discrimination on the grounds of gender reassignment.

⁴⁹⁹ To see the entire text of this Order, please visit: <http://www.legislation.gov.uk/apni/1970/32>

⁵⁰⁰ To see the entire text of this Order, please visit: <http://www.legislation.gov.uk/nisi/1976/1042>

- Article 5 deals with discrimination against married persons and civil partners in the employment field. The article states that, *“a person discriminates against a person (“A”) who fulfils the condition⁵⁰¹ in paragraph (2) if, (a) on the ground of the fulfilment of the condition, he treats A less favourably than he treats or would treat a person who does not fulfil the condition, or (b) he applies to that person a provision, criterion or practice which he applies or would apply equally to an unmarried person, but (i) which puts or would put married persons at a particular disadvantage when compared with unmarried persons of the same sex, (ii) which puts or would put that person in that disadvantage, and (iii) which he cannot show to be a proportionate means of achieving a legitimate aim”*.
- Articles 5A and 5B cover provisions on discrimination on the ground of pregnancy or maternity leave.
- Article 6 pertains to discrimination by way of victimization. According to this article, *“A person (“the discriminator”) discriminates against another person (“the person victimized”) in any circumstances relevant for the purpose of any provision of this Order if he treats the person victimized less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimized has (a) brought proceedings against the discriminator or any other person [...], or (b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person [...], or (c) otherwise done anything under or by reference to this Order or the Equal Pay Act [...], in relation to the discriminator or any other person, or (d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Order or give rise to a claim under the Equal Pay Act, [...].”*

Part III of this Order covers the prohibition of discrimination in the field of employment and includes provisions on discrimination by employers (Articles 8-13); discriminations against office holders (Articles 13A and 13B); discrimination by other bodies, such as partnerships, trade unions, employment agencies etc. (Articles 14-18); as well as discrimination in special cases, such as by prison officers, ministers of religion, midwives etc. (Articles 20-23).

Part IV includes provisions on discrimination in other fields, mainly in education (Articles 24-28); and discrimination in the provision of goods, facilities or services (Article 30) and others.

Public Order (Northern Ireland) Order (1987)⁵⁰²

This Order is very similar in content to the Public Order Act (1986) authorized by the Parliament of the United Kingdom. It defines the meanings of fear and hatred and makes it unlawful to use words or behaviour, or to display material, with insulting or threatening messages. The punishments for offences under Part III are, in the case of summary conviction, imprisonment not exceeding 6 months, or a fine not exceeding the statutory

⁵⁰¹ Article 5(2): The condition is that the person is (a) married, or (b) a civil partner.

⁵⁰² To see the entire text of the Act, please visit: <http://www.legislation.gov.uk/nisi/1987/463>

maximum. In the case of conviction on indictment, the punishment is imprisonment not exceeding 7 years, and/or a fine.

- Article 9 of this Act specifically addresses the use of words, behaviour or the display of written material. It states that, *“a person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if (a) he intends thereby to stir up hatred or arouse fear; or (b) having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby.”*
- Article 10 refers to publishing or distributing written material, and states that, *“a person who publishes or distributes written material is threatening, abusive or insulting is guilty of an offence if (a) he intends thereby to stir up hatred or arouse fear; or (b) having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby”*.
- Article 11 applies to distributing, showing or playing a recording of visual images or sounds that are threatening, abusive or insulting. A person is guilty of these offences in case he/she intends to stir up hatred or arouse fear. This is defined in the same way as paragraphs (a) and (b) of the previous Articles.
- Article 12 is implemented in the same way as Articles 9 to 19, and applies to broadcasting or including programmes in cable programming services which involves threatening, abusive or insulting visual images or sounds. According to 12(2), this provision affects *“(a) the person providing the [said] programme service; (b) any person by whom the programme is produced or directed; and (c) any person by whom offending words or behaviour are used.”*

Disability Discrimination Act (DDA) (1995)⁵⁰³

In Great Britain, this Act has been repealed by the Equality Act of 2010. However, it still applies in Northern Ireland. The Act introduced new rights for disabled people, includes provisions which make it unlawful to discriminate against anyone who is disabled. Such regulation particularly applies in the employment field, in the provision of goods, facilities and services, or in the disposal or management of premises in the education and public transport systems.

- Article 1 defines a person with a disability as one who has *“a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities”*.
- Article 3 further clarifies an act of discrimination against a disabled person. For the purpose of this Act, such discrimination occurs when it is *“(a) for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats*

⁵⁰³ To see the entire text of this Act, please visit: <http://www.legislation.gov.uk/ukpga/1995/50>

or would treat others to whom that reason does not or would not apply, and (b) he cannot show that the treatment in question is justified”.

- Article 19 identifies the unlawfulness of discrimination in relation to goods, facilities and services against disabled persons. According to this Article, *“It is unlawful for a provider of services to discriminate against a disabled person, (a) in refusing to provide, or deliberately not providing, to the disabled person any service which he provides, or is prepared to provide, to members of the public; (b) in failing to comply with any duty imposed on him [...] in circumstances in which the effects of that failure is to make it impossible or unreasonable difficult for the disabled person to make use of any such service; (c) in the standard of service which he provides to the disabled person or the manner in which he provides it to him; or (d) in the terms on which he provides a service to the disabled person”.*

Northern Ireland Act (1998)⁵⁰⁴

This Act transfers legislative power from the direct rule of Westminster and allots it to the Assembly of Northern Ireland. It also established new rules which are in accordance with the European Union. Sections 75 and 76 are especially relevant to discrimination, as they make it unlawful for the public authorities to discriminate against another person, and provide for equal opportunities.

- Section 75 came into force on 1 January 2000, and it provides for a statutory obligation in public authorities to promote equality of opportunity. It declares that, *“a public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity, (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; (b) between men and women generally; (c) between persons with a disability and persons without, and (d) between persons with dependants and persons without”.*
- Section 76 refers to discrimination by public authorities, and provides that *“it shall be unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion”.*

Fair Employment and Treatment (Northern Ireland) Order (1998)⁵⁰⁵

According to this Order, it is unlawful to discriminate against someone due to their religious belief or political opinion, including the absence of religious belief, political opinion, or both. Within this Order, discrimination is seen as the less favourable treatment of a person based on the grounds of either religious belief or political opinion. It also includes a provision on the victimisation of persons because he or she has defended or helped another person to defend their rights under this Order.

