




 UNIVERSITY OF AMSTERDAM
Centre for International & European Law

Tackling Hate Speech in EU Law

Guest lecture for the Academy of European Law (ERA)
Seminar for Legal Practitioners
“Applying EU Anti-Discrimination Law”

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 Tuesday, 18 October 2022 – Bucharest (Romania)




Funded under the Rights, Equality and Citizenship Programme 2014-2020 of the European Commission

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AGENDA FOR TODAY



- 1) Hate Speech v. Freedom of Expression
- 2) US Law
- 3) Council of Europe Law
- 4) EU Law
 - Primary and Secondary Law;
 - Forms of Discrimination;
 - *Feryn* (2008), *Associatia ACCEPT* (2013) and *NH* (2020).
- 5) Conclusions
 - Positioning Hate Speech within EU Law

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“Hate Speech”	US Law	Council of Europe Law	EU Law	Conclusions
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DEFINING HATE SPEECH

- Hate speech consists of verbal or non-verbal communication that involves hostility directed towards particular social groups.
- Most often on the grounds of:
 - Race;
 - Ethnicity (racism, xenophobia, anti-Semitism, etc);
 - Gender (sexism, misogyny);
 - Sexual orientation (homophobia, transphobia);
 - Age (ageism);
 - Disability (ableism), etc.

For more, see Uladzislau Belavusau, [Hate Speech](#), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press, 2017).



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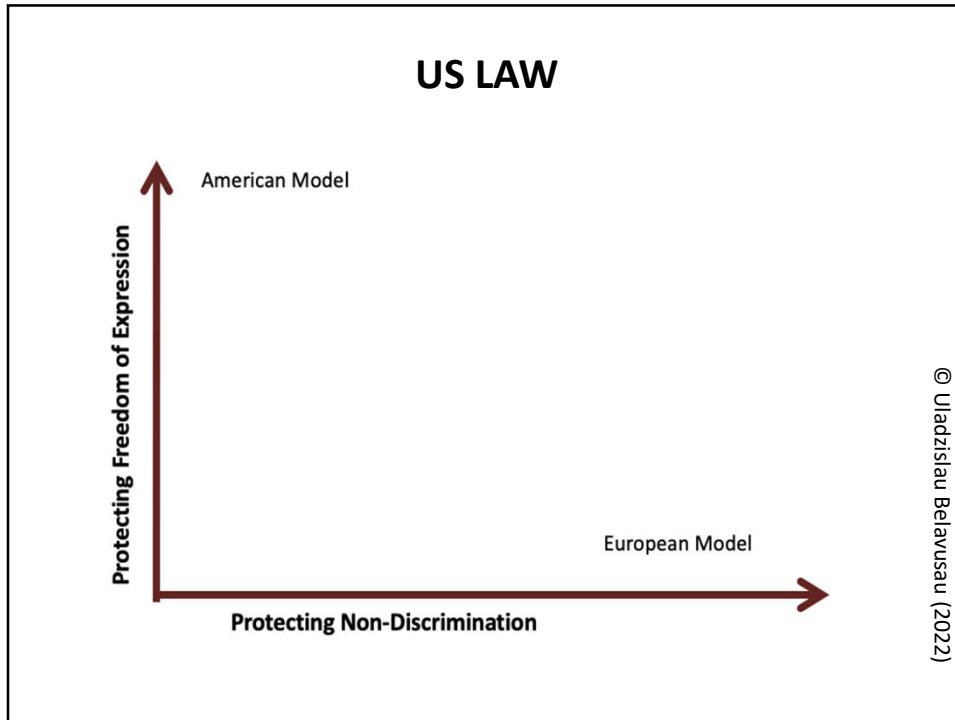
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FREEDOM OF SPEECH: SCOPE AND BOUNDARIES



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US LAW

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.




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).

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FREEDOM OF EXPRESSION IN EUROPE

NATIONAL LAW	COUNCIL OF EUROPE	EUROPEAN UNION
<ul style="list-style-type: none"> • Constitutional traditions; • High courts; • Concept of <i>militant democracy</i>. 	<ul style="list-style-type: none"> • Art. 10 ECHR + soft law. 	<ul style="list-style-type: none"> • TEU? • Charter? • Secondary law? • Court of Justice?
		

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EUROPEAN CONVENTION ON 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.**

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ECtHR CASE LAW

- 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).

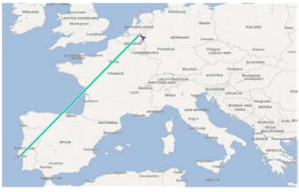


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PRIMARY LAW OF THE EU: FROM MAASTRICHT TO LISBON

Art. 2 TEU	Art. 6 TEU	Art 19(1) TFEU (ex Art. 13 EC)
<p>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.</p>	<ul style="list-style-type: none"> • EU Charter of Fundamental Rights; • ECHR & EU's accession to Strasbourg mechanism; • <u>Constitutional traditions</u> common to the MS as general principles of EU law. 	<p>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.</p> <p>+ EU external dimension + developments of the EU secondary law.</p>



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FROM AMSTERDAM TREATY (1997)



**Art. 157 TFEU
(former 119 EEC / 141 EC)**

“1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. ...”

