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Where Does the Line Go between Protected and Prohibited Expression? – The Challenge of Hate Speech in the Practice of the European Court of Human Rights

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I. Introduction

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention", "the ECHR")[1] guarantees freedom of expression, one of the most universally recognized human right, dearly won after centuries of struggle.[2] Given that there is no democracy without public discourse and no public discourse without freedom of speech, freedom of expression is understood both as a consequence of democracy and as one of its roots,[3] a basic precondition for its functioning and a prerequisite for the enjoyment of other rights and freedoms.[4] Furthermore, the free communication of opinions is considered essential to the full development of personality in society.[5]

In *Handyside v the United Kingdom*,[6] the European Court of Human Rights ("the ECtHR", "the Court") emphasized the fundamental role of freedom of expression in a democratic society, framing it in words what would become one of the mostly repeated phrases in the Court's jurisprudence:

> "Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man... [I]t 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

[1] As amended by Protocols 11 and 14, Rome, 4.11.1950.

[2] M Janis, R Kay & A Bradley, *European Human Rights Law: Text and Materials* (3rd ed., OUP 2008) 235; Y Arai, 'Article 10: Freedom of Expression' in D Harris, M O'Boyle & C Warbrick (eds), *Law of the European Convention on Human Rights* (2nd ed., OUP 2009) 443.

[3] A Weber, *Manual on Hate Speech* (CoE Publishing 2009) 19; I Hare & J Weinstein, *Extreme Speech and Democracy* (OUP 2009) 11; P Dijk, F Hoof, A Rijn & L Zwaak (eds.), *Theory and Practice of the European Court of Human Rights* (4th ed., Intersentia 2006) 774.

[4] Janis et al. (n 2) 235; K Boyle, 'Hate Speech – The United States Versus the Rest of the World?' (2001) 53 MLR 487; D Gomien, *Short Guide to the European Convention on Human Rights* (3rd ed., CoE Publishing 2005) 101. See also J Mill, *On Liberty* (1859) (The Floating Press 2009).

[5] Janis et al. (n 2) 235-236. For further analysis, see T Scanlon, 'A Theory of Freedom of Expression' (1972) 1 PPA 204; M Redish, 'The Value of Free Speech' (1982) 130 UPLR 591. See also C Yong, 'Does Freedom of Speech Include Hate Speech?' (2011) 17(4) Res Publica 385,391.

[6] App 5493/72, 7.12.1976.

> sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"".[7]

Despite its special position, freedom of expression is not absolute, since every right becomes controversial when it clashes with other – individual or communal – interests.[8] Based on the two-fold basis of the right – personal self-development and collective self-determination,[9] – the ECtHR has adopted a three-part enquiry, under which limitations on freedom of expression are allowed if "prescribed by law" and "necessary in a democratic society" for the protection of one of the objectives exhaustively set out in Article 10(2).[10] As the case-law reveals, the central issue here is to strike a fair balance between freedom of expression and other fundamental rights or interests at stake.[11]

The challenge of finding a correct balance, so that the *Handyside* dictum does not become "an incantatory or ritual phrase",[12] takes on its full meaning within the ECtHR's jurisprudence on hate speech.[13] While, as a matter of principle, the protection under Article 10 extends to any expression, notwithstanding its content, limitations on hate speech are the only content-based restrictions applied by the Strasbourg organs.[14]

The totalitarian dictatorships and their consequences in the form of widespread anti-Semitism, persecution and genocide, as well as the migration of large numbers of people to Western Europe, following the breakup of the Soviet Union and Comecon, and the aggressive reaction from the resident population, revealed the problem of addressing

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[7] Ibid para.49.

[8] R Dworkin, 'We Do Not Have a Right to Liberty' in R Stewart (ed), *Readings in Social and Political Philosophy* (2nd ed., OUP 1996) 184. See *German Communist Party v the Federal Republic of Germany,* App 250/57, 20.07.1957.

[9] Arai (n 2) 444; Hare & Weinstein (n 3) 12.

[10] For further analysis on the interference test, see Harris et al. (n 2) 341-360; Jacobs, R White & C Ovey, *The European Convention on Human Rights* (5th ed., OUP 2010) 308-333.

[11] See Dijk et al. (n 3) 785.

[12] See Joint Dissenting Opinion of Judges Costa et al. in *IA v Turkey,* App 42571/98, 13.09.2005, para.1.

[13] M Oetheimer, 'Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Rights Case Law' (2009) 17 CJICL 427,428; Weber (n 3) 2. See also L Groen & M Stronks, *Entangled Rights of Freedom: Freedom of Speech, Freedom of Religion and the Non-Discrimination Principle in the Dutch Wilders Case* (Eleven International Publishing 2010) 77-78.

[14] M Macovei, *A Guide to the Implementation of Article 10 of the European Convention on Human Rights* (2nd ed., CoE Publishing 2004) 7; *Brind and others v UK,* App 18714/91, 25.11.1993, The Law, para.1.

increasing hate speech, xenophobia and racism in Europe.[15] The movement towards a united European Union with open borders, capable to shaken national identity, has been argued to trigger psychological defense mechanisms and projection of aggressive emotions onto vulnerable groups.[16] Against this background, the post-World War II international community realized that, beyond simple communication, hate speech could be an effective tool of racial and ethnic subjugation.[17] In view of these considerations, the ability of democracy to resist the risk of hate propaganda, leading to dictatorship and massive human rights violations, has been questioned.[18] In response, states have enacted laws at the domestic and international level to prevent harmful effects of such expression.[19] However, due to the underlying fears of abuse to the detriment of free speech, every attempt of such legislative intervention has been extensively debated.[20] It has been in fact

[15] S Douglas-Scott, 'The Hatefulness of Protected Speech: A Comparison of the American and European Approaches' (1998-1999) 7 WMBRJ 305, 310. See European Parliament, *Resolution on the communication from the Commission on racism, xenophobia and anti-Semitism,* 1996 OJ (C 152) 57.

[16] A Falk, 'Border Symbolism' (1974) 43 PAQ 650 (cited in Douglas-Scott (n 15) 310). See also F Kubler, 'How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights' (1998-1999) 27 HLR 335, 337.

[17] M Mello, '*Hagan v Australia*: A Sign of the Emerging Notion of Hate Speech in Customary International Law' (2006) 28 LLICLR 365, 368; W Schabas, 'Hate Speech in Rwanda: The Road to Genocide' (2000) 46 MLJ 141, 144; E Bertoni, 'Hate Speech under the American Convention on Human Rights' (2005-2006) 12 ILSAJILCL 569, 570.

[18] A Lester, 'Freedom of Expression' in R Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers 1993) 474; M Cohen, *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (Cohen Committee 1966) 8.

[19] Mello (n 17) 368. See e.g., Article 20 of the International Covenant on Civil and Political Rights (General Assembly Resolution 2200(XXI) 16.12.1966) (ICCPR); Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (General Assembly Resolution 2106A(XX) 21.12.1965) (CERD); Article 13 of the American Convention on Human Rights (Pact of San José, Costa Rica, 22.11.1969) (ACHR).

[20] See I Boerefijn & J Oyediran, 'Article 20 of the International Covenant on Civil and Political Rights' in S Coliver, K Boyle & F D'Souza (eds), *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (ARTICLE 19, 1992) 29. For the analysis of *travaux preparatories,* see S Farrior, 'Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech' (1996) 14(1) BJIL 1-96. Notably, the Human Rights Committee (HRC), monitoring the compliance of obligations under the ICCPR, has specifically stated that Article 20 (Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred) and Article 19 (Freedoms of Opinion and Expression) are compatible with and complement each other (HRC, CCPR *General Comment No. 11: Article 20, Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred,* 29.07.1983, para.2; HRC, CCPR *General comment No. 34, Article 19, Freedoms of opinion and expression*, 12.09.2011, CCPR/C/GC/34, paras.50-52).

difficult to prove whether and to what degree hate speech laws have "restrained the heartless".[21]

The ECHR does not specifically regulate hate speech, to which there is no reference in Article 10(2), exhaustively enlisting the grounds for interference with the protected right.[22] However, the Court has tackled the issue numerously while assessing the limitations on freedom of expression. Given that extreme speech quite often takes the form of political speech,[23] which generally enjoys the greatest level of protection in the jurisprudence,[24] the question of precise delineation between protected and unprotected expression becomes all the more acute. The situation is complex as there is no universally accepted understanding of "hate speech", which has been considered as "a somewhat indeterminate category",[25] subjective notion, not capable of being legally defined.[26]

It stems from the case-law, that the ECtHR takes three approaches to hate speech cases. When the Court is confronted with "clearly" racist, xenophobic or Holocaust denial-type of speech, it removes the expression from the protection of Article 10 by engaging Article 17.[27] If there are any doubts as to the hatred-related aspect of the speech, it applies the tripartite test, scrutinizing the type of the speech in issue and the context in which it was formulated.[28] General elements of assessing the interference in matters of extreme speech are not, or only summarily, taken into account in cases relating to religious hate speech.[29] The position of the ECtHR is made less predictable by the influence of the controversial margin of appreciation doctrine, the variable discretion that the Court grants to national

[21] Farrior (n 20) 7, quoting Martin Luther King Jr., 'An Address Before the National Press Club' in *A Testament of Hope: The Essential Writings of Martin Luther King Jr* (J M Washington ed., 1986) 99-100.
[22] Lester (n 18) 467.
[23] See e.g., *Regina v Keegstra*, where the Supreme Court of Canada recognized that "hate" propaganda is expression of the type which would generally be categorized as "political" ([1990] 3 SCR 697, paras.89-90). See also V Zeno-Zenovich, *Freedom of Expression: A Critical and Comparative Analysis* (Routledge-Cavendish Publishing 2008) 83.
[24] See, *inter alia, Wingrove v UK,* App 17419/90, 25.11.1996, para.58.
[25] See Mello (n 17) 378; D Vick, 'Regulating Hatred' in M Klang & A Murray (eds), *Human Rights in the Digital Age* (GlassHouse 2005) 41.
[26] Boerefijn & Oyediran (n 20) 29; Weber (n 3) 3.
[27] Oetheimer (n 13) 429.
[28] Ibid.
[29] Weber (n 3) 49.

authorities to assess the need for legal restrictions, based on local and cultural differences.[30]

The paper aims to analyze the challenge of striking a fair balance in the ECtHR's jurisprudence on extreme speech. What is the approach of the Court towards distinguishing expression that is shocking, but stimulating public debate, from the statement releasing emotional hostility?[31] What are the variables affecting the categorization of the speech by the ECtHR as "incitement to hatred" or "incitement to violence"? Is the Court consistent in applying the general principles to particular factual circumstances? The paper seeks to address these principal questions by focusing on the case-law of the Strasbourg organs. Although relevant for the comprehensive understanding of the hate speech concept, the paper lacks space to explore the general compatibility of hate speech bans with freedom of expression or philosophical theories justifying or rejecting extreme speech prohibition. As the focus of the paper is much narrower, it sticks to the ECtHR's experience to examine the logic behind and the consistency of the Court's approach. Likewise, it is beyond the scope of the study to provide a comparative analysis of European case-law and other national or international jurisprudence; however, it does not leave without consideration the leading cases from various bodies in order to emphasize similarities or the widely diverging attitudes on the issue.

For this purpose, the paper first explores the problem of defining "hate speech". This sets stage for the examination of the general approach of the Court in extreme speech cases: what is the threshold for the speech to be assessed under Article 17 and when is Article 10 engaged? Next part analyses the basic methodology of the ECtHR in relation to speech inciting to violence. Following section tackles racist hate speech. Finally, the special case of

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[30] G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 80-98. For further analysis on the doctrine of margin of appreciation, see Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002); H Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (KLI 1996); H Houtte, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 ICLQ 638.

[31] L Christians, *Study for the Workshop on the Prohibition of Incitement to National, Racial or Religious Hatred,* 9-10 February, 2011, Office of the United Nations High Commissioner for Human Rights, available at: http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/ViennaWorkshop_BackgroundStudy_en.pdf, [21.08.2012], 8.

religious hate speech is considered, as the divergence from the general line of hate speech jurisprudence.

The paper concludes that the ECtHR's current hate speech approach is in need of re-evaluation.[32] Given the absence of precise definition, the broad reach of the hate speech concept, as interpreted by the Court, is the main challenge. Inconsistency in applying Article 17 raises further questions on the over-sensitivity of the Strasbourg organs to extreme speech, especially with regards to revisionist expressions. The wide margin of appreciation granted to the States in religious hate speech context raises further concerns on the proper execution of European supervision. The ECtHR's approach to incitement to violence cases is more logical and stable as the test applied is narrower than the one in hate speech cases.[33] The hate speech standard, elaborated by the Court, may fail to distinguish dangerous discourse from actual incitement, undermining the very idea of freedom of expression.[34]

II. Defining "hate speech"

1. General dilemma

Despite its frequent usage, there is no universal interpretation of "hate speech", which has often been perceived as a notion not capable of being legally defined.[35] Given the variety of speech, which may be considered hateful and the vagueness of the language used to delineate the prohibited expression at the domestic or international level, the existence of a dilemma is evident.[36] For the purposes of flexibility, hate speech bans are worded in open-ended terms – such as "insulting", "advocacy", "incitement" – raising questions on their

[32] See S Sottiaux, '"Bad Tendencies" in the ECtHR's "Hate Speech" Jurisprudence' (2011) 7(1) ECLR 40, 57. Cf Oetheimer (n 13) 443.
[33] Sottiaux (n 32) 62.
[34] Ibid 63.
[35] Boerefijn & Oyediran (n 20) 29; Weber (n 3) 3.
[36] S Chan, 'Hate Speech Bans: An Intolerant Response to Intolerance' (2011) 14 TCLR 77,84.

content and the circumstances in which they apply.[37] The elusiveness of the very concept of "hate" or "hatred" is exacerbated by a lack of clarity regarding the evil sought to be avoided.[38] Furthermore, what constitutes hate speech can be culturally specific, largely tied to a society's history, the status of groups as majorities or minorities, customs, the power of speakers and their targets within the society.[39] As a result, legislation risks of having a chilling effect on genuine ideas held on good faith terms and, accordingly, removing a protected speech from a public debate.[40] Drawing the line between a tolerable expression of controversial or shocking ideas and an intolerable expression of hatred is indeed the biggest challenge in the area, so that it has even been argued that striking a fair balance in this situation is impossible.[41]

International standards and jurisprudence provide very little guidance as to the definition of "hatred";[42] however, almost all regulations interpret "hate speech" both in terms of expressions of dislike or abhorrence and of some additional element ought to identify the unique presence of extreme hate, justifying legal intervention.[43] This additional element may be the manner of speech or the likelihood of causing harm, like violence or discrimination.[44] In this light, incitement to hatred is a performative act, which, in contrast to abstract discussion of ideas, represents a call for disparaging conduct towards specific

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[37] Ibid 77; Christians (n 31) 4. See also HRC, CCPR *Draft General Comment No.34* (Upon Completion of the First Reading by the HRC) U.N. Doc.CCPR/C/GC/34/CRP.4 (22.10.2010); T Mendel, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred,* for the UN Special Advisor on the Prevention of Genocide (April 2006), available at: http://www.concernedhistorians.org/content_files/file/TO/239.pdf, [21.08.2012], 10.

