Freedom of speech and "hate speech"

Unravelling the jurisprudence of the European Court of Human Rights

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Abstract

Freedom of speech is a fundamental human right, and has been labelled as such since the beginnings of the "human rights" era. However, there is an increasing belief that some speech, loosely known as "hate speech", is unworthy of protection. This article outlines the principles of free speech as enshrined in the European Convention on Human Rights and demonstrates how the new restriction on so-called "hate speech", particularly in regard to issues of sexual morality, is having an erosive effect on freedom of speech.

Keywords Hate speech, freedom of speech, European Court of Human Rights.

On 20 July 2003, Pastor Åke Green, from his small church in rural Borgholm, Sweden, delivered a strongly worded sermon on the topic of sexual immorality, redemption and grace. The Prosecutor's Office filed a criminal claim against Pastor Green under Sweden's 2002 "hate speech" law which referenced "sexual orientation" and he was eventually sentenced to one month in prison. It was not until the case reached the Supreme Court on 29 November 2005 that Pastor Green was finally acquitted of the accused crime.[2] In another incident, this time in Croatia, an elderly Catholic school teacher was sued for "hate speech" by a Lesbian Association

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[2] Case No. B 1050-05, 29 November 2005.

for teaching the Catholic position on homosexual behaviour from a state sanctioned textbook. While the court eventually found in Ms. Mudrovcic's favour, the stress of the case which lasted over a year led to the elderly school teacher having a stroke.[3] In recent months a criminal investigation has been launched against a Roman Catholic bishop in Ireland under "hate speech" laws for delivering a homily on "the arrows of a secular and godless culture" which allegedly insulted a humanist,[4] and in Spain efforts are currently underway to criminally prosecute a bishop for delivering a homily from the Bible during a Good Friday mass, in which he celebrated the virtues of the sinless life and warned against the particular sins of the age.[5]

None of these instances, at the time of writing, have resulted in a criminal conviction, yet they do beg the question – "whatever happened to freedom of speech?" Many look to the European Convention on Human Rights to provide the answer, and although most citizens do not know the details of the law, the majority will have a vague understanding that their speech is somehow "protected by human rights". Worryingly, however, it is becoming increasingly clear that rather than being the safeguard of free speech that many hope and claim it to be, the European Court's desire to ban so-called "hate speech" has led to an inconsistent and downright contradictory jurisprudence, leaving freedom of speech in great danger.

1. Protections afforded to freedom of speech

1.1 Article 10 of the European Convention

For those citizens living within one of the 47 Member States of the Council of Europe, Article 10 of the European Convention on Human Rights provides the clearest protections for the right to freedom of speech:

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.

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

[3] *Lesbian Assn. Kontra v. Jelena Coric Mudrovcic* (2010).

[4] See *Irish Central,* Irish Bishop may be prosecuted for hate speech after criminal referral, 30 January 2012.

[5] See *LifeSiteNews,* Liberal outrage in Spain: Homosexual groups seek prosecution of bishop over sermon on homosexuality, 18 April 2012.

or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[6]

The European Court of Human Rights has stated that freedom of expression has a "special importance"[7] under the Convention. The Court has repeatedly held that freedom of expression applies to "everyone"[8] and "constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for each individual's self-fulfilment."[9] Likewise, domestic courts of the Member States have frequently made reference to the fundamental importance of the right, noting that it is "an essential condition of an intellectually healthy society" and has "a central role in the Convention regime."[10]

1.2 The right to offend, shock or disturb

It is not just inoffensive speech which is protected by Article 10. Over the years the Court has reiterated that subject only to narrowly defined limitations in paragraph 2 of Article 10, freedom of expression is "applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'"[11]

This has been the long-standing view of the Court and has meant that over the course of several decades, many "offensive" forms of expression have been protected by Article 10. Thus, at its best, Article 10 of the Convention is able to act as a safeguard in Strasbourg when domestic authorities place undue restrictions on speech which is considered "offensive".[12] For example, the Court held that a journalist convicted for insulting a prominent politician by labelling him an "idiot"

