



Strasbourg, 12 June 2015

CDL-JU(2015)013
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**14th meeting of the Joint Council
on Constitutional Justice**

MINI-CONFERENCE ON

**“BLASPHEMY AND OTHER LIMITATIONS TO THE
FREEDOM OF EXPRESSION”**

Bucharest, Romania

12 June 2015

**“Blasphemy and other limitations to the freedom of expression in the
case law of the European Court of Human Rights”**

REPORT BY

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1. Introductory comments

In modern societies characterised by a variety of cultures, religions and lifestyles, it has become increasingly necessary to reconcile the right to freedom of expression with other fundamental rights, such as the right to freedom of religion, the right to protection of reputation or the right to be free from discrimination.

This reconciliation can become a source of problems, because all of the aforementioned rights are fundamental elements of a “democratic society” and most of them are expressly protected by the European Convention on Human Rights as well as other international instruments.

The European Court of Human Rights has time and again affirmed that freedom of expression guaranteed under Article 10 constituted one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. But however vast the scope of freedom of expression, it is not an absolute right. The exercise of this freedom carries with it certain duties and responsibilities and is subjected to certain restrictions as set out in Article 10 (2) ECHR, in particular those that concern the protection of the rights of others.

Several rights, equally protected by the Convention, can compete in this regard. The right to freedom of expression can for instance be limited by the right to freedom of thought, conscience or religion. Confronted with attacks on religious beliefs the European Court of Human Rights has highlighted that the question involves “balancing the conflicting interests that result from exercising those two fundamental freedoms: on the one hand, the applicant’s right to communicate his or her ideas on religious beliefs to the public, and, on the other hand, the right of other persons to respect of their right to freedom of thought, conscience and religion.” In some circumstances, freedom of expression can also be a threat to the right to respect of privacy or reputation. And, finally, there is the risk of conflict between freedom of expression and the interdiction of all forms of discrimination in those cases where exercising this freedom is used to incite hatred and shows the characteristics of “hate speech”.

In my presentation today I will concentrate on issues of blasphemy and hate speech in the jurisprudence of the ECHR.

2. Blasphemy

Already in its early case-law (*Wingrove v. the United Kingdom*) the Court observed that blasphemy legislation was still in force in various European countries, notwithstanding the fact that application of those laws had become increasingly rare and that several States had repealed them entirely. The Court concluded that there wasn’t sufficient common ground (“European consensus”) in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State could impose restrictions on the propagation of materials on the basis that it was blasphemous would, in itself, be unnecessary in a democratic society and thus incompatible with the Convention.

As the Court has held since 1976 and its landmark *Handyside* judgment, Article 10 applies to all sorts of ideas and information, even those that offend, shock or disturb the State or any sector of the population. Nevertheless those who exercise the freedom of expression undertake certain duties and responsibilities. (In *Klein v. Slovakia*) the Court highlighted that “those duties and responsibilities – in the context of religious opinions and beliefs – may legitimately include an obligation to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane.”

Given that there was no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions in the various European States, the Court leaves the States a rather wide margin of appreciation in matters of religious insult. This was particularly evident in its early case-law which seemed to show a greater degree of tolerance towards limitations of freedom of expression for reasons of offending religious feelings of part of the population.

In one of its leading cases on the matter, *Otto-Preminger-Institut v. Austria* (no. 13470/87) 20.9.1994, the Court concluded that seizure of a movie containing “[t]rivial imagery and absurdities of the Christian creed in a caricatural mode” which “investigated the relationship between religious beliefs and worldly mechanisms of oppression” had been justified. Noting the provocative portrayal of God, the Father, the Virgin Mary and Jesus Christ and taking into account that the overwhelming majority of local population in Tirol was Roman Catholic, the Court accepted the national courts’ assessment and found no violation of Article 10.

