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.”

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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 of expression versus hate speech, fundamental rights versus the peculiarities


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). 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. 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. In the middle of the 1950s, one could seriously doubt that European integration would reach these horizons, 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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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.\textsuperscript{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.\textsuperscript{11} This clash can be analysed as an interaction between the ECtHR and the ECJ.\textsuperscript{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.\textsuperscript{13} This is not surprising taking into account the specificities of ECJ case-law which constantly refers to the ECHR.\textsuperscript{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,\textsuperscript{15} competition law,\textsuperscript{16} and social and employment law.\textsuperscript{17}


\textsuperscript{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).


\textsuperscript{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, ‘À la recherche d’un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur: quelques réflexions à propos des arrêts Schmidberger et Omega’, Revue du droit de L’Union Européenne 2004, p. 709.

\textsuperscript{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’États 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.

- 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).

- 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.

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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. 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.

The most quoted example is perhaps the (now) classic (academic) juxtaposition of Schmidberger and Angry Farmers. 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;

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.


access to information (in particular consumer rights to information); broadcasting; the film industry; public servants and EU procedures; public morality issues and issues of harmonisation.


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).


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. 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?

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; 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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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: 

\textit{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 \textit{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 ‘\textit{De Standaard}’ in which \textit{inter alia} he shared his experience in recruiting fitters to install up-and-over doors in his customers’ houses:

\begin{quote}
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.
\end{quote}

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


\(^{36}\) 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 Searle38 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.
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 ECI 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’), 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. 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).

This approach stimulated criticism of the US Supreme Court’s laissez-faire attitude towards hate speech 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.
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.
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’. 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

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. 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.

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 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 Grundordnung).
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