



Hate Speech: An Anti-Discrimination Legal Approach

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Hate Speech – Definition?

No universal definition of hate speech
Issues/Problems?



Definition – European Union Agency for Fundamental Rights

The incitement and encouragement of hate, **discrimination** or hostility against a person, which are motivated by prejudices against said person because of a certain characteristic.



Academic Definition (Example)

Greenawalt: Expressions that reflect stereotypes about race, ethnic groups, religion and gender and can dangerously promote prejudices and feelings of inferiority



Framework Decision on Racism and Xenophobia

Article 1

Offences concerning racism and xenophobia

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:
 - (a) Publicly inciting to **violence** or **hatred** directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.
2. For the purpose of paragraph 1, Member States may choose to punish only conduct which is either carried out in a manner **likely to disturb public order** or which is **threatening, abusive or insulting**.



Framework Decision on Racism and Xenophobia

Thresholds – compare with Article 20(2) of the International Covenant on Civil and Political Rights.

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Protected characteristics – e.g. LGBTQI community?

In 2013, the European Parliament recommended that the Decision should include grounds of sexual orientation and gender identity.



Scope

In her 2020 State of the Union address, the President of the European Commission noted that the Commission will extend the list of EU-level crimes to all forms of hate crime and hate speech, whether based on race, religion, gender or sexuality.



EU Equality Directives

[Directive 2000/43/EC](#) against discrimination on grounds of race and ethnic origin

[Directive 2000/78/EC](#) against discrimination at work on grounds of religion or belief, disability, age or sexual orientation.

[Directive Proposal \(COM\(2008\)462\)](#) against discrimination based on age, disability, sexual orientation and religion or belief **beyond the workplace.**



EU Equality Directives

Variation of protection – race/religion on the one hand and other characteristics e.g. sexual orientation on the other.



EU Equality Directive (Employment)

In EU law, the Framework Equality Directive contains four grounds of prohibited conduct, namely *direct discrimination, indirect discrimination, harassment and instruction to discriminate*.

As to the substance of the term harassment, the general definition provided in the Directive appears fairly clear.

However, looking at the case law of the Court of Justice of the European Union (CJEU), the difference between direct discrimination and harassment remains a perplex issue.



Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn

Involved a Belgian firm director who stated that he was unwilling to hire Moroccan employees.

First case on the Race Equality Directive (about targeting a particular racial or ethnic origin)

The CJEU established that a public statement by an employer not to hire a person because of that person's attribution to the protected minority constitutes direct discrimination under EU anti-discrimination law.



Asociația Accept v Consiliul Național pentru Combaterea Discriminării

This judgment concerned a homophobic incident in a Romanian football club, lays the foundation for a new cluster in EU anti-discrimination law.

In February 2010, a patron of the Romanian football club Steaua București SA ("Steaua"), Mr. Becali, stated, amongst other things, that "not even if I had to close [FC Steaua] down could I accept a homosexual on the team" and that "even if [player X's current club] gave him to me for free I wouldn't have him! He could be the biggest troublemaker, the biggest drinker . . .but if he's a homosexual I don't want to know about him."



Case C-81/12 Asociația Accept v Consiliul Național pentru Combaterea Discriminării,

The *Feryn* approach was continued in *ACCEPT*, which concerned the characteristic of sexual orientation.

With *ACCEPT*, the Court made an important statement acknowledging that certain homophobic utterances in the employment context amount to direct discrimination.



NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford

During an interview on a radio programme, a senior lawyer at a law firm stated that he would never hire a homosexual person to work in his law firm nor wish to use the services of such persons.

However, there was no recruitment procedure open at NH's law firm at the time when he made those remarks.



CJEU Case Law

The Court held that:

'conditions for access to employment ... or to occupation' in Article 3(1)(a) of the Framework Equality Directive must be interpreted as covering such statements as those made by NH, *even though no recruitment procedure had been opened*, nor was planned, provided that the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical.



NH v. Associazione Avvocatura per I Diritti LGBTI – Rete Lenford

In the Advocate's General opinion:

There was a discussion on the relationship between non-discrimination law and freedom of expression.

In her opinion, by enacting the Framework Equality Directive, the EU legislature has expressed a clear choice.

Statements that are discriminatory and that fall within the scope of Directive 2000/78 may not be exonerated by invoking freedom of expression.

Thus, an *employer* cannot declare that he would not hire LGBTI persons, or disabled persons, or Christians, or Muslims, or Jew, and then invoke freedom of expression as a defence. In making such a statement, he/she is not exercising his/her right to freedom of expression. He/she is enunciating a discriminatory recruitment policy.



European Parliament

In 2019, the European Parliament adopted a resolution on public discrimination and hate speech against LGBTI people, including LGBTI free zones.

Amongst others, the 2019 resolution condemned hate speech by public authorities and elected official against hate speech and the declarations of LGBT free zones in Poland.
European Parliament: Resolution on Public Discrimination and Hate Speech against LGBTI people, including LGBTI free zones, 2019/2933



Way forward?

- Inequality *vis-à-vis* protected characteristics
- Hate speech in EU Law – Discrimination framework & Criminal Law Framework
- Differences between the two?
- Impact of each on freedom of expression and non-discrimination?



Criminal Law approach – Rushing to Judgment?

Criminal Law – last resort (e.g. ECRI, UN)

See: Mchangama J ‘Rushing to Judgment: *Examining Government Mandated Content Moderation*’

<https://www.lawfareblog.com/rushing-judgment-examining-government-mandated-content-moderation>

Full report: <https://futurefreepress.com/rushing-to-judgment-are-short-mandatory-takedown-limits-for-online-hate-speech-compatible-with-the-freedom-of-expression/>



Criminal Law approach – Rushing to Judgment?

- Austrian authorities took 1,273.5 days on average to reach their decision, starting from the day of the alleged offense.

- Danish authorities took 601 days from the date of complaint until the conclusion of the trial at first instance (as per data released by national authorities for cases between 2016 and 2019) and 1,341 days on average (as per data extracted from the two ECHR judgments from other periods).

- French authorities took 420.91 days on average.

- German authorities took 678.8 days on average.

- United Kingdom authorities took 35.01 days from the date of first hearing in court to the conclusion of the trial at first instance (according to data released by national authorities for cases between 2016 and 2019) and 393 days from the date of the alleged offense (according to data extracted from the sole hate speech case from the United Kingdom that was decided by the ECHR).

- Overall, data extracted from all ECHR hate speech cases reveals that domestic legal authorities took 778.47 days on average from the date of the alleged offending speech until the conclusion of the trial at first instance.

See: Mchangama J ‘Rushing to Judgment: *Examining Government Mandated Content Moderation*’

<https://www.lawfareblog.com/rushing-judgment-examining-government-mandated-content-moderation>



Useful Resources on Hate Speech developed by Justitia

ECHR database on hate speech: <https://futurefreespeech.com/hate-speech-case-database/>

UN database on hate speech: <https://futurefreespeech.com/un-hate-speech-case-database/>

Global handbook on hate speech laws: <https://futurefreespeech.com/global-handbook-on-hate-speech-laws/>



Questions

