

# Protection against Religious Hatred under the UN ICCPR and the European Convention System

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## Abstract

*This paper will explore the exact relation between the right to freedom of expression and the prohibition of religious hatred that constitutes incitement to discrimination, hostility or violence.<sup>3</sup>*

*Considering the precise formulations of the substantive human rights norms of the International Covenant on Civil and Political Rights (Part III of the treaty: articles 6–27), one could argue that the prohibition of religious hatred that constitutes incitement to discrimination, hostility or violence is the ‘odd-one-out’ in as far as this norm: (i) does not provide the individual with a clear right (it does specify the duty bearer: the state; however, this clause does not identify a right holder);<sup>4</sup> (ii) if anything, actually constitutes a limit on another substantive human rights norm: the right to freedom of expression.*

*The principal objective of this paper is to present a critical analysis of and to provide workable benchmarks and guidelines on the interplay between these two norms. In the context of the interrelatedness of the two norms it has been argued that the prohibition of advocacy of religious hatred should be interpreted as a restriction on the right to freedom of expression in a way that is consistent with the grounds for limitation that are listed by the provision on freedom of expression itself.<sup>5</sup> That is to say, the prohibition of advocacy of religious hatred as a possible limit on free expression needs to be prescribed by law and applying this restriction must be necessary to uphold the fundamental rights of others (i.e. religious minorities, in the present context). Though this sheds some light on the relation between the two rights, many related issues are still to be resolved. Questions that will be addressed in this paper include:*

- *What is the legal threshold for determining whether a discriminatory speech or a speech that advances certain stereotypes constitutes religious hate speech?;<sup>6</sup>*

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3. Art. 19 and art. 20 of the International Covenant on Civil and Political Rights of 16 Dec. 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force: 23 Mar. 1976).

4. Unless one would reformulate it as an individual ‘right to be free from religious hatred’.

5. *Human Rights*, Volume 10, Number 2, (Fall2015-Winter2016), 119-138

6. As David O. Brink, Millian Principles, *Freedom of Expression and Hate Speech*, (2001) 7 LEGAL THEORY, pp. 138-139, observes: “There is much

- *Can an attack on a religious doctrine be so severe as to merit state interference, i.e. can an attack on religions (rather than on religious believers) amount to hate speech?; and how to draw the line between expressions about religious doctrine or ideology on the one hand and religious believers on the other?;*
- *What is the legal relevance of the position or function of the person behind the speech or publication (e.g. are there different thresholds for politicians, civilians, artists, etc.)?;*
- *What is the legal relevance of the type of media (which can range from internet blogs, to propaganda or quasi docu-type films broadcasted on the television or posted on the internet, to written materials) used when it comes to assessing hateful speech or publications?*
- *Is the 'state of society' legally relevant in determining the threshold for hate speech? (e.g. is there a different legal threshold in so-called genocidal societies and post-genocidal societies);<sup>1</sup>*
- *What does the prohibition of advocacy of religious hatred mean in terms of state obligations?; how to transpose this norm into an adequate domestic anti-hate speech Act?; at what exact stage does the state need to interfere with the right to freedom of expression (i.e. is censorship ever merited or should the prohibition of hate speech solely translate into legal repercussions after the fact, that is, in reaction to illegal speech or publications)?*

*The proposed output of the paper is a comprehensive principles model on the interplay between the right to freedom of expression and the prohibition of religious hatred that constitutes incitement to discrimination, hostility or violence, taking into account the relevant international human rights norms and jurisprudence surrounding the issue of hate speech.*

### **A. Introduction: the Emerging Counter-Defamation Discourse**

From 1999–2005 the UN Commission on Human Rights adopted the so-called “Combating Defamation of Religions” resolutions,<sup>2</sup> a trend

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speech that is discriminatory but does not count as hate speech. It reflects and encourages bias and harmful stereotyping, but it does not employ epithets in order to stigmatize and insult ... vilify and wound. ... hate speech is worse than discriminatory speech ... hate speech's use of traditional epithets or symbols of derision to vilify on the basis of group membership expresses contempt for its targets and seems more likely to cause emotional distress and to provoke visceral, rather than articulate, response.”

1. One can think in this context of William Schabas' observation that “[t]he road to genocide in Rwanda was paved with hate speech” (William A. Schabas, *Hate Speech in Rwanda: The Road to Genocide*, (2000) 46 MCGILL LAW JOURNAL, p. 144.
2. Commission on Human Rights Resolutions: 1999/82 of 30 April 1999 (the first defamation Resolution was entitled “Defamation of Religions”, an earlier draft spoke of “Defamation of Islam”); 2000/84 of 26 April 2000 (“Defamation of religions”); 2001/4 of 18 April 2001 (“Combating defamation of religions as a means to promote human rights, social harmony and religious and cultural diversity”); 2002/9 of 15 April 2002 (“Combating defamation of religions”); 2003/4 of 14 April 2003 (“Combating defamation of religions”); 2004/6 of 13 April 2004 (“Combating defamation of religions”); and: 2005/3 of 12 April 2005 (“Combating defamation of religions”).