⁵⁰⁴ To see the entire text of this Order, please visit: <http://www.legislation.gov.uk/ukpga/1998/47>

⁵⁰⁵ To see the entire text of this Order, please visit: <http://www.legislation.gov.uk/nisi/1998/3162>

- Section 3(2) includes the definition of discrimination. It states that “A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of this Order, if (a) on either of those grounds he treats that other less favourably than he treats or would treat other persons; or (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same religious belief or political opinion as that other but, (i) which is such that the proportion of persons of the same religious belief or of the same political opinion as that other who can comply with it is considerably smaller than the proportion of persons not of that religious belief or, as the case requires, not of that political opinion who can comply with it; and (ii) which he cannot show to be justifiable irrespective of the religious belief or political opinion of the person to whom it is applied; and (iii) which is to the detriment of that other because he cannot comply with it”.
- Section 5 of this Order covers equality of opportunity, which means “equality of opportunity between persons of different religious beliefs”, especially when seeking employment or when employed, and when seeking to become engaged in any occupation.

Racism

Race Relations (Northern Ireland) Order (1997)⁵⁰⁶

This Order was amended by the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 to implement the EU Framework Employment Directive. It was amended again in 2009 by the Race Relations Order (Amendment) Regulations (Northern Ireland).

The Order prohibits discrimination which is based on racial grounds. The law protects persons from racial discrimination in the areas of employment, education, the provision of goods, facilities or services and the disposal or management of premises. The Race Relations Order also declares that segregation on racial grounds constitutes discrimination.

- Section 3 of the Order asserts that “a person discriminates against another in any circumstances relevant for the purposes of any provision of this Order if, (a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or (b) 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, (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”.

⁵⁰⁶ To see the entire text of this Order, please visit: <http://www.legislation.gov.uk/nisi/1997/869>

- Section 3(1A) was added in 2003 and further states that, “a person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in paragraph (1B), he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but (a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons; (b) which puts or would put that other at that disadvantage; and (c) which he cannot show to be a proportionate means of achieving a legitimate aim”.

Hate speech law

Hate speech in Northern Ireland is defined by part III of the Public Order (Northern Ireland) Order (1987), as mentioned above. According to Section 9(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 hatred or arouse fear; or (b) having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby.”

Hatred and fear are defined by reference to religious belief, sexual orientation, disability, colour, race, nationality (including citizenship) or ethnic or national origins. Section 16(1) establishes that a person guilty of an offence under this Part is liable: “(a) on summary conviction, to imprisonment for a term not exceeding 6 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 7 years or to a fine, or to both.”

The Effectiveness of the UK Legal Framework towards Hate Crime and Racism

According to the report of the *European Commission against Racism and Intolerance* (ECRI) published in 2010, the UK has made many improvements with regard to combating discrimination, especially since a number of new criminal law provisions have been put in place, specifically the Equality Act of 2010.⁵⁰⁷ The UK has strived to ensure the effectiveness and consistency of reporting racially motivated offences. In addition, the *United Nations Committee on the Elimination of Racial Discrimination* (CERD) evaluated the UK’s policies and legal framework in this field, noting positive changes and significant efforts by the State in fighting racial discrimination and inequality. As was the case with ECRI’s assessment, CERD also considers the Equality Act of 2010 to be a major improvement in this regard.⁵⁰⁸

⁵⁰⁷ ECRI (2010), “ECRI Report on the United Kingdom”, European available online at: http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/United_Kingdom/GBR-CbC-IV-2010-004-ENG.pdf

⁵⁰⁸ United Nations Committee on the Elimination of Racial Discrimination (2011), “International Convention on the Elimination of Racial Discrimination – United Kingdom of Great Britain and Northern Ireland”, available online at: <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.GBR.CO.18-20.pdf>

Nonetheless, there are still many more steps that the UK can take in order to strengthen its anti-discrimination efforts, principally by signing important international agreements that, in one way or another, address the issue of discrimination. The UK, in particular, has not signed or ratified Protocol No. 12 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, which contains a provision on the general prohibition of discrimination. It guarantees that “no-one shall be discriminated against on any ground by any public authority”.⁵⁰⁹ In its third report on the UK, ECRI recommended that the UK Government sign and ratify the Protocol; however, no steps have been made towards doing so. ECRI, within the text of its fourth report, continued to urge the UK to ratify the protocol, but to no avail.⁵¹⁰ Additionally, the UK has neither signed nor ratified the *Additional Protocol to the Convention on Cybercrime*, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, a measure that significantly links the issue of racism with technological misuse and which can have an impact on addressing the evolving phenomenon of hate speech online.⁵¹¹

It has also been recommended by ECRI that the UK sign and ratify the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.⁵¹² Furthermore, the UK has signed, but not yet ratified the *Convention on the Participation of Foreigners in Public Life at Local Level*, which aims to improve the integration of foreign residents into community life and guarantees that foreigners are allotted with all of the basic rights enjoyed by State Party nationals.⁵¹³ Another point of contention regarding the effectiveness of UK legislation in this field comes from the fact that the country has not yet signed the *Optional Protocol to the International Covenant on Civil and Political Rights*, which gives the Human Rights Committee the power to receive complaints from individuals whose rights have been violated under the Covenant. ECRI has recommended that the UK to sign and ratify this optional protocol in order to improve effectiveness.⁵¹⁴ Moreover, the UK has neither signed nor ratified the *European Convention on Nationality* of the Council of Europe, which has been open for signature since 1997. The convention relates to all aspects of nationality, including the acquisition of a new nationality, the recovery of a former one, and the guarantees for procedures, etc. It also provides for the prevention of statelessness and non-discrimination with regard to nationality, making it a relevant tool for addressing racism and ethnic discrimination.⁵¹⁵

⁵⁰⁹ CoE, “Protocol No.12 to the Convention for the Protection of Human Rights and Fundamental Freedoms”, available online at: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=177>

⁵¹⁰ ECRI (2010), “ECRI Report on the United Kingdom” available online at:

http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/United_Kingdom/GBR-CbC-IV-2010-004-ENG.pdf

⁵¹¹ CoE, “Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems”, available online at:

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=189>

⁵¹² ECRI (2010), “ECRI Report on the United Kingdom”, available online at:

http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/United_Kingdom/GBR-CbC-IV-2010-004-ENG.pdf

⁵¹³ CoE, “Convention on the Participation of Foreigners in Public Life at Local Level”, available online at:

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=144>

⁵¹⁴ ECRI (2010), “ECRI Report on the United Kingdom”, available online at:

http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/United_Kingdom/GBR-CbC-IV-2010-004-ENG.pdf

⁵¹⁵ *Ibid.*

With respect to domestic legislation already in place, ECRI, through its General Policy Recommendation No.7, has also called on the UK to include ‘language’ as one of the protected characteristics under the Equality Act 2010.⁵¹⁶

Moreover, ECRI has also referenced the UK’s current national discourse concerning the kingdom’s newly proposed Bill of Rights. ECRI has positively received the new proposal, but at the same time recommends that the proposed legislation adopt current, or even strengthened, human rights protection mechanisms, especially regarding equality and protection against racism and racial discrimination.⁵¹⁷

Another recommendation has been for UK authorities to strengthen efforts regarding prevention, as there has been an increase in racist and religious violence across the country. As can be seen in Figure 2, there was a perceived decrease in hate crime offences in 2011. However, this drop in numbers is not necessarily due to a general decrease in hate crime incidents, but could also be the result of underreporting or procedural changes. This is a distinct possibility, as hate crime based on racial, religious, sexual orientation and transgender bias has again begun to increase, especially in 2013-2014.

