

Fighting Hate Speech through EU Law

A guest the Academy of European Law (*ERA*),

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Today



- ① Freedom of speech *versus* hate speech
- ② Anti-discrimination law in the CoE and EU
- ③ Hate speech:
 - (a) US Supreme Court
 - (b) European Court of Human Rights
 - (c) Court of Justice of the European Union

What does jurisprudence of the two major European courts tell us about European anti-discrimination law?

Hate Speech



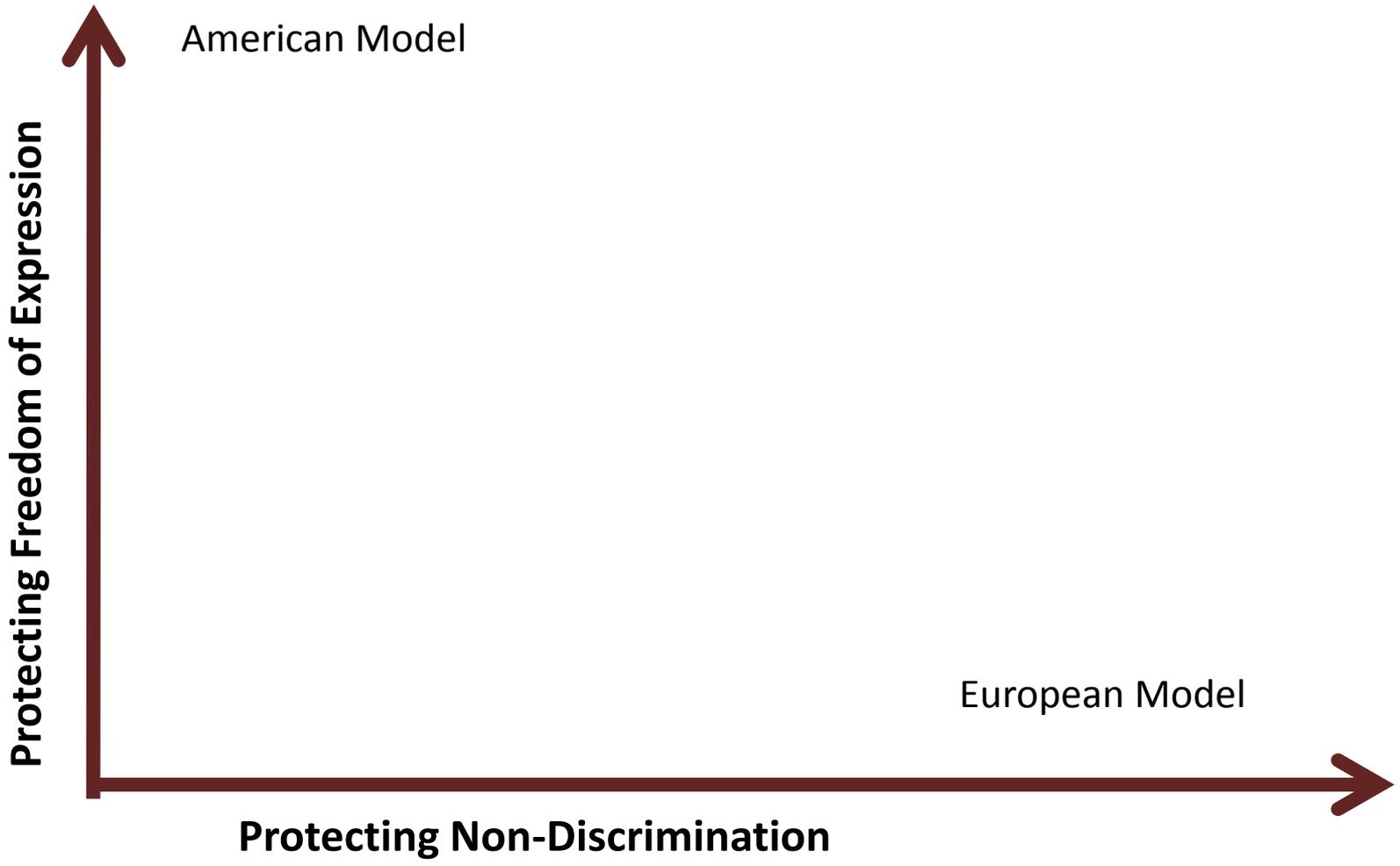
Anti-Discrimination Law

**RESPECT
DIFFERENCES**



AGAINST DISCRIMINATION

Disabilities, Nationality, Gender, Language, Religion, Belief, Marital Status, Age, Sexual Orientation, Ethnic Origin. Social Origin or any other status;



American Model

European Model

Protecting Freedom of Expression

Protecting Non-Discrimination

The First Amendment

CONGRESS SHALL MAKE NO LAW *respecting*
an establishment of religion, or prohibiting the free
exercise thereof; or abridging the freedom of speech,
or of the press; or the right of the people peaceably
to assemble, and to petition the Government for a
redress of grievances.

 **THE FIRST AMENDMENT
TO THE U.S. CONSTITUTION**
15 DECEMBER 1791

US Supreme Court

- 1952: *Beauharnais* (libel statute in Chicago),
- 1969: *Brandenburg* (Ku Klux Klan in Ohio)
- 1978: *Collin v. Smith* (“Skokie”)
- 1992: *R.A.V.* (St. Paul, Minnesota)
- 2011: *Snyder v. Phelps* (Wesboro Baptist Church)

FREEDOM OF EXPRESSION IN EUROPE

→ NATIONAL LAW:

constitutional traditions – high courts – concept of *militant* democracy

→ COUNCIL OF EUROPE:

Art. 10 ECHR + soft law

→ EU:

TEU? Charter? Secondary law? Court of Justice?