continued in 2007 and 2008 by its successor, the Human Rights Council.<sup>1</sup> A similar development can be perceived within the UN General Assembly since 2005.<sup>2</sup> In general terms, these Resolutions are annually proposed by (a member state on behalf of) the Organization of the Islamic Conference<sup>3</sup> and are, as a rule, not unanimously adopted (the opposition can be considered rather significant),<sup>4</sup> with the states voting against typically consisting of a list of European states, plus Canada and US and some of the Pacific states (obviously, depending on the composition of those bodies at the time of voting).<sup>5</sup>

Whilst some UN member states have expressed concern about the Resolutions' one-sided focus on defamation of Islam,<sup>6</sup> it would appear

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1. Human Rights Council Resolution 4/9 of 30 March 2007 ("Combating defamation of religions"); and: Human Rights Council Resolution 7/19 of 27 March 2008 ("Combating defamation of religions").
  2. Resolution 60/150 ("Combating defamation of religions") of 16 December 2005, A/RES/60/150; Resolution 61/164 ("Combating defamation of religions") of 19 December 2006, A/RES/61/164; and Resolution 62/154 ("Combating defamation of religions") of 18 December 2007, A/RES/62/154.
  3. OIC: an inter-governmental organisation consisting of 57 states established to safeguard Islamic interests.
  4. Especially considering the fact that many resolutions in these bodies are adopted without a vote. See the following overview for the exact voting patterns: (i) the Commission on Human Rights: whilst the original Resolution 1999/82 of 30 April 1999 and subsequent Resolution 2000/84 of 26 April 2000 were adopted without a vote, Resolution 2001/4 of 18 April 2001 was put to the vote: 28 states voted in favour, 15 against, while 9 states abstained; henceforth the Defamation Resolutions were always put to the vote: Resolution 2002/9 of 15 April 2002 was carried by 30/15/8; Resolution 2003/4 of 14 April 2003 by 32/14/7; Resolution 2004/6 of 13 April 2004 by 29/16/7; and Resolution 2005/3 of 12 April 2005 by 31/16/5; (ii) the Human Rights Council: Resolution 4/9 of 30 March 2007 was carried by 24/14/9; Human Rights Council Resolution 7/19 of 27 March 2008 was carried by 21/10/14; (iii) the General Assembly: Resolution 60/150 of 16 December 2005 carried by 101/53/20; Resolution 61/164 of 19 December 2006 by 111/54/18; and Resolution 62/154 of 18 December 2007 by 108/51/25.
  5. Within the UN GA, the European opposition is joined by the US, Canada, Australia and New Zealand (and, typically, some of the smaller pacific states). Within the UN HRC, the European opposition is presently joined by Canada (7th session, 2008).
  6. Though the Resolutions are entitled Combating Defamation of Religions, the preamble and actual content of those Resolutions reflect a rather one-sided emphasis on Islam: see, e.g., the following excerpts from the most recent GA Combating Defamation of Religions Resolution (Res. 62/154 of 18 December 2007): "... the negative projection of Islam in the media and the introduction and enforcement of laws that specifically discriminate against and target Muslims, particularly Muslim minorities following the events of 11 September 2001" (preamble); "... Islam is frequently and wrongly associated with human rights violations and terrorism" (para. 5); "...the ethnic and religious profiling of Muslim minorities in the aftermath of the tragic events of 11 September 2001" (para. 6); "...acts of violence, xenophobia or related intolerance and discrimination against Islam or any other religion ..." (para. 8); "...incitement to religious hatred, against Islam and Muslims in particular" (para. 9). The latest Human Rights Council Defamation Resolution (Human Rights Council Resolution 7/19 of 27 March 2008, "Combating defamation of religions") contains no less than 11 references to "Islam" or "Muslim(s)". Several UN member states have expressed concern about the limited scope of such formulations: e.g. Guatemala (in relation to Resolution 60/150 of 16 December 2005, as recorded in the official records, A/60/PV.64): "With respect to draft resolution I, "Combating defamation of

that the major problem with these Resolutions is their overall tenor: the protection of religions as a concern of the international community. ‘Combating defamation of religion’ is *sensu stricto* not a human rights issue as human rights law is not interested in religions. Human rights law is not concerned with their doctrines, their survival or their reputation — human rights law is concerned with people and their rights and freedoms. One might argue that defamation of religions is arguably indirectly relevant to the human rights discourse to the extent that it can be maintained that such defamation “could lead to social disharmony and violations of human rights”.<sup>1</sup> There is a crucial difference, however, between the illegal act of advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, or simply causing offence, be it in the form of criticism, ridicule or insult of religion, by denying religious doctrinal views, or indeed by blaspheming. Any human rights based approach tackling the issue of religious intolerance should take this crucial distinction into account. The Counter-Defamation Discourse is not the appropriate way of dealing with contemporary issues of religious intolerance. The Counter-Defamation Discourse is unacceptable because it: (i) seeks to shift the emphasis from protection of the rights of individuals to protection of religions per se; (ii) introduces grounds for limitation of human rights, particularly of the right to freedom of expression, that are not —and should not become— recognised by international human rights law (e.g. ‘respect for religions’, ‘respect for people’s religious feelings’); and (iii) seeks to reformulate the right to freedom of religion or belief so as to include a right to have one’s religious feelings respected (something that goes hand in hand with (i) and (ii) clearly).

