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A Brief Account of Offending Public Morals and Religious Sensibilities before the European Court of Human Rights

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المجلة الدولية للفقه والقضاء والتشريع
المجلد ٣ ، العدد ١ ، ٢٠٢٢

نبذة مختصرة عن ممارسات الإساءة إلى الآداب العامة والمشاعر الدينية أمام المحكمة الأوروبية لحقوق الإنسان

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الصفحات **١٢٣-١٥٢**

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نسق توثيق المقالة: نور الدين عبده ، نبذة مختصرة عن ممارسات الإساءة إلى الآداب العامة والمشاعر الدينية أمام المحكمة الأوروبية لحقوق الإنسان ، المجلة الدولية للفة والقضاء و التشريع ، المجلد ٣ ، العدد ١ ، ٢٠٢٢ ، صفحات (١٢٣-١٥٢)

Abstract

The article analyzes the scope of the right to freedom of expression under the European Convention for the Protection of Human Rights and Fundamental Freedoms and the potential limitations arising from its intersection with the right to freedom of thought, conscience and religion as interpreted by the European Court of Human Rights. It focuses on examples of artistic expression that are deemed offensive to public morals as well as religious convictions in the European sphere. The main query in the article traces whether the Court sought an even-handed approach towards restrictions on offensive speech arising from different moral and religious backgrounds in Europe and whether it changed over time. This entails an assessment of the rationale in upholding imposed restrictions on various forms of artistic expression, which found their way to the Court by means of offending public morals, committing religious defamation and blasphemy, besides inciting religious hatred. The analysis highlights some of the inconsistencies in the Court's supervisory role in light of its reliance on the margin of appreciation doctrine to avoid playing a norm-setting role in matters of morality and religious sensibilities, which are left to the Member States to formulate according to their specific legal orders and particular social needs.

Keywords: ECHR, European Court of Human Rights, freedom of expression, margin of appreciation, blasphemy.

الملخص

تتناول المقالة نطاق الحق في حرية التعبير كما هو وارد بالمعاهدة الأوروبية لحقوق الإنسان وأثر القيود الناتجة عن تقاطع هذا الحق مع الحق في حرية الفكر والضمير والدين على نحو ما فسرت وقضت المحكمة الأوروبية لحقوق الإنسان، حيث تتناول نماذج لحرية التعبير مما يندرج تحت فئة التعبير الفني والتي تم إدانتها إما لإساءتها للآداب العامة أو المعتقدات الدينية في نطاق الدول الأعضاء. تتمثل الإشكالية الرئيسية محل البحث في تعقب ما إذا استطاعت المحكمة الأوروبية لحقوق الإنسان أن تلتزم بمعيار ثابت لا يتبدل في تفسير النزاعات الناشئة عن تقييد هذا الصنف من حرية التعبير أم يتغير باختلاف المعطيات الأخلاقية والدينية باختلاف البلدان الأوروبية. وبالتالي تعمل المقالة على تقييم تسبيب قضاء المحكمة الأوروبية لحقوق الإنسان من تثبيت ما ذهبت إليه المحاكم الوطنية من تضييق وتثبيط لصنوف مختلفة من التعبير الفني، كالاجتراء على الأخلاق والآداب العامة، أو بارتكاب جريمة التجديف أو ازدراء الأديان، أو جريمة الحض على الكراهية على أساس ديني. و تُبرز المقالة بعض التذبذب في منهج المحكمة الأوروبية لحقوق الإنسان في ممارستها لدورها الرقابي، خاصة باعتمادها المفرط على نظرية هامش التقدير و ذلك لكي تتجنب أي دور من شأنه أن يجعل منها واضعة للمعايير الأخلاقية و الدينية، و التي تُترك للدول الأعضاء لتتم صياغتها و تكييفها بحسب نظامها القانوني و احتياجاتها الاجتماعية الخاصة.

الكلمات المفتاحية: المعاهدة الأوروبية لحقوق الإنسان ، المحكمة الأوروبية لحقوق الإنسان ، الحق في حرية التعبير، نظرية هامش التقدير، التجديف و ازدراء الأديان .

Introduction[1]

This contribution engages with one of the complex facets of the right to freedom of expression, namely, artistic expression that entails transgression of public morals as well as religious convictions in the European sphere. It analyzes the scope of the right to freedom of expression under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR)[2] and the limitations arising from its intersection with the right to freedom of thought, conscience and religion as interpreted by the European Court of Human Rights (hereinafter the Court). It demonstrates manifestations of such intersection, or rather clash, in light of the varying perceptions of morality and religious ethos across the Member States of the Council of Europe. Whereas an overlap of rights in general is not an inordinate occurrence, it nevertheless serves as a stress test deemed necessary in democratic societies, which scrutinizes the practiced, not presumed, standard of protection within a particular legal order. It is rather useful to emphasize at the outset that in this article the right to freedom of thought, conscience and religion is not analyzed as an independent right per se, such as debating the legal definition of religion, the right to its manifestation or what warrants recognition of religious groups before the State. Instead, the main aim is to engage in a dialectic discourse between the two established freedoms while focusing on the potential limitations on the right to freedom of expression once a cycle of expressionreceptioncomplaintrestriction is triggered in varying socio-legal contexts. Having said that, the main query in this article traces how the Court has managed to strike a balance between the competing claims in a manner that upholds the lofty ideals of the ECHR, specifically in light of the stature of free speech as a cardinal premise in democratic societies. More pertinently, has the Court sought an evenhanded approach towards restrictions on offensive speech cases arising from different backgrounds or have the irked mores required a delicate handling that might have led to some inconsistency over the

[1]This contribution is based on a submission presented before the 'UNDERSTANDING EU AND ECHR LAW ON THE BASIS OF CASE LAW' Seminar, which was organized and funded by the Europa-Institut of Saarland University, Germany in July 2017. I would like to thank Justice Henrik Bull of the Supreme Court of Norway for his invaluable feedback and insightful comments. The responsibility for any errors or inadequacies is mine alone.

[2]European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols nos. 11 and 14 (opened for signature 4 November 1950, entered into force 3 September 1953) ETS No 005 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005> accessed 10 May 2017.

time? The following sections aim to address these questions by providing a critical analysis of the Court's rationale, reviewing some of the decisions that helped shape the contours of its jurisprudential theory on artistic offensive speech, hoping it would constitute a valuable contribution to the existing literature on the topic. Henceforth, the analysis proceeds in two main sections, whereby the first outlines the intertwined relationship between the contesting rights from a wider international human rights law perspective, followed by a delimitation of the scope of the right to freedom of expression as laid down in Article 10 ECHR and the varying levels of protection accorded thereto. The second section examines the Court's rationale in upholding imposed restrictions on various forms of artistic expression, which found their way to the Court by offending public morals, committing religious defamation and blasphemy, in addition to inciting religious hatred. The article concludes with an assessment of the Court's theory on restricting artistic expression in light of the inconsistency which materialized throughout the line of analyzed cases, and reflects on the prospects of overcoming them in favor of a more robust protection of the right to freedom of expression under the Convention.

Scope

Interrelatedness, indivisibility and interdependence of all human rights regardless of their categorization has become a well-established concept within the alphabet of international human rights law.[(3)] It has amassed a continuous momentum of recognition since the promulgation of the Universal Declaration of Human Rights (hereinafter as UDHR),[(4)] followed by the adoption of the International Covenant on Civil and Political Rights of 1966 (hereinafter as ICCPR)[(5)] and the International Covenant for Economic, Social and Cultural Rights.[(6)] World conferences on human rights giving rise to soft law instruments, such as the Proclamation of Teheran[(7)] and the Vienna Declaration and Programme of Action,[(8)] as well as the establishment of the Human Rights Council, all helped further cement the notion by reaffirming the universality, indivisibility and mutually reinforcing nature of all human

[(3)]Theo van Boven, 'Categories of Rights' in Daniel Moeckli and others (eds), International Human Rights Law (2nd edn, OUP 2014) 144.