[38] Mendel (n 37) 10.

[39] Vick (n 25) 52; M Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CLR 1523,1565.

[40] Chan (n 36) 84-85; Vick (n 25) 52.

[41] Ibid.

[42] Mendel (n 37) 28.

[43] Hare & Weinstein (n 3) 127; ARTICLE 19, *Towards an Interpretation of Article 20 of the ICCPR: Thresholds for the Prohibition of Incitement to Hatred, Work in Progress,* Vienna, February 8-9, 2010, Office of the High Commissioner of Human Rights, available at: http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf, [21.08.2012] ("A19 Study") 10. See also *Camden Principles on Freedom of Expression and Equality* (ARTICLE 19, 2009), Principle 12.1.

[44] Hare & Weinstein (n 3) 127; K Partsch, 'Racial Speech and Human Rights: Article 4 of the CERD' in Coliver et al. (n 20) 26.

categories of individual.[45] Notably, this kind of speech may not necessarily manifest itself through direct expressions of "hatred", but be concealed in statements which at a glance seem to be rational.[46] But when do emotions become so "extreme" as to deserve legal suppression?[47]

2. European perspective

Although there have been numerous attempts to frame hate speech prohibition at the European level,[48] the ECHR remains the incontrovertible reference point in this field.[49] Unlike the ICCPR and the CERD, the Convention does not expressly regulate hate speech;[50] however, the Court has tackled the issue in a vast number of cases under Article 10. Since the ECtHR is not tasked with determining whether statements qualify as hate speech, it more focuses on the assessment of interference in freedom of expression.[51] In this light, the Court, mapping the general contours of the concept, has chosen not to commit itself to a definitive definition.[52] In the jurisprudence, "hate speech" is an autonomous notion, disbounding the Strasbourg organs from domestic interpretations.[53] As a result, taking a case-by-case approach, the ECtHR is flexible to rebut categorizations adopted by national courts or consider certain statements as "hate speech", even when the State has ruled out such classification.[54]

[45] Christians (n 31) 8; Sottiaux (n 32) 52. See also *Keegstra* (n 23) para.116.
[46] Weber (n 3) 5.
[47] Hare & Weinstein (n 3) 123.
[48] For the review of applicable instruments, see Weber (n 3) 7-17.
[49] Ibid 7.
[50] Cf ACHR Article 13. See J Oyediran, 'Article 13(5) of the American Convention on Human Rights' in Coliver et al. (n 20) 33.
[51] Mendel (n 37) 25.
[52] Christians (n 31) 4; Weber (n 3) 3.
[53] Ibid.
[54] Weber (n 3) 3; Oetheimer (n 13) 429. See e.g., *Surek v Turkey (No 1),* App 26682/95, 8.07.1999, para.62; *Gunduz v Turkey,* App 35071/97, 14.06.2004, para.43.

While referring to "all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)" as hate speech,[55] the ECtHR echoes the contested definition proposed by the Committee of Ministers,[56] revealing the consensus among the Council of Europe Member States.[57] However, given the vagueness and broadness of the terms employed, this contributes little to the clarification of the scope of the concept.[58] The wording suggests that the proscribed result is not only incitement to specific acts of violence or discrimination, but also incitement to hatred, which is simply a state of mind in which hostility towards a target group is harboured, even though not accompanied by any urge to take action to manifest itself.[59] This is of itself problematic from the perspective of freedom of expression, since it is almost impossible to prove whether hatred *per se* is or is not likely to result from the dissemination of particular statements.[60]

Furthermore, at times, the Court accepts even the "expressions…which may be insulting to particular individuals or groups"[61] to fall within "hate speech". Inconsistent reference to "insulting" statement as an extreme speech significantly lowers the borderline for the prohibited expression, creating ground for the State to suppress merely offensive statement. In this regard, parallel can be drawn with Article 20 of the ICCPR, setting rather high threshold, prohibiting an advocacy of hatred that "*constitutes incitement* to discrimination, hostility or violence", rather than simply advocacy.[62] Although the question of what is "incitement" is an extremely complex and controversial one, it is generally understood as imposing some requirement of nexus between the speech and the

[55] *Gunduz* (n 54) para.40.

[56] See Recommendation No R97(20) on hate speech, defining "hate speech" as covering "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance" (Committee of Ministers, 30.10.1997, available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec%281997%29020&ExpMem_en.asp, [21.08.2012], Appendix, Scope).

[57] *Gunduz* (n 54) para.40; *Feret v Belgium,* App 15615/07, 16.07.2009, para.64; Oetheimer (n 13) 428.

[58] Sottiaux (n 32) 53. Cf Oetheimer (n 13) 429.

[59] Mendel (n 37) 15.

[60] Ibid 28,39.

[61] See e.g., *Jersild v Denmark,* App 15890/89, 23.09.1994, para.35.

[62] Emphasis added. See A19 Study (n 43) 3. Cf CERD Article 4, prohibiting not only advocacy of hatred, but also the dissemination of ideas based on racial superiority or hatred.

proscribed result.[63] In assessing this link, the ECtHR widely interprets the notion of harm, including in it not only personal injury and harmful persuasion, but also the danger to "political stability" and "serene social climate",[64] stretching the potential reach of the concept of "hate speech".[65]

It stems from the case-law, that the term encompasses a multiplicity of situations: incitement to racial hatred; incitement to hatred on religious grounds and incitement to other forms of hatred based on intolerance "expressed by aggressive nationalism and ethnocentrism".[66] Although the Court has not yet directly dealt with this aspect, homophobic speech shall also be considered as falling within the category of "hate speech".[67] Notably, in many European jurisdictions, the concept covers racial, national and religious hatred, also hatred on the grounds of sex, sexual orientation, political convictions, language, social status or physical or mental disability.[68]

3. Summary

Given the absence of uniform definition, it is not surprising that the identification of hate speech has been particularly difficult either at the domestic or at the international level, especially considering that this kind of speech may take the form of indirect expressions of "hatred", at first sight formulated in a neutral manner. Problems of definition are all the more acute, as the scope of hate speech can vary from one society to another.

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[63] Mendel (n 37) 14.

[64] Sottiaux (n 32) 52; *Feret* (n 57) para.77.

[65] Sottiaux (n 32) 52,55.

[66] Weber (n 3) 4. See also Recommendation 97(20) (n 56).

[67] Weber (n 3) 4. See Concurring Opinion of Judge Spielmann joined by Judge Nussberger in *Vejdeland and other v Sweden*, referring to Resolution CM/ResChS(2009)7, Collective complaint no. 45/2007 by the *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia,* Committee of Ministers, 21.10.2009) (App 1813/07, 09.09.2012, para.6).

[68] A19 Study (n 43) 3; European Commission for Democracy Through Law (Venice Commission), *Report on the Relationship between Freedom of Expression and Freedom of Religion: The issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred,* 17-18 October 2008, CDL-AD(2008)026 ("Venice Commission Report"), para.34.

The ECtHR, seemingly aware of the underlying concerns, has not limited itself with the fixed definition and developed an autonomous concept of extreme speech. However, the overbroad interpretation and reference to vague terms, less clarified by the Strasbourg organs, raise questions on the content of the notion and significantly blur the lines between protected and prohibited speech.

III. General Methodology of the ECtHR in hate speech cases

1. Speech falling within the ambit of Article 17

1.1 General principles of application of Article 17 in hate speech cases

The ECHR was drafted in response to the experience of totalitarian regimes, aiming to "sound the alarm at their resurgence".[69] In this context, the Court has frequently stressed the relevance of Article 17, focused to correspond to the "more recent dangers to the European principles of democracy and the rule of law".[70] In the light of the constant emphasis of the ECtHR on the notion of "a democracy capable of defending itself",[71] the provision is understood as a safeguard for democratic society and institutions.[72] Some compromise between the requirements of defending democracy and individual rights is indeed inherent in the Convention system.[73]

[69] See Concurring Opinion of Judge Jambrek in *Lehideux and Isorni v France*, quoting R Ryssdal, 'The Expanding Role of the European Court' in A Eide & J Helgesen (eds), *The Future Protection in a Changing World* (NUP 1991) (App 24662/94, 23.09.1998, para.3).

[70] Ibid. The provision is based on Article 30 of the Universal Declaration of Human Rights (General Assembly Resolution 217A(III), 10.12.1948 (UDHR)) (D Keane, 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights' (2007) 25 NQHR 641, 643).

[71] Harris et al. (n 2) 649. See *Zana v Turkey,* App 18954/01, 25.11.1997, para.55; *Refah Partisi (The Welfare Party) and others v Turkey,* Apps 41340/98,41342/98,41343/98,41344/98, 13.02.2003, paras.98-99; *X v Italy,* App 6741/74, 21.05.1976, The Law, para.2.

[72] See Concurring Opinion of Judge Jambrek in *Lehideux* (n 69) paras.2-3; Keane (n 70) 647.

[73] See *Klass and others v Germany,* App 5029/71, 06.09.1978, para.59; *United Communist Party of Turkey and others v Turkey,* App 19392/92, 30.01.1998, para.32.

The Court generally applies Article 17 when freedom of expression is used as a basis for activities, which are "contrary to the text and spirit of the Convention".[74] The case-law discloses a variety of values which have been found incompatible with the "constitutional paradigm" of the Convention - apart from (neo)-Nazism, fascism, racism, anti-Semitism, National Socialism[75] and communism, the recent cases address Islamic fundamentalism and Kurdish nationalism involving discussions of hatred and an incitement to violence.[76] In this way, the issue of hate speech has involved both Article 10 and Article 17.

The engagement of Article 17 eliminates the need for a balancing process under Article 10, as the State is not required to show that there was a pressing need for interference, but only to prove the content (and not the impact) of the speech.[77] Due to this huge effect of removing the speech from the protection purely on the basis of content and the dangers of its abusive application, it has been relatively rare for the Court to refer to Article 17.[78] However, many hate speech cases have involved Article 17 and, thus, failed to pass the admissibility stage.

The ECtHR jurisprudence reflects a confused understanding of the relationship between Article 10 and Article 17, as the Court has applied them inconsistently throughout the years.[79] Decisions like *Glimmerveen and Hagenbeek v the Netherlands*[80] reveal that if the Court considers the content of the speech as "clearly" racist, as "beyond the pale",[81] it will be attacked directly under Article 17, without any examination of interference under Article 10.[82] For instance, a statement linking in general the religious group with a grave

[74] *Kuhnen v Germany,* App 12194/86, 28.05.1986, The Law, para.1.
[75] See *B.H., M.W., H.P. and G.K. v Austria,* App 12774/87, 1989, The Law, para.2.
[76] Arai (n 2) 449.
[77] Keane (n 70) 656.
[78] Ibid 643. See *United Communist Party of Turkey* (n 73) para.23; *Lawless v Ireland (No 3),* App 332/57, 1.07.1961, The Law, paras.5-6; *Paksas v Lithuania,* App 34932/04, 06.01.2011, para.87; *Hizb Ut-Tahrir and others v Germany,* App 31098/08, 12.06.2012, paras.73-74.
[79] Keane (n 70) 641; Harris et al. (n 2) 650; Mendel (n 37) 33.
[80] Apps 8348/78,8406/78, 11.10.1979.
[81] Jacobs et al. (n 10) 126.
[82] Weber (n 3) 27; Keane (n 70) 647; *DI v Germany,* App 26551/95, 26.06.1996, The Law, para.2; *Kaptan v Switzerland,* App 55641/00, 12.04.2001.

act of terrorism has fallen within the ambit of Article 17.[83] At the same time, although in an unstable way, the Court has applied the abuse clause indirectly, as a "principle of interpretation",[84] employing it as a guiding provision, but making the decision under Article 10.[85] Although suggested to extend Article 17 to cover all those situations where the aim of the statement is racist,[86] there has been no indication that the Court will follow this approach in future.[87] Overall, it is established that Article 17 requires high threshold for its engagement, coming into play only when the threat to the democratic society reaches a certain degree of seriousness.[88]

1.2 Application of Article 17 in cases of negationism

While generally the direct recourse to Article 17 is relatively rare, the Court has actively applied this clause in the very specific discourse of negationism and, in particular, Holocaust denial. Holocaust-based racism – approval, glorification, justification, minimization and denial of the Holocaust – has been around since the very aftermath of the World War II.[89] If the pace of general hate speech provisions has been slow, due to the

[83] *Norwood v UK*, App 23131/03, 16.07.2003. Cf *Feret*, where the speech associated all Muslims to terrorism, but the Court analyzed it under Article 10 (n 57, para.71). See also *Pavel Ivanov v Russia,* App 35222/04, 27.08.2004, The Law, para.1; *WP and others v Poland,* App 42264/98, 2.10.2004.

[84] Weber (n 3) 27.

[85] Keane (n 70) 646,650,656. See *X v Italy* (n 71) The Law, para.2; *T v Belgium,* App 9777/82, 14.07.1983; *Kuhnen* (n 74); *Remer v Germany*, App 25096/94, 19.08.1994; *Garaudy v France,* App 65831/01, 24.06.2003; *Metzger v Germany,* App 56720/00, 17.11.2005. Cf HRC, *MA v Italy,* Communication No.117/1981, 10.04.1984, para.13.3.

[86] Concurring opinion of Judge Jambrek in *Lehideux* (n 69) para.2.

[87] Keane (n 70) 662.

[88] See e.g., *United Communist Party of Turkey* (n 73) para.23. See also *Update of the Preliminary Report prepared for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities,* UN Doc.E/CN.4/Sub.2/1991/9, 16.07.1991 ("Preliminary Report"), para.74.

