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FIGHTING HATE SPEECH THROUGH EU LAW

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Abstract

This article explores the rise of the European 'First Amendment' beyond national and Strasbourg law, offering a fresh look into the previously under-theorised issue of hate speech in EU law. Building its argument on (1) the scrutiny of fundamental rights protection, (2) the distinction between commercial and non-commercial speech, and, finally, (3) the looking glass of *critical race theory*, the paper demonstrates how the judgment of the ECJ in the *Feryn* case implicitly consolidated legal narratives on hate speech in Europe. In this way, the paper reconstructs the dominant European theory of freedom of expression via rhetorical and victim-centered constitutional analysis, bearing important ethical implications for European integration.

Introduction: *τέλος* (*telos*) and *ήθος* (*ethos*) of European integration

"The ancient Greek values of equal rights of birth (isogonia), before the law (isopoliteia), in the body politics (isonomia) and to freedom of speech (isegoria), underpin the virtue of today's Europe, the democracy that is established through dialogue, justice and respect for human rights. [...] And Europe is perhaps now in a position to demand these equalities, so that the European Community, which began as an economic and trading union, can proceed to the political formation that will make the common civilization of its peoples viable and vital."

Hélène Glykatzi-Ahrweiler[1]

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[1] H. Glykatzi-Ahrweiler, 'European Community as An Idea: The Historical Dimension' in Chrysos, Kitromilides & Svolopoulos (eds.), *The Idea of European Community in History*, Conference Proceedings, Athens: National & Capodistrian University of Athens 2003-1, p. 29.

In the course of the last three years the Court of Justice of the European Union (ECJ) has arrived at several decisions which essentially widen the scope of the EU anti-discrimination instruments (pursuant to Article 19 of the TFEU), justifying these judgments as part and parcel of general principles of EU law.[2] Whilst most of these decisions have received adequate commentary in the legal literature,[3] one seems to have escaped much academic attention.[4] The late-2008 decision in *Feryn*[5] is something of a Cinderella in the realm of brief case notes, although the question the Court had to deal with there is actually of primary importance for an adequate understanding of the *telos* (strategic direction) of European integration. Though on its surface it appears to be exclusively a non-discrimination case, the judgment is essentially informed by several human rights' discourses. Among them are the dichotomies of freedom of expression versus hate speech, fundamental rights versus the peculiarities

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[2] Amongst others, Case C-555/07, *Kücükdeveci v. Swedex GmbH & Co. KG,* [2010] not yet reported (non-discrimination on the ground of age); Case C-267/06, *Maruko v. Versorgungsanstalt der Deutschen Bühnen,* [2008] ECR I, at 757 (essentially widening the rights of same-sex partners in the light of EU law); Case C-303/06, *Coleman v. Attridge Law & Steve Law,* [2008] ECR I, at 5603 (fighting discrimination on grounds of disability); Case C-63/08, *Virginie Pontin v. T-Comalux SA,* [2009] ECR I at 10467 (fostering rights of pregnant workers via the principle of effective judicial protection), etc. See also A. Eriksson, 'European Court of Justice: Broadening the Scope of European Nondiscrimination Law', *International Journal of Constitutional Law* 2009-4, pp. 731-753. After 2008, we can observe a considerable statistical advancement in the judgments of the Court, accompanied by a reduction in the duration of preliminary ruling proceedings. See A. Biondi & I. Maletić, 'Recent Developments in Luxembourg: The Activities of the Courts in 2008', *European Public Law* 2009-15, pp. 501-511.

[3] See T. Roes, 'Case Kücükdeveci v. Swedex GmbH & Co. KG', *Columbia Journal of European Law* 2010-16, pp. 497-519; M. Pilgerstorfer,'Transferred Discrimination in European Law. Case C-303/06, Coleman v. Attridge Law', *Industrial Law Journal* 2008-37, pp. 384-393; T. Connor, 'Case C-303/06, Coleman v. Attridge Law', *Columbia Journal of European Law* 2010-16, pp. 141-159. M. Möschel, 'Life Partnerships in Germany: Separate and Unequal?', *Columbia Journal of European Law* 2009-16, pp. 37-65; M. Bell, 'Sur l'égalite d'accès aux avantages liés au travail pour les couples du même sex: réflexions concernant l'affaire Maruko', *Revue du droit européen relatif à la non-discrimination* 2009-8, pp. 11-21.

[4] Especially in English language journals. There are some brief case notes in German, French, and Italian, for example: N. Reich, 'Kurzbesprechung der Schlussanträge des Generalanwalts Poiares-Maduro vom 12.3.2008 in der Rechtssache C-54/07', *Europäische Zeitschrift für Wirtschaftsrecht*, 2008, pp. 229-230; A. Potz, 'Öffentliche Äußerungen eines Unternehmers im Lichte des europäischen Gleichbehandlungsrechts', *Zeitschrift für europäisches Sozial- und Arbeitsrecht,* 2008, pp. 495-505; L. Driguez, 'Lutte contre les discriminations à l'embauche fondées sur la race ou l'origine ethnique', *European Commission No. 321*, 2008, pp. 27-28; L. Fabiano, '"Le parole come pietre" nel diritto antidiscriminatorio comunitario', *Diritto pubblico comparato ed europeo*, 2008, p. 204; and F. Savino, 'Discriminazione razziale e criteri di selezione del personale', *Rivista italiana di diritto del lavoro* 2009-1, p. 243-251.