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[6] The rights and freedoms protected by Article 10 of the Convention are closely connected with the rights and freedoms contained within Article 9 (freedom of religion – see ECHR: *Okçuoğlu v. Turkey,* Application no. 24246/94, [G.C.] judgment of 8 July 1999) and Article 11 (Freedom of Association – see ECHR: *United Communist Party v. Turkey,* application no. 133/1996/752/951, judgment of 30 January 1998, § 42). While both of these articles are relevant, Article 10 is considered the *lex specialis* on issues of speech and will be the focus of this article.

[7] See *Ezelin v. France* (1992) 14 E.H.R.R. 362 § 51.

[8] Article 10 applies to "everyone, whether natural or legal persons." *Autoronic AG v. Switzerland* (1990) 12 E.H.R.R. 485 § 47.

[9] See, for example, *Handyside v. The United Kingdom* (1976) 1 E.H.R.R. 737 § 49.

[10] Per Lord Bingham, *R (Animal Defenders International) v. Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312 § 27.

[11] See *Handyside* at § 49.

[12] As well as a safeguard in Strasbourg, Article 10 has frequently been used in domestic proceedings in the defence of freedom of speech – either as an overarching warning on the domestic Courts (case of Ake Green, case No. B 1050-05, 29 November 2005), or through its direct incorporation into domestic legislation *(Re Sandown Free Presbyterian Church* [2011] NIQB 26, § 73).

was protected by Article 10,[13] as was the leader of an "Islamic sect" who referred to children born in a civil marriage as "piçs".[14] The Court has also protected "offensive" speech against religion, and in particular the Catholic Church. Thus, it has held that a French journalist who was convicted of a "hate speech" offence for writing that a Church doctrine contained the seeds of the anti-Semitism which fostered the idea and implementation of the Holocaust violated the European Convention on Human Rights[15], as did the conviction of a journalist in Slovakia who labelled the highest representative of the Roman Catholic Church in Slovakia an "ogre" and urged Catholic believers to leave the Church.[16] Offensive, yes. Illegal, no. This has been the clear mantra of the Court. Citizens have had the freedom to use speech which offends, shocks or disturbs and the Court has refused to recognize that citizens have a right under the Convention not to be offended.[17] However, limitations are increasingly being placed on this well-established freedom.

2. The limits to freedom of speech: Preventing so-called "hate speech"

2.1 Defining "hate speech"

Before turning to the limitations placed on certain speech by a desire to ban so-called "hate speech", it is first worth considering what "hate speech" actually is. But the fact is, nobody knows. And that is a large part of the problem. To paraphrase the words of Humpty Dumpty in *Through the Looking Glass,* the phrase means just what people choose it to mean, neither more nor less.[18] A recent factsheet produced by the European Court of Human Rights admits that there "is no universally accepted definition of ... 'hate speech'"[19] and a previous factsheet observed that: "The identification of expressions that could be qualified as 'hate speech' is sometimes difficult because this kind of speech does not necessarily manifest itself through the expression of hatred or of emotions. It can also be concealed in statements which at a first glance may seem to be rational or normal."[20]

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13 ECHR: *Oberschlick v. Austria* (No. 2), judgment of 1 July 1997, R.J.D. 1997-IV.

14 ECHR: *Gündüz v. Turkey,* Application no. 35071/97, judgment of 4 December 2003. The Court explained at § 49 that a "'piç' is a pejorative term referring to children born outside marriage and/or born of adultery and is used in everyday language as an insult designed to cause offence."

15 *Giniewski v. France* (2007) 19 E.H.R.R. 34 § 52.

16 ECHR: *Klein v. Slovakia,* Application no. 72208/01, judgment of 31 October 2006.

17 Cf. the Concurring Opinion of Judge Petitti, who has claimed that "profanation and serious attacks on the deeply held feelings of others" should not be protected by the Court. *Wingrove v. United Kingdom* (1996) 24 E.H.R.R. 1.

