

European Court of Human Rights – European Judicial Training Network
Seminar on Human Rights for European Judicial Trainers

Strasbourg, Human Rights Building
Tuesday 3 September 2013

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**When to say is to do
Freedom of expression and hate speech in the case-law
of the European Court of Human Rights ***

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Françoise Tulkens
Former Judge and Vice-President of the European Court of Human Rights

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Introduction

1. Hate speech is, without any doubt, a paradigmatic situation where significant epistemological differences can be observed between the European Court of Human Rights, informed by the tragic experience of World War II, and the US Supreme Court, motivated by the safeguard of the “market of ideas”¹. The dominant doctrine “there is no truth, but only a competition of ideas” seems far from the European Cartesian conception of evidential truth². More generally and in a nutshell, the European Convention on Human Rights is rooted in a tradition that is more concerned with balancing private and public interests, protecting the equality and dignity of all citizens and ensuring that the attributes of democratic government are preserved.

2. The *Erbakan v. Turkey* judgment of 6 July 2006 reflects the essence of the European Court of Human Rights’ position today: “[T]olerance and respect for the equal dignity of all human beings constitute 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”³.

¹. This paper is partly based and expands on: Fr. TULKENS, “When to say is to do Freedom of expression and hate speech in the case-law of the European Court of Human Rights”, *Freedom of expression. Essays in Honour of Nicolas Bratza*, Oisterwijk, Wolf Legal Publishers, 2012, pp. 279 et seq.

¹. “Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition ... But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas ... that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution” (dissenting opinion of Justice Holmes in *Abrams v. United States*, 250 U.S. 616 (1919)).

². Cf. U. BELAVUSAU, “Judicial epistemology of free speech through ancient lenses”, *International Journal for the Semiotics of Law*, 2010, pp. 165 et seq.

³. Eur Court H.R., *Erbakan v. Turkey*, judgment of 6 July 2006, § 56.

3. When dealing with incitement to hatred and freedom of expression, the European Court of Human Rights uses two approaches: the broader approach of *exclusion* from the protection of the Convention provided for by Article 17 which prohibits the abuse of rights, and the narrower approach of *restrictions* on protection provided for by Article 10, paragraph 2, of the Convention which is, as we know, a qualified right, i.e. a right to relative protection. "What is the significance of using Article 17 instead of Article 10? The result is an absence of a balancing process. Article 10 cases take the right to freedom of expression in Article 10 § 1, and weigh this against the interests in Article 10 § 2. (...) There is no such balancing process under Article 17; speech is restricted solely because of its content."⁴ I will touch upon both these approaches (II and III), but first I want to define some aspects of the context (the background) in which the case-law of the Court operates in this area (I).

I. The background

4. When the European Court of Human Rights finds itself confronted with hate speech, it must build its case-law in the (relative) absence of international anchors and texts. In fact, at the universal level, only Article 20 of the International Covenant on Civil and Political Rights provides that "[a]ny advocacy of national, racial or religious hatred ... shall be prohibited by law", while at the regional level, only the American Convention on Human Rights of 22 November 1969 explicitly prohibits hate speech in its Article 13 § 5 concerning freedom of thought and expression. Against this background, the European Court of Human Rights is called upon to develop a "constructive case-law"⁵, linked to the conceptions that prevail today in democratic societies and to the evolution of European law in relation to incitement to hatred.

5. As we know, the European Court of Human Rights does not generally use precise definitions, whether in relation to the concepts set out in Article 10 of the Convention or in relation to extraneous concepts such as hate speech, even though there seems to be a consensus on a definition of this concept within the Member States of the Council of Europe⁶. Indeed, the 1997 Recommendation of the Committee of Ministers on hate speech states that this term "shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin"⁷. The Court, of course, does not overlook this definition and in one recent judgment even expressly referred to it⁸. But this recognition does not call into question the approach of the Court, which prefers to

4. D. KEANE, "The innocence of satirists: will caricatures of the Prophet Mohammad change the ECHR approach to hate speech?", www.ejiltalk.org, 26 September 2012.

5. Cf. G. COHEN-JONATHAN, "Le droit de l'homme à la non-discrimination raciale", *Rev. trim. dr. h.*, 2001, p. 679.

6. See M. OETHEIMER, "La Cour européenne des droits de l'homme face au discours de haine", *Rev. trim. dr. h.*, 2007, pp. 63 et seq.

7. Recommendation no. R (97) 20 of the Committee of Ministers to the Member States on "hate speech", adopted by the Committee of Ministers on 30 October 1997, at the 607th meeting of the Ministers' Deputies.