[5] Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestnijding v. Firma Feryn NV,* [2008] ECR I, at 5187.

of contemporary European racism, and commercial liberty versus labour discrimination. The decision sheds light on the very *ethos* (moral implications) of European citizenship viewed through the lens of the job market.

For the first time, the ECJ had to address a free speech problem which exceeded the narrow scope of pure commercial speech (in other words, free speech in the context of the internal market) and to scrutinise racist speech (a classic theme in the realm of freedom of expression, usually labelled 'hate speech'). Admittedly this is not the first case in which the ECJ has been confronted with a freedom of expression dilemma. As will be demonstrated, the Court did not dwell substantially on pure freedom of expression and the concept lost out when balanced with other rights. Yet for someone dealing with freedom of speech as a constitutional issue, the mere decision in *Feryn* marks the long-awaited birth of what can be symbolically entitled a 'European law of freedom of expression'. This is the domain of general European human rights law; freedom of expression can be invoked not only under the traditional legal frameworks of the Council of Europe – conventional and soft instruments, judgments of the European Court of Human Rights (ECtHR) – but also as a fundamental right in the Union, bound by 'Strasbourg' mechanisms combined with the instruments of 'Brussels' harmonisation and 'Luxembourg' adjudication. This legal field can be viewed as a 'European First Amendment' and the right to freedom of expression understood as an intersection of European constitutional traditions, the law of the Council of Europe, and the law of the EU.

The goal of the present piece is, therefore, to demonstrate how the decision in *Feryn* implicitly consolidated the constitutional narratives on hate speech and contributed to an ever-harmonising 'European freedom of expression'. Following this introduction, the first part of the article summarises the position on the right to freedom of expression in EU law. The second part discusses the ECJ's decision in *Feryn* as well as the particularly illuminating opinion of the Advocate General, reconstructing the position in Luxembourg through the methodological strategies of rhetorical and victim-centred constitutional analysis. Finally, the conclusion deliberates on the effects of the judgment for the appraisal of the right to freedom of expression as a focus of EU law.

I. Towards EU Freedom of Expression

I.1 Fundamental Rights and the Internal Market

The status of fundamental rights in EU Law was somewhat uncertain for a time because the Community was initially established to pursue the goal of economic integration and this did not necessarily presuppose a separate human rights policy. The situation was complicated by the fact that on the European level there are at least two systems of human rights observance with separate dispute resolution mechanisms, namely, national (constitutional and other high) courts (at the level of states), and the European Court of Human

Rights (at the level of the Council of Europe).[6] In combination with a wide range of NGOs dealing with human rights, this mechanism leaves little room for EU manoeuvres in the field. Nonetheless, the evolution of the internal market revealed an overwhelming need to distinguish a separate human rights *acquis* in the Union.[7] That policy required establishing a comprehensive legal ground for institutional decision-making and dispute-resolution with regard to fundamental rights in the ECJ. This uneasy task revealed several problems including the delineation of the frontline between Strasbourg and Luxembourg, the positioning of fundamental rights *vis-à-vis* economic freedoms in the Union, and, what turned to be even a greater challenge, defining the scope of fundamental rights common to the constitutional traditions of all the Member States.[8] In the middle of the 1950s, one could seriously doubt that European integration would reach these horizons,[9] especially taking into account the fact that a separate jurisdiction in the field of fundamental rights had been established at the pan-European level which turned to be the success story of Strasbourg.

This institutional contradiction found its roots and was reflected in the bulk of legal instruments which the relatively recently-created EU citizen could invoke. In particular, national legal norms and principles (including those of a constitutional character), the European Convention of Human Rights (ECHR),

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[6] '*Détriplement fonctionnel*', as Douglas-Scott eloquently phrases it. See S. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis', *Common Market Law Review* 2006-43, p. 639.

[7] One could argue that human rights in EU law steadily gained in importance from the late 1960s. A. Von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union', *Common Market Law Review* 2000-37, pp. 1307-1338. One of the first cases (often taken as a reference point) in which the Court explicitly refers to fundamental rights are traced back to the end of the 1960s and beginning of 1970s, namely Case 29/69, *Stauder v. City of Ulm,* [1969] ECR at 419 and Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR I at 1125. Active reference to the case-law of Strasbourg started only in the mid- 1990s. For a convincing deconstruction of the 'EU fundamental rights narrative', see S. Smismans, 'The European Union's Fundamental Rights Myth', *Journal of Common Market Studies* 2010-48, pp. 45-66.

[8] For a profound analysis of the ECJ's role in mainstreaming fundamental rights in EU Law, see B. De Witte, 'Le rôle passé et futur de la cour de justice des communautés européennes dans la protection des droits de l'homme' in P. Alston, M. Bustelo & J. Heenan (eds.), *L'Union Européenne et les droits de l'homme*, Brussels: Bruylant 2001, pp. 895-935; see in particular pp. 905-920 illuminating the evolution of the Court's role *vis-à-vis* national systems, access to jurisdictions, degree of protection, and more.