[89] E Bleich, *The Freedom to Be Racist: How the United States and Europe Struggle to Preserve Freedom and Combat Racism* (OUP 2011) 46; J Knetchle, 'Holocaust Denial and the Concept of Dignity in the European Union' (2008-2009) 36 FSULR 41,44.

sensitivities in countries with a Nazi, fascist, occupied or sympathizing past, denial laws have developed rapidly.[90]

Holocaust denial laws, enforced vigorously, are the most controversial restrictions on freedom of expression because they forbid people to contest the past.[91] Besides, the connection between Holocaust denial and hatred, discrimination and violence is often less immediate than with other forms of hate speech.[92] However, although difficult to assess the impact of such statements, it has been stressed that "genocide denial…forms part of the genocidal project itself".[93] Due to this, according to the ECtHR, negationism or the denial of the crimes against humanity is "the most serious forms of racial defamation of Jews and of incitement to hatred of them".[94] In this light, the Court has upheld Holocaust denial efforts as consistent with a commitment to freedom of expression.[95] The Strasbourg organs have tackled the issue of balancing the acceptability of statements that cast revisionist light on accepted historical interpretations or understandings, on the one hand, and the importance in safeguarding the rights and honours of victims of past atrocities, on the other.[96] The ECtHR jurisprudence on negationism confirms that incitement to hatred need not necessarily be explicit in order to be removed from the protection.[97]

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[90] Bleich (n 89) 59. See Additional Protocol to the Convention on Cybercrime concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems (Strasbourg, 28.01.2003), Article 6; Council of the European Union, Council Framework Decision No.16771/07 on combating certain forms and expressions of racism and xenophobia by means of criminal law (Brussels, 26.02.2008), Article 1.

[91] Bleich (n 89) 45; Boyle (n 4) 498; *R v. Zundel* [1992] 2 SCR (Supreme Court of Canada) 731,754. See General Comment No.34, where the HRC expresses concern on the implications Holocaust denial legislation may have on freedom of expression (n 20, para.49).

[92] Bleich (n 89) 45.

[93] Ibid 47; G Stanton, Genocide Watch, *The 8 Stages of Genocide* (1998), available at: http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html, [21.08.2012].

[94] *Garaudy* (n 85) The Law. See also HRC, *Faurrison v France,* Communication No.550/1993, 8.11.1996, para.9.6.

[95] Bleich (n 89) 45. See eg., *DI* (n 82) The Law, para.2. For the similar approach, see also *Keegstra* (n 23). This contrasts sharply with the jurisprudence of the US courts. For instance, in *Collin v Smith* (578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 US 916 (1978)), the court held that the First Amendment protected from prior restraint the planned march of a group of neo-Nazis through the places where a large number of Holocaust survivors lived (1199, 1201; Douglas-Scott (n 15) 308). See also *Ku Klux Klan etc v Martin Luther King Worshippers,* 735 F Supp 745 (MD Tenn 1990).

[96] Arai (n 2) 450. See e.g., *Witzsch v Germany,* App 7485/03, 13.12.2005.

[97] Christians (n 31) 13.

Lehideux and Isorni v France,[98] providing the most extended scrutiny of Holocaust denial laws, clarified the conditions for the application of Article 17 in such cases[99] - if the revisionist expression refers to the "category of clearly established historical facts, such as the Holocaust", it is removed from the protection by the abuse clause.[100] The categorization of speech as referring to a "clearly established historical fact" raises questions, especially considering the repeated statement of the ECtHR that "it is not the Court's role to arbitrate the underlying historical issues".[101] Furthermore, the approach following *Garaudy*[102] is that not only denying the existence of specific atrocities, but also minimizing their degree and seriousness, fall within the ambit of Article 17.[103] This casts doubts on the extent to which the Court will expand the list of the "clearly established historical facts" and whether this principle can be applied by analogy to certain revisionist comments that shed a different light on the magnitude and causes of such an atrocity.[104] The problem is even more pressing, since Holocaust deniers typically frame their arguments in scientific or academic terms (often in a neutral tone)[105] – the type of expression which usually enjoys great protection in the jurisprudence.[106] For this reason, in differentiating between legitimate historical debate and hate speech, rather than considering statements in the abstract, particular emphasis shall be made on the context, taking into account language, anti-Semitic allegations and other circumstances in which the speech was made.[107]

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[98] n 69.

[99] Boyle (n 4) 498; Keane (n 70) 641.

[100] *Honsik v Austria*, App 25062/94, 18.10.1995; *Marais v France*, App 31159/96, 24.06.1996; *Lehideux* (n 69) para.47.

[101] *Chauvy and others v France*, App 64915/01, 29.06.2004, para.69; *Monnat v Switzerland,* App 73604/01, 21.09.2006, para.57.

[102] n 85.

[103] Arai (n 2) 451. Cf *X v Federal Republic of Germany*, where the Commission, although admitting that the murder of the Jews was a "known historic fact" established beyond doubt by overwhelming proof of all kinds, had recourse to Article 10, without referring to Article 17 (App 9235/81, 16.07.1982, The Law, para.4).

[104] Arai (n 2) 451, referring to the debates on the legal characterization of the massacres and deportation of Armenians at the hand of the Ottoman Empire during the First World War (fn 57). In this light, see *Cox v Turkey*, where the Court found the ban on re-entering Turkey for expressing controversial opinions on Kurdish and Armenian issues in violation of Article 10 (App 2933/03, 20.08.2010).

[105] Bleich (n 89) 46-47.

[106] See *Lehideux* (n 69) para.47. Cf *Garaudy* (n 85). See also CERD, *Jewish Community of Oslo et al. v Norway,* Communication No 30/2003, 15.08.2005, para.10.5.

[107] Mendel (n 37) 41.

2. Application of Article 10 and variables affecting the level of protection

In cases, where there is less explicit hate speech and the room for hesitations, instead of engaging Article 17, the starting point for the Court is that the expression could *a priori* be integrated into a public debate.[108] The ECtHR examines with "close scrutiny" the interference under tripartite test: once the legality and the legitimacy of interference are established, the Court reviews the necessity and the proportionality of measures.[109] In large part, the necessity test addresses the question of what constitutes incitement.[110] The ECtHR assesses restrictions on the speech "in the light of the case as a whole".[111] While acknowledging that it is not to take the place of the competent national authorities and reinforcing the principle of subsidiarity,[112] the Court reviews the State's decisions pursuant to its power of appreciation, which goes beyond ascertaining whether the State exercised its discretion "reasonably, carefully and in good faith".[113] The jurisprudence on hate speech reveals that there does not exist one decisive factor determining what is allowed and what is not, but rather a set of variable elements, combined on a case-by-case basis.[114]

2.1 Content

The content analysis necessarily entails passing a value judgment on the ideas expressed.[115] Threats of such, somewhat paternalistic, approach cannot be ignored, as

[108] Oetheimer (n 13) 433.
[109] Ibid 433-434. See *Silver and others v UK,* Apps 5947/72;6205/73;7052/75;7061/75;7107/75;7113/75;7136/75, 25.03.1986, paras.97-98.
[110] Mendel (n 37) 32.
[111] *Sunday Times v The UK (No 2),* App 13166/87, 26.11.1991, para.50.
[112] See P Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 AJIL 38, 74-75.
[113] *Sunday Times (No 2)* (n 111) para.50.
[114] Weber (n 3) 33.
[115] Preliminary Report (n 88) para.95.

"personal convictions can influence…ideas about what is actually dangerous".[116] Due to the underlying fears of excessive discretion and abuse, the Court has generally rejected to provide distinctions based on the content of speech.[117] However, given that hate speech restriction is of itself a content-based limitation and the content of the speech is a critical element of incitement,[118] it is not surprising that the examination of the content of an expression takes crucial place in the ECtHR's extreme speech jurisprudence.

In distinguishing between hate speech and statements that simply offer a critique on a matter of public interest, the ECtHR checks whether the language is "susceptible to instill" or "of such a nature as to arouse" feelings of rejection, hostility or hatred against targeted community.[119] The Court examines if the expressions have a "tendency" to persuade the members of the public to adopt hateful attitudes and, at times, controversially infers from the tendency both the nature of the act – incitement – and the intention of the author.[120] In this way, language that is susceptible to cause feelings of hatred is equated with intentional incitement to hatred.[121] As the category of speech with a mere tendency to cause social harm is limitless, it is clear that the so-called "bad tendency" approach, originated in the US jurisprudence and subsequently removed as a misguided interpretation of the First Amendment, poses risks to the adequate protection of freedom of expression.[122]

2.2 Purpose

[116] See Dissenting opinion of Judge András Sajó et al. in *Feret* (n 57); Concurring opinion of Judge Bostjan M Zupancic in *Vejdeland* (n 67) paras.2-4. Cf *Snyder v Phelps* (562 US (2011); *Keegstra* (n 23) para.62.
[117] Zeno-Zencovich (n 23) 13.
[118] A19 Study (n 43) 12.
[119] Ibid; Sottiaux (n 32) 53. See also *Ceylan v Turkey,* App 23556/94, 8.07.1999; *Karkin v Turkey,* App 43928/98,12.03.2002; *Gunduz v Turkey* (n 54); *Ergin v Turkey (No 6)*, App 47533/99, 4.05.2006, para.34.
[120] Sottiaux (n 32) 53. See *Feret* (n 57) paras.70-71,78, Dissenting opinion of Judge András Sajó et al. Cf *Le Pen v France,* App 18788/09, 20.04.2010, where the mere tendency sufficed to justify the restriction (Sottiaux (n 32) 53).
[121] Sottiaux (n 32) 53.
[122] Ibid 57.

Is the speech intended to spread intolerant ideas through hate speech or is it an attempt to inform the public about the issue of general interest?[123] The *bona fide* purpose of the speech, such as the search for historical truth or the dissemination of news and information, excludes a statement from the category of extreme speech.[124] This is in line with the wording of the ICCPR Article 20 of "advocacy", implying intentional action.[125] Notably, the Venice Commission has stressed that the States shall introduce an explicit requirement of intent or recklessness in their hate speech legislation.[126]

Given the difficulty to assess an individual's inner state of mind, this criterion seems a delicate one to implement and the qualification of intentional incitement has been problematic in the ECtHR jurisprudence.[127] As an actual language of the speech has largely determined the purpose of the speaker, the Court focuses more on the content and the context in which the incriminating remarks were disseminated, rather than on the intent of the speaker.[128] Regrettably, due to the application of the "bad tendency" test, the Court has often justified the restriction of speech merely because of the dangerous tendency of expression and not because it constituted an "intentional incitement", as required by the ICCPR and other instruments.[129] This has unduly broadened the reach of the "hate speech" concept.[130] To echo the Canadian Court's position, in this context, "willful blindness" or knowledge as to the consequences could suffice the *mens rea* requirement, without having the chilling effects.[131] Besides, such approach would be consistent with the ECtHR's

[123] See A19 Study (n 43) 10. See also *Jersild* (n 61); *Wabl v Austria,* App 24773/94, 21.03.2000, para.42; *Aksu v Turkey,* Apps 4149/04,41029/04, 22.11.2010, paras.56-57; *Gitlow v. New York* 268 US 652, 673 (1925) per Holmes J.

[124] Bertoni (n 17) 572.

[125] A19 Study (n 43) 11; Mendel (n 37) 14. The requirement of intent has also been provided by the European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No.7 on National Legislation to Combat Racism and Racial Discrimination ("ECRI Recommendation") (13.12.2002, CRI(2003)8, para.18). In contrast, the CERD does not require intent for the mere dissemination of ideas based on superiority and racial hatred (see Article 4(a); Mendel (n 37) 14).

[126] Venice Commission Report (n 68) para.89(a).

[127] Weber (n 3) 33. This variable has been decisive in *Jersild* (n 61), *Lehideux* (n 69), *Garaudy* (n 85).

[128] Bertoni (n 17) 572; Weber (n 3) 33.

[129] Sottiaux (n 32) 54.

[130] Ibid 58.

[131] Ibid 59. See *Keegstra* (n 23) para.120. Cf the "purpose" test, applied by the American Courts (e.g., *Abrams v United States*, 250 US 616 (1919) 626).

incitement to violence jurisprudence, where it pays more attention to the aim of the speaker.[132]

2.3 Context

The contextual impact seems to be the preeminent criterion in examining hate speech.[133] Due to the broad set of factors that constitute context, it seems extremely difficult to draw general conclusions from the case-law about what sort of contexts are more likely to promote the prohibited result.[134] However, some common principles may be supplied.[135] Ideally, context analysis means consideration of social and political environment existing at the time the speech was made.[136] In this sense, the ECtHR scrupulously examines the applicant's function in society and the interest of the speech in a democratic society.[137] The level of the speaker's authority and influence over the audience is relevant as is the degree to which the audience is already conditioned to take their lead from the speaker.[138] The Court further explores the medium used and the form of speech, as well as the manner in which views are expressed.[139]

International jurisprudence has not traditionally required a direct link between the expression at issue and the demonstration of a direct effect.[140] It would be difficult, or even impossible, to prove a causal connection between hate speech and certain types of social harm, especially given that there is not any convincing empirical evidence supporting the

[132] Sottiaux (n 32) 60.
[133] Christians (n 31) 5. See *Jersild* (n 61); *Gunduz* (n 54); *Erbakan v Turkey,* App 32153/03, 20.09.2007.
[134] Mendel (n 37) 56.
[135] Ibid.
[136] A19 Study (n 43) 17; Bertoni (n 17) 572. See e.g., *BH MW HP and GK* (n 75); *Zana* (n 71).
[137] Oetheimer (n 13) 439. See *Incal v Turkey,* App 22678/93, 09.06.1998, para.46; *Ceylan* (n 119) para.36; *Erbakan* (n 133) para.65.
[138] *Alinak v Turkey,* App 40287/98, 29.03.2005, para.41; *Vejdeland* (n 67) para.56; Venice Commission Report (n 68); A19 Study (n 43) 14. See also Concurring Opinion of Judge Bostjan M Zupancic in *Vejdeland,* referring to "a captive audience" formula developed in *Rowan v. Post Office Dept*., 397 U.S. 728, 736-738, and in *Frisby and Schultz* 487 U.S. 474, 484-485 (n 67, para.9).
[139] Oetheimer (n 13) 439; Christians (n 31) 15.
[140] Bertoni (n 17) 572.

causal claim.[141] Nevertheless, in approaching hate speech cases, the Court requires for some degree of risk or resulting harm to be identified, implicit in the notion of "incitement".[142] For this purpose, the "social impact" test[143] is used, referring to destroying or limiting other rights, particularly equality or the negative effect on justice and peace, while analyzing the impact of the statements.[144] The vague nature of the aims protected exacerbates the weakness of the causality standard employed by the ECtHR.[145] Given that it may be central consideration to achieving an appropriate balance, it would have been better if the Court clarified the degree of causal link required in hate speech cases.[146]

2.4 Measures

While there is a requirement under the CERD that the States should criminalize hate speech, which is identified as a serious act of racial discrimination,[147] the question is whether the abuse of expression can really justify deprivation of liberty.[148] Issue of what sanction is appropriate under international law for extreme speech has long been ignored in the debates.[149] Gradually, the potential danger of discriminatory or arbitrary implementation of action against hate speech has been recognized within the UN and

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[141] Sottiaux (n 32) 54. For the analysis of various types of social harms of hate speech and potential effects of racial vilification, see R Delgado & J Stefancic, *Understanding Words that Wound* (Westview Press 2004). See also C Baker, 'Autonomy and Hate Speech' in Hare & Weinstein (n 3) 146; N Wolfson, *Hate Speech, Sex Speech, Free Speech* (Praeger Publishers 1997) 51-60.