18 L. Carroll, *Through the Looking-Glass.* Raleigh, NC: Hayes Barton Press, 1872, p. 72.

19 *Id.*

20 Council of Europe, "Factsheet - Hate Speech", November 2008, p.2.

Similarly, the Fundamental Rights Agency of the European Union has attempted to identify the *particular* speech which *it* considers to be criminal. Depending which document one reads, a different definition can be found. For example, the FRA has stated that: "'Hate speech' refers to the incitement and encouragement of hatred, discrimination or hostility towards an individual that is motivated by prejudice against that person because of a particular characteristic…"[21] However, in another document, the FRA states that: "The term 'hate speech', *as used in this section,* includes a broader spectrum of verbal acts … [including] *disrespectful public discourse."*[22] It also laments in another paper that: "There is currently no adequate EU binding instrument aimed at effectively *countering expression of negative opinions …"*[23]

Such confusion over the term abounds, and despite "hate speech" being without definition and difficult to identify, the latest European Court factsheet places great hope in the Court's ability to navigate the difficult, if not impossible, path between the offensive speech which is protected by the Convention, and the "hate speech" which is not. The factsheet states that: "the Court is … careful to make a distinction in its findings between, on the one hand, genuine and serious incitement to extremism and, on the other hand, the right of individuals (including journalists and politicians) to express their views freely and to "offend, shock or disturb" others."[24] It is not at all clear how the Court makes this "distinction". However, what is becoming increasingly apparent is that by labelling some speech as "hate speech", controversial and unpopular views can effectively be silenced. The Court principally does this in two ways: (1) by excluding certain speech from the scope of Article 10 altogether or (2) by justifying the restriction on speech under Article 10 § 2.

2.2 Excluding certain speech from protection

On certain occasions, the Strasbourg Court has held that certain speech does not even fall within the scope of Article 10 because of the very *nature or content* of the speech. Hence, the detailed and rigorous process of making a Member State justify why it restricted the speech under Article 10 § 2 is short-circuited and the Court effectively says, "Article 10 does not apply". Although not always the case,[25] Article

[21] Hate speech and hate crimes against LGBT persons, *FRA,* 2009, p.1.

[22] Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States Part II – The social situation, *FRA,* 2009, p.46. Emphasis added.

[23] Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity, *FRA,* 2010, p.36-37. Emphasis added.

[24] Council of Europe, 'Factsheet - Hate speech', February 2012, p.1.

[25] Some claims are considered "manifestly unfounded" without reference to Article 17. See ECHR: *Le Pen v. France* (application no. 18788/09), admissibility decision of 20 April 2010.

17 is often used to justify excluding certain forms of expression from the scope of Article 10. Article 17 of the Convention states:

> 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.

Thus, expressions deemed to destroy the rights and freedoms set forth in the Convention have been considered unworthy of detailed consideration by the Court. For example, in the early case of *Glimmerveen and Hagenbeek v. Netherlands,*[26] the European Commission cited Article 17 to exclude the applicants – who had been convicted of possessing leaflets which called for the deportation of non-whites from the Netherlands – from relying on Article 10. The Commission held:

> The applicants are essentially seeking to use Article 10 to provide a basis under the Convention for a right to engage in these activities which are … contrary to the text and spirit of the Convention and which right, if granted, would contribute to the destruction of the rights and freedoms referred to above. Consequently, the Commission finds that the applicants cannot, by reason of the provisions of Article 17 of the Convention rely on Article 10.

However, there is no clear basis on which the Court excludes some speech by virtue of Article 17 and not others. Some decisions state that Article 17 can be used to declare *ratione materiae* an applicant's complaint,[27] while in other decisions the Court delays Article 17 arguments to the justification test in Article 10 § 2.[28] Although the Court's use of Article 17 appears to relate only to the most serious of speech – such as the denial of the Holocaust[29] – such an approach is nevertheless highly problematic. Not only does Article 17 have the capability of removing from the applicant the protections of the Convention without even the merits of the claim being heard – and thus without the State having to prove that the interference on speech was justified – there is also a danger that as more and more rights are read into the Convention, freedom of expression could gradually be reduced. For example, a number of years ago the belief (and manifestation of that belief) that homosexual behaviour was morally wrong would never have been considered to be

[26] Application nos 8348/78 and 8406/78; 18 D.R. 187.