[(4)]Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).

[(5)]International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[(6)]International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[(7)]'Final Act of the World Conference on Human Rights in Tehran' (13 May 1968) UN Doc A/CONF. 32/41, art 13.

[(8)]Vienna Declaration and Programme of Action adopted at the second World Conference on Human Rights (25 June 1993) UN Doc A/CONF.157/23, paras 1, 5, 32 and 37.

rights, which are to be treated in an equal manner and with the same emphasis.[9] On a more pertinent level, four freedoms constitute the building blocks of civil and political rights, namely, freedom of thought, expression, association and assembly, whereby the enjoyment of any of them hinges on the guarantee of the others.[10] Hence, whereas freedom of expression would be devoid of meaning if the individual does not enjoy the freedom to think and have an opinion, by the same token free speech is indispensable if freedom of thought were to be exercised.[11]

A preliminary scanning through the major international human rights instruments reveals a pattern through which the provisions guaranteeing the rights to free speech and freedom of religion were drafted back to back in a relatively similar language, as laid down in the UDHR[12], the ICCPR,[13] the European Charter of Fundamental Rights,[14] the American

[9]UNGA Res 60/251 (3 April 2006) UN Doc A/RES/60/251.

[10]Kevin Boyle and Sangeeta Shah, 'Thought, Expression, Association, And Assembly, in International Human Rights Law' in Daniel Moeckli and others (eds), International Human Rights Law (2nd edn, OUP 2014) 217.

[11]ibid.

[12]Article 18: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.' Article 19: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

[13]Article 18: '1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.' Article 19: '1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.'

[14]Charter of Fundamental Rights of the European Union [2012] OJ C326/391. Article 10: '1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.' Article 11: '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected.' < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012P/TXT> accessed accessed 10 May 2017.

Convention on Human Rights[15] and the ECHR.[16] The reiteration of this specific order is, by all means, not a mere coincidence but rather a reflection of the framers' discernment of the extent of interdependence between the two sets of rights throughout the international and regional levels. It could be argued thus that such interrelatedness is perceived in the western world as an essential criterion for the establishment and survival of democracy, not just as a political system of government, but also as a conscious collective choice for building civilization following the apocalyptic destruction brought about by the Second World War.

Being the focus of this analysis, freedom of expression is indisputably an integral pillar

[15]American Convention on Human Rights (Pact of San Jose) (opened for signature 22 November 1969 and entered into force 18 July 1978) OAS Treaty Series No 36 Reprinted in Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992). Article 12: '1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private. 2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs. 3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others. 4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.' Article 13: '1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals. 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions. 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence. 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.' < OAS :: IACHR : Basic Documents in the Inter-American System> accessed 10 May 2017.

[16]Article 9: '1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.' Article 10: '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

upon which an effectively functioning democracy rests.[17] It is interwoven within the very fabric of the democratic process given its role as an essential vehicle for fostering public debates and shielding marginal groups from being overpowered in any society,[18] rendering it a public good that should be relentlessly protected.[19] To that effect, it could be useful to briefly draw forth at this juncture the philosophical justifications which reflect the inherent values and importance of the right to freedom of expression within the overall hierarchy of human rights.[20] The rationale behind the significance of free speech can be traced back to four main liberal justifications.[21] First, the notion of individual autonomy and its relevance to freedom of thought,[22] which entails that one gets to live a life according to choices consciously made between ranges of values, therefore, selfexpression in such a context is deemed an instrument of declaring autonomy choices.[23] The second justification is epistemological, whereby freedom of speech is perceived as a vessel of truth,[24] facilitating an interplay of ideas,[25] which takes place by allowing the widest possible range of ideas to circulate and challenge one another, leading to the prevalence of the best possible conclusion.[26] The third pertains to the significance of free speech to the development of political discourse, an imperative without which democracy cannot exist as a mode of government.[27]

The fourth justification is associated with the pursuit and propagation of scholarly and artistic work of all sorts.[28] The latter, is deemed a variation of the first two; enabling personal autonomy on the one hand, while enhancing the moral and intellectual development of society on the other.[29] Freedom of expression is such an over-arching right that is likely to collide

[17]Karen Reid, A Practitioner's Guide To The European Convention On Human Rights (2nd edn Sweet & Maxwell 2004) 317.

[18]David Harris, Michael O'Boyle and Colin Warbrick, Law of the European Convention on Human Rights (3rd edn OUP 2014) 613.

[19]Ilias Trispiotis, 'The Duty to Respect Religious Feelings: Insights from European Human Rights Law' (2013) 19.3 ColumJEurL 499, 503.

[20]Ellen Wiles, 'A Right to Artistic Blasphemy? An Examination of the Relationship between Freedom of Expression and Freedom of Religion, through a Comparative Analysis of UK Law' (2006) 6 UCDLR, 124, 133.

[21]David Feldman, Civil Liberties and Human Rights in England and Wales (OUP 1993) 547.

[22]Wiles (n 19) 134.

[23]Feldman (n 20) 548.

[24]Wiles (n 19).

[25]Feldman (n 20). He made a link between 'interplay of ideas' and the 'market place of ideas'. The first being a development of John Milton's and John Stuart Mill's utilitarian concepts of freedom of speech separating facts from opinions, whereas the latter was developed by the US Supreme Court in bestowing First Amendment protection on unpopular speech.

[26]ibid 549.

[27]ibid 550.

[28]ibid 551.

[29]Wiles (n 19).

with other individual or group rights. Even in liberal democratic States, notwithstanding the foregoing normative justifications, certain circumstances may warrant the suppression of dissenting individual political speech, the most privileged of all forms of speech, for the sake of some higher State interest such as confronting imminent threats and maintaining public order.[30] Whether the philosophical premises fortifying the right to free speech will outweigh the expedience of State interests is to be reckoned with after appreciating the reasoning of the Court in some of the seemingly controversial cases, as shall be discussed in the following section.

Turning to the European sphere, the ECHR could be perceived as the regional counterpart to the ICCPR, rendering its ratification a mandatory condition[31] of membership to the Council of Europe.[32] Considering historical reasons, the ECHR was drafted with a predominant aim of providing a statement of common values in contradistinction from the Soviet-style communism,[33] a stance which explains the almost exclusive emphasis on protecting civil and political rights.[34] This is echoed in the provisions incorporating both rights (belief and speech) in the ECHR, which are formally constructed in identical forms, whereby the first paragraph furnishes the protected right in almost an absolute form, the second paragraph however qualifies the scope by laying down the conditions in which the State may legitimately interfere with the enjoyment of said right.[35] Substantively, these provisions are essentially protecting civil liberties against intervention by the State or any of its authorities, phrased in terms of rights to the given freedoms, which must be read in conjunction with other provisions in the ECHR, a formulation that has enabled the Court to interpret the protected right beyond a literal guarantee of nonintervention by State authorities.[36] A broad construction of the first paragraph of Article 10 thus suggests that whoever is exercising this right is entitled to a choice of modality.[37] The right is presented

[30]James Weinstein and Ivan Hare, 'General Introduction: Free Speech, Democracy, and the Suppression of Extreme Speech Past and Present' in: James Weinstein and Ivan Hare (eds), Extreme Speech and Democracy (OUP 2010) 3-6. For example, the zealous protestors in Britain, Australia, New Zealand, Canada and the United States were imprisoned for protesting against their countries' involvement in WWI.

[31]Statute of the Council of Europe (opened for signature 5 May 1949) ETS No 001 Art 3 reads: 'Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms…' <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001> accessed 10 May 2017.

[32]Steven Greer, 'Europe' in Daniel Moeckli and others (eds), International Human Rights Law (2nd edn, OUP 2014) 422.

[33]ibid 418.

[34]Harris, O'Boyle and Warbrick (n 17) 5.

[35]ibid 503.

[36]ibid.