8. Eur. Court H.R., *Gündüz v. Turkey*, judgment of 4 December 2003, § 22.

analyse each case submitted to it on its own merits and to ensure that its reasoning – and its case-law – is not confined within definitions that could limit its action in future cases. In addition, the Court favours the use of an autonomous conception of certain notions. The case-law relating to hate speech exemplifies this kind of approach.

6. Finally, as E. Delruelle has rightly pointed out, this entire matter is dominated by an aporia which creates some misunderstanding in public debate. Democracy is grounded on freedom of opinion and expression and therefore it is impossible to prohibit incitement to hatred without interfering with this freedom. But another hypothesis can be formulated. Admittedly, in a democracy, a person may not be incriminated on the basis of an opinion, but only on the basis of behaviour, of an act. Does this mean that words cannot be subject to any restrictions? No. When we consider matters from this perspective, the focus shifts. The question is no longer what types of opinions or expressions are lawful or not, but which speech acts are compatible with democracy and which are not. When it is found to have occurred, hate speech is an act and not only an opinion⁹.

II. Article 17 of the Convention and abuse of rights

7. Little used (or misused) a few years ago¹⁰ – to the extent that some were even questioning its value¹¹ – Article 17 of the Convention has resurfaced in some recent rulings of the Court. “No freedom for the enemies of freedom”, proclaimed Saint-Just; or, to take up the comment by J. Rawls, “justice does not require that men must stand idly by while others destroy the basis of their existence”¹².

A. A disqualification measure

8. As analysed by M. Oetheimer, this provision is aimed at “withdrawing from those who wish to use the Convention’s guarantees the benefit of those rights because their aim is to challenge the values that the Convention is protecting”¹³. In other words, it is a deprivation of the protection afforded by the Convention for those who are found to have used the rights guaranteed by the Convention for liberticidal purposes¹⁴. In the *Lawless (no. 3) v. Ireland* judgment of 1 July 1961 the Court set out, for the first time, that “the purpose of Article 17, insofar as it refers to groups or to individuals, is to make it

⁹. E. DELRUELLE, “Introduction”, *L’incitation à la haine : “Quand dire, c’est faire” - Approche pragmatique de la liberté d’expression*, Seminar organised by the Centre for Equal Opportunities and Opposition to Racism (Brussels, 25 November 2011).

¹⁰. Indeed, in the cold war climate of the 1950s, the European Commission of Human Rights adopted a broad interpretation of Article 17 of the Convention “emptying freedom of expression of any content and apparently meaning that the ideology of the ECHR was incompatible with the existence of communist parties in the countries of Western Europe” (F. SUDRE, *Droit européen et international des droits de l’homme*, Paris, PUF, 8th edition, 2006, p. 206, no. 148). See Eur. Comm. HR, *German Communist Party v. Federal German Republic*, decision of 20 July 1957.

¹¹. S. VAN DROOGHENBROECK, “L’article 17 de la Convention est-il indispensable?”, *Rev. trim. dr. h.*, 2001, p. 541.

¹². J. RAWLS, *A Theory of Justice*, Oxford, Oxford University Press, 1971, p. 218.

¹³. M. OETHEIMER, “La Cour européenne des droits de l’homme face au discours de haine”, *op. cit.*, p. 66.

¹⁴. S. VAN DROOGHENBROECK, “L’article 17 de la Convention européenne des droits de l’homme : incertain et inutile ?”, in H. Dumont et al. (eds.), *Pas de liberté pour les ennemis de la liberté ? Groupements liberticides et droits*, Brussels, Bruylant, 2000, pp. 141 et seq.

impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; ... therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms ...”¹⁵.

9. As rightly observed by S. Van Drooghenbroeck, “breaking with the darkest pages of European history”, the European Convention on Human Rights “could not logically provide the means which could rewrite them”¹⁶. That is the reason for Article 17 of the Convention, which is nearly a word-for-word copy of Article 30 of the Universal Declaration of Human Rights. “The society that [the Convention] has built up is ... a democracy capable of defending itself and determined, in order to achieve this, to step outside of itself, by stopping short of providing its enemies with the guarantees that are ... its essential pillars”¹⁷. This reaching of the limit which is embodied in Article 17 of the Convention is clearly referred to in the report of the European Commission on Human Rights of 11 May 1984 in the case of *Glaserapp v. Germany*: “where a Government seeks to achieve the ultimate protection of the rule of law and the democratic system the Convention itself recognises in Article 17 the precedence which such objectives take, even over the protection of the specific rights which the Convention otherwise guarantees”¹⁸. In concrete terms, this means that where freedom of expression is asserted as a cover for hate speech, it will not be afforded protection under Article 10 § 1 of the Convention, and the limitations laid down in this provision will accordingly not be “mobilised”. Here we are simply in another scenario, that of outright disqualification.