[27] See, for example, ECHR: *Garaudy v. France* Application no. 65831/01, judgment of 24 June 2003; ECHR: *Norwood v. United Kingdom*, Application no. 23131/03, judgment of 16 November 2004.

[28] See ECHR: *Féret v. Belgium,* Application no. 15615/07, judgment of 16 July 2009 § 52.

[29] See ECHR: *Chauvy v. France* Application no. 64915/01, judgment of 29 June 2004.

"aimed at the destruction of any of the rights and freedoms set forth" in the Convention. Today that position is becoming less clear.[30]

Thus, if protections afforded to freedom of expression are to be considered robust, and the right itself considered fundamental, it is highly questionable whether certain speech – however objectionable – can be considered to fall out of the scope of Article 10, without even a consideration of the merits. Instead, it is far more helpful for the Court to consider that the speech falls within the scope of Article 10, and then consider whether any restriction on the speech was justifiable under Article 10 § 2 after considering the case as a whole.[31]

2.3 Justifying restrictions on speech

The right to freedom of expression is a qualified right, not absolute. Accordingly, if the speech is deemed to fall within the scope of Article 10, an interference with the right to freedom of speech can nevertheless be lawful if it is justified under Article 10 § 2. For the interference in question to be justified it must pass a strict and cumulative three stage test and any exceptions to the right to freedom of expression must be "construed strictly and the need for any restrictions must be established convincingly."[32] The Court is empowered to give the final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10[33] and any restriction imposed must be proportionate to the legitimate aim pursued.[34]

First, therefore, the restriction on speech must be "prescribed by law". It is now well understood that to be prescribed by law, the restriction must have a basis in the domestic law of the State in question,[35] the law must fulfil certain "quality"[36] requirements – often known as accessibility, precision, foreseeability and clarity – and the law must be applied in a non-arbitrary way.[37]

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[30] See the arguments of "Liberty" in the third party intervention in *Ladele and McFarlane v. The United Kingdom,* Application Nos: 51671/10 and 36516/10. In §§22-3 of the third party submissions, Liberty submitted that because homosexual relationships are now recognized under the Convention (citing ECHR: *Schalk and Anor v Austria,* App no 30141/04, 24 June 2010) the Christian applicants in question cannot rely on their Convention rights where to do so would lead to discrimination against same-sex couples – thus breaching Article 17.

[31] See Harris et al, *Law of the European Convention on Human Rights,* 2nd ed. Oxford: Oxford University Press, 2009, p.450.

[32] *Şener v. Turkey,* no. 26680/95, § 39, ECHR 2000-III. See also *Thoma v. Luxembourg,* no. 38432/97, §§ 43, 48, ECHR 2001-II; see also *The Observer and The Guardian v. the United Kingdom,* judgment of 26 November 1991, Series A no. 216, p. 30, § 59.

[33] *Handyside* at § 49.

[34] *Id.*

[35] See, for example, ECHR: *Peev v. Bulgaria,* application no. 64209/01, judgment of 26 July 2007.

[36] See *Sunday Times v. The United Kingdom* (1979-80) 2 E.H.R.R. 245 § 49.

[37] See ECHR: *Olsson v. Sweden* (No. 1), application no. 10465/83, judgment of 24 March 1988, § 61; ECHR: *Hasan and Chaush v. Bulgaria,* application no. 30985/96, judgment of 26 October 2000, § 86.