[142] A19 Study (n 43)15.

[143] Christians (n 31) 5. Cf the ECtHR jurisprudence on incitement to violence (see Section IV below).

[144] A19 Study (n 43) 15-16; Sottiaux (n 32) 48. See also *Glimmerveen* (n 80); *Garaudy* (n 85).

[145] Mendel (n 37) 55.

[146] Ibid.

[147] Mello (n 17) 369; Partsch (n 44) 23.

[148] Preliminary Report (n 88) para.100. "As far as democracy is concerned, ideas should be fought with ideas and reasons; theories must be refuted by arguments and not by the scaffold, prison, exile, confiscation or fines" (Colombian Representative, UN GAOR, 20th Sess., 1406th Plenary mtg., UN Doc.A/PV.1406 (1965), 42-43).

[149] Farrior (n 20) 10; L Bollinger, 'The Tolerant Society: A Response to Critics' (1990) 90 CLR 979,985. See also R Delgado, 'Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling' (1982) 17 HCCR 133; M Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 MLR 2320,2360 (cited in Mello (n 17) 376).

European bodies, with the growing emphasis on the rejection of imprisonment for hate speech.[150] Although the CERD Committee has not agreed expressly that criminal sanctions can be substituted by conciliation procedures, it has displayed some flexibility on this point, holding that Article 4 does not require the State to prosecute every case of racist discrimination.[151] As for the European level, the Committee of Ministers stated that defamation or insult by the media should not lead to imprisonment, unless this is strictly necessary and proportional to the seriousness of the violation of the rights or reputation of others.[152] The Venice Commission has also urged that criminal sanction should be seen as a last resort measure to be applied in strictly justifiable situations, when no other means appear capable of achieving the desired protection.[153]

The ECtHR, even having classified the expression as hate speech, has consistently reviewed the proportionality of restrictive measures used by the State.[154] In this light, the Court has paid particular attention to the nature and the severity of penalty imposed on the applicant,[155] expecting from the State to "show restraint" in resorting to criminal proceedings and especially to imprisonment.[156] However, although such "radical" measure or the preventive aspect will generally raise serious concerns, the Court does not exclude the possibility of justifying the engagement of criminal sanctions, given that they are used appropriately and not excessively.[157]

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[150] Council of Europe, Parliamentary Assembly Resolution 1754(2010), *Fight against Extremism: Achievements, Deficiencies and Failures,* (5.10.2010) paras.13.3,13.5; Christians (n 31) 8. See also Commission on Human Rights, Report on the 44th Session, ECOSOC Official Records 1988, Supp No.2, Resolution 1988/37, *'Right to Freedom of Expression and Opinion'* UN Doc.E/CN.4/1988/88, 96-97; Preliminary Report (n 88) paras.6,21,23.

[151] CERD, *Yilmaz-Dogan v the Netherlands,* Communication No 1/1984, U.N. Doc.CERD/C/36/D/1/1984 (10.08.1988), para.9.4; Partsch (n 44) 28.

[152] Council of Europe, Committee of Ministers, *Declaration on Freedom of Political Debate* (12.02.2004) para.VIII. See also Recommendation 97(20) (n 56), Appendix, Principle 2; ECRI Recommendation (n 125).

[153] Venice Commission Report (n 68) para.55.

[154] Oetheimer (n 13) 443. See also *Gunduz* (n 54).

[155] See *Ceylan* (n 119) para.37; *Tammer v. Estonia*, App 41205/98, 06.02.2001, para.69; *Skaÿka v. Poland*, App 43425/98, 27.05.2003, paras.41-42.

[156] *Incal* (n 137) para.54; *Vajnai v Hungary,* App 44438/08, 08.07.2008, para.58.

[157] *Surek (No 1)* (n 54) para.61; Oetheimer (n 13) 442-443. For the preventive prohibitions, see also *United Communist Party of Turkey* (n 73) paras.51-61; *Dicle v Turkey,* App 34685/97, 10.11.2004, para.17; *Alinak* (n 138) para.37.

3. Summary

Should content-based restrictions on hate speech fall within Article 17 or should all expression, including Holocaust denial, be protected under Article 10?[158] Are these questions relevant at all, considering that most instances of state interference in respect to hate speech were deemed necessary under Article 10(2), if not excluded from its scope by Article 17?[159]

A sounder approach is that all forms and types of free speech are embraced within the scope of protection under Article 10, so that the limitations are examined under the tripartite test.[160] In order to prevent the States from abusive recourse to Article 17, it is preferable to carry out a specific contextual analysis in each case, rather than to take an "across-the-broad" approach of banning the speech as such.[161] This would also be in line with the position of the HRC, which requires that any limitation under Article 20 be compatible with the conditions of Article 19(3), so that any restriction on speech is scrutinized under the general test of interference.[162] Dubious interpretation of the relationship between Article 17 and Article 10 by the ECtHR casts doubts on the effective protection of free speech.

While it is possible to frame basic principles for the application of Article 10, the instability of the Court makes the approach less predictable, raising concerns on the provision of "direct, objective and full-scale" review.[163] In this light, the ECtHR may be criticized for having recourse to the "bad tendency" test, stretching the potential reach of the hate speech concept to the detriment of freedom of expression. More speaker-based position

[158] Keane (n 70) 657.
[159] Ibid 661.
[160] Arai (n 2) 450; E Barendt, *Freedom of Speech* (2nd ed., OUP 2007) 177.
[161] Arai (n 2) 450,452.
[162] General Comment No.34 (n 20) para.50.
[163] Arai (n 30) 17.

and emphasis on the requirement of intense proximity between the expression and its effects would delimit the overbroad interpretation of the notion.

IV. Incitement to Violence

1. Background

Generally, political speech must be tolerated to the greatest extent possible and the least restrictive alternative must be chosen for the interference in freedom of expression.[164] This means that the most stringent scrutiny shall intervene and the margin of appreciation shall become the narrowest.[165] However, political speech may involve statements which directly or indirectly incite violence against government, individuals or a sector of the population. The Court happened to review the nature of such expression and protection afforded to it in various cases. The practice discloses that the ECtHR does not exclude the incitement to violence from the scope of Article 10 on the basis of Article 17, but analyzes the restrictions applied by the State under Article 10(2).[166]

The case-law reveals that the ECtHR differentiates between "incitement to hatred" and "incitement to violence."[167] While the latter is much narrower,[168] the Court inconsistently refers to these concepts cumulatively, raising questions on the distinguishing criteria between them.[169] Given that in a number of cases hate speech, taken in the narrow sense, as defined by Recommendation 97(20), is frequently linked to incitement to violence, the

[164] Ibid 122. See *Wingrove* (n 24) para.58; *Castells v Spain,* App 11798/85, 23.04.1992. See also A Mowbray, *Cases, Materials and Commentary on the European Convention on Human Rights* (3rd ed., OUP 2012) 644-666.
[165] Arai (n 30) 123.
[166] Arai (n 2) 452. For the parallel in the constitutional history of the US, see *Masses Publishing v Pattern*, 244 F 535, 540 (SDNY 1917).
[167] Christians (n 31) 2. See *Surek v Turkey (No 3),* App 24735/94, 08.07.1999, para.40. Cf *Surek (No 1)* (n 54) para.62.
[168] S Roth, 'CSCE Standards on Incitement to Hatred and Discrimination on National, Racial or Religious Grounds' in Coliver et al. (n 20) 59. See *Document of the Copenhagen Meeting of the Conference on the Human Dimension*, 5-29.06.1990, Conference on Security and Cooperation in Europe (CSCE), para.40.1.
[169] Oetheimer (n 13) 435. See *Gunduz* (n 54).

jurisprudence may be confusing to read.[170] The ECtHR treats both types of cases identically; however, when developing its reasoning, it grants a special meaning to each notion.[171] For instance, in most of the Turkey cases decided in 1999, introducing the standard of incitement to violence, the Court does not focus on the notion of hatred.[172] In contrast, in cases specifically related to hate speech, the element of incitement to violence disappears.[173] This means that the concepts are distinguished, but without creating different consequences in the reasoning.[174]

The States enjoy wide margin of appreciation when examining the need for interference when the speech constitutes an incitement to violence against the State, an individual or a sector of the population.[175] The maintenance of national security, the prevention of disorder and crime and the protection of "rights of others" are usually invoked and easily proved by the State as legitimate aims for interference. The qualifying words of "duties and responsibilities" in Article 10(2) are further used as a justification for broadening the State's discretionary power.[176]

However, the problem of balancing freedom of expression and the public interest has continuously presented itself, particularly in the context of fight against terrorism.[177] The great deference to national discretion in matters of state security has corresponded to the absence of proper examination of proportionality by the ECtHR.[178] In this sense, the Court can be criticized for assuming the *bona fides* of the State in striking a reasonable balance and showing reluctance to engage in its own scrutiny.[179]

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[170] Oetheimer (n 13) 435.
[171] Ibid 436.
[172] Ibid. See *Gerger v Turkey,* App 24919/94, 8.07.1999; *Polat v Turkey,* App 23500/94, 07.07.1999, para.47. Cf *Surek (No.1)* (n 54) para.61; *Karatas v Turkey,* App 23168/94, 8.07.1999; *Surek and Ozdemir v Turkey,* Apps 23927/94;24277/94, 08.07.1999.
[173] Oetheimer (n 13) 438.
[174] Ibid 436.
[175] *Surek (No 1)* (n 54) para.61.
[176] Arai (n 30) 106.
[177] S Sottiaux, '*Leroy v France*: Apology of terrorism and the Malaise of the European Court of Human Rights' Free Speech Jurisprudence' (2009) 3 EHRLR 415,415.
[178] Arai (n 30) 106.
[179] Ibid.

2. General approach

The jurisprudence reveals that it is not always straightforward whether the speech involves incitement to violence or constitutes disturbing, shocking or offensive expression, which, as a rule, falls under the protection of Article 10.[180] Analysis of the series of cases against Turkey envisages the basic methodology of the Court in relation to extreme speech inciting to violence. Background to most of these cases is the conflict between Kurdish nationals and Turkish authorities, which penalized expressions in support for the Kurdish nationalists.[181]

The borderline case of *Zana*,[182] illustrating restrained patterns of examination, is a typical example of the initial approach of the ECtHR, having regard to the nature of the words and their possible consequences, without incorporating these elements into a fixed formula.[183] The applicant, a former mayor of a city, was sentenced to twelve months' imprisonment due to his statement supporting the Worker's Party of Kurdistan (PKK).[184] In particular, he described the PKK as a "national liberation movement" and the killing of women and children by the PKK – "a mistake".[185] At the same time, he denounced the massacres and dissociated himself to some extent from the violence used by the PKK.[186] The Court chose to apply a lax proportionality review, tipping the fair balance in favour of the democracy's right to protect itself against terrorism.[187] Controversially finding that these "contradictory and ambiguous" statements were "likely to exacerbate an already explosive situation", the ECtHR failed to duly take into account the content of the expressions, the applicant's personal background (as he had always spoken out against violence) and was curiously

[180] J Frowein, 'Incitement against Democracy as a Limitation of Freedom of Speech' in D Kretzmer & F Hazan (eds), *Freedom of Speech and Incitement Against Democracy* (KLI 2000) 36.
[181] Barendt (n 160) 167.
[182] n 71.
[183] Arai (n 30) 106; Sottiaux (n 177) 418.
[184] *Zana* (n 71) paras.12,26.
[185] Ibid para.12.
[186] Ibid. See Partly Dissenting Opinion of Judge Van Dijk et al. in *Zana* (n 71).
[187] *Zana* (n 71) paras.55,61-62; Arai (n 30) 106.

silent on the fact that when the interview took place, he was in prison.[188] In this context, the imprisonment would less likely have been regarded as a proportionate reaction from the State.[189]

In late 1990s, the Court began to elaborate a full-scale doctrine to assess interferences with speech advocating illegal conduct or speech potentially harmful to national security interests.[190] The ECtHR shifted from context-based "democratic necessity" approach, formulated in *Zana*, to a more speaker-based incitement attitude.[191] In *Surek v Turkey (No 1),*[192] one of the first cases in which the Court adopted the "incitement to violence" standard, the ECtHR again stressed the wide margin of appreciation of the State when remarks incited to violence and re-affirmed the possibility of restrictive, including criminal, measures.[193] Here the applicant was convicted of disseminating separatist propaganda through the medium of which he was the owner; in particular, he published letters submitted by readers, in which the Turkish military was vehemently accused of brutally suppressing the Kurds.[194] The Court perceived certain phrases ("the fascist Turkish army", "the hired killers of imperialism", references to "massacres" and "brutalities") in the letters as intending to "stigmatize the other side of the conflict," as an "appeal to bloody revenge by stirring up base emotions".[195] Considering the special context of security situation in the South-East Turkey, the ECtHR found the content capable of inciting to violence in the region "by instilling a deep-seated and irrational hatred".[196]

The judgment is controversial in the way it broadens the scope of special "duties and responsibilities" of media in situations of conflict to the serious detriment of press freedom,

[188] *Zana* (n 71) paras.58-62, Partly Dissenting Opinion of Judge Van Dijk et al.; Arai (n 30) 107.
[189] Arai (n 30) 107. See also Dissenting Opinion of Judge Thor Vilhjamsson in *Zana* (n 71).
[190] Sottiaux (n 177) 419.
[191] Ibid.
[192] n 54.
[193] Ibid para.61. Cf *Surek and Ozdemir* (n 172). See S Sottiaux, 'Anti-Democratic Associations: Content and Consequences in Article 11 Adjudication' (2004) 22 NQHR 585,589.
[194] *Surek (No 1)* (n 54) paras.11,60.
[195] Ibid para.62.
[196] Ibid.

stretching it not only to the authors or the editors, but also to the owners of the medium.[197] The Court failed to take into account the fact that, in contrast to *Zana*, the speaker was not a prominent figure, capable of exerting influence on the public; neither did he personally associate himself with the contested views.[198] Although the ECtHR has long recognized that the States are entitled to adopt special measures to combat terrorism, extending to media restrictions, it is worth recalling that the general policy is to provide the press with the widest scope of protection, as it plays a crucial role of a "public watchdog" in a democratic society.[199] However, cases like *Surek,* reveal that the role of the media in informing the public of extreme political movements and their leaders could be underrated by the Court.[200] Even though the ECtHR requires from the State to show "restraint" on recourse to criminal measures,[201] it stems from the case-law that it is relatively easy to demonstrate the proportionality of such sanctions when the statements are published in the media.[202]

The case can be contrasted to *Surek and Ozdemir v Turkey*,[203] where the Court, departing from *Surek (No 1),* accorded primacy to freedom of expression and again showed inconsistency in applying the margin of appreciation doctrine.[204] Here the applicants were contesting criminal sanctions imposed for publishing interviews with a leading member of the PKK and a joint statement issued on behalf of proscribed organizations.[205] The ECtHR

[197] Arai (n 2) 453; H Davis, 'Lessons From Turkey: Anti-terrorism Legislation and the Protection of Free Speech' (2005) 1 EHRLR 75,78. Cf *Halis v Turkey,* App 30007/96, 11.04.2005, para.34. See Recommendation 97(20), under which the law should clearly distinguish between the responsibility of the author of hate speech and that of the media for their dissemination (n 56, Principle 6). On the contribution of the media to the fight against intolerance, see Council of Europe, *Committee of Ministers Recommendation 97(21) on the media and the promotion of a culture of tolerance* (30.10.1997); Council of Europe, *Parliamentary Assembly Recommendation 1277 (1995) on migrants, ethnic minorities and media* (30.06.1995) para.2.