+


**+ [New provision] Article 19 TFEU
(Art. 13 EC in 1997)**

“1. ... the Council... may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. ...”

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RELEVANT SECONDARY EU LAW: INTRODUCING THE 2000 EQUALITY DIRECTIVES

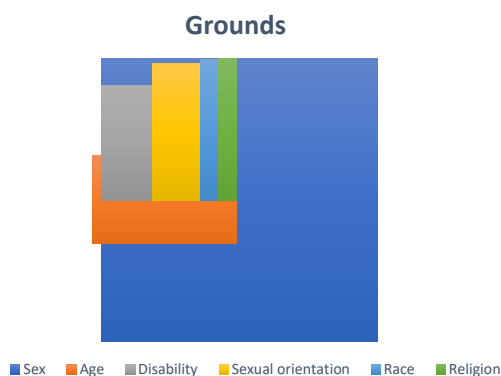
Sex	Racial & Ethnic Origin	
<p>Directive 2006/54/EC (a.k.a. “Equal Treatment” or “Gender/Sex Equality” Directive)</p>	<p>Directive 2000/43/EC (a.k.a. “Race Equality Directive”, or RED)</p>	+
		<p>Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law</p>
<p>Religion, Disability, Age, & Sexual Orientation</p>		
<p>Directive 2000/78/EC (a.k.a. “Framework Equality Directive”, or FED)</p>		

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MAJOR TRENDS AND THEMES SINCE ADOPTION OF 2000 EQUALITY DIRECTIVES

1. Disproportionality Amongst Grounds of Discrimination in CJEU Jurisprudence



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MAJOR TRENDS AND THEMES SINCE ADOPTION OF 2000 EQUALITY DIRECTIVES

2. Unequal Material Scope of the Equality Directives (RED & FED)

Grounds Field	Race	Religion	Disability	Age	Sexual orientation	Sex
Employment & vocational training	Yes	Yes	Yes	Yes	Yes	Yes
Education	Yes	No	No	No	No	No
Goods and services	Yes	No	No	No	No	Yes
Social protection	Yes	No	No	No	No	Yes

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MAJOR TRENDS AND THEMES SINCE ADOPTION OF 2000 EQUALITY DIRECTIVES

3. Proceduralisation of EU Equality Law

Art. 7(2) RED & 9(2) FED:

Member States shall ensure that **associations, organizations or other legal entities** that have [...] a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of that complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations [...]

Art. 13 RED (→ "Equality Bodies"):

Member States shall designate **a body or bodies for the promotion of equal treatment** of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individual rights.

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FORMS OF DISCRIMINATION

As of 2000, a new generation of Directives:

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



RESPECT
DIFFERENCES



AGAINST DISCRIMINATION

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

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FIRST CJEU CASE ON “HATE SPEECH”: 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
- “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’.”
- Opinion of AG Maduro
- Direct / indirect discrimination? = Art. 2 (2) RED (2000/43/EC ‘Race Equality Directive’)

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C-81/12 *Asociația ACCEPT v. CNCD* (2013)

Parties

“Applicant”



- An LGBT rights organisation.
- Major lobbyist for de-criminalization of homosexuality in Romania.
- Organizer of LGBT events (GayFest).

“Respondent”



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

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C-81/12 Asociația ACCEPT v. CNCD (2013)

Facts

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

For a detailed analysis of this case, see U. Belavusau, [A Penalty Card for Homophobia from EU Non-Discrimination Law](#), *Columbia Journal of European Law*, 21, 2, 2015.

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C-81/12 Asociația ACCEPT v. CNCD (2013)

Facts

March 2010



=> Harassment; Written Warning

• ACCEPT: Becali, ‘de jure’ decision maker

• Steaua: Becali, no employer involvement



=> Direct Discrimination

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C-81/12 Asociația ACCEPT v. CNCD (2013)

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] (emphasis added)


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C- 507/17, NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford (2020)

Parties


“Applicant”



Rete Lenford
AVVOCATURA PER I DIRITTI LGBTI

Associazione Avvocatura per i diritti LGBTI – Rete Lenford (further “the Associazione”), an association of lawyers.

“Respondent”



Senior lawyer → “NH”.

Facts

- During an interview for a radio program, NH stated he would never hire a homosexual person to work nor wish to use the services of such persons.
- No job openings at the time.

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C- 507/17, NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford (2020)

Facts

First Instance → District Court, Bergamo.