10. Article 17 of the Convention – which is sometimes referred to as a “guillotine” provision – enables States to act against liberticidal activities but does not impose on them an obligation to do so. Is it possible, but also appropriate, to go further? To some, it seems that an answer in the affirmative could be suggested¹⁹. As a result, one could take the view, based on the doctrine of positive obligations, which is developing considerably in the case-law of the Court, that there exists such an obligation on States to combat hate speech through appropriate legal measures (legislative or other). In other words, this would mean a positive obligation for States to combat and prevent hate speech aimed at the destruction of freedom of expression. Others hold instead that the abuse clause’s application is undesirable, since it tends, even in its indirect variant, to set aside substantial principles and safeguards that are characteristic of the European framework for protection of speech. They argue that there are convincing arguments and pertinent legal justifications for the European Court not to exclude any type of speech categorically from the protection of Article 10 of the Convention. The application of Article 17 is also said to be unnecessary, as it in no way generates added value for democracy or for human rights

¹⁵. Eur. Court HR, *Lawless (no. 3) v. Ireland*, judgment of 1 July 1961, § 7 (law part).

¹⁶. S. VAN DROOGHENBROECK, “L’article 17 de la Convention européenne des droits de l’homme : incertain et inutile ?”, *op. cit.*, p. 144.

¹⁷. *Ibid.*, p. 145. In Europe, “wehrhafte Demokratie” – a democracy capable of defending itself; see Eur. Court HR (GC), *Ždanoka v. Latvia*, judgment of 16 March 2006.

¹⁸. Eur. Comm. HR, *Glaserapp v. Germany*, report of 11 May 1984, § 110.

¹⁹. S. VAN DROOGHENBROECK, “L’article 17 de la Convention européenne des droits de l’homme : incertain et inutile ?”, *op. cit.*, p. 150.

protection. They therefore strongly encourage the European Court to consider all forms of hate speech from the perspective of Article 10, without according a decisive impact, whether directly or indirectly, to Article 17 of the Convention²⁰.

11. This is a delicate debate. On the one hand, Article 17 emerged in a particular historical context – the post-war period – and the geopolitical background has clearly undergone a fundamental transformation in the intervening fifty years, although the current resurgence of certain forms of extremism across Europe could justify increased recourse to this Article. On the other hand, however, I believe that Article 17 should be used in moderation as it could serve as a pretext for the worst kinds of abuses. It was precisely on the basis of Article 17 that the Turkish Constitutional Court legitimised the dissolution of political parties, a measure that was subsequently condemned by the Court²¹. Moreover, it is a mechanical and unrefined device – “rough”, to quote C. Tomuschat. There is no weighing up of the interests at stake, no analysis of the importance of the rights being forfeited and the damage caused as a result, and no examination of the circumstances of the case²², the method of reasoning favoured by the European judge. As S. Van Drooghenbroeck puts it, in passing from the “scales” of justice to the “sword” embodied by outright disqualification under Article 17²³, is there not a danger of a democracy using “the same methods as its adversaries” to defend itself?²⁴

B. A moderate use

12. In the case-law of the European Court of Human Rights²⁵, it can be observed that Article 17 is used but in moderation, which is a sign of increased vigilance when it comes to this issue but is also symptomatic, in view of the growing number of cases submitted to the Court concerning such matters²⁶, of a greater social malaise.

13. Concerning *racial hatred*, the inadmissibility decision of 24 June 2003 in the case of *Garaudy v. France* is significant. Roger Garaudy, the author of a book entitled *Les mythes fondateurs de la politique israélienne (The Founding Myths of Israeli Politics)*, had been convicted of denying crimes against humanity, public defamation of a group of persons, in this instance the Jewish community, and

²⁰. H. CANNIE and D. VOORHOOF, “The abuse clause and freedom of expression in the European Human Rights Convention: an added value for democracy and human rights protection?”, *Netherlands Quarterly of Human Rights*, 2011, vol. 29, no. 1, pp. 54 et seq.

²¹. S. VAN DROOGHENBROECK, “L'article 17 de la Convention européenne des droits de l'homme : incertain et inutile ?”, *op. cit.*, p. 195 and the references cited in footnote 220.

²². *Ibid.*

²³. *Ibid.*, p. 196.

²⁴. *Ibid.*, p. 196, and see also C. TOMUSCHAT, “Democratic Pluralism: the Right to Political Opposition”, in A. ROSAS and J. HELGERSEN (eds.), *The Strength of Diversity. Human Rights and Pluralist Democracy*, London-Dordrecht-Boston, Martinus Nijhoff Publishers, 1992, p. 33.

