

The Far-Right in International and European Law

Since the Second World War, the international community has sought to prevent the repetition of destructive far-right forces by establishing institutions such as the United Nations and by adopting documents such as the Universal Declaration of Human Rights. Jurisprudence and conventions directly prohibit far-right speech and expression. Nevertheless, recently, violent far-right entities, such as Golden Dawn of Greece, have received unprecedented electoral support; xenophobic parties have done spectacularly well in elections; and countries such as Hungary and Poland are being led by right-wing populists who are bringing constitutional upheaval and violating basic elements of doctrines such as the rule of law.

In light of this current reality, this book critically assesses the international and European tools available for States to regulate the far-right. It conducts the analysis through a militant democracy lens. This doctrine has been considered in several arenas as a concept more generally; in the sphere of the European Convention on Human Rights; in relation to particular freedoms, such as that of association; and as a tool for challenging the far-right movement through the spectrum of political science. However, this doctrine has not yet been applied within a legal assessment of challenging the far-right as a single entity. After analysing the aims, objectives, scope and possibility of shortcomings in international and European law, the book looks at what state obligations arise from these laws. It then assesses how freedom of opinion and expression, freedom of association and freedom of assembly are provided for in international and European law, and explores what limitation grounds exist which are directly relevant to the regulation of the far-right.

The issue of the far-right is a pressing one on the agenda of politicians, academics, civil society and other groups in Europe and beyond. As such, this book will appeal to those with an interest in International, European or Human Rights Law and Political Science.

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The Far-Right in International and European Law

Natalie Alkiviadou

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The Far-Right in International and European Law

Natalie Alkiviadou

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In memory of
Shehzad Luqman, 1986–2013
Pavlos Fyssas, 1979–2013



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Abbreviations

BNP	British National Party
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECHR	European Convention on Human Rights
EComHR	European Commission of Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EDL	English Defence League
EU	European Union
FPÖ	Freiheitlichen Partei Österreichs
FRA	Fundamental Rights Agency
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESR	International Covenant on Economic, Social and Cultural Rights
ISP	Internet Service Provider
KKK	Klu Klux Klan
LGBTI	Lesbian, Gay, Bisexual, Transgender, Intersex
NGO	Non-Governmental Organisation
NSPA	National Socialist Party of America
OAS	Organisation of American States
OSCE	Organisation of Security and Cooperation in Europe
ÖVP	Österreichische Volkspartei
PiS	Prawo i Sprawiedliwość
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
U.K.	United Kingdom
UKIP	United Kingdom Independence Party
U.S.	United States (of America)
UN	United Nations
WHO	World Health Organisation



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General introduction

The far-right: a contextual framework

Books cannot be killed by fire. People die, but books never die. No man and no force can abolish memory. No man and no force can put thought in a concentration camp forever. In this war, we know, books are weapons. And it is a part of your dedication always to make them weapons for man's freedom.

Franklin D. Roosevelt – 6 May 1942¹

The destructive force of the far-right was tragically witnessed through the mass devastation brought about by the Second World War. The international community sought to prevent the repetition of such devastation through the establishment of institutions, including the United Nations (UN) and the Council of Europe (CoE), and the adoption of documents such as the Universal Declaration of Human Rights (UDHR) and the European Convention on Human Rights (ECHR). Jurisprudence and conventions, on an international and European level, directly prohibit manifestations of hate with, for example, Article 4 of the International Convention on the Elimination of All Forms of Discrimination (ICERD) prohibiting racist associations and racist expression. Nevertheless, violent far-right entities, such as *The Popular Association – Golden Dawn* (*Λαϊκός Σύνδεσμος Χρυσή Αυγή*) of Greece, have received unprecedented electoral support. Greece is of particular interest to the European far-right content. Its far-right spectrum is dominated by *Golden Dawn* which is a political party simultaneously acting as a violent movement organising itself in hit squads. *Golden Dawn's* national parliamentary election results saw a dramatic rise from approximately 20,000 votes² to 440,000 votes³ during the period 2009 to 2012, with a small drop in the 2015 elections where it received around 380,000.⁴ Nevertheless, in 2015, Golden

1 Franklin D. Roosevelt: 'Message to American Booksellers Association' (23 April 1942).

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

3 Golden Dawn Election Results 2012: [http://ekloges-prev.singularlogic.eu/v2012b/public/index.html#{"cls":"party","params":{"id":41}}](http://ekloges-prev.singularlogic.eu/v2012b/public/index.html#{) [Accessed 1 November 2015].

4 Golden Dawn election Results 2015: [http://ekloges.ypes.gr/current/v/public/#{"cls":"party","params":{"id":41}}](http://ekloges.ypes.gr/current/v/public/#{) [Accessed 1 November 2015].

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Dawn moved from being the fifth to third largest party.⁵ This development has been characterised as particularly alarming by the Fundamental Rights Agency (FRA). Following the murder of Pavlos Fyssas in 2013, the leadership and some members of *Golden Dawn* are currently on trial for leading or participating in a criminal organisation. In 2017, two members of *The National Populist Front ELAM* (*Εθνικό Λαϊκό Μέτωπο*), which is a sister organisation of Golden Dawn, were voted into the Cypriot parliament. The 2018 Italian elections saw the far-right *Lega Nord*, a party promoting nativist and racist rhetoric and positions, coming third in line, superseding conservative *Forza Italia* and gaining 17.6%,⁶ a considerable leap from the 2013 elections in which it received just 4.09%⁷ of the vote. Overall, the far-right attracts more than 10% of Western European votes on a national or European level.⁸ In the East, apart from some exceptions, such as Estonia and Slovenia, such parties receive an average support of approximately 20%.⁹ Even though the far-right is regularly associated with countries marred by financial crisis, and whilst ‘East Central Europe continues to be the most dynamic breeding ground for right-wing extremism,’¹⁰ this movement is also developing in other frameworks, such as the liberal traditions of Scandinavia. For example, *Sverigedemokraterna* (*the Sweden Democrats*), a party founded in 1988, first entered the National Assembly in 2010 with 5.70% of the vote. In 2014, the Sweden Democrats received 12.9% of the vote,¹¹ making the party the third largest in the country and by 2018 received 17.5%, retaining its third place and gaining thirteen more seats.¹² During the early 1990s, *The Sweden Democrats* were part of a neo-Nazi movement¹³ before cleaning up their image, with their position remaining within a nativist, anti-immigrant and right-wing populist framework and their slogan being ‘to keep Sweden Swedish.’¹⁴ On a

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

6 Italy Election Results 2018: <http://electionresources.org/it/2018/senate.php?region=> [Accessed 5 October 2018].

7 Italy Election Results 2013: <http://electionresources.org/it/senate.php?election=2013> [Accessed 5 October 2018].

8 Friedrich-Ebert-Stiftung, ‘Right-Wing Extremism in Europe Country Analyses, Counter-Strategies and Labor-Market Oriented Exit Strategies’ (2013) 9.

9 Ibid.

10 Ibid.

11 Sweden Election Results 2014: <http://electionresources.org/se/riksdag.php?election=2014> [Accessed 18 April 2015].

12 Sweden Election Results 2018: <http://electionresources.org/se/riksdag.php?election=2018> [Accessed 5 October 2018].

13 The Telegraph: ‘EU Elections 2014: “I Can Hear the Boots of the 1930s Marching through Europe”’ (14 May 2014) www.telegraph.co.uk/news/worldnews/europe/eu/10823028/EU-elections-2014-I-can-hear-the-boots-of-the-1930s-marching-through-Europe.html [Accessed 5 October 2018].

14 New Statesman: ‘How the Remorseless Rise of the Swedish Far Right Could Leave the Country Ungovernable’ (4 July 2018) www.newstatesman.com/culture/observations/2018/07/how-remorseless-rise-swedish-far-right-could-leave-country-ungovernable [Accessed 5 October 2018].