[37]ibid 615.

in the form of a positive obligation, using the verb shall, without prejudice to the possibility of producing a negative obligation as well. For example, freedom not to hold opinion, or freedom not to impart information, as in the case of requiring a defendant to testify against herself, all fall within the scope of the language. It could be discerned from the extensive case law of the Court that a variety of forms are recognized as falling within the ambit of Article 10, including but not limited to handing out of leaflets to spectators, a puppet show satirical of politicians or even the demonstration of historical signs of fascism.[38] The ECHR as a living instrument has not provided an exhaustive list of speech forms, which can change from time to time and from one society to another, instead it framed the right in a manner that asserts a wide presumption of entitlement to this freedom with its various manifestations, whereas a restriction is the exception as per Article 10.2.[39]

As a corollary to this formulation, the jurisprudence of the Court has developed a structured mechanism as to how the limitations imposed on free speech should be approached.[40] To that effect, a series of issues need to be considered beforehand; first, whether the impugned form of expression falls within the ambit of Article 10 in the first place and whether there has been a denial or limitation of expression.[41] If the applicant can establish these points, then the State intervention will be subject to the Court's scrutiny, with the onus shifting to the State, and will be justified only if the limitation has a clear legal basis, serving specified societal objectives and is proportionate to the aim, namely, deemed necessary in a democratic society.[42] In other words, in the exercise of its supervisory role the Court applies a tripartite test, whereby checking, first, whether the restrictive measure is having a clear legal basis provided for in national law, complying with the standards of the rule of law in a democratic State. Therefore, a law as such cannot be a result of an arbitrary whim from the side of the State. It must have already existed before the issue was invoked before the Court, enacted by a legitimate authority subject to independent judicial review, while maintaining the basic characteristics of legal rules, namely, being adequately accessible,[43] formulated with sufficient clarity and precision,[44] as well as allowing for a

[38]ibid.

[39]Boyle and Shah (n 9) 219.

[40]Harris, O'Boyle and Warbrick (n 17) 616.

[41]Ian 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 Res Publica 55, 56.

[42]ibid.

[43]Phillip Leach, Taking a Case to the European Court of Human Rights (Blackstone Press Limited 2001) 148.

[44]Hashman and Harrup v UK App no 25594/94 (ECtHR, 25 November 1999) para 41.

reasonable level of foreseeability of the outcome.[45] The second strand of the test checks if the intervention limiting freedom of expression is pursuing a legitimate aim. This entails verifying whether the impugned measure is introduced to confront a situation of pressing social need, then the State by its turn must provide evidence that the undertaken measure is serving a definite objective such as securing public safety and preventing disorder.[46] This goes hand in hand with the third strand, through which the Court ascertains whether the imposed restriction is proportionate to the aim pursued notwithstanding the fulfillment of the preceding strands, which is to be weighed according to the standards expected to endure in a democratic society.[47] The application of the test however is not always enforced in a linear fashion in light of the margin of appreciation doctrine being one of the guiding principles of interpretation of the ECHR.[48]

The doctrine comprises a latitude of discretion accorded by the Court to the Member States to assess for themselves the extent and need for legal restrictions pursuant to their local and cultural specificities.[49] It finds its roots in French and German administrative law, whereby the domestic systems distinguish between a full review and a limited review of administrative actions taken in the exercise of a discretion allowed by the law.[50] The utilization of the margin of appreciation had been initially triggered during the 1950s in a series of Article 15[51] applications, whereby the European Commission of Human Rights (hereinafter the Commission) examined derogations from certain ECHR obligations during war or emergencies threatening the life of the nation, before being applied to individual rights

[45]Sunday Times v UK App no 6538/74 (ECtHR, 26 April 1979) para 49.

[46]Leach (n 42).

[47]Handyside v UK App no 5493/72 (ECtHR, 7 December 1976), para 49: 'The Court's supervisory functions oblige it to pay the utmost attention to the principles characterizing 'a democratic society'. 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.

[48]Eva Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1996) 56 ZaöRV 240, 241.

[49]George Letsas, A Theory of Interpretation of the European Convention on Human Rights (OUP 2007) 80.

[50]Jean-Pierre Cot, 'Margin of Appreciation' Max Plank Encyclopedia of Public International Law (2007) para 5 <Oxford Public International Law: Margin of Appreciation (ouplaw.com)> accessed 12 May 2017.

[51]Article 15 states '1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.'

covered in Articles 8 through 11 respectively in a later stage.[52] The doctrine is unsurprisingly accused of judicial diplomacy, yet remains supported by a factual lack of European legal consensus, disparate notions of morality,[53] diverging cultural and religious backgrounds among the Member States (project these elements to draw a comparison for example between contemporary Turkey and Netherlands).[54] Throughout its extensive Article 10 jurisprudence, the Court has distinguished between categories of expression in terms of the extent of bestowed protection against State intervention, namely, political expression, artistic expression and expression involving matters of commercial interest (advertising).[55] Political expression appears to be almost immune against suppression by the State, as it constitutes one of the essential pillars of a democratic society and one of the basic conditions for its progress and for each individual's selffulfillment.[56] A privilege as such renders the State's reliance on the margin of appreciation to restrict this class of expression only applicable subject to the highest scrutiny,[57] as opposed to commercial speech, which stands at the opposite end of the spectrum.[58]

In Mahoney's words, the margin of appreciation 'gives priority to the universality of

[52]Cora Feingold, 'Doctrine of Margin of Appreciation and the European Convention on Human Rights' (1977) 53 NotreDameLRev 90, 91 - 94. Analyzing the First Cyprus case in 1958, in which Greece lodged an inter-State application against the UK on claims of gross violations in Cyprus. These aforementioned rights entail; the right to respect for private and family life; the right to freedom of thought, conscience and religion; the right to freedom of expression; and the right to freedom of assembly and association.

[53]Handyside (n 46) para 48: '… it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject'.

[54]Leigh (n 40) 56.

[55]Alastair Mowbray, Cases, Materials, and Commentary on the European Convention on Human Rights (3rd edn OUP 2011) 627.

[56]Lingens v Austria App no 9815/82 (ECtHR, 8 July 1986) para 41. The case involved a defamation case instigated by the former Chancellor of Austria (Bruno Kreisky) against a journalist (Mr. Lingens) in the aftermath of the federal elections. Mr. Lingens published a staunch criticism of the outgoing Chancellor for having vigorously supported former Nazis for political gain, branding him as practicing 'basest opportunism' given his close connection to Friedrich Peter (President of the Austrian Liberal Party), who was a former member of the Nazi SS infantry brigade during the Second World War.

[57]ibid, para 42: 'freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues'.

[58]Mowbray (n 52).

the standard of freedom of expression laid down in Article 10 in regard to political and publicconcern speech, but much more scope for subsidiarity that is the exercise of democratic discretion at local level - in regard to cultural or artistic speech'.[59] Given historical and political reasons, it may be comprehensible why has (classical) political speech acquired such a stature when compared to the other two types, whether in the domestic legal systems or under the Convention, let alone its significant role in uncovering abuses.[60] The line between different forms of speech however could be blurred, where in certain situations a clearcut distinction between artistic and political expression is difficult to ascertain, especially if the former is employed to convey a message imbued with political connotations as in the case of the rebellious poems of Karatas.[61]

Categories and Limits

Artistic expression is not an encrypted form of expression. Simply understood, given its seemingly infinite forms, it could range from any sort of literary work as a novel, an academic lecture or a journalistic article, to sorts of visual and audio entertainment like theater, film or radio shows, as well as traditional exhibits of paintings or sculptures. Although comprehending or even tasting of art in general is a matter that may lack consensus as to its different parameters, when it becomes occupied with morality or an element perceived as relevant to religious belief, then the artistic expression may evolve into a contentious situation, arguably manifesting a collision between freedom of expression and that of religion. Yet what makes offensive artistic expression often a source of controversy when juxtaposed with religious sentiments? Why is it any different from its political counterpart?[62] These questions beg a preliminary distinction. The specificity of religiously offensive speech in particular hinges on targeting the sacred factor in any religious belief, one that relates to the innate state of identifying with the divine and its omnipresent existence, one that materializes in the special sense of reverence and veneration held by the religious.[63] This interaction with a core element closely connected to the forum internum dynamic of the right to freedom of conscience and belief is essentially what makes the religious more susceptible to offense and more sensitive than the one holding political convictions for instance, which,