[9] In this context, it is worth mentioning the Charter of Fundamental rights, the adoption of the non-discrimination directives under the former Article 13 of the EC Treaty, and the incorporation of human rights initiatives into policies such as the European Neighbouring policy (Cf., S. Douglas-Scott, op. cit. n. 6. With regard to Article 19 of the TFEU (the former Article 13 of the EC Treaty) in the light of European citizenship, see also C. Barnard, 'Article 13: Through the Looking Glass of Union Citizenship' in D. O'Keeffe and P. Twomey (eds.), *Legal Issues of the Amsterdam Treaty,* Hart: Oxford 1999, pp. 375-394.

and the *acquis communautaire* that was created pursuant to the former EU (now TEU) and EC (now TFEU) Treaties, as recently modified and reinforced in terms of fundamental rights' emphasis by the Lisbon Treaty.[10]

The specification of the range of the applicable *acquis* is important, first of all, for the internal purposes of the EU where the progress of the internal market is still a priority. The issue which demands particular attention is whether there is a clash between the economic and the fundamental (human rights) principles of the Union.[11] This clash can be analysed as an interaction between the ECtHR and the ECJ.[12] The very scrutiny of this specific interface between the ECtHR and the ECJ ('judicial dialogue') has become a popular theme in the bibliography on judicial review in the ECJ since the early 1990s.[13] This is not surprising taking into account the specificities of ECJ case-law which constantly refers to the ECHR.[14]

This specific reference to fundamental rights can also be found in numerous other domains of EU law, in particular with regard to the free movement of persons,[15] competition law,[16] and social and employment law.[17]

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[10] For a review of the applicable base after Lisbon, see S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon', *Human Rights Law Review* 2011-11, pp. 645-682.

[11] T. Hartley, *European Union Law in a Global Context,* Cambridge: CUP 2004, p.332.

[12] For a comprehensive description of the situations, where the ECtHR found jurisdiction over actions involving the EU, as well as about specific interaction between two courts, see S. Douglas-Scott, op. cit. n. 6, pp. 629-665 (in particular, 632-639).

[13] See F.G. Jacobs, 'Human Rights in the EU: the Role of the Court of Justice' *European Law Review* 2001-26, p. 331; G. De Búrca, 'Fundamental Human Rights and the Reach of the EC Law', *Oxford Journal of Legal Studies* 1993-13, pp. 283-319; D. Spielman, 'Human Rights Case Law in Strasbourg and Luxembourg Courts: Inconsistencies and Complementarities' in Alston (ed.), *The EU and Human Rights,* Oxford: OUP 1999, pp. 757-780.

[14] In the academic literature the following have been proposed: (1) a solution 'à la *Keck*' (with a symbolic parallel to the revolutionary limits established by the Court in Cases 267 and 268/91, *Keck & Mithouard* [1993] ECR I at 6097, (2) the introduction of a *de minimis* rule (exclusion from application of human rights derogation in the situations when no significant economic effect is evident), (3) *Cassis de Dijon* solution (with reference to Case 120/78, *Cassis de Dijon* [1979] ECR I at 649, where the Court elaborated a compatibility test on the basis of the restrictive effects analysis under Article 28 EC escaping from the derogation of Article 30 EC). See A. Alemanno, 'Á la recherche d'un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur: quelques réflections à propos des arrêts Schmidberger et Omega', *Revue du droit de L'Union Européene* 2004, p. 709.

[15] Especially with regard to the discussion on the role of Article 6 ECHR, which often affects third country nationals. See C. Chenevière, 'Régime juridique des ressortissants d'Etats tiers membres de la famille d'un citoyen de l'Union' in D. Hanf and R. Muñoz (eds.), *La libre circulation des personnes. États des lieux et perspectives*, Brussels: Peter Lang 2007, pp.125-144.

In order to discuss the potential for free speech as a Union value, we need to identify the legal bases for fundamental rights in the EU legal order. Nowadays within (and even outside) the EU one can distinguish, at least, eight interlinked platforms for the protection of fundamental rights. These are as follows:

- Article 6 of the Treaty on European Union (TEU) with its references to fundamental rights as guaranteed by the ECHR and by the constitutional traditions common to the Member States; such fundamental rights are described as 'general principles of the Union's law'. Article 6 of TEU was a significant achievement of the Treaty of Maastricht. The Treaty of Lisbon further reinforced the link to Strasbourg by inserting a special legal base, paragraph 2 of Article 6 of the TEU, whereby the Union shall accede to the ECHR.
- Article 19 of the Treaty on the Functioning of the European Union (TFEU,) the former Article 13 of the EC Treaty on non-discrimination.[18]
- The established case-law of the ECJ (especially with regard to a clash with the internal market).
- Human rights as an inherent part of the constitutional traditions of the Member States (the *ius commune* of human rights).[19]
- The judicial dialogue between the ECJ and the ECtHR (mostly by way of preliminary rulings).
- The general acceptance of international human rights law; (it is the EU which promotes the *instrumentalisation* of human rights under the political framework of the UN).
- The mechanism of human rights clauses *vis-à-vis* third countries.
- The Charter of Fundamental Rights.[20]

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[16] See S. De Vries, 'Public Service, Diversity and Freedom of Expression and Competition Law' *ERA* 2005, pp. 46-57.