Secondly, the interference must pursue one or more of the legitimate aims listed in Article 10 § 2, namely: national security; territorial integrity; public safety; prevention of disorder or crime; protection of health, morals, reputation or rights of others; preventing the disclosure of information received in confidence, and; maintaining the authority and impartiality of the judiciary. The exceptions must be narrowly interpreted, such that the enumeration of them is strictly exhaustive and the definition of them necessarily restrictive.[38] No criteria other than those mentioned in the exception clause itself may be at the basis of any restrictions, and these criteria, in turn, must be understood in such a way that the language is not extended beyond its ordinary meaning.[39] Hence, if the State fails to prove that it was pursuing one of the legitimate aims listed above, the restriction will be unlawful. However, even if the State can demonstrate the pursuit of a legitimate aim, it must still prove that the restriction was justifiable under the third limb of Article 10 § 2.

Thirdly, whether or not a restriction can be justified depends on whether the restriction was "necessary in a democratic society".[40] The Court has noted that the adjective "necessary" implies the existence of a "pressing social need" and the word does not have the flexibility of expressions such as "useful", "reasonable" or "desirable".[41] Although the Contracting States have a certain margin of appreciation in assessing whether such a "pressing social need" exists, this must go hand in hand with European supervision. The Court is therefore empowered to give the final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10.

When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 10 the decisions they took. However, this does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith. Instead, the Court will look at the interference complained of in the light of the case as a whole and determine, after having established that the State pursued a "legitimate aim", whether it was proportionate to that aim and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient".[42] In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assess-

[38] *Mutatis mutandis,* ECHR, *Sidiropoulos v. Greece,* (57/1997/841/1047), 10 July 1998, § 38.

[39] See *Sunday Times v. The United Kingdom,* Decision of the European Commission, adopted on 18 May 1977, Series B no. 28, p. 64, § 194.

[40] *Vögt v. Germany* (1996) 21 EHRR 205 § 52.

[41] *Handyside* at § 48.

[42] *Sunday Times* at § 62.

ment of the relevant facts.[43] It is under the Court's reasoning on whether or not a restriction is "necessary in a democratic society" that the inconsistent approach regarding free speech and "hate speech" is revealed.

3. Justifying restrictions: The court's inconsistent approach

3.1 Potentially relevant factors

In deciding whether a restriction on freedom of expression is necessary, a non-exhaustive number of factors will be considered by the Court. For example, the *author of the expression* may be a relevant consideration in some cases, and members of society such as journalists are given strong protections due to their contribution to discussion of "matters of public interest",[44] whereas judges[45] and civil servants[46] are expected to show more "discretion". The *means of communication* may also be relevant in some cases, and expressions which are communicated through a medium with a large public impact, such as television or radio, may require more caution.[47] Similarly, the *recipient of the expression* may also be relevant. For example, in *Handyside v. United Kingdom,* the Court noted that the expression in question – a book containing a chapter on sex – was being sent to "young people at a critical stage of their development".[48] This was a relevant consideration when holding that the domestic authorities did not violate Article 10 by preventing the distribution of the book. Lastly, the *nature and severity of the penalties imposed* will always need to be taken into account when assessing the proportionality of an interference.[49] Thus, the more severe the restriction, the more difficult it will be to justify. Where a restriction merely limits the manner or form of the expression, it will more easily be considered proportionate.[50] However, restrictions or penalties such as heavy fines[51] or the termination of employment[52] will always be difficult to justify and criminal sanctions require a particularly robust justification.[53]

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43 *Jersild v. Denmark* (1994) 19 E.H.R.R. 1 § 31.

44 See, for example, *id.* at § 35 and ECHR: *Scharsach and News Verlagsgesellschaft mbH v. Austria,* Application no. 39394/98, judgment of 13 November 2003.

45 See *Wille v. Liechtenstein* (2000) 30 E.H.R.R. 558 § 64.

46 See *De Diego Nafria v. Spain* (2003) 36 E.H.R.R. 36 § 37.

47 See *Purcell v. Ireland,* Application no. 15404/89, European Commission decision of 16 April 1991.

48 *Handyside* at § 52.