[59]Paul Mahoney 'Universality Versus Subsidiarity in the Strasbourg Case Law on Free Speech' (1997) 4 EHRLR 364, 379.
[60]Francis Jacobs and Robin White, *The European Convention on Human Rights* (4th edn OUP 2006) 318.
(61)Karatas v Turkey [GC] App no 23168/94 (ECtHR, 8 July 1999) para 10. The applicant was a Turk of Kurdish descent, published an anthology of poems yearning for a Kurdish homeland, glorifying insurrection against the Ottomans and the Turkish domination. Tried under Prevention of Terrorism Act before the National Security Court, and sentenced to imprisonment and fined.
[62]Peter Jones, 'Blasphemy, Offensiveness and Law' (1980) 10 BJPolSci. 129, 138.
[63]ibid.

by all means, could be as strong as those of the religious.[64] Does that mean or even imply that such vulnerability merits a special type of protection under the ECHR or rather an exemption from the general ambit of freedom of expression? An initial reading of the text of Article 10 suggests that the scope accorded therein does not entail an express protection for what is held sacred or divine per se, otherwise, the State may violate its presumed neutrality towards individuals belonging to different religious affiliations and risk being perceived as discriminatory by shielding a specific religion against offensive speech. Nevertheless, as shall be demonstrated in the ensuing analysis, the Court's interpretation of Article 10 condoning the stifling of morally and religiously offensive speech was critically received for failing to develop a coherent approach that lays down specific criteria according to which such curtailment is consistently reconciled with the text of the ECHR.[65] Accordingly, in order to stand upon the Court's rationale, claims of artistic expression violating public morality shall be examined first, perhaps since it possesses a wider common ground as to what constitutes established norms in a given society, before turning to offenses directed to the specific edicts of religious dogmas and members of religious groups.

Public Morals

For practical considerations, a single criterion is set for classifying cases under this division, namely, the existence of a legislation or a statutory provision in force within the relevant domestic legal order, which regulates contraventions falling under titles such as maintaining public order, public morality or combatting obscenity. Considered as the leading case in which the margin of appreciation doctrine was first employed to address Article 10 claims,[66] the Handyside ruling serves as an illustrative example of how the Court engaged with invoking the protection of public morals as legitimate grounds for restricting freedom of expression.[67] The case involved the prosecution of a book for containing obscene content tending to deprave and corrupt given its premeditated readership of school pupils and

[64]ibid.

[65]Leigh (n 40) 56.

[66]Lorenz Langer, Religious Offence and Human Rights: the Implications of Defamation of Religions (CUP 2014) 146. The case was the first to address Article 10 claims lodged by a civilian. However, it was preceded by another Article 10 application yet in the context of Armed forces service in Engel and Others v Netherlands Apps nos 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 8 June 1976) paras 94 – 101.

[67]Handyside (n 46), paras 14 – 19. The case involved the seizure and forfeiture of copies of a schoolbook 'The Little Red School Book', and the publisher fined for violating the Obscene Publications Acts 1959/1964. Originally authored in Denmark, besides the publication of its translation in the UK, the book had circulated in fourteen European States without stirring similar complaints, thirteen of whom had been already signatories of the ECHR.

teenagers.[68] The aforementioned tripartite test was applied, whereby the respondent State managed to establish that the impugned measure was prescribed by law (contravention of the Obscene Publications Acts 1959/1964) and pursued the legitimate aim of protecting morals, being one of the admitted grounds of restriction as per Article 10(2) ECHR. The Court was then confronted with the proportionality question, examining whether the restrictions and penalties that had befallen the applicant were necessary in a democratic society for the protection of morals.[69] In addressing the question, the Court developed its position along two axes underpinning its free speech theory.

The first axis was founded on the subsidiarity – margin of appreciation dyad. In so doing, the Court asserted, first, the subsidiary nature of its mandate.[70] The subsidiarity principle is ingrained in the very design of the ECHR from the outset and throughout its provisions,[71] most notably that only following the exhaustion of domestic remedies can an application be lodged before the Court as per Article 35(1) ECHR. This requisite underscores not only the duty of domestic institutions to remedy alleged human rights violations, but also their right to do so in line with their domestic arrangements for resolving such disputes.[72]

[68]ibid, paras 31 – 32. Before the domestic UK appeals court (Inner London Quarter Sessions), the prosecution highlighted some of the passages that were deemed subversive for a book purported to function as a reference for children in such young and formative stage. Perceived as anti-establishment, the book ignored a discussion on marriage and the influence of traditional institutions such as parents, Churches and youth organizations. Conversely, it indulged in an unbalanced substance not typically included in the education curricula of pupils at such age. This was evident under the passage 'Be Yourself', where it stated: 'Maybe you smoke pot or go to bed with your boyfriend or girlfriend and don't tell your parents or teachers, either because you don't dare to or just because you want to keep it secret. Don't feel ashamed or guilty about doing things you really want to do and think are right just because your parents or teachers might disapprove. A lot of these things will be more important to you later in life than the things that are "approved of".' These were stated without any reference to the illegality of smoking pot or the illegality of sexual intercourse by minors (under fourteen for a boy and under 16 for girls). The domestic courts emphasized further examples on the tendency of the content of the book to deprave. For example, the main heading 'Sex' included passages discussing intercourse and petting (sexual activity between humans and animals). The heading 'Pornography' included passages stating: 'Porn is a harmless pleasure if it isn't taken seriously and believed to be real life. Anybody who mistakes it for reality will be greatly disappointed. But it's quite possible that you may get some good ideas from it and you may find something which looks interesting and that you haven't tried before.'; and 'But there are other kinds - for example pictures of intercourse with animals or pictures of people hurting each other in various ways'.

[69]ibid, para 47.

[70]ibid, para 48: 'the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights… The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines'.

[71]See Mark E Villiger, 'The Principle of Subsidiarity in the European Convention on Human Rights' in Marcelo G Kohen (ed), Promoting Justice, Human Rights and Conflict Resolution through International Law/ La Promotion de la Justice, des Droits de l'Homme et du Règlement des Conflits par le Droit International (Martinus Nijhoff Publishers 2007) 623 – 637. Provides a concise sketch of the various manifestations of the principle in different ECHR provisions.

[72]Andreas von Staden, 'The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and

Stressing the subsidiary nature is more likely to anchor the Court in its constitutionalist function, which involves, inter alia, judicial clarification and development of human rights standards sometimes even beyond their literal conceptions to accommodate contemporary understandings while holding States to account for them,[73] instead of being perceived in terms of a purely adjudicatory role.[74] Second, being a natural product of the principle of subsidiarity, the margin of appreciation doctrine was brought into play to delineate the boundary between primary national discretion and the subsidiary international supervision.[75] In other words, having emphasized the absence of a uniform European conception of morals and that State authorities are in a better position to assess the necessity that determines a restriction, by virtue of their direct contact with the vital forces of their countries, the Court interpreted Article 10(2) as granting the Member States a margin of appreciation to restrict freedom of expression while remaining within the bounds of the ECHR.[76] This power of appreciation is, however, qualified by the Court's supervisory role, which extends not only to the legality of the impugned measure and its necessity, but also to the decision applying it, even one rendered by an independent court.[77] Notwithstanding the foregoing formulation, the second axis accentuated freedom of expression as one of the essential foundations of a democratic society and a basic condition for its progress, thus broadening the scope of the right to free speech beyond what is deemed acceptable to include offensive, shocking and disturbing ideas:

Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[78]

Interestingly though, this famous statement often quoted or paraphrased in almost every judgment suggests that offensive speech as such should not be precluded from the ambit of Article 10, unless a case is made that it is necessary in a democratic society in

Judicial Standards Review' (2012) 10 ICON 1023, 1036.