[198] See Partly Dissenting Opinion of Judge Palm in *Surek (No 1)* (n 54).

[199] Arai (n 30) 127; Davis (n 197) 78. See, *inter alia, The Sunday Times v UK (No 1),* App 6538/74, 26.04.1979, para.65; *Brogan v United Kingdom,* Apps 11209/84,11234/84,11266/84,113868/85, 29.11.1998; *Handyside* (n 6) para.49.

[200] Arai (n 2) 477. See also *Purcell and others v Ireland,* App 15404/89, 16.04.1991; *Brind and others* (n 14).

[201] Davis (n 197) 79. See *Karatas* (n 172); *Surek and Ozdemir* (n 172) para.63.

[202] *Polat* (n 172) para.47; Davis (n 197) 82; Weber (n 3) 10. See also Recommendation 97(20), emphasizing that hate speech may have a greater and more damaging impact when disseminated through the media (n 56, Principle 6).

[203] n 172.

[204] Arai (n 2) 453; Arai (n 30) 107.

[205] See *Surek and Ozdemir* (n 172) paras.58-59.

assessed the context of the contested statements ("[T]he war will go on until there is only one single individual left on our side", "If they want us to leave our territory, they must know that we will never agree to it")[206] as "newsworthy content" for the public and found the failure of the State to give sufficient regard to the public's right to be informed on different perspectives on the situation in country.[207] The Court correctly stressed that the fact that the contested interviews were given by a leading figure of a banned organization could not in itself justify interference with freedom of expression.[208] Furthermore, in contrast to the *Zana* case, the very circumstance of the interviewed person being the key figure of the PKK was considered to enhance the newsworthiness of the information.[209]

It is indeed difficult to reconcile cases like *Zana*, *Surek (No 1)* and *Surek and Ozdemir,* as the logic behind taking different approaches by the Court is not quite clear. Nevertheless, Turkish cases are of fundamental importance as they more or less settle the jurisprudence in the area,[210] adopting the general formula, that particularly sharp expression drawing a very negative picture of the State, giving a hostile connotation to the story, may still be protected if it does not clearly encourage violence.[211] In contrast, statements that advocate intensifying the armed struggle, espouse an intention to fight to the last drop of blood in the conflict setting can be seen as incitements to violence.[212]

[206] Ibid para.61.
[207] Ibid.
[208] Arai (n 2) 454.
[209] Ibid.
[210] Oetheimer (n 13) 437.
[211] *Dicle v Turkey (No 2),* App 46733/99, 11.04.2006, para.33; Davis (n 197) 81; Arai (n 2) 454. See also *Ceylan* (n 119) para.36; *Baskaya and Okcuoğlu v Turkey,* Apps 23536/94;24408/94, 8.07.1999, para.64; *Erdogdu and Ince v Turkey,* App 25067/94, 08.07.1999, para.52; *Ozgur Gundem v Turkey*, App 23144/93, 16.03.2000, paras.63,70.
[212] Davis (n 197) 81. See *Karatas* (n 172) para.52; *Ozgur Gundem* (n 211) para.65; *Surek (No 1)* (n 54) para.62. See also *Surek v Turkey (No 4),* App 24762/94, 08.07.1999, para.58; *Sener v Turkey,* App 26680/95, 18.07.2000, paras.44-45.

3. *Leroy* – unexplained exception or shift from the precedent?

Leroy v France[213] illustrates that penalizing the "glorification of terrorism" has opened the possibility to prosecute media content in a way that forms a real threat for independent journalism and thus for democracy itself.[214] The case was one of the first opportunities for the Court to take a clear position in the debates over the post 9/11 legislative developments, however, the decision has been argued to be both substantially and methodologically flawed.[215] While departing from its well-established incitement to violence jurisprudence, the ECtHR offered no alternative principle, which is, unfortunately, symptomatic of the Court's Article 10 decision-making process.[216] The case concerned the applicant's conviction for complicity in condoning terrorism, following the publication of a drawing on the attacks of 11 September 2001, which parodied the advertising slogan of a famous brand: "We have all dreamt of it…Hamas did it".[217]

In this context, one should note the Council of Europe Convention on the Prevention of Terrorism[218], which requires that the implementation and application of the penalization of "public provocation to commit a terrorist offence" be respectful of freedom of expression.[219] Notably, the Council Framework Decision, introducing an offence of public provocation to commit a terrorist offence, refers to direct as well as indirect advocacy of terrorist offences.[220] While generally the concept of incitement covers indirect advocacy, the task of elaborating a test for the regulation of such non-express instances of incitement

[213] App 36109/03, 02.10.2008.
[214] D Voorhoof, 'European Court of Human Rights: Where is the 'Chilling Effect''? Draft Version 15/10, DV, available at: http://www-ircm.u-strasbg.fr/seminaire_oct2008/docs/Voorhoof_Where_is_Chilling_Effect.pdf, [21.08.2012], 2. For further analysis on the incitement to terrorist acts, see Y Ronen, 'Incitement to Terrorist Acts and International Law' (2010) 23(3) LJIL 645-674.
[215] Sottiaux (n 177) 417.
[216] Ibid.
[217] See Voorhoof (n 214) 1.
[218] Warsaw, 16.05.2005.
[219] Ibid, Article 12. See also Council of Europe, Committee of Ministers, *Declaration on freedom of expression and information in the media in the context of the fight against terrorism,* 2.03.2005.
[220] Council of the European Union, Council Framework Decision 2008/919/JHA amending Framework Decision 2002/475/JHA on Combating Terrorism [2008] OJ L330/21, Article 1(1).

is much controversial.[221] In this respect, the precise definition of "apology" is decisive, as the broad interpretation of the notion risks having a chilling effect on political speech and on the media coverage of terrorism-related news items.[222]

Against this background, in *Leroy*, the Court does not employ its already established incitement standard and, instead, recalls earlier open-ended democratic necessity approach, elaborated in *Zana*.[223] While the incitement test is limited to the advocacy of "violence" or "terrorism", this requirement is totally absent in the judgment.[224] The ECtHR fails to suggest that the statement in the form of cartoon directly or indirectly encourages violence or terrorism, but perceives it as "supporting" or "glorifying" terrorism.[225] This is in contrast to the previous decisions of the Court, stating that the notion of "apology" or "glorification" shall not be equated with "incitement".[226] According to the ECtHR in other cases, absent a finding of incitement to violence, a conviction for glorification of terrorism would amount to a violation of Article 10, as simply moral support for terrorism *per se* does not deprive an expression of the protection.[227]

The Court completely ignores the intention of the speaker, the relevance of which has been heavily emphasized in 1999 Turkish cases, as well as by the Council of Europe Convention and Framework Decision.[228] As for the component of incitement standard concerning the probable impact of the expression, playing a significant role in overall assessment and prevalent already in *Zana*, the Court chooses to pay attention to the circumstances surrounding the publication of the cartoon, in particular, the fact that the drawing was

[221] Sottiaux (n 177) 417.
[222] Ibid.
[223] Ibid 420.
[224] Ibid 421.
[225] Ibid. See *Leroy* (n 213) para.43.
[226] *EK v Turkey,* App 28496/95, 07.02.2002, para.88; Sottiaux (n 177) 421. See Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism (CETS No 196), para.98.
[227] Dissenting opinion of Judges Sajo and Tsotsoria in *Gul and others v Turkey,* App 4870/02, 08.06.2010; Sottiaux (n 177) 421.
[228] Sottiaux (n 177) 421-422. See *Surek (No 1)* (n 54) para.62; *Halis Dogan v Turkey (No.3),* App 50693/99, 10.10.2006, para.34. Cf Article 5(1) of the Convention for the Prevention of Terrorism (n 218); Article 1(1) of the Proposal for a Council Framework Decision (n 220).

published in two days from the attacks, with no precautions as to the language used and that the region where it was published (Basque Country) was a politically sensitive one.[229] Nevertheless, it is hard to maintain that the cartoon created any "credible" danger, especially considering the authority of the speaker – there is a significant difference between a cartoonist and a politician or a representative of terrorist organization, the fact that shall be taken into account.[230] The approach conflicts the attitude of the Court taken in many cases against Turkey, where the reality of terrorism was more imminent, but the ECtHR held that the State violated Article 10 in restricting speech, even hostile in tone.[231]

The acceptance of the criminal conviction of the cartoonist by the Court because of one isolated cartoon may be assessed as a step too far that risks having a chilling effect on cartoonists and columnists who comment the news in the form of cartoons and satire.[232] The judgment sharply contradicts with the statement of the ECtHR that the satire is "a form of artistic expression and social comment which, by exaggerating and distorting reality, is intentionally provocative".[233] In this way, *Leroy* takes from the press the benefit of "provocation and exaggeration",[234] and unconvincingly explains it by the sensitive nature of the fight against terrorism.[235]

4. "Clear and Present Danger" Test in the ECtHR jurisprudence?

[229] *Leroy* (n 213) paras. 43-45; Sottiaux (n 177)423. See also Explanatory Report (n 226) para.100.
[230] Sottiaux (n 177) 424; L Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP 2011) 420-421.
[231] Voorhoof (n 214) 3.
[232] Ibid 2. For further analysis, see D Keane, 'Cartoon Violence and Freedom of Expression' (2008) 30 HRQ 845-875. See also the strong condemnation of Danish cartoons from the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN News Centre, Racism and Racial Discrimination on Rise Around the World, UN Expert Warns, 7 Mar. 2006, available at http://www.un.org/apps/news/story.asp?NewsID=17718&Cr=racis&Cr1, [21.08.2012].
[233] Voorhoof (n 214) 2.
[234] See *Fressoz and Roire v France*, App 29183/95, 21.01.1999, para.45.
[235] Voorhoof (n 214) 3. See the similar line of reasoning in *Lindon, Otchakovsky-Laurens and July v France,* Apps 21279/02,36448/02, 22.10.2007; *Stoll v Switzerland,* App 69698/01, 10.12.2007; *Flux v Moldova (No 6),* App 22824/04, 29.07.2008.

Leroy can be usefully contrasted with the similarly recent subversive speech case of *Vajnai v Hungary*,[236] where the Court went far to require a "real and present danger" to justify restrictive measures.[237] In this way, the ECtHR somehow moved away from its broadly worded "social impact" test, applied in hate speech cases, under which it assessed the impact of the statements in the light of destroying or limiting other rights, particularly equality or the negative effect on justice and peace.[238] Notably, it was in *Erbakan*, where the Court for the first time and without elaborating more, emphasized that the speech did not create an "actual risk" and "imminent danger" for society.[239] Similarly, in the case of *Association of Citizens Radko & Paunkovski v The Former Yugoslav Republic of Macedonia*[240] the ECtHR again pointed to the high threshold for restriction of the speech, by not being satisfied that the speech was "liable to arouse hostile sentiments among the population" and requiring "imminent threat" to public order.[241] Due to this, it may be argued that there is a recent (although unstable) tendency of the Court to follow the previously ignored US approach in its "incitement to violence" cases.

The wish to relate hate speech jurisprudence to the "clear and present danger" test, elaborated in *Schenck v United States*,[242] was repeatedly emphasized by the dissenting judges in the cases against Turkey.[243] Under this standard, even exhortation to violence is protected, if the speech is not highly likely to produce imminent harm in a particular situation.[244] This means that where the invitation to violence remains in the abstract and

[236] n 156. See also *Fratanolo v Hungary,* App 29459/10, 08/03/2012.
[237] n 156, para.49; Sottiaux (n 177) 424-425.
[238] A19 Study (n 43) 15-16. See *Glimmerveen* (n 80); *Garaudy* (n 85); *Feret* (n 57) para.73; Sottiaux (n 32) 48.
[239] *Erbakan* (n 133) para.68; Oetheimer (n 13) 442. Notably, in *Erbakan* there was very particular circumstance of the authorities waiting more than four years to bring an action against applicant (Oetheimer (n 13) 442).
[240] App 74651/01, 15.04.2009.
[241] Ibid para.75. See also *Gul and others* (n 227) para.42; *Kilic and Eren v Turkey,* App 43807/07, 29.11.2011, para.29.
[242] 249 US 47 (1919). Notably, the US Supreme Court no longer applies the test, which has been replaced with more speech-protective formula of "imminent lawless action", formulated in *Brandenburg v Ohio* (395 US 444 (1969), 447) (O Bakircioglu, 'Freedom of Expression and Hate Speech' (2008-2009) 16 TJCIL 1, 15-16).
[243] See the Joint Concurring Opinion of Judges Palm et al. and Partly Dissenting Opinion of Judge Bonello in e.g., *Surek and Ozdemir* (n 172) and *Baskaya* (n 211).
[244] *Abrams* (n 131) 616-630 (Holmes J dissenting); Janis et al. (n 2) 281.

removed in time and space from actual or impending scene, the interest of free speech shall prevail.[245] The purpose for the standard is to require a higher need of proximity between expression and likely resulting violence.[246]

The Court has long ignored this important pillar of the US jurisprudence,[247] as, apart from occasional recourse in dissenting opinions, there could be found no discussion of the test in the judgments, affirming the view that the US precedent could not be applied in Europe.[248] However, the recent cases reveal that there is indeed a possibility for the ECtHR to refer to the doctrine in the "incitement to violence" cases in the future. Nevertheless, it remains to be tested whether the Court will firmly accept the "clear and present danger" standard, based on the "free marketplace of ideas" rationale, on which the US jurisprudence stands.[249]

5. Summary

The incitement jurisprudence is perhaps one of the better-developed areas of free speech law, giving predictability and structure to the ECtHR's adjudication.[250] The series of cases against Turkey reflect the basic methodology of the Court in this respect. Earlier judgments, such as *Zana*, disclose the ECtHR's reluctance to shrink the margin of appreciation when protection of national security was in issue. This approach favoured the democracy's "right to protect itself" against terrorism and did not take duly into account the content of the statements. However, the Court gradually shifted the approach and, in late 1990s, presented a full-scale doctrine, under which, parallel to examining the possible effects of an expression, the Court focused more on the intention of the speaker.

