

Introduction

In Europe's culturally diverse societies there is a need to reconcile the right to freedom of expression with other rights, such as freedom of belief, conscience or religion, which might sometimes compete with each other. It is a difficult challenge because these rights are at the core of democracy.

Article 10 of the European Convention on Human Rights states that "everyone has the right to freedom of expression", including the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers". However the convention also provides that the exercise of these freedoms carries with it duties and responsibilities, and establishes that some restrictions to this right, including for "the protection of the reputation or rights of others", may in certain circumstances be possible.

In November 2008 the Council of Europe is launching a **Manual on Hate Speech** which aims to clarify this concept and guide policy makers, experts and society as a whole on the criteria followed the European Court of Human Rights' case law. The author is human rights expert Anne Weber, who was commissioned by the Council for this project.¹

Questions and Answers

1. What is hate speech?

There is no universally agreed definition. Most countries have adopted legislations banning expressions that can be included in this concept, but with slight differences.

In 1997 the Committee of Ministers of the Council of Europe adopted a Recommendation on hate speech which stated the term "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 its case law the European Court of Human Rights, without adopting a precise definition, has applied this term to forms of expression which spread, incite, promote or justify hatred founded on intolerance, including religious intolerance. The manual points out that, although the Court has not yet dealt with this aspect, homophobic speech also falls into what can be considered as hate speech.

2. Has the European Court of Human Rights set any restrictions to freedom of expression related to hate speech?

According to the Court's case law, 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, and therefore can be restricted by governments in their national law.

¹ The views in this manual are those of the author and do not necessarily reflect those of the Council of Europe.

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.

3. What has the Council of Europe done to prevent and combat hate speech?

The 1997 Committee of Ministers’ Recommendation on hate speech condemns this kind of expression and aims at providing states with some common criteria for national legislation. The text points out among other things that these expressions can often be more harmful if they are disseminated by the media. It also recommends states to clearly distinguish the responsibility of the author of the statement from that of the media which reports it. Other declarations and recommendations have followed.

A 2007 Parliamentary Assembly Recommendation pointed out the need to criminalise statements which incite hate, discrimination or violence against individuals or groups for religious or other reasons. The Assembly requested the European Commission for Democracy through Law (Venice Commission) to prepare a report on national law in Europe on blasphemy, insults of a religious nature or incitement to religious hatred.

The Venice Commission concluded that in a democracy religious groups must, as any other groups, tolerate criticisms in public statements and debates related to their activities, teachings and beliefs, as long as the criticisms do not constitute deliberate and gratuitous insults or hate speech, an incitement to disturb public order, violence or discrimination towards people who adhere to specific religions.

The European Commission against Racism and Intolerance (ECRI) has also recommended criminalising expressions which can be considered racist speech, notably when it intentionally and publicly incites to violence, to hatred, or discrimination on grounds of race, colour, language, religion, nationality or national or ethnic origin.

Other Council of Europe texts refer to this issue, such as the 2003 [Protocol to the Convention on Cyber Crime, related to the prosecution of acts of racist and xenophobic nature through computer systems](#).

4. How does the Court assess if freedom of expression can be restricted?

The Court has two ways for assessing if freedom of expression is competing with another right guaranteed by the European Convention on Human Rights: applying Article 10, which it does most often, or Article 17, which excludes the expression from the protection of the convention, if it aims at the destruction of another right laid down in the Convention.

Article 17 aims at guaranteeing the preservation of the system of democratic values underpinning the convention notably by preventing totalitarian groups from exercising the rights set by the convention in a way to destroy the rights and liberties established by the convention itself. This article has been applied by the Court to statements conveying racial messages of racial hatred, defending national socialism or denying the Holocaust. The Court has, for instance, stated that freedom of expression may be restricted to avoid the dissemination of the denial of the holocaust, considering it is at the same time a denial of crimes against humanity and an incitement to hate towards the Jewish people.