Figure 2 - Hate Crime Offences in the UK from 2010 to 2014

Year	RACE	RELIGION	SEXUAL ORIENTATION	TRANSGENDER	DISABILITY	ANTI-SEMITISM	TOTAL
2010	39,311	2,007	4,883	357	1,569	488	48,615
2011	35,875	1,773	4,447	299	1,937	440	44,771
2012/13	33,434	1,543	3,964	410	1,853	385	41,204
2013/14	33,856	2,055	4,119	551	1,853	318	42,752

The above data is according to the Home Office records, which can be found at: www.report-it.org.uk/hate_crime_data1

In the educational field, there has also been a significant improvement with regard to the education of students belonging ethnic minority groups. As an example, the disproportionate exclusion of Black pupils from schools has been reduced. However, more initiatives should be put in place in order to advance the conditions of children coming from minority groups, such as the Gypsy, Roma and Traveller ethnicities.⁵¹⁸

⁵¹⁶ ECRI (2002), “ECRI General Policy Recommendation No.7 on National Legislation to Combat Racism and Racial Discrimination”, available online at: http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n7/ecri03-8%20recommendation%20nr%207.pdf

⁵¹⁷ ECRI (2010), “ECRI Report on the United Kingdom”, available online at: http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/United_Kingdom/GBR-CbC-IV-2010-004-ENG.pdf

⁵¹⁸ *ibid.*

Another problem relates to the UK media's portrayal of certain groups in a negative light, especially Muslims, migrants, asylum-seekers, Roma, and Travellers.⁵¹⁹ CERD has also recognized this problem, and in its 2011 report recommended that the UK Government "closely monitor the media with a view to combating prejudices and negative stereotypes, the unchecked expression of which may result in racial discrimination or incitement to racial hatred".⁵²⁰ CERD has advised that the UK take all necessary measures in order to eliminate racist media coverage. As a step in this direction, the Department for Communities and Local Government (DCLG) is currently working with the Society of Editors in order to develop "good practice guidance for moderators of online newspaper content".⁵²¹ DCLG has provided funds to the society for pursuing research on the issue of online moderation. The aim of this research is to develop a stronger understanding of online hate crime, and to produce good practice guidelines in the field. The Society of Editor's survey is currently underway.⁵²²

In 2012, the UK government published 'Challenge it, Report it, Stop it', the Government's plan to tackle hate crime.⁵²³ This plan lists all the actions the government plans to take in the coming years in order to reduce hate crime offences. The plan includes changes to police forces, giving each department a free hand in order to develop hate crime strategies that best reflect local needs, rather than adopting generalized strategies that might not be effective in all regions of the country.⁵²⁴ Other actions regarding the prevention of hate crime include: developing a better understanding of hate crime by publishing analyses of data on hate crime victimization; adopting welfare reform in order to reduce negative media portrayals of disability issues; supporting the Ann Frank Trust UK and the Jewish Museum in their fight against anti-Semitism; working with National Governing Bodies to tackle homophobia and transphobia; and an array of others.⁵²⁵ Early intervention actions include, among others: developing a program to tackle hate crime online; developing information resources for use by partnerships and professionals, and distributing them through the True Vision website, which offers information, reporting mechanisms, and victim support services concerning hate crime; and supporting NGOs such as Tell MAMA, an organization that addresses anti-Muslim abuse.⁵²⁶ A number of other actions have also been put in place regarding the strengthening of victim confidence, improving identification and case management, and dealing effectively with offenders.⁵²⁷

⁵¹⁹ *Ibid.*

⁵²⁰ United Nations Committee on the Elimination of Racial Discrimination (2011), "Concluding observations of the Committee on the Elimination of Racial Discrimination – United Kingdom of Great Britain and Northern Ireland", available at: <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.GBR.CO.18-20.pdf>

⁵²¹ UK Government (2014), "Challenge It, Report It, Stop It", available online at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307624/HateCrimeActionPlanProgressReport.pdf

⁵²² True Vision (2015), "Society of Editors' survey to review online moderation", available at: http://report-it.org.uk/society_of_editorsrsquo_survey_to_review_online

⁵²³ To view the complete plan, please visit:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97849/action-plan.pdf

⁵²⁴ UK Government (2012), "Challenge it, Report it, Stop it: The Government's Plan to Tackle Hate Crime", available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97849/action-plan.pdf

⁵²⁵ *Ibid.*

⁵²⁶ *Ibid.*

⁵²⁷ *Ibid.*

In 2014, the government published another report entitled '*Challenge It, Report It, Stop It – Delivering the Government's hate crime action plan*'.⁵²⁸ This report summarizes the successes and problems faced in carrying out the previous plan to tackle hate crime, and provides feedback on what actions have been implemented and with what result. In addition, this report provides a new, revised and more effective plan of action for dealing with the issues that have emerged, or which have continued to evolve, becoming more of a challenge over the last two years. One of the areas which proved to be difficult to tackle was hate crime on the Internet, but even in this field, there has been some progress. For example, the Inter-Parliamentary Coalition to Combat Anti-Semitism established a task force that works with social media companies and monitors hate comments online.⁵²⁹ Furthermore, a number of international seminars on hate crime and freedom of expression on the Internet have been held, including one in 2013 that was hosted by the Foreign and Commonwealth Office.⁵³⁰ Additionally, there are ongoing efforts by the government which continue to tackle hate crime online.

In 2014, the College of Policing published *Hate Crime Strategy and Operational Guidance*, which provides significant information on hate crime, including definitions, types of victimization, legislation, and types of hate-based offences and how to approach them.⁵³¹ The guidance serves as a vital point of reference for police officers, lawyers, judges, those working in the hate crime field, and anyone interested in this area. This operational guidance is also helpful for victims since it outlines the proper standards and procedures they should encounter when dealing with the authorities after reporting a hate crime.