49 ECHR: *Öztürk v. Turkey,* Application no. 22479/93, judgment of 28 September 1999 § 70; *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV.

50 See, for example, *Rai v. United Kingdom* (1995) 19 E.H.R.R. CD93.

51 See, for example, *Jersild* at § 35 and ECHR: *Sokolowski v. Poland,* Application no. 75955/01, judgment of 29 March 2005.

52 *Vögt v. Germany* (1995) 21 E.H.R.R. 205.

53 ECHR: *Cumpănă and Mazăre v Romania,* Application No. 33348/96, judgment of 17 December 2004 [G.C.], §§ 116-7.

Thus, there are numerous factors that may be taken into account by the Court when deciding whether or not the interference was necessary and proportionate, and for the large part, these factors are common sense and intuitive. However, the Court is in far more dangerous territory when it conducts an analysis of the *nature or content* of the speech.

3.2 An increasingly relevant factor: The content of the speech

In line with a wave of non-binding recommendations and resolutions from varying international and supranational institutions,[54] the Court has increasingly undertaken an analysis of the *nature or content* of the speech in question when deciding whether or not the interference was ''necessary''. Of course, analysing the content of the speech can be important, particularly in libel or defamation claims, where the truthfulness of the comment is at issue, but the Court has not concerned itself merely with assessing truthfulness of the speech in applicable cases. Instead it has increasingly made value judgments on the speech in question, effectively asserting its own opinion as to the moral validity of the speech.

In recent judgments regarding Article 10, the Court has noted that: ''expressions that seek to spread, incite or justify hatred based on intolerance…do not enjoy the protection afforded by Article 10 of the Convention''[55] and ''concrete expressions constituting a hate speech … which may be insulting to individuals or groups, do not benefit from the protection of article 10 of the Convention.''[56] Likewise, the Court has attempted to develop the notion that while offensive speech is protected, ''gratuitously offensive'' speech is not.[57] The vagueness of such phrases is clearly cause for concern and clearly provides ''wide and vaguely defined powers to prescribe the manner in which ideas and opinions are expressed.''[58]

Although the line of ''hate speech'' cases has previously been limited to racial issues[59] and accusations of ''extremism'' that may stir up violence,[60] the development into

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[54] Of particular note are: "Recommendation No. R (97) 20 on 'hate speech'", adopted on 30 October 1997 by the Committee of Ministers of the Council of Europe and "General Policy Recommendation no. 7 of the European Commission against Racism and Intolerance on national legislation to combat racism and racial discrimination", 13 December 2002, which states that: "The law should penalise the following acts when committed intentionally: a) public incitement to violence, hatred or discrimination, b) public insults and defamation or c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin." § 18.

[55] *Gündüz v. Turkey,* Application no. 35071/97, ECHR 2003-XI, § 37.

[56] *Erbakan v. Turkey,* Application no. 59405/00, judgment of 6 July 2006 § 57.

[57] See, for example, *Otto-Preminger Institut v. Austria* (1995) 19 E.H.R.R. 34.

[58] Ian Cram, The Danish cartoons, offensive expression and democratic legitimacy. In *Extreme speech and democracy,* ed. Ivan Hare and James Weinstein, 311-330, Oxford: Oxford University Press, 2009, p.327.

[59] See, for example, *Féret v. Belgium* Application no. 15615/07, judgment of 16 July 2009.

[60] See, for example, *Lindon Otchakovsky-Laurens and July v. France* (2008) 46 E.H.R.R. 35 § 57.

areas where there are significant and legitimate moral disagreements regarding sexual morality did not take long. As the Court has made clear, "discrimination based on sexual orientation is as serious as discrimination based on 'race, origin or colour"'.[61]