European Parliament level, in 2014 the EU witnessed the victories of parties such as France's *Front National (National Front)*, the *United Kingdom Independence Party (UKIP)* and Denmark's *Dansk Folkeparti (The Danish People's Party)*, with the parties gaining 24.86%,¹⁵ 26.77%¹⁶ and 26.60%¹⁷ of the vote, respectively, finding themselves at the top of the list for their countries.¹⁸ Violent far-right parties are also part of the European Parliament with Greece's *Golden Dawn* receiving 9.39% of the vote and Hungary's *Jobbik Magyarországért Mozgalom (Jobbik)* receiving 14.67% of the vote in 2014 in third and second place respectively.¹⁹ In relation to *Jobbik*, it must be noted that there exists a close proximity between this party and the ruling *Fidesz*.²⁰ In addition to the habitual electorate of such parties, a large section of society was wooed by this mandate, as is reflected by 'public attitudes on immigration, growing public hostility towards, for example, settled Muslim communities and public dissatisfaction with mainstream parties and their performance on immigration-related issues.'²¹ Moreover, by contributing to the mainstreaming of their rhetoric, far-right parties 'help to create a broader climate conducive to radical right thinking.'²²

On a non-party level, examples of the far-right include the *English Defence League (EDL)* which has been 'at the forefront of violence around major Muslim centres and mosques,'²³ with the United Kingdom (U.K.) banning their demonstrations on several occasions for purposes of public order.²⁴ It is estimated that there have been approximately seven hundred criminal convictions directly linked to the *EDL* and its members.²⁵ In 2011, German authorities discovered a link between the violent far-right group, *Nationalsozialistischer Untergrund (National Socialist Underground)*, and the killing of ten persons, nine immigrants and one policewoman, over a period of ten years as well as a bombing

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

16 Ibid.

17 Ibid.

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

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

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

21 A Chatham House Report: Matthew Goodwin, 'Right Response: Understanding and Countering Populist Extremism in Europe' (2011) 11.

22 Institute for Strategic Dialogue: Matthew Goodwin & Vidhya Ramalingam, 'Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe' (2012) 3.

23 Ibid.

24 See, *inter alia*, Ibid., BBC: 'English Defence League March in London is Blocked' (27 August 2011): www.bbc.com/news/uk-england-london-14684704 [Accessed 10 May 2015]; BBC: 'Home Secretary Bans Telford EDL March' (12 August 2011) www.bbc.com/news/uk-england-shropshire-14506941 [Accessed 10 May 2015].

25 Institute for Strategic: 'Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe' (2012) 9.

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in Cologne.²⁶ In 2007, members of *Jobbik* established a group named *Magyar Gárda Egyesület (The Hungarian Guard Association)*, which has organised several public demonstrations throughout the country and in villages inhabited by a large Roma population.²⁷ This association has been the subject of a European Court of Human Rights (ECtHR) judgement, discussed further in Chapter 4.

Further, there is the *subculture milieu*, which is an unstructured part of the far-right movement with, for example, the *Aryan Strike Force*, *Combat 18* and *Blood and Honour* being movements active on an international level. In the U.K., two members of the *Aryan Strike Force* were arrested in 2010 and imprisoned for preparing violent racist activities. *Κρυπτεία (Kriptia)* is a new subculture movement in Greece which uses violence against migrants.²⁸ It calls itself a ‘national resistance organisation’²⁹ which pledges to ‘fight until the last illegal migrant is gone’³⁰ and to do so will use ‘relentless violence.’³¹

Moreover, the far-right phenomenon goes beyond the ‘West’ with examples from countries including, but not limited to, Brazil, Japan and Russia. In the latest Concluding Observations to Russia of the Committee on the Elimination of All Forms of Racial Discrimination, the violent racist attacks of neo-Nazi groups and Cossack patrols were underlined as a ‘pressing problem in the State Party.’³² In its latest Concluding Observations to Japan, the same Committee noted its concern about hate speech, including that of inciting violence by ‘right-wing movements or groups that organise racist demonstrations and rallies against foreigners and minorities, in particular against Koreans.’³³

The mandates of such parties, groups and movements vary according to the contextual setting. However, ‘the centrality of the immigration issue for this party family in Europe is undisputed,’³⁴ a statement that can be extended to other entities such as non-party movements. More particularly, the very opposite ‘others’ scapegoated through the movement’s rhetoric and activities are immigrants, with a particular emphasis being placed on Muslims.³⁵ This is particularly true of far-right entities which exist in countries with a high Muslim population. In fact, this

26 Spiegel Online International: ‘The World from Berlin: “The Neo-nazi Killers Were among Us” (15 November 2011) www.spiegel.de/international/germany/the-world-from-berlin-the-neo-nazi-killers-were-among-us-a-797948.html [Accessed 26 January 2015].

27 Examples of Jobbik’s paramilitary rallies beyond the rally which was the subject of the ECtHR judgement include a 2012 demonstration - following anti-Roma speeches, the marchers proceeded to Roma houses and shouted such slogans as “You are going to die here!”

28 Nooz.gr: ‘Ομάδα “Κρυπτεία”: Θα χρησιμοποιήσουμε βία αλύπητα’ (Κρίπτια: ‘We will use violence relentlessly’ (28 November 2017) www.nooz.gr/greece/1474522/omada-krypteia-tha-chrisimopoiisoyme-bia-alypta [Accessed 5 October 2018].

29 Ibid.

30 Ibid.

31 Ibid.

32 CERD Concluding Observations to Russia (2017) CERD/C/RUS/CO/23-24, para. 15.

33 CERD Concluding Observations to Japan (2014) CERD/C/JPN/CO/7-9, para. 11.

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

35 Ibid. 9.

characteristic is facilitated by the ‘increasingly critical rhetoric and policy surrounding migration and Islam in Europe.’³⁶ Notwithstanding the accuracy of such statements for the reality of a large number of European countries, they must be considered with care given that the contextual reality of this movement in Central and Eastern Europe is different, resulting in the parties and groups of these areas focussing on ‘mobilizing public hostility towards the Jews [and] the Roma’³⁷ with their northern and western counterparts, for example, placing more emphasis on anti-Islam rhetoric. Once again, these characteristics are not clear-cut since these features are not mutually exclusive but merely mark the bulk of the parties’ activities. This is not to say that many of these parties limit themselves to the type of rhetoric mentioned earlier, with new objectives arising as times and contexts change, a suitable example being the discriminatory rhetoric adopted by these parties against EU immigrants in countries such as the U.K. Such rhetoric, for example, constituted a large part of the Brexit campaign. Beyond the EU, targets include the Koreans in Japan and ethnic minorities in Russia. Thus, the argument made in the framework of far-right political parties insofar as ‘they appear similar but in some respects they also seem the same but different’³⁸ hits the nail on the head in relation to the movement more generally. In light of this, it is safer to argue that ‘ethnic exclusionism and/or expulsionism are now the *sine qua non* of most extreme right movements.’³⁹

On one level, this movement is characterised by an anti-minority rhetoric and/or practice, a characteristic which encompasses all the relevant counterparts such as anti-immigrant, anti-Muslim, anti-Roma and anti-Semitic. In addition to this, the movement is explicitly defined as such or implicitly linked with the notion of extremism. This positive correlation assumes that the rhetoric and activities such parties or groups promote or adopt are incongruous with the general framework in which they find themselves. In liberal democracies, it is the principles which make up a liberal democracy that are the driving force of politics and, by extension, other groupings. As a result, any potential for the existence of extremism should be measured against the aforementioned principles.⁴⁰ In this light, and as noted by Minkenberg, right-wing radicalism, which is his preferred term, is a ‘political ideology or tendency based on ultra-nationalist’⁴¹ ideas which tends to be directed against liberal democracy – although not necessarily directly

36 Ibid.

37 Ibid. 12.

38 Ibid.

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

40 Ian Hare & James Weinstein, ‘Extreme Speech and Liberalism’ in *Extreme Speech and Democracy* (2009) www.oxfordscholarship.com [Accessed 20 August 2014] 2.