²⁵. For the case-law of the European Commission on Human Rights concerning the condemnation of totalitarian doctrine, negationism or racial hate speech, see A. WEBER, *Manual on hate speech*, Strasbourg, Council of Europe Publishing, 2009, pp. 23 et seq.

²⁶. See, for example, Eur. Court HR, *Leroy v. France*, judgment of 2 October 2008; Eur. Court HR, *Féret v. Belgium*, judgment of 16 July 2009; and Eur. Court HR (GC), *Paksas v. Lithuania*, judgment of 7 January 2011: in these three cases, the Government put forward the abuse of rights argument, but the Court rejected it.

incitement to racial discrimination and hatred. The Court considered that the content of the applicant's work was markedly negationist and pointed out that "[d]enying crimes against humanity is ... one of the most serious forms of racial defamation of Jews and of incitement to hatred of them". It stated that denying the reality of clearly established historical facts did not constitute historical research akin to a quest for the truth but was aimed at rehabilitating the National-Socialist regime and accusing the victims themselves of falsifying history. Such acts being, in the Court's view, incompatible with the fundamental values of the Convention, the Court applied Article 17 and deprived the applicant of the right to invoke Article 10.

14. As far as *religious hatred* is concerned, the *Norwood v. the United Kingdom* inadmissibility decision of 16 November 2004 is worth mentioning. In this case, the applicant, who was a regional organiser for the British National Party (BNP), displayed in the window of his flat a large poster supplied by the BNP, with a photograph of the Twin Towers in flame, the words "Islam out of Britain – Protect the British People" and a symbol of a crescent and star in a prohibition sign. The applicant was then charged with an aggravated offence of displaying, with hostility towards a racial or religious group, any writing, sign or other visible representation which is threatening, abusive or insulting, within the sight of a person likely to be caused harassment, alarm or distress by it. The Court agreed with the assessment made by the domestic courts that "the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is 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 ...".

15. Regarding *ethnic hatred*, the *Ivanov v. Russia* inadmissibility decision of 20 February 2007 is also interesting. The applicant, the owner and editor of a newspaper, was convicted of public incitement to ethnic hatred through the use of the mass media. He authored and published a series of articles portraying the Jews as the source of evil in Russia, calling for their exclusion from social life. He accused an entire ethnic group of plotting a conspiracy against the Russian people and ascribed Fascist ideology to the Jewish leadership. Both in his publications and in his oral submissions at the trial, he consistently denied the Jews the right to national dignity, claiming that they did not form a nation. The Court had no doubt as to the markedly anti-Semitic tenor of the applicant's views. It agreed with the assessment made by the domestic courts that through his publications he had sought to incite hatred towards the Jewish people. Such a general, vehement attack on one ethnic group was directed against the Convention's underlying values, notably tolerance, social peace and non-discrimination.

III. Article 10 of the Convention and authorised interferences

16. As far as hate speech is concerned, we are in the sphere of the right to freedom of expression guaranteed by Article 10 § 1, but this right may be restricted for one of the reasons

envisaged in Article 10 § 2²⁷. However, such exceptions – the limitations set out in paragraph 2 – must be strictly constrained and the need for any restrictions must be established convincingly. To be lawful, such limitations must have a clear legal basis providing the appropriate procedural and substantial guarantees, must pursue a legitimate aim and must be proportionate, which means that we have to balance the interest in free speech against the public interest. Flexible standards versus determinative rules?

A. The basics

17. The traditional and well-established case-law of our Court goes back to the *Handyside v. United Kingdom* judgment of 7 December 1976, in which it observed that “[f]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man”. So freedom of expression is the condition *sine qua non* for a genuine pluralist democracy. This affirmation of the social function of freedom of expression constitutes the basic philosophy of all the Court’s case-law relating to Article 10. This has two consequences: on the one hand, freedom of expression is not only a safeguard against interferences by the State (a subjective right), it is also an objective fundamental principle for life in a democracy; on the other hand, freedom of expression is not an end in itself but a means for the establishment of a democratic society.

18. Against this background, how are limits to be devised and where are they to be established? On the one hand, the Court often points out that freedom of expression – the foundation of democracy – subject to paragraph 2 of Article 10, is applicable “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population”, considering that “such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society”²⁸. This formula should not, however, be treated as magic or ritual but must remain the cornerstone of European supervision. In fact, it takes on its full meaning in the context of the case-law relating to hate speech. On the other hand, the Court takes the view that it may be deemed necessary, in democratic societies, to penalise, or even prevent, all forms of expression that spread, encourage, promote or justify hatred based on intolerance.

