



## Introduction

In multicultural societies, which are characterised by a variety of cultures, religions and lifestyles, it is sometimes necessary to reconcile the right to freedom of expression with other rights, such as the right to freedom of thought, conscience and religion or the right to be free from discrimination. This reconciliation can become a source of problems, because these rights are all fundamental elements of a “democratic society”.

The European Court of Human Rights (hereinafter the Court) has therefore affirmed that freedom of expression as guaranteed under article 10 of the European Convention on Human Rights (hereinafter the Convention or ECHR) “constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.”<sup>1</sup>

But however vast the scope of freedom of expression, some restrictions to the exercise of this right may in some circumstances be necessary. Unlike the right to freedom of thought (inner conviction or *forum internum*), the right to freedom of expression (external manifestation or *forum externum*) is not an absolute right. The exercise of this freedom carries with it certain duties and responsibilities and is subjected to certain restrictions as set out in article 10(2) of the ECHR, in particular those that concern the protection of the rights of others.

The European Court has always affirmed that “it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations.”<sup>2</sup> Thus,

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1 *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A No. 24, para. 49.

2 *Jersild v. Denmark* [GC], judgment of 23 September 1994, Series A No. 298, para. 30. To emphasise this statement, the Court refers,

it has emphasised in various judgments “that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued.”<sup>3</sup>

The challenge that the authorities must face is therefore to find the correct balance between the conflicting rights and interests at stake.

#### Conflicting rights and interests

Several rights, equally protected by the Convention, can compete in this regard. The right to freedom of expression can thus be limited by the right to freedom of thought, conscience or religion. Confronted with attacks on religious beliefs the European Court of Human Rights has highlighted that the question involves “balancing the conflicting interest that result from exercising those two fundamental freedoms: on the one hand, the applicant’s right to communicate his ideas on religious beliefs to the public, and, on the other hand, the right of other persons to respect of their right to freedom of thought, conscience and religion.”<sup>4</sup> In some circumstances, freedom of expression can also be a threat to the right to respect of privacy. And, finally, there is the risk of conflict between freedom of expression and the interdiction of all forms of discrimination in those cases where exercising this freedom is used to incite hatred and shows the characteristics of “hate speech”.

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in its decision *Seurot v. France* (dec.), No. 57383/00, 18 May 2004, to the ECRI’s statute, more precisely to “the text of resolution Res(2002)8 of the Committee of Ministers on the statute of the European Commission against Racism and Intolerance (ECRI) which aims to reinforce the action of the ECRI, convinced of the need to take firm and sustained action at European level to combat the phenomena of racism, xenophobia, anti-Semitism and intolerance.”

3 *Gündüz v. Turkey*, No. 35071/97, para. 40, CEDH 2003-XI, and *Erbakan v. Turkey*, No. 59405/00, para. 56, 6 July 2006.

4 *Aydın Tatlav v. Turkey*, No. 50692/99, para. 26, 2 May 2006.

The concept of “hate speech”

No universally accepted definition of the term “hate speech” exists, despite its frequent usage. Though most States have adopted legislation banning expressions amounting to “hate speech”, definitions differ slightly when determining what is being banned. Only the Council of Europe’s Committee of Ministers’ Recommendation 97(20) on “hate speech” defined it as follows: “the term “hate speech” shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.” In this sense, “hate speech” covers comments which are necessarily directed against a person or a particular group of persons.

According to the Committee of Ministers, hate speech covers all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance.

The term is also found in European case-law, although the Court has never given a precise definition of it. The Court simply refers in some of its judgments to “all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance).”<sup>5</sup> It is important to note that this is an «autonomous» concept, insofar as the Court does not consider itself bound by the domestic courts’ classification. As a result, it sometimes rebuts classifications adopted by national courts<sup>6</sup> or, on the contrary, classifies certain statements as “hate speech”, even when domestic courts ruled out this classification.<sup>7</sup>

The concept of “hate speech” encompasses a multiplicity of situations:

- 5 *Gündüz v. Turkey*, op. cit., para. 40; *Erbakan v. Turkey*, op. cit., para. 56.
- 6 See, for example, *Gündüz v. Turkey*: unlike the domestic courts, which classified the applicant’s statements as hate speech, the Court is of the opinion that the statements made cannot be regarded as such (op. cit., para. 43).
- 7 See to that effect, *Sürek v. Turkey* [GC], No. 26682/95, ECHR 1999-IV: the Court concluded in this instance that there had been hate speech, whereas the applicant had not been convicted of incitement to hatred but of separatist propaganda, since the domestic courts considered that there were no grounds for convicting him of incitement to hatred.

- firstly, incitement of racial hatred or in other words, hatred directed against persons or groups of persons on the grounds of belonging to a race;
- secondly, incitement to hatred on religious grounds, to which may be equated incitement to hatred on the basis of a distinction between believers and non-believers;
- and lastly, to use the wording of the Recommendation on “hate speech” of the Committee of Ministers of the Council of Europe, incitement to other forms of hatred based on intolerance “expressed by aggressive nationalism and ethnocentrism”.

Although the Court has not yet dealt with this aspect, homophobic speech<sup>8</sup> also falls into what can be considered as a category of “hate speech”.

The classification of certain statements as “hate speech” has several consequences. Thus, according to the Court “there can be no doubt that concrete expressions constituting “hate speech”, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.”<sup>9</sup> On the other hand, according to recent judgments, the fact that certain expressions do not constitute “hate speech”, is an essential element to be taken into consideration in determining whether the infringements to the right of freedom of expression are justified in a democratic society.<sup>10</sup> The concept of “hate speech” therefore allows to draw a dividing line between those expressions that are excluded from Article 10 of the ECHR and are not covered by freedom of expression or are not justified with regard to the second paragraph of Article 10, and those which, as they are not considered as constituting “hate speech”, consequently can be tolerated in a democratic society.

Insofar as “hate speech” is therefore an element that the Court takes into consideration, the question arises as to

8 See on this point the report “Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis” (European Union Agency for Fundamental Rights), June 2008, and the White Paper on Intercultural Dialogue adopted at the 118th session of the Committee of Ministers, 7 May 2008, para. 133.

9 *Gündüz v. Turkey*, op. cit., para. 41.

10 *Ergin v. Turkey (No. 6)*, No. 47533/99, para. 34, 4 May 2006.

when an expression can be classified as “hate speech”. And yet, in the absence of a precise definition, how can “hate speech” be identified?

Identification criteria

The identification of statements that could be classified as “hate speech” seems all the more difficult because this kind of speech does not necessarily manifest itself through expressions of “hatred” or emotions. “Hate speech” can be concealed in statements which at a first glance may seem to be rational or normal. Nevertheless, it is possible to distil from the applicable texts in this matter and from the principles found in the case-law of the European Court of Human Rights or other bodies, certain parameters for distinguishing expressions which, though they are of an insulting nature, are fully protected by the right to freedom of expression from those that do not enjoy such protection.