

Foreword

Today's Europe is a large space where opportunities for intercultural exchanges multiply and the potential for cultural enrichment develops constantly, even as we strive to consolidate our common values. Will we take these chances? Or will we retreat into our traditional identities, out of fear of assimilation? Will diversity really become the asset we claim it is, or will it engender xenophobia and ignorance? Will intolerance and violence give way to acceptance and open-mindedness?

The Council of Europe's European Commission for Democracy through Law ("the Venice Commission") reflected on these matters when dealing with a request from the Parliamentary Assembly to look into the issue of the regulation and prosecution of blasphemy, religious insult and incitement to hatred.

The Venice Commission thus brainstormed with intellectuals, politicians and the civil society. In its report on freedom of expression and freedom of religion, it strove to propose a new ethic of responsible intercultural relations – an attitude that starts by acknowledging that it is not always others who are the intolerant ones: each and every one of us is often intolerant too.

Section I of this publication is that Report of the Venice Commission, on "The relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred", which was adopted by the Venice Commission at its 76th Plenary Session (17-18 October 2008).

Section II contains three documents from the Council of Europe: General Policy Recommendation No. 7 of the European Commission Against Racism and Intolerance (ECRI) on national legislation to combat racism and racial discrimination, from 2002, which sets out the fundamental principles which inspired the Venice Commission's report; Resolution 1510 of the Parliamentary Assembly on freedom of expression and respect for religious beliefs, from 2006; and the Assembly's Recommendation 1805 on blasphemy, religious insults and hate speech against persons on grounds of their religion, from 2007.

Section III has some interesting reports that were presented at the international round-table conference on Art and Sacred Beliefs: from Collision to Co-existence, which

the Venice Commission organised in Athens on 31 January and 1 February 2008, in co-operation with the Hellenic League of Human Rights.

Finally, Section IV consists of the two appendices to the Report of the Venice Commission. Appendix 1 collects together European national laws on blasphemy, religious insult and incitement to religious hatred; Appendix 2 analyses domestic laws on blasphemy, religious insult and inciting religious hatred in various countries, on the basis of replies to a questionnaire.

Taken together, these documents help Europe to face the dilemma of getting strong opinions to live with genuine tolerance. They show how we can live with other people's beliefs without sacrificing our own.

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I. Report by the Venice Commission

*Adopted by the Venice Commission at its 76th Plenary Session
(Venice, 17-18 October 2008)*

The relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred

1. Introduction

1. In its Resolution 1510 (2006) on Freedom of expression and respect for religious beliefs,¹ the Parliamentary Assembly of the Council of Europe addressed the question of whether and to what extent respect for religious beliefs should limit freedom of expression. It expressed the view that freedom of expression should not be further restricted to meet increasing sensitivities of certain religious groups, but underlined that hate speech against any religious group was incompatible with the European Convention on Human Rights. The Assembly resolved to revert to this issue on the basis of a report on legislation relating to blasphemy, religious insults and hate speech against persons on grounds of their religion, after taking stock of the different approaches in Europe, including the report and recommendations of the Venice Commission.

2. By a letter of 11 October 2006, the Secretariat of the Parliamentary Assembly, on behalf of Mrs Sinikka Hurskainen, Rapporteur of the Committee on Culture, Science and Education on this matter, requested the Venice Commission to prepare an overview of national law and practice concerning blasphemy and related offences with a religious aspect in Europe.

3. A working group was promptly set up within the Venice Commission, composed of Mr Pieter van Dijk (member, the Netherlands), Ms Finola Flanagan (member, Ireland) and Ms Hanna Suchocka (member, Poland). Mr Louis-Léon Christians, Professor at Louvain University, Belgium, was invited to join the group as an expert and to collect the domestic provisions relating to blasphemy, religious insults and incitement to hatred of the Council of Europe's member states. Mr Christians' preliminary report was submitted to the Venice Commission in December 2006; it was subsequently supplemented and updated, where necessary, by the commission members, and finalised by the Secretariat (CDL-AD(2008)026add). It collects the legal provisions which are in force in all Council of Europe member states, and contains some references to the relevant case law of the national courts.

1. Adopted by the Parliamentary Assembly on 28 June 2006 (19th sitting).

4. A preliminary discussion of the request submitted to the Venice Commission took place at the meeting of the Sub-commission on Fundamental Rights, held in Venice on 13 December 2006. At this meeting, in the light of the impossibility, under the applicable time constraints, of gathering exhaustive information on the practice and case law of all Council of Europe member states, it was decided to send a more detailed questionnaire to selected countries to obtain some indication of current trends and problems in Europe, and related legal practices. The questionnaire was sent to twelve states (Albania, Austria, Belgium, Denmark, France, Greece, Ireland, the Netherlands, Poland, Romania, Turkey, the United Kingdom). Appendix II (CDL-AD(2008)026add2 – page 229) contains the replies received from these twelve states.

5. The working group also relied on the material and information collected by the Committee of Experts for the Development of Human Rights (DH-DEV) relating to national legislation on hate speech.²

6. The working group exchanged information with the above Committee of Experts as well as with the Secretariat of the European Commission against Racism and Intolerance (ECRI).³ It wishes to thank them for the fruitful co-operation.

7. A preliminary report was discussed at the meeting of the Sub-Commission on Fundamental Rights on 15 March 2007 and was subsequently adopted by the Commission at its 70th Plenary Session (Venice, 16-17 March 2007). This preliminary report was subsequently sent to the Parliamentary Assembly.

8. On 29 June 2007, the Parliamentary Assembly adopted Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against persons on grounds of their religion, which contains references to the commission's preliminary report.