In *Wingrove v. the United Kingdom* (no. 17419/90) 25.11.1996 the applicant’s movie was refused a classification certificate by the British Board of Film Classification on the basis that it “depicted the mingling of religious ecstasy and sexual passion... presenting the wounded body of the crucified Christ solely as the focus of, and at certain moments a participant in, the erotic desire of St Teresa with no attempt to explore the meaning of the imagery beyond engaging the viewer in an erotic experience”. The Board concluded that a reasonable and properly directed jury would find that the work infringes the criminal law of blasphemy.

The Court recalled that the margin of appreciation when regulating freedom of expression relating to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion, was wider than, for example, with regard to restrictions on political speech or on public debates. What is likely to cause substantial offence to persons of a particular religious persuasion might vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. The Court considered national authorities to be in a better position to determine what was necessary in such a case which did not, of course, exclude final European supervision. Given the content of the video, the Court did not find the national authorities’ decision to be arbitrary or excessive. As a result, it found no violation of Article 10.

In *İ.A. v. Turkey* (no. 42571/98) 13.9.2005 a publisher of a novel was convicted for blasphemy against “God, the Religion, the Prophet and the Holy Book”. The wording of his novel was quite severe, one of the passages stating: *“Muhammad did not forbid sexual intercourse with a dead person or a live animal.”* The Court found that the measure which had been taken by the national authorities in relation to the statements at stake was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. Considering all the relevant aspects of the case, the interference complained of could reasonably have been considered as meeting a pressing social need and the margin of appreciation was not overstepped as the reasons presented for the measure were

relevant and sufficient. Lastly, the insignificant fine imposed on the applicant was proportionate to the aim pursued by the national authorities.

In more recent cases, presumably for fear of downgrading the standard of protection of free speech, pursuant to some authors the Court seems to have taken a more audacious stance. Instead of basing its assessment to subjective feelings of followers of a specific religion, the emphasis has shifted to a more objective evaluation of the public sentiment.

In *Klein v. Slovakia* (no. 72208/01) 31.10.2006 a journalist strongly criticized the Archbishop who had protested against the display of a poster for the movie “The People vs. Larry Flynt” as being profane. The Court noted that the applicant’s criticism was directed at the Archbishop following his call for the withdrawal of the film in question and the accompanying poster. The applicant’s article was aimed at intellectually-oriented readers and a limited amount of copies were published. Moreover, the applicant’s strongly worded pejorative opinion related exclusively to the Archbishop and his statements did not discredit an entire sector of the population on account of their faith. Consequently the publication did not interfere with other persons’ right to freedom of religion in a manner justifying the sanction imposed on the applicant and Article 10 had been violated.

In *Giniewski v. France* (no. 64016/00) 31.1.2006 the applicant was convicted for defaming the Christian community in an article he had published on Pope John Paul II’s book essentially accusing it of “containing the seeds of anti-Semitism”. The Court considered that the applicant aimed at developing an argument about the scope of a specific doctrine and its possible links with the origins of the Holocaust, thereby making a contribution to a wide-ranging and ongoing debate without sparking off any controversy that was gratuitous or detached from the reality of contemporary thought. The text may have contained conclusions and phrases which might offend, shock or disturb some people; nevertheless, such views did not in themselves preclude the enjoyment of freedom of expression. Moreover, the article in question was not “gratuitously offensive” or insulting (in contrast to *I.A. v. Turkey*), and did not incite disrespect or hatred or cast doubt in any way on clearly established historical facts. The interference had thus not been necessary in a democratic society and Article 10 had been violated.

As regards the famous caricatures of the Prophet Muhammad published in a Danish newspaper in 2005, particularly the one where he was shown with a bomb in his turban, a Moroccan national and two Moroccan associations had complained to the Court against Denmark about the publication of those cartoons. However, their case was declared inadmissible on the basis that the applicants were not within the jurisdiction of Denmark in accordance with Article 1 of the Convention (*Ben el Mahi and others v. Denmark* (no. 5853/06) 11.12.2006). As a result, the Court did not have to elaborate on a clear concept of insult to a religion and the dividing line between on the one hand art which might be offensive to a religious community, but could still be considered legitimate under Article 10, and on the other hand matters which are likely to incite religious hatred and would, therefore, not be considered legitimate under the same Article.¹

¹ Rainey, B., Wicks, E. and Ovey, C. “Jacobs, White, & Ovey, the European Convention on Human Rights” (Oxford University Press, Oxford, 2014, 6th ed.), p.458.

