

# HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION



APPLYING EU ANTI-DISCRIMINATION LAW  
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## LINKS BETWEEN CONCEPTS

STEROTYPES AND  
PREJUDICES

DISCRIMINATION

HATE SPEECH

HATE CRIMES

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## WHAT IS HATE SPEECH? SOME CHALLENGES...

- „I know it when I see it/hear it”
- Freedom of expression – limit: hate speech – but where do we draw the line?
- No comprehensive legal definition
- Changing context - offline + ONLINE
- Individual cases/legal action & wider/other action
- Criminal, civil, administrative law
- EU law – CoE law (grounds, areas, approaches)



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## WHAT IS HATE SPEECH?

- **Council of Europe – soft law definitions**
  - European Commission Against Racism and Intolerance (ECRI) General Policy Recommendation N° 15 on Combating Hate Speech

„The advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status.”
  - CM/Rec (2022) 16 on Combating Hate Speech

“All types of expression that incite, promote, spread or justify violence, hatred or discrimination against a person or group of persons, or that denigrates them, by reason of their real or attributed personal characteristics or status such as “race”, colour, language, religion, nationality, national or ethnic origin, age, disability, sex, gender identity and sexual orientation.”

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## WHAT IS HATE SPEECH?

- deep-rooted, complex and multidimensional phenomenon
- defined in differing ways at national, European and international levels
- disseminated quickly through the internet + availability online exacerbates its impact
- internet intermediaries
  - facilitate public debate, but can be used to disseminate hate speech
  - should ensure that their activities do not have or facilitate an adverse impact on human rights online + address such impacts when they occur
- hate speech negatively affects individuals, groups and societies in a variety of ways and with different degrees of severity, including by instilling fear in and causing humiliation to those it targets + chilling effect on participation in public debate

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## WHAT IS HATE SPEECH?

- individuals and groups can be targeted by hate speech **on different grounds or combinations of grounds**
- hate speech interferes with and often violates
  - **the right to non-discrimination (Art 14 ECHR) +**
  - **the right to respect for private life (Article 8 ECHR)**
- **freedom of expression** – 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.)

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## FREEDOM OF EXPRESSION AND HATE SPEECH

- **Freedom of expression (Article 10 ECHR)**
  - **freedom to hold opinions and to receive and impart information and ideas**
  - **without interference by public authority**
- applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but **also to those that „shock, offend or disturb”** (Handyside v UK, 1976)
- any restriction must be in strict accordance with Article 10, para 2 ECHR - narrowly construed and must comply with the requirements of lawfulness, necessity and proportionality to the legitimate aims
- expressions aimed at the destruction of any of the rights and freedoms set forth in the ECHR do not enjoy protection (Article 17 ECHR - prohibition of abuse of rights)
- hate speech legislation can be misused or abused, in particular for the purpose of inhibiting public debate and silencing critical voices, political opponents or persons belonging to minorities.

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## HATE SPEECH – WHERE TO DRAW THE LINE?

Expressions vary in **severity**, the **harm they** cause and the **impact** on members of a particular groups

### LEGAL RESPONSES

- 1. hate speech prohibited under **criminal law**
  - 2. hate speech that does not attain the level of severity required for criminal liability, but is nevertheless subject to **civil or administrative law**
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- 3. offensive or harmful types of expression **not sufficiently severe to be legitimately restricted under the ECHR** – NON-LEGAL RESPONSES - e.g.
    - counter-speech;
    - measures fostering intercultural dialogue and understanding;
    - relevant educational, information-sharing and awareness-raising activities.

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## EU LAW

- No single legal definition of hate speech in EU law
- Primary law – Charter of fundamental rights

### HATE SPEECH IN CRIMINAL LAW OF MEMBER STATES

- **Framework Decision on combating certain forms of expressions of racism and xenophobia** - criminalisation of public incitement to violence or hatred based on race, colour, religion, descent or national or ethnic origin.
- **Directive on combating violence against women and domestic violence** (April 2024!) - cyber harassment and cyber incitement to violence or hatred punishable as criminal offences
  - Proposal - European Commission (2021) - to extend the current list of 'EU crimes' in Article 83(1) TFEU to hate crimes and hate speech – after Council decision the Commission could propose secondary legislation to criminalise other forms of hate speech

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## EU LAW

- **Framework Decision on combating certain forms of expressions of racism and xenophobia**
  - 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;
    - (b) the commission of an act referred to in point (a)
    - (c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes
    - (d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal

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## EU LAW

### DIRECTIVES – GROUNDS

- Directive 2000/43/EC – racial or ethnic origin – wide area of application
- Directive 2000/78/EC – religion or belief, disability, age or sexual orientation - in the field of employment and occupation
- Directive 2006/54/EC – sex - in the field of employment and occupation
- Directive 2004/113/EC – sex - in the access to and supply of goods and services.
- Directive 2010/41/EU – sex - self-employment

### FORMS OF DISCRIMINATION

- Direct discrimination
- Indirect discrimination
- Harassment
- Instruction to discriminate

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## EU LAW – CASES REGARDING DISCRIMINATORY PUBLIC STATEMENTS

- **Firma Feryn C-54/07** – public statement by one of company directors that his company did not wish to recruit 'immigrants' as customers do not want them in their homes (installing garage doors) - constitutes direct discrimination in respect of recruitment as such statements are likely to dissuade certain candidates/hinder their access to the labour market; even where there is no identifiable victim.
- **Asociația Accept C 81/12** – public statement that a gay professional footballer would not be hired by a football club - no identifiable complainant who claims to have been their victim is required
- **Associazione Avvocatura C-507/18** – public statement in an interview given during a radio programme that he would not wish to recruit homosexual persons to his law firm nor to use the services of such persons in his law firm even though no recruitment procedure had been opened, nor was planned.

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## EU LAW

### ❖ Harassment

- **Directive 2000/43/EC** -Article 2.3. „Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to **racial or ethnic origin** takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.”
- **Directive 2000/78/EC** – religion or **belief, disability, age or sexual orientation** - in the field of **employment and occupation** - same definition in Article 2.3.
- **Directive 2006/54/EC** - Article 2.1. „harassment’: where unwanted conduct related to the **sex** of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment”
- ❖ **Instruction to discriminate** – no definition

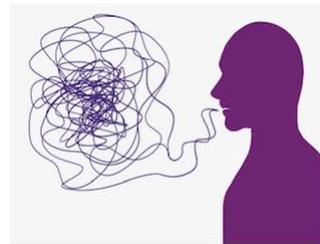
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## ECHR CASE LAW

### 1. FOCUS ON THE VICTIM OF HATE SPEECH/DISCRIMINATORY STATEMENTS



### 2. FOCUS ON THE AUTHOR OF HATE SPEECH



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## ECHR/COE CASE LAW

### FOCUS ON THE VICTIMS/TARGETS OF HATE SPEECH/DISCRIMINATORY STATEMENTS

Applicants claiming violations of Article 8 privacy +14 non-discrimination (+3,+13)

- *Beizaras and Levickas v Lithuania (2020)*
- *Behar and Gutman v. Bulgaria, Budinova and Chaprazov v. Bulgaria (2021)*
- *Oganezova v. Armenia (2022)*
- *Nepomnyashchiy and Others v. Russia (2023)*

### FOCUS ON THE SENDER OF HATE SPEECH

Applicants claiming violations of freedom of expression Article 10

Also for not moderating/removing posts !

- *Sanchez v. France (2023)*

Regarding sender of hate speech also see

*Atamanchuk v. Russia (2020), Lenis v. Greece (2023)*

*CNews c. France (2023)*

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## *BEIZARAS AND LEVICKAS V. LITHUANIA (2020)*

- gay couple posted a photo of themselves kissing on their Facebook page
- offline and online *homophobic* hate speech/harassment (e.g. “*Into the gas chamber with the pair of them*”)
- hate comments (800 comments), some about LGBT people in general, others personally threatening him and his partner; including calls for attacks; abusive private messages on social media; the victims were also harassed offline in public places.
- the authorities refused to investigate (prosecutor declined) - there was no possibility of redress.
- the ECtHR found that sexual orientation played a role in the authorities’ response: they expressed disapproval of the applicants publicly manifesting their homosexuality
- violations of **Article 14 (discrimination) in conjunction with Article 8 (private life) and of Article 13 (effective remedy) ECHR.**
- the applicants argued that they were harassed - the Court called the expressions “**hateful comments**” and “**hate speech**”

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## BEHAR AND GUTMAN V. BULGARIA BUDINOVA AND CHAPRAZOV V. BULGARIA (2021)