9. The commission subsequently organised, in co-operation with the Hellenic League of Human Rights, an international round-table conference on Art and Sacred Beliefs: from Collision to Co-existence, which took place in Athens on 31 January and 1 February 2008. At this conference, which gathered lawyers, artists, journalists, MPs and representatives of civil society, the intersection between freedom of expression and freedom of religion was extensively discussed, with a view to proposing constructive solutions to the conflicts which have been occurring in recent times.

10. The present report was discussed and adopted by the commission at its 76th Plenary Session (Venice, 17-18 October 2008).

2. GT-DH-DV A(2006)008 Addendum, Human Rights in a Multicultural Society: compilation of the replies received from the member states to the questionnaire on hate speech. This information covers 37 countries.

3. www.coe.int/T/e/human_rights/ecri/1-ECRI.

2. Applicable international standards⁴

11. Article 9 of the European Convention on Human Rights (ECHR) provides that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

12. Article 10 of the ECHR provides that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

13. Article 14 of the ECHR provides that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

14. Article 1 of Protocol 12 to the ECHR provides that:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

15. The Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, provides that:

Article 3 – Dissemination of racist and xenophobic material through computer systems

4. For a full review of relevant international standards, see: Anne Weber, *Handbook on Hate Speech*, Council of Europe Publishing, Strasbourg, October 2009.

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:

distributing, or otherwise making available, racist and xenophobic material to the public through a computer system.

2. A Party may reserve the right not to attach criminal liability to conduct as defined by paragraph 1 of this article, where the material, as defined in Article 2, paragraph 1, advocates, promotes or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available.

3. Notwithstanding paragraph 2 of this article, a Party may reserve the right not to apply paragraph 1 to those cases of discrimination for which, due to established principles in its national legal system concerning freedom of expression, it cannot provide for effective remedies as referred to in the said paragraph 2.

Article 4 – Racist and xenophobic motivated threat

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:

threatening, through a computer system, with the commission of a serious criminal offence as defined under its domestic law, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics.

Article 5 – Racist and xenophobic motivated insult

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:

insulting publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics.

2. A Party may either:

a. require that the offence referred to in paragraph 1 of this article has the effect that the person or group of persons referred to in paragraph 1 is exposed to hatred, contempt or ridicule; or

b. reserve the right not to apply, in whole or in part, paragraph 1 of this article.

Article 6 – Denial, gross minimisation, approval or justification of genocide or crimes against humanity

1. Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right:

distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts

constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.

2. A Party may either

a. require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise

b. reserve the right not to apply, in whole or in part, paragraph 1 of this article.

16. Article 20.2 of the United Nations International Covenant on Civil and Political Rights provides that:

every kind of propaganda for national, racial or religious hatred, which constitutes incitement to discrimination, hostility or violence must be prohibited by law.

17. Article 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination calls upon states party to it to

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

18. Recommendation No. R (1997) 20 on Hate Speech⁵ of the Committee of Ministers of the Council of Europe contains the following relevant principles:

Principle 2

The governments of the member states should establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech which enable administrative and judicial authorities to reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or the rights of others. To this end, governments of member states should examine ways and means to:

- stimulate and co-ordinate research on the effectiveness of existing legislation and legal practice;
- review the existing legal framework in order to ensure that it applies in an adequate manner to the various new media and communications services and networks;
- develop a co-ordinated prosecution policy based on national guidelines respecting the principles set out in this recommendation;

5. Adopted by the Committee of Ministers on 30 October 1997 at the 607th meeting of the Ministers' Deputies.

- add community service orders to the range of possible penal sanctions;
- enhance the possibilities of combating hate speech through civil law, for example by allowing interested non-governmental organisations to bring civil law actions, providing for compensation for victims of hate speech and providing for the possibility of court orders allowing victims a right of reply or ordering retraction;
- provide public and media professionals with information on legal provisions which apply to hate speech.

Principle 3

The governments of the member states should ensure that in the legal framework referred to in Principle 2, interferences with freedom of expression are narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria. Moreover, in accordance with the fundamental requirement of the rule of law, any limitation of, or interference with, freedom of expression must be subject to independent judicial control. This requirement is particularly important in cases where freedom of expression must be reconciled with respect for human dignity and the protection of the reputation or the rights of others.

Principle 4

National law and practice should allow the courts to bear in mind that specific instances of hate speech may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the European Convention on Human Rights to other forms of expression. This is the case where hate speech is aimed at the destruction of the rights and freedoms laid down in the Convention or at their limitation to a greater extent than provided therein.

Principle 5

National law and practice should allow the competent prosecution authorities to give special attention, as far as their discretion permits, to cases involving hate speech. In this regard, these authorities should, in particular, give careful consideration to the suspect's right to freedom of expression given that the imposition of criminal sanctions generally constitutes a serious interference with that freedom. The competent courts should, when imposing criminal sanctions on persons convicted of hate speech offences, ensure strict respect for the principle of proportionality.

Principle 6

National law and practice in the area of hate speech should take due account of the role of the media in communicating information and ideas which expose, analyse and explain specific instances of hate speech and the underlying phenomenon in general as well as the right of the public to receive such information and ideas. To this end, national law and practice should distinguish clearly between the responsibility of the author of expressions of hate speech, on the one hand, and any responsibility of the media and media professionals contributing to their dissemination as part of their mission to communicate information and ideas on matters of public interest on the other hand.

Principle 7

In furtherance of Principle 6, national law and practice should take account of the fact that:

- reporting on racism, xenophobia, anti-Semitism or other forms of intolerance is fully protected by Article 10, paragraph 1, of the European Convention on Human Rights and may only be interfered with under the conditions set out in paragraph 2 of that provision;
- the standards applied by national authorities for assessing the necessity of restricting freedom of expression must be in conformity with the principles embodied in Article 10, as established in the case law of the Convention's organs, having regard, *inter alia*, to the manner, content, context and purpose of the reporting;
- respect for journalistic freedoms also implies that it is not for the courts or the public authorities to impose their views on the media as to the types of reporting techniques to be adopted by journalists.