3. Hate speech

a. General

This brings us to the second group of cases I would like to speak about today, which are in my view closely linked to the cases discussed previously – those concerning “hate speech”. Despite its frequent usage, there doesn’t seem to be a universally accepted definition of the term “hate speech”.

Even though the ECHR has never given a precise definition of the term, it has always affirmed that “it was particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations.” It emphasised in various judgments “that tolerance and respect for dignity of all human beings constituted the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued.” The challenge that the authorities must face is therefore to find the correct balance between the conflicting rights and interests at stake.

Finally, the ECHR considers “hate speech” to be an «autonomous» concept and is therefore not bound by the domestic courts classification. As a result, the ECHR can sometimes rebut classifications adopted by national courts or, on the contrary, classify certain statements as “hate speech”, even when domestic courts have not done so.

The concept of “hate speech” can encompass a multitude of situations.

Firstly, it can concern incitement of racial hatred or hatred on religious grounds. But it can also include homophobic speech and incitement to all other forms of hatred based on intolerance.

Generally speaking, when faced with a conflict between the right to freedom of expression and another right guaranteed by the Convention, the European Court has two options.

Firstly, the Court can decide to completely exclude the expression in question from the protection offered by the Convention, by applying Article 17 of the ECHR which prohibits to any State, group or person performance of any act with the aim of destroying any of the rights and freedoms contained in the Convention. As will be shown below, this first option has been frequently – even though not exclusively – used in cases of hate speech.

On the other hand, the Court can also assess whether a restriction of freedom of expression is legitimate by applying Article 10 (2) of the ECHR.

We will now look at these two options in more detail and see how they were applied in practice.

A. Application of Article 17 ECHR

a) Totalitarian doctrine contrary to the Convention

The European Commission of Human Rights applied Article 17 for the first time – and in a broad interpretation – in the context of the Cold War, in its decision on *Communist Party (KPD) v. the Federal Republic of Germany*, considering that the establishment of “the communist social order by means of a proletarian revolution and the dictatorship of the proletariat” was contrary to the Convention. Although the political activities employed by this party at the time of its appeal had been constitutional, the Commission concluded that it had not renounced its revolutionary goals. In the following decades, the Convention bodies repeatedly affirmed that National Socialism was a totalitarian doctrine incompatible with democracy and human rights and that its adherents undoubtedly pursued aims of the kind referred to in Article 17. Accordingly, any activity inspired by National Socialism would be considered incompatible with the Convention.

b) Negationism

Article 17 has also been applied to prevent freedom of expression from being used to promote revisionist or negationist statements. Negationism is a specific category of racist comments since it both constitutes a denial of crimes against humanity – meaning here the Nazi Holocaust – and an incitement to hatred against the Jewish community.

On this subject, the European Court stated in *Lehideux and Isorni v. France* that “like any other remark directed against the Convention’s underlying values ..., the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10.” In other words, there was a category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17. The concrete case which concerned the convictions of the publication manager of *Le Monde* and the author of an article about a historical French figure from WWII was found, however, not to fall within that category. In this case, the applicants did not deny or revise clearly established historical facts, but supported the conflicting “double game” theory in the debate about the role of the protagonist of the article who had been accused of Nazi collaboration. The Court noted that more than forty years had passed since the relevant events and that the applicants’ criminal convictions were disproportionate and unnecessary in a democratic society.