[73]Fiona de Londras, 'Dual Functionality and the Persistent Frailty of the European Court of Human Rights' (2013) 1 EHRLR 38, 40.

[74]ibid 46.

[75]Herbert Petzold, 'The Convention and the Principle of Subsidiarity' in R Macdonald, F Matscher and Herbert Petzold (eds) The European System for the Protection of Human Rights (Martinus Nijhoff Publishers 1993) 59.

[76]Handyside (n 46) para 48.

[77]ibid, para 49.

[78]ibid.

accordance with Article 10(2).[79] Nevertheless, the dissenting opinion emphasized how the Court must have scrutinized further the satisfaction of the element of necessity.[80] When assessing whether the pressing social need (protection of morals) had justified the impugned measure, the pursued aim seemed barely realized, when considering that the part of the book impression subjected to the impugned measure amounted to less than 10 percent.[81] Whereas the remainder (90 percent) had been already accessible to the public, including adolescents, which rendered in practice young people unprotected against the corrupting and depraving influence of the book, hence undermining the credibility of the aim pursued.[82] Arguing based on the discrepancy between the undertaken measure and the aim pursued was tenable, given that far more obscene publications were readily accessible to anyone in the United Kingdom, besides the diversity of reactions to the book across different regions of the country (it was not prosecuted in other regions of the UK).[83] Accordingly, Judge Mosler was led to conclude, separately, that the impugned measure was not necessary within the meaning of Article 10(2) with regard to the aim, even if the qualification of what is moral in a democratic society remained within the State's margin of appreciation.[84]

In Müller,[85] the Court followed the lines of the Handyside rationale in granting the respondent State a margin of appreciation, finding no violation of the applicant's Article 10 rights in confiscating his obscene paintings, which depicted an orgy of unnatural sexual practices including sodomy, bestiality and petting in a public exhibition.[86] Upon a complaint by a visitor who reported how violently his young daughter reacted to the paintings on show, the local prosecutor found the paintings to fall within the provisions of Article 204 of the Swiss Criminal Code that prohibited obscene publications.[87] Despite the applicant's argument that obscenity was a relative concept not expressly defined especially pertaining to the field of art,[88] domestic case law adopted the person of ordinary sensitivity test as an objective reference, namely, whether the work of art caused moral offence to a person

[79]Leigh (n 40) 71.

[80]Handyside (n 46) Separate Opinion of Judge Mosler, para 2.

[81]ibid.

[82]ibid.

[83]ibid.

[84]ibid, para 3.

[85]Müller and Others v Switzerland App no 10737/84 (ECtHR, 24 May 1988).

[86]ibid para 18.

[87]ibid paras 12-14. Book Two of the Swiss Criminal Code, Title Five 'Offenses Against Sexual Integrity' Article 204 < SR 311.0 - Swiss Criminal Code of 21 December 1937 (admin.ch)> accessed 27 May 2017.

[88]Müller, para 17.

of ordinary sensitivity, to ascertain whether the obscenity element was fulfilled.[89] After examining the paintings, the Court endorsed the Swiss courts' interpretation of obscenity, concluding that the paintings grossly offended the sense of sexual propriety of persons having ordinary sensitivity.[90] The Court sided with the domestic courts' view that artistic depiction of such vulgar and crude sexuality fell outside the ambit of Article 10 and was thus unworthy of the protection accorded to freedom of expression.[91] Large portrays of men engaging in sexual activity with animals, among others, displayed in an unrestricted exhibition open to public at large, with expected minors and children attendees, as the case revealed, triggered a pressing social need to protect public morality against obscenity, thus inviting State intervention and bringing about a warranted restriction of the artistic expression in such context.[92] The weight of public exposure, arguably, fortified by individual complaints, made it easier for the prosecution and domestic courts to establish a case for protecting public morals and rule in favor of the confiscation of the paintings. Whereas in Schrer,[93] the owner of a pornographic materials shop who displayed homosexual films inside his premises on the basis of a membership that were not open to public display was subject to criminal prosecution on the account of displaying obscene materials in public. However, the Commission held that there has been a violation of Article 10.[94] There were no compelling reasons for the prosecution, especially since there was no actual threat to the public and the threshold of encountering a pressing social need was not met in light of the controlled private medium where viewers were aware in advance what to expect unlike in Müller.[95]

It is worth recalling at the end of this subsection that the Court was called upon to rule on the employment of public morality as legitimate grounds to restrict freedom of expression. As has been demonstrated, it seemed to be a highly fluid notion, changing across Member States and evolving through time. What remained fixed though is that the specific parameters of public morality were always locally defined and not superimposed by the Court. This is consistent with the subsidiaritymargin of appreciation dyad, whereby, evidently, Member States enjoy a relatively wide latitude to justify their intervention against artistic expression that transgresses public mores, provided that they manage to satisfy the tri-partite test set by

[89]ibid, para 18.

[90]ibid, para 36.

[91]ibid, para 14.

[92]ibid, para 36.

[93]Schrer v Switzerland App no 17116/1990 (ECtHR, 25 March 1994), para 24.

[94]ibid, para 26.

[95]Reid (n 16) 329.

the Court. In the following subsections the analysis shifts to the Court's stance on restrictions imposed upon anti-religious speech as well as its approach in resolving the presumed clash between two ECHR rights, namely, freedom of expression and that of religion. Following the distinction made by the Council of Europe's advisory body, the Venice Commission, three types of offences that penalize anti-religious speech shall be entertained, i.e.; blasphemy, religious insult and religious hatred respectively.[(96)]

Blasphemy

Blasphemy prohibitions have historically been adopted in Europe with the aim of protecting the Christian faith, being the dominant religion adhered to by the population, before gradually developing into provisions of statutory law, typically falling under Penal Codes.[(97)] Within the Member States of the Council of Europe, a minority continues to uphold blasphemy as a criminal offence (Austria, Denmark, Finland, Greece, Italy, Liechtenstein, the Netherlands, and San Marion).[(98)] In the absence of an all-encompassing definition assigned to blasphemy, a matter is considered blasphemous if it denies the veracity of the Christian doctrine or the Bible, or vilifies God or Christ in a profane manner that is likely to outrage believers.[(99)] The rationale underlying blasphemy offences however has evolved in the modern era from defending religious orthodoxy per se to serve a social rather than a religious purpose by preventing offence to religious believers and maintaining public order.[(100)] The jurisprudence indicates that the Court's approach has been inclined to uphold blasphemy laws, notwithstanding their impact on freedom of expression, by interpreting them as being necessary for the protection of others, which is one of the admissible grounds according to which free speech may be curtailed as per Article 10(2) ECHR.[(101)]

In the seminal Otto-Preminger ruling,[(102)] which entailed the seizure and the forfeiture of the satirical anti-religious film 'Das Liebeskonzil' (Council in Heaven),[(103)] the Court found

[(96)]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' Study 406/2006, adopted by the Venice Commission at its 76th plenary session, 17-18 October 2008, para 22. <Venice Commission :: Council of Europe (coe.int)> accessed 30 May 2017.

[(97)]Jeroen Temperman, 'Blasphemy, Defamation of Religions and Human Rights Law' (2008) 26 NQHR 517, 518.

[(98)]The Venice Commission (n 95) para 24.

[(99)]Feldman (n 20) 684.

[(100)]Rex Ahdar and Ian Leigh, Religious Freedom in the Liberal State (2nd edn, OUP 2013) 436.

[(101)]Leigh (n 40) 59.

[(102)]Otto-Preminger v Austria App no 13470/87 (ECtHR, 20 September 1994).