A mandatory training for prosecutors on hate crime cases involving victims with mental health issues and learning disabilities has also been realized as part of the Government's 2012 action plan.⁵³² The NGO *Stop Hate UK* also offers a number of trainings on hate crime, which can be delivered to police services, councils, schools, universities, housing providers, probation services, youth offending services, health services, and others.⁵³³

With regard to Northern Ireland, ECRI recommended that extensive training be carried out with regard to criminal law provisions against racially or religiously aggravated behaviour for everyone working in the country's criminal justice system.⁵³⁴ A report from the *Challenge Hate Crime Project*, an initiative launched within Northern Ireland in 2010, identified numerous problems with regard to criminal justice responses to hate crime in Northern Ireland. Particularly, the report concluded that there is generally very limited awareness of

⁵²⁸ UK Government (2014), "Challenge It, Report It, Stop It", available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307624/HateCrimeActionPlanProgressReport.pdf

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.*

⁵³¹ To see the complete guidance, please visit: http://www.report-it.org.uk/files/hate_crime_operational_guidance.pdf

⁵³² UK Government (2012), "Challenge it, Report it, Stop it: The Government's Plan to Tackle Hate Crime", available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97849/action-plan.pdf

⁵³³ Stop Hate UK, (2015), available at: <http://www.stophateuk.org/training/>

⁵³⁴ ECRI (2010), "ECRI Report on the United Kingdom", available online at: http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/United_Kingdom/GBR-CbC-IV-2010-004-ENG.pdf

hate crime based on disability, and thus recommended that the Northern Ireland Policing Board should review how the problem of hate crime and harassment of people with disabilities is addressed by different groups and agencies, and develop a more effective response.⁵³⁵ The report also found that hate crime in Northern Ireland is not only significantly underreported, but noted that even offences which are reported possess considerable gaps in information. Therefore, it was recommended that the methodology for data collection be reviewed, and that more information should be provided, in relation to issues such as mapping, identifying, and quantifying hate crimes in greater detail. In this way, a clearer and more accurate picture of hate crime in Northern Ireland can be ensured.⁵³⁶ Moreover, the report advised that the Department of Justice work more closely with other departments (i.e. Education, Employment and Learning, and Health, Social Services and Public Safety) in order to create a new strategy for recording hate crimes.⁵³⁷ Likewise, the report made a recommendation that the Policing Board publish an annual review or report of the Police Service's performance in responding to hate crime.⁵³⁸

With regard to racism and racially aggravated hate crime, the government of Northern Ireland established the Racial Equality Strategy 2014-2024, which aims to, among other things, eradicate racism and hate crime. Proposals for the final plan of action are still being developed.⁵³⁹

Procedural Issues and Mechanisms

In order to increase reporting and make it easier and safer for victims, there are now multiple ways of reporting a hate crime in the United Kingdom. Aside from directly contacting the police, victims and the general public have the possibility to report incidents of physical hate crime or hate crime online via the True Vision website.⁵⁴⁰ Once the online form has been completed, it is sent directly to a local police station. In addition to a standard reporting form, an easy-to-read reporting form is also available on the website. This form uses simple language with pictures and allows victims to draw a depiction of the incident in order to explain what has happened. Furthermore, victims have the option to indicate a person whom they trust to act as a liaison with the police, in case the victim does not want to be directly contacted by the police at home. Moreover, anyone who is in need of help can always contact the Citizens Advice Bureau.⁵⁴¹

⁵³⁵ Jarman N. (2012), "Criminal Justice Responses to Hate Crime in Northern Ireland", Challenge Hate Crime, Deal With It, available at: <http://conflictresearch.org.uk/wp-content/uploads/NIACRO-Report-01-Complete-Low-Res.pdf>

⁵³⁶ *Ibid.*

⁵³⁷ *Ibid.*

⁵³⁸ *Ibid.*

⁵³⁹ Office of the First Minister and Deputy First Minister (2015), "Racial Equality Strategy 2014-2024", available at: <http://www.ofmdfmi.gov.uk/racial-equality-strategy>

⁵⁴⁰ To report an online hate crime in the UK, please visit: http://www.report-it.org.uk/your_police_force

⁵⁴¹ Citizens Advice Bureau is an independent charity which offers help and advice to citizens throughout UK in various areas, including hate crime. For more information, please visit: <https://www.citizensadvice.org.uk/discrimination/hate-crime/>

Directly reporting hate crime to the police on behalf of another person is also possible within the UK. Detailed information about how to report is described on the Police.UK website. Anyone who is reporting a hate crime may choose where he/she wants to be interviewed, and may also be accompanied by either a legal advisor or a friend. The police or Citizens Advice Bureau may also help with providing a translator in the case that one is needed. There are two non-emergency numbers (101; 18001 101) and the general emergency number (999) available for contacting the police by phone.

The Citizens Advice Bureau has identified a number of issues that may arise when reporting a hate crime. One of the main concerns is that law enforcement authorities might not correctly perceive or record an incident as a hate crime, or instead classify it as anti-social behaviour.

Laws concerning discrimination have also become more complex, which has consequently led to victims needing legal assistance while in court. The Citizens Advice Bureau's website offers help concerning both of these issues, among others.

In 2013, the Ministry of Justice also implemented a new *Code of Practice for Victims of Crime*. The Code offers clearer entitlements for victims and provides them with improved services.⁵⁴² Furthermore, the Crown Prosecution Service (CPS) is currently in the process of developing a *Witness Care Unit Manual*, which will aim to assist Witness Care Officers and managers in dealing with hate crime victims and witnesses.⁵⁴³

The CPS is the principal prosecution service in England and Wales and is independent from the police, which are only responsible for carrying out investigations and gathering evidence. The CPS, on the other hand, decides whether a suspect should be charged, and, if so, which charges should be applied. Within its work, the CPS follows the Code for Crown Prosecutors.

Northern Ireland, conversely, maintains the Public Prosecution Service (PPS). The PPS, as in the case of the CPS, is responsible for prosecution only, with all investigations being handled by the Police Service of Northern Ireland (PSNI).⁵⁴⁴ In Scotland, the major prosecuting body is the Crown Office and Procurator Fiscal Service (COPFS). Unlike the CPS and PPS, in addition to handling prosecuting criminals, the COPFS also investigates crime and can bring forth allegations of criminal misconduct against police officers.⁵⁴⁵

There are a number of procedural issues within UK legislation regarding discrimination and hate crime. The Crime and Disorder Act of 1998 defines the term "racially or religiously aggravated offences" and sets the condition that for an individual to be charged with this type of offence there must be proof that a 'basic offence' or a non-aggravated offence has also taken place. A basic offence is the same offence, but without the aggravating feature.