41 Ultra-nationalism can be defined as ‘a great or excessive devotion to or advocacy of national interests and rights especially as opposed to international interests.’ (Webster’s Third New International Dictionary)

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or explicitly so.⁴² It is of particular significance here to refer to the possibility of an implicit breach of the principles of a liberal democracy referred to by Minkenberg, which is a reality since, for example, far-right political parties, duly registered as such, are acting within the framework of a democratically elected system of government but, through this avenue, are promoting and adopting anti-democratic approaches and practices. This poses the interesting perplexity of a liberal democratic system which permits a far-right entity to exist within its spectrum, notwithstanding that the latter's aims and objectives are in direct contravention to the former's founding principles. The dichotomy between the freedoms of expression, association and assembly, which are central to a liberal democracy, on the one hand, and the right to non-discrimination as well as general principles such as preserving human dignity, on the other, will lie at the heart of the theoretical framework underpinning this book's analysis.

The aforementioned focus on the hostility expressed towards the aforementioned minority does not mean that groups within this framework do not adopt a discriminatory approach towards other vulnerable groups such as LGBTI (Lesbian, Gay, Bisexual, Transgender and Intersex).⁴³ However, while ethnic minorities and/or immigrants are the common denominator⁴⁴ amongst the far-right worldwide, from Japan to Greece, LGBTI are not, the differentiation varying, once again, according to context.⁴⁵ To illustrate this briefly, Wilders Freedom Party is pro-LGBTI whilst the majority of political parties in, for example, Southern, Central and Eastern Europe, are actively anti-LGBTI. The anti-LGBTI rhetoric of, for example, Jobbik and Golden Dawn is endless, but, to illustrate briefly, a couple are put forth here. In 2014, *Jobbik* displayed a sign reading 'The Parliament Does Not Want Any Deviants' during Budapest Pride and verbally attacked participants, whilst Golden Dawn argued that gay couples can only raise pets and not children.⁴⁶

Whatever their preferred target groups, far-right parties are 'ambivalent if not hostile towards liberal representative democracy.'⁴⁷ There are different types of political parties that make up the far-right scene. The simplest examples that demonstrate a differentiation of the types of political parties are those 'that re-

42 Michael Minkenberg, 'The Radical Right in Europe Today: Trends and Patterns in East and West' in Friedrich-Ebert-Stiftung Forum Berlin: Nora Langenbacher & Britta Schellenberg, 'Is Europe on the Right Path? Right-Wing Extremism and Right-Wing Populism in Europe' (2011) 38.

43 Christopher T. Husbands, 'Combating the Extreme Right with the Instruments of the Constitutional State: Lessons from Experiences in Western Europe' (2002) 4 *Journal of Conflict and Violence Research* 1, 53.

44 Ibid.

45 See for example, Wilders pro-LGBT approach in comparison to Golden Dawn anti-LGBT rights.

46 News 247: 'Παραλήρημα Ηλιόπουλου της Χρυσής Αυγής κατά των ομόφυλων ζευγαριών' (Iliopoulos rant against gay couples): (3 May 2018) www.news247.gr/politiki/paralirima-iliopoyloy-tis-chrysis-aygis-kata-ton-omofylon-zeygarion.6608997.html [Accessed 5 October 2018].

47 A Chatham House Report: Matthew Goodwin, 'Right Response: Understanding and Countering Populist Extremism in Europe' (2011) 10.

main wedded to interwar fascism and those that eschew this tradition.⁴⁸ Notwithstanding the differences between far-right political parties in terms of vision, mission and structure, they nevertheless share the common feature of presenting minority groups, such as immigrants, as posing a socio-cultural threat to the nation. The dire consequence of such parties is that they ‘can weaken social cohesion, undermining the social fabric of democracy.’⁴⁹ The impact of such parties goes beyond these frameworks given that ‘their ideas have become increasingly intertwined with mainstream politics.’⁵⁰ As noted by Carter, far-right entities ‘reject the principle of fundamental human equality.’⁵¹ Such parties are considered to be far-right as ‘they unquestionably occupy the right-most position of the political spectrum’⁵² and embrace ‘exclusionary representations of the nation, combined with authoritarian political perspectives.’⁵³ Some parties may directly dismiss the functioning of a representative democracy but, even if they guise themselves behind a shield of alleged legitimacy and do not, *per se*, doubt or condemn the functioning of a liberal democracy, they are nevertheless quick to espouse extremist discourses and exclusionary approaches to issues such as immigration, thereby diverging from the key constituents of a democratic system.⁵⁴

The element of violence is also a key consideration when looking at the far-right. Although, today, such parties are mainly of a non-violent nature with most seeking to ‘disassociate themselves from historical or perceived ties to their ... violent counterparts,’⁵⁵ there are situations where violence continues to mark their activities as is the case, for example in Greece. Violence is more related to non-party groups and the subculture milieu. Hence, far-right organisations come in different shapes and sizes, boasting a variety of means and methods adopted for purposes of achieving their objectives. Notwithstanding some variations in their mandates, the key elements which tie these entities together include their ethnically exclusionary and/or expulsionary rhetoric and activities conducted through an extremist framework, targeting a variety of groups due to their ethnicity and/or nationality and/or religion and/or sexual orientation and/or gender identity.

Whether it is a party, a non-party group, a subculture movement or a *mélange* of any of these, at the core of the matter is the reality that the far-right movement promotes ideas and beliefs which are against the spirit and values of a human

48 Ibid. 12.

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

50 Ibid. 9.

51 Elizabeth Carter, *The Extreme Right in Western Europe: Success or Failure?* (1st edn. Manchester University Press, Manchester 2005) 17.

52 Piero Ignazi, *Extreme Right Parties in Western Europe* (1st edn. Oxford University Press, New York 2003) 2.

53 Paul Hainsworth, *The Politics of the Extreme Right: From the Margins to the Mainstream* (1st edn. Pinter, London 2000) 7.

54 Ibid.

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

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rights culture, as these have been promulgated by the UDHR and the documents subsequent to it. In essence, far-right groups ‘reject the principle of human equality and are hence hostile towards immigrants, minority groups and rising ethnic and cultural diversity.’⁵⁶ Moreover, the hate that constitutes the foundation of organised and semi-organised far-right groups underpins the rhetoric and actions of right-wing populist political leaders such as Donald Trump and Victor Orbán. Even in countries where such parties have not been very successful in the electoral process, they have ‘nevertheless often contributed towards the mainstreaming of anti-immigrant and anti-Muslim ideas and discourse, which help to create a broader climate conducive to radical right thinking.’⁵⁷ In light of this, the far-right is no longer a phenomenon of the past. It is one of the present, which is depicted in, *inter alia*, collective violence carried out by neo-Nazis, such as *Golden Dawn* and *Jobbik*, in rallies, such as Unite the Right, and in the rise in hate speech and hate crime against foreigners living in the U.K. following the Brexit vote. It has also infiltrated policies, particularly when it comes to the treatment of the non-native other. In Europe, policies dealing with international protection are starkly marked by exclusionary and nativist conceptions on both a European and national level, transforming the Mediterranean Sea into a floating death-bed for those fleeing persecution. On a parallel note, Trump’s ‘Zero Tolerance’ immigration policy has seen a serious violation of, amongst others, children’s rights, separating minors from their families and placing them in cages. Trump has since signed an executive order allowing families to remain together while individual prosecution for irregular entry continues and, in the case of asylum seekers, occurs regardless of international refugee law.

The extreme-right: an ideology against human rights

The extreme-right movement promotes ideas and beliefs which are against the spirit and values of a functional human rights culture as these have been promulgated by the UDHR and the documents subsequent to it. In essence, far-right entities ‘reject the principle of human equality and hence are hostile towards immigrants, minority groups and rising ethnic and cultural diversity.’⁵⁸ By endorsing and carrying out Islamophobic, Romaphobic, anti-Semitic, anti-immigrant and/or homophobic and transphobic rhetoric and activities, the movement itself becomes an issue that is to be looked at and addressed through a human rights lens in a two-fold manner. On the one hand, the movement violates human rights and fundamental freedoms, such as non-discrimination, and rejects principles such as equality and human dignity. On the other hand, the

56 A Chatham House Report, Matthew Goodwin, ‘Right Response: Understanding and Counter-ing Populist Extremism in Europe’ (2011) 12.

57 Institute for Strategic Dialogue: ‘Briefing Paper - The New Radical Right: Violent and Non-Violent Movements in Europe’ (2012) 3.