19. The Council of Europe's European Commission against Racism and Intolerance (ECRI), in its general policy recommendation No. 7,⁶ makes, *inter alia*, the following recommendations on domestic criminal legislation:

I. Definitions

1. For the purposes of this Recommendation, the following definitions shall apply:

- a. "racism" shall mean the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.

...

II. Constitutional law

2. The constitution should enshrine the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination on grounds such as race, colour, language, religion, nationality or national or ethnic origin. The constitution may provide that exceptions to the principle of equal treatment may be established by law, provided that they do not constitute discrimination.

...

IV. Criminal law

...

18. The law should penalise the following acts when committed intentionally:

- a. public incitement to violence, hatred or discrimination,

6. ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted by the ECRI on 13 December 2002, found at www.coe.int/t/e/human_rights/ecri/1-ecri/3-general_themes/1-policy_recommendations/recommendation_n7/3-Recommendation_7.asp.

- 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;
 - d. the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
 - e. the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;
 - f. the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18 a, b, c, d and e; ...
23. The law should provide for effective, proportionate and dissuasive sanctions for the offences set out in paragraph 18 The law should also provide for ancillary or alternative sanctions

20. The Committee of Ministers' Declaration on freedom of political debate in the media, adopted in February 2004, holds that defamation or insult by the media should not lead to prosecution, "unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech" (emphasis added).⁷

21. In its Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against persons on grounds of their religion, the Parliamentary Assembly of the Council of Europe considers that "national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence".⁸

3. National legislation on blasphemy, religious insults and inciting religious hatred

22. The Venice Commission collected the criminal law provisions of Council of Europe member states relating to blasphemy, religious insults and incitement to religious hatred.⁹ This information is contained in document CDL-AD(2008)026add

7. The criminalisation of defamation on the ground of race, colour, language, religion, nationality, or national or ethnic origin recommended by the ECRI does not conflict with the modern trends towards decriminalisation of defamation, which concerns more particularly the cases of criticism of politicians and other public figures.

8. Assembly debate on 29 June 2007, recommendation adopted by the Assembly on 29 June 2007. See also Res(2006)1510 on Freedom of expression and respect for religious beliefs, adopted by the Assembly on 28 June 2006. See also the statement of the Human Rights Commissioner: "Do not criminalise critical remarks against religions", of 11 June 2007, available at the commissioner's website at www.commissioner.coe.int.

9. The criminal legislation of several states also imposes limitations on the freedom of association and assembly with a view to preventing hate speech.

(see Appendix I, p. 149). The commission also sought more specific and detailed information about the legislation and legal practice in a selected number of member states (Albania, Austria, Belgium, Denmark, France, Greece, Ireland, the Netherlands, Poland, Romania, Turkey and the United Kingdom); this information is contained in document CDL-AD(2008)026add2. The commission's analysis, set out hereinafter (see Appendix II, p. 229), is based on this information.

23. Most states penalise the disturbance of religious practice (for instance, the interruption of religious ceremonies).

Blasphemy

24. Blasphemy is an offence in only a minority of member states (Austria, Denmark, Finland, Greece, Italy, Liechtenstein, the Netherlands, San Marino).¹⁰ It must be noted in this context that there is no single definition of "blasphemy". In the Merriam-Webster Dictionary, blasphemy is defined as: 1: the act of insulting or showing contempt or lack of reverence for God b: the act of claiming the attributes of deity; 2: irreverence toward something considered sacred or inviolable. According to the Committee on Culture, Science and Education, in their report on blasphemy, religious insults and hate speech against persons on grounds of their religion,¹¹ blasphemy can be defined as the offence of insulting or showing contempt or lack of reverence for God and, by extension, towards anything considered sacred. The Irish Law Reform Commission suggested a legal definition of "blasphemy" as "Matter the sole effect of which is likely to cause outrage to a substantial number of adherents of any religion by virtue of its insulting content concerning matters held sacred by that religion".¹²

25. The penalty incurred for blasphemy is generally a term of imprisonment (mostly, up to three, four or six months; up to two years in Greece for malicious blasphemy) or a fine.

26. The offence of blasphemy is, nowadays, rarely prosecuted in European states.

Religious insult

27. Religious insult is a criminal offence in about half the member states (Andorra, Cyprus, Croatia, the Czech Republic, Denmark, Spain, Finland, Germany,¹³ Greece, Iceland, Italy, Lithuania, Norway,¹⁴ the Netherlands, Poland, Portugal, Russian Federation, Slovak Republic, Switzerland, Turkey and Ukraine),

10. The introduction of the criminal offence of blasphemy is being discussed in Ireland in order to implement Article 40 paragraph 6.1(l) of the Constitution.

11. Doc. 11296, 8 June 2007.

12. There exist several other definitions: see Angela Evenhuis, *Blasphemous Matter: Blasphemy, Defamation of Religion and Human Rights*, Magenta Foundation, 2008, p. 8.

13. In Germany it is a condition that the offender has disturbed the public peace for the offence to materialise. Similarly, in Portugal the offender is required to have breached the peace.

14. Prosecution of religious insults is only done when it is in the public interest to do so.

whereas insult as such is generally considered as a criminal or administrative offence in all countries.

28. Although there is no general definition of “religious insult”, the relevant European provisions appear to cover the different concepts (often at the same time) of “insult based on belonging to a particular religion” and “insult to religious feelings”.

29. The penalty incurred is generally a term of imprisonment, varying significantly amongst member states and ranging from a few months (four or six) to one, two, three and even five years (in Ukraine). A pecuniary fine is always an alternative to imprisonment.

Negationism

30. Negationism, in the sense of public denial of historic crimes is an offence in a few countries (Austria, Belgium, France, Switzerland). In other countries such as Germany, certain activity amounting to negationism may come within the definition of the offence of incitement to hatred.

