



ERA TRAINING ON RECENT NON-DISCRIMINATION CASE-LAW

ECtHR: Hate speech, freedom of expression and non-discrimination



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Question

Hate speech ...

- A. falls outside of the scope of freedom of expression
- B. should always be assessed under the freedom of expression
- C. it depends



Hate speech – general context

- No clear treaty definition of hate speech in international human rights law
- Political definition (Council of Europe Committee of Ministers, 1997):

“All forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance”



Hate speech – general context



- States should balance freedom of expression with other human rights obligations:
- ICCPR Article 20: War propaganda and advocacy of hatred constituting incitement to discrimination, hostility or violence shall be prohibited by law.
[read together with Article 19: freedom of expression]
- CERD Article 4: Incitement to racial discrimination and violence shall be an offence punishable by law
[but with “due regard” to other rights, including freedom of expression]



Hate Speech - ECHR

- **Starting point:** wide protection of freedom of expression under Article 10, including expressions that “**shock, offend or disturb**” (*Handyside v. UK*, 1976)
- **But** states are allowed to act against hate speech, if measures are proportionate: **tolerance and respect for equal dignity of all people** also important, so it can be “necessary in a democratic society” to “sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance.” (*Erbakan v Turkey*, 2006)



Hate Speech - ECHR

Crucial: no abusing of hate speech laws for other purposes!

Stomakhin v Russia (2018) para. 117: states should adopt:

*“a cautious approach in determining the scope of “hate speech” crimes and strictly construe the relevant legal provisions in order to **avoid excessive interference under the guise of action taken against “hate speech”**, where such charges are brought for a mere criticism of the Government, State institutions and their policies and practices.”*



Hate Speech - ECHR

Two approaches taken by the Court:

1. Exclusion from ECHR protection

Application of Article 17 (Abuse of rights provision).

This can be done for incitement to violence and for (ethnic, religious, racial) hate speech that negates the “fundamental values of the Convention” such as “tolerance, peace and non-discrimination” (*Pavel Ivanov v Russia* – anti-Jewish hatred)

Also applied in cases of racism, Holocaust denial, Islamophobia, Islamic hate against non-believers etc.) -> cases declared inadmissible



Hate Speech - ECHR

2. Application of Article 10 to all other cases of hate speech (normal test, including necessity and thus proportionality)

Balancing factors (*Perincek v Switzerland* [GC], 2015):

- Context: Is there a tense political or social background?
- Content: can it be seen as call for or justification of violence, hatred or intolerance? (e.g. by attacking or making sweeping negative statements about a whole group of people)
- Form of statement and capacity (directly or indirectly) to lead to harm: a poem has less influence than a military style march



Hate Speech & Discrimination: 2 Situations



Target of hate speech

Positive obligations
(respect for privacy + non-
discrimination: 8 +14 ECHR)

Sender of hate speech

Interference by state
(freedom of expression
10 ECHR)



'Sender' of hate speech: *Atamanchuk v. Russia* (2020)

FACTS

- Businessman (newspaper owner) wrote a newspaper article in which he talked very negatively about non-Russian minorities, accusing them of being involved in crime, taking over the country: "they will start to burn, slaughter, rape, rob and enslave, in line with their barbaric ideas". No calls for violence in the text.
- Convicted for "inciting hatred and enmity, debasing the human dignity of a person or group of people on account of their ethnicity, language, origin and religious beliefs"
- Fined equivalent of 5000 euros and prohibited from any journalistic activity for 2 years



Atamanchuk v. Russia (2020)

APPLICANT: violation of freedom of expression

GOVERNMENT: complaint should be inadmissible under Article 17 ECHR (abuse of rights), as the article could have incited violence and attacked non ethnic Russians. If assessed under Article 10, then the conviction was proportionate

EUROPEAN COURT'S ASSESSMENT UNDER 10 ECHR:

Government's arguments about Article 17 closely related to merits -> case assessed under Article 10.



Atamanchuk v. Russia (2020)

EUROPEAN COURT'S ASSESSMENT UNDER 10 ECHR:

TEST:

Interference with Article 10? Yes, the conviction

3-step justification:

1. Provided by law? YES, Russian criminal code

2. Legitimate aim?

YES, the rights of others (non ethnic Russians): racial discrimination is "invidious" and requires "special vigilance and a vigorous reaction" (42)

BUT NOT preventing risk of violence (not shown article was "capable of leading" to violence, no direct or indirect calls to violence (43)).



Atamanchuk v. Russia (2020)

3. Necessary in a democratic society?

Court assesses proportionality and whether reasons put forward by domestic courts were “relevant and sufficient”:

Content

- Language used did “shock, offend and disturb” (57)
- During election time, and meant as election advice, but cannot be read as criticism of particular state policy (59-60)
- No factual basis for statements (61)

Context

- “could be reasonably assessed as stirring up base emotions or embedded prejudices” in a multi-ethnic region (64)

Proportionality of sentence

“exceptional circumstances” justify it: fighting hate speech AND role of press less central: journalistic activities not his core job: entrepreneur



Atamanchuk v. Russia (2020)

EUROPEAN COURT’S ASSESSMENT UNDER 10 ECHR:

Conclusion: NO violation of Article 10 ECHR



NOTE:

- 6 votes to 1 : Cypriot judge found the interference disproportionate. Court’s follows its own established case-law only in theory, not in practice!
- whether there was actual ethnic tension not taken into account.
- he also was local leader of political party: not relevant?
- exceptional judgment indeed in that this type of heavy sentence is rarely accepted by the Court in similar cases.