- 2 judgements - publicly made statements by leader of far-right political party against minorities in articles, radio, TV, gatherings, in books
- Budina and Chaprazov: anti-Roma hate speech- Anti-Roma speech - “Gypsies” terror over Bulgaria, Bulgaria is conquered by ‘Gypsification’ etc.
- Behar and Gutman: anti-semitic hate speech - Anti-Jewish speech - calling the Holocaust a hoax, calling Judaism “elitist, xenophobic, racist philosophy” etc.
- civil proceedings - harassment and incitement – domestic courts gave priority to politicians’ freedom of expression
- ECtHR established the **criteria for hate speech: a) characteristics of the group, b) content (degree of the negative stereotypes), c) form and context (reach, status of author), d) social and political climate at the time of the statements**
- individual community members have victim status (regardless of not being individually targeted)
- violations of **Article 14 (discrimination) in conjunction with Article 8 (private life) ECHR**
- ECtHR did not use the terms “harassment” and “hate speech” but “**discriminatory statements**” and “**extreme negative stereotyping**”

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## OGANEZOVA V. ARMENIA (2022)

- “aggressive *homophobic* campaign”, online and offline abuse
- “continuous harassment” of the victim “and the prevailing negative attitude towards the members of the LGBT community in the country” – „homophobic hatred must necessarily have aroused in her feelings of fear, anguish and insecurity which were not compatible with respect for her human dignity.”
- ECtHR **explicitly qualified this as hate speech** - the applicant was targeted on social-media platforms (Facebook and YouTube) in highly abusive online speech”; “the abuse directed against the applicant on social media included numerous direct calls for violence.”
- in procedural terms, the applicant “submitted the evidence in her possession, including screenshots from the relevant web pages which contained homophobic comments, to the police.” - no “meaningful follow-up on the matter” by the authorities - the authorities failed to offer adequate protection and to conduct a proper investigation into the hate-motivated ill-treatment against her including the arson attack on the club and the subsequent homophobic attacks
- violations of **Article 3 (procedural) and of Article 14 in conjunction with Article 3 of ECHR**
- ECtHR used the terms “**hate speech**”, “**abusive speech**”, and “**harassment**”

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## NEPOMNYASHCHIY AND OTHERS V. RUSSIA (2023)

- negative public statements by a regional governor and by a member of a regional legislature against the applicants as members of the LGBTI community, openly homophobic and particularly aggressive and hostile in tone
- Behar and Budinova test
- special protection from hate speech in a homophobic society
- gravest hate speech promoting/ justifying violence/ intolerance is excluded entirely from Art. 10 protection (under Art. 17), less grave hate speech does not fall entirely outside Art. 10, but may be restricted
- „it is of crucial importance that politicians, including parliamentarians, avoid making statements promoting hatred or intolerance in their public speech.”
- domestic courts’ failed response - focus on freedom of expression, ‘personal opinion, no recognition victims’ Art. 8 rights, no analysis of vulnerability and impact
- violation of **Article 8 read in conjunction with Article 14 of the ECHR**;

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## SANCHEZ V. FRANCE (2023)

- politician convicted for **not moderating/removing posts on his Facebook page**
- posts clearly targeting Muslims, likely to arouse strong hostility
- tense local context, elections
- authors of posts also convicted
- chose to enable public posts so obligation to moderate - removal duty
- internet dissemination - higher risks, unlimited reach - allowed public access, knowing risks
- duty to remove *entirety* of hateful comments forming “a coherent whole”, an “ongoing dialogue”, and not just isolated comments - undeleted comments echoed, “contributed to and thus pursued the same discourse” as deleted one
- politicians have duties when using social media for political purposes, when they enable public user posts
- incitement to hatred (hate speech) does not require calls for specific violent acts/ offences
- hate speech is *not always ‘openly presented as such’* - hate speech need not be explicit and overtly intentional

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## HATE SPEECH – WHAT TO TAKE INTO ACCOUNT

In assessing the severity of hate speech and determining **which type of liability - if any** - take into account the following factors and the interplay between them:

1. the content of the expression;
2. the political and social context at the time of the expression;
3. the intent of the speaker;
4. the speaker's role and status in society;
5. how the expression is disseminated or amplified;
6. the capacity of the expression to lead to harmful consequences, including the imminence of such consequences;
7. the nature and size of the audience;
8. the characteristics of the targeted group.

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How do you recognize hate speech?  
On a case by case basis 😊

Thank you for your attention!  
Let's discuss...



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