Discrimination

31. Discriminatory treatment of various kinds, including on religious grounds, is prohibited at constitutional level in all Council of Europe member states. Some states also have specific laws or provisions against such discrimination.

32. In some countries, the commission of any crime with an ethnic, racial, religious or similar motive constitutes a general aggravating circumstance (for example in France, Georgia, Italy, Luxembourg, Sweden, Spain and Ukraine). In some countries, certain specific crimes (for instance, murder) are aggravated by a racial or similar motive (as in Belgium, France, Georgia and Portugal).

Incitement to hatred

33. Practically all Council of Europe member states (except for Andorra and San Marino) provide for an offence of incitement to hatred.¹⁵ However, in some of

15. There is no generally recognised definition of “incitement to hatred” or “hate speech”. The Committee of Ministers, in its Recommendation No. R (1997) 20, provides the following working definition: “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.” The European Court of Human Rights referred to “all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)” in its *Gunduz v. Turkey* judgment of 4 December 2003, paragraph 40. Hate speech is not a so-called “hate crime”. Hate crimes always comprise two elements: 1) a criminal offence committed with 2) a bias motive. As speech would not be a crime without the bias motive, it lacks the first essential element of hate crimes. However, “direct and immediate incitement to criminal acts” is prohibited in all member states: in those countries where what is penalised is not incitement to hatred as such, but incitement to violent acts or through violent acts, such incitement would qualify as a hate crime. General and specific penalty enhancements

these countries (among them Austria, Cyprus,¹⁶ Greece, Italy¹⁷ and Portugal) the law punishes incitement to acts likely to create discrimination or violence, not incitement to mere hatred. In some states (like Lithuania), the law penalises both (but incitement to violence carries more severe penalties).

34. In most member states, the treatment of incitement to religious hatred is a subset of incitement to general hatred, the term “hatred” generally covering racial, national and religious hatred in the same manner,¹⁸ but at times also hatred on the ground of sex or sexual orientation, political convictions, language, social status or physical or mental disability. In Georgia, Malta, Slovakia and “the former Yugoslav Republic of Macedonia”, religion is not specifically foreseen as a ground for hatred.

35. In several states (among them Armenia, Bosnia and Herzegovina, Latvia, Montenegro, Serbia, Slovenia, Ukraine), the fact that the incitement to hatred has been committed through – or has actually provoked – violence, constitutes an aggravating circumstance.

36. In the majority of member states (with the exception of Albania, Estonia, Malta, Moldova, Montenegro, the Netherlands, Poland, Serbia, Slovenia and Ukraine – and the United Kingdom, but with the exception of one’s private dwelling), the incitement to hatred must occur in public. In Armenia and France, the fact that the incitement is committed in public represents an aggravating circumstance.

37. In Austria and Germany, the incitement to hatred must disturb the public order in order for it to become an offence. In Turkey, it must clearly and directly endanger the public.

38. Some states provide for specific, more stringent or severe provisions relating to incitement to hatred through the mass media (such as Armenia, Azerbaijan, Czech Republic, Romania).

(see para. 32 above) also qualify as hate crime legislation. See OSCE/ODIHR Hate Crime Laws: A Practical Guide, available at www.osce.org/item/36671.html?ch=1263.

16. In Cyprus, incitement to acts which are likely to cause discrimination, hatred or violence is penalised.

17. In Italy, the law distinguishes between incitement to commit discriminatory acts and incitement to commit violent acts.

18. In General Policy Recommendation No. 7, the ECRI uses “racism” to mean “the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons”; The ECRI uses “direct racial discrimination” to mean “any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification.” It must also be noted that the judges in Strasbourg have stated that “no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.” (European Court of Human Rights, *Timishev v. Russia* judgment of 13 December 2005 [final on 13 March 2006], paragraph 58).

39. The intention to stir up hatred is generally not a necessary element of the offence, but it is so in Cyprus, Ireland, Malta, Portugal, Ukraine and England and Wales. In some member states, recklessness is taken into account too. In Ireland, for example, it is a defence for the accused to prove not to have intended to stir up hatred or not to have intended or not to have been aware that the words, behaviour or material concerned might be threatening, abusive or insulting. In Italy, the words, behaviour or material in question must stir up, or be intended to stir up, or be likely to stir up hatred. In Norway, the offence of incitement to hatred may be committed willingly or through gross negligence.

40. The maximum prison sentence incurred for incitement to hatred varies significantly (from one year to ten years) among member states:¹⁹ one year (Belgium, France, the Netherlands); eighteen months (Malta); two years (Austria, Cyprus, Czech Republic, Denmark, Georgia, Iceland, Ireland, Lithuania, Slovenia, Sweden); three years (Azerbaijan, Bulgaria, Croatia, Estonia, Hungary, Italy, Latvia, Moldova, Norway, Poland, Slovakia, Spain, Turkey); four years (Armenia); five years (Bosnia and Herzegovina, Germany, Monaco, Montenegro, Portugal, Serbia, “the former Yugoslav Republic of Macedonia”, Ukraine); ten years (Albania). In all countries, a prison term is alternative to or cumulative with a pecuniary fine.

4. General remarks

Scope of the reflection

41. The Parliamentary Assembly requested an overview of the legislation of the Council of Europe member states in regard to religious offences in the context of reciprocal limitations of freedom of expression and freedom of religion.

42. The following questions arise:

- Is there a need for specific supplementary legislation in this area?
- To what extent is criminal legislation adequate and/or effective for the purpose of bringing about the appropriate balance between the right to freedom of expression and the right to respect for one’s beliefs?
- Are there alternatives to criminal sanctions?