58 A Chatham House Report, Matthew Goodwin, ‘Right Response: Understanding and Counter-ing Populist Extremism in Europe’ (2011) 12.

movement exploits rights and freedoms emanating from this framework, such as the freedoms of expression, association and assembly, so as to pursue and achieve their discriminatory and, at times, violent goals. Particularly due to the dire effects of fascism and extremism on mid-twentieth Century Europe, through its post-Second World War initiatives, the international community recognised the consequences of far-right rhetoric and activity and sought to eliminate the possibility of the movement's resurgence. This was pursued through the direct recognition of non-discrimination as a principle of law and on the limitation of the aforementioned rights in the event of discriminatory and/or violent activities and expressions. As such, there exist several international and European laws, principles and policies designed to counter this phenomenon, with leading documents including, *inter alia*, the ICERD and the European Convention on Human Rights (ECHR). The framework has not remained static on any of these levels, with the UN Monitoring Bodies, such as the Committee on the Elimination of Racial Discrimination (CERD), issuing General Recommendations, such as No. 15, on Measures to Eradicate Incitement to or Acts of Discrimination and incorporating recommendations to States in relation to their handling of right-wing extremism within Concluding Observations. On a CoE level, the developments are manifested in, *inter alia*, Strasbourg case-law which prohibits hate speech and hateful association⁵⁹ as well as the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. In fact, one of the commitments made by the Heads of State of CoE countries in the Vienna Declaration⁶⁰ was

to combat all ideologies, policies and practices constituting an incitement to racial hatred, violence and discrimination as well as any action or language likely to strengthen fears and tensions between groups from different racial, ethnic, national, religious or social backgrounds.

The authors of the Declaration were 'convinced that these manifestations of intolerance threaten democratic societies and their fundamental values.' Also, in 2014, a General Rapporteur against Racism and Intolerance was appointed on a CoE level. The role of the rapporteur is to deal with issues such as racist violence and hate speech. On an EU level, the development of initiatives to challenge the far-right have been limited in scope and applicability. The most central tool to challenge the far-right in EU Member States is the combined Article 2 and Article 7 mechanism of the Treaty on the European Union which seeks to tackle breaches of the rule of law, human rights and democracy which may arise, amongst others, from the rhetoric and/or activities of movements such as

⁵⁹ See, *inter alia*, *Norwood v UK & Vona v Hungary*.

⁶⁰ Vienna Declaration and Programme of Action - Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx [Accessed 14 November 2014].

the far-right. However, upon investigating this tool further, as will be done in Chapter 5, one can discern that, to date, it is marred by too much reliance on political will and, thus, remains dormant for the moment. On this level, there is also the Framework Decision on Combating Certain Forms and Expressions of *Racism* and *Xenophobia* by Means of Criminal Law which can be used to tackle rhetoric and acts of the far-right. At the foundation of the relevant legal provisions of international conventions and jurisprudence, and, as a result, at the foundation of the analysis of this dissertation, lies the doctrine of militant democracy further discussed in Chapter 2.

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

Approach, contribution and structure of the book

Against the aforementioned conceptual framework, this book conducts a critical analysis of the international and European tools available for States and obligations emanating, therefrom in the sphere of tackling the far-right and its by-products. The major case-law of the U.S., involving the far-right and its manifestations will be examined in order to compare its libertarian approach to free speech with the more restrictive counterparts of the international and European frameworks. The phenomenon of the far-right has been looked at within several academic spheres including political science and law. In relation to the former, academic discussion has considered, *inter alia*, the general trends and developments of the far-right, generally or within particular contexts⁶¹ and the nature of the far-right as a political and/or non-political structure, with such books focussing on particular areas or regions,⁶² the socio-economic and interpersonal

61 General analyses of the development of the far-right (although case-studies are used) include: Pippa Norris *Radical Right: Voters and Parties in the Electoral Market* (1st edn. Cambridge University Press, Cambridge 2005); Contextual analyses of the development of the far-right include: Sofia Vasilopoulou & Daphne Halikiopoulou: *The Golden Dawn's "Nationalist Solution": Explaining the Rise of the Far Right in Greece* (1st edn. Palgrave Pivot, London 2015); Kathy Marks *Faces of Right-Wing Extremism* (1st edn. Brande Books, Tucson 2014); Anders Widfeldt *Extreme Right Parties in Scandinavia* (1st edn. Routledge, Abingdon, New York 2015).

62 General Analysis: Cas Mudde, *The Ideology of the Extreme Right* (1st edn. Manchester University Press, Manchester 2003); Contextual Regional Analysis: Andrea Mammone, Emmanuel Godin & Brian Jenkins, *Varieties of Right-Wing Extremism in Europe* (1st edn. Routledge, Abingdon, New York 2013); Cas Mudde, *Populist Radical Right Parties in Europe* (1st edn. Cambridge University Press, Cambridge 2007); Cas Mudde, *Racist Extremism in Central and Eastern Europe* (1st edn. Routledge, Abingdon, New York 2005); Contextual Country Analysis: Stephen E. Atkins, *Encyclopaedia of Right-Wing Extremism In Modern American History*

reasons which have led citizens to opt to be part of the far-right electorate⁶³ and the advantages and disadvantages of proscribing far-right groups.⁶⁴ Legal research to date has considered elements of the far-right and, in particular, hate speech,⁶⁵ with no study, thus far, considering the far-right in its entirety.

Hate speech: are bans legitimate?

In relation to hate speech, the question of whether bans on hate speech should be permitted constitutes a significant one for scholars. In fact, at the core of the argumentation put forth by supporters of hate speech bans is that ‘the behaviour they seek to restrict causes real harm to certain identifiable classes of victims.’⁶⁶ Williams holds that victims of hate speech experience ‘spirit murder’ and Eberle argues that they suffer ‘hatred or self-hatred’ or a sense of ‘degradation or

(1st edn. ABC-CLIO, California 2011); Other country examples include studies on, *inter alia*, Switzerland: Marcel Alexander Niggli: *Right-Wing Extremism in Switzerland: National and International Perspectives* (1st edn. Nomos Verlagsgesellschaft, Baden 2009).

63 Marco Giugni & Ruud Koopmans, ‘What Causes People to Vote for a Radical Right Party? A Rejoinder to van der Brug and Fennema’ (2007) 19 *International Journal of Public Opinion Research* 4; Matthew J. Goodwin, *Revolt on the Right: Explaining Support for the Radical Right in Britain* (1st edn. Routledge, London 2014).

64 Meindert Fennema, ‘Legal Repression of Extreme Right Parties and Racial Discrimination’ in Ruud Koopmans & Paul Statham (eds.), *Challenging International and Ethnic Relation Politics – Comparative European Perspectives* (1st edn. Oxford University Press, Oxford 2000). This has also been done through a US-Europe comparative approach in Erik Bleich, *The Freedom to be Racist? How the United States and Europe Struggle to Preserve Freedom and Combat Racism* (1st edn. Oxford University Press 2011); Stefan Sottiaux, ‘Anti-Democratic Associations: Content and Consequences in Article 11 Adjudication’ (2004) 22 *Netherlands Quarterly of Human Rights* 4.

65 Michael Herz & Peter Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (1st edn. Cambridge University Press, Cambridge 2012); Uladzislau Belavusau, *Fighting Hate Speech through EU Law* (2012) 4 *Amsterdam Law Forum*; Ivan Hare & James Weinstein, *Extreme Speech and Democracy* (2nd edn. Oxford University Press, Oxford 2011); Erich Bleich, *The Freedom to be Racist? How the USA and Europe Struggle to Preserve Freedom and Combat Racism* (1st edn. Oxford University Press, Oxford 2011); Marloes van Noorloos, *Hate Speech Revisited: A Comparative and Historical Perspective on Hate Speech Law in the Netherlands and England and Wales* (1st edn. Intersentia Cambridge 2011); Nazil Ghanea, ‘Minorities and Hatred: Protections and Implications’ (2010) 17 *International Journal on Minority and Group Rights* 3; Eva Brems, ‘State Regulation of Xenophobia Versus Individual Freedoms: the European View’ (2002) 1 *Journal of Human Rights* 4; David Kretzmer & Francine Kershman Hazan, *Freedom of Speech and Incitement against Democracy* (1st edn. Brill, Leiden 2000); Meindert Fennema, ‘Legal Repression of Extreme Right Parties and Racial Discrimination’ in Ruud Koopmans & Paul Statham (eds.), *Challenging International and Ethnic Relation Politics – Comparative European Perspectives* (1st edn. Oxford University Press, Oxford 2000).