[245] See the Partly Dissenting Opinion of Judge Bonello in *Surek (No 1)* (n 54).
[246] Davis (n 197) 84.
[247] See Douglas-Scott (n 15) 313; Sottiaux (n 32) 41-42. See also Dissenting Opinion of Justices Brandeis and Holmes in *Whitney v California,* 274 US 357 (1927) 375-377; *Schenck v United States* (n 242).
[248] Sottiaux (n 32) 49.
[249] Ibid 61.
[250] Sottiaux (n 177) 420.

Nevertheless, the inconsistency and conflicting assessment of more or less similar facts cannot be overlooked, as it has casted doubts on the execution of European supervision. The ECtHR may be criticized for broadening the scope of "duties and responsibilities" in such manner as to unduly restrict freedom of the press. It should be emphasized that the context of terrorism does not give the States *carte blanch* in interfering in the protected speech, especially by means of criminal sanctions.

Somewhat surprisingly, in *Leroy* the ECtHR has moved away from its incitement standard, recognizing apology as a separate category of unprotected speech and thus creating grounds for the unnecessary limitations of freedom of expression by the States.[251] Beside substantial concerns, the case is also open to criticism from the point of methodology as the Court is unpredictable, failing to make explicit the elements it takes into account in overall assessment.[252] Here the ECtHR disregards its case-law, without offering a clear alternative and, by overvaluing security matters, raises concerns that Article 10 incitement test is unable to preserve human rights in stressful times.[253] However, the jurisprudence on incitement in Turkish cases has revealed that there is an ability to accommodate legitimate security interests without harming the core of freedom of expression.[254]

The recent tendency of having recourse to "clear and present danger" test reveals the possibility of applying the US standard in the incitement to violence cases. Nevertheless, given the previous rejection of the doctrine, it is still difficult to say firmly whether the Court has fully accepted the test or not.

V. Racist hate speech

1. Background

[251] Ibid 425.
[252] Ibid 425-426.
[253] Ibid 426; Lester (n 18) 472-473.
[254] Sottiaux (n 177) 426.

The international human rights system is founded on the idea that all human beings have the same set of fundamental rights.[255] The principle of equality and non-discrimination is included in the key human rights instruments and the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993,[256] describes it as "a fundamental rule of international human rights law".[257] However, there is no equivalent in the ECHR to Article 26 of the ICCPR, providing comprehensive protection against discrimination in all those activities which the State chooses to regulate by law.[258] Protocol 12 to the Convention[259] to some degree plugs this gap, but it has not been widely ratified to date.[260] In this light, the key provision addressing discrimination within the Convention is Article 14, a "parasitic" clause, applying only to "rights and freedoms set forth" in the Convention and its Protocols.[261] Given that it remains to be seen whether the positive obligation to restrain racially inflammatory speech exists under Article 14 and Protocol 12, the most sufficient means to challenge racist hate speech under the ECHR are Article 10 and Article 17.[262]

The question that raises is what should a democratic society do when some groups seek to use their freedom of expression to advocate the denial of equality and exclusion of others.[263] In this sense, racist speech is a particularly problematic category, as it requires the striking of balance between freedom of expression and freedom from discrimination, both of which are preconditions and results of a democracy.[264] Furthermore, racist propaganda, however odious it might be, seems to fit easily within the definition of political

[255] D Moeckli, 'Equality and Non-Discrimination' in D Moeckli, S Shah, S Sivakumaran & D Harris (eds), *International Human Rights Law* (OUP 2010) 189.
[256] A/CONF.157/23, 25.06.1993.
[257] Ibid para.15; Moeckli (n 255) 189.
[258] Harris et al. (n 2) 577.
[259] Rome, 4.11.2000.
[260] Harris et al. (n 2) 577. For the chart of signatories, see http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=8/25/2006&CL=ENG [27.08.2012].
[261] Harris et al. (n 2) 578.
[262] Ibid 610; Bakircioglu (n 242) 38.
[263] Boyle (n 4) 490.
[264] Ibid.

speech, freedom of which is one of the cornerstones of a liberal democracy.[265] So what value is liberty for some, if it undermines democracy for all?[266]

2. European perspective

The Court has attached special importance to discrimination based on race, which it describes as "a particularly invidious kind of discrimination… [that], in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction".[267] Due to this, the ECtHR has urged the States to use all available means to combat racism, "thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment".[268] Furthermore, the Strasbourg organs have expressed the view that publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special affront to human dignity, amounting to degrading treatment in violation of Article 3.[269]

Incitement to racial hatred has been unequivocally condemned by the ECtHR,[270] which does not make clear distinction between racial statements and incitement to ethnic, national or religious hatred, referring to "incitement to racial hatred", "spreading of racist ideas and opinions" or "racist aims".[271] Generally, the concept of the "rights and reputation

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[265] L Sumner, 'Hate Propaganda and Charter Rights' in W J Waluchow (ed), *Free Expreesion: Essays in Law and Philosophy* (OUP 1994) 153.

[266] K Mahoney, 'Hate Speech: Affirmation or Contradiction of Freedom of Expression' (1996) UILR 789, 794; D Bell, *Race, Racism and American Law* (2nd ed., Little Brown and Company 1980) 27-29.

[267] *DH and others v Czech Republic,* App 57325/00, 13.11.2007, para.176.

[268] Ibid; *Nachova and others v Bulgaria,* Apps 43577/98,43579/98, 06.07.2005, para.145.

[269] See *Abdulaziz, Cabales and Balkandali v UK,* Apps 9214/80,9473/81, 28.05.1985; Harris et al. (n 2) 591. Notably, under the Parliamentary Assembly Recommendation, racism is considered "not as an opinion but as a crime" (Council of Europe, Parliamentary Assembly Recommendation No. 1543 (2001), Racism and Xenophobia in Cyberspace (8.11.2001), available at: http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta01/erec1543.htm, [21.08.2012], para.1).

[270] See e.g., *Jersild* (n 61) para.30; *Soulas and others v France,* App 15948/03, 10.07.2008, para.42; *Feret* (n 57) para.63.

[271] Christians (n 31) 15. See *Jersild* (n 61) paras.34-37; *Balsyte-Lideikiene v Lithuania,* App 72596/01, 4.02.2009, paras.78-80.

of others" is invoked to justify the restrictions needed in the struggle against racism.[272] The earlier case-law reveals that if national authorities justified the contested measures by reference to the need to address racial discrimination, there was a presumption in favour of their decisions.[273]

However, the jurisprudence reveals that, even in the context of combating racial discrimination, the importance of which is "vital",[274] the ECtHR is ready to choose free speech over hate speech statutes.[275] The leading case for the Court to deal with the dissemination of racist remarks is *Jersild v Denmark*,[276] concerning the conviction of the presenter and the head of news section for the broadcast on television of a programme in which a group of racist youths made extremely offensive remarks about black people.[277] The ECtHR took this opportunity to clearly affirm that the racist statements are "more than insulting" to members of targeted groups and "do not enjoy the protection under Article 10".[278] As the judgment does not directly refer to racist remarks, it leaves unclear whether it shall be interpreted as potentially removing such speech from the protection by Article 17 or requiring the application of the necessity test under Article 10.[279] More acceptable would be to examine restrictions on racist hate speech under Article 10(2).[280]

The case is also interesting in the way it explores the interrelationship of the ECHR and the CERD from the Court's perspective. The ECtHR, while affirming that the State's obligations under Article 10 shall be "reconcilable" with its obligations under the CERD "to the extent possible",[281] refrains from interpreting the controversial "due regard" clause in Article 4 of

[272] Preliminary Report (n 88) para.46.
[273] Arai (n 2) 449. See *BH MW HP and GK* (n 75); *Purcell* (n 200). See also *Faurrison* (n 94) para.9.6; HRC, *Ross v Canada,* Communication No 736/1997, 18.10.2000, para.11.5.
[274] *Jersild* (n 61) para.30.
[275] S Halpin, 'Racial Hate Speech: A Comparative Analysis of the Impact of International Human Rights Law upon the Law of the United Kingdom and the United States' (2010-2011) 94 MLR 463, 477.
[276] n 61.
[277] See *Jersild* (n 61) paras.9-18; Jacobs et al. (n 10) 430.
[278] *Jersild* (n 61) para.35; Oetheimer (n 13) 430.
[279] Keane (n 70) 654. See *Norwood* (n 83), referring to *Jersild* (n 61), while removing speech via Article 17.
[280] Keane (n 70) 655.
[281] See *Glimmerveen* (n 80) para.196; *Gunduz* (n 54) para.21; *Soulas* (n 270) para.42.

the UN Convention.[282] In contrast to the requirement of the CERD to make the dissemination of ideas based on racial hatred an offence, whatever the motivation of their proponents,[283] in finding the violation of Article 10, the Court finds it decisive that the purpose of the applicant was not racist.[284] In this sense, the ECtHR puts emphasis on the need to strike a fair balance between freedom of expression and other rights.[285] The approach can be contrasted with the position of the CERD Committee, asserting that in any conflict between freedom of expression and freedom from discrimination, the latter shall be given priority.[286] It shall be saluted that the Court refrained from allowing the national authorities a wide margin and, instead, examined whether the statements were presented in an objective (as part of news reporting) or in a tendentious manner abetting the incitement of racial hatred.[287] Furthermore, the ECtHR noted that it believed that the decision was consistent with the provisions of the CERD.[288]

In contrast, the recent case of *Vejdeland and others v Sweden,*[289] a particularly important and regrettably superficial judgment, raises concerns on the understanding of the concept of hate speech by the Court. The case concerned the distribution at a secondary school of vehemently anti-homosexual leaflets, calling homosexuality a "sexual deviance", having a "morally destructive effect on the substance of society".[290] Here the ECtHR refers for the

[282] *Jersild* (n 61) para.30. On different schools of thought concerning the effect of the "due regard" clause, see Partsch (n 44) 23-26. See also K Boyle & A Baldaccini, 'A Critical Evaluation of International Human Rights Approaches to Racism' in S Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (OUP 2001) 160-161; D Mahalic & J Mahalic, 'The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination' (1987) 9 HRQ 74, 89.

[283] Keane (n 70) 653.

[284] *Jersild* (n 61) para.36; A19 Study (n 43) 11.

[285] See Partsch (n 44) 24-25.

[286] Boyle (n 4) 496; Farrior (n 20) 51-52.

[287] See *Jersild* (n 61) para.37; Arai (n 2) 449-450. Cf Joint Dissenting Opinion of Judges Ryssdal et al. (para.2) and Joint Dissenting opinion of Judges Golcuklo et al. in *Jersild* (n 61). See also *JRT and the WG Party v Canada,* where the HRC took the view that the transmission over the telephone of particularly serious anti-Semitic messages "clearly" constituted "the advocacy of racial or religious hatred" and referred to Article 20 rather than to Article 19 (HRC, Communication No.104/1981, 06.04.1983, para.8(b)).

[288] *Jersild* (n 61) para.30; Mendel (n 37) 34.

[289] n 67.

[290] Ibid paras.8-17.

first time to hate speech towards homosexual people,[291] stressing that discrimination based on sexual orientation is "as serious as discrimination based on "race, origin or colour".[292]

In finding the conviction of the applicants in accordance with Article 10, the ECtHR states that incitement to hatred "does not necessarily entail a call for an act of violence, or other criminal acts".[293] "Insulting, holding up to ridicule or slandering" certain groups can be sufficient for the State to favour combating racist speech.[294] This may be arguable, since it has been suggested that any expression, including one having little value to society (such as racist speech), should be prohibited only if it represents incitement to "imminent acts of violence or discrimination against a specific individual or group".[295] Given that the ECtHR surprisingly found the aim of the expression (starting a debate) at issue acceptable, it is confusing what is the rationale behind the Court's reasoning.[296] As the statement linked the whole group to the "plague of the twentieth century", parallel can be drawn with *Norwood*, where the vehement attack against a group, linking it with the act of terrorism, was found incompatible with the Convention values and thus treated under Article 17.[297] It would have been more coherent if the ECtHR put heavier emphasis on the fact that the leaflets were distributed at school, as correctly stressed by the concurring judges.[298] Due to the

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[291] See Equality for Lesbian, Gay, Bisexual, Trans and Intersex People in Europe (ILGA) announcement on the case, 09.02.2012, available at: http://www.ilga-europe.org/home/news/for_media/media_releases/important_judgment_in_hate_speech_case_by_the_european_court_of_human_rights [21.08.2012]; Case Commentary, 'Hate speech: anti-homosexual leaflets distributed in schools - criminal conviction - protection of minorities - *Vejdeland v Sweden* (1813/07)' (2012) EHRLR 348, 350.

[292] *Vejdeland* (n 67) para.55, referring to *Smith and Grady v. the United Kingdom*, Apps 33985/96;33986/96, 27.09.1999, para.97.

[293] Ibid paras.54-55. See also *Feret* (n 57) paras.72-73.

[294] Ibid.