B. The contours of hate speech

19. Several different periods can be identified in the case-law of the European Court of Human Rights. At the turn of this century, the Court delivered many judgments in Turkish cases in relation to the

²⁷. As shown also by Article 19 § 3 and Article 20 § 2 of the International Covenant on Civil and Political Rights and Article 4 of the International Convention on the elimination of all forms of racial discrimination, as well as under domestic constitutional law. See R. ERRERA, “In defence of civility: reflections on hate – speech and group libel”, *The Cyprus Yearbook of International Relations 2007*, Nicosia, Power Publishing, 2008, pp. 159 et seq.

²⁸. Eur. Court HR, *Handyside v. United Kingdom*, judgment of 7 December 1976, § 49.

PKK terrorist organisation, focusing mainly on glorification of violence. From 2008 onwards, it was faced with racist hate speech and hate propaganda. In 2012, a new dimension seems to be emerging, namely sexual orientation hate speech.

20. The Court's case-law has established certain parameters – identification criteria – making it possible to characterise “hate speech” in order to exclude it, or not, from the protection afforded to freedom of expression. The context²⁹ and the intention³⁰ are the two main elements, the combination of which produces the pragmatic force of speech (its ability to convince, to direct the audience, to incite it to commit or not to commit a specific act). The status of the perpetrator³¹, as well as the form and impact of the speech,³² are further elements that the Court also takes into account.

Glorification of violence

21. As will be seen, hate speech is often part of a whole which also includes incitement to violence or hostility. Incitement is characterised by the speaker's intent to make someone else the instrument of his or her unlawful will. The Court, for example, considers *justified* under Article 10 of the Convention criminal convictions for statements expressing incitement to “hatred, revenge, recrimination or armed resistance”³³, to “violence, armed resistance or an uprising”³⁴ and for statements “which advocated intensifying the armed struggle, glorifying war and espoused the intention to fight to the last drop of blood”³⁵. The same is true of statements advocating the use of violence, for example “to use knives or bayonets to get rid of political adversaries”³⁶. Maybe we are close here to the “clear and present danger” test³⁷ and the “imminent lawless action” test³⁸.

22. In the *Sürek (no. 1) v. Turkey* judgment of 8 July 1999, the fact that the speech was hate-tinged appears to have played an important role, even if incitement to violence was not lacking. In this case, the applicant had been convicted of disseminating propaganda against the indivisibility of the State following the publication of two readers' letters in a review that he owned. In the Court's view, “the impugned letters amount to an appeal to bloody revenge by stirring up base emotions and hardening

²⁹. See, for example, as far as public or political debate is concerned, Eur. Court HR, *Erbakan v. Turkey*, judgment of 6 July 2006, § 55; Eur. Court HR, *Balsytė-Lideikienė v. Lithuania*, judgment of 4 November 2008.

³⁰. Eur. Court HR, *Gündüz v. Turkey*, judgment of 4 December 2003; Eur. Court HR *Gündüz v. Turkey*, decision of 13 November 2003.

³¹. Eur. Court HR (GC), *Sürek (no. 1) v. Turkey*, judgment of 8 July 1999; Eur. Court HR, *Seurot v. France*, decision of 18 May 2004.

³². Eur. Court HR (GC), *Karataş v. Turkey*, judgment of 8 July 1999, § 52 (a poem); Eur. Court HR, *Alinak v. Turkey*, judgment of 29 March 2005, § 41 (a novel); Eur. Court HR, *Kızılyaprak v. Turkey*, judgment of 2 October 2003, § 37 (a book of memoirs); Eur. Court HR (GC), *Oğuzoğlu v. Turkey*, judgment of 8 July 1999, § 48 (a magazine intended for limited circulation); Eur. Court HR (GC), *Gerger v. Turkey*, judgment of 8 July 1999, § 50 (a message read out in public at a memorial ceremony).

³³. Eur. Court HR, *Şener v. Turkey*, judgment of 18 July 2000.

³⁴. Eur. Court HR (GC), *Gerger v. Turkey*, judgment of 8 July 1999.

³⁵. Eur. Court HR, *Özgür Gündem v. Turkey*, judgment of 16 March 2000.

³⁶. Eur. Court HR, *Gündüz v. Turkey*, decision of 13 November 2003.

³⁷. *Schenck v. United States*, 249 U.S. 47 (1919).

³⁸. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

already embedded prejudices which have manifested themselves in deadly violence. ... In such a context the content of the letters must be seen as capable of inciting to further violence in the region by instilling a deep-seated and irrational hatred against those depicted as responsible for the alleged atrocities. Indeed, the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor. It must also be observed that the letter entitled 'It is our fault' identified persons by name, stirred up hatred for them and exposed them to the possible risk of physical violence ... The Court reiterates that the mere fact that 'information' or 'ideas' offend, shock or disturb does not suffice to justify that interference ... What is in issue in the instant case, however, is hate speech and the glorification of violence"³⁹.