66 Claudia E. Haupt, ‘Regulating Hate Speech - Damned If You Do and Damned If You Don’t: Lessons Learned from Comparing the German and U.S. Approaches’ (2005) 23 *Boston University International Law Journal* 2, 305.

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worthlessness.⁶⁷ As such, the harm is ‘quite real.’⁶⁸ As well as pinpointing the actual harm in hate speech, Eberle also makes a more general conceptualisation, that ‘restraint on freedom is part of the price of joining society.’⁶⁹ Kübler argues that at the crux of the problem of deciphering whether or not hate speech can legitimately be restricted lies the fact that the manner in which one chooses to define another emanates from basic elements of self-determination and personal autonomy. However, he finds that the harm which hate speech causes to its victims in the form of, for example, intimidation, and the further marginalisation of minorities and the potential links with violence render hate speech to be legitimately restrictable.⁷⁰ In Post’s article ‘Racist Speech, Democracy and the First Amendment,’⁷¹ the author argues that, in order to ensure an harmonious existence between the freedom of expression and the limitation of racist speech, focus must be placed on the harm caused by such speech. Closely interrelated to this justification are the ideas/arguments put forth by Waldron in his 2014 book ‘The Harm in Hate speech.’⁷² Waldron justifies limiting hate speech on grounds of preserving human dignity and protecting members of minority groups, often targeted by such speech. The arguments put forth in that book can be considered as an extension of his article ‘Dignity and Defamation: the Visibility of Hate’⁷³ in which the author contends that hate speech should be restricted for purposes of ensuring human dignity. On the other hand, some authors find no justification for the banning of hate speech. For example, in ‘Viewpoint Absolutism and Hate Speech,’ Heinze argues that there exist no justifications for restricting hate speech and that such measures are ‘inherently discriminatory and should be abolished.’⁷⁴

Legitimising hate speech bans through striking a balance

Some commentators have sought to tackle the question of how to strike a balance between combatting hate, on the one hand, and preserving democratic freedoms, such as that of expression, on the other. This concept has been dealt with by

67 Edward J. Eberle, ‘Hate Speech, Offensive Speech, and Public Discourse in America’ (1994) 29 *Wake Forest Law Review* 4, 1169. See also Charles R. Lawrence III, ‘If He Hollers Let Him Go: Regulating Racist Speech on Campus’ (1990) 39 *Duke Law Journal* 3, 452–457.

68 *Ibid.* 955.

69 *Ibid.* 959.

70 Friedrich Kübler, ‘How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights’ (1998) 27 *Hofstra Law Review* 335.

71 Robert Post, ‘Racist Speech, Democracy and the First Amendment’ (1990–1991) 32 *William and Mary Law Review* 2, 267.

72 Jeremy Waldron, *The Harm in Hate Speech* (2nd edn. Harvard University Press, Cambridge MA 2014).

73 Jeremy Waldron, ‘Dignity and Defamation: The Visibility of Hate’ (2010) 123 *Harvard Law Review* 7, 1597.

74 Eric Heinze ‘Viewpoint Absolutism and Hate Speech’ (2006) 69 *The Modern Law Review* 4, 543.

several authors who have approached it through a *mélange* of legal, normative and contextual avenues alone or in conjunction with each other. Kretzmer's article entitled 'Freedom of Speech and Racism'⁷⁵ is an earlier piece of work which is often included in literature. It looks at freedom of speech and racism and considers the boundaries of freedom of expression when dealing with racist speech, placing more emphasis on normative appraisals of free speech theories, such as Mill's truth argument, and individualist arguments and the way in which such theories, where applicable, have received judicial support. The central research question put forth is whether there is a case for limiting the right of racist groups, such as the *Ku Klux Klan*, from disseminating their ideologies. After establishing a definitional framework of the key terms of racist speech and freedom of speech, the paper appraises theoretical arguments for and against the restriction of racist speech and the question of legislating against hate speech, its intricacies and desirability in light of the difficulties, with the author concluding that the desirability for legislation ultimately depends on social factors. Although the paper commences with a direct reference to racist groups, no examination of the freedom of association or assembly is conducted. Defeis's 'Freedom of Speech and International Norms: A Response to Hate Speech'⁷⁶ examines the U.S.' approach to hate speech, underlining the difference in the approach it takes in comparison to most other countries and noting that it is very different to that incorporated in international law. It argues that the 'First Amendment absolutist approach has failed to accommodate equality and non-discrimination rights.'⁷⁷ It then looks at the international conventions relevant to this discussion and examines regional documents such as the ECHR. This article produces an overview of the international and European frameworks, referring to other regions such as Africa. The author's argument for a change in the U.S.' approach to hate speech is predominantly based on the breach of equality and non-discrimination that arises from the aforementioned absolutist approach, making this a significant contribution to the interrelation and interdependence of restricting hate speech and promoting the aforementioned values as a valid justification for legitimately legislating against hate. In Farrow's 'Molding the Matrix',⁷⁸ the author offers an extensive assessment of the international framework governing hate speech, exploring the history of the prohibition of hate speech in this sphere by looking at the *travaux préparatoires* of the documents and assesses the theories that underlie these developments. The author also makes a comparison of the justifications put forth by international law for the limitation of hate speech with those of critical race theory, noting, for example, the importance both place on the potential injury of hate speech to its targets. Through the analysis of the legal and normative frameworks, Farrow concludes

75 David Kretzmer, 'Freedom of Speech and Racism' (1986) 8 *Cardozo Law Review* 1.

76 Elizabeth F. Defeis, 'Freedom of Speech and International Norms: A Response to Hate Speech' (1992) 29 *Stanford Journal of International Law* 57.

77 *Ibid.* 59.

78 Stephanie Farrow, 'Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech' (1996) 14 *Berkley Journal of International Law* 1.

that hate speech can be restricted for purposes of protecting the principles of equality and non-discrimination, finding that the abuse of rights theory is one of the most convincing justifications for limiting hate speech. McGonagle's article 'Wrestling Racial Equality from Tolerance of Hate Looks at the Restrictions to Hate Speech from the Ambit of Prompting the Right to Equality'⁷⁹ studies the notion of tolerance in a normative sphere and the socio-political reality behind the increasing anti-racist mandate of the international community, thereby, setting a well-rounded and original normative and contextual setting for the subsequent analysis. It then continues with the standard UN and CoE instruments and case-law, considers negationism, the effectiveness of hate speech laws and the contextual reality of Ireland. This formula is implemented in order to justify its central position that the 'objective of promoting equality and non-discrimination must not be allowed to subordinate or even subdue the right to freedom of expression.'⁸⁰ The author suggests the need to balance all the rights and interests at stake. Two earlier pieces of writing also focus on the issues of equality and non-discrimination within the sphere under consideration. 'Extreme Speech and Democracy'⁸¹ includes a collection of essays on a wide variety of issues related to its title including, *inter alia*, the international and European frameworks governing hate speech and the issue of legislating against Holocaust denial. It incorporates examples from Europe and the U.S. to illustrate the points put forth whilst simultaneously including a section which outlines the problems of implementing comparative analyses between the approach taken by States and regions to hate speech. At the core of the discussions is the difficulty of balancing between the different rights and freedoms at stake, an issue which is further developed through a philosophical approach too. This book generally adopts an interdisciplinary approach rather than a purely legal one. In Brems's article on 'State Regulation of Xenophobia Versus Individual Freedoms,' the one research question is whether States can and should impose restrictive legal measures against anti-democratic rhetoric, organisations and individuals. She frames this question as a 'democratic dilemma'⁸² with the central question being 'is the remedy then not as dangerous as the illness?'⁸³ The author responds to the question through a legal appreciation of the issues. She establishes the legal framework by providing an overview of the international and European documents that are relevant to anti-democratic rhetoric and activities, promulgated by groups and individuals, and offers a comparative analysis of the situation in the U.S. and Germany, putting forth an historical explanation as to the variation in stances. She then moves on to tackling the problem

79 Tarlach McGonagle, 'Wrestling (Racial) Equality from Tolerance of Hate Speech' (2001) 23 *Dublin University Law Journal* 21.