In the recent case of *Vejdeland and Others v. Sweden,*[62] the Fifth Section of the European Court of Human Rights held unanimously that there had been no violation of Article 10. In 2004 the applicants went to an upper secondary school and distributed approximately a hundred leaflets in or near the pupils' lockers. The applicants were then stopped by the principal of the school and were told to leave the premises. The leaflets in question criticized homosexual behaviour – referring to it as "deviant sexual proclivity" which had "a morally destructive effect on the substance of society" – and warned the pupils of "homosexual propaganda" allegedly being promulgated by teachers in the school.[63]

For distributing the leaflets, the applicants were charged with agitation against a "national or ethnic" group. The applicants disputed that the text in the leaflets expressed contempt for homosexuals and claimed that, in any event, they had not intended to express contempt for homosexuals as a group. They stated that the purpose of their activity had been to start a debate about the lack of objectivity in the education dispensed in Swedish schools. Nevertheless, on 6 July 2006 the Supreme Court of Sweden convicted the applicants under Chapter 16, Article 8 of the Penal Code for agitation against a national or ethnic group.

It was contended by the applicants that their conviction constituted a violation of their freedom of expression under Article 10. The Court found that the applicants' conviction amounted to an interference with their freedom of expression as guaranteed by Article 10 § 1 and quickly came to the conclusion that the impugned interference was "prescribed by law" and served a legitimate aim, namely "the protection of the reputation and rights of others". The Court therefore had to decide whether the interference was "necessary in a democratic society". It is here where some of the Court's reasoning is clearly acceptable, while other parts of the reasoning are highly problematic.

The Court took into consideration the fact that the leaflets were left in the lockers of young people who were at an "impressionable and sensitive" age (as per *Handyside* § 52) and who had no possibility to decline to accept them (in other words, a "captive audience"[64]).[65] Moreover, the Court noted that the distribution of the leaflets took

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[61] *Vejdeland and Others v. Sweden,* Application no. 1813/07, judgment of 9 February 2012. The Court pointed to, *inter alia, Smith and Grady v. the United Kingdom,* (Application nos. 33985/96 and 33986/96), ECHR 1999-VI, § 97.

[62] Application no. 1813/07, judgment of 9 February 2012.

[63] *Id.,* at § 8.

[64] Cf. the jurisprudence of the United States, such as *Rowan v. Post Office Dept.,* 397 U. S. 728, 736–738 (1970).

[65] *Vejdeland* at § 56.

place at a school which none of the applicants attended and to which they did not have free access (commonly known as "trespass"). The Court also considered the penalty imposed on the applicants and noted that none of the applicants were imprisoned despite the maximum sentence for their offence carrying a prison sentence of two years. It therefore held that the penalties were not excessive.[66]

As noted above, in deciding whether there has been a violation of Article 10, the Court is clearly justified in taking the circumstances of the expression into consideration as well as the severity of the penalty imposed. It is well understood that freedom of expression cannot be protected in all circumstances and it would not surprise many to learn that unsolicited leaflet dropping on private property may perhaps fall unprotected under the Convention – whatever the contents of the leaflets. However, in considering that the *content* of the expression was unworthy of protection, as the Court did in paragraphs 54-55 of the judgment, the Court is on a far more dangerous footing.

Many would agree that when it comes to direct incitements to violence, they should either remain unprotected under the Convention,[67] or provide the Member State in question with a wider margin of appreciation in deciding how to deal with such speech.[68] However, in *Vejdeland* the Court took a different approach and acknowledged that while the leaflets "did not directly recommend individuals to commit hateful acts", the comments were nevertheless "serious and prejudicial allegations".[69] Moreover, the Court stated that "inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts".[70] Instead, the Court held that "[a]ttacks on persons" can be committed by "insulting, holding up to ridicule or slandering specific groups of the population".[71] Based on these assessments, the Court held that no violation of Article 10 had taken place.[72]

3.3 The problem of the content-based approach

An inconsistent approach is clearly emerging. On the one hand the Court is quick to praise freedom of speech and places it at the foundations of democracy itself – not just any speech, but speech that is offensive, shocking and disturbing. On the other hand the Court is keen to eradicate "extremism" and has targeted so-called "hate speech" as a means of achieving this. The problem, of course, is that nobody,

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66 *Id.,* at § 58.