23. In the *Gündüz v. Turkey* decision of 13 November 2003 the Court declared inadmissible an application by the leader of an Islamic sect who had been convicted of incitement to commit an offence and incitement to religious hatred on account of statements reported in the press. Having regard to the content and violent tone of the applicant's statements, the Court considered that they amounted to hate speech promoting the glorification of violence and therefore could not be regarded as compatible with the fundamental values of justice and peace set forth in the Preamble to the Convention. Moreover, in the report in issue the applicant gave the name of one of the persons he was alluding to, a person who, enjoying a certain amount of fame, was easily recognisable by the general public and was therefore indisputably exposed to a significant risk of physical violence. In this context, the Court considered that the severity of the penalty imposed (four years and two months' imprisonment and a fine) could not be regarded as disproportionate, in so far as it had a deterrent effect which could have been necessary to prevent public incitement to commit offences.

24. As far as judgments *finding a violation* of Article 10 are concerned, the reasoning is often as follows: "The Court notes that although certain particularly acerbic passages of the article paint an extremely negative picture of the State and thus give the narrative a hostile tone, they do not encourage violence, armed resistance or insurrection and do not constitute hate speech. That, in the Court's view, is an essential factor to be taken into consideration"⁴⁰.

25. The *Erdal Taş v. Turkey* judgment of 19 December 2006 is in exactly the same spirit. The Court noted that the State Security Court had merely considered that comments in the article in issue promoted separatism. However, the grounds adopted by the Turkish courts could not be regarded in themselves as sufficient to justify interference with the applicant's right to freedom of expression. While the disputed article contained critical ideas regarding the Kurdish question, it did not, however, advocate the use of violence, armed resistance or an uprising, and did not constitute hate speech, which in the view of the Court was the essential factor to be taken into consideration⁴¹.

³⁹. Eur. Court HR (GC), *Sürek (no. 1) v. Turkey*, judgment of 8 July 1999, § 62. See, in the same vein, Eur. Court HR, *Hocaoğulları v. Turkey*, judgment of 7 March 2006, § 39.

⁴⁰. Eur. Court HR, *Dicle v. Turkey (no. 2)*, judgment of 11 April 2006, § 33.

⁴¹. Eur. Court HR, *Erdal Taş v. Turkey*, judgment of 19 December 2006, § 38.

26. In the *Faruk Temel v. Turkey* judgment of 1 February 2011, the applicant, the chairman of a legal political party, read out a statement to the press at a meeting of the party, in which he criticised the United States' intervention in Iraq and the solitary confinement of the leader of a terrorist organisation. He also criticised the disappearance of persons taken into police custody. Following his speech he was convicted of disseminating propaganda, on the ground that he had publicly defended the use of violence or other terrorist methods. The applicant contended that his right to freedom of expression had been breached. The Court noted that the applicant had been speaking as a politician and a member of an opposition political party, presenting his party's views on topical matters of general interest. It took the view that his speech, taken overall, had not incited others to violence, armed resistance or uprising and had not amounted to hate speech. It found a violation of Article 10.

27. In the *Önal v. Turkey* judgment of 2 October 2012, both applications concerned criminal proceedings brought against the application for publishing works which had allegedly incited hatred and hostility. According to the first application, the publishing house of which he was the proprietor published the biography of a businessman of Kurdish origin accused of drug trafficking and belonging to the illegal armed organisation PKK (Kurdistan Workers' Party). According to the second application, the applicant's publishing house had published the second edition of a work that had initially been published in Sweden in 1995 on the subject of the Alevis of Dersim. The applicant complained, among other things, that his right to freedom of expression had not been taken into consideration by the courts, which had given him harsh sentences even though the two works had contained neither an incitation to hatred, nor violations of the rights of others, nor any glorification of crime. The Court found a violation of Article 10.