[295] UN, Human Rights Council, *Further to Human Rights Council Decision 1/107 on Incitement to Racial and Religious Hatred and the Promotion of Tolerance,* Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diane, U.N. Doc.A/HRC/2/3(2006), para.47. See also Concurring Opinion of Judge Spielmann joined by Judge Nussberger in *Vejdeland* (n 67), para.4.

[296] *Vejdeland* (n 67) para.54, Concurring Opinion of Judge Yudkivska joined by Judge Villiger, para.8.

[297] See Concurring Opinion of Judge Yudkivska joined by Judge Villiger in *Vejdeland* (n 67), para.10.

[298] See Concurring Opinion of Judge Spielmann joined by Judge Nussberger in *Vejdeland* (n 67), para.6; Concurring Opinion of Judge Bostjan M Zupancic in *Vejdeland* (n 67).

lack of in-depth reasoning, the judgment has been actively criticized within the Court itself, given the number of dissenting and concurring opinions, the one of which refers to the case as the "missed…opportunity" to consolidate an approach to hate speech against homosexuals.[299]

3. Summary

The ECtHR is straightforward in condemning racist speech. Early case law reveals that restriction on the statement due to the need to address racial discrimination generated some kind of presumption in favour of the State decisions. Against this background, *Jersild* disclosed the ability of the Court to choose freedom of expression over restrictions. Although the judgment explicitly condemned racist speech as "not enjoying the protection under Article 10", the ECtHR refrained from elaborating more, leaving doubts on the potential engagement of Article 17. The case also reflects the position of the Court with regard to the interrelationship of the ECHR and the CERD.

Vejdeland is an important point, at which the ECtHR shows confusion. While condemning discrimination based on sexual orientation, the Court makes somewhat controversial assessments of the purpose of the speech. The ECtHR fails to accentuate correctly the decisive factor of targeted audience and raises questions on the scope of "hate speech" by reluctance to elaborate more on the notions of "insult" and "incitement".

VI. Religious hate speech

1. Background

[299] See Concurring Opinion of Judge Yudkivska joined by Judge Villiger in *Vejdeland* (n 67), para.1.

Article 20 of the ICCPR is the only international standard specifically concerned with incitement to religious hatred.[300] While racist speech is prohibited under Article 4 of the CERD, no comparable international instrument exists in the area of religion - the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief[301] contains no similar provision.[302]

At this point, it should be recalled that there is no abstract clash between freedom of expression and freedom of religion or belief.[303] While the "rights of others to freedom of religion or belief" under Article 10(2) is in theory a legitimate ground for limitation, the threshold for restricting the freedom of expression is a high one,[304] as "hatred" is a powerful concept and must mean something more than the contempt, dislike, criticism, ridicule, insult or even abuse of religious beliefs.[305] In this regard, there should be drawn a distinction between blasphemy, religious insult and religious hatred, the latter being a stronger form of conduct that may or may not be accompanied by intention to promote discrimination of violence against members of religions.[306] While blasphemy protects religious ideas, religious insult and religious hatred protect the persons holding religious

[300] General Assembly, Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council",* U.N. Doc.A/HRC/2/3 (2006) (prepared by Asma Jahangir), para.48; K Boyle, 'Overview of a Dilemma: Censorship versus Racism' in Coliver et al. (n 20) 65. See also ACHR 13(5).

[301] UN, General Assembly Resolution, A/RES/36/55, 25.11.1981.

[302] See Keane (n 232) 872. Notably, Article 3 of the UNESCO Declaration on Race and Racial Prejudice states that religion is encompassed by the concept of racial discrimination (27.11.1978, E/CN.4/Sub.2/1982/2/Add.1, Annex V (1982) (D Keane, 'Addressing the Aggravated Meeting Points of Race and Religion' (2006) 6 Md Lj Race Religion & Gender Class 367, 388)). Referring to CERD Article 5(d)(vii), the Special Rapporteur Amor states that "racial, *in the sense of ethnic matters,* fully encompasses the religious aspect" (UN, General Assembly, *World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance,* A/CONF.189/PC.1/7, 13.04.2000 ("World Conference") para.55 (emphasis added)). On the interrelationship of racial and religious discrimination, see M Chon & D E Artz, 'Walking While Muslim' (2004-2005) 68 LCP 215, 216,237; N Lerner, 'The Nature and Minimum Standards of Freedom of Religion or Belief' (2000) BLR 906,921; D Sullivan, 'Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1988) 82/4 AJIL 487,508.

[303] J Temperman, 'Blasphemy, Defamation of Religions and Human Rights Law' (2008) 26/4 NQHR 517,544-545.

[304] Ibid.

[305] A Jeremy, 'Practical Implications of the Enactment of the Racial and Religious Hatred Act 2006' (2006) ECCLJUK 187,189. See *Otto-Preminger-Institut v Austria,* App 13470/87, 20.09.1994, para.47.

[306] I Leigh, 'Damned if They Do, Damned if They Don't: the European Court of Human Rights and the Protection of Religion From Attack' (2011) 17(1) Res Publica 55, 57-58.

beliefs.[307] However, as the case-law reveals, this is an area where the dividing lines are often blurred.[308]

The reasons for intervention in speech attacking religious beliefs have been found to be much weaker than with regard to racist hate speech, mainly because there is no common standard of what constitutes hate speech in this context - some religious communities may feel insulted by speech that would provoke only indifference in others.[309] The result may be the prohibition of speech which other groups would tolerate and find only mildly offensive.[310] It is indeed difficult for a legal system to accommodate the different standards of tolerance allowed[311] and that difficulty has often been reflected in the ECtHR's, quite controversial, jurisprudence on religious hate speech.[312] Regrettably, the Court has failed to develop a coherent approach to why and when the religious offence caused by certain forms of expression justifies their suppression.[313]

2. European perspective

While there is a strong consensus in Europe on the restriction of racist hate speech, there is less on the question of speech targeting the religious beliefs of others.[314] The dilemma of definition is especially pressing here because religion is not only the basis of group identity but also an ideology, the support or opposition of which lies at the heart of freedom of belief and expression.[315] While increasingly hate speech is taking the form of religious

[307] Ibid. See Venice Commission Report (n 68) para.89.
[308] Leigh (n 306) 57-58; Venice Commission Report (n 68) para.68.
[309] Barendt (n 160) 190; C Unsworth, 'Blasphemy, Cultural Divergence and Legal Relativism' (1995) 58 MLR 658,676–677.
[310] Barendt (n 160) 191. See also E Barendt, 'Religious Hatred Laws: Protecting Groups or Belief?' (2011) 17(1) Res Publica 41, 45-46.
[311] Barendt (n 160) 190-191. See also R Post, 'Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment' (1988) 76 CLR 297, 322-323.
[312] See Leigh (n 306) 56.
[313] Ibid.
[314] K Boyle, 'The Danish Cartoons' (2006) 24/2 NQHR 185,189.
[315] World Conference (n 302) para.122; Vick (n 25) 52. See also E Odio-Benito, Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, stating that "there does not seem to be any

intolerance,[316] the ECtHR has failed to formulate a standard to evaluate efforts to penalize religious hate speech.[317] Until recently, the ECtHR jurisprudence concerning attacks on religious beliefs was confined to racially discriminatory speech and anti-Semitism, which has tended to be regarded as racial rather than religious in motivation.[318] However, having faced with the phenomenon of Islamophobia and the so-called "defamation of religion" movement within the UN, the Court has begun to focus more on the concept of religious hate speech.[319]

The ECtHR's reasoning in cases relating to expressing opinions of a religious nature is very different from the one it adopts in other hate speech cases, as here the general elements of assessing the interference in matters of extreme speech are not, or only summarily, taken into account.[320] The Court has repeatedly stressed that "those who choose to exercise the freedom to manifest their religion…cannot reasonably expect to be exempt from all criticism" and that "they must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith".[321] However, the ECtHR has generally granted a wide margin of appreciation to the States to adopt measures restricting the freedom of expression in attacks that are offensive and concern matters that are sacred to the holders of a belief.[322] As in the sphere of morals, the absence

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discrimination that is purely and exclusively religious" (UN Sales No E.89.XIV.3 (1989) para.187 (cited in World Conference (n 302) para.123)).

316 Keane (n 70) 663. See UN, Economic and Social Council, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination: Situation of Muslims and Arab Peoples in Various Parts of the World,* Doudou Diene, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E/CN.4/2006/17, 13.02.2006.

317 Sottiaux (n 177) 427. See *Norwood* (n 83), where the mere Islamophobic content of the message was sufficient to justify punishment (ibid).

318 Leigh (n 306) 63. See *Kuhnen* (n 74), referring to both racial and religious discrimination.

319 Leigh (n 306) 63. See e.g., Commission on Human Rights, *Resolution 1999/82 on defamation of religions,* 30.04.1999; Human Rights Council, *Resolution 4/9 on combating defamation of religions,* 30.03.2007; Human Rights Council, *Resolution 60/150 on combating defamation of religions,* 16.12.2005, UN Doc.A/RES/60/150, 2005; Human Rights Council, *Resolution 13/16 on combating defamation of religions,* 15.04.2010, UN Doc.A/HRC/RES/13/16. For the analysis of the so-called "Counter-Defamation Discourse" within the UN, see Temperman (n 303) 530-533.

320 Weber (n 3) 49; Oetheimer (n 13) 429. See also S Vance, 'The Permissibility of Incitement to Religious Hatred Offenses Under European Convention Principles' (2004) 14 TLCP 201.

321 *Otto-Preminger-Institut* (n 305) para.47.

322 Weber (n 3) 49. See *Murphy v Ireland,* App 44179/98, 10.07.2003, para.81.

of European consensus has been repeatedly pointed to enlarge the discretion of national authorities in this field.[323] The position of the Court seems to be that, given that religious beliefs affect "the most intimate" feelings, they should be granted a high degree of protection.[324] Consequently, the ECtHR found no violation of Article 10 in the majority of cases, raising questions on whether the proportionality assessment was actually carried out or totally abandoned.[325] Nevertheless, there are few judgments where the Court has provided robust review, analyzing the contested statements in the light of more objective public sentiments and effectively relying on the principle of pluralism, tolerance and broadmindedness.[326]

3. Main criticism

It has often been ignored by the Strasbourg organs, especially in the earlier cases, that there is a crucial difference between the insult of religion and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence.[327] For instance, in *Otto-Preminger-Institut*, the Court accepted that a law penalizing or preventing the distribution of religiously provocative films could amount to a necessary restriction and, even more controversially, suggested that a public showing of the film would violate the right of believers to have their feelings respected.[328]

In contrast, in some rare cases, the ECtHR has displayed a readiness scrupulously to analyze the contested statements in the light of more objective criteria, rather than the subjective feelings of specific individuals.[329] For instance, in *Klein v Slovakia,*[330] the Court

[323] See *Otto-Preminger-Institut* (n 305) para.50; *Wingrove* (n 24) para.58; Arai (n 30) 104. Notably, there is no empirical evidence cited in support of the existence or lack of European consensus (I Cram, 'The Danish Cartoons, Offensive Expression, and Democratic Legitimacy' in Hare & Weinstein (n 3) 318).
[324] Venice Commission Report (n 68) para.48.
[325] A19 Study (n 43) 6; Arai (n 30) 103; Weber (n 3) 50.
[326] Arai (n 2) 482-483. See *Nur Radyo Ve Televizyon Yayinciligi ASS v Turkey*, App 6587/03, 27.11.2007, para.30.
[327] Temperman (n 303) 531.
[328] n 305, paras.47-57; Barendt (n 160) 192.
[329] Arai (n 2) 482.

found that the criticism, leveled exclusively at the member of the Church (although sharp and with vulgar and sexual connotations) neither interfered with the right of believers to express and exercise their religion, nor did it "denigrate the content of their religious faith".[331]

The approach in *Norwood*, that some religious hate speech does not enjoy the protection at all and consequently there is no need for the State to justify limitation, is also highly debatable.[332] The alternative method of disposing of such cases has been illustrated by *Gunduz v Turkey*,[333] where the Court assessed the interference within Article 10 and focused on the content of the statement, holding that "the mere fact of defending Sharia, without calling for violence to establish it" did not constitute hate speech.[334]

The main problem of the jurisprudence is the misleading application of terms, such as the "peaceful enjoyment" of one's religious beliefs and the "right to respect for freedom of thought, conscience and religion", which are guaranteed neither by Article 9 of the ECHR, nor by international human rights law broadly.[335] For instance, in *IA*, the Court refers to the "abusive attack on the Prophet of Islam" and "offensive attacks on matters regarded as sacred by Muslims".[336] In this way, the ECtHR fails to distinguish an attack upon religion and the conduct directed against a religious group, as only the latter involves religious liberty – religions do not have rights because ideas do not have rights.[337] Without any argument, the Court establishes the "right not to be insulted in the religious feelings",[338]

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[330] App 72208/01, 31.01.07.

[331] Ibid paras.52-53. See also *Giniewski v France,* App 64016/00, 31.01.2006, para.51; *Vereinigung Bildender Kunstler v Austria,* App 68354/01, 25.01.2007.

[332] Leigh (n 306) 64.

[333] n 54.

[334] Ibid para.51.

[335] Leigh (n 306) 65; J Temperman, 'Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech' (2011) BYULR 729, 732-733. See *Otto-Preminger-Institut* (n 305) para.47, Joint Dissenting Opinion of Judges Palm et al. para.6. See also P Taylor, *Freedom of religion: UN and European human rights law and practice* (CUP 2005) 86; A Geddis, 'You Can't Say 'God' on the Radio: Freedom of Expression, Religious Advertising and the Broadcast Media after *Murphy v Ireland'* (2004) 2 EHRLR 181, 184. The terms also appear in the Venice Commission Report (n 68) (see e.g., paras.47,83).

[336] *IA* (n 12) paras.29-30.

[337] Leigh (n 306) 61; Temperman (n 303) 526. See *IA* (n 12) para.29, referring to the "abusive attack on the Prophet of Islam"; *Giniewski* (n 331) para.51.