⁵⁴² UK Government (2014), "Challenge It, Report It, Stop It, available online at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307624/HateCrimeActionPlanProgressReport.pdf

⁵⁴³ *Ibid.*

⁵⁴⁴ Public Prosecution Service (2014), "The Role of the Public Prosecution Service", available at:

<http://www.ppsni.gov.uk/Branches/PPSNI/PPSNI/Files/Documents/The%20Role%20of%20The%20PPS%20%28Oct%202014%29.pdf>

⁵⁴⁵ *Ibid.*

When an offence is racially or religiously aggravated, the maximum sentences are much higher.⁵⁴⁶ However, when both offences are charged (a basic and an aggravated offence), plea bargaining becomes an option. In more cases than not, a guilty plea to the basic offence is accepted and the aggravated offence is then dropped. When guilty pleas to the lesser offence occur too frequently, the effect of the law becomes diminished, and the possibility of future deterrence is reduced.⁵⁴⁷

Another factor concerning the application of aggravated offences is that judges allow juries to submit an alternative verdict. Therefore, the prosecution may bring forth the charge of an aggravated offence, but the jury has the option to convict a suspect only on the non-aggravated offence, in the case that the first cannot be proved beyond reasonable doubt.⁵⁴⁸ This practice, however, is useful as it reduces the chance of a wrongful conviction.

Another issue relates to the offences included in the Public Order Act of 1986, specifically within Part III, which covers acts that are likely to stir up racial hatred. The Act was further amended in 2006 and in 2008 to include religious hatred and hatred on the grounds of sexual orientation. However, in order to convict an individual of these types of offences, it must be proved beyond reasonable doubt that there was the intent to stir up hatred, which historically has proven to be very difficult.⁵⁴⁹ When laws are too narrow they consequently become ineffective. Moreover, after a review of the legislative reforms, the UK's Law Commission refused to extend the legislation to cover hatred against persons with disabilities and transgender people.⁵⁵⁰

The most important mechanism for the promotion and protection of human rights and countering discrimination within the UK is the Equality and Human Rights Commission.⁵⁵¹ The Commission is a non departmental public body that enforces equality and non-discrimination laws in England, Wales and Scotland. It was established by the Equality Act in 2006.

The Commission's duties and powers were set up by the Equality Acts of 2006 and 2010. Among other duties, the Commission has a mandate to monitor the law and scrutinize the effectiveness of existing statutes. Furthermore, the Commission needs to monitor the progress, meaning, and identification of relevant changes in society, define which outcomes are perceived as the indicators of progress, monitor this progress, and submit reports on these issues to Parliament.

⁵⁴⁶ In 2012, the custody rate for racially or religiously aggravated assault with injury offences was 20 percent higher than the comparable non-aggravated offence.

⁵⁴⁷ Owusu-Bempah A. (2015), "Can hate crime be prosecuted?", International Network for Hate Studies, available at: <http://www.internationalhatestudies.com/can-hate-crime-prosecuted-effectively/>

⁵⁴⁸ *Ibid.*

⁵⁴⁹ Walters M. (2015), "Stirring up hatred against disabled and trans people: does hate crime legislation go far enough?", The International Network for Hate Studies, available at: <http://www.internationalhatestudies.com/stirring-hatred-disabled-trans-people-hate-crime-legislation-go-far-enough/>

⁵⁵⁰ The Law Commission (2014), "Hate Crime: Should the Current Offences be Extended?", available at: http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc348_hate_crime.pdf

⁵⁵¹ Equality and Human Rights Commission (2015), available at: <http://www.equalityhumanrights.com/>

The Commission can also provide assistance to those who want to introduce legal proceedings related to equality, and it can take on legal cases, or intervene in litigation, in order to test and expand the right to equality and human rights. In the case of an unlawful act, the Commission has the right to apply to the court in order to request an injunction. Additionally, the Commission provides a variety of training and education programmes on discrimination, as well as guidance and statutory of practice in order to help individuals and organizations comply with the law.

Part 1 of the Equality Act of 2006 is devoted to the Commission, its duties and general powers, as well as enforcement powers. Section 20 establishes its power to investigate the commission of an unlawful act; Section 24 gives the Commission the right to enter into agreements with employers so they can agree that the employer will promote equality and avoid discriminatory practices; and Section 30 allows the Commission to carry out judicial review proceedings against public authorities.

Northern Ireland has a similar non departmental public body that ensures and promotes laws against discrimination. The Equality Commission for Northern Ireland was established by the Northern Ireland Act 1998, and its powers and duties originate from numerous statutes that provide protection from discrimination on the grounds of age, disability, race, religion and political opinion, and sex and sexual orientation.⁵⁵²

Another institutional mechanism active in this field is the Government Equalities Office (GEO), which ensures the presence of equality within the legislation, as well as in UK policy.⁵⁵³ It is the principal entity in Northern Ireland promoting the issue of gender, and it is responsible for gender equality policy within the government's overall policy framework. The main priorities of the GEO are reducing discrimination and disadvantage towards women, homosexuals and transsexuals in all areas (such as at work, the public sphere and in politics).⁵⁵⁴

The right to non-discrimination also incorporates the right to a remedy. Under European anti-discrimination law, one of the requirements for remedies is that they are effective. The UK has successfully integrated substantive remedies, which have resulted in the creation of a proactive, constructive, as well as a punitive, approach to redressing discrimination.⁵⁵⁵ According to the European Anti-Discrimination Law Review, the goal of these remedies is to create systemic changes, as they perform three different functions. They recognize victims' sufferings, they fulfil the State's obligation to punish minor offences, and they also establish conditions which prevent further discrimination, educate, and raise awareness.⁵⁵⁶

⁵⁵² Equality Commission for Northern Ireland (2015), available at: <http://www.equalityni.org/Home>

⁵⁵³ UK Government (2011), "United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) United Kingdom's Seventh Periodic Report", available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85456/7th-cedaw-report.pdf

⁵⁵⁴ Government Equalities Office (2015), available at: <https://www.gov.uk/government/organisations/government-equalities-office>

⁵⁵⁵ European Commission (2014), "European Anti-Discrimination Law Review" available at:

<http://ec.europa.eu/justice/discrimination/files/adlr-19-2014-final.pdf>

⁵⁵⁶ *Ibid.*

UK tribunals have the power to order proactive and positive remedies; for example, they can introduce desegregation policies in cases where there is segregation in the school system. They can also review recruitment policies, or adopt diversity policies or non-discrimination codes. Moreover, they may impose violators to set up equality trainings.⁵⁵⁷

In order to effectively deal with discrimination, the causes leading up to offences being committed on discriminatory grounds, as well as the general socio-economic context, must be considered and addressed. The substantive remedies adopted by the UK acknowledge both aspects.

Jurisprudence

In attempting to better understand the effectiveness of the UK legislative framework with respect to discrimination and hate-based crime, we examined a sampling of important court cases that have had an impact in this field.