Criminal legislation as a basis for interference with freedom of expression

43. Freedom of expression, guaranteed by Article 10 of the European Convention on Human Rights (ECHR), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received, or regarded

19. Information on penalties is not available for all states.

as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.²⁰

44. A democracy should not fear debate, even on the most shocking or anti-democratic ideas. It is through open discussion that these ideas should be countered and the supremacy of democratic values be demonstrated. Mutual understanding and respect can only be achieved through open debate. Persuasion through open public debate, as opposed to ban or repression, is the most democratic means of preserving fundamental values.

45. Article 10.2 of the ECHR provides for the possibility of imposing formalities, conditions, restrictions or penalties on freedom of expression, as are prescribed by law and are necessary in a democratic society in pursuit of specifically listed legitimate interests.

46. In the commission's view, however, in a true democracy, imposing limitations on freedom of expression should not be used as a means of preserving society from dissenting views, even if they are extreme. Ensuring and protecting open public debate should be the primary means of protecting inalienable fundamental values like freedom of expression and religion at the same time as protecting society and individuals against discrimination. It is only the publication or utterance of those ideas that are fundamentally incompatible with a democratic regime because they incite to hatred that should be prohibited.

47. Measures and acts to ensure respect for the religious beliefs of others pursue the aims of "protection of the rights and freedoms of others" and "protecting public order and safety". These aims can justify restrictions on the right to freedom of expression.²¹ Indeed, the European Court of Human Rights has held that, in order to ensure religious peace, states have an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.²² Respect for the religious feelings of believers can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration or offensive attacks on religious principles and dogmas; these may in certain circumstances be regarded as malicious violation of the spirit of tolerance, which must also be a feature of a democratic society.²³

48. There is a view that, to the extent that religious beliefs concern a person's relation with the metaphysical, they can affect the most intimate feelings and

20. European Court of Human Rights, *Giniewski v. France*, judgment of 31 January 2006, paragraph 43.

21. See, *inter alia*, European Court of Human Rights, *Murphy v. Ireland*, judgment of 10 July 2003, paragraph 64.

22. European Court of Human Rights, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, paragraph 56.

23. *Ibid.*, paragraph 47.

may be so complex that an attack on them might cause a disproportionately severe shock. In this respect, it is argued that they differ from other beliefs, such as political or philosophical beliefs, and it is argued that they deserve a higher degree of protection.²⁴

49. At any rate, the concepts of pluralism, tolerance and broadmindedness on which any democratic society is based mean that the responsibility that is implied in the right to freedom of expression does not, as such, mean that an individual is to be protected from exposure to a religious view simply because it is not his or her own.²⁵ The purpose of any restriction on freedom of expression must be to protect individuals holding specific beliefs or opinions, rather than to protect belief systems from criticism. The right to freedom of expression implies that it should be allowed to scrutinise, openly debate and criticise, even harshly and unreasonably, belief systems, opinions and institutions, as long as this does not amount to advocating hatred against an individual or groups.

50. Restrictions on the right to freedom of expression must be made "in accordance with the law". The nature and quality of the domestic legislation are therefore important, and so are the interpretation and application of the law, which depend on practice. Domestic law is interpreted and applied by domestic courts, which therefore play a vital role in bringing about the balance of interests and deciding whether an interference with the right to freedom of expression is necessary in a democratic society, and notably whether it is proportionate to the legitimate aims pursued.

51. Member states enjoy a certain, but not unlimited, margin of appreciation in that respect. The absence of a uniform European concept of the requirements of the protection of the rights of others in relation to attacks on religious convictions broadens the contracting states' margin of appreciation when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or religion.²⁶ What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations: state authorities are therefore better placed than the international judge to appreciate what is "necessary in a democratic society".²⁷

52. When looking into the extent of permissible restrictions on freedom of expression, the commission stresses that a distinction can be drawn between, on the one hand, works of art (in whatever form, such as painting, sculpture, installation, music, including pop music, theatre, cinema, books or poetry), and, on

24. See contribution by N. Alivizatos, "Art and religion: the limits of liberalism", on p. 73.

25. European Court of Human Rights, *Murphy v. Ireland*, judgment of 10 July 2003, paragraph 72.

26. European Court of Human Rights, *Giniewski v. France*, judgment of 31 January 2006, paragraph 44; *Aydin Tatlav v. Turkey*, judgment of 2 May 2006, paragraphs 26, 27.

27. European Court of Human Rights, *Murphy v. Ireland*, judgment of 10 July 2003, paragraph 67.

the other hand, statements or publications expressing an opinion (for instance, speech that is audible in public, journalism, public speaking or television/radio debate). However, a work of art may contain political comment, and an ostensibly political expression may also be or become accepted as art. In respect of both forms of expression, therefore, restrictions will only be possible if they cause an undue interference in a guaranteed right of another person or group as per Article 17 of the ECHR, having regard to the permissible limitations in Article 10.2 of the ECHR.

53. Before proceeding with the analysis of the forms of interference with freedom of expression, the commission wishes to underline that what it may be necessary to limit in a democratic society is not the freedom of artistic or intellectual or other expression in itself, but the manner and extent of circulation of the intellectual or artistic product (the ideas expressed, the work of art created, the book or articles written, the cartoon drawn and so on). This explains why it is, at least theoretically, possible to hold accountable for incitement to hatred or religious insults not only and not even primarily the author of a statement or work of art, but also those who have directly or indirectly contributed to the circulation of such statement or work of art: a publisher, an editor, a broadcaster, a journalist, an art dealer, an artistic director or a museum manager.

54. There exist several forms of sanction of freedom of expression,²⁸ including:

- administrative fines;
- civil law remedies, including liability for damages;
- restraints on publication of periodicals, magazines, newspapers or books, or on art exhibitions; or criminal sanctions, both fines and imprisonment.