[338] *Otto-Preminger-Institut* (n 305) para.48.

allowing the States to prohibit speech merely on the ground of its offensiveness.[339] In this light, the concept of "gratuitously offensive" speech is another vague category applied by the ECtHR, conferring on the State broadly defined powers.[340] It must be borne in mind that materialist or atheist views may well shock the faith of the majority of the population, but that does not appear to be sufficient reason in a democratic society to impose sanctions.[341] The concern is critical in the context of artistic expression, which may be perceived as exceptionally offensive to the religious convictions of members of a particular religious faith.[342]

In this sense, there is a sharp contrast with the approach of the HRC, which does not see the need to develop a notion of "respect for other peoples' religion", but bases its reasoning on the existing grounds for limitations.[343] Importantly, the Committee emphasizes that the "rights or reputation of others" may relate to "a community as a whole" - that is not the same as "religion".[344] It is also worth mentioning that the HRC is not simply satisfied with the acknowledgment that the limitation of freedom of expression *in abstracto* could be justified, but instead looks at the actual necessity of the interference, in the scope of which it focuses on the objective incitement element and the potential reaction of audience.[345]

The ECtHR's approach is also confusing with regard to the State responsibility. In *Otto*, the Court seems to suggest that in respect to religious beliefs the State has a duty to police the conduct of third parties.[346] In contrast to this proposition, the ECtHR has found neither the "de-programming" of members of a religious cult by family members, nor a state-

[339] *Wabl* (n 123) para.40; Barendt (n 160) 192; Weber (n 3) 52. Cf *Aydin Tatlav v Turkey,* App 50692/99, 02.05.2006; *Cohen v California,* 403 US 15, 25-26 (1971).
[340] Leigh (n 306) 60,71; Cram (n 323) 327.
[341] Dissenting opinion of Judges Costa et al. in *IA* (n 12) para.3.
[342] Arai (n 2) 458. See UN, Economic and Social Council, *Addendum, Defamation of Religions and Global Efforts to Combat Racism: Anti-Semitism, Christianophobia and Islamophobia*, Doudou Diane, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc.ECN.4/2005/18/Add.4 (2004).
[343] Temperman (n 303) 528-529. See also *Ross* (n 273).
[344] *Ross* (n 273) para.11.5; HRC, *General Comment No. 10: Article 19 (Freedom of Opinion),* 29.06.1983, para.4; Temperman (n 303) 529.
[345] *Ross* (n 273) paras.11.5-11.6; Temperman (n 303) 529; Temperman (n 335) 744.
[346] Leigh (n 306) 65. For the positive obligations under Article 9, see *97 members of the Gldani congregation of Jehovah's witnesses and 4 others v. Georgia,* App 71156/01, 3.05.2007.

sponsored publicity campaign designed to warn young people of the dangers of religious "cults" as an Article 9 issue.[347] In these cases, the Court asserts that the Convention does not require the States to make attacks upon religion into criminal offences and explains it by reference to the wide national discretion due to the lack of uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions.[348] Nevertheless, if in some cases the ECtHR finds it necessary in the interests of a democratic society to protect religious believers from attack, because these would violate their right of freedom of thought, belief and religion, then it is confusing why the States, failing to do so, are not in breach of Article 9.[349] In this light, the reference to "peaceful enjoyment" or "respect" for religious beliefs adds further confusion.[350]

Although the ECtHR does recognize that a much higher threshold needs to be satisfied, the standard applied by the Court, especially in earlier cases, is certainly not the one.[351] The temptation to dismiss some speech merely because of its insulting content should be resisted as well as the somewhat automatic resort to the margin of appreciation.[352] Only in rare and narrow cases, when the attacks on religious groups reach the level of incitement to hatred and violence, should the State be able to restrict freedom of speech.[353] While there are different sensitivities affecting the interpretation of the incitement to religious hatred that should be taken into account by the national authorities, the democratic societies shall not become "hostages" to these sensitivities.[354]

Overall, the ECtHR places too much emphasis on the uniformity of thought and reflects an "overcautious and timid conception" of freedom of expression.[355] For this reason, it has

[347] Leigh (n 306) 66. See *Riera Blume and others v Spain,* App 37680/97, 09.03.1999; *Leela Forderdkreis EV and Others v Germany,* App 58911/00, 6.11.2008.
[348] Leigh (n 306) 68. See *Choudhury v the UK,* App 17439/90, 05.03.1991, The Law, para.1; *Murphy* (n 322) paras.67,72.
[349] Leigh (n 306) 69.
[350] Ibid 66.
[351] See Temperman (n 335) 733.
[352] Leigh (n 306) 73.
[353] Ibid 72. See Venice Commission Report (n 68) paras.46,48.
[354] Venice Commission Report (n 68) paras.79-81.
[355] Joint Dissenting Opinion of Jugdes Costa et al. in *IA* (n 12), para.8.

been suggested, even within the Court, that "the time has perhaps come to 'revisit' this case-law".[356] Although the ECtHR has declined to reconsider its precedents, it refused to apply them in several cases, in this way, slowly abandoning the "right not to be insulted in one's religious feelings".[357]

4. Summary

As drawing the lines between racial and religious hate speech is problematic, the ECtHR jurisprudence has long been approaching attacks on religious beliefs in the context of racially discriminatory speech (particularly, with respect to anti-Semitism). However, in the light of Islamophobia and the so-called "defamation of religion" movement within the UN, the Court has begun to distinguish and focus more on the concept of religious hate speech.

Regrettably, this line of jurisprudence reflects the reluctance of the Court to provide meaningful and full-scale assessment of interference. The ECtHR fails to differentiate between religious insult and incitement to religious hatred, which means more than the dislike, criticism or even abuse of religious beliefs. The Court has recognized that, absent direct threat to order, even extreme views on matters of serious public interest, such as the practices of the Church, deserve protection.[358] It has also acknowledged that an insult to a principle or dogma or a representative of a religion does not necessarily incite to hatred against individual believers of that religion.[359] However, at the same time, the Court has granted surprisingly wide discretion to the national authorities with regards to attacks on religious beliefs. As a result, the judgments are poorly reasoned, making an over-emphasis on freedom of religion.[360] The attitude of acknowledging the high threshold for the speech to categorize under hate speech and, simultaneously, revealing oversensitivity to religious

[356] Ibid.
[357] Janis et al. (n 2) 289; Temperman (n 335) 734.
[358] A19 Study (n 43) 13.
[359] Ibid.
[360] Barendt (n 160) 192; Leigh (n 306) 65.

insult, raises questions on the understanding of the concept of hate speech in the religious context by the Court.

From methodological perspective, the jurisprudence on religious hate speech is quite different from the line of general hate speech cases. Instead of following the standard of assessment more or less elaborated in extreme expression judgments, the ECtHR inconsistently refers to the margin of appreciation doctrine. Although the absence of European consensus and the principle of subsidiarity[361] may indeed explain the reluctance of the Court to engage in strict scrutiny of the measures used by the State, this does not justify the level of relaxation of proportionality examination by the ECtHR, casting doubts on the effectiveness of European supervision. Such approach creates uncertainty, blurring the freedom of religion into "a general mélange of mutual respect not only between religions but between the freedom of religion and other human rights".[362] This "cleansing" of public debate may result in creating a chill on expressing a range of opinion concerning the links between religious fundamentalism and terrorism.[363]

The main criticism regards to the tendency of the Court to read into Article 9 rights that are not guaranteed by the Convention. The ECtHR should abandon its approach of establishing the "right to respect for freedom of thought, conscience and religion" or "the right not to be insulted in the religious feelings", as this allows the States to prohibit speech merely on the ground of its offensiveness. It should be acknowledged that religions do not have rights and an attack upon religion should be distinguished from the act directed against a religious group. The difference between expression targeting ideas and expression targeting human beings shall be taken into account while distinguishing hate speech in general from offensive speech.[364] Given that virtually all criticism of a religion or the religious practices is likely to cause insult and become eligible to be restricted by the national authorities, the

[361] See P Cumper, 'Article 9: Freedom of Religion' in Harris et al. (n 2) 440.
[362] M Evans, *Religious Liberty and International Law in Europe* (CUP 1997) 365.
[363] Cram (n 323) 324.
[364] Mendel (n 37) 25; J Gaudreault-DesBiens, 'From Sisyphus's Dilemma to Sisyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide' (2000) 46 MLJ 121,135.

ECtHR shall affirm the high threshold for the qualification of an expression as a religious hate speech.[365]

VII. Conclusion

Freedom of expression represents the bedrock of democracy, the tool to uncover abuses and advance political, artistic, scientific or commercial development.[366] At the same time, free speech can be used to incite violence, spread hatred and impinge on individual safety.[367] The jurisprudence has reflected the continuous attempt of the ECtHR to strike the proper balance between these competing interests.[368]

The analysis reveals that one of the most important challenges in the jurisprudence is the definition of "hate speech". While, for the purposes of flexibility, it is the proper approach to refer to the concept as to an autonomous notion, the vagueness of the language used by the Court makes it difficult to map precise contours and risks removing a protected speech from public debate. Despite its consistent emphasis on the protection of shocking ideas, at times, the ECtHR seems to ignore that the qualification of the speech as "extreme" requires additional element of "incitement" and in this way sets the threshold lower than Article 20 of the ICCPR. The reference to broad terms in assessing the impact of the statement, such as preserving "political stability", "serene social climate", the compatibility of which with open democratic system is questionable, dangerously stretches the potential reach of "hate speech".

The unstable engagement of Article 17 presents further confusion. While it eliminates the need for a balancing process under Article 10, great cautiousness is required from the Strasbourg organs in its application. The provision removes the speech purely on the basis

[365] Cram (n 323) 316.
[366] Jacobs et al. (n 10) 426.
[367] Ibid.
[368] Ibid.

of its content and, thus, the risks of its abusive recourse are beyond dispute. *Jersild* is one of those cases which reveal that there may be indeed a material difference – if the case had been treated under the abuse clause, it would not have passed the admissibility stage, based on the content only, irrespective of the context on which the Court made such heavy emphasis later.[369]

Application of Article 17 in the specific discourse of negationism and particularly Holocaust denial casts doubts on the categorization of an expression as referring to the "clearly established historical facts". The Court is silent on the extent to which it expands this category to certain revisionist comments on the magnitude and causes of atrocities. This may pose risk to the academic expression, which usually enjoys great protection in the jurisprudence. It would have been sounder, if all forms of speech were examined under Article 10 to prevent abusive recourse to Article 17.

The approach to less explicit hate speech under Article 10 discloses a set of variables affecting the level of protection of an expression in issue. By framing general principles, the ECtHR seems to be wary of the dangers of content-based limitation and attempts to distinguish extreme statements from those that offer critique on a matter of public interest. However, the application of the so-called "bad tendency" test, equating the language that is susceptible to cause feelings of hatred with intentional incitement significantly lowers the ideally high threshold set by the concept of "hate speech". Although it has been numerously suggested to put emphasis on the purpose of the speaker and the ECtHR has indeed focused on this factor in some of the cases, the Court has often justified the restriction merely because of the dangerous tendency of expression and ignored the intent. This is at odds with the ICCPR standard and the requirements of Venice Commission.

The jurisprudence on incitement to violence cases proposes standard different from incitement to hate speech cases, showing more consistency and coherence from the Court. Although the risks of suppressing media freedom have been particularly acute in the conflict setting, the ECtHR is more or less stable in emphasizing the high threshold for qualifying the speech as "incitement". It is salutary that the Court has shifted from the

[369] Keane (n 70) 661.

initial approach of restrained examination, elaborated in *Zana*, to more extensive review, generated in 1999 Turkish cases. The emphasis on the intent and contextual analysis of the background present coherent means of approaching extreme speech, so that it is desirable for the Court to take the similar attitude in other hate speech cases.

Nevertheless, this line of case-law is not devoid of methodological or contextual flaws. Primarily, as the ECtHR has chosen to differentiate between the concepts of incitement to violence and incitement to hatred, it should clearly formulate the distinguishing criteria and be more consistent in referring to them cumulatively or separately. Another problem is the unduly broad interpretation of special "duties and responsibilities" of the media in conflict setting, creating the risk of hampering its role of a "public watchdog". *Leroy* particularly illustrates the dangers in the context of combating terrorism. Such negative deviation from the precedent, equating "apology" or "glorification" of terrorism to "incitement", casts doubts on the oversensitivity of the Court, opening doors to the abusive recourse to the restrictions by the states in the fight against terrorism, even in respect to artistic expression, which generally enjoys a high level of protection in the jurisprudence.

In this sense, the recent tendency of the ECtHR to refer to previously largely rejected "clear and present danger" test, elaborated in the US jurisprudence, in the incitement to violence cases, seems to provide a more acceptable approach, setting high threshold for interference. Although it is still early to conclude on the willingness of the Court to accept fully the doctrine, the gradual shift from the consistent application of "social impact" test cannot be ignored. Given that vagueness of the way in which the ECtHR identifies the degree of risk or resulting harm of the speech, it would be sounder to formulate the similarly high-threshold test in other hate speech cases.

Regulation of racist speech requires the balance between freedom of expression and freedom from discrimination, which is quite difficult to strike, especially considering that racist propaganda generally takes the form of political speech, the protection of which is the cornerstone of a democracy. While incitement to racial hatred has been clearly condemned by the ECtHR, the Court has showed its ability to favour free speech over restrictions in *Jersild*. Regrettably, some racist speech cases raise concerns on the

understanding of the concept of hate speech by the ECtHR, allowing the State to suppress speech that is merely insulting to certain groups.

The ECtHR jurisprudence on religious hate speech raises most of the concerns as here the standard of review is close to diminished and the Court grants particularly wide discretion to the national authorities, explaining the approach by the lack of the European consensus on the issue. The ECtHR completely abandons the standards applied in other hate speech or incitement to violence cases and reflects reluctance to provide scrutiny on restrictions of speech in attacks on religious beliefs. Although the Court repeatedly emphasizes that criticism or ridicule aimed at religion does not automatically create ground for restricting speech, in practice it is not always following this dictum. As a result, it dangerously blurs the concepts of blasphemy, religious insult and religious hatred with each other.

The main problem in this line of jurisprudence is the misleading reading by the Court of the rights, which are not guaranteed by the Convention. In particular, there is no such right as the '"right to respect for freedom of thought, conscience and religion" or the "right not to be insulted in the religious feelings". This attitude gives the States the possibility to prohibit speech merely on the ground of its offensiveness, which runs counter to the *Handyside* formula of protecting expression that may well be shocking. This is all because of the failure of the ECtHR to distinguish an attack upon religion and the act directed against a religious group. The concept of "gratuitously offensive speech" is also at odds with the requirement of "incitement". Although there are different sensitivities affecting the interpretation of incitement to religious hatred, the ECtHR should refrain from broadening the margin of appreciation to the extent of casting doubts on the execution of supervision at all.

Overall, the analysis discloses that the ECtHR has yet to conceptualize the prohibition of hate speech,[370] so that the "demands of pluralism, tolerance and broadmindedness", often referred to in the jurisprudence, are in fact realized.

[370] Temperman (n 335) 747.

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