[17] See R. Kreide, 'The Range of Social Human Rights', *German Law Journal* 2001-18 at: http://www.germanlawjournal.com/index.php?pageID=11&artID=116.

[18] See H. Meenan (ed.), *Equality Law in an Enlarged EU. Understanding the Article 13 Directives*, Cambridge: CUP 2007 and C. Barnard, op. cit. n. 9. Article 19 of the TFEU, tackling discrimination, contains an essential potential for the analysis of hate speech doctrine in Europe. For a recent perspective, offering an original 'synergetic' approach to EU non-discrimination law, see D. Kochenov, 'EU Minority Protection: A Modest Case for a Synergetic Approach', *Amsterdam Law Forum* 2011- 3, pp. 33-53.

[19] S. Douglas-Scott, op. cit., n. 6, p. 665.

[20] Following the Lisbon changes, the Charter finally entered the scope of primary EU law: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties' – Art. 6 (1) TEU.

I.2 Freedom of Expression and the EU: the Domain of Commercial Speech

Respect for freedom of expression constitutes a principle on which the EU is founded. Yet that does not automatically mean that the ECJ has full jurisdiction to assess whether a Member State has violated this fundamental right. As the Court has held on numerous occasions, it only has power to examine the compatibility of national rules that fall within the scope of EU law with fundamental rights.[21] Consequently, freedom of expression has become an issue of an adequate balance *vis-à-vis* commercial (internal market) values in Luxembourg. Some authors refer to this domain of 'EU freedom of expression' as 'commercial speech' by analogy with the American constitutional doctrine.[22]

The most quoted example is perhaps the (now) classic (academic) juxtaposition of *Schmidberger* and *Angry Farmers*.[23] In the latter case, the ECJ found a violation of the internal market provisions through an abuse of the rights to free speech and association (in the form of mass protests and blockages by French farmers against imported strawberries). Conversely, in the former case, the right to free speech and association prevailed over the internal market provisions in the situation of a protest by environmentalists against trafficking in contaminated materials through the territory of Austria. The difference lies in the nature of the proportionality test set by the Court between fundamental (human) rights and economic freedoms (free movement of goods).

Other cases where freedom of expression has (explicitly or implicitly) been at stake include the group of Luxembourg decisions dealing with advertising;[24]

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[21] See paragraph 15 of the Opinion of Maduro AG in Case C-380/05, *Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni and Direzione Generale Autorizzazioni e Concessioni Ministero delle Comunicazioni,* [2008] ECR I, at 349.

[22] See for example J. Krzemińska-Vamvaka, *Freedom of Commercial Speech in Europe*, Hamburg: Verlag R. Kovač 2008.

[23] Case 112/00, *Schmidberger v. Republic of Austria,* [2003] ECR I, at 5659 and Case 265/95, *Commission v. France* [1997] ECR I, at 443. See L. Woods, 'Freedom of Expression in the European Union', *European Public Law* 2006-12, pp. 371-401; D.W. Wyatt, 'Freedom of Expression in the EU Legal Order and in EU Relations with Third Countries' in J. Beatson and Y. Cripps (eds.), *Freedom of Expression and Freedom of Information* (Essays in Honour of Sir David Williams), Oxford: OUP 2000, pp. 205-221; A. Alemanno, op. cit. n. 14.

[24] Case 368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag,* [1997] ECR I, at 03688 [referred to in the literature as *Familiapress*] (prohibition of the inclusion of prize competitions in journals); Case 405/98, *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP),* [2001] ECR I, at 01795 [referred to in literature as *Gourmet*] (prohibition of advertising of alcoholic drinks – the potential of infringing Article 28 EC); Joint Cases 34/95, 35/95, 36/95, *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB) and TV-Shop i Sverige AB,* [1997] ECR I, at 03843 (advertising targeted for children); Case C-71/02, *Karner Industrie-Auktionen GmbH v. Troostwijk GmbH,* [2004] ECR I, at 3025 (auctioning moveable property at a sale on insolvency); Case C-412/93, *Société*

access to information (in particular consumer rights to information);[25] broadcasting;[26] the film industry;[27] public servants and EU procedures;[28] public morality issues[29] and issues of harmonisation.[30]

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d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA, [1995] ECR I*, at 00179* (ban on distribution sector advertisements); Case 249/81, *Commission v. Ireland,* [1982] ECR, at 04005 [referred to in the literature as 'Buy Irish''] (an affirmative support to Irish goods through public advertisement).