55. Criminal sanctions related to unlawful forms of expression which impinge on the right to respect for one's beliefs, which are specifically the object of this report, should be seen as last resort measures to be applied in strictly justifiable situations, when no other means appears capable of achieving the desired protection of individual rights in the public interest.

56. It is beyond doubt that hate speech towards members of other groups including religious groups "is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination". Consequently, the author of hate speech "may not benefit from the protection afforded by Article 10 of the Convention". This arises by virtue of Article 17 of the Convention, which provides that:

Nothing in [the] 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

28. Similarly, freedom of assembly and association may be restricted in order to protect the rights of others.

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.²⁹

No one is allowed to abuse his or her right to freedom of expression to destroy or unduly diminish the right to respect for the religious beliefs of others.

57. Hate speech thus justifies criminal sanctions. Indeed, the pan-European introduction of sanctions against incitement to hatred has a very strong symbolic value, which goes beyond the objective difficulty of defining and prosecuting the crime of incitement to hatred. This trend is in accordance with General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, produced by the European Commission against Racism and Intolerance (ECRI). Similarly, the European Court of Human Rights has stated:

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.³⁰

58. The application of hate legislation must be measured in order to avoid an outcome where restrictions, which potentially aim at protecting minorities against abuses, extremism or racism, have the perverse effect of muzzling opposition and dissenting voices, silencing minorities and reinforcing the dominant political, social and moral discourse and ideology.

59. The need for specific criminal legislation prohibiting blasphemy and religious insults is more controversial. There are two opposite views on this: one advocating the repeal of legislation on blasphemy and religious insult altogether; and one advocating introduction of the offence of religious insult or even the specific offence of “incitement to religious hatred”.

60. In this respect, it is worth recalling that it is often argued that there is an essential difference between racist insults and insults on the ground of belonging to a given religion: whereas race is inherited and unchangeable, religion is not, and is instead based on beliefs and values that the believer will tend to hold as the only truth. This difference has prompted some to conclude that a wider scope

29. See European Court of Human Rights, *Pavel Ivanov v. Russia*, dec. 20 February 2007; see also *Günduz v. Turkey*, judgment of 14 December 2003, paragraph 41, where the Court states that “Furthermore, as the Court noted in *Jersild v. Denmark* (judgment of 23 September 1994, Series A No. 298, p. 5, paragraph 35), 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”. In the case of *Norwood v. the United Kingdom*, the Court stated that “a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination” (*Norwood v. the UK* (dec.), No. 23131/03, 16 November 2004). See also European Court of Human Rights, *Garaudy v. France*, dec. 24 June 2003, and *Lawless v. Ireland*, judgment of 1 July 1961, Series A No. 3, p. 45, paragraph 7.

30. European Court of Human Rights, *Gunduz v. Turkey*, judgment of 14 December 2003, paragraph 40.

of criticism is acceptable in respect of a religion than in respect of a race. This argument presupposes that, while ideas of superiority of a race are unacceptable, ideas of superiority of a religion are acceptable, because it is possible for the believer of the “inferior” religion to refuse to follow some ideas and even to switch to the “superior” religion.

61. In the commission’s opinion, this argument is convincing only insofar as genuine discussion is concerned, but it should not be used to stretch unduly the boundaries between genuine “philosophical” discussion about religious ideas and gratuitous religious insults against a believer of an “inferior” faith. On the other hand, it cannot be forgotten that international instruments and most domestic legislation put race and religion on an equal footing as forbidden grounds for discrimination and intolerance.

62. The Parliamentary Assembly – noting that, in the past, national law and practice concerning blasphemy and other religious offences often reflected the dominant position of particular religions in individual states – has considered that “in view of the greater diversity of religious beliefs in Europe and the democratic principle of the separation of state and religion, blasphemy laws should be reviewed by member states and parliaments” and that “blasphemy, as an insult to a religion, should not be deemed a criminal offence. A distinction should be made between matters relating to moral conscience and those relating to what is lawful, and between matters which belong to the public domain and those which belong to the private sphere.”³¹

63. The commission agrees with this view.

64. The commission does not consider it necessary or desirable to create an offence of religious insult (that is, insult to religious feelings) *simpliciter*, without the element of incitement to hatred as an essential component.³² Neither does the commission consider it essential to impose criminal sanctions for an insult based on belonging to a particular religion.³³ If a statement or work of art does not qualify as incitement to hatred, then it should not be the object of criminal sanctions.

31. Parliamentary Assembly of the Council of Europe, Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against persons on grounds of their religion.

32. This finding does not appear to comply fully with UN Human Rights Council Resolution 7/19 of 27 March 2007 on “Defamation of religion”, which reads as follows: “[the Human Rights Council] ... also urges States to provide, within their respective legal and constitutional systems, adequate protection against acts of hatred, discrimination, intimidation and coercion resulting from the defamation of any religion, to take all possible measures to promote tolerance and respect for all religions and their value systems and to complement legal systems with intellectual and moral strategies to combat religious hatred and intolerance”.

33. In its General Policy Recommendation No. 7, the ECRI recommends that public insults and defamation against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin be penalised. The commission recalls in this respect that the offences of “insult” and “defamation” exist in every member state and can be used, subject to all the relevant legal conditions, also in cases of public insults and defamation on religious grounds.

65. It is true that penalising insult to religious feelings could give a powerful signal to everyone, both potential victims and potential perpetrators, that gratuitously offensive statements and publications are not tolerated in an effective democracy.

66. On the other hand, the commission reiterates that recourse to criminal law, which should of itself be reserved in principle to cases when no other remedy appears effective, should only take place with extreme caution in the area of freedom of expression.