In *Garaudy v. France* the Court applied for the first time the principles outlined above to demonstrate the inadmissibility *ratione materiae* of an Article 10 complaint for abuse of rights. It noted that in his book on Israeli politics the applicant questioned the reality, extent and seriousness of historical events such as the persecution of the Jews by the Nazis, the Holocaust and the Nuremberg Trials which were clearly established historical events. The applicant systematically denied the crimes against humanity perpetrated by the Nazis. As a result, his book could not be considered to constitute historical research to determine the truth. Instead, its aims were revisionist and ran counter to justice and peace as expressed in the Convention. The applicant did not limit himself to political criticism of the State of Israel, but pursued a proven aim of racism. In accordance with Article 17, the applicant could therefore not rely on the protection provided for under Article 10.

c) Racial hate speech

The European Court further had recourse to Article 17 when the right to freedom of expression was invoked to incite hatred or racial discrimination, the “classic” cases of hate speech. So, for example, the Convention organs have made use of Article 17 to oppose applicants who had made manifestly racist statements constituting racial “hate speech” in for instance *Glimmerveen and Hagenbeek v. the Netherlands*, where the applicants had been convicted for possessing leaflets addressed to “White Dutch people”, which tended to make sure notably that everyone who was not white left the Netherlands.

The Court has firmly reiterated its position on the subject in a number of occasions. In *Jersild v. Denmark* concerning an interview made by a group called the Greenjackets, there was no doubt for the Court that “the remarks in respect of which the group were convicted ... were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10.” However, the case before the Court actually concerned the journalist who had merely conducted an interview with the members of the said group, the aim of which was not racist but rather informative – to expose, analyze and explain this particular group of youths. The Court ultimately found a violation of Article 10 of the Convention for conviction of the journalist because he had conducted the said interview.

The Court applied Article 17 for the first time with regard to an attack directed at a religious community in the case of *Norwood v. the United Kingdom* in which the applicant had been convicted for having displayed in his window a large poster of the British National Party showing a photograph of the Twin Towers in flame, with the words “Islam out of Britain – Protect the British People” and the symbol of a crescent and star in a prohibition sign. The Court found that “such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, had been incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant’s display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14.

In the case of *Pavel Ivanov v. Russia*, the Court concluded that the applicant could not benefit from the protection of Article 10, as the publications of which he was the author, and which had led to his conviction by the domestic courts, were aimed to incite hatred towards the Jewish people and were therefore in contradiction with the Convention’s underlying values.

Confronted with a clearly racist statement, the Court will therefore exclude it from the protection of Article 10 of the ECHR. Direct recourse to Article 17 nevertheless rare, since the Court sometimes prefers to use this provision indirectly as a “principle of interpretation” in order to assess whether restrictions on freedom of expression are necessary, in cases of comments which leave room for doubt. In such cases, “the Court will begin condering question of compliance with Article 10, whose requirements it will however assess in the light of Article 17.”

B. Examination of proportionality under Article 10-2

The application of Article 17 in practice remains rather rare. The second – and perhaps safer – option for the Court when confronted with cases of conflict of rights, including those concerning “hate speech”, is to conduct a proportionality analysis under paragraph 2 of Article 10 using Article 17 as a “principle of interpretation” in order to assess whether restrictions on freedom of expression were necessary.

This methodology might also prevent States from slipping into abusive recourse to Article 17. Indeed, the Court might sometimes disagree with the domestic authorities’ classification of a given expression.

For example, in *Leroy v. France* (no. 36109/03) 2.10.2008 the applicant was a cartoonist who had published, two days after the attack on the World Trade Centre, a drawing representing the attack with the caption "We have all dreamt of it... Hamas did it". The Court found at the outset that the impugned form of expression did not fall under Article 17 of the Convention as opposed to the findings of the national court. The applicant did not try to convey the negation of fundamental rights and the message could not be equated with racist, anti-Semitic or Islamophobic remarks going directly against the values underpinning the Convention. Furthermore, the drawing could not be seen as an unequivocal attempt to justify terrorist acts. Instead, the Court found that the case had to be examined on the merits. Accepting that cartoons and caricatures involved artistic expression and could be provocative, it considered that the applicant's drawing did not merely "criticize American imperialism" as intended by the applicant, but supported and glorified its violent destruction, expressed approval of the violence applied and undermined the dignity of the victims. Granting particular importance to the timing of the publication as well as the political sensitivity of the Basque region where it had been published, the Court found no violation of Article 10.