[25] *De Peijper* type of differentiation between different kinds of information (Case 104-75 , *Centrafarm BV and Adriaan de Peijper v. Winthrop BV*, [1976] ECR, at 00613 – managing director of Centrefarm prosecuted for selling pharmaceutical products without obtaining the necessary authorisations); Case 362/88, *GB-INNO-BM v. Confédération du commerce luxembourgeois,* [1990] ECR I, at 00667 (advertising in Luxembourg about price reductions in their Belgian store); Case *François De Coster v. Collège des bourgmestre et échevins de Watermael-Boitsfort,* [2001] ECR I, at 09445 [referred to in literature as *De Coster*] (a tax on installation of satellite dishes).

[26] Case 23/93, *TV10 SA v. Commissariaat voor de Media,* [1994] ECR I at 04795 (whether broadcasters established in another member state but aiming their programming at the Netherlands must comply with Dutch regulation – the AG deliberated on whether freedom of expression encompasses freedom of information); Case T-266/97, *Vlaamse Televisie Maatschapij NV v. Commission of the European Communities,* [1999] ECR II at 2329 [referred to in literature as *VTM*] (series of 'licensing cases'– absolute territorial protection conferred on the licensee, stemming from Article 85 [3] of the EC Treaty); Case 260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others,* [1991] ECR I, at 2925 [referred to in literature as *ERT*] (exclusive rights of a Greek TV & radio undertaking), the position of the European Broadcasting, Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93, *Métropole,* (Métropole I) [1996] ECR II, at 649.

[27] Joined Cases 60 and 61/84, *Cinéthèque SA and others v. Fédération nationale des cinémas français* [referred to in literature as *Cinéthèque*] (ban on a movie appearing on video until a certain time had passed; The Opinion of AG is particularly illuminating in the context of freedom of expression).

[28] (1) The assessment of the freedom of speech and privacy rationales against the Commission's right to authorize examinations and searches in the context of the suspected violation of competition law; (2) Case T-14/89, [CFI] *Montecatini SpA (formerly Montedipe SpA) v. Commission of the European Communities* [1992] ECR II, at 0249 (cartel, whose members held a number of meetings to set prices), (3) Case 273/99, *Connolly v. Commission* [2001] ECR I, at 1611 (public servant at the Commission and discloser of information).

[29] Case 159/90, *The Society for the Protection of Unborn Children Ireland Ltd v. Grogan and others,* [1991] ECR I, at 04685 [referred to in literature as *Grogan*] (controversy around the reference from Irish courts on abortion); Case 34/79, *R v. Hann and Darby,* [1979] ECR, at 3795 (pornography – public morality), Case 121/85, *Conegate Ltd. v. HM Customs & Excise* [1986] ECR, at 1007 (consignment of blow-up dolls and vacuum flasks). See U. Belavusau, 'Sex in the Union: EU law, Taxation and the Adult Industry', *European Law Reporter* 2010, pp. 144-150.

[30] *Television Without Frontiers Directive* (issues of harmonisation and free speech); *Directive on Misleading Advertising* 84/450 [1984] OJ L250; Tobacco Advertising Cases (e.g. Case 376/98, *Germany v. Parliament,* [1998] ECR I, at 2000).

The logic of both Brussels' harmonization and Luxembourg case law suggests the emergence of a positive obligation on states to facilitate freedom of expression both in terms of licensing requirements and access to airtime. The formulation of free speech as a Union value raises the question of the necessary convergence of the constitutional traditions of the Member States and of its ability to establish the existence of general principles for the assessment of freedom of expression *vis-à-vis* the rules of the internal market.

The subsequent 'harmonisation' of the right to freedom of expression thus presupposes a kind of fiction, namely the assumed convergence of the constitutional traditions of the Member States. The danger which Craig and De Búrca describe as the 'maximum standard' problem illustrates the paradox of two extremes.[31] On the one hand, we risk ignoring the progressive constitutional development of a particular Member State when considering only those rights which are 'shared by all (or most) states in the Union'. On the other, there is a danger of falling into the tyranny of the forcible imposition of a right recognised in some Member States on others through an (accidental) general principle of EU law. Similarly, how far could we stretch this fiction of 'common constitutional tradition' if for example 'picking mushrooms in the forest' was a human right in one of the Member States?[32]

Likewise, the criminal ban on certain narratives of historical revisionism or civil fines on some hate speech utterances may be pertinent only to one or several constitutional traditions; and the legislative attitude towards certain historical events may vary (for example, only France has criminalised the denial of Armenian genocide).

One of the underlying ideas behind harmonisation may be a parallel to the internal market itself, in other words, the goal of preventing racist groups from moving to countries with less restrictive legislation;[33] there may also be an intention to elaborate a common approach to the issue in negotiations on international instruments such as the Council of Europe's Cyber-Crime Convention, designed for the criminalisation of hate speech on the internet. Another rationale is the codification of the Council of Europe's approach and case law of the ECtHR at the EU level with a subsequent harmonisation requirement among Member States.

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[31] P. Craig and G. De Búrca, *EU Law – Text, Cases and Materials 4th Edition*, Oxford: OUP 2007, p. 388.

[32] J.H.H. Weiler, *The Constitution of Europe*, Cambridge: CUP 1999, Chapter 3.

[33] Point 5 in the Preamble to the Framework Decision, infra. n. 34, suggests that 'it is necessary to define a common criminal-law approach in the European Union to this phenomenon in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties are provided for natural and legal persons having committed or being liable for such offences'.