Question

When speech (Art. 10 ECHR)
clashes with privacy (Art. 8 ECHR)

- A. Article 10 takes priority if it is about politicians
- B. Article 8 takes priority if it affects victims
- C. None of these is true



Target of hate speech: *Beizaras and Levickas v. Lithuania* (2020)





Beizaras and Levickas v. Lithuania (2020)

FACTS (I)

- Young gay couple posts photo on own Facebook page of themselves kissing each other, to announce their relationship.
- 2400 likes, but also over 800 comments, majority of which were hateful, both about LGBT people in general as well as personal threats against them:
- *“Scum!!!!!! Into the gas chamber with the pair of them”*
- *“Hey fags – I’ll buy you a free honeymoon trip to the crematorium.”*
- *“Satan, please allow me to smash their heads into a wall”*



Beizaras and Levickas v. Lithuania (2020)

FACTS (II)

- LGBT association asked, on behalf of the two victims, the public prosecutor to start pre-trial investigation.
- Prosecutor declined, stating comments were unethical but did not amount to incitement to hatred or violence.
- Confirmed by district Court: “eccentric behaviour really did not contribute to the cohesion of those within society who had different views or to the promotion of tolerance” and that the one posting such a photo had an “obligation to respect the views and traditions of others.”
- Appeals Court: publicly posting the photo was “an attempt to deliberately tease or shock individuals with different views or to encourage the posting of negative comments”.



Beizaras and Levickas v. Lithuania (2020)

CONTEXT:

Lithuanian Criminal Code: hate speech on the basis of sexual orientation of the target is a crime.

European Commission against Racism and Intolerance:

Lithuania does not effectively tackle the problem of racist and homo-/transphobic hate speech. [2019]

EU Fundamental Rights Agency:

Lithuanian LGBT feeling discriminated against or harassed on the grounds of their sexual orientation: the highest proportion in the EU. Also highest amount of violence against LGBT of entire EU.



Beizaras and Levickas v. Lithuania (2020)

BEFORE THE ECtHR:

Applicants: violation of non-discrimination (Art. 14 ECHR) combined with respect for privacy (Art. 8 ECHR): discriminated on account of their status by the authorities' refusal to open pre-trial investigation. Government is victim shaming and blaming.

Government: "the photograph itself was already rather provocative on account of the kiss between two gays". No physical attacks had taken place and more positive than negative comments under the photo.



Beizaras and Levickas v. Lithuania (2020)

COURT'S ASSESSMENT: General Principles (based on existing case-law)

- Democracy means respect for diversity and more than just the views of the majority prevailing (paras. 106-107).
- **SCOPE** of Article 8: privacy includes “physical and psychological integrity of a person” and sexual orientation.
- **THRESHOLD:** “an attack on a person must attain a certain level of seriousness and be made in a manner causing prejudice to the personal enjoyment of the right to respect for one’s private life” (109).
- **POSITIVE OBLIGATIONS:** criminal law is last resort but can be necessary for effective deterrence in case of “direct verbal assaults and physical threats motivated by discriminatory attitudes” (110-111).



Beizaras and Levickas v. Lithuania (2020)

COURT'S ASSESSMENT: General Principles (based on existing case-law)

- Article 14 (non-discrimination) can only be invoked if the situation falls “within the ambit” of another ECHR right (which does not need to be violated itself) (112).
- “any other status” includes sexual orientation and gender identity (113).
- “particularly convincing and weighty reasons” necessary to justify difference of treatment based on sex and sexual orientation -> narrow margin of appreciation for states. And even further: “Differences based solely on considerations of sexual orientation are unacceptable under the Convention.” (114).



Beizaras and Levickas v. Lithuania (2020)

COURT'S ASSESSMENT: Application to facts of the case

- **SCOPE:** situation falls within scope of Article 8: online comments affected victims' "psychological well-being and dignity" and reached threshold of seriousness -> as a result also within scope of Article 14



Beizaras and Levickas v. Lithuania (2020)

Court then goes into **2 justifications by state:**

1. **allegedly provocative behaviour of applicants?** Not the case. Rather key to have "fair and public debate about sexual minorities' social status that benefits social cohesion by ensuring that representatives of all views are heard". And: domestic courts verdicts show that sexual orientation did play a role in the decision not to prosecute.
2. **Correct assessment under domestic criminal law?** These "undisguised calls on attack on the applicants' physical and mental integrity" require protection by criminal law. It does not matter that there were many other positive comments nor that it was on a Facebook page and not on an online news portal (128).