Judgements on Discrimination

County Court in Northern Ireland: Gareth Lee v. Ashers Baking Co. Ltd, Colin McArthur and Karen McArthur; 19/5/2015⁵⁵⁸

This judgement ruled in favour of the plaintiff, Gareth Lee, and found that the three defendants unlawfully discriminated against him by not accepting his order for a cake with a text “Support Gay Marriage”. The plaintiff turned to the courts by claiming that a number of provisions had been violated by the defendants, namely the Equality Act (Sexual Orientation) Regulations 2006 and the Fair Employment and Treatment Order 1998. The Equality Act Regulations do not prohibit businesses from turning down potential customers from any background; however, at the same time, these regulations do protect individuals whose sexual orientation is used as a reason for business being turned down. The presiding District Judge stated, *“the defendants are not a religious organisation; they are conducting a business for profit, and notwithstanding their genuine religious beliefs, there are no exceptions available under the 2006 Regulations which apply to this case [...]”*.⁵⁵⁹ Moreover, the main purpose of the Fair Employment and Treatment Order 1998 is to prevent discrimination on the grounds of religious belief or political opinion, and in this case the judge ruled that the defendants acted against the 1998 Order as they did not agree with the plaintiff’s religious and political beliefs regarding the change in the law, which permits gay marriage. Thus, the defendants discriminated against the plaintiff.

⁵⁵⁷ European Commission (2014), “European Anti-Discrimination Law Review”, available at: <http://ec.europa.eu/justice/discrimination/files/adlr-19-2014-final.pdf>

⁵⁵⁸ Equality Commission for Northern Ireland (2015), “Gareth Lee v Ashers Baking Co Ltd, Colin McArthur and Karen McArthur”, full judgement, available at: www.equalityni.org/ECNI/media/ECNI/.../Lee-v-Ashers_Judgement.pdf

⁵⁵⁹ *Ibid*, p.15.

Court of Appeal (Civil Division) in England: Michael Black and John Morgan v. Susanne Wilkinson; 09/07/2013⁵⁶⁰

On 19 March 2010, the defendant, Mrs. Wilkinson, turned away a homosexual couple (Mr. Black and Mr. Morgan, the claimants) from her bed and breakfast on the grounds of their sexual orientation. The claimants had booked a double room in advance and paid a deposit of £30. Upon arrival, when the defendant saw that they were both men, she informed them that she could not accommodate them. Mrs. Wilkinson has been described as a committed Christian who does not believe in homosexual relations. Additionally, she had also turned away a number of unmarried heterosexual couples from her lodgings. In any case, the judge concluded that there was unlawful direct discrimination on the ground of sexual orientation. The judge, furthermore, concluded that this also constituted a case of indirect discrimination because even though the defendant's policy restricts her double rooms to married heterosexual couples, it puts homosexual couples in more of a disadvantage on the ground of their sexual orientation. Therefore, according to the provision of the Equality Act (Sexual Orientation) Regulations 2007, the judge ruled in favour of the claimants, Mr. Black and Mr. Morgan.

Judgements on Hate Crime

Court of Appeal (Criminal Division) in the case of Steven Simpson; 06/07/2013⁵⁶¹

Steven Simpson was an 18 year old from South Yorkshire who died on 24 June 2012 as a result of injuries caused by Jordan Sheard. Simpson suffered from Asperger's syndrome and was openly homosexual. The incident occurred at his 18th birthday party, during which he was mocked for being gay. Later in the evening, Simpson was forced to undress, while one of the guests sprayed him with flammable tanning oil. Jordan Sheard then placed a cigarette lighter to Simpson's groin, and lit it, immediately causing Simpson to catch fire. Sixty percent of his body was burnt, and Simpson died two days after the incident. The Crown Prosecution submitted that the offence was committed on the grounds of either the victim's learning disability or his sexuality, and, therefore, it should be considered as a serious aggravating feature. The offender, Jordan Sheard, was sentenced to three and a half years detention in a young offender institution. The decision was appealed by the Attorney General due to the low sentence, but the Court of Appeals upheld previous ruling.

Court Judgment in the case of Zack Davies; 25/06/2015

Zack Davies, a 26 year old from Mold in Wales, was found guilty of the attempted murder of Mr. Bhabra in an attack that was racially motivated.⁵⁶² Davies attacked Bhabra using a

⁵⁶⁰ Courts and Tribunals Judiciary (2013), "Black and Morgan v. Wilkinson", available at: <https://www.judiciary.gov.uk/judgments/morgan-wilkinson-09072013/>

⁵⁶¹ Courts and Tribunals Judiciary (2013), "Decision in the Court of Appeals (Criminal Division) on Appeal from her Majesty's Attorney General", available at: <https://www.judiciary.gov.uk/.../Judgments/jordan-sheard-10072013.pdf>

⁵⁶² Morris S. (2015), "Nazi-obsessed loner guilty of attempted murder of dentist in racist attack", *The Guardian*, available at: <http://www.theguardian.com/uk-news/2015/jun/25/zack-davies-racist-guilty-attempted-murder-dentist>

machete and a hammer in a local grocery store. Zack Davies is a member of a white supremacist group, rooted in far right ideology. Moreover, during the assault Davies screamed “white power”.⁵⁶³ Davies later claimed that he was inspired by a British Isis terrorist, whose nickname is Jihadi John, and that the attack was revenge for the death of Lee Rigby, a British soldier killed by Islamist extremists in London in 2013.⁵⁶⁴ Judge Rhys Rowlands ordered Davies to be sent for a psychiatric evaluation before making a final decision on a sentence. Following the evaluation, Davies was sentenced to life in prison on 11 September 2015, with the possibility of parole after serving at least 14 years.⁵⁶⁵ As stated by the Crown Prosecution, “this was an attack against a complete stranger, singled out for no other reason than his ethnicity.”⁵⁶⁶

Judgements on Hate Speech

Mark Anthony Norwood v. the United Kingdom; 16/10/2004⁵⁶⁷

In 2002, Mr. Norwood was charged with an aggravated offence under section 5 of Public Order 1986, which concerns ‘*displaying 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*’. Mr. Norwood was a Regional Organizer for the British National Party, which is an extreme right wing political party. Between November 2001 and 9 January 2002, he displayed a large poster in the window of his first-floor apartment; the poster portrayed a photograph of the World Trade Center in flames with the words “Islam out of Britain – Protect the British People”, together with a symbol of a crescent and star set within a prohibition sign. The defendant pleaded not guilty to the original charge, and therefore appealed the initial decision to the High Court, where his appeal was dismissed. The defendant turned to the ECtHR, claiming that his freedom of expression, as stated in Article 10 of the European Convention of Human Rights, was breached. The application of Mr. Norwood was rejected as the European Court of Human Rights agreed with the domestic courts that “the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom, [and] such 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”.⁵⁶⁸