Instead of applying Article 17, the Court as examined the merits of cases concerning possible hate speech on a number of occasions.

For instance, in *Balsytė-Lideikienė v. Lithuania* (no. 725896/01) 4.11.2008 it examined a complaint of a publisher of a so-called "Lithuanian calendar" which was found insulting for persons of Polish, Russian and Jewish origin. In the domestic proceedings, two experts held that the calendar was promoting "the radical ideology of nationalism which rejected the idea of the integration of civil society, incited ethnocentrism, contained xenophobic and offensive statements, in particular with regard to the Jewish and Polish populations, and promoted territorial claims and national superiority vis-à-vis other ethnic groups". The Court found no violation of Article 10 on account of the administrative penalty and confiscation of the said publication ordered by the domestic authorities.

Another good example of this type of analysis is to be found in *Féret v Belgium* (no. 15615/07) 16.7.2009, where the applicant, president of extreme right-wing party, had been for inciting the public to discrimination and racial hatred in leaflets distributed during the party's electoral campaign. The writings included slogans such as "Stand up against the Islamification of Belgium", "Stop the sham integration policy" and "Send non-European job-seekers home". Non-European immigrant communities were presented as criminally-minded and as intending to exploit the benefits from living in Belgium. The applicant was sentenced to 250 hours' community service together with a 10-month suspended prison sentence and a declared ineligibility for 10 years. Concerning the necessity of the impugned measure, the Court noted that the relevant statements unavoidably led to feelings of disrespect, rejection and hatred against foreigners in the public. The national court held that even though the statements might have not led to an incitement of violence, they at least incited to discrimination, segregation or hatred towards a group, a community or their members on the basis of their race, colour, national or ethnic origin.

73. La Cour estime que l'incitation à la haine ne requiert pas nécessairement l'appel à tel ou tel acte de violence ou à un autre acte délictueux. Les atteintes aux personnes commises en injuriant, en ridiculisant ou en diffamant certaines parties de la population et des groupes spécifiques de celle-ci ou l'incitation à la discrimination, comme cela a été le cas en l'espèce, suffisent pour que les autorités privilégient la lutte contre le discours raciste face à une liberté d'expression irresponsable et portant atteinte à la dignité, voire à la sécurité de ces parties ou de ces groupes de la population. Les discours politiques qui incitent à la haine fondée sur les préjugés religieux, ethniques ou culturels représentent un danger pour la paix sociale et la stabilité politique dans les Etats démocratiques.

[Additionally, with regard to the specific circumstances, the Court recalled that there existed a crucial importance for politicians not to disseminate statements that could nourish intolerance. The incitement to the exclusion of foreigners constituted a fundamental breach to the rights of individuals and should, therefore, require particular precautions to be taken also by politicians. The Court also attached particular importance to the ways and circumstances in which the statements had been disseminated and to their potential impact on the public order and the cohesion in this social group. Since those were statements made by a political party before elections they tended to become more rigid and stereotype formulas become more powerful than reasonable arguments.]

Consequently, the Court found that the interference had been necessary in a democratic society and that no violation of Article 10 had taken place.

As regards cases of hate speech based on religious intolerance, a good example of the Court's balancing exercise can be found in *Gündüz v. Turkey* (no. 35071/97) 4.12.2003. In that case the applicant, a leader of an Islamic sect appeared in a TV program broadcast live on an independent channel and shared his opinions, including that democratic values were incompatible with its conception of Islam, a matter which constituted a problem of general interest at the material time. His statements included the following: '*anyone calling himself a democrat, secularist ... has no religion ... Democracy in Turkey is despotic, merciless and impious [dinsiz] ... This secular ... system is hypocritical.* He was ultimately convicted to two years' imprisonment and a fine for statements inciting hatred and hostility on the basis of a distinction founded on religion. *What* had to be established was whether the national authorities rightly determined the statements made by the applicant as "hate speech". The Court highlighted the weight that needs to be attached to the fact that the applicant was actively participating in a lively public discussion and considered that the mere fact of defending sharia, without calling for violence to establish it, could not be regarded as "hate speech". Consequently, there had been a violation of Article 10.