The proposal for a harmonised EU ban on hate speech appeared in 2001.[34] It took a further seven years until it was adopted under the German presidency.[35] The deliberations of the Member States perfectly illustrated the fundamental controversy of such a ban. The very wording of the Decision appears to be disproportionate as it leaves vast room for speculation and has a potentially chilling effect in its concrete clauses. Despite the fact that the proposal appeared two months after the tragedy of the Twin Towers in New York, its text illustrates that the focus was not on hate speech by Islamic radicals, but on far-right groups and the adversaries of immigration policy. The question, apart from the political rhetoric around this new Brussels instrument, is the acceptability of excluding something which has traditionally been perceived as a matter of political speech.

II. Beyond Commercial Speech: *Feryn*

II.1 Judgment

Another question which requires further consideration is the arguable shift towards a victim-centred policy with regard to fundamental rights, in contrast to one focusing on the actors. I shall exemplify this development through discussion of the *Feryn* case,[36] which on the surface dealt exclusively with non-discrimination but upon deeper analysis reveals a typical speech-effects dilemma.

The case arose in Belgium. The co-director of the Brussels firm 'Feryn', Mr. Pascal Feryn, gave an interview to a newspaper '*De Standaard*' in which *inter alia* he shared his experience in recruiting fitters to install up-and-over doors in his customers' houses:

> 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.

In the subsequent interview on Belgian national television, Mr. Feryn refuted any racist beliefs attributed to him and linked his reluctance to employ

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[34] COM (2001) 664 final, [2002] OJ C75E, submitted by the Commission on 29 November 2001. The seminal idea for criminalisation stems from the earlier Council Joint Action 96/443/JHA of 15 July 1996 concerning action to combat racism and xenophobia (OJ [1996] L185). The latter instrument is now obsolete.

[35] Council Framework Decision on Combating Certain Forms and Expression of Racism and Xenophobia by Means of Criminal Law, 2008/913/JHA. For a detailed account of the controversial history of the Decision's adoption, see M. Bell, *Racism and Equality in the European Union*, Oxford: OUP 2008, pp. 164-168.

[36] Case C-54/07*, Centrum voor gelijkheid van kansen en voor racisme bestrijding v. Firma Feryn NV*, [2008] ECR I, at 5187.

immigrants to the business rationale. He argued that it was the problem of a society which was afraid of immigrants to such an extent that customers would not use a firm's services if they realised that their alarm systems would be installed by Moroccans. An anti-racist organization, the 'Centre for equal opportunities and opposition to racism,' invoked the Race Directive as well as a national clause transposing the directive. However, the President of the *Arbeidsrechtbank* (a lower Brussels court) concluded that the public statements in question did not constitute acts of discrimination; rather, they were merely evidence of potential discrimination.

Such an attitude illustrates the core of the discriminatory speech problem, in other words, the issue of whether mere speech can constitute an act of discrimination. Maduro AG starts his Opinion with a metaphorical statement: 'contrary to conventional wisdom, words can hurt'.[37] Remarkably, he links the *performative* potential of the degrading expression to *speech acts theory* with a clear reference to Searle[38] and thus suggests the directly discriminatory effect of the speech discouragement for a job application by immigrants:

> By publically stating this intention not to hire persons of a certain racial or ethnic origin, 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'. The announcement that persons of a certain racial or ethnic origin are unwelcome as applicants for a job is thus itself a form of discrimination.[39]

Thus, paradoxically, this case on non-discrimination is perhaps the first one attributable to the realm of hate speech before the ECJ. Since there is no other evidence of direct discrimination, the discriminatory utterances, suggesting the racial, national or religious inferiority of the identifiable groups, is the only proof of labour discrimination at stake. In its decision the Court, therefore, maintains that the existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim.[40] The preventive character of the utterances – the *speech-as-performative*

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[37] Ibid, paragraph 1 of the AG's Opinion.

[38] See J.L. Austin, *How To Do Things With Words, The William James Lectures delivered at Harvard University*, Harvard: 1955; J. Searle, *Speech Acts: An Essay in the Philosophy of Language*, Cambridge: CUP 1969. 'Speech act theory' is analysed in more detail below.

[39] Opinion of Maduro AG in Case C-54/07, op. cit., n. 36, paragraph 16.

[40] It is also remarkable that the Court is willing to view the discrimination at stake as direct and not indirect discrimination, in terms of Article 2 (2) of the Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (often referred to as 'Race Directive'), thus, limiting the scope of justifications for the employer at stake.

significance of the director's interview – is sufficient to demonstrate employment discrimination.

II.2 Overcoming the Colour-Blindness of European Law?

Despite the fact that the issue of racism had received increasing prominence in EU discourse since the mid-1980s, the decision on apparently non-commercial speech in Luxembourg became practically possible because of the anti-racial developments in Brussels following the Maastricht Treaty and due to the mainstreaming of Article 19 of the TFEU. The 'Race Directive', invoked by the ECJ in relation to hate speech in *Feryn*, is an instrument adopted under Article 19 TFEU to tackle discrimination on grounds of racial or ethnic origin in employment and other fields. Two resulting issues are of particular interest for the construction of hate speech in multi-level European human rights discourse.