80 *Ibid.* 27.

81 Ivan Hare & James Weinstein, '*Extreme Speech and Democracy*' (2nd edn. Oxford University Press, Oxford 2011).

82 Eva Brems, 'State Regulation of Xenophobia versus Individual Freedoms: The European View' (2002) 1 *Journal of Human Rights* 4, 482.

83 *Ibid.*

question against the aforementioned normative background, setting out a two-fold justification for the legitimate restriction of anti-democratic groups and expression in the form of ‘weighing different kinds of harm’⁸⁴ and ‘defending democracy.’⁸⁵ In relation to the first, restricting a person or group of persons’ freedom of expression or association is legitimate due to the harmful effects such speech has on individuals and groups. Although the author does not explicitly extend this position to association, it can be implicitly discerned from the composition of this section. In relation to the second justification, the author focusses particularly on Article 17 of the ECHR as the embodiment of militant democracy and notes that far-right ideology threatens the very foundation of the ECHR. Bleich’s ‘The Freedom to be Racist? How the USA and Europe Struggle to Preserve Freedom and Combat Racism’⁸⁶ explores national laws and policies of countries, such as the U.S., Germany, the U.K. and France, in the spheres of racist expression and association. It recognises the differences in approach taken by European countries, on the one hand, and the U.S. on the other, but concludes that, regardless of such variations, none of the countries has breached democratic principles. The contribution’s overarching objective is to examine how the countries under consideration strike a balance between the different rights and values at stake. Interestingly, Bakken’s article on ‘Liberty and Equality through Freedom of Expression: The Human Rights Questions behind Hate Crime Law’ takes an opposite stance to that of the majority of relevant literature. It looks at how enhancing the freedom of expression maximises liberty and equality, focussing on the justification put forth for the enactment of laws against hate crime and concludes that these laws ‘actually diminish liberty and equality.’⁸⁷ The author further argues that such laws do, in fact, promote inequality as they allow for greater punishments due to the victims’ race, religion, sex or national origin. The author seeks to justify his positions by looking at theories of free expression and some case-law, statistics and figures from the U.S. with a brief reference to relevant international law. It must be noted that the comparison between American and European approaches to hate speech is of particular interest and relevance to the issue of hate speech given the profoundly different approaches taken by the two on the issue, with an almost absolutist position on free speech being adopted by the former. Several articles have been written by authors such as Kiska,⁸⁸ Haupt,⁸⁹

84 Ibid. 495.

85 Ibid.

86 Erich Bleich, *The Freedom to be Racist? How the USA and Europe Struggle to Preserve Freedom and Combat Racism* (1st edn. Oxford University Press, Oxford 2011).

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

88 Roger Kiska, ‘Hate Speech: A Comparison between the European Court of Human Rights and the United States Supreme Court Jurisprudence’ 25 *Regent University Law Review* 1, 107.

89 Claudia E. Haupt, ‘Regulating Hate speech – Damned If You Do and Damned If You Don’t: Lessons Learned From Comparing the German and U.S. Approaches’ (2006) 23 *Boston University International Law Journal* 2.

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Brugger⁹⁰ and Douglas-Scott⁹¹ on freedom of expression through a comparative assessment of U.S.-European approaches to this freedom, with European meaning either an analysis of ECtHR case-law or an analysis of instruments available in single States, usually Germany.⁹² All the authors mentioned provide normative overviews of international and/or European law, due to the distinctions between the approaches being compared which serve to reflect the pros and cons of each. Thus, these articles contribute to the build-up of literature on the treatment of hate speech and to the variations between positions adopted in the U.S., on the one hand, and in Europe and/or European countries on the other. This literature seeks to find ways to strike a balance between the values and rights at stake in cases of promoting hate through freedoms and/or to justify or reject such a balancing exercise. Principles ranging from the preservation of the principle of non-discrimination to Mill's truth argument, against the backdrop of international and national frameworks, have been assessed by authors in pursuing their objectives. One important observation that can be made from this is that, although the authors recognise the potential of organised groups, such as political parties, to promote hate, focus is placed on the freedom of expression with no concrete mention of association or assembly in the sphere of legitimately restricting hate.

- 90 Winfried Brugger, 'Ban on or Protection of Hate Speech? Some Observations based on German and American Law' (2002) 17 *Tulane European & Civil Law Forum* 1.
- 91 Sionaidh Douglas-Scott, 'The Hatefulness of Protected Speech: A Comparison of the American and European Approaches' (1999) 7 *William & Mary Bill of Rights Journal* 2.
- 92 See e.g., Bradley A. Appleman, 'Hate Speech: A Comparison of the Approaches Taken by the United States and Germany' (1996) 14 *Wisconsin International Law Journal* 422; Winfried Brugger, 'Ban On or Protection of Hate Speech? Some Observations Based on German and American Law' (2002) 17 *Tulane European and Civil Law Forum* 1; Winfried Brugger, 'Verbot oder Schutz von Haßrede? Rechtsvergleichende Beobachtungen zum deutschen und amerikanischen Recht' (2003) 27 *DAJV-NL* 33; Winfried Brugger 'Schutz oder Verbot aggressiver Rede? Argumente aus liberaler und kommunitaristischer Sicht' (2003) 42 *Der Staat* 77; Winfried Brugger, 'Verbot oder Schutz von Hassrede? Rechtsvergleichende Beobachtungen zum deutschen und amerikanischen Recht' (2003) 128 *Archiv Des Öffentlichen Rechts* 372; Thomas W. Church & Milton Heuman, 'Punishing the Words that Wound: Thoughts on Hate Speech Regulation in Western Democracies; Annual Meeting of the Committee on Comparative Judicial Studies' *International Political Science Association*, Jerusalem, July 1-4, 1996; Roland Krotoszynski, Jr., 'A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany' (2004) 78 *Tulane European and Civil Law Forum* 1549; Friedrich Kubler, 'How much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights' (1998) 27 *Hofstra Law Review* 2; Friedrich Kuibler, 'Rassenhetze und Meinungsfreiheit' (2000) 125 *Archiv Des Öffentlichen Rechts* 125; Natasha L. Minsker, "'I Have a Dream-Never Forget": When Rhetoric Becomes Law, A Comparison of the Jurisprudence of Race in Germany and the United States' (1998) 14 *Harvard BlackLetter Law Journal* 1; Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 *Cardozo Law Review* 1; Lars Weihe, 'Freedom of Speech: Gleichheit ohne Grenzen. Eine rechtsvergleichende Untersuchung zur Meinungsfreiheit in den USA und Deutschland' (1990) 24 *Deutsch-Amerikanische Juristen-Vereinigung Newsletter* 46; Mari J. Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320; Richard Delgado & David H. Yun, 'The Speech We Hate: First Amendment Totalitarianism, The ACLU, And the Principle of Dialogic Politics' (1995) 27 *Arizona State Law Journal* 1.