The recent ‘Defamation Saga’ with the political (‘Charter-Based’) bodies of the UN raises the question whether UN treaty-based bodies (particularly the Human Rights Committee), consisting of independent human rights experts, and regional human rights systems (the focus here will be on the Council of Europe and its European Court of Human

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religions”, my delegation would like to state that Guatemala does not accept and condemns the defamation of any religion whose principles and practices are compatible with human rights and fundamental freedoms. Guatemala defends the principles of tolerance, non-discrimination and freedom of worship. However, we believe that this resolution lacks balance in giving more importance to one religion than to others. Despite that fact, we voted in favour of the resolution, and we hope that in future it would be more inclusive and also condemn intolerance towards minorities whose religion is not the official State religion”; India (during Third Committee deliberations Concerning the most recent GA Combating Defamation of Religions Resolution, Res. 62/154, as recorded in GA/SHC/3909): “The representative of India said that his delegation would abstain, as the draft resolution focused excessively on a single religion, and defamation and stereotyping should be of concern to all religions”. In the debates in the Human Rights Council on the 2008 Defamation Resolution similar concerns were raised by the EU and again by India.

1. In the words of a GA Resolution: Resolution 62/154 (“Combating defamation of religions”) of 18 December 2007, preamble.

Rights) have found more convincing and satisfactory ways of dealing with the interplay between freedom of expression and freedom of religion or belief.

### **B. Human Rights Committee & the Emerging Right to be Free from Religious Hatred**

There is much to be praised in the way the Human Rights Committee has dealt with the issue at stake. The issue before the Committee in *Malcolm Ross v. Canada*<sup>1</sup> was whether Canada had breached the applicant's right to freedom of expression by sanctioning his removal from his teaching job, following (mostly off-duty<sup>2</sup>) statements in which he had denigrated Judaism and urged other people to contempt Jews. The objectionable comments were published in books and pamphlets with such titles as "Web of Deceit", "The Real Holocaust", "Spectre of Power" and "Christianity vs. Judeo-Christianity".<sup>3</sup> During the procedures before the domestic tribunals, the Canadian Human Rights Board of Inquiry had considered:

It would be an impossible task to list every prejudicial view or discriminatory comment contained in his writings as they are innumerable and permeate his writings. These comments denigrate the faith and beliefs of Jews and call upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values. Malcolm Ross identifies Judaism as the enemy and calls on all Christians to join the battle.<sup>4</sup>

The reason why the Human Rights Committee can be praised for tackling the issue the way it did is that it —unlike the European Court, as we will see— did not see the need to develop a notion of 'respect for other people's religions', but based its reasoning on the existing grounds for limitation. In this case the Committee reasoned that the teacher's right could reasonably be restricted on the basis of *the rights and reputations of others* (more specifically: the right of others 'to be protected from religious hatred'; i.e. article 19, para. 3, in conjunction with art. 20, para 2 of the ICCPR).<sup>5</sup> To that effect, the Committee first

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1. Human Rights Committee, Communication No. 736/1997, *Malcolm Ross v. Canada*, U.N. Doc. CCPR/C/70/D/736/1997 (2000), views of 18 October 2000.

2. The domestic procedure also shows some evidence of expressions of religious hatred whilst in function, namely the "repeated and continual harassment in the form of derogatory name calling of Jewish students, carving of swastikas into desks of Jewish children, drawing of swastikas on blackboards and general intimidation of Jewish students" (*ibidem*, para. 4.3, based on statements made by students before the Board of Inquiry).

3. *Ibidem*, para. 4.2.

4. *Idem*.

5. *Ibidem*, para. 11.5; in the same paragraph the Human Rights Committee elaborates on 'the right [of others] to have an education in the public school system free from bias, prejudice and

of all emphasized that the rights or reputations of others for the protection of which restrictions may be permitted under the right to freedom of expression may relate to other persons or to *a community as a whole* (i.e. a community of believers, which is not the same as a religion).<sup>1</sup> In other words, restrictions are in principle permitted on statements which are of a nature as to raise or strengthen hostile feelings vis-à-vis adherents of a certain religion, in order to uphold the latter's right to be protected from religious hatred; particularly since such restrictions derive support from the principles reflected in article 20, para (2), of the ICCPR.<sup>2</sup> In its reasoning, following the findings of both the Canadian Board of Inquiry and the Supreme Court, the Committee emphasised that the author's statements not merely denigrated Judaism, but actually "called upon true Christians to not merely question the validity of Jewish beliefs and teachings but *to hold those of the Jewish faith and ancestry in contempt* as undermining freedom, democracy and Christian beliefs and values."<sup>3</sup> In view of this, the Committee found little difficulty in concluding "that the restrictions imposed on him were for the purpose of protecting the "rights or reputations" of persons of Jewish faith."<sup>4</sup>

What is furthermore to be praised in the Committee's reasoning is that it was not simply satisfied with this acknowledgment that the limitation of the freedom of expression in this case can *in abstracto* be justified by reference to this ground for limitation: it actually inquires into the necessity of the interference with the right to freedom of expression. Protecting the rights of Jews to be protected from religious hatred is surely a legitimate ground for limiting someone's freedom of expression, but can it indeed be established that the particulars of the case at hand permit such interferences? In this particular case, this aspect of the assessment was fairly straightforward as the Canadian Supreme Court had already established that there was a correlation between the expressions of the author and the "poisoned school environment" experienced by Jewish children in the School district.<sup>5</sup> The Committee had no reason to cast doubt on that consideration.<sup>6</sup> In this context it is also important to acknowledge, as the Committee noted, that the influence exerted by school teachers may justify restraints in order

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intolerance' in this context.