Seeking →

- Damages for non-material loss.
- Order - NH to publish a section of the order in a national daily newspaper and to establish an action plan to eliminate discrimination at his law firm.

Two questions for the CJEU:

- First, does *Associazione* have standing to bring such a lawsuit for damages?
- Second, does NH's statement fall within the scope of the FED, even if it does not relate to any current or planned recruitment procedure?



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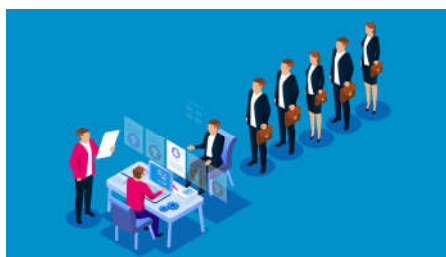
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GUIDING PRINCIPLES:

WHEN DO DISCRIMINATORY STATEMENTS PRESENT A SUFFICIENT LINK WITH “ACCESS TO EMPLOYMENT” IN ACCORDANCE WITH THE COURT’S CASE-LAW?

- 1) The status and capacity of the person making the statements must be examined.
- 2) The nature and content of the statements made must be considered.
- 3) The context in which the statements were made is also relevant.
- 4) Lastly, it is important to consider the extent to which the nature, content and context of the statements made may discourage persons belonging to the protected group from applying for employment with that employer.

LGBT – LGBTI – LGBTQ – LGBTIQ –
LGBTQI – LGBTQIAP ???



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2000-2022: PROCEDURALISATION OF EU EQUALITY LAW

C-54/07 *Feryn* [2008]C-81/12 *Asociația ACCEPT*
[2013]C-507/17, *NH v. Associazione
Avvocatura per i Diritti LGBTI – Rete
Lenford* (2020)

Why this “empowerment” turn to equality bodies and NGOs is important?

1. Low awareness of legal possibilities to seek judicial redress, frequently combined with imperfect knowledge of the official language of procedure (very often affecting migrants);
2. Serious physical or mental impairments (in the case of disabled people);
3. Age of affected victims (in the case of both youth and the elderly);
4. Religious considerations or subordinated status (e.g. women in some traditional Islamic families); and
5. Fear of public ostracism, considerations of privacy and safety (e.g. LGBT plaintiffs)

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THE LUXEMBURG TRILOGY

1C-54/07 *Feryn* (2008)

- No plaintiff involved.
- Belgian seller/installer of doors publicly stated that he wouldn't employ persons of Moroccan origin.
- Court found that this 'speech act' is likely to dissuade certain candidates from submitting their candidature and accordingly hinders their access to the labour market direct discrimination in respect of recruitment.
- Direct discrimination found in the absence of a concerned complainant from the affected minority.

2C-81/12 *Asociația ACCEPT v. CNCD* (2013)

- “Patron” of the Steaua Football club said he would never accept a homosexual player.
- Court declared that an entity may be liable for its non-de jure representative committing direct discrimination.
- Established that NGOs can invoke discrimination claims.

**3**C507/17, *NH v. Associazione Avvocatura per i Diritti LGBTI – Rete Lenford* (2020)

- Senior lawyer at an Italian firm stated that he would not hire/work with a homosexual colleague (no vacancies at the time).
- Question of whether a local LGBTI organization (an association of lawyers) had standing to bring a lawsuit for damages → Court concluded that this was allowed under the FED.
- Building on *Feryn* and *Asociația ACCEPT*, the Court finds direct discrimination → such discriminatory statements influenced applications and access to the job market.

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THANK YOU FOR YOUR ATTENTION!

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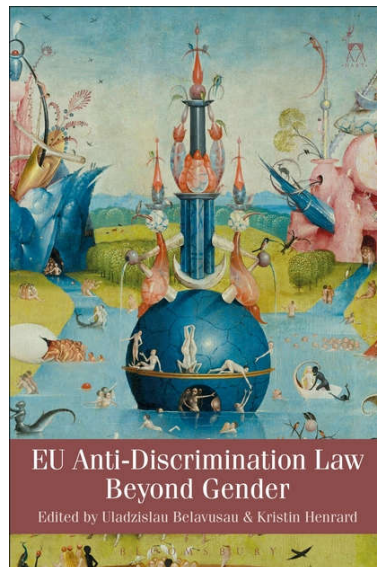
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Further resources:

U. Belavusau & K. Henrard (eds.), [*EU Anti-Discrimination Law Beyond Gender*](#), Hart (Oxford, 2018) →

U. Belavusau, [Hate Speech](#), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press, 2017).

U. Belavusau & N. Alkiviadou, [Rien Que Des Mots: Counteracting Homophobic Speech in European and U.S. law](#), *International Journal of Discrimination and the Law*, 21(4), 2021, pp.374-400.



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