67 See ECHR: *Surek v. Turkey (No. 1),* [G.C] Application no. 26682/95, judgment of 8 July 1999, § 62.

68 See ECHR: *Surek v. Turkey (No. 3),* [G.C] Application no. 24735/94, judgment of 8 July 1999 § 37.

69 *Vejdeland* at § 54.

70 Relying on principles established in *Féret v. Belgium,* (Application no. 15615/07), judgment of 16 July 2009.

71 *Vejdeland* at § 55.

72 The decision is not yet final, as there is still an opportunity to appeal to the Grand Chamber.

and certainly not the Court, is able to distinguish between "offensive" but lawful language and the unlawful "hate speech". The Court is therefore adopting a very problematic content-based approach.

As the dissenting opinion of Judge András Sajó, joined by Judges Vladimiro Zagrebelsky and Nona Tsotsoria, warned in *Féret v. Belgium:*

> Content regulation and content-based restrictions on speech are based on the assumption that certain expressions go "against the spirit" of the Convention. But "spirits" do not offer clear standards and are open to abuse. Humans, including judges, are inclined to label positions with which they disagree as palpably unacceptable and therefore beyond the realm of protected expression. However, it is precisely where we face ideas that we abhor or despise that we have to be most careful in our judgment, as our personal convictions can influence our ideas about what is actually dangerous.

One domestic judge has made similar observations, noting that, "a freedom which is restricted to what Judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and Judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible."[73]

Regrettably, the Court in *Vedjeland* did not heed such warnings and in holding that there was no violation of Article 10, in large part because of the content of the applicants' expression, the Court has done a disservice to freedom of expression as enshrined in the Convention. Such a decision does not enable citizens to characterize the speech that is deemed unworthy of protection and as such, there will very likely be a chilling effect on free speech through self-regulation and self-censorship. As long as citizens remain in the dark on whether their speech is protected or not, Article 10 can hardly be considered to have a "special importance" under the Convention or be a fundamental human right.

4. Conclusion

Although there is no definition of "hate speech", the Court is certain that it will not protect the thing that it will not define. As one commentator has noted: "So far as the ECtHR can be said to have a free speech theory, it is a very narrow and impoverished one…the notions of a marketplace of competing ideas and beliefs or the value of expression as an outworking of personal autonomy barely feature in the jurisprudence."[74] Hence, the mixed jurisprudence under Article 10 of the

[73] Per Hoffman LJ, *R v. Central Independent Television* [1994] Fam. 192 §§ 532-3.

[74] Ian Leigh, Damned if they do, damned if they don't: the European Court of Human Rights and the

Convention clearly reveals uncertainty in the Court's approach, if not outright inconsistency.

The problem, it seems, is that the Court wants to "have its cake and eat it". In other words, the Court rightly extols the virtues of freedom of speech, but takes a very hesitant approach towards so-called "intolerant" or "hate" speech, without, of course, defining what constitutes such speech. However, the Court cannot have it both ways. If it is true that "freedom only to speak inoffensively is not worth having"[75] then the Court must protect speech even if it is offensive, shocking, disturbing, as well as "intolerant" and "hateful" and any other synonym one can imagine, including "homophobic". Rather than attempting to become the all-powerful moderator of public discourse, the Court must uphold true freedom of speech, perhaps in a similar vein to the United States Supreme Court, which recently held that: "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and … inflict great pain. [But] we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[76] One can only hope that the European Court will also take a "different course" to the one it has recently started – steering away from its content-based regulation and returning to the values enshrined in the Convention.

protection of religion from attack, *Res Publica,* 2011, 17(1), 55-73 § 70.

[75] Per Sedley LJ, *Redmond-Bate v. Director of Public Prosecutions,* Judgment of 23 July 1999, [2000] H.R.L.R. 249 § 20.

[76] *Snyder v. Phelps* 562 U.S. 15 (2011).