If an expression is not excluded outright from the protection of the Convention in accordance with Article 17, the Court will examine whether the restriction imposed by a state on freedom of expression fulfills a number of requirements: .

- the restriction to freedom of speech was foreseen by national law
- the reasons for these restrictions are among the legitimate aims set out in Article 10
- they are necessary in a democratic society to achieve one or more of the legitimate aims mentioned under Article 10.

The Court has ruled that restrictions to freedom of expression are only acceptable if they respond to an “pressing social need” and that the means used were proportionate to the legitimate aim pursued. However it has stated that national authorities enjoy a certain “margin of appreciation” to do this, which will vary from one type of case to the other, and will in any event be supervised by the Court. Nonetheless, the Court has also held that Article 10 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.

Any restriction of freedom of speech will be examined by the Court in the light of the global context. Since there is no decisive factor, which draws a line between what is allowed and what is not, a number of elements need to be considered together in each case.

5. What factors does the Court consider in every case?

According to the manual, the Court takes into account the following factors:

- The objective of the person whose freedom of speech was restricted
- The content of the expression
- The context, eg whether the person who made the statement is a journalist or politician
- The profile of the people who are targets of opinions and expressions
- The publicity and potential impact of the expression, eg whether the statement was made in a widely distributed newspaper or in a poem
- The nature and gravity of the restriction

6. Which is the key criterion to determine whether an expression constitutes hate speech and may be restricted?

The basic criterion the Court uses to determine whether a restriction of freedom of expression is acceptable or not is the original aim of the author of the statement. This may be difficult to determine and that is why the Court gives great importance to the context in which the statement was made.

The key issue the Court examines is whether the author of the statement was intentionally spreading racist or intolerant ideas through the use of hate speech or was trying to inform the public about an issue of general interest. The answer to this question should allow to determine which expressions, though shocking or offensive, are protected by Article 10, from those which should not be tolerated in a democratic society and are excluded from the protection of Convention by virtue of Article 17.

7. Does the profile of people who spread hate speech influence the Court's criteria?

Generally speaking, the Court considers that the limits of acceptable criticism are wider when the target is a politician than if it is a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by journalists and the public, and must consequently display a greater degree of tolerance.

With regard to spreading hate speech, the Court is stricter with politicians and insists on their special responsibility in not using language that contributes to fuelling intolerance. Concerning the media, the manual distinguishes between two situations: when the journalists are the authors of the statements, which is not acceptable, and when they are only intermediaries in imparting statements made by others and which they do not make themselves or endorse.

The Court is strict when it comes to possible restrictions on media freedom, due to the important role they play in democratic societies. It underlines that whilst the press must not overstep the bounds set, among other things, for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.

8. How has the Court dealt with restrictions related to attacks against other religions?

The Court's established position is that those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.

However in cases where the attacks may be offensive or concern issues that are considered sacred by believers, the Court recognises in its case law the possibility for states to adopt restrictions to freedom of expression, provided they satisfy the requirements of Article 10 (prescribed by law, pursuing a legitimate aim, and being necessary in a democratic society). In this sense it understands that the religious feelings of others are the "rights of others" mentioned in Article 10 of the Convention. The Court has favoured a wide margin of appreciation for states when such attacks occur. However, this margin does not go unchecked and is subject to the Court's supervision.

In most of its judgments on this topic the Court has ruled that there was no violation of Article 10, considering that the restriction to freedom of speech by the concerned state was necessary to protect the rights of others. In other cases it has ruled that there had been a violation of freedom of expression and accepted that some expressions which might be "shocking" or "offensive" should not be restricted as long as:

- They were not gratuitously offensive
- The insulting tone did not target directly specific believers
- The expressions were insulting neither for believers nor with respect to sacred symbols
- They did not attack believers' rights to manifest or practice their religion and did not denigrate their faith
- In particular, that they did not incite disrespect, hatred or violence.

Contact

Jaime Rodríguez, Press Officer
Tel. +33 (0) 689 99 50 42
Email: jaime.rodriquez@coe.int

Updated: November 2008