[(103)]ibid, para 22. The film portrays the God of the Jewish religion, the Christian religion and the Islamic religion as an apparently senile old man prostrating himself before the Devil with whom he exchanges a deep kiss and calling the Devil his friend. He is also portrayed as swearing by the Devil. Other scenes show the Virgin Mary permitting an obscene story

no violation of the applicant's Article 10 rights. In assessing the legitimacy of the aim of the restriction, the Court developed quite an intriguing formulation. It stressed first that in a democratic society religious believers cannot expect to be exempted from all criticism or even the propagation of doctrines hostile to their faith.[104] However, the State may legitimately take measures aimed at repressing the imparting of ideas, if they are deemed incompatible with the respect for the freedom of thought, conscience and religion of others.[105] This was evident in its following confirmation that the respect for the religious feelings of believers as guaranteed in Article 9 can be violated by provocative portrayals of objects of religious veneration.[106] The purpose of the impugned measure was thus the protection of the rights of citizens not to be insulted in their religious feelings by the public expression of views of other persons.[107] In other words, it could be argued that by this reasoning the Court justified the restriction of Article 10 in terms of imposing a positive obligation on the State to maintain Article 9 rights.[108] In the same vein, the Court interpreted undertaking 'duties and responsibilities' as enshrined in Article 10(1) to include an obligation to avoid as far as possible expressions that are gratuitously offensive to others and which do not contribute to any form of public debate capable of furthering progress in human affairs.[109] As to the necessity of the restriction, the Court deferred to the findings of the domestic courts that there was a pressing social need to preserve the religious peace and public order against the anti-religious nature of the film in light of the overwhelming Roman Catholic majority in the region.[110] Notwithstanding the foregoing, what remains problematic in the Court's formulation is that the Convention does not guarantee a right to protection of religious feelings, and more importantly, such right cannot be derived from the right to freedom of religion.[111] Some might even argue that the Court has created an illusionary clash between freedom of expression and that of religion through a misleading reference to Article 9, which guarantees neither a right to protection of religious feelings nor a right to respect for

to be read to her and the manifestation of a degree of erotic tension between the Virgin Mary and the Devil. The adult Jesus Christ is portrayed as a low grade mental defective and in one scene is shown lasciviously attempting to fondle and kiss his mother's breasts, which she is shown as permitting. God, the Virgin Mary and Christ are shown in the film applauding the Devil.

[104]ibid, para 47.

[105]ibid, para 47.

[106]Otto-Preminger, para 47

[107]ibid, para 48.

[108]Leigh (n 40) 67.

[109]Otto-Preminger, para 49.

[110]ibid, para 52.

[111]ibid, Joint Dissenting Opinion of Judges Palm, Pekkanen, and Makarcyzk, para 6.

freedom of thought, conscience and religion, in order to justify the restriction of Article 10.[112]

A similar rationale was reached in Wingrove,[113] which involved a challenge to the refusal of the British Board of Film Classification to issue a certificate of sale and for banning the distribution of the film 'Visions of Ecstasy' on grounds of being potentially blasphemous.[114] The refusal amounted to a prior restraint, a Common Law principle, which obliges the State not to ban expression before its publication.[115] The Court held that there was no violation of Article 10, emphasizing that the extent of insult to religious feelings has to be significant and not a mere criticism or simply offending Christians.[116] While acknowledging that the impugned law clearly interfered with freedom of expression, the Court nonetheless found that the English law of blasphemy satisfied the requirement of a measure being prescribed by law.[117] It also found the State authority's interference valid,[118] since it pursued the legitimate aim of protecting the rights of others,[119] which was necessary in a democratic society because the film constituted an offensive attack on matters held by Christians as sacred, and was proportionate due to the high level of profanation entailed in the offence of blasphemy.[120] The Court made it clear that since it was neither a case of political speech nor a debate on questions of public interest, a wider margin of appreciation was thus granted to Member States to regulate freedom of expression in relation to matters which are liable to offend intimate convictions within the sphere of morals and religion.[121] This conclusion affirmed the impression held by some critics that the Court willfully refrained from being involved in the process of normsetting in the areas of sexual or religious morality, as manifested in Wingrove which happened to be a combination of both, and instead continues to rely on the

[112]Leigh (n 40) 65.

[113]Wingrove v UK App no 17419/90 (ECtHR, 25 November 1996).

[114]ibid, paras 8-9. An eighteen minutes silent film based on the writings and life of the sixteenth century Carmelite nun St. Theresa of Avila, portraying her as experiencing ecstatic visions of sexual nature juxtaposed with images of Christ fastened to the cross. The film ends with St. Theresa kissing and licking the body of Christ and placing her hand in his which he then holds.

[115]Rafaella Guinane, 'The Racial and Religious Hatred Act 2006 and Offensive Speech: Has the Sensitivity of the ECtHR Overly-Influence UK Law? (2009) 2 UCLHRRev 208, 214.

[116]Wingrove (n 112), para 60.

[117]Ivan Hare, 'Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine' in James Weinstein and Ivan Hare (eds), Extreme Speech and Democracy (OUP 2010) 304.

[118]Jennifer James and Sandy Ghandi, 'The English Law of Blasphemy and the European Convention on Human Rights' (1998) 4 EHRLR 430, 439.

[119]Sandberg Russel and Norman Doe, 'The Strange Death of Blasphemy' (2008) 71 ModLRev 971, 975.

[120]ibid.

[121]Wingrove (n 112), para 58.

margin of appreciation doctrine to resolve them on a domestic level.[122]

An additional layer of inconsistency in the Court's stance could be discerned from the abortive attempt to bring private prosecution against the publishers of Salman Rushdie's book,[123] The Satanic Verses,[124] for the Common Law offence of blasphemy only applied to the adherents of the Church of England and thus excluding the adherents of other religions.[125] In Strasbourg, the applicant claimed that the English Law did not give the Muslim religion protection against abuse or scurrilous attacks without which there will be a limited enjoyment of his right to freedom of religion as per Article 9.[126] He also complained of the discriminatory protection of the English law in force that was extended only to Christianity with the exclusion of other religions contrary to the provisions of Article 14.[127] The European Commission unanimously declared the application incompatible ratione materiae with the provisions of the ECHR and thus inadmissible, because it found no link between the claims and the applicant's enjoyment of Article 9 freedoms.[128] In other words, since the Member States were not required by the ECHR to prohibit blasphemy to secure the enjoyment of the right to freedom of religion in the first place, the UK in this instance was free to do so on a selective basis.[129] The lack of an express ECHR right to be protected in this way nullified the second claim under Article 14, because sensu stricto no issue of discrimination in the enjoyment of Article 9 rights arose on the basis of blasphemy law being applied only to Christians in the UK.[130] Interestingly though, an argument could still be put forth, namely, that the conclusion of the Commission was at odds with the positive State duty to protect citizens from being insulted in their religious feelings as developed by the Court in the Otto-Preminger ruling.[131]

By way of contrast, the Court found no violation of Article 10 when the author of the

[122]Richard Stone, Civil Liberties and Human Rights (5th edn, OUP 2004) 303.

[123]Leigh (n 40) 66.

[124]R v Chief Metropolitan Magistrate, ex p Choudhury [1991] QB 429. The Novel gained wide fame back at the time, particularly due to the Fatwa (religious opinion) issued by Al-Khomeini the supreme spiritual leader of the Iranian Islamic Republic, declaring Salman Rushdie as an apostate, who should be killed, and that was a duty borne on every adult Muslim according to his view. That was a major reason for similar cases attempting to bring prosecution against Rushdie.

[125]Paul Kearns, 'The Uncultured God: Blasphemy Law's Reprieve and the Art Matrix' (2000) 5 EHRLR 512, 513.

[126]Choudhury v UK App no 17439/90 (ECtHR, 5 March 1991).

[127]ibid, para 1. Article 14 reads: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

[128]ibid, para 2.

[129]Leigh (n 40) 66.

[130]ibid.

[131]ibid 67.