1. Such was already established in: Human Rights Committee, General Comment 10, para. 4; and subsequently confirmed in: Human Rights Committee, Communication No. 550/1993, *Robert Faurisson v. France*, U.N. Doc. CCPR/C/58/D/550/1993(1996), views of 8 November 1996.

2. *Malcolm Ross v. Canada*, para. 11.5.

3. *Ibidem*, para. 11.5 (emphasis added).

4. *Idem*.

5. *Ibidem*, para. 4.6–4.7 (following early observations made by the Board of Inquiry; *ibidem*, para. 4.6).

6. *Ibidem*, para. 11.6.

to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory.<sup>1</sup>

### **C. European Court of Human Rights & the Unacceptable Notion of Respect for Citizens' Religious Feelings**

The European Court of Human Rights, unfortunately, seems to have taken a far less convincing approach to cases of alleged defamation: it fails to distinguish between forms of criticism or insult that do and forms of defamation that —though perhaps morally deplorable— do not actually jeopardize the rights and freedoms of others.

The European Court's ruling in the *Otto-Preminger-Institute v. Austria* case evolved around the film *Das Liebeskonzil* ("Council in Heaven"),<sup>2</sup> directed by Werner Schroeter. The Austrian authorities ordered the seizure and forfeiture of the film as a result of which the planned showings in a cinema could not take place. The Austrian Court sanctioned these interferences as it deemed the content of the film within the definition of the criminal offence of disparaging religious precepts.<sup>3</sup> The film in question, in the description of the European Court,

... begins and ends with scenes purporting to be taken from the trial of Panizza in 1895. In between, it shows a performance of the play by the Teatro Belli in Rome. 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 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.<sup>4</sup>

In a rather questionable judgement, the European Court of Human Rights sanctioned the seizure and forfeiture of the film and concluded that the right to freedom of expression had not been violated by Austria. In

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1. *Ibidem*, para. 11.6.

2. ECtHR, Application no. 13470/87, *Otto Preminger-Institute v. Austria*, judgment of 20 September 1994.

3. Art. 188 of the Austrian penal Code states: "Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates."

4. *Otto Preminger-Institute v. Austria*, para. 22.

assessing whether the interferences with the right to freedom of expression had a legitimate aim, the European Court reasoned that “[t]he respect for the religious feelings of believers as guaranteed in Article 9 [of the European Convention on Human Rights] can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration”.<sup>1</sup> The European Court further reasoned that “[t]he measures complained of were based on ... the Austrian Penal Code ... [T]heir purpose was to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons ... [T]he Court accepts that the impugned measures pursued a legitimate aim under Article 10 para. 2 [of the European Convention on Human Rights], namely “the protection of the rights of others”.<sup>2</sup> The European Convention on Human Rights, however, guarantees no such right (a right not to be insulted in one’s religious feelings). The three dissenting judges shared that opinion as well: “The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.”<sup>3</sup> The only reason why the European Court perceives a need to balance two seemingly conflicting rights is because it takes a questionable view of the right to freedom of thought, conscience and religion as a right not to be insulted in one’s religious feelings.<sup>4</sup> Again, this is not to say that the right to freedom of expression can under no circumstances be restricted in the interest of other people’s right to thought, conscience and religion proper. In the European Court’s own words: “in extreme cases the effect of particular methods of opposing... religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them”.<sup>5</sup> Such instances would clearly lean towards advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. The onus then surely is on the state to establish that in a particular case fully granting the freedom of expression would impede or threaten to impede the freedom of religion or belief of others. In the present case the state did not establish anything of the kind, nor did the European Court make any assessments along those lines.

The decision in *Otto-Preminger-Institute v. Austria* was actually a

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1. *Ibidem*, 47 (emphasis added).

2. *Ibidem*, para. 48 (emphasis added).

3. *Ibidem*, Joint Dissenting Opinion of Judges Palm, Pekkanen and Makarczyk, para. 6.

4. *Ibidem*, para. 55: “The issue before the Court involves weighing up the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention, namely the right of the applicant association to impart to the public controversial views and, by implication, the right of interested persons to take cognisance of such views, on the one hand, and the right of other persons to proper respect for their freedom of thought, conscience and religion, on the other hand.”