⁵⁶³ *Ibid.*

⁵⁶⁴ Lee Rigby, a soldier from Middleton, Greater Manchester, was stabbed to death on 22 May in Woolwich, London, by two men, who were Muslim converts. According to a letter which was handed to a witness by one of the attackers, the attack was retaliation for Muslim oppression. For more info, please see: “Lee Rigby murder: Map and timeline”, *BBC News*, (2014), available at: <http://www.bbc.com/news/uk-25298580>

⁵⁶⁵ Morris S. (2015), “‘Lee Rigby revenge’ attacker jailed for life”, *The Guardian*, available at: <http://www.theguardian.com/uk-news/2015/sep/11/lee-rigby-revenge-attacker-zack-davies-jailed-for-life>

⁵⁶⁶ Morris S. (2015) “Nazi-obsessed loner guilty of attempted murder of dentist in racist attack”, *The Guardian*, available at: <http://www.theguardian.com/uk-news/2015/jun/25/zack-davies-racist-guilty-attempted-murder-dentist>

⁵⁶⁷ CoE, “Decision as to the Admissibility of Norwood v. UK, European Court of Human Rights”, available at: <http://hudoc.echr.coe.int/web/services/content/pdf/001-67632>

⁵⁶⁸ *Ibid.*

High Court Judgment in the case of Sean Ratcliffe; 16/06/2003

The judges of the High Court overturned the ruling of a District Court and convicted Sean Ratcliffe of a criminal offence under the Football (Offences) Act (1991).⁵⁶⁹ The defendant was a part of a crowd chanting offensive words while watching the football match of Port Vale versus Oldham Athletic in October 2002. Mr. Ratcliffe was shouting, “*You are just a town full of Pakis*” at the Oldham fans.⁵⁷⁰ The district judge from the Stoke-on-Trent Magistrates court argued that “Paki” is just a non-offensive expression for someone from Pakistan. However, Lord Justice Auld from the High Court believes that, “*it is all too familiar an expression to the courts, used as it so often is as a prelude to violence, whether provoking or offering*”.⁵⁷¹ The judge further said, “*Words or chant cannot be taken in isolation. In this case the context was a football match in which a large number of football supporters were chanting in an aggressive manner. The whole thrust of the chant was an insult*”.⁵⁷² This case became a precedent for future cases, as it established that even if there are no swearing or insults, chants in football which include the word “Paki” are racist and illegal, and contravene the Football (Offences) Act (1991).⁵⁷³

Judgements on Hate Speech Online

The Westminster Magistrates’ Court v. John Raymond Nimmo and Isabella Kate Sorley; 24/01/2014⁵⁷⁴

On 24th January 2014, the two defendants, Nimmo and Sorley were found guilty of separate offences of improper use of a public electronic communications network, as stated in Section 127 of the Communications Act 2003. They were sending threatening messages on Twitter to Caroline Criado-Perez. Ms. Criado-Perez is a journalist and feminist campaigner who had a successful campaign pushing for the appearance of a female figure on a Bank of England note. The judge considered the offence to be of an aggravated character, since there were a series of communications, rather than just a single message. Furthermore, the threats were very serious, including references to death and rape. The messages were mostly posted on Twitter, but other sites were also used. Both Nimmo and Sorley sent tweets from numerous accounts. The maximum sentence for such crime is a level 5 fine and/or six months imprisonment. However, since both defendants pleaded guilty at the first available opportunity, they were given a reduction in their sentences. Mr Nimmo was sentenced to 8 weeks of immediate custody and Ms Sorley was sentenced to 12 weeks of immediate custody.

⁵⁶⁹ Bowcott O. (2003), “‘Paki’ football chant ruled racist by court”, *The Guardian*, available at:

<http://www.theguardian.com/football/2003/jun/17/newsstory.sport6>

⁵⁷⁰ *Ibid.*

⁵⁷¹ Martin N. (2003), “Fan’s ‘Paki’ taunt was racist, High Court rules”, *The Telegraph*, available at:

<http://www.telegraph.co.uk/news/uknews/1433212/Fans-Paki-taunt-was-racist-High-Court-rules.html>

⁵⁷² Bowcott O. (2003), “‘Paki’ football chant ruled racist by court”, *The Guardian*, available at:

<http://www.theguardian.com/football/2003/jun/17/newsstory.sport6>

⁵⁷³ *Ibid.*

⁵⁷⁴ Courts and Tribunals Judiciary (2014), “The Queen v John Raymond Nimmo and Isabella Kate Sorley”, available at: <https://www.judiciary.gov.uk/wp.../Judgments/r-v-nimmo-and-sorley.pdf>

High Court of Justice in Northern Ireland; AB Limited, JW, SM, and CM v. Facebook Ireland Limited and A person or persons adopting the pseudonyms Ann Driver and Alan Driver; 06/02/13⁵⁷⁵

Three employees of a Belfast company (which was granted anonymity) were awarded £35,000 in damages after an online hate campaign was raged against them by an anonymous individual (or individuals) on Facebook, posing under the pseudonyms Ann Driver and Alan Driver. Initial proceedings against Facebook Ireland Ltd were eventually dismissed; however, they continued against the anonymous person or persons behind the campaign. The defendant(s) wrote hateful messages and lies targeting the company, and specifically against some of its employees. The financial award can be distributed to the claimants if, and when, the defendants are identified. The judgement on the case was delivered by Justice McCloskey who stated that *“as this case demonstrated, the laws through the courts penetrate the shields of anonymity and concealment”*. The judge also said that in his view, *“this is properly described as a campaign of vilification and abuse which ebbed and flowed during a period of some few months”*. Moreover, Justice McCloskey added that social networking sites *“are becoming increasingly misused as a medium by which to threaten abuse, harass, intimidate and defame members of society”*. Finally, the judge made a further comment that *“the courts in Northern Ireland have demonstrated their availability and willingness to protect the interests of those whose legal rights are infringed by the cowardly and faceless perpetrators of this evil”*.

Institutions and Associations

There are many institutions and associations in the UK that deal with issues such as hate crime and hate speech. The largest and the most active organizations are *Stop Hate UK* and *True Vision*.

Stop Hate UK was established in 1995 with the aim to provide assistance for victims of racial harassment. The project was a direct response to the murder of Stephen Lawrence.⁵⁷⁶ Stephen Lawrence was an 18 year-old Black British man from southeast London who was murdered in April 1993 by a group of young white men during a conflict that was racially motivated.⁵⁷⁷ The case became very high profile in the media and caused changes within the UK regarding the perception of race-related issues.