Beizaras and Levickas v. Lithuania (2020)

Court's Conclusion: Violation of 8 and 14 ECHR combined (129): Hateful comments "were instigated by a bigoted attitude towards that community and, secondly, that the very same **discriminatory state of mind** was at the core of the **failure** on the part of the relevant public authorities **to discharge their positive obligation** to investigate in an effective manner" whether those comments regarding the applicants' sexual orientation constituted incitement to hatred and violence, which confirmed that by downgrading the danger of such comments **the authorities at least tolerated such comments.**"

Also **violation of Article 13:** effective remedy (wider pattern too here, risk that domestic criminal law on this point would remain a "dead letter" (155)). -> **NOVELTY: importance of domestic remedies for this issue**



Budina and Gaprazov (2021) Behar and Gutman (2021)

- Two different judgment issues on the same day (16 February 2021), relating to the same statements
- *Budina and Gaprazov*: anti-Roma hate speech
- *Behar and Gutman*: anti-semitic hate speech
- Seen as a guide on how to deal with public statements degrading minorities (Court itself sees it as "key cases")
- Cases are "*a quantum leap*" (Margarita Ilieva)





Budina and Gaprazov (2021) *Behar and Gutman (2021)*

FACTS

- Volen Siderov leader of far-right nationalist political party ATAKA ('Attack') and journalist
- Campaigned against minorities in books, articles, on radio, in TV shows and in political gatherings
- Cases litigated nationally as *actio popularis* by broad coalition 'Citizens against Hatred'
- Applicants complain about domestic authorities' failure to offer redress against hate speech (Articles 8 and 14 combined)



Budina and Gaprazov (2021) *Behar and Gutman (2021)*

FACTS

- Anti-Jewish statements included calling the holocaust a hoax, calling Judaism "elitist, xenophobic, racist (...) philosophy" and saying that Bulgaria should not become a Jewish colony, etc.
- Anti-Roma statements included saying "Gypsies' committed genocide against Bulgarians, accusing them of spreading terror over Bulgaria, Bulgaria is conquered by 'Gypsification', etc.
- All these messages spread through many media: books, radio ,television., mass rallies.



Budina and Gaprazov (2021) *Behar and Gutman (2021)*

Applicants:

- started civil discrimination proceedings,
- argued that the messages were harassment and incitement to discrimination against them as members of their attacked communities,
- and sought a court injunction on Siderov to apologise and to abstain.

Domestic courts dismissed their claims, giving priority to Siderov's freedom of expression.

Applicants then claimed violation of positive obligations of state under Articles 8 + 14 ECHR in Strasbourg



Budina and Gaprazov (2021) *Behar and Gutman (2021)*

ASSESSMENT BY THE EUROPEAN COURT:

Is Article 8 ECHR applicable?

General principles:

A statement about a social or ethnic group must rise above "threshold of severity"/"certain level" to fall within scope of Article 8 on the basis of the *interplay* of 4 factors:

- a) **characteristics of the group** (including its vulnerability and history of stigmatization)
- b) **content** (in particular the degree of the negative stereotypes)
- c) **form and context** (position of author, capacity to affect the core aspect of the group's identity and dignity)
- d) **overall social and political climate** at the time of the statements



Budina and Gaprazov (2021) *Behar and Gutman (2021)*

ASSESSMENT BY THE EUROPEAN COURT:

Application to the facts of the cases

- a) **Group:** Jews vulnerable minority in light of historical persecutions. Roma vulnerable and disadvantaged. Need to combat negative stereotypes against them.
- b) **Content:** speech virulently anti-Semitic, including the particularly upsetting Holocaust denial
- c) **form and context:** extreme negative stereotyping, well-known politician, repeated over many different media
- d) **overall social and political climate at the time of the statements:** politician and his party were on the rise

CONCLUSION : Article 8 threshold reached -> Art. 14 applicable too!



Budina and Gaprazov (2021) *Behar and Gutman (2021)*

Next step: fair / proper balance struck between positive obligation to offer redress (Article 8) versus freedom of speech of Siderov (Article 10)?

- **No automatic priority** of one of the two rights
- **Margin of appreciation** for states to do the balancing
- But: must be done **according to ECtHR criteria**
- Includes **involving in the balancing Article 14** if statements are *prima facie* discriminatory -> obligation to combat racial/ethnic discrimination
- Domestic courts balanced wrongly: too much weight to Siderov being politician and seeing this as 'public debate' and downplaying effect on the groups involved
- **Conclusion: violation 8+14 ECHR** (failure to respond adequately to ethnic discrimination)





Overall conclusions

- Solid responses to hate speech *possible* and sometimes even *required* under ECHR.
- Situations can come from two perspectives:
 1. sender of speech perspective (Article 10)
 2. target of speech perspective (Article 8, positive obligations, combination with non-discrimination: Article 14) .
- After years of emphasis on perspective 1, Court now is solidly developing perspective 2 (different type of cases brought, also strategic litigation).
- Authorities (including courts!) should be careful not to enable or reflect anti-minority prejudices or biases.



More info

- European Court's fact sheet on [hate speech](#)
- ECHR Blog : echrblog.blogspot.com
- Free MOOC on [ECHR](#)
- My research [profile](#)

Thank you for your attention!