First, the semantic focus of the Directive on *race* as a ground of discrimination for the purposes of EU law requires further analysis. Recital 6 of the Directive's Preamble declares that the EU rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in the Directive is not to imply an acceptance of such theories. On the one hand, the wording of the recital clearly indicates that the whole reference to race is a purely rhetorical follow-up to the traditional conventions of the colour-centric ('black-and-white') non-discrimination debate. In line with the post-war ethos of universal human rights, it rejects a biological notion of race. On the other hand, this stance raises a question of how 'race' should be properly conceived for the purposes of EU non-discrimination law.[41]

By far the most obvious specificity of the contemporary European anti-racist discussion is an apparent focus on ethnicity, in conjunction with the issue of Islamophobia. In a similar mode, the Directive seems to connect racism with the current vehement discourse on immigration. For a proper assessment of hate speech as a recent new focus of fundamental rights in EU law, it is necessary to make a radical shift from an emphasis on purely racist utterances towards rhetorical practices which primarily affect migrants. The racist black-

[41] Due to the limits of the present article it is impossible to give a full account of the discussion on how 'race' should be conceived within EU anti-discrimination law. There is a long-standing debate, in particular in the UK, about how discourse on racialized minorities has mutated from 'colour' (in the 1950-1960s) via 'race' (1960-1980s) and 'ethnicity' (1990s) towards 'religion' and 'islamophobia'. See C. Peach, 'Muslims in the 2001 Census of England and Wales: Gender and Economic Disadvantage', *Ethnic and Racial Studies* 2006-29, pp. 629-655. For a legal account of socialisation and communication of race, see an original empirical study by K. Obasogie, 'Do Blind People See Race? Social, Legal and Theoretical Considerations', *Law & Society Review* 2010-44, pp. 585-610. He demonstrates that blind individuals perceive 'race' not through obvious physical difference but through 'the social processes outside of vision that constitute racial categories' perceptibility and salience'.

and-white dichotomy manifests itself in the European context through the contrast between citizens and third country nationals, titular national citizens and immigrants, old and new Member States nationals, Christians and Muslims. The dichotomy ultimately gratifies its ontological core in the word game of 'Europeans versus non-Europeans'. Along with the traditional themes of anti-Roma and anti-Semitic utterances, this dichotomy lies at the heart of contemporary hate speech in Europe.

Secondly, it is unclear what type of racism is actually addressed by the Directive. The focus on ethnicity suggests that the most relevant aspects of racism are cultural or institutional. However, is it the effect in outcomes which counts as discrimination (the numerical prevalence of 'white' employees) or a more structural vision of discrimination through a balanced analysis of different layers of social inclusion? In the latter respect, the position of migrants at different levels of the labour hierarchy (*the 3Ds*: 'dirty, dangerous and demanding'),[42] as well as in various market segments (usually essentially less prestigious and lower-paid) may diverge dramatically. Besides, the European conception of 'race' should be informed by an intersectional vision of non-discrimination, at least, between ethnicity and religion.

Finally, Maduro AG's reference to speech acts theory illuminates the development of hate speech in EU law. Discussion of the *performative* capacities of hate speech is rooted in speech acts theory, introduced by Austin (*How to Do Things with Words*) and further elaborated by Searle (*Speech Acts*), mentioned above.[43] According to this approach, certain utterances do not just 'sound' in the semiotic space of oral expressions, written texts, pictures, and songs, but perform as acts. This can bring evident consequences with legal implications (consider the role of 'I do' as a response to 'Do you agree to marry Ms. X?' during a wedding ceremony or 'Kill the nigger!' addressed to a group of skinheads, surrounding a person of African origin).[44]

This approach stimulated criticism of the US Supreme Court's *laissez-faire* attitude towards hate speech[45] by a body of American scholars, addressing themselves under the heading of *critical race theory*. They emphasised the socially constructed nature of race, considered judicial conclusions to be the result of power imbalances, and opposed the continuation of all forms of

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[42] 3Ds is an American neologism derived from an Asian concept (in particular, Japanese '*kitanai, kiken* and *kitsui*') that refers to certain kinds on non-prestigious labour, often performed by migrant blue-collar workers.

[43] Op. cit., n. 38.

[44] For the perhaps most influential analysis of hate speech through the methodology of speech acts, see J. Butler, *Excitable Speech: A Politics of the Performative*, London: Routledge 1997.

[45] I address in detail the epistemological difference in American and Strasbourg approaches to hate speech, in U. Belavusau, 'Judicial Epistemology of Free Speech Through Ancient Lenses', *International Journal for the Semiotics of Law* 2010-23, pp. 165-183.

subordination. Appearing in the 1980s, this body of scholarship is usually classified as a branch of postmodern legal movements or critical legal studies concerned with issues of power and discrimination (in particular, gender, sex, and colour). An important feature of the critical race theory narratives is an emphasis on victimhood as a contextual construct. Hate speech does act and does discriminate when experienced through the lens of a marginalised community. To reveal this context of victimhood, omitted by the positivists, critical race theorists evoke a series of rhetorical practices which deconstruct legal texts through the narration of victim stories, the history of racial segregation, poetry and songs, quotations and interviews.