67. In addition, one has to be aware of certain difficulties with enforcement of criminal legislation in this area. The intention of the accused speaker or author, the effects of his or her action and the political, social or scientific context in which the contested statements or publications are made constitute elements that may be problematic to evaluate and balance for the prosecuting authorities and the courts. For this reason or for reasons of opportunity within the discretionary powers of the prosecuting authorities, new, specific legislation might raise expectations concerning prosecution and conviction that will not be met. Moreover, too activist an attitude on the part of the latter authorities may place the suspect persons or groups in the position of underdog, and provide them and their goal with propaganda and public support (the role of martyrs).

68. It is true that the boundaries between insult to religious feelings (even blasphemy) and hate speech are easily blurred, so that the dividing line, in an insulting speech, between the expression of ideas and the incitement to hatred is often difficult to identify. This problem, however, should be solved through an appropriate interpretation of the notion of incitement to hatred rather than through the punishment of insult to religious feelings.

69. When it comes to statements, certain elements should be taken into consideration in deciding if a given statement constitutes an insult or amounts to hate speech: the context in which it is made; the public to which it is addressed; whether the statement was made by a person in his or her official capacity, in particular if this person carries out particular functions. For example, with respect to a politician, the Strasbourg Court has underlined that "it is of crucial importance that politicians in their public speeches refrain from making any statement which can provoke intolerance."³⁴ This call on responsible behaviour does not, of itself, unduly limit the freedom of political speech, which enjoys a reinforced protection under Article 10 of the ECHR.³⁵ On the other hand, however, it has to be pointed out that, in most legal systems, politicians enjoy certain immunities for their official statements.

70. As concerns the context, a factor which is relevant is whether the statement (or work of art) was circulated in a restricted environment or widely accessible

34. European Court of Human Rights, *Erbakan v. Turkey*, judgment of 6 July 2006, paragraph 64.

35. European Court of Human Rights, *Incal v. Turkey*, judgment of 9 June 1998, paragraph 46.

to the general public, whether it was made in a closed place accessible with tickets or exposed in a public area. The circumstance that it was, for example, disseminated through the media bears particular importance, in the light of the potential impact of the medium concerned. It is worth noting in this respect that "it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media; the audiovisual media have means of conveying, through images, meanings which the print media are not able to impart."³⁶

71. The commission notes in addition that circumstances as regards publication have changed since the arrival of the Internet. It is now possible to communicate instantly to a vast number of people in the world at large. Therefore, the power to incite to hatred is far greater than in pre-Internet days. Furthermore, publication is now much less in the control of the author or publisher, who may find it impossible to limit publication in the manner he or she would have originally intended.

72. As concerns the content, the Venice Commission wishes to underline that in a democratic society, religious groups must tolerate, as other groups must, critical public statements and debate about their activities, teachings and beliefs, provided that such criticism does not amount to incitement to hatred and does not constitute incitement to disturb the public peace or to discriminate against adherents of a particular religion.

73. Having said so, the Venice Commission does not support absolute liberalism. While there is no doubt that in a democracy all ideas, even though shocking or disturbing, should in principle be protected (with the exception, as explained above, of those inciting hatred), it is equally true that not all ideas deserve to be circulated. Since the exercise of freedom of expression carries duties and responsibilities, it is legitimate to expect from every member of a democratic society to avoid, as far as possible, wordings that express scorn or are gratuitously offensive to others and infringe their rights.

74. It should also be accepted that when ideas which, to use the formula used by the Strasbourg Court, "do not contribute to any form of public debate capable of furthering progress in human affairs"³⁷ cause damage, it must be possible to hold whoever expressed them responsible. Instead of criminal sanctions, which in the Venice Commission's view are only appropriate to prevent incitement to hatred, the existing causes of action should be used, including the possibility of claiming damages from the authors of these statements. This conclusion does not prevent the recourse, as appropriate, to other criminal law offences, notably public order offences.

36. European Court of Human Rights, *Jersild v. Denmark*, judgment of 23 September 1994, paragraph 31.

37. European Court of Human Rights, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, paragraph 49.

75. Whether damage has been suffered and, if so, the extent of such damage, is for the courts to determine (including the matter of whether the action is possibly barred by parliamentary immunity). Courts are well placed to enforce rules of law in relation to these issues and to take into account the facts of each situation; they must reflect public opinion in their decisions, or the latter risk not being understood and accepted, and to lack legitimisation.

76. The Venice Commission underlines, however, that it must be possible to criticise religious ideas, even if such criticism may be perceived by some as hurting their religious feelings. Awards of damages should be carefully and strictly justified and motivated, and should be proportional, lest they should have a chilling effect on freedom of expression.

77. It is also worth recalling that an insult to a principle or a dogma, or to a representative of a religion, does not necessarily amount to an insult to an individual who believes in that religion. The European Court of Human Rights has made clear that an attack on a representative of a church does not automatically discredit and disparage a sector of the population on account of their faith in the relevant religion,³⁸ and that criticism of a doctrine does not necessarily contain attacks on religious beliefs as such.³⁹ The difference between group libel and individual libel should be carefully taken into consideration.

78. A legitimate concern which arises in this respect is that only the religious beliefs or convictions of some would be given protection. It might be so on account of their belonging to the religious majority or to a powerful religious minority, or their being recognised as a religious group. It might also be the case on account of the vehemence of their reactions to insults: a reasonable fear of uncontrollable reactions could lead to specific caution in respect of Muslims, for example.

79. In different societies it can indeed be observed that there are different sensitivities which affect the interpretation of, in the past, the offences of blasphemy and religious insult and, nowadays, the offence of incitement to hatred.

80. Certain individuals have undoubtedly shown increasing sensitivities in this regard and reacted violently to criticism of their religion. The commission accepts that, in the short term, these sensitivities may be taken into due account by the national authorities when, in order to protect the rights of others and to preserve social peace and public order, they are to decide whether or not a restriction to freedom of expression is to be imposed and implemented.