European Convention of Human Rights

ARTICLE 10

Freedom of expression

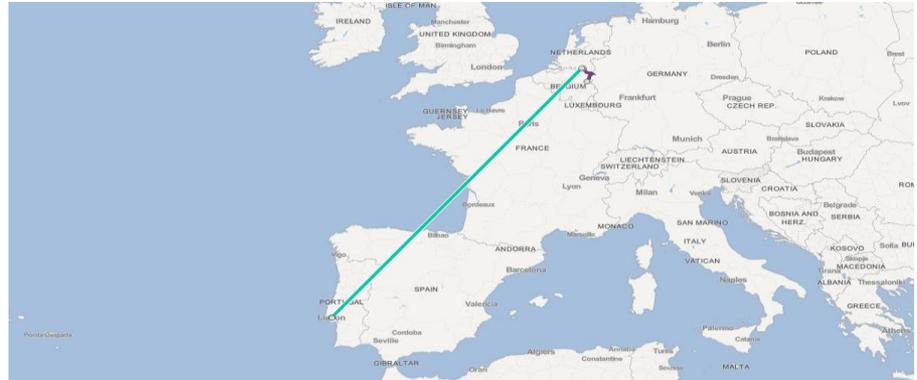
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting,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

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

Case Law at the ECtHRs

- Old case load + ‘Turkish’ cases
- 2008-cases: *Soulas & Others v. France* (anti-migrant hate speech), *Leroy v. France (apologie du terrorisme)*, *Balsyte-Lideikiene v. Lithuania* (historical discourse)
- 2009: *Féret v. Belgium* (political context)
- 2012: *Vejdeland v. Sweden* (homophobia)
- 2012: *Aksu v. Turkey* (anti-Gypsism)
- 2015: *Dieudonné* (anti-Semitism)

Fundamental Rights & Anti-Discrimination Law in the EU: from Maastricht to Lisbon



Art. 2 TEU

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the MS in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women & men prevail.

Art. 6 TEU:

- EU Charter of Fundamental Rights
- ECHR & EU's accession to Strasbourg mechanism
- Constitutional traditions common to the MS as general principles of EU law

Art. 19 (1) TFEU (ex Art. 13 EC)

[...] the Council [...] with the consent of the European Parliament may take appropriate action to combat discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation.

+ EU external dimension + developments of the EU secondary law.

Relevant secondary law

- Sex: **Directive 2006/54/EC** (sex: Recast);
- Racial and ethnic origin: **Directive 2000/43/EC** (aka “Race Equality Directive”).
- Religion or belief, disability, age, sexual orientation: **Directive 2000/78/EC** (aka “Framework, or Equal Treatment Directive”)

Forms of Discrimination

As of 2000 a new generation of directives:

- ✓ Direct discrimination;
- ✓ Indirect discrimination;
- ✓ Harassment;
- ✓ Instruction to discriminate.

Case C-54/07 *Feryn* [2008]

“Apart from these Moroccans, no one else has responded to our notice in two weeks ...but we aren’t looking for Moroccans. Our customers don’t want them. They have to install up-and-over doors in private homes, often villas, and those customers don’t want them coming into their homes” (*De Standaard*)

‘Centrum voor gelijkheid van kansen’ – Arbeidsrechtbank – ECJ



➤ Opinion of AG Maduro

“By publically stating this intention [...] the employer is, in fact, excluding those persons from the application process and from his workflow. He is not merely talking about discriminating, he is discriminating. He is not simply uttering words, he is performing a ‘speech act’.”

Direct / indirect discrimination? = Art. 2 (2)

Council Directive 2000/43/EC (‘Race Directive’)

Asociatia ACCEPT

v.



CNCD
[2013]



**Employment Discrimination
on the basis of Sexual Orientation**

Parties Involved

The Accuser



- an LGBT-rights organization
- Major lobbyist for de-criminalization of homosexuality in Romania
- Organizer of LGBT events (GayFest)

The Accused



- A populist politician, G. Beccali
- “Patron” of the *Steaua* Football club
- Involved in shady land-transactions, but also an MP

Events of the Case

- **February 2010**

*“Not even if I had to close Steaua down could I accept a homosexual on the team. Maybe he’s not a homosexual. But what if he is? There’s no room for gays in my family, and [FC Steaua] is my family. (...) **This isn’t discrimination: no one can force me to work with anyone. I have rights just as they do and I have the right to work with whomever I choose.** Even if God told me in a dream that it was 100 percent certain that the player wasn’t homosexual I still wouldn’t take him. Too much has been written in the papers about him being a homosexual. (...) He could be the biggest troublemaker, the biggest drinker. . . but if he’s a homosexual I don’t want to know about him.”*

- The player in question was **not** hired by the club

Events of the Case

- March 2010



- ACCEPT: Becali, 'de jure' decision maker
- Steaua: Becali, no employer involvement

=> Harassment; Written Warning



=> Direct Discrimination

Implications

Even non-de jure
representatives can
commit direct
discrimination

Expanding non-
discrimination coverage –
Homophobia legally “hate
speech”

NGOs can invoke
claims of
discrimination

“He is not merely talking
about discriminating, **he is
discriminating**. He is not
simply uttering words; he is
performing a **‘speech act.’”**

-*Feryn* C-54/07 [2008]

Thank you for attention!



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