In a somewhat similar mode, Maduro AG starts his opinion with the rhetorically powerful utterance 'despite the conventional wisdom, words hurt', implicitly echoing the title of by far the most cited collection of articles produced by critical race theorists with regard to hate speech, 'Words that Wound'.[46] The decision in *Feryn* may turn out to be an important catalyst for what can be loosely called 'European critical race theory'. It may, thus, be heuristically fruitful to rationalise the ambiguous semantics of the word 'race' in the Race Directive through the rhetorical evocation of the contextual specificities of European 'racism'. The methodologies of the revelation of the victim-stories (by the communities of Afro-, Latin-, Asian- and Native-Americans) can be successfully transplanted for the deconstruction of European 'colour-blindness' with regard to migrants, Muslims, and the Roma community. *Feryn* therefore sends out an encouraging signal for the application of the Race Directive, whose Article 11 places an emphasis on the promotion of social dialogue between the two sides of industry with a view to fostering equal treatment, including the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experience and good practices. It is important to conceive *Feryn* beyond a Belgian story of an abstract employer making frivolous remarks against a marginalized community (*discrimination à l'embauche*). *Feryn* is foremost the failure of a Member State to safeguard a proper social dialogue, which shines a light on otherwise hidden aspects of ethnic segregation within a national labour market.

Conclusions

The contextualisation (via the rhetorical narration of victim stories) of discrimination on racial and ethnic grounds has been given a new potential in the light of the recent post-Lisbon changes. The prospect of the Union's

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[46] M.J. Matsuda et al (eds.), *Words that Wound. Critical Race Theory, Assaultive Speech, and the First Amendment*, Boulder: Westview Press 1993. For an account of critical race theory and its potential applicability in European law, see also U. Belavusau, 'Instrumentalisation of Freedom of Expression in Postmodern Legal Discourses', *European Journal of Legal Studies* 2010-3, pp. 145-167; M. Möschel, 'Race in Mainland European Legal Analysis: Towards a European Critical Race Theory', *Ethnic & Racial Studies* 2011-3, pp. 1648-1664.

accession to the ECHR makes the issue of non-commercial speech (in particular, hate speech) in EU law directly dependent on the mainstream vision in Strasbourg. Together with the constitutional traditions of the EU Member States, the ECJ and the ECtHR have become the locomotives of what might well be called a 'European First Amendment'. In a series of hate speech cases, the ECtHR has recently confirmed its unwillingness to interfere with the states' margin of appreciation. Vehement anti-immigration utterances, the glorification of terrorism, and the disruption of ethnic peace are thus all left to the Member States' margin of appreciation.[47] Similarly to the ECtHR judgments, the first hate speech case to reach the ECJ came via a group claim, brought by an anti-racist organization. Consequently, discrimination was recognized as transcending individual harm and was understood in terms of community exclusion. However, an important detail to mention is that the organization which brought the claim before the ECJ (the *Centrum voor gelijkheid van kansen en voor racismebestrijding*) was also a body established under Article 13 of the EU 'Race Directive'. On the one hand, the Directive obliges the Member States to set up such a body, addressing discrimination on the national level. On the other hand, it leaves the decision on the procedural capacities of such bodies before national courts up to a Member State. The 'success story' of the Belgian case can be attributed to this active procedural role, created for the non-discrimination authority in Belgium. In other EU countries it may be more difficult to bring an analogous group claim before the courts. Finally, in the majority of EU states a constitutional dialogue at the national level does not appear friendly to any radical change, in line with a broad American perception of the marketplace of ideas.[48] Thus, hate speech becomes a multi-level exception to the realm of a 'European First Amendment', embracing a traditional post-war *ethos* of militant non-racism[49] and a newer *telos* of the peaceful integration of migrants.

[47] For a detailed review of recent ECtHR judgments on hate speech, see U. Belavusau, 'A Dernier Cri from Strasbourg: An Ever Formidable Challenge of Hate Speech', *European Public Law* 2010- 16, pp. 373-389.

[48] Unlike in the USA, where the US Supreme Court and federal courts have been taking a very libertarian position with regard to hate speech, the national constitutional approach in EU Member States has been traditionally unsympathetic towards racially motivated hate speech. The punitive measures against right-wing politicians in France, Belgium, and the Netherlands (e.g., against Jean-Marie Le Pen, Daniel Féret, and Geert Wilders) are perhaps the most vivid examples of the recent feedback of national courts on hate speech. Only the controversial 2011-Dutch judgement took a more pro-expression position *vis-à-vis* hate speech, in Wilder's case (*Rechtbank Amsterdam*, 23 June 2011).

[49] The so-called 'militant democracy' (*Streitbare Demokratie*) is a popular Germanic concept, designed as a remedy to prevent a repeat of the Weimar Republic's failure to react effectively to an authoritarian threat to a free democratic order (*freiheitlich-demokratische Grundordung*).

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