81. It must be stressed, however, that democratic societies must not become hostage to these sensitivities, and freedom of expression must not indiscriminately retreat when facing violent reactions. The threshold of sensitivity of certain

38. European Court of Human Rights, *Klein v. Slovakia*, judgment of 31 October 2006, paragraph 51.

39. European Court of Human Rights, *Giniewski v. France*, judgment of 31 January 2006, paragraph 51.

individuals may be too low in certain specific circumstances, and incidents may even happen in places other than, and far away from, those where the original issue arose, and this should not become of itself a reason to prevent any form of discussion on religious matters involving that particular religion: the right to freedom of expression in a democratic society would otherwise be jeopardised.

82. The commission considers that any difference in the application of restrictions to freedom of expression with a view to protecting specific religious beliefs or convictions (including as regards the position of a religious group as victim as opposed to perpetrator) should either be avoided or duly justified.

83. A responsible exercise of the right to freedom of expression should endeavour to respect the right to respect for religious beliefs or convictions of others. In this and other areas, sensible self-censorship could help to strike a balance between freedom of expression and ethical behaviour. Refraining from uttering certain statements can be perfectly acceptable when it is done in order not to hurt gratuitously the feelings of other persons, whereas it is obviously unacceptable when it is done out of fear of violent reactions.

84. As important as the role of the courts may be in deciding whether a statement amounted to incitement to hatred or whether damages are incurred, the commission is of the opinion that the relationship between freedom of expression and freedom of religion should not per se be regulated through court rulings, but, first and foremost, through rational consultation between people, believers and non-believers.⁴⁰

85. For this reason, the recommendations of the Parliamentary Assembly of the Council of Europe, the ECRI and many others as to the need to promote dialogue and encourage an ethic of communication for both the media and religious groups should be taken up with urgency. Education leading to better understanding of the convictions of others and to tolerance should also be seen as an essential tool in this respect.

86. In the long term, every member of a democratic society should be able to express in a peaceful manner his or her ideas, no matter how negative, on other faiths or beliefs or dogmas. Constructive debates should take place as opposed to dialogues of the deaf.

87. Mutual understanding and acceptance is perhaps the main challenge of modern societies. Diversity is undoubtedly an asset; but cohabiting with people of different backgrounds and ideas entails the need for everyone to refrain from gratuitous provocation and insults. In the end of the day, it is the price to pay for a new ethics of responsible intercultural relations in Europe and in the world.

40. See contribution by D. Christopoulos and D. Dimoulis, "Art can legitimately offend", on p. 83.

5. Conclusions

88. The Venice Commission has examined the European legislation on blasphemy, religious insult and incitement to religious hatred, and has extensively reflected on this matter, including at the international round-table conference on Art and Sacred Beliefs: from Collision to Co-existence, which was held in Athens on 31 January and 1 February 2008. The commission has reached the following conclusions.

89. As concerns the question of whether or not there is a need for specific supplementary legislation in the area of blasphemy, religious insult and incitement to religious hatred, the commission finds:

a. That incitement to hatred, including religious hatred, should be the object of criminal sanctions as is the case in almost all European states, with the exception only of Andorra and San Marino. The latter two states should criminalise incitement to hatred, including religious hatred. In the commission's view, it would be appropriate to introduce an explicit requirement of intention or recklessness, which only a few states provide for.

b. That it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) *simpliciter*, without the element of incitement to hatred as an essential component.

c. That the offence of blasphemy should be abolished (which is already the case in most European states) and should not be reintroduced.

90. As concerns the question of to what extent criminal legislation is adequate and/or effective for the purpose of bringing about the appropriate balance between the right to freedom of expression and the right to respect for one's beliefs, the commission reiterates that, in its view, criminal sanctions are only appropriate in respect of incitement to hatred (unless public order offences are appropriate).

91. Notwithstanding the difficulties with enforcement of criminal legislation in this area, there is a high symbolic value in the pan-European introduction of criminal sanctions against incitement to hatred. It gives strong signals to all parts of society and to all societies that an effective democracy cannot bear behaviours and acts that undermine its core values: pluralism, tolerance, respect for human rights and non-discrimination. The application of legislation against incitement to hatred must be done in a non-discriminatory manner.

92. In the commission's view, instead, criminal sanctions are inappropriate in respect of insult to religious feelings and, even more so, in respect of blasphemy.

93. Finally, as concerns the question of whether there are alternative options to criminal sanctions, the commission recalls that any legal system provides for other courses of action, which can be used in cases other than incitement to hatred.

94. However, as is the case with other problems of society, it is not exclusively or even primarily for the courts to find the right balance between freedom of religion and freedom of expression, but rather for society at large, through rational discussions between all parts of society, including believers and non-believers.

95. A new ethic of responsible intercultural relations in Europe and in the rest of the world is made necessary by the cultural diversity in modern societies and requires that a responsible exercise of the right to freedom of expression should endeavour to respect the religious beliefs and convictions of others. Self-restraint, in this and other areas, can help, provided of course that it is not prompted by fear of violent reactions, but only by ethical behaviour.

96. This does not mean, however, that democratic societies must become hostage to the excessive sensitivities of certain individuals: freedom of expression must not indiscriminately retreat when facing violent reactions.

97. The level of tolerance of these individuals, and of anyone who would feel offended by the legitimate exercise of the right to freedom of expression, should be raised. A democracy must not fear debate, even on the most shocking or anti-democratic ideas. It is through open discussion that these ideas should be countered and the supremacy of democratic values be demonstrated. Mutual understanding and respect can only be achieved through open debate. Persuasion, as opposed to ban or repression, is the most democratic means of preserving fundamental values.

98. For this reason, in the commission's opinion, the recommendations of the Parliamentary Assembly of the Council of Europe, the ECRI and many others as to the need to promote dialogue and encourage a communication ethic for both the media and religious groups should be taken up by way of urgency. Education leading to better understanding of the convictions of others and to tolerance should also be seen as an essential tool in this respect.