In 2006, the organization launched their own reporting hotline, which was a response to Recommendation 16 of The Stephen Lawrence Inquiry of 1999, which states that: *“That all possible steps should be taken by Police Services at local level in consultation with local*

⁵⁷⁵ Northern Ireland Courts and Tribunals Service (2013), “Ex Tempore Judgment in the High Court of Justice in Northern Ireland in AB Limited, JW, SM, and CM v. Facebook Ireland Limited and A person or persons adopting the pseudonyms Ann Driver and Alan Driver”, available at: https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2013/%5B2013%5D%20NIQB%2014/j_j_McCL8748Final.htm

⁵⁷⁶ Stop Hate UK, available at: <http://www.stophateuk.org>

⁵⁷⁷ UK Government Web Archive (1999), “The Stephen Lawrence Inquiry”, available at: <https://www.gov.uk/government/publications/the-stephen-lawrence-inquiry>

Government and other agencies and local communities to encourage the reporting of racist incidents and crimes. This should include, the ability to report at locations other than police stations; and the ability to report 24 hours a day”.

The organization also fights against other forms of hate crime. In 2013, the Stop Learning Disability Hate Crime Line was initiated, and it is currently funded by the Ministry of Justice. Additionally, the Stop Lesbian, Gay, Bisexual and Transgender Hate Crime Line was established in January 2015, and is funded by the Equality and Human Rights Commission. All lines provide help, advice and more information to victims affected by any kind of hate-based crime.⁵⁷⁸

True Vision is another institution that is heavily involved in the fight against hate crime, maintaining a particular focus on victim assistance.⁵⁷⁹ It is owned and operated by the Association of Chief Police Officers and addresses homophobic and transphobic hate crime, crimes committed on the grounds of race or religion, and those perpetrated on the grounds of disability. True vision mostly specializes in preventing hate crime by providing information and urging the public to report any hate crime they might encounter. As True Vision was set up by the police association, it provides useful information concerning how police treat and investigate different types of hate crime, and what the victims and other persons involved should expect after a crime had been reported.

The Forum Against Islamophobia & Racism (or FAIR) is an independent charitable organization, founded in 2001, that aims to provide protection for British Muslims who have been negatively targeted because of their religion. The latest campaign of the organization aims to implement reforms which would make Muslims a protected minority under the Race Relations (Amendment) Act 2000, similar to Sikhs and Jews who are already recognized as protected minorities under this legislation.⁵⁸⁰

Other prominent organizations include Galop (London’s LGBT anti-violence and abuse charity), I CARE (Internet Center Anti Racism Europe), LAMBDA (LGBT non-profit agency), and Tell Mama (Measuring Anti-Muslim Attacks).

A recent development regarding the debate over how to effectively address hate crime in the UK centers around proposals being made by London’s mayor, Boris Johnson, who have advocated setting up a single hotline for reporting any type of hate crime incident occurring in London. However, a number of associations are opposing the new plan, highlighting the difficulties present in finding a commonly agreed to approach for tackling hate crime. Among the associations opposed to the plan, the Community Service Trust (a Jewish security charity), Tell Mama and Galop have been vocal on this issue. Nik Noone, who is the chief executive of Galop has said that “Reporting relies on trust between organizations and their communities, and a one-number, blanket approach ignores this fundamental principle”.⁵⁸¹

⁵⁷⁸ Stop Hate UK, available at: <http://www.stophateuk.org>

⁵⁷⁹ For more information about True Vision, please visit: <http://www.report-it.org.uk>

⁵⁸⁰ FAIR, “Time to make a difference – Getting a fair deal for British Muslims”, available at: <http://www.fairuk.org/fairdeal.htm>

⁵⁸¹ Townsend M. (2015), “UK: Jewish, Muslim and LGBT communities oppose hate-crime hotline plans, *The Guardian*, available at: <http://www.theguardian.com/society/2015/aug/01/jewish-muslim-lgbt-communities-hate-crime-hotline-boris-johnson-london>

The founder of Tell Mama, also stated that “[...] it is already difficult to report and this will add another layer of confusion. It will also segment data collection”.⁵⁸² An official announcement on the issue will be made in October 2015, during the Hate Crime Awareness Week.

Conclusions

In conclusion, the UK maintains a relatively strong legal framework and set of mechanisms for tackling discrimination, hate speech, and hate crime. The consolidation of various anti-discrimination laws to create the Equality Act 2010 effectively centralized and made accessible comprehensive legislation on discrimination, while Acts such as the Malicious Communications Act (1988), Public Order Act (1986), and an array of others are capable of addressing hate speech and hate crime.

Northern Ireland as well, through the enactment of the Northern Ireland Act (1998), Race Relations (Northern Ireland) Order (1997), and Public Order (Northern Ireland) Order (1987), among others, have also contributed in the country having a strong legal framework in place to deal with hate-based and discriminatory incidents.

However, problems have arisen in this field for the UK when it comes to adopting international protocols, enacting preventative measures that include the general public, and educating both law enforcement and legal professionals in the nature and effects of hate speech and hate crime.

Training is of the utmost concern for many of the entities currently reporting on the UK’s approach to hate crime and hate speech. Not only prosecutors and judges, but also law enforcement authorities must be able to identify and correctly classify incidents of hate crime and hate speech in their respective jurisdictions. Misreporting hate crime by the police as anti-social behaviour, for example, is a major disservice to victims. Moreover, a misclassification of this type emboldens perpetrators and can perpetuate existing knowledge gaps on this issue within police departments across the UK.

The UK Government’s 2012 Action plan has addressed this weakness to some degree, promoting training activities among certain stakeholders, particularly prosecutors. Nonetheless, comprehensive training for all criminal justice actors on a mandatory basis could greatly improve awareness and performance of these stakeholders.

The situation in Northern Ireland with regard to training and awareness is of particular concern, as LEAs and legal stakeholders, have been described by ECRI and the *Challenge Hate Crime Project*, in particular, as lacking training in the field of hate crime and discrimination.

Moreover, the complexity of new laws and issues related to hate crime and hate speech makes it difficult for victims across the UK to navigate the legal system on their own in order

⁵⁸² *Ibid.*

to redress an incident. This situation requires victims to seek legal counsel, which can be expensive, and therefore a resource that may be out of reach for many individuals. This is a serious concern, which may be alleviated to some degree with the stronger promotion and development of legal resources and civil society mechanisms to meet the needs of victims.

Finally, the general public's perception of certain groups is often negatively influenced by the national media, and low levels of awareness of the consequences of hate speech, in particular, can adversely affect the prevention of hate-based incidents occurring in UK society.

With the proliferation of new media, and the potential for hate speech online to increase in scope and intensity, the UK should look to strengthen its legal and societal mechanisms for combating hate-based crime, particularly in reference to adopting all pertinent international protocols, and promoting education, training, and awareness activities.

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