Freedom of expression: a legal assessment of theoretical issues

The third set of relevant literature is context specific, assessing the international, European and/or national legal frameworks in the arena of free speech and hate speech, with some pieces focussing on particular issues such as minority rights and the incitement to violence. The book ‘Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination,’⁹³ edited by Coliver, brings together a collection of essays which establish the international standards for dealing with hate speech and provides an overview of the legal regulation of hate speech in a large number of countries. This book incorporates an introductory section regarding the balancing of rights and is simultaneously a rich source of the laws in the ambit of free speech and non-discrimination in the countries under consideration. During the countries’ assessments, the authors pinpoint how the balance is found between competing rights. McGoldrick and O’Donnell write on ‘Hate Speech Laws: Consistency with National and International Human Rights Law.’⁹⁴ The article looks at the freedom of expression in national, European and international frameworks; extensively assesses the case of *Faurisson v France*; and sets out criteria for determining whether hate speech laws are in compliance with national and international human rights law based on the variety of jurisprudence examined therein. It is a significant contribution as it refers to a series of different national laws, such as Israeli and German, as well as case-law from different States such as Canada and Australia. Therefore, this article gives an insight into the legal reality of several countries in the sphere of hate speech and is one of the most extensive analyses of the *Faurisson* case, whilst the criteria it ultimately recommends are useful as indicators of the legitimacy of measures which restrict racist expression. For example, the authors note that restrictions on the freedom of expression for purposes of protecting the rights of others may ‘extend to the protection of the community as a whole and thereby to the groups that make up that community.’⁹⁵ In van Noorloos’s book ‘Hate Speech Revisited: a Comparative and Historical Perspective on Hate Speech Law in The Netherlands and England & Wales,’⁹⁶ the author conducts a comparative study on the historical development of hate speech and extreme speech laws in the two jurisdictions, looking at how and why the law of the two developed as it did, also considering the impact of international and European law. This contribution offers an in-depth historical appreciation of the development of laws relevant to hate speech in the two jurisdictions. In Belavusau’s book ‘Freedom of Expression - Importing

93 Sandra Coliver, *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (1st edn. Article 19, International Centre against Censorship, University of Essex, Essex 1992).

94 Dominic McGoldrick & Thérèse O’Donnell, ‘Hate Speech Laws: Consistency with National and International Human Rights Law’ (1998) 18 *Legal Studies* 4.

95 *Ibid.* 484.

96 Marloes van Noorloos, *Hate Speech Revisited: A Comparative and Historical Perspective on Hate Speech Law in The Netherlands and England & Wales* (1st edn. Intersentia, Cambridge 2011).

European and US Constitutional Models in Transitional Democracies,⁹⁷ the author looks at free speech in the Czech Republic, Hungary and Poland and looks at how these transitional democracies have incorporated free speech models of the CoE, the EU and the U.S. The analysis of the EU approach is significant and, along with article ‘Fighting Hate Speech through EU Law,’ by the same author, makes up some of the first literature on regulating hate speech using EU mechanisms. Ghana places hate speech in the realm of minority rights. Her book ‘Minorities and Hatred: Protections and Implications’ looks at the protection of minorities through the restriction of hate speech. The book adopts the hypothesis that there exists a nexus between hate speech and the protection of minorities, which has not yet been adequately incorporated into international documents. To justify this position, the author examines the impact of Article 20 of the ICCPR on minorities and examines jurisprudence from several countries on the link between prohibiting hate and protecting minorities, also looking at international and European case-law. In Kretzmer and Hazan’s ‘Freedom of Speech and Incitement against Democracy,’⁹⁸ the authors focus particularly on inciting violence and, more particularly, consider the extent to which speech that incites violence can be legitimately restricted by democratic States. It looks at U.S. and German approaches and ECtHR case-law on incitement as well as theories of free speech and theoretical justifications of restricting speech, with the general framework emanating, in part, from the institutions’ approaches to the far-right.

Although the majority of the aforementioned literature has referred to Strasbourg jurisprudence during the analysis of issues, the literature mentioned in the following focusses solely on aspects related to this Court in the sphere of hate, in particular, and, more specifically, the issues of violent speech, the role of Article 17 of the ECHR and the ‘bad tendency test,’ with particular focus placed on *Féret v Belgium* and *Le Pen v France*. Buyse’s ‘Dangerous Expressions: The ECHR, Violence and Free Speech’ considers how the freedom of expression and the prevention of violence can be balanced, using, *inter alia*, jurisprudence, such as *Vona*, *Norwood* and *Féret*, to illustrate the main arguments. Given that the analysis looks at such cases, and since there exists an inextricable link between the far-right and violence, this article is of particular relevance to the topic under consideration. It indicates that ECtHR case-law shows an ‘overlap between cases relating to hate speech and those relating to instances of violence-prone speech’⁹⁹ with the Court not always being clear as to the distinction between the two types of dangerous speech. It also demonstrates that the Court has not found a mechanism adequately to balance the prevention of violent speech and the freedom of expression. The same author has previously

97 Uladzislau Belavusau ‘Freedom of Expression- Importing European and US Constitutional Models in Transitional Democracies’ (1st edn. Routledge, London 2013).

98 David Kretzmer & Francine Kershman Hazan, ‘Freedom of Speech and Incitement against Democracy’ (1st edn. Brill, Leiden 2000).

99 Antoine Buyse, ‘Dangerous Expressions, the ECHR, Violence and Free Speech’ (2014) 63 *International and Comparative Law Quarterly* 2, 493.

made a relevant contribution to a book entitled ‘Contested Contours – The Limits of Freedom of Expression from an Abuse of Rights Perspective – Articles 10 and 17 ECHR’ which focusses on the limits of freedom of expression from an abuse of rights perspective, considering Article 10 and Article 17 of the ECHR, placing the study within the framework of totalitarian regimes and particularly those of the far-right. It assesses the role of Article 17 of the ECHR, the relationship between Article 17 of the ECHR and other articles, in particular Article 10 of the ECHR. The paper peruses case-law relevant to far-right expression and association where there has been a direct or indirect application or a discarding of Article 17 of the ECHR. From this analysis, it concludes that the Court applies Article 17 of the ECHR to situations of preventing totalitarian movements from abusing Convention rights as well as to those pertaining to revisionism, racism, anti-Semitism, Islamophobia and incitement to violence. This analysis interestingly shows that the Court has not been systematic when endeavouring to ‘categorise freedom of expression cases as falling either within the Convention’s protective scope (Article 10) or outside it (Article 17).’¹⁰⁰ It also argues that experience has demonstrated that the task of deciphering whether activities do, in fact, aim at destroying human rights and democracy is difficult. It concludes by arguing that an indirect application of Article 17 of the ECHR is the most suitable, as it enables a proportionality test of the impugned measures under consideration and, thus, from a human rights perspective, is the most suitable approach. In Sottiaux’s article on ‘Bad Tendencies in the ECtHR’s Hate Speech Jurisprudence’¹⁰¹ the author places his analysis on the U.S. ‘bad tendency’ formula as a means to justify the suppression of ideas that put the foundations of government at risk. He argues that, although this formula has disappeared from American case-law, it marks the ECtHR’s hate speech jurisprudence, resulting in a lucid relation between the expression in question and the potential danger arising therefrom. He illustrates his arguments by focussing on *Féret v Belgium* and *Le Pen v France*, on a European level, and *R v Keegstra* on a Canadian level. The author acknowledges that the U.S.-European comparison has occurred time and again in this sphere and, instead, looks at a Euro-Canadian comparison. The article finds that the ECtHR’s current approach to hate speech ‘is in need of re-evaluation,’¹⁰² with the Court currently citing a variety of negative social and personal consequences which may arise from hate speech ‘without indicating how they will ultimately affect its proportionality analysis.’ It turns to *Keegstra* in which the Court distinguished between discriminatory speech and speech

100 Antoine Buyse, ‘Contested Contours – The Limits of Freedom of Expression from an Abuse of Rights Perspective – Articles 10 and 17 ECHR’ in Eva Brems & Janneke Gerards (eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (1st edn. Cambridge, Cambridge University Press 2013) 185.

101 Stefan Sottiaux, ‘Bad Tendencies in the ECtHR’s Hate Speech Jurisprudence’ (2011) 7 *European Constitutional Law Review* 1.

102 Ibid. 57.

which incites hate or discrimination,¹⁰³ as a method that should be looked at by the ECtHR for purposes of ensuring a more equitable approach to hate speech and Article 10 of the ECHR. Thus, the three aforementioned pieces of writing are directly related to the role and impact of the ECtHR in the framework of far-right manifestations, denoting key weaknesses of the Court in this sphere and seeking to advance recommendations for the improvement of its approach.

Freedom of (extreme) association?