In *Soulas and Others v. France* (no. 15948/03) 10.7.2008 the applicants were convicted for inciting hatred and violence against Muslim communities through the publication of the book "The colonization of Europe – Truthful remarks about immigration and Islam". The Court recalled at the outset that this case related to issues of general interest being problems related to the integration of immigrants in their country of reception. It especially concerned France as it was a country which had received a great number of immigrants over the years. The impact that politics had in this area can depend on several aspects such as history, demography and culture and the domestic authorities enjoyed a wide margin of appreciation in this field as they knew best about the actual situation and problems in their states. In assessing the relevant text, the Court noted that it was written in a simple and clear style common to newspaper articles and included an analysis of the situation, proposals and their possible effects and an outlook of the future. The authors tried to show that the Islam was embarking on a hostile conquest of France and of Europe and saw it as an upcoming event which might be worse than the big plagues and wars that have taken place in Europe. Several passages of the book presented a negative image of the communities at stake as were written in a polemical style presenting the effects of immigration as leading to a catastrophe. The national court of appeal has highlighted that the proposals made in the book aim at provoking feelings of rejection and antagonism in the reader and to agree with the authors' solution found being a war of ethnic recapture. The Court found that the national authorities had not exceeded their margin of appreciation and found no violation of Article 10.

And finally, in *Vejdeland and others v. Sweden* the applicants were convicted of agitation against a national or ethnic group after leaving homophobic leaflets in pupils' lockers at an upper secondary school. The Court agreed with the Supreme Court that, even if the applicants' aim of starting a debate about the lack of objectivity of education in Swedish schools had been acceptable, it was necessary to have regard to the wording of the leaflets,

which stated that homosexuality was a “deviant sexual proclivity”, had “a morally destructive effect” on society and was responsible for the development of HIV and AIDS. The leaflets further alleged that the “homosexual lobby” had tried to play down paedophilia. Even though they made no direct call for violence, these were serious and prejudicial allegations. While acknowledging the applicants’ right to express their ideas, the Supreme Court had found that the statements made in the leaflets were unnecessarily offensive. It had further emphasised that the applicants had imposed the leaflets on the pupils by leaving them in or on their lockers. The European Court noted that the pupils had been at an impressionable and sensitive age and that the distribution of the leaflets had taken place at a school which none of the applicants attended and to which they did not have free access. None of the applicants were given an immediate custodial sentence and the sentences they received were not excessive in the circumstances. There had therefore been no violation of Article 10 in the present case.

Conclusion

In conclusion, it is evident from the above examples that – as with many things in life – there is no black and white solution to cases of conflict of freedom of expression with other fundamental rights.

In the context of religious beliefs, the Court seems to accept that some expressions which might be “shocking” and “offensive” should not be restricted, provided, however, that:

- these expressions are not gratuitously offensive;
- the insulting tone does not directly target specific believers;
- these expressions are insulting neither for believers nor with respect to sacred symbols;
- they do not attack believers rights to express and practice their religion, and do not denigrate their religious faith;
- in particular, they do not incite disrespect, hatred or violence.

Indeed, the Court has shown a very low threshold of acceptance for any expression inciting to any sort of racism or other forms of intolerance. In its most severe forms frequently related to cases of “hate speech”, such expression may be excluded from the application of Article 10 altogether. More traditionally the Court will examine such complaints under Article 10-2 ECHR bearing in mind the need to protect the underlying values of the Convention and protect any abuse of rights as stated in Article 17.