Religious intolerance

28. The *I.A. v. Turkey* judgment of 13 September 2005 concerned the prosecution of the author of a novel, *The Forbidden Phrases*, which contained "an abusive attack on the Prophet of Islam". The Court observed that it was not disputed that the applicant's conviction had amounted to interference with his right to freedom of expression. The interference had been prescribed by law and had pursued the legitimate aims of preventing disorder and protecting morals and the rights of others. As to deciding whether the interference had been necessary, this involved weighing up the conflicting interests relating to the exercise of two fundamental freedoms, namely the applicant's right to impart his ideas on religion, on the one hand, and the right of others to respect for their freedom of thought, conscience and religion, on the other. Certain passages in the novel in question had attacked the Prophet Muhammad in an abusive manner. Therefore, the measure at issue had been intended to provide protection against offensive attacks on matters regarded as sacred by Muslims and could reasonably be regarded as meeting a "pressing social need". In addition, the authorities had not exceeded their margin of appreciation, and the reasons given by the domestic courts to justify the measure taken against the applicant had been relevant and sufficient. As to whether the conviction had been proportionate, the

Court noted that the national courts had not seized the book in question, and that the small fine imposed appeared to be proportionate to the aims pursued. Conclusion: no violation.

Racial hate speech

29. From 2008 onwards, the cases have related more to racial/ethnic hate speech. Some of them reflect the anti-immigration and anti-Islam discourse found in many European countries and mainly concern hate propaganda.

30. The *Soulas and Others v. France* judgment of 10 July 2008 concerned the conviction of the two authors of a book entitled *La colonisation de l'Europe. Discours vrai sur l'immigration et l'Islam*. The main goal of the book, as the authors claimed, was to demonstrate what they considered to be incompatibilities between European and Muslim civilisations. They specified that they were not expressing their views on behalf of any party, group or school of thought and that their decision to write the book had been purely voluntary. They also underlined that they did not intend to caricature, insult or slur anybody. Their intention was, therefore, to defend the inalienable right of Europeans to preserve their identity. The Court of Appeal found the authors guilty of inciting hate propaganda. Both of them had to pay a fine of 7,500 euros. The judges placed emphasis on the particular wording of the book, in particular the phrases "ethnic war", "the anti-French racism of the young generations of immigrants" and "ritual rapes of European women".

31. In this judgment the European Court of Human Rights essentially carried out a proportionality test on the interplay of two aspects of Article 10 of the Convention. Therefore, the analysis involved a straightforward assessment of "social need" in order to determine the necessity of the restrictions imposed. Drawing on its previous case-law⁴², the Court mentioned the particular French problem regarding the social integration of immigrants and emphasised the public need for a wide margin of appreciation in relation to such a delicate issue⁴³. Similarly to the national court, the European Court addressed the wording of the book, underlining the potential for incitement to aggression in the passage "it is only if an ethnic civil war breaks out that the solution can be found"⁴⁴. The Court construed the margin of appreciation in such a way as to suggest that the harmful effect of speech depends on historic, demographic and cultural contexts.

32. In the *Leroy v. France* judgment of 2 October 2008, the applicant was a cartoonist. One of his drawings representing the attack on the World Trade Centre was published in a Basque weekly newspaper on 13 September 2011, with a caption which read: "We have all dreamt of it... Hamas did it". Having been ordered to pay a fine for "condoning terrorism", Mr Leroy argued that his freedom of expression had been infringed. The Court considered that, through his work, the applicant had glorified

⁴². Eur. Court HR, *Soulas and Others v. France*, judgment of 10 July 2008, §§ 32-35.

⁴³. *Ibid.*, §§ 36 and 37.

⁴⁴. *Ibid.*, § 43.

the violent destruction of American imperialism, expressed moral support for the perpetrators of the attacks of 11 September, commented approvingly on the violence perpetrated against thousands of civilians and diminished the dignity of the victims. This case gave the Court its first occasion to address the issue of “glorification of terrorism” in the context of a western democracy. Here the Court was inclined to take into consideration the harmful effect of the phrase in question and endorsed a victimisation approach. Without an explicit reference to scholars of the effects of linguistic utterances, such as Austin and Searle, the Court came close to *speech act theory* in its assessment of the capture as performative, thus revealing the *perlocutionary* effect of the cartoon. According to this approach, certain utterances do not just “sound” in the semiotic space of oral expressions, written acts, pictures and songs, but perform as acts, bringing evident consequences with legal implications. Despite the newspaper’s limited circulation, the Court observed that the drawing’s publication had provoked a certain public reaction, capable of stirring up violence and of having a demonstrable impact on public order in the Basque Country. The Court held that there had been no violation of Article 10.