The literature on extreme-right association is limited in comparison to its expression counterpart. Three directly relevant articles can be found. Of particular relevance to this study is Sottiaux's article 'Anti-Democratic Associations: Content and Consequences in Article 11 Adjudication' which seeks to evaluate the position of anti-democratic political parties under Article 11 of the ECHR and does so through an analysis of *Refah Partisi v Turkey*. Even though this case does not deal with the far-right, *per se*, it is a landmark case to any analysis of Article 11 and the dissolution of an association in particular, an issue of paramount importance in relation to the treatment of far-right groupings. The assessment is placed within the broader framework of Loewenstein's dilemma of whether a democracy can restrict the association of political parties without violating its very aims and objectives. The article's 'central claim is that the *Refah* Court adopted a standard which is both content and consequence-based' and, thus, resembles the U.S. Supreme Court's First Amendment jurisprudence. The article's discussion builds up to the important question of why the ECtHR's analysis in *Refah Partisi* required a sufficiently imminent risk test whilst such a counterpart is not evident in its Article 10 case-law on hate speech, with the author referring to *Jersild v Denmark* to illustrate this example. This question subsequently provides a justification of the Court's treatment of Article 11 and, namely, that this reflects 'the essential role the Strasbourg organs ascribe to political associations in preserving democracy and pluralism.'¹⁰⁴ Further, in Fennema's contribution to a book entitled 'Legal Repression of Extreme-Right Parties and Racial Discrimination',¹⁰⁵ the author looks at the origins of anti-racist and anti-fascist legislation, explores the ICERD, with a particular focus on Article 4, considers the implementation of the ICERD by States Parties, with a particular focus on how far-right parties can be banned under such legislation, and refers to actual cases and figures looking at initiatives taken by the European Union for purposes of countering racism, while dedicating a separate section to the discussion on revisionism. The author makes several conclusions, two of which stand out. First that anti-fascist legislation had its foundations in militant democracy whereas

103 Ibid. 58.

104 Stefan Sottiaux, 'Anti-democratic Associations: Content and Consequences in Article 11 Adjudication' (2004) 22 *Netherlands Quarterly of Human Rights* 4, 598.

105 Meindert Fennema, 'Legal Repression of Extreme Right Parties and Racial Discrimination' in Ruud Koopmans & Paul Statham (eds.), *Challenging International and Ethnic Relation Politics – Comparative European perspectives* (1st edn. Oxford University Press, Oxford 2000).

anti-racist legislation is founded on the principle of equality which is not easily compatible with the freedom of expression, without extrapolating on the alleged links between the types of legislation and doctrines they pursue. Either way, this article is valuable to the academic understanding of far-right parties as it is one of a kind in providing such a lengthy normative overview of initiatives, legislation and case-law pertaining to, *inter alia*, banning far-right parties. Lastly, Bleich's article 'Hate Crime Policy in Western Europe – Responding to Racist Violence in Britain, Germany and France'¹⁰⁶ evaluates the different approaches taken by the three countries to combat hate crime and argues that, with a view to ensuring an efficient response, it is important to learn from best practices adopted in other States and efficiently responds to actors voicing concerns about particular problems. This article gives a comprehensive overview of the social reality of the integration of migrants in each State and the legal and policy measures adopted to counter racist violence, thereby, constituting a source of relevant background information on, *inter alia*, national legal approaches to racist violence.

Under the umbrella of the far-right, one can find hate speech, hate crime and hateful types of associations and assemblies. These issues and topics are entities within themselves but are, simultaneously, interdependent and interrelated with not only each other but also with the broader framework of the far-right movement. In this light, the first conclusion that can be drawn from the earlier review is that most literature has focussed on the theoretical and/or contextual and/or legal analysis of hate speech as an entity within itself rather than within the greater spectrum of the far-right. Further, available literature has placed more focus on hate speech than hateful types of association, while there has been no substantial assessment of the freedom of assembly in the framework of the far-right as it arises within Article 11 of the ECHR. Lastly, the comparative approach between country laws and regulations has been adopted with a predominant reliance on the U.S.-European model, with the latter meaning Europe as an entity or a particular European country, more often than not Germany, but only in relation to free speech *per se* rather than the far-right and its by-products more generally. Thus, the first reason for which this book is a new contribution to the general academic framework is that it focusses on the far-right in international and European law in its entirety rather than on just one element of its manifestation. Second, this book seeks to contribute to existing academic research by addressing the imbalance, described earlier, in relation to the focus on expression and ensure that all the rights which may be used by the far-right to promote their mandate and conduct their activities are dealt with in a comprehensive manner. In relation to this, the book goes beyond the common free speech-hate speech debate, assessing the issue of hate speech within the framework of non-discrimination as well. Third, the book provides a black letter assessment of the relevant articles and documents as well as a theoretical extrapolation of

106 Erik Bleich, 'Hate Crime Policy in Western Europe – Responding to Racist Violence in Britain, Germany and France' (2007) 51 *American Behavioral Scientist* 2.

their nature and composition as these emanate from the doctrine of militant democracy. This doctrine has been considered in several arenas as a concept, more generally,¹⁰⁷ in the sphere of the ECHR¹⁰⁸ in relation to particular freedoms, such as that of association,¹⁰⁹ and as a tool for challenging the far-right movement through the spectrum of political science.¹¹⁰ However, this doctrine has not yet been applied within a legal assessment of challenging the far-right as a single entity, whilst the *mélange* of the positive law and theoretical analysis of all the relevant provisions to tackle the far-right has yet to be conducted. Moreover, in addition to the appraisal of the militant democratic approach of the international community to the far-right and its by-products, the book will also look at opposing positions, such as the libertarian approach to hate speech, and also critically consider other theories, such as Critical Race Theory which can be used when appraising relevant laws on the far-right and whose characteristics and positions can be found in, for example, ECtHR jurisprudence, as discussed further in Chapter 4.

To achieve its aim, which is to conduct a critical analysis of the legal treatment of the far-right at the aforementioned levels, the book is structured in the following way. Chapter 1 provides a definitional framework of key terms and notions that will be employed in this book. Chapter 2 establishes the theoretical framework, considering the approaches adopted, predominantly by philosophers and legal theorists, on the question of if, how and when freedoms can be restricted. Chapter 3 sets out the international legal framework on the regulation of the far-right and considers relevant UN Conventions and, particularly, the ICCPR and the ICERD as well as relevant jurisprudence, General Comments and General Recommendations of the Human Rights Committee (HRC) and the CERD as well as reports of relevant UN Special Rapporteurs. It also sets out the development, efficacy and potential loopholes that exist on this level. This chapter examines how international law, directly or indirectly, challenges the far-right and its by-products, looking at its aims, objectives, scope and possible shortcomings. Chapter 4 assesses the legislative and jurisprudential protection and limitations of free speech, assembly and association under the ECHR and the ECtHR's treatment of hateful activity and rhetoric. An overview will also be made of the Additional Protocol to the Cybercrime Convention, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature

107 See, *inter alia*, Paul Cliteur & Bastiaan Rijpkema, 'The Foundations of Militant Democracy' in Afshin Ellian & Gelijs Molier (eds.), *The State of Exception and Militant Democracy in a Time of Terror* (1st edn. Republic of Letters Publishing, Dordrecht 2012); András Sajó, *Militant Democracy* (1st edn. Eleven International Publishing, Utrecht 2004); Markus Thiel, *The Militant Democracy Principle in Modern Democracies* (1st edn. Routledge, London 2009).

108 Paul Harvey, 'Militant Democracy and the European Convention on Human Rights' (2004) 29 *European Law Review* 3; Patrick Macklem, 'Militant Democracy, Legal Pluralism and the Paradox of Self-Determination' (2006) 4 *I-CON* 3.

109 Stefan Sottiaux, 'Bad Tendencies in the ECtHR's Hate Speech Jurisprudence' (2011) 7 *European Constitutional Law Review* 1.

110 Alexander S. Kirshner: *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism* (1st edn. Yale University Press 2014).

Committed through Computer Systems. Chapter 5 looks at the EU and the frameworks through which the far-right can and/or should be challenged by Member States and/or European institutions. Particularly, it will look at primary law, such as Article 7 of the Treaty on the European Union, and secondary law, such as the Council Framework Decision on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law.¹¹¹ The overarching objective is to consider the means available to the EU directly or indirectly to challenge the far-right and its by-products and the aims, scope and possible shortcomings of these instruments. Chapter 6 will conduct an analysis of the major U.S. case-law on hate speech and hate crime with the overarching aim of this chapter constituting a comparator with the international and European frameworks.

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