'Forbidden Verses' book was convicted of blasphemy pursuant to Article 175 of the Turkish Criminal Code.[(132)] The applicant claimed that the book conveyed his philosophical and theological views in a novelistic style, however based on expert reports, the prosecution established that certain passages contained therein satisfied the actus reus of the offence, whereas the mens rea was fulfilled given the title of the book.[(133)] In its reasoning, the Istanbul Court of First Instance cited in particular the following passage:

Look at the triangle of fear, inequality and inconsistency in the Koran; it reminds me of an earthworm. God says that all the words are those of his messenger. Some of these words, moreover, were inspired in a surge of exultation, in Aisha's arms. ... God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal.[(134)]

Following the same line of reasoning set in the Otto-preminger decision, the Court read that passage as constituting an abusive attack on the Prophet of Islam, notwithstanding the Turkish society's attachment to secularity.[(135)] To that effect, the Court considered that the impugned measure was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims.[(136)] Once again, the Court established that an attack on religious doctrine amounts to an attack on believers, which leaves one to speculate that had the UK chosen to prosecute Salman Rushdie for 'The Satanic Verses', most probably the conviction would have been upheld under Article 9.[(137)] Yet again, the dissenting Judges argued in an opposing direction, stressing the need for that caselaw to be revisited, because it is placing too much emphasis on conformism or uniformity of thought and reflects a timid conception of freedom of the press.[(138)]

In conclusion of this subsection, although the Court has been reproached for its deference to national authorities by relying on the margin of appreciation doctrine generously,[(139)] its stance was based on two main points; first, the absence of a uniform European conception as to the requirements of the protection of the rights of others regarding attacks on their

[(132)]I.A. v Turkey App no 42571/98 (ECtHR,13 December 2005).

[(133)]ibid, paras 5-9.

[(134)]ibid, para 13.

[(135)]ibid, para 29.

[(136)]ibid, para 30.

[(137)]Leigh (n 40) 61.

[(138)]ibid Joint Dissenting Opinion, para 8.

[(139)]Fionnuala Ni Aolain, 'The Emergence of Diversity: Differences in Human Rights Jurisprudence' (1995) 19 FordhamIntLJ 101, 115.

religious convictions.[140] Second, the threshold in blasphemy convictions must be high, emphasizing the manner in which the expression is advocated, and that the extent of insult to religious feelings must be significant to establish an admissible restriction.[141] Nevertheless, there remains force in the claim of some observers that the Court has actually created an unenumerated ECHR right, namely, the right to be protected from offensive expression to religious feelings.[142]

Religious Defamation

While there is no general definition of religious insult,[143] what distinguishes it in essence is being an affront specifically targeting the adherents (including sympathizers) of a particular religion or their religious sentiments, and by extension, laws penalizing this type of expression, unlike blasphemy, aim to protect the persons and not the religious doctrine.[144]

This could be grasped in the Giniewski case,[145] in which the author of a journalistic article was prosecuted for allegedly making racially defamatory statements against the Christian community in France.[146] His published article addressed the Papal encyclical 'Splendor of Truth', whereby he criticized the propagated doctrine therein that the New Covenant under Christ 'fulfilled' the Old Covenant as scriptural antiJudaism, arguing that a theological understanding as such led to anti-Semitism and prepared the ground in which the idea and the implementation of Auschwitz took seed.[147] In applying the tripartite test, the Court interpreted the element of legitimate aim of the interference as to protect a group of persons from defamation on the account of their membership of a specific religion, akin to that of the protection of the rights of others as per Article 10(2).[148] As to the element of necessity, the Court did not accept the domestic courts' characterization of the applicant's article as if it were attaching the blame for the Nazi massacres on Catholics and Christians.[149] Instead, the applicant's article demonstrated a professional scholarly work in developing an argument pertaining to the scope of the specific doctrine and its possible links with the origins of the

[140]Wingrove (n 112), para 58.

[141]ibid, para 60.

[142]Ian Cram, 'The Danish Cartoons, Offensive Expression, and Democratic Legitimacy' in James Weinstein and Ivan Hare (eds), Extreme Speech and Democracy (OUP 2010) 311, 320.

[143]ibid paras 27-28.

[144]Leigh (n 40) 58.

[145]Giniewski v France App no 64016/00 (ECtHR, 31 April 2006).

[146]ibid, para 14. Punishable under section 32 of the Freedom of the Press Act of 29 July 1881.

[147]ibid.

[148]ibid, para 40.

[149]ibid, para 46.

Holocaust.[150] The Court thus considered the contested article as having contributed to a discussion of a question of an indisputable public interest in a democratic society, and that it was essential in a society as such that a debate over those matters should take place freely.[151] The Court added, that even though his article contained views and phrases which may shock or offend, it was not 'gratuitously offensive', and did not incite disrespect or hatred, or cast doubt in clearly established historical facts, thus undermining the pressing social need that would justify the State intervention.[152]

A similar conclusion was reached in Klein,[153] in which a journalist was prosecuted for publicly defaming the Roman Catholic Archbishop in his article by referring to the Archbishop's cooperation with secret police during the communist era, criticizing his moral failings and wondered why decent Catholics did not leave their church headed with such an 'ogre'.[154] The domestic courts convicted him of defaming the highest representative of the Roman Catholic Church in Slovakia and blatantly discrediting and disparaging a group of citizens for their Catholic faith.[155] The Court however was not persuaded with the domestic courts' conclusion, based on the fact that the critique, albeit sharp and pejorative in tone, had exclusively addressed the person of the Archbishop and not the religion he represented.[156] It accepted the applicant's argument that his article neither unduly interfered with the rights of Catholic believers to exercise their religion, nor denigrated the content of their religious faith, finding inappropriate his conviction of the criminal offence of defaming other persons' beliefs.[157] This conclusion rendered the interference with his right to freedom of expression neither corresponding to a pressing social need, nor proportionate to the legitimate aim pursued.[158]

Religious Hatred

Just like the former two types of anti-religious speech, there is no generally recognized definition for hate speech. In a broad sense, it could be described as emotions of intense

[150]ibid, para 50.

[151]ibid, para 51.

[152]ibid, para 52.

[153]Klein v Slovakia App no 72208/01 (ECtHR, 31 October 2006).

[154]ibid, para 12-17.

[155]ibid, para 50. His conviction under Article 198(1)(b) of the Slovakian Criminal Code. The said Article entitled 'Defamation of nation, race and belief' reads as follows: 'A person who publicly defames a) a nation, its language or race or; b) a group of inhabitants of the republic for their political belief, faith or because they have no religion, shall be punished by up to one year's imprisonment or by pecuniary penalty'.

[156]ibid, para 51.

[157]ibid, para 52-53.

[158]ibid, para 54.

dislike or hatred,[159] or that form of speech designed to promote and propagate hatred on the basis of race, religion or ethnic origin.[160] In international human rights law, Article 20(2) of the ICCPR expressly outlaws any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence, whereas a detailed prohibition of hate speech finds its place under Article 4[161] of the Convention on the Elimination of All Forms of Racial Discrimination.[162] In the European sphere, the Committee of Ministers of the Council of Europe defines the notion as encompassing all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antiSemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.[163] In most Member States, the treatment of the incitement of religious hatred is a subset of incitement to hatred, in general covering other elements (such as sex, language, social status).[164] Perhaps it is the most direct form of anti-religious speech, clearer in terms of identification, prosecution and protection of the rights of others. In a line of cases, typically confined to racial discrimination and anti-Semitism yet at a later stage encompassed Islamophobia, in which applicants complained of the violation of their freedom of expression by prosecutions for hate speech, the Court recognized that limited

[159]Cram (n 141) 313.

[160]Michael Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 CardozoLRev, 1523.

[161]International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965 UNGA Res 2106 (XX), entered into force 4 January 1969) 660 UNTS 195. Article 4 reads: 'States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia: (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination'.

[162]Stephanie Farrior, 'Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech' (1996) 14 BerkleyJIntlL 1, 4.

[163]Appendix to Recommendation No R (97)20 on "Hate Speech" of the Committee of Ministers of the Council of Europe, adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers' Deputies. <1680505d5b (coe.int)> accessed 30 May 2017.

[164]The Venice Commission Report (95) para 34.

and proportionate hate speech offences in national law are compatible with the ECHR.[165]

Norwood serves as an example of Islamophobia cases,[166] in which the applicant who was a regional organizer of the extreme right wing British National Party was convicted with an aggravated offence of displaying a threatening, abusive or insulting sign (poster), with hostility towards a racial or religious group. The poster contained a photograph of the Twin Towers in flames, the words 'Islam out of Britain' – 'Protect the British People' and a symbol of a crescent and star in a prohibition sign.[167] The applicant then lodged his complaint before the Court arguing the violation of his Article 10 and 14 rights respectively. However, the Court deferred to the domestic courts assessment and stressed that the impugned poster constituted an abuse of ECHR rights within the meaning of Article 17,[168] and should therefore not be awarded the protection guaranteed under the ECHR. The Court stated:

[N]otes and agrees with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14.[169]

It could be argued that since the poster bore an exclusionary message, aiming at the expulsion of an entire class of citizens from their country on the sole account of their religious belief, it was rather intelligible to view this poster as antithetical to democracy itself.[170] The Court's rationale thus rested on finding some religious hate speech as being a priori unworthy of the protection guaranteed under Article 10, and therefore, there was no need to scrutinize the respondent State to justify the imposed limitation.[171]

[165]Leigh (n 40) 63.

[166]Norwood v UK App no 23131/03 (ECtHR, 16 November 2004).

[167]ibid. Upon appeal before the UK High Court, Lord Justice Auld held that the poster was 'a public attack on all Muslims in this country, urging all who might read it that followers of the Islamic religion here should be removed from it and warning that their presence here was a threat or a danger to the British people'.

[168]David Keane, 'Attacking Hate Speech Under Article 17 of the European Convention on Human Rights' (2007) 25 NQHR 641, 642. Article 17 reads: 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention'.

[169]Norwood (n 165).

[170]James Weinstein, 'Extreme Speech, Public Order, and Democracy: Lessons from the Masses' in: James Weinstein and Ivan Hare (eds), Extreme Speech and Democracy (OUP 2010) 23, 49.

[171]Leigh (n 40) 64.

In Gündüz,[172] the applicant who was convicted of inciting hatred via a televised show, in which he attacked secularism and called for the enforcement of Shariah, complained that his rights under Article 10 have been violated.[173] The Court concluded that while expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention, the mere fact of defending Shariah, without calling for violence to establish it, cannot be regarded as hate speech per se.[174] What could be seen here contrary to Norwood, that the Court examined the case under Article 10(2), acknowledged that there was an interference with freedom of expression that was not necessary in a democratic society, notwithstanding the legitimate aim.[175]

Another category of hate speech, one that invokes the direct utilization of Article 17, involves revisionist expression, which negates clearly established historical facts such as crimes against humanity and Holocaust denial.[176] In Garaudy,[177] the applicant disputed in his book 'The Founding Myths of Israeli Politics' the legitimacy of the Nuremberg International Military Tribunal, the number of victims as well as the nature and cause of their death during the Nazi genocide against the Jewish population in Europe, based on his historical research of a collection of documents associated to a number of Nazi dignitaries. He lodged a case before the Court claiming the violation of his Article 6(1)[178] rights, contending that the domestic courts had systematically dismissed his defence after trying him for the denial of crimes against humanity.[179] Notwithstanding the Court's decision to declare the application manifestly illfounded on the basis of Article 6(1), it found that not only revising established historical facts does not enjoy the protection of the Convention, but also trivializing their degree falls outside the protection of Article 10:[180]

[t]here is no doubt that, like any other remark directed against the Convention's underlying

[172]Gündüz v Turkey App no 35071/97 (ECtHR, 14 June 2004).

[173]ibid, paras 10-12.

[174]ibid, para 51.

[175]Leigh (n 40) 64.

[176]ibid 72.

[177]Garaudy v France App no 65831/01 (ECtHR, 24 June 2003) para 1 ff.

[178]Article 6(1) reads: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

[179]Garaudy (n 176) Complaints, para, 1.

[180]ibid, under The Law, para 1.

values (…), the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10 and that there is a category of clearly established historical facts - such as the Holocaust - whose negation or revision would be removed from the protection of Article 10 by Article 17.

The Court therefore ruled that the applicant's book used the right to freedom of expression for ends which are contrary to the text and spirit of the ECHR, which if were to be admitted, would contribute to the destruction of the rights and freedoms guaranteed by the ECHR.[(181)]

Concluding Remarks

This article aimed at providing an objective analysis of some of the potential limits that may be imposed on the right to freedom of expression arising from its intersection with the right to freedom of religion under European human rights law. Having reached the end of this contribution, it is worth reiterating the main question posed at the Introduction, namely, whether the Court sought an evenhanded approach in dealing with offensive speech or have the varying backgrounds amounted to some inconsistency over time. While dedicating a single article is insufficient to provide redress for the invoked inquiry, it is safe to argue however that the answer is far from being straightforward.

Whereas Article 10 specifically defines an express language as to the scope and potential limits of freedom of expression, jurisprudence have revealed the willingness of the Court to go beyond the text of the ECHR. Whereas the Court applies high scrutiny against State interventions in the case of political expression, and demonstrates appreciation of journalism in a democratic society for contributing to public debate and informing the citizenry, thus bestowing higher protection even if it may be offensive to religious adherents, it is less enthusiastic in declaring a similar stature for artistic expression involving offensiveness.[(182)] As has been discussed in the foregoing line of cases, the Court's default position treats expressions against morals and religious beliefs as domestically defined matters, because they have not yet attained the level of European legal consensus and uniformity which is currently enjoyed by the political theories of governance in force. Owing also to the subsidiarity-margin of appreciation dyad, which defines the mandate of the Court, deference to domestic authorities becomes the more likely outcome in this field of applications. When comparing the outcomes of Otto-Preminger and IA with those in Klein and Giniewski, one is left with an overall impression of inconsistency, for the State was allowed to penalize

[(181)] ibid.

[(182)] Leigh (n 40) 70.

art mocking religious beliefs in one instance, yet was prevented from censoring satirical journalism directed at religious figures in another.[183]

The Court's stance in disentangling what appears to be a collision between two ECHR rights was also clouded by inconsistency. While expanding the scope of Article 10 to encompass ideas that offend, shock or disturb the State or any sector of the population as per the famous Handyside quotation, this half loaf protection was later confined by newly developed categories, such as duty to avoid as far as possible expressions that are offensive to others and gratuitously offensive speech that does not contribute to any form of public debate. By way of contrast, the Court's interpretation expanded the scope of Article 9 beyond the text of its provisions to include the right to respect for freedom of religion, the right to peaceful enjoyment of one's religious feelings, the right of citizens not to be insulted in their religious feelings, and the duty to protect believers from unwarranted attacks. The restriction of Article 10 by means of expanding the scope Article 9 led some critics to conclude that the Court has invented rights for an illusionary clash, because the religious offence caused by such transgressions does not by itself hinder any person from enjoying fully the right to believe, practice or manifest religious beliefs.[184] Although cases of incitement to hatred of significant magnitude may justify State intervention, what remains important is that the Court maintains its structured approach under Article 10, namely, consistently applying the tri-partite test with the onus upon the respondent State to justify the pressing social need leading to the restriction, instead of shortcircuiting this process by resorting to Article 17.[185] No matter how hideous and appalling, all forms of speech should fall within the ambit of Article 10 while all limitations may be justified under Article 10(2) and thus preventing States from having abusive recourse to Article17.[186] This would lead to a more robust free speech theory under which freedom of expression is the rule whereas restriction remains the exception, and is more like to develop consistency and predictability in the Court's rulings in this class of applications on the long run.[187]