5. *Ibidem*, para. 47.



confirmation of an earlier European Commission of Human Rights decision. In *Gay News Ltd. and Lemon v United Kingdom*,<sup>1</sup> the Commission dealt with a publication in a magazine called *Gay News* of a poem (accompanied by a drawing illustrating its subject-matter) entitled ‘The Love that Dares to Speak its Name’ which “purported to describe in explicit detail acts of sodomy and fellatio with the body of Christ immediately after His death and ascribed to Him during His lifetime promiscuous homosexual practices with the Apostles and other men.”<sup>2</sup> Both publisher and editor were charged with the common law offence of blasphemous libel, the specific charge being that they had “unlawfully and wickedly published or caused to be published a blasphemous libel concerning the Christian religion, namely an obscene poem and illustration vilifying Christ in His life and in His crucifixion.”<sup>3</sup> As to whether the UK had sought to protect a legitimate aim whilst interfering with the freedom of expression of the applicants, the Commission considered that “the offence of blasphemous libel as it is construed under the applicable common law in fact has the main purpose to protect *the right of citizens not to be offended in their religious feelings by publications*. ...The Commission therefore concludes that the restriction was indeed covered by a legitimate purpose recognised in the Convention, namely the protection of the rights of others.”<sup>4</sup> It is precisely because the Commission took this questionable view that it could be satisfied so unquestioningly that the restriction in question should be deemed necessary in a democratic society: “If it is accepted that the religious feelings of the citizen may deserve protection against indecent attacks on the matters held sacred by him, then it can also be considered as necessary in a democratic society to stipulate that such attacks, if they attain a certain level of severity, shall constitute a criminal offence triable at the request of the offended person.”<sup>5</sup> The question whether the rights of religious believers in the UK to freely have or adopt a religion or belief and to freely manifest a religion or belief could ever reasonably be considered at risk on account of the mentioned publication —and thus in such dire need of protection that it would justify restricting the fundamental right of freedom of expression— is not looked into by the Commission in its decision. The Commission furthermore failed to explain how a discriminatory ground for limitation (for the common law offence of blasphemy, as explained above, solely protected against insults aimed at Christianity or the doctrine of the established Church of England

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1. ECommHR, Application No. 8710/79, *Gay News Ltd. and Lemon v United Kingdom*, of 7 May 1982.

2. *Ibidem*, para. 1 in which the Commission cites from the House of Lords’ decision (*R. v. Lemon*, 1979).

3. *Ibidem*, para. 2.

4. *Ibidem*, para. 11 (emphasis added).

5. *Ibidem*, para. 12.

specifically) can ever be deemed a legitimate ground for limitation or deemed necessary in a democratic society.

The European Court touched upon —though did certainly not deal convincingly with— the latter issue (discriminatory blasphemy bans) in the case of *Wingrove v. the United Kingdom*.<sup>1</sup> The British Board of Film Classification had rejected the application for a classification certificate for the short video work *Visions of Ecstasy* as it held that “a reasonable jury properly directed would find that the work infringes the criminal law of blasphemy.”<sup>2</sup> This amounted effectively to the film being banned as the distribution of a video work without such certificate constitutes a criminal offence.<sup>3</sup> *Visions of Ecstasy*, in the words of the European Court, can be described as follows:

The action of the film centres upon a youthful actress dressed as a nun and intended to represent St Teresa. It begins with the nun, dressed loosely in a black habit, stabbing her own hand with a large nail and spreading her blood over her naked breasts and clothing. In her writhing, she spills a chalice of communion wine and proceeds to lick it up from the ground. She loses consciousness. This sequence takes up approximately half of the running time of the video. The second part shows St Teresa dressed in a white habit standing with her arms held above her head by a white cord which is suspended from above and tied around her wrists. The near-naked form of a second female, said to represent St Teresa's psyche, slowly crawls her way along the ground towards her. Upon reaching St Teresa's feet, the psyche begins to caress her feet and legs, then her midriff, then her breasts, and finally exchanges passionate kisses with her. Throughout this sequence, St Teresa appears to be writhing in exquisite erotic sensation. This sequence is intercut at frequent intervals with a second sequence in which one sees the body of Christ, fastened to the cross which is lying upon the ground. St Teresa first kisses the stigmata of his feet before moving up his body and kissing or licking the gaping wound in his right side. Then she sits astride him, seemingly naked under her habit, all the while moving in a motion reflecting intense erotic arousal, and kisses his lips. For a few seconds, it appears that he responds to her kisses. This action is intercut with the passionate kisses of the psyche already described. Finally, St Teresa runs her hand down to the fixed hand of Christ and entwines his fingers in hers. As she does so, the fingers of Christ seem to curl upwards to

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1. ECtHR, Application No. 17419/90, *Wingrove v. the United Kingdom*, judgment of 25 November 1996.

2. *Ibidem*, para. 13.