33. In the *Féret v. Belgium* judgment of 16 July 2009, the applicant, a member of parliament and chairman of an extreme right-wing political party (for which he was responsible for publications and the owner of its Internet site), was convicted and sentenced to 250 hours’ community service (to be carried out in the field of integration of immigrants) and prohibited from standing for election for ten years, for public incitement to discrimination and racial hatred through the publication and dissemination of leaflets, on the basis of a 1981 law intended to penalise certain acts inspired by racism or xenophobia. The Court found that there had been no violation of Article 10 of the Convention. The judgment is interesting in that the Court for the first time accepted interference with the freedom of expression of a member of parliament outside Parliament, attached particular significance to the fact that the impugned leaflets were distributed in the course of electoral campaigns, as the impact of racist and xenophobic speech was greater and more likely to cause harm at such a time, and acknowledged the existence of a pressing social need to prevent disorder and protect the rights of others, in this case the immigrant community. This judgment implicitly raises the issue of the requirement of a specific act in order for restrictions on freedom of expression to be accepted with regard to hate speech. As observed by F. Rigaux, “the category of fighting words reverses the dialectics between speech and conduct: speech which can provoke retaliatory conduct is in itself a form of conduct”⁴⁵.

34. In the same vein, there is the *Le Pen v. France* inadmissibility decision of 20 April 2010. The applicant, the president of the French “National Front” party, had been fined 10,000 euros in 2005 for “incitement to discrimination, hatred and violence towards a group of people because of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion”, on account of statements he had made about Muslims in France in an interview with *Le Monde* daily newspaper. He had asserted, among other things, that “the day there are no longer five million but 25 million Muslims in France, they will be in charge”. The Court of Appeal considered that the applicant’s

⁴⁵. F. RIGAUX, “Abridged or forbidden speech: how can speech be regulated through speech?”, in M. Van Hoecke (ed.), *Epistemology and methodology of comparative law*, Oxford-Portland (Oregon), Hart Publishing, 2004, p. 292.

comments to the newspaper suggested that the security of the French people, whose reactions allegedly went further than his own offending statements, depended on them rejecting the Muslim community. It held that the applicant's freedom of expression was no justification for statements that were an incitement to discrimination, hatred or violence towards a group of people. The European Court of Human Rights took the view that, by doing this, the applicant had set the French people against a community whose religious convictions were explicitly mentioned and whose rapid growth was presented as an already latent threat to the dignity and security of the French people. It further considered that the applicant's comments had certainly presented the "Muslim community" as a whole in a disturbing light likely to give rise to feelings of rejection and hostility. At the end of the day, the derogation permitted under Article 10 § 2 of the Convention outweighed the value of pure "expression for expression's sake".

35. The gist of these judgments is close to what the US constitutionalist A. Bickel observed: "This sort of speech constitutes an assault. More, and equally important, it may create a climate, an environment in which conduct and actions that were not possible before become possible ... Where nothing is unspeakable, nothing is undoable"⁴⁶. But they have been criticised, even within the Court⁴⁷. As S. Sottiaux has pointed out, in these cases the Court has adopted a "community-oriented" approach, seeking to harmonise freedom of expression with a commitment to human dignity and equality⁴⁸ (like the Canadian Supreme Court in the *R. v. Keegstra* case). Nevertheless, in his view, there is no such thing as a "bad idea" and the remedy for bad speech is more speech, and not enforced silence.

Sexual orientation hate speech

36. The *Vejdeland and Others v. Sweden* judgment of 9 February 2012 is the first one where the Court has been faced with hate speech concerning homophobic propaganda. In this case, the applicants went to an upper secondary school and distributed leaflets (by leaving them in or on the pupils' lockers) containing homophobic statements, saying *inter alia* that homosexuality was a deviant proclivity and had a morally destructive effect on the substance of society. In its assessment of the necessity of the interference in a democratic society, the Court reiterated that "inciting to hatred does not necessarily entail a call for an act of violence. Attacks on persons committed by insulting or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner" (§ 55). Interestingly, in their concurring opinion, Judges Spielmann and Nussberger refer also to the context of LGBT bullying in school.

37. This case – which is not yet final and could eventually end up before the Grand Chamber – may of course, as observed by Judge Zupančič in his concurring opinion, be compared to the *Snyder v.*

⁴⁶. A. M. BICKEL, *The morality of consent*, New Haven, Yale University Press, 1975, pp. 72-73.

⁴⁷. See Judge Sajó's dissenting opinion in the *Féret* case.

⁴⁸. S. SOTTIAUX, "Bad tendencies' in the ECtHR's 'hate speech' jurisprudence", *European Constitutional Law Review*, 2011, vol. 7, no. 1, p. 42.

Phelps et al judgment of the US Supreme Court of 2011, which chose a different course to protect even hurtful speech on public issues, to ensure that public debate was not stifled. But, as noted by Judge Yudkivska in her concurring opinion joined by Judge Villiger, “for many well-known political and historical reasons today’s Europe cannot afford the luxury of such a vision of the paramount value of free speech”.

38. By extending hate speech restrictions/interferences to homophobic speech, are we on a slippery slope? The debate is open.

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