3. Under sec. 9 of the Video Recordings Act of 1984.

hold with hers, whereupon the video ends.<sup>1</sup>

In assessing whether the interference (the ban of the video) with the right to freedom of expression pursued a legitimate aim, the European Court again elaborated on a right not to be insulted in one's religious feelings: "The Commission considered that the English law of blasphemy is intended to suppress behaviour directed against objects of religious veneration that is likely to cause justified indignation amongst believing Christians. It follows that the application of this law in the present case was intended to protect *the right of citizens not to be insulted in their religious feelings*."<sup>2</sup> It can with Carolyn Evans be contended, however, that "it is not at all clear that [the distribution of this video] would have interfered with the ability of the majority Christian community to hold their own beliefs, practice their religion, or express views about their religions (including criticisms of the films)."<sup>3</sup> As to the discriminatory nature of the blasphemy offence under British common law, the European Court solely held that: "It is true that the English law of blasphemy only extends to the Christian faith. ... The uncontested fact that the law of blasphemy does not treat on an equal footing the different religions practised in the United Kingdom does not detract from the legitimacy of the aim pursued in the present context."<sup>4</sup> The issue of the (il)legitimacy of discriminatory laws as a basis for grounds for limitation of fundamental human rights certainly merits more elaborate discussion than this meagre if not empty phrase, particularly as the European Court here notably deviates from the UN system: the Human Rights Committee has considered that restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.<sup>5</sup> Needless to say that if the law on which the interference is based is inherently discriminatory the restrictions in question are always applied in a discriminatory manner. It is submitted therefore that if a blasphemy law discriminates on the basis of religion such certainly does detract from the legitimacy of the aim pursued.<sup>6</sup>

In the case of *Murphy v. Ireland* the European Court sanctioned a ban on a religious radio advertisement which reads as follows:

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1. *Wingrove v. the United Kingdom*, para. 9.

2. *Ibidem*, para. 47 (emphasis added).

3. Evans, C., *Freedom of Religion under the European Convention on Human Rights*, Oxford University Press, Oxford, 2001), p. 71. Paul Taylor, on the contrary, is of the opinion that this judgement largely demystified earlier jurisprudence on the issue at stake: Taylor, P.M., *Freedom of Religion: UN and European Human Rights Law and Practice*, Cambridge University Press, 2005, pp. 87–88.

4. *Wingrove v. the United Kingdom*, para. 50.

5. E.g. in the context of art. 18 of the ICCPR: "Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner" (Human Rights Committee, General Comment 22, para. 8). Moreover, the Human Rights Committee has repeatedly deemed UK's blasphemy laws discriminatory and urged the state to annul those provisions, e.g.: A/46/40 (1991), para. 568; A/55/40 vol. I (2000), para. 310.

6. Which was one of the reasons for Judge Lohmus to dissent (*Wingrove v. the United Kingdom*, para. 4 of Dissenting Opinion of Judge Lohmus).

What think ye of Christ? Would you, like Peter, only say that he is the son of the living God? Have you ever exposed yourself to the historical facts about Christ? The Irish Faith Centre are presenting for Easter week an hour long video by Dr Jean Scott Phd on the evidence of the resurrection from Monday 10th - Saturday 15th April every night at 8.30 and Easter Sunday at 11.30am and also live by satellite at 7.30pm.<sup>1</sup>

The ban was in accordance with Irish law which provides: “No advertisement shall be broadcast which is directed towards any religious or political end ...”.<sup>2</sup> Within the context of assessing whether the interference (the ban of the advertisement) with the applicant’s right to freedom of expression pursued a legitimate aim, the European Court once more elaborated on the notion of respect for other people’s beliefs: “The Government maintained that the prohibition sought to ensure *respect for the religious doctrines and beliefs of others* so that the aims of the impugned provision were public order and safety together with the protection of the rights and freedoms of others ... The Court does not see any reason to doubt that these were indeed the aims of the impugned legislation and considers that they constituted legitimate aims ...”.<sup>3</sup> In addition to the fact that respect for religions is not a legitimate ground for limitation of the right to freedom of expression, the judgement can be criticised on the ground that is in fact far from clear that respect for the religious doctrines and beliefs of others is actually the aim pursued here. One can particularly wonder if that is truly the case since the Irish Government itself plainly admits “that the advertisement appeared innocuous and that it was to some extent simply informational”.<sup>4</sup> It would appear that, given this acknowledgement, it is problematic at least to render the rejected advertisement a threat to the protection of the rights and freedoms of others. The Irish Government attempted to do so nonetheless; in the words of the European Court:

The Government observed that the rights of an individual to express religious beliefs were necessarily determined and limited by reference to the Article 9 rights of others ... Moreover, the Convention clearly applied, in the Government’s view, a distinct standard to the control of religious expression so that religious offence was a legitimate basis for the prohibition of otherwise acceptable and protected speech. This was explained by the fact that religious belief was not the subject of reasoned decision making: rather it presented an intensely personal and private matter and concerned deeply held and profoundly important

1. ECtHR, Application no. 44179/98, *Murphy v. Ireland*, judgment of 3 December 2003, para. 8.

2. Sec. 10, para. (3), of the Radio and Television Act of 1988.

3. *Murphy v. Ireland*, paras. 63–64 (emphasis added).

4. *Ibidem*, para. 38.

convictions. Consequently, the simple proclamation of the truth of one religion necessarily proclaims the untruth of another. As such even innocuous religious expression can lead to volatile and explosive reactions.<sup>1</sup>

One would expect that the European Court would have little difficulty invalidating this type of reasoning as the Convention does not protect an individual from being exposed to a religious view simply because it does not accord with his or her own (which was also the view of the applicant).<sup>2</sup> The European Court, however, observed “that it is not to be excluded that an expression, which is not on its face offensive, could have an offensive impact in certain circumstances” and ultimately — unanimously— held that Ireland did not breach the right to freedom of expression.

In the case of *İ.A. v. Turkey* the European Court came quite close to revising its earlier jurisprudence: the prosecution and sentencing of a publisher for blaspheming against “God, the Religion, the Prophet and the Holy Book” was only just sanctioned in a 4 to 3 decision.<sup>3</sup> This case evolved around a novel by Abdullah Rıza Ergüven entitled *Yasak Tümceler* (“The Forbidden Phrases”), a book conveying “the author’s views on philosophical and theological issues in a novelistic style”.<sup>4</sup> The Turkish Court convicted the publisher of blasphemy and sentenced him to two years’ imprisonment and a fine (at a later stage this was commuted into merely a fine).<sup>5</sup> The Turkish Court referred specifically to the following book excerpt in its judgement:

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.<sup>6</sup>

There is much to be praised about this judgement as the European Court did not in its reasoning lean heavily on the here criticised notion of ‘respect for other people’s beliefs’, it did not, in other words, equate freedom of religion or belief with a right to respect for one’s religious

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1. *Idem*.

2. *Ibidem*, para. 50.

3. ECtHR, Application No 42571/98, *İ.A. v. Turkey*, judgement of 13 September 2005.

4. *Ibidem*, para. 5.

5. Article 175 of the Turkish Criminal Code provides: “It shall be an offence punishable by six months to one year’s imprisonment and a fine of 5,000 to 25,000 Turkish liras to blaspheme against God, one of the religions, one of the prophets, one of the sects or one of the holy books ... or to vilify or insult another on account of his religious beliefs or fulfilment of religious duties ... The penalty for the offence set out in the third paragraph of this Article shall be doubled where it has been committed by means of a publication.”

6. *İ.A. v. Turkey*, para. 13.

feelings. It considered that “[t]he issue before the Court ... involves weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public his views on religious doctrine on the one hand and the *right of others to respect for their freedom of thought, conscience and religion* on the other hand.”<sup>1</sup> Though it is to be applauded that the European Court explicates that in theory “the right of others to respect for their freedom of thought, conscience and religion” (rather than a ‘right of others to respect for their religion’) is a legitimate ground for limiting freedom of expression, the European Court does not satisfactorily explain how the rights of others to freedom of religion or belief exactly *come into play in this particular case*. Are the two rights indeed conflicting in this particular case? At no point does the European Court explicate how the blasphemous act in question could affect people’s freedom to have a religion or belief or to manifest that religion or belief. As has been repeatedly argued, an attack on a religion can be so severe as to engage state action with the view of protecting individual adherents to the religion in question — yet, whether such is the case needs to be established on a case by case basis. In this context the onus is on the state to put forward and substantiate such a claim and the European Court has to look into that vindication whenever brought forward: neither was sufficiently done in this case.<sup>2</sup>

In the words of the three dissenting Judges to the *İ.A. v. Turkey* case, “the time has perhaps come to “revisit” this case-law, which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press.”<sup>3</sup> Arguably, the first step toward such necessary revision has been taken by the European court in *Klein v. Slovakia*.<sup>4</sup> The case dealt with an article by M. Klein entitled “The falcon is sitting in the maple tree; Larry Flynt and seven slaps to the hypocrite”. Klein published the article as a reaction to Archbishop Sokol’s<sup>5</sup> public criticism of and public request for a ban on Miloš Forman’s film “The

1. *Ibidem*, para. 27 (emphasis added).

2. The closest the Court came to making that very assessment was in para. 29 of the judgment (*ibidem*): “the present case concerns not only comments that offend or shock, or a “provocative” opinion, but also an abusive attack on the Prophet of Islam. Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks through the [cited] passages.” The final phrase, however, misses the point completely: the question is not whether believers may legitimately feel themselves to be the object of unwarranted and offensive attacks, but rather whether Turkey could legitimately consider the rights of religious believers at risk on account of the said publication.

3. *Ibidem*, Joint Dissenting Opinion of Judges Costa, Cabral Barreto and Jungwiert, para. 8.

4. ECtHR, Application No. 72208/01, *Klein v. Slovakia*, judgment of 31 October 2006.

5. NB: *Sokol* means falcon in Slovak.

People vs. Larry Flynt” (including a request for a ban on the film poster with which it was advertised in the streets),<sup>1</sup> which movie was released to the cinemas in Slovakia in February 1997. The Slovak Court convicted Klein of ‘defamation of nation, race and belief’;<sup>2</sup> it particularly cited the following excerpt from the article in its argumentation: “This principal representative of the first Christian church has not even as much honour as the leader of the last gypsy band in his bow! I do not understand at all why decent Catholics do not leave the organisation which is headed by such an ogre ...”.<sup>3</sup> The Slovak Court concluded that Klein had defamed the highest representative of the Roman Catholic Church in Slovakia and had thereby offended the members of that church and that Klein’s statement in which he wondered why decent members of the church did not leave it had blatantly discredited and disparaged a group of citizens for their Catholic faith (a view which was upheld by the Court of appeal as it considered that, by the contents of the published article, the applicant had violated the rights of a group of inhabitants of the Christian faith).<sup>4</sup> The European Court of Human Rights rejected this view; the European Court accepted the applicant’s argument that the article did in fact not “unduly interfere ... with the right of believers to express and exercise their religion...”.<sup>5</sup> The European Court concluded that “it cannot be concluded that by its publication the applicant interfered with other persons’ right to freedom of religion in a manner justifying the sanction imposed on him. The interference with his right to freedom of

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1. Archbishop Sokol had made the following statements on the Slovak Television: “In these days we are witnessing ‘the humiliation of the crucifix’. In spite of all protests of the Slovak Bishops’ Conference and the Ecumenical Council of Churches aimed at stopping the production and distribution of the poster promoting the film of Miloš Forman: ‘The People versus Larry Flynt’ this poster is present in the streets of our capital Bratislava. It is a defamation of the symbol of the Christian religion. The American Film Association did not allow this blasphemy. It was not allowed in France and Belgium either. How is it possible that it was allowed in Slovakia which professes the tradition of Cyril and Methodius, that is the Christian religion, even in the Constitution? ... Therefore we request the Government, the Parliament, our public officials within the legislature and judiciary to examine the entire issue and take appropriate measures for withdrawal of the posters and the film and to hold accountable those who violated the laws... We hope that our protest will be viewed favourably by the responsible officials and that redress will be made. To all those who endeavour to do so we express our sincere thanks in advance” (*Klein v. Slovakia*, para. 10).
  2. Art. 198, para. (1), of the Slovak Criminal Code (entitled “Defamation of nation, race and belief”), which (at the relevant time) read as follows: “A person who publicly defames a) a nation, its language or a 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 a pecuniary penalty.”
  3. *Klein v. Slovakia*, para. 14, which is part of the seventh paragraph –or seventh “slap” rather– of the article.
  4. *Ibidem*, para. 14–27 and 50.
  5. *Ibidem*, para. 52. Admittedly, the Court adds (same para.) “nor did it denigrate the content of their religious faith”, which is besides the point.

expression therefore neither corresponded to a pressing social need, nor was it proportionate to the legitimate aim pursued. It thus was not "necessary in a democratic society".<sup>1</sup> This seems to be the right decision as it is indeed unlikely that this publication was ever going to undermine anyone's right to freedom of religion or belief.<sup>2</sup>

In conclusion, the future will reveal whether *Klein v. Slovakia* indeed is the first step towards a European approach that deals with blasphemy and defamation prohibitions in a convincing manner, that is, without making a travesty of the right to thought, conscience and religion as well as the right to freedom of expression.

#### D. Conclusion

There is no abstract 'clash' between freedom of expression and freedom of religion or belief. The portrayal of the two discussed fundamental rights —the right to freedom of expression and the right to freedom of religion or belief— as being somehow perpetually at odds, as inevitably 'clashing' whenever being implemented, is a flawed and hazardous one.<sup>3</sup> Limiting the right to freedom of expression in the interest of the right to freedom of religion or belief in many cases would come down to seriously 'stretching' the scope of the latter right. Proceeding along those lines would not only be at the detriment of the fundamental right of freedom of expression; too broad a right to freedom of religion or belief as a right to respect for one's religion also jeopardises the right to freedom of religion or belief itself (as the very exercise of one's religion in a certain fashion might be considered heretical in the eyes of another person — something that clearly is not a valid reason for limiting the *forum externum* of the former).

It is submitted that the approach taken by the Human Rights Committee in *Ross v. Canada* does most justice to the tenets (and the discernible precise nuances) of international human rights law. In exceptionally severe cases of defamation, the prohibition of advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence can be construed as a limit on the free exercise of expression

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1. *Ibidem*, para. 54.

2. Contending that this is the right decision is not saying that the attack on the person of Mr Sokol is justifiable: that question was not in issue in this case as Klein had been convicted of 'defamation of nation, race and belief' and not of libel or defamation of a person (Archbishop Sokol at first personally joined the proceedings as an aggrieved person but actually later withdrew from the case and waived his right to claim compensation; *ibidem*, para. 13).

3. Cf. *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 Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance*, A/HRC/2/3, 20 September 2006 (The Chapter "Defamation of Religion and the Right to Freedom of Religion or Belief", paras. 22–50, were prepared by the Special Rapporteur on Freedom of Religion or Belief), para. 38.



so as to protect other people's right to be free from religious hatred. The threat to the rights of others must be real and imminent and close scrutiny by the Human Rights Committee is called for whenever the incitement prohibition is advanced by states to justify interferences with freedom of expression.

Within the European context, part of the problem is likely to stem from the fact that there is no proper equivalent to the prohibition of advocacy of religious hatred (art. 20 of the ICCPR). It would appear, though, that rather than further shaping and hallmarking the here criticised, rather ambiguous notion of 'a right to respect for one's religious feelings', it would be well-advised in this context to make better use of and to elaborate more on the *prohibition of abuse of rights*' as a relevant limit to the right to freedom of expression.<sup>1</sup> Nothing in the European Convention may be interpreted as implying for any 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 provided by the European Convention, which arguably implies that people cannot abuse the right to freedom of expression to incite religious hatred or discrimination.

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1. Art. 17 of the European Convention on Human Rights: "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." The abuse of rights doctrine as a special limit on freedom of expression in case of incitement to discrimination (in this particular case racial discrimination) was essentially the approach taken in: ECommissionHR, Application Nos. 8348/78 and 8406/78, *Glimmerveen & Hagenbeek v. Netherlands*